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Clay Calvert

University of Florida Levin College of Law, profclaycalvert@gmail.com

Matthew D. Bunker

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FISSURES, FRACTURES & DOCTRINAL DRIFTS: PAYING THE PRICE IN FIRST AMENDMENT JURISPRUDENCE FOR A HALF DECADE OF AVOIDANCE, MINIMALISM & PARTISANSHIP

Clay Calvert* and Matthew D. Bunker**

ABSTRACT

This Article comprehensively examines how the U.S. Supreme Court's adherence to principles of constitutional avoidance and judicial minimalism, along with partisan rifts among the Justices, have detrimentally affected multiple First Amendment doctrines over the past five years. The doctrines analyzed here include true threats, broadcast indecency, offensive expression, government speech, and strict scrutiny, as well as the fundamental dichotomy between content-based and content-neutral regulations.

INTRODUCTION

When the U.S. Supreme Court agreed in June 2014 to hear *Elonis v. United States*,¹ it directed the parties to address two questions—one constitutional,² one statutory.³ The constitutional issue gave the Court an excellent opportunity to clarify

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Florida. Ph.D., 1996, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; B.A., 1987, Communication, Stanford University. Member, State Bar of California. The authors thank students Alexa Jacobson, Stephanie McNeff and Cristina Rabionet of the University of Florida for their excellent research and suggestions on several drafts of this Article.

** Reese Phifer Professor of Journalism, College of Communication and Information Sciences, at the University of Alabama. Ph.D., 1993, University of Florida; M.S., 1989, Kansas State University; J.D., 1985, University of Kansas; B.S., 1979, Kansas State University.

¹ 134 S. Ct. 2819 (2014) (granting petition for writ of certiorari).

² The constitutional question was:

Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

Petition for Writ of Certiorari, *Elonis*, 134 S. Ct. 2819 (No. 13-983).

³ The statutory question was: "Whether, as a matter of statutory interpretation, conviction

when speech constitutes an unprotected true threat⁴ under First Amendment⁵ jurisprudence and, in the process, to resolve a lower-court split of authority.⁶ Furthermore, the Court had not squarely addressed a true threats case in more than a decade.⁷ Additionally, it never had heard an Internet-era threats case, such as *Elonis*, involving speech posted on a social media platform.⁸ Indeed, as the *Washington Post* noted, “Parties on both sides of the groundbreaking case are asking the court to consider the unique qualities of social media.”⁹

But one year later, when the Court issued a less-than-groundbreaking ruling in *Elonis v. United States*,¹⁰ Chief Justice John Roberts wrote for the majority that it was “not necessary to consider any First Amendment issues.”¹¹ Why? Roberts reasoned the jury was incorrectly instructed regarding the mental state necessary to convict Anthony Elonis under 18 U.S.C. § 875(c).¹² Resolving the statutory question thus eliminated the need to address the constitutional one.

of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten.” *Elonis*, 134 S. Ct. at 2819.

⁴ See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (identifying “true threats” as one of the few historical and traditional categories of content not protected by the First Amendment); *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (observing that “[w]hat is a threat must be distinguished from what is constitutionally protected speech”).

⁵ The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties that apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁶ The U.S. Court of Appeals for the Ninth Circuit maintains that a subjective intent analysis “must be read into all threat statutes that criminalize pure speech.” *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). Similarly, the Tenth Circuit subscribes to the view “that a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened.” *United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014).

In contrast, other federal appellate courts reject requiring subjective intent under the First Amendment analysis and, instead, hold only that an objective, reasonable-listener standard is mandated. See, e.g., *United States v. Jeffries*, 692 F.3d 473, 479–81 (6th Cir. 2012); *United States v. White*, 670 F.3d 498, 523–25 (4th Cir. 2012). Indeed, a majority of federal appellate courts “employ a purely objective test for determining whether a communication constitutes a true threat.” *White*, 670 F.3d at 523.

⁷ See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (providing the Court’s most recent analysis of the First Amendment true threats doctrine prior to *Elonis*).

⁸ See Robert Barnes, *A Social Media Test for Justices*, WASH. POST, Nov. 24, 2014, at A1 (describing *Elonis* as the Supreme Court’s “first examination of the limits of free speech on social media”).

⁹ *Id.* at A13.

¹⁰ 135 S. Ct. 2001 (2015).

¹¹ *Id.* at 2012.

¹² *Id.*

This is perfectly permissible, of course, under a facet of the doctrine of constitutional avoidance.¹³ As framed by Justice Louis Brandeis eighty years ago, the doctrine holds that

[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.¹⁴

Justice Felix Frankfurter once described the practice of dodging constitutional questions “unless such adjudication is unavoidable” as being “more deeply rooted than any other in the process of constitutional adjudication.”¹⁵ Much more recently, in the student-speech case of *Morse v. Frederick*,¹⁶ Justice Stephen Breyer wrote that the Court should “adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions.”¹⁷ Indeed, as First Amendment scholar Ronald Collins observed in 2012, “There’s a doctrine that this Court loves to preach called the Doctrine of Constitutional Avoidance. We don’t reach a Constitutional question unless we have to.”¹⁸

This is not surprising because the Chief Justice endorsed the closely related doctrine of judicial minimalism¹⁹ during his confirmation hearings.²⁰ The nexus between minimalism and avoidance is snug. As Professor Charles Rhodes asserts, a “minimalist judge will seek to avoid a constitutional decision if possible, to decide

¹³ See generally Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015) (providing a timely review of the doctrine of constitutional avoidance).

¹⁴ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

¹⁵ *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

¹⁶ 551 U.S. 393 (2007).

¹⁷ *Id.* at 428 (Breyer, J., concurring).

¹⁸ Alan B. Morrison et al., *Panel Discussion on Recent U.S. Supreme Court Free Speech Decisions & the Implications of These Cases for American Society*, 76 ALB. L. REV. 781, 809 (2012).

¹⁹ Minimalism is “a term coined by Cass Sunstein (minimalism’s most prominent advocate).” Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 5 (2009).

²⁰ See Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149, 164 (2013) (noting that Roberts “claimed in the nomination hearings before the Congress Judiciary Committee that he was ‘not sent there to make law’ but to ‘take whatever case comes before [the Court] and just decide the case.’ He thus endorsed judicial minimalism, with its emphasis on deciding cases ‘narrowly and shallowly’” (alteration in original) (footnote omitted)).

cases in small, incremental steps, and to respect the holdings (although not necessarily the dicta) in prior cases.”²¹

In *Elonis*, however, adherence to avoidance left some legal observers utterly unsatisfied.²² For instance, UCLA Professor Eugene Volokh lamented that the Court

ended up deciding only a fairly narrow—and rarely practically significant—federal statutory question. We still don’t know, following *Elonis*, whether the “true threats” exception to the First Amendment (1) covers only statements said with the purpose of putting someone in fear, (2) applies also to statements said knowing that the target will be put in fear, (3) applies also to statements said knowing that there’s a serious risk that the target will be put in fear, or (4) covers all statements that a reasonable person would view as aimed at putting the target in fear. Indeed, as best I can tell, the Supreme Court did not resolve the federal circuit court disagreement on the First Amendment issue that helped persuade the Court to hear the case.²³

Beyond evading the constitutional issue in *Elonis*, the Court also failed to resolve the statutory *mens rea* requirement for 18 U.S.C. § 875(c). This too is troublesome. As Justice Clarence Thomas fretted in dissent, “Lower courts are thus left to guess at the appropriate mental state for § 875(c). All they know after today’s decision is that a requirement of general intent will not do.”²⁴

The same month it decided *Elonis*, the Court also failed to clarify an even more chaotic First Amendment doctrine²⁵ in *Walker v. Texas Division, Sons of Confederate*

²¹ Charles W. “Rocky” Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 6 (2011).

²² See Tony Mauro, *Narrow Win for Speech in Online Threats Case*, NAT’L L.J. (June 8, 2015), <http://www.nationallawjournal.com/id=1202728583213/Narrow-Win-For-Speech-in-Online-Threats-Case> [<http://perma.cc/9AUG-ZMQC>] (reporting that “the court avoided the First Amendment altogether in *Elonis v. United States*, much to the chagrin of speech advocates who hoped the justices would give wide berth to the range of expression in modern-day media, social and otherwise”).

²³ Eugene Volokh, *The Supreme Court Doesn’t Decide When Speech Becomes a Constitutionally Unprotected “True Threat,”* WASH. POST: VOLOKH CONSPIRACY (June 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/the-supreme-court-doesnt-decide-when-speech-becomes-a-constitutionally-unprotected-true-threat/> [<http://perma.cc/D2E9-YE3Q>].

²⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2018 (2015) (Thomas, J., dissenting).

²⁵ Professor Mark Strasser contends that the government speech doctrine’s “lack of definition creates the potential not only for doctrinal confusion, but for use of the doctrine in alarming ways.” Mark Strasser, *Ignore the Man Behind the Curtain: On the Government*

Veterans.²⁶ Specifically, the nascent and problematic government speech doctrine, which University of Florida Professor Lyriisa Lidsky frankly describes as “lacking in coherence—to put it mildly,”²⁷ was at the heart of *Walker*. Although incoherent, the doctrine is exceedingly important. That is because “when the government is the speaker, the First Amendment does not apply at all or provide a basis for challenging the government’s action.”²⁸

Unlike in *Elonis*, the Court in *Walker* tackled the constitutional question head on. The issue was whether Texas’s rejection of a specialty license plate featuring a Confederate battle flag violated the First Amendment rights of the proposed plate’s sponsor, the Texas Division of the Sons of Confederate Veterans (SCV).²⁹ Resolving that issue, in turn, pivoted largely on whether specialty plates in Texas are government speech or private expression.³⁰ This dichotomy is crucial because, as Justice Samuel Alito wrote for the Court in *Pleasant Grove City v. Summum*,³¹ “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”³²

Thus, if Texas’s specialty plates were deemed government speech, then the Lone Star State could lawfully discriminate against both the content and the viewpoint of the SCV’s proposed plate, and the SCV would be powerless to raise a First Amendment challenge. Conversely, if specialty plates were considered private speech, then the SCV could mount traditional First Amendment attacks based on both alleged content-based³³

Speech Doctrine and What It Licenses, 21 B.U. PUB. INT. L.J. 85, 86 (2011) (footnotes omitted). He argues that

[t]he contours of the doctrine are blurred—there are no clear criteria by which to determine when the government is speaking or what, if anything, the government must say to trigger the doctrine’s protections. Not surprisingly, this lack of clarity has caused great confusion in the lower courts—judges seem not to know how or when to apply the doctrine.

Id. at 85.

²⁶ 135 S. Ct. 2239 (2015).

²⁷ Lyriisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1976 (2011). The term “nascent” also seems appropriate here, as the government speech doctrine was recently described as “newly evolving.” Jeffrey S. Helmreich, *Putting Down: Expressive Subordination and Equal Protection*, 59 UCLA L. REV. DISCOURSE 112, 116 (2012). “Problematic” also seems accurate, with Professor Joseph Blocher observing that the “[g]overnment speech doctrine is young, and its youthful exuberance and ambition—not to mention its adolescent awkwardness—has become cause for some parental concern.” Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696 (2011).

²⁸ Erwin Chemerinsky, Lecture, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 730 (2011).

²⁹ *Walker*, 135 S. Ct. at 2243–44.

³⁰ *Id.* at 2245–46.

³¹ 555 U.S. 460 (2009).

³² *Id.* at 467.

³³ Content-based speech regulations typically face the strict scrutiny standard of judicial review. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (observing that “[g]overnment regulation of speech is content based if a law applies to particular speech because

and viewpoint-based discrimination³⁴ by Texas in denying the Confederate battle flag plate.

In *Walker*, the Court—with one notable exception—fractured cleanly along perceived partisan lines.³⁵ Only conservative Justice Clarence Thomas, who was nominated to the Court by Republican President George H.W. Bush,³⁶ crossed over to join the four liberal-leaning, Democrat-nominated Justices—Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor³⁷—to conclude that Texas’s specialty plates are government speech.³⁸ The other four members of the Court, all nominated by Republican Presidents—Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito³⁹—dissented and found that specialty plates are private speech.⁴⁰

Perhaps inevitably, some speculated that Thomas, the lone African American Justice, joined the liberals because the *Walker* specialty plate featured the Confederate battle flag.⁴¹ Adam Liptak wrote for the *New York Times* that “[t]he liberals, as

of the topic discussed or the idea or message expressed,” and noting that content-based regulations “are subject to strict scrutiny”).

³⁴ Viewpoint-based speech regulations are a subset of content-based regulations. See *McCullen v. Coakley*, 134 S. Ct. 2518, 2533 (2014) (labeling viewpoint discrimination “an ‘egregious form of content discrimination’” (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995))); *Rosenberger*, 515 U.S. at 829 (asserting that “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant”).

³⁵ See generally Adam Liptak, *Right Divided, Disciplined Left Steered Justices*, N.Y. TIMES, July 1, 2015, at A1 (discussing the current partisan and political lines on the Court).

³⁶ See *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> [<http://perma.cc/PFQ2-3F8U>] (last updated Mar. 20, 2016) [hereinafter *Biographies*] (setting forth the official biographies for the Justices, including the names of the Presidents who nominated each); see also *Biographies of the Justices*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> [<http://perma.cc/BBS8-LDWR>].

³⁷ See *Biographies*, *supra* note 36; see also Adam Liptak, *Supreme Court Upholds Texas Ban of License Plates with Confederate Flag*, N.Y. TIMES, June 19, 2015, at A12 (reporting that “[t]he court’s other three liberal members joined Justice Breyer’s majority opinion, as did Justice Clarence Thomas”); Dahlia Lithwick, Editorial, *Good Day to Fold Up the Confederate Flag*, PITT. POST-GAZETTE, June 22, 2015, at A7 (noting that “Thomas, the court’s staunchest conservative,” joined “the court’s left wing without explaining why”).

³⁸ See *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2243 (2015) (identifying how the Justices voted in *Walker*).

³⁹ See *Biographies*, *supra* note 36.

⁴⁰ See *Walker*, 135 S. Ct. at 2254 (Alito, J., dissenting) (noting that Alito was joined by Chief Justice Roberts and Justices Scalia and Kennedy).

⁴¹ See Robert Barnes, *Texas Free to Say No to Confederate Flag Plates*, WASH. POST, June 19, 2015, at A1, A4 (noting that “Justice Clarence Thomas, the court’s only African American justice, split with fellow conservatives and joined the court’s liberals in the 5-to-4 decision,” and adding that “[i]t was hard not to speculate that Thomas, who normally sides

usual, voted as a group—but they were joined by Justice Thomas in a rare alliance.⁴² David Savage of the *Los Angeles Times* noted that Thomas

cast a rare fifth vote on the side of the court’s four liberals to reject the Confederate license plate. While Thomas regularly supports 1st Amendment claims, he dissented alone in 2003 when the justices ruled that members of the Ku Klux Klan had a free-speech right to burn a cross in a Virginia farm field.⁴³

Regardless of why Thomas joined the liberals in *Walker*, the other eight Justices split neatly along partisan lines, leaving the emerging government speech doctrine more confused than ever.⁴⁴ Rather than adopt a clear-cut rule for identifying government speech, the majority simply applied three key factors that the Court used in its 2009 government speech decision in *Pleasant Grove City v. Summum*.⁴⁵ *Summum* involved a religious group’s efforts to force a Utah municipality “to place a permanent monument in a city park in which other donated monuments were previously erected.”⁴⁶ It is thus so factually distinct from *Walker*’s specialty license-plate scenario that applying factors from *Summum* to *Walker* is quite a judicial stretch.

with the conservatives in free speech cases, was swayed by the symbolism of the flag. He did not write to explain his view of the case” (emphasis added).

⁴² Liptak, *supra* note 37, at A21.

⁴³ David G. Savage, *Court Upholds License Plate Limits*, L.A. TIMES, June 19, 2015, at A8. The case referenced by Savage is *Virginia v. Black*, 538 U.S. 343 (2003). In *Black*, Justice Thomas wrote that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.” *Black*, 538 U.S. at 391 (Thomas, J., dissenting). He added, in considering whether cross burning constitutes symbolic speech or merely conduct under the Virginia statute at issue in the case, that

as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

Id. at 394–95.

⁴⁴ See generally Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 263 (2015) (identifying “[t]he conservative justices on the Supreme Court” as John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito, and Anthony Kennedy).

⁴⁵ 555 U.S. 460 (2009). In *Walker*, Justice Breyer identified those factors for the majority as: (1) “the history of license plates” in terms of whether “they long have communicated messages from the States”; (2) whether license plates are reasonably identified in observers’ minds as the speech of the government or a private individual; and (3) whether the government “maintains direct control over the messages conveyed on its specialty plates.” *Walker*, 135 S. Ct. at 2248–49 (majority opinion). In brief, then, the factors relate to history, observers, and control.

⁴⁶ *Summum*, 555 U.S. at 464.

Perhaps Justice Breyer, who penned the majority opinion in *Walker*, did not fashion a clear, concise rule for determining what constitutes government speech because, as he wrote in *Summum*, “the ‘government speech’ doctrine is *a rule of thumb*, not a rigid category.”⁴⁷ In other words, Breyer was reticent to fully flesh out a doctrine and, instead, left government speech merely as an inchoate “rule of thumb”—a phrase he repeated in 2015 in *Reed v. Town of Gilbert*.⁴⁸ Justice Alito, who authored the Court’s opinion in *Summum*,⁴⁹ dissented in *Walker* and asserted that Breyer and the *Walker* majority “badly misunderstands *Summum*.”⁵⁰ In brief, *Walker* fails to advance the government speech doctrine.

With *Elonis* and *Walker* serving as timely analytical springboards, this Article examines how three variables—constitutional avoidance,⁵¹ judicial minimalism,⁵² and partisanship⁵³—have, in several instances since the start of 2011, thwarted the

⁴⁷ *Id.* at 484 (Breyer, J., concurring) (emphasis added).

⁴⁸ 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (writing that “the category ‘content discrimination’ is better considered in many contexts, including here, as *a rule of thumb*, rather than as an automatic ‘strict scrutiny’ trigger, leading to almost certain legal condemnation” (emphasis added)).

⁴⁹ *Summum*, 555 U.S. at 464.

⁵⁰ *Walker*, 135 S. Ct. at 2258 (Alito, J., dissenting).

⁵¹ See *supra* notes 13–19 and accompanying text (addressing the doctrine of constitutional avoidance).

⁵² Judicial minimalism “is the view that courts should resolve cases by issuing narrow rulings that steer clear of broad principles and wide implications” and that “[w]hatever changes are effected through judicial rulings should be small and incremental, as judges should resolve as little as necessary in order to decide the dispute at hand.” Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 352 (2010). As Cass Sunstein writes, jurists who favor minimalism “decide no more than they have to decide. They leave things open. They make deliberate decisions about what should be left unsaid.” Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996).

See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix (1999) (asserting that “[a] minimalist court settles the case before it, but it leaves many things undecided,” and adding that such a court “seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions”); see also John P. Elwood, Jeremy C. Marwell & Eric A. White, *FCC, Fox, and That Other F-Word*, 2011–2012 CATO SUP. CT. REV. 281, 305 (2012) (noting the “Roberts Court’s (intermittent) judicial minimalism”); see generally Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (providing a review and critique of judicial minimalism).

⁵³ The partisan lines on today’s Supreme Court are clear. Professor Lawrence Baum contends, for example, that

since the retirement of Justice John Paul Stevens in 2010, the Supreme Court for the first time has had ideological blocs that follow party lines (based on the party of the appointing president) perfectly. To the extent that partisan divisions reinforce ideological divisions, the Court’s liberal and conservative Justices are separated from each other to a greater extent than in the past.

Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage*

advancement and coherence of First Amendment doctrine, if not tossed it into greater confusion.⁵⁴ In addition to the Court's 2015 decisions in *Elonis* and *Walker*, which, respectively, failed to clarify the doctrines of true threats and government speech, this Article analyzes several other cases in the five-year window from January 1, 2011, through December 31, 2015. These cases all feature either missed opportunities or doctrinal confusion.⁵⁵ In short, the outcomes in *Elonis* and *Walker* are not outliers.

Other missed opportunities to advance doctrine due to either minimalism or avoidance include *Snyder v. Phelps*⁵⁶ in 2011 and *FCC v. Fox Television Stations, Inc.*⁵⁷ in 2012. To wit, Yale Professor Dan Kahan described *Snyder*'s outcome as "antidramatic"⁵⁸ and "easy."⁵⁹ In turn, University of Virginia Professor A.E. Dick Howard labeled *Fox Television Stations* a "case of passing on the chance to fortify First Amendment values" and perhaps "one of judicial minimalism—passing up a

Between Judges and Justices, 98 MARQ. L. REV. 333, 344 (2014) (footnotes omitted). Baum and Professor Neal Devins assert that

for the first time in more than a century, the ideological positions of the justices on today's Supreme Court can be identified purely by party affiliation. What that means is that, for the first time in our political lifetimes, each of the four Democratic appointees has a strong tendency to favor liberal outcomes, while the five Republicans typically take conservative positions.

Lawrence Baum & Neal Devins, *Split Definitive*, SLATE (Nov. 11, 2011, 5:27 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/11/supreme_court_s_partisan_divide_and_obama_s_health_care_law.html [<http://perma.cc/L42G-WD63>].

University of Virginia Professor A.E. Dick Howard writes that today's Court "seems to be more politically and ideologically driven and divided than ever." A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 315 (2015).

⁵⁴ This Article, importantly, does not analyze the general judicial philosophy of Chief Justice John Roberts. Other scholars have tackled that issue. See, e.g., Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137 (2014).

⁵⁵ January 1, 2011, was chosen as the starting point for the analysis in this Article because it corresponds roughly to when the newest member of the Court, Justice Elena Kagan, took her seat on the bench and, importantly, after her first autumn of hearing oral arguments. See *Biographies*, *supra* note 36 (noting that Kagan "took her seat on August 7, 2010"). In brief, from January 1, 2011, to December 31, 2015, the composition of the Court remained the same and heard oral arguments together in all First Amendment cases ruled on during that time.

⁵⁶ 562 U.S. 443 (2011).

⁵⁷ 132 S. Ct. 2307 (2012).

⁵⁸ Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 42 (2011).

⁵⁹ *Id.* at 43. See also Clay Calvert, *Too Narrow of a Holding? How—and Perhaps Why—Chief Justice John Roberts Turned Snyder v. Phelps into an Easy Case*, 64 OKLA. L. REV. 111, 112 (2012) (asserting that "Chief Justice Roberts avoided multiple interesting and complex issues in *Snyder*. The result oversimplified the case, making the outcome, in lay-person's terms, a no-brainer").

more difficult constitutional question in favor of another which, albeit constitutional, was hardly controversial.”⁶⁰

In addition to these judicial sidesteps of minimalism and avoidance thwarting doctrinal growth, other instances of doctrinal confusion are spawned by partisanship. These include the 2014 ruling in *McCullen v. Coakley*,⁶¹ which detrimentally affects the fundamental First Amendment dichotomy between content-based and content-neutral laws.⁶² Furthermore, the Court’s 2015 decision in *Williams-Yulee v. Florida Bar*⁶³ and its 2012 ruling in *United States v. Alvarez*⁶⁴ illustrate partisan cleavage in the meaning and application of the strict scrutiny standard of judicial review.⁶⁵

This is not to suggest, of course, that doctrinal drifts, rifts, and lack of development have always been the case since the start of 2011. For instance, in *Brown v. Entertainment Merchants Ass’n*,⁶⁶ the Court made it clear for the first time that “video games qualify for First Amendment protection,”⁶⁷ and it emphasized that violent expression is distinct from obscene speech.⁶⁸ The Court in *Brown* also advanced the strict scrutiny standard of review⁶⁹ not only by succinctly articulating the test for it,⁷⁰ but by making it clear that the government must demonstrate “a direct causal link between”⁷¹ the speech and harm to satisfy that test.⁷² The Court then reinforced *Brown*’s causation principle for strict scrutiny one year later in *United States v. Alvarez*, where the plurality wrote that “[t]here must be a direct causal link

⁶⁰ A.E. Dick Howard, Essay, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 84 (2012).

⁶¹ 134 S. Ct. 2518 (2014).

⁶² See *infra* notes 294–314 and accompanying text (analyzing *McCullen*).

⁶³ 135 S. Ct. 1656 (2015).

⁶⁴ 132 S. Ct. 2537 (2012).

⁶⁵ Partisanship, of course, also is present in the money-as-speech cases of *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), and *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). This facet of First Amendment jurisprudence is beyond the scope of this Article, as the rifts in the money-as-speech niche of cases predate these decisions.

⁶⁶ 131 S. Ct. 2729 (2011).

⁶⁷ *Id.* at 2733.

⁶⁸ See *id.* at 2735 (writing that “speech about violence is not obscene”).

⁶⁹ See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (asserting that a content-based speech regulation can only withstand judicial review “if it satisfies strict scrutiny,” noting that “[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest,” and adding that “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative”).

⁷⁰ See *Brown*, 131 S. Ct. at 2738 (writing that “[b]ecause the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest”).

⁷¹ *Id.*

⁷² The Court made it clear that correlation is not the same as causation under this requirement. *Id.* at 2739.

between the restriction imposed and the injury to be prevented.”⁷³ As observed elsewhere, “the phrase ‘direct causal link’ is brand new within the Supreme Court’s First Amendment jurisprudence, having only entered the doctrinal lexicon in *Brown* and *Alvarez*.”⁷⁴

Furthermore, in April 2010—before Justice Elena Kagan joined the Court and, in turn, before the start of this Article’s analysis—Chief Justice Roberts nimbly nudged First Amendment doctrine forward across partisan lines in *United States v. Stevens*.⁷⁵ Specifically, eight Justices—conservative Samuel Alito was the lone dissenter,⁷⁶ in accord with his penchant for not protecting offensive expression⁷⁷—agreed on a rather rigid standard for deciding when potentially new categories of expression fall outside of First Amendment protection.⁷⁸

Part I of this Article provides an overview of how other scholars perceive the Court’s First Amendment free speech jurisprudence under the leadership of Chief Justice Roberts. Part II then examines cases since the start of 2011 in which either judicial minimalism or constitutional avoidance hampered the progress of First Amendment doctrine. Next, Part III addresses select cases in which political partisanship among the Justices clouded the articulation and/or application of several First Amendment doctrines.

Finally, the Article concludes by addressing the collective effects—both pros and cons—of minimalism, avoidance, and partisanship during the past five years on the Roberts Court. Importantly, this Part notes that these three variables cannot, standing alone or considered in the aggregate, completely explain any specific case’s outcome. Additionally, the conclusion emphasizes that avoidance and minimalism are not always or necessarily bad things, at least in terms of providing free-speech-friendly results for the specific litigants involved, as the outcomes in *Elonis v. United States*, *FCC v. Fox Television Stations, Inc.* and *Snyder v. Phelps* reveal. Yet, these micro-level victories (victories for specific individuals in specific cases) do not translate to macro-level doctrinal triumphs for future litigants.

⁷³ 132 S. Ct. 2537, 2549 (2012).

⁷⁴ Clay Calvert & Matthew D. Bunker, *An “Actual Problem” in First Amendment Jurisprudence? Examining the Immediate Impact of Brown’s Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT. L.J. 391, 404 (2013).

⁷⁵ 559 U.S. 460 (2010).

⁷⁶ *Id.* at 482 (Alito, J., dissenting).

⁷⁷ See generally Clay Calvert, *Justice Samuel A. Alito’s Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 121 (2011) (contending that Justice Alito “embraces a very subjective approach to First Amendment jurisprudence that privileges what he apparently considers to be decent speech of high value”).

⁷⁸ See *Stevens*, 559 U.S. at 469–72 (rejecting the Government’s proposal that “a claim of categorical exclusion should be considered under a simple balancing test . . . ‘of the value of the speech against its societal costs’” (quoting Brief for the United States at 8, *Stevens*, 559 U.S. 460 (No. 08-769))).

I. THE ROBERTS COURT & FREEDOM OF EXPRESSION: PERSPECTIVES OF
LEADING LEGAL SCHOLARS

This Article concentrates on First Amendment doctrine and, specifically, how three variables—avoidance, minimalism, and partisanship—have negatively affected the doctrine since Justice Elena Kagan replaced John Paul Stevens. Other scholars, however, have examined different facets of the high court’s First Amendment jurisprudence. Their perspectives are addressed in this Part of the Article.

Perhaps the highest profile analysis to date is Dean Erwin Chemerinsky’s 2011 article, *Not a Free Speech Court*.⁷⁹ There, the prolific and renowned constitutional scholar argued that although “it is tempting to generalize that the Roberts Court is strongly protective of speech,” the reality is that “the Roberts Court frequently rules against free speech claims.”⁸⁰ Chemerinsky explained that

[t]he Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government’s national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.⁸¹

Chemerinsky ultimately concluded that, despite some obvious free speech victories, “a look at the overall pattern of Roberts Court rulings on speech yields a clear and disturbing conclusion: it is not a free speech Court.”⁸² In brief, Chemerinsky debunks what Nadine Strossen, former President of the American Civil Liberties Union, calls “[t]he conventional wisdom . . . that this Court has been very speech protective.”⁸³ Similarly, the gist of Chemerinsky’s article was encapsulated by another scholar as demonstrating that “the Court’s image as an unequivocal defender of freedom of speech is somewhat inaccurate.”⁸⁴ Chemerinsky’s article, unlike the one here, did not focus on the First Amendment doctrinal rifts and drifts caused by avoidance, minimalism, and partisanship.

Professor Lidsky, in a 2012 essay openly modeled on Chemerinsky’s above-mentioned work, offered a more mixed analysis, focusing not only on the Roberts

⁷⁹ Chemerinsky, *supra* note 28.

⁸⁰ *Id.* at 724.

⁸¹ *Id.* at 725.

⁸² *Id.* at 734.

⁸³ Nadine Strossen, Essay, *Textualism and the Bill of Rights*, 37 HARV. J.L. & PUB. POL’Y 721, 722 (2014).

⁸⁴ Zvi Triger, *Discriminating Speech: The Heterophilia of the Freedom of Speech Doctrine*, 19 CARDOZO J.L. & GENDER 349, 355 (2013).

Court's free *speech* jurisprudence, but also its free *press* decisions.⁸⁵ She found that "[t]he media can take heart from the strength of the Roberts Court's commitment to protecting unpopular speech,"⁸⁶ pointing to its 2010 decision in *United States v. Stevens*⁸⁷ and its 2011 opinion in *Snyder v. Phelps*.⁸⁸ Yet, when it comes to press freedom, Lidsky was more critical of the Roberts Court. Citing the Court's 2010 ruling in the corporate political speech case of *Citizens United v. FEC*,⁸⁹ Lidsky asserted that there are

extensive dicta in *Citizens United* suggesting that a majority of the Justices on the Roberts Court are deeply suspicious of the claim that the media play a special constitutional role in our democracy. This deep suspicion, even hostility, to the media's role as the "Fourth Estate" gives cause for concern that future decisions might erode the few "special rights" the media currently enjoy.⁹⁰

Professor Lidsky drew support for her thesis from dicta in the majority opinion of Justice Anthony Kennedy, including his observation that "media corporations accumulate wealth with the help of the corporate form, the largest media corporations have 'immense aggregations of wealth,' and the views expressed by media corporations often 'have little or no correlation to the public's support' for those views."⁹¹ Lidsky thus added skeptically that the majority in *Citizens United* "appears to view the 'press' or 'media' as comprised primarily of powerful corporate conglomerates whose chief mission is seeking profit through manipulation of the political process."⁹² Furthermore, she posited that "[i]n the Court's view, powerful media corporations have the potential not only to 'distort' electoral outcomes but to distort them in ways that favor their corporate parents."⁹³

If Professor Lidsky's interpretation of *Citizens United* dicta is correct, then the Roberts Court, indeed, may *not* be a free press court. Ultimately, however, she cautiously noted "the paucity of press cases before the Court," and concluded that "any predictions about the Roberts Court's likely path in 'press cases' must be circumspect."⁹⁴

⁸⁵ Lyrisa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYUL REV. 1819, 1834 (2012) (writing that her "essay is modeled on Erwin Chemerinsky's 2011 published lecture entitled *Not a Free Speech Court*, in which Professor Chemerinsky attempted to gauge the Roberts Court's commitment to free speech protection from its decided cases").

⁸⁶ *Id.* at 1821.

⁸⁷ 559 U.S. 460 (2010).

⁸⁸ 562 U.S. 443 (2011).

⁸⁹ 558 U.S. 310 (2010).

⁹⁰ Lidsky, *supra* note 85, at 1831–32.

⁹¹ *Citizens United*, 558 U.S. at 351 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

⁹² Lidsky, *supra* note 85, at 1833.

⁹³ *Id.*

⁹⁴ *Id.* at 1834.

Echoing this sentiment in 2014 about the dearth of Roberts-era free press cases, Professor RonNell Andersen Jones of Brigham Young University found that “the only decisions even possibly characterized as free press cases”⁹⁵ are two involving the Federal Communications Commission’s (FCC) regulation of broadcast indecency.⁹⁶ Compared to what she considers the halcyon, glory days of press freedom—the 1960s, 1970s, and early 1980s, when “the Court went out of its way to speak of the press and then offered effusively complimentary depictions of the media in its opinions”⁹⁷—today there is a “trend toward less positive characterizations of the press by the Supreme Court.”⁹⁸ Jones offered and explored three possible explanations for the modern Court’s “loss of an inclination to support the newsgathering or public-informing work of the press.”⁹⁹ In brief, the conclusions of Professors Lidsky and Jones are very similar concerning the Roberts Court and press freedom.

When it comes to freedom of speech, however, Professors Toni Massaro and Robin Stryker of the University of Arizona argue that “the current Court has been quite bullish on free speech, despite the potentially harmful consequences of the expression.”¹⁰⁰ They tick through a veritable laundry list of cases supporting this conclusion, noting that

[t]he Roberts Court has overturned congressional restrictions on corporate campaign expenditures and state clean election laws, upheld the right of religious protesters to picket a serviceman’s funeral, struck down a congressional measure that restricted commercial trafficking in images of animal cruelty, and struck down a state law that sought to restrict minors’ access to violent video games.¹⁰¹

⁹⁵ RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 261 (2014).

⁹⁶ *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

⁹⁷ Jones, *supra* note 95, at 256.

⁹⁸ *Id.* at 268.

⁹⁹ *Id.* at 269. Specifically, she asserts that

there are at least three major categories of explanations that might need to be explored: the characterizations of the press have changed because the Court has changed; the characterizations of the press have changed because the press has changed; and the characterizations of the press have changed because the public opinion or perception of the press has changed.

Id. at 262–63.

¹⁰⁰ Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 392 (2012).

¹⁰¹ *Id.* at 391–92 (footnotes omitted). The cases referred to in this quotation are, in order of reference from first to last: *Citizens United v. FEC*, 558 U.S. 310 (2010); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Snyder v. Phelps*, 562 U.S.

Ultimately, Massaro and Stryker call for civilized discourse in the name of promoting democracy while simultaneously “favor[ing] no new government-imposed regulations designed to enforce civility norms in any traditional or designated public forums.”¹⁰² They assert that “[t]he call to civil political discourse is not inherently inconsistent with the First Amendment, with liberal democratic principles, or with the many ways in which modern culture is hardly civil.”¹⁰³

In summary, several leading scholars have addressed various aspects of First Amendment jurisprudence as articulated and as applied by the U.S. Supreme Court under the leadership of Chief Justice John Roberts. The next two Parts of this Article take very different tacks. Specifically, they examine how principles of minimalism and avoidance, along with divisions along lines of political partisanship, have negatively impacted free speech jurisprudence in several of its domains since Justice Elena Kagan joined the Court.

II. JUDICIAL MINIMALISM & CONSTITUTIONAL AVOIDANCE: MISSED OPPORTUNITIES TO ADVANCE AND CLARIFY DOCTRINES

This Part features four Sections, the first three of which analyze how philosophies of minimalism and avoidance have detrimentally affected First Amendment doctrines since Justice Kagan joined the Roberts Court. Specifically, Section A addresses the true threats doctrine in light of *Elonis v. United States*, and Section B examines the FCC’s regulation of broadcast indecency and the Court’s contentious indecency doctrine in its 2012 decision in *FCC v. Fox Television Stations, Inc.* Section C then turns to First Amendment protection of offensive expression in the face of tort liability in *Snyder v. Phelps*. Finally, Section D synthesizes and summarizes these three facets of free speech jurisprudence in which minimalism and avoidance are evident, if not predominant.

A. True Threats Doctrine

If one First Amendment doctrine screams out the loudest for clarification, it may well be true threats.¹⁰⁴ This relatively new category of unprotected expression is rooted in the Supreme Court’s 1969 decision in *Watts v. United States*.¹⁰⁵ The Court

443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); and *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

¹⁰² Massaro & Stryker, *supra* note 100, at 438 (emphasis omitted).

¹⁰³ *Id.* at 439.

¹⁰⁴ See Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 825 (2011) (asserting that “the current doctrine of true threats is incoherent”).

¹⁰⁵ 394 U.S. 705 (1969).

there made clear that what is an unprotected “threat must be distinguished from what is constitutionally protected speech.”¹⁰⁶ Unfortunately, that was about all the Court made clear, as it failed to define what constitutes a threat that falls outside the reach of First Amendment protection.

Instead, the Court concluded that “political hyperbole,”¹⁰⁷ like the kind engaged in by petitioner Robert Watts at a rally near the Washington Monument in August 1966, was not tantamount to an unprotected threat.¹⁰⁸ Watts had told the crowd that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”¹⁰⁹ The Supreme Court, in reversing Watts’s conviction for threatening President Lyndon B. Johnson, concluded that the “only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’”¹¹⁰

Watts is disappointing, Professor Frederick Schauer asserts, because it “provides virtually no information on just what a threat *is* other than that what Watts said was not one.”¹¹¹ More recently, Brooks Fuller adds that “[d]ue to a perceived dearth of guidance from the Court in *Watts* . . . true threats jurisprudence has yet to develop a clearly articulated test among the circuits.”¹¹² Fuller points out that the “Supreme Court has offered relatively little guidance . . . regarding the definitions of, and distinctions between, true threats and political advocacy.”¹¹³

The Supreme Court’s 2003 foray into true threats with the cross-burning case of *Virginia v. Black*¹¹⁴ only muddled the mess when it comes to whether a defendant’s subjective intent matters in determining when speech constitutes a true threat. In *Black*, the Court wrote that true threats include “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹¹⁵

But as attorneys Miguel Estrada and Ashley Boizelle observe, the statute in *Black* “expressly incorporated an intent-to-intimidate requirement, and thus the Court was not forced to decide the precise question of whether the First Amendment requires that convictions under such statutes be based on the speaker’s subjective intent to threaten the recipient of the speech.”¹¹⁶ Put slightly differently, the Court

¹⁰⁶ *Id.* at 707.

¹⁰⁷ *Id.* at 708.

¹⁰⁸ *Id.* at 706.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 708.

¹¹¹ Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 211 (2004).

¹¹² P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 52 (2015).

¹¹³ *Id.* at 44.

¹¹⁴ 538 U.S. 343 (2003).

¹¹⁵ *Id.* at 359.

¹¹⁶ Miguel A. Estrada & Ashley S. Boizelle, *Looking Ahead: October Term 2014*, 2013–2014 CATO SUP. CT. REV. 337, 346–47 (2014).

in *Black* “did not decide whether a ‘true threat’ required that the speaker subjectively intend to threaten the listener.”¹¹⁷

The result, Professor Clay Calvert writes, “is a circuit split on the question of intent in the aftermath of *Virginia v. Black*, specifically on the difference between objective intent and subjective intent.”¹¹⁸ And the bottom line, Professor Mark Strasser asserts, is that the nation’s high court offers “little guidance with respect to what constitutes a threat that is outside First Amendment protection. State and lower federal courts have been trying to make sense of this area of the law, sometimes seeking to refine what the Court has said and sometimes striking out on their own.”¹¹⁹

And then along came *Elonis v. United States*.¹²⁰ It provided the Court with a prime opportunity to resolve the circuit split on the question of intent, as well as to address whether (and how) posting messages to online social media platforms, such as Facebook, affects the true threats analysis.¹²¹ Furthermore, *Elonis* gave the Court an opening to consider if conveying alleged threats in the form of an artistic, albeit controversial, mode of expression—in *Elonis*, the defendant-petitioner contended his prosecuted messages were merely cathartic, musical raps—makes any difference in the threats calculus.¹²²

Writing four years before the U.S. Supreme Court issued its 2015 ruling in *Elonis*, Professor Charles Rhodes observed that “[t]he Roberts Court typically avoids constitutional issues by articulating statutory grounds for decisions and assuming the resolution of issues without actually deciding them.”¹²³ That observation regarding avoidance proved particularly prescient in *Elonis*, where the Court addressed only the federal statutory issue—Anthony Elonis was prosecuted under 18 U.S.C. § 875(c)¹²⁴—and evaded the constitutional one.¹²⁵

The majority concluded merely that “negligence is not sufficient to support a conviction under Section 875(c).”¹²⁶ Even this statutory conclusion is minimalistic,

¹¹⁷ Peter S. Larson, *Is That a Threat?: Elonis v. United States and the Standard of Intent for True Threat Convictions*, 10 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 83, 84 (2015).

¹¹⁸ Clay Calvert, Emma Morehart & Sarah Papadelias, *Rap Music and the True Threats Quagmire: When Does One Man’s Lyric Become Another’s Crime?*, 38 COLUM. J.L. & ARTS 1, 9 (2014).

¹¹⁹ Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 368 (2011).

¹²⁰ 135 S. Ct. 2001 (2015).

¹²¹ All of the indictments against Anthony Elonis were based on Facebook postings. *Id.* at 2005–07.

¹²² *See id.* (noting that Anthony “Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem, some of which involve fantasies about killing his ex-wife,” and he explained to one Facebook user, “I’m doing this for me. My writing is therapeutic”).

¹²³ Rhodes, *supra* note 21, at 52–53.

¹²⁴ *Elonis*, 135 S. Ct. at 2007.

¹²⁵ *See supra* notes 10–12 and accompanying text.

¹²⁶ *Elonis*, 135 S. Ct. at 2013.

with the majority admitting that it failed to consider “whether recklessness suffices for liability under Section 875(c).”¹²⁷ As Professor Suzanna Sherry of Vanderbilt University Law School put it, *Elonis* comports with the Roberts Court’s style of reaching “the narrowest possible rulings. Certainly this is very narrow. Not only did they not decide any constitutional issue, they didn’t even decide what level of criminal intent is necessary—just that negligence is not enough.”¹²⁸

This latter omission sparked rebukes from both Justices Clarence Thomas¹²⁹ and Samuel Alito, the latter of whom remarked that the majority’s decision

is certain to cause confusion and serious problems. Attorneys and judges need to know which mental state is required for conviction under 18 U.S.C. § 875(c), an important criminal statute. This case squarely presents that issue, but the Court provides only a partial answer. The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain what type of intent was necessary.¹³⁰

In the process of dodging the constitutional issue, the Court also missed a chance to address how the online, social-media context of messages affects the true threats analysis.¹³¹ Publishing shortly before the Court decided *Elonis*, First Amendment scholar Brooks Fuller argued that the “Court should address in its discussion, if not in its holding, whether an online communication is itself a contextually relevant factor and whether usage of social media impacts the intended or objective meaning of a communication.”¹³² Fuller reasoned that “[b]ecause Internet media provide a unique contextual experience, examining how federal courts have analyzed the complexities of speaker’s intent and audience interpretation of Internet messages is worthwhile to develop a richer sense of the cultural and First Amendment issues raised in *Elonis*.”¹³³

The Court’s failure in *Elonis* to clarify the true threats doctrine in the Internet era is problematic because, as Dean Chemerinsky emphasizes, “Facebook and other

¹²⁷ *Id.*

¹²⁸ See Mauro, *supra* note 22 (quoting Professor Sherry).

¹²⁹ Justice Thomas wrote in dissent that “[l]ower courts are thus left to guess at the appropriate mental state for § 875(c). All they know after today’s decision is that a requirement of general intent will not do.” *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting).

¹³⁰ *Id.* at 2013–14 (Alito, J., concurring in part and dissenting in part).

¹³¹ Erwin Chemerinsky, *What the Supreme Court Didn’t Decide This Week*, MS. MAG.: BLOG (June 3, 2015), <http://www.ms magazine.com/blog/2015/06/03/what-the-supreme-court-didnt-decide-this-week/> [<http://perma.cc/M5F7-DVL3>].

¹³² Fuller, *supra* note 112, at 53.

¹³³ *Id.*

social media have made it much more common for people to make threatening statements that cause others to fear for their safety and even their lives.”¹³⁴ Chemerinsky adds that, regrettably after *Elonis*, “[t]he issue remains as to what constitutes a true threat and when may such speech be constitutionally punished. . . . In a world of Facebook and other social media, it is an issue sure to come back before the court sometime soon.”¹³⁵

Other legal experts also were somewhat taken aback by the Court’s failure to tackle the constitutional issue. Attorney Paul Smith, who argued successfully before the Supreme Court on behalf of the victors in such high-profile cases as *Lawrence v. Texas*¹³⁶ and *Brown v. Entertainment Merchants Ass’n*,¹³⁷ contends, “The surprise in *Elonis* is that the Court did not answer that [First Amendment] question at all.”¹³⁸ He laments that “[i]t appears that we will have to wait for another day to receive an answer to the question presented in *Elonis*.”¹³⁹

The bottom line is that adherence to the doctrine of constitutional avoidance in *Elonis* failed to meaningfully advance the First Amendment true threats doctrine in the Internet era. What could have been “a ground-breaking case”¹⁴⁰ faded and fizzled. Anthony *Elonis* certainly scored an individual free speech victory—his conviction was tossed out due to the statutory instructional error—but First Amendment doctrine was left foundering. It thus may be considered a micro-level victory for free speech at the individual level, but a wash, at best, at the macro level of doctrine.

B. Broadcast Indecency

The Supreme Court’s “decades-old indecency doctrine,”¹⁴¹ which affects terrestrial broadcasters’ First Amendment right to air sexual and excretory-related expression during certain times of the day,¹⁴² dates back nearly forty years to *FCC v. Pacifica Foundation*.¹⁴³ There, the Court framed the issue as “whether the First

¹³⁴ Chemerinsky, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ 539 U.S. 558 (2003).

¹³⁷ 131 S. Ct. 2729 (2011).

¹³⁸ Paul M. Smith & Jessica Ring Amunson, *Some Surprising First Amendment Rulings*, 31 COMM. LAW. 14, 14 (2015), http://www.americanbar.org/content/dam/aba/publications/communications_lawyer/summer2015/CL_Sum15_v31n3_Courtside.authcheckdam.pdf [<http://perma.cc/6AFR-6M33>].

¹³⁹ *Id.* at 15.

¹⁴⁰ Larson, *supra* note 117, at 83.

¹⁴¹ Ilya Shapiro, *Introduction*, 2011–2012 CATO SUP. CT. REV. 1, 10 (2012).

¹⁴² Under the FCC’s current standards, “[i]ndecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity.” *Obscene, Indecent and Profane Broadcasts*, FCC, <https://consumercomplaints.fcc.gov/hc/en-us/articles/202731600-Obscene-Indecent-and-Profane-Broadcasts> [<http://perma.cc/646N-PJNH>].

¹⁴³ 438 U.S. 726 (1978).

Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.”¹⁴⁴ A fractured Court held that the First Amendment does not forbid FCC regulation of broadcast speech that is indecent,¹⁴⁵ yet not obscene,¹⁴⁶ at least during times of the day when children likely are in the audience.¹⁴⁷ Congress earlier had given the FCC statutory authority to regulate obscenity and indecency, as well as profane language.¹⁴⁸

Although *Pacifica Foundation* narrowly affirmed the FCC’s power to regulate indecency,¹⁴⁹ the FCC “treated fleeting expletives as an aspect of television that was beyond its reach to punish as indecent” for about a quarter century thereafter.¹⁵⁰ But in 2004, Professor Terri Day wrote, “[T]he FCC completely abandoned its long-standing policy of not sanctioning fleeting expletives.”¹⁵¹ The FCC announced that year, in an order centering on the phrase “really fucking brilliant” uttered live by U2 singer Bono during the Golden Globe Awards show,¹⁵² that it “could, and would, sanction broadcasters for airing ‘fleeting and isolated’ expletives.”¹⁵³

¹⁴⁴ *Id.* at 744.

¹⁴⁵ The FCC today defines indecency as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.” FED. COMM’NS COMM’N, CONSUMER GUIDE: OBSCENE, INDECENT AND PROFANE BROADCASTS 1 (2015), <https://transition.fcc.gov/cgb/consumerfacts/obscene.pdf> [<http://perma.cc/NA3P-END9>]. The FCC adds that “[i]ndecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity.” *Id.*

¹⁴⁶ Obscene speech is not protected by the First Amendment. *See Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”); *see also Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the current three-part test for determining when speech is obscene).

¹⁴⁷ *Pacifica Found.*, 438 U.S. at 748–51.

¹⁴⁸ *See* 18 U.S.C. § 1464 (2012) (making it unlawful to convey “any obscene, indecent, or profane language by means of radio communication”).

¹⁴⁹ *See generally* Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221, 235–45 (1996) (providing an excellent analysis of the Court’s five-to-four opinion in *Pacifica Found.* and noting, among other things, that “[f]or the most part, the five Justices supporting the Commission were able to unite behind a single majority opinion”).

¹⁵⁰ Toby Coleman, *Limiting Judges: Placing Limits on Judges’ Power in Hard-look Review*, 88 U. DET. MERCY L. REV. 883, 884–85 (2011).

¹⁵¹ Terri R. Day & Danielle Weatherby, *BLEEEEEEP! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469, 484 (2012).

¹⁵² *See In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4976 n.4 (2004). For other news, videos, and information about the Golden Globes Awards, *see generally* GOLDEN GLOBE AWARDS, <http://www.goldenglobes.com>.

¹⁵³ Toby Coleman, *Explaining Change and Rethinking Dirty Words: FCC v. Fox Television Stations, Inc.*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 71, 72 (2008).

This policy change¹⁵⁴ is important—and dangerous from a free speech perspective—because, as former ACLU President Nadine Strossen observes, “[A] whole broadcast can be condemned just because of a single F-word or S-word, and likewise for a mere glimpse of a breast for 9/16 of one second, as in the infamous 2004 Super Bowl wardrobe malfunction.”¹⁵⁵ It thus is not surprising that the FCC’s policy shift sparked litigation that eventually reached the nation’s highest court.

Specifically, the U.S. Supreme Court granted certiorari in June 2011 in *FCC v. Fox Television Stations, Inc.*¹⁵⁶ (*Fox Television Stations II*) to consider “[w]hether the FCC’s current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.”¹⁵⁷ Three instances of alleged indecency provided the case’s factual underpinnings, with two involving unscripted utterances of “fuck” or “fucking” by celebrities during the Billboard Music Awards.¹⁵⁸

Just two years prior, in *FCC v. Fox Television Stations, Inc.*¹⁵⁹ (*Fox Television Stations I*), the Court passed on a nearly identical constitutional question¹⁶⁰ and, instead, narrowly based its decision then to uphold the FCC’s decision to start targeting the broadcast of fleeting expletives—after years of tolerance¹⁶¹—under the Administrative Procedure Act.¹⁶²

¹⁵⁴ An in-depth discussion of the reasons for the FCC’s sudden policy change is beyond the scope of this Article. For background on that topic, see Abner Greene et al., *Indecent Exposure? The FCC’s Recent Enforcement of Obscenity Laws*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087 (2005).

¹⁵⁵ Nadine Strossen, *Obscenity & Indecency Law: Why Howl Is Still Silenced*, 37 SEATTLE U. L. REV., at lxi, lxvi (2013).

¹⁵⁶ 131 S. Ct. 3065 (2011) (granting petition for writ of certiorari).

¹⁵⁷ *Id.* at 3065–66.

¹⁵⁸ See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2314 (2012) [hereinafter *Fox Television Stations II*]. In accepting an award during the 2002 Billboard Music Awards, singer and actress Cher proclaimed, “I’ve also had my critics for the last 40 years saying that I was on my way out every year. Right. So f[uck]’em.” *Id.* At the same show the following year, Nicole Richie said, “Have you ever tried to get cow s[hit] out of a Prada purse? It’s not so f[uck]ing simple.” *Id.* The third incident involved an episode of the scripted show, *NYPD Blue*, which “showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.” *Id.*

¹⁵⁹ 556 U.S. 502 (2009) [hereinafter *Fox Television Stations I*].

¹⁶⁰ See *id.* at 529 (writing that “[w]e decline to address the constitutional questions at this time”).

¹⁶¹ William E. Lee, *Books, Video Games, and Foul-Mouthed Hollywood Glitteratae: The Supreme Court and the Technology-Neutral Interpretation of the First Amendment*, 14 COLUM. SCI. & TECH. L. REV. 295, 366–67 (2013) (noting that “[f]or nine years after *Pacifica*, the FCC emphasized it would only punish repetitive use of the indecent words in Carlin’s monologue and found no broadcasts deserving sanctions,” and, adding that, “from the late 1980s until the early 2000s, indecency fines were still rare and generally a small amount”).

¹⁶² See *Fox Television Stations I*, 556 U.S. at 517 (concluding that, under the requirements of the Administrative Procedure Act, the FCC’s “new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious”); see also Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

Although *Fox Television Stations I* was “widely anticipated”¹⁶³ as the Court’s first review of its indecency doctrine in the three-plus decades that had passed since *Pacifica Foundation*, the result, media defense attorney Robert Corn-Revere writes that the decision “focused solely on the narrow issue of whether the FCC’s explanation for the policy change was adequate under the Administrative Procedure Act.”¹⁶⁴ Such minimalism seemingly peeved Justice Ruth Bader Ginsburg, who wrote in dissent that “there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today’s decision does nothing to diminish that shadow.”¹⁶⁵

Fox Television Stations II, however, gave the Court another shot at tackling the issue in a media landscape radically changed since 1978 when *Pacifica Foundation* was decided.¹⁶⁶ Crisply encapsulating those changes, attorney Nick Gamse explains that

[a]lthough broadcast television was recognized as a dangerously pervasive medium in 1978, it is no longer the dominant force that it once was, with the vast majority of Americans now paying for subscription television services like cable or satellite. While the *Pacifica* Court strove to support parents in their struggle to protect their children from pervasive inappropriate content by upholding the Federal Communication Commission’s content regulation, technological developments like the V-Chip, cable boxes, DVRs, and satellite boxes have afforded modern parents various self-help alternatives.¹⁶⁷

When the Court issued its June 2012 ruling in *Fox Television Stations II*,¹⁶⁸ however, it once again skipped the First Amendment issue.¹⁶⁹ It resolved the case solely on Fifth Amendment grounds regarding lack of fair notice to the broadcasters about the FCC’s policy shift to target fleeting expletives.¹⁷⁰ As Justice Anthony Kennedy wrote for the majority, “the Court rules that Fox and ABC lacked notice at the time

¹⁶³ Robert Corn-Revere, *FCC v. Fox Television Stations, Inc.: Awaiting the Next Act*, 2008–2009 CATO SUP. CT. REV. 295, 295 (2009).

¹⁶⁴ *Id.* at 296.

¹⁶⁵ *Fox Television Stations I*, 556 U.S. at 545 (Ginsburg, J., dissenting).

¹⁶⁶ See Edward Wyatt, *Justices Agree to Consider F.C.C. Rules on Indecency*, N.Y. TIMES, June 28, 2011, at B3 (noting that, in the thirty-three years since *Pacifica Found.*, “the media landscape has markedly changed, causing several justices to question in recent decisions whether those standards were still relevant in a world of unfiltered cable television, Internet, film and radio”).

¹⁶⁷ Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287, 288 (2012) (footnotes omitted).

¹⁶⁸ See 132 S. Ct. 2307 (2012).

¹⁶⁹ See *id.* at 2320.

¹⁷⁰ See *id.*

of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies. Given this disposition, it is unnecessary for the Court to address the constitutionality of the current indecency policy.”¹⁷¹

In ducking the First Amendment question, Kennedy cited favorably the Court’s observation more than sixty years ago, in an Equal Protection Clause context, that “this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible.”¹⁷² Only Justice Ginsburg, in a lone concurrence, suggested how the First Amendment issues should be resolved.¹⁷³

The bottom line is that *Fox Television Stations II* demonstrates judicial minimalism, which focuses “on deciding legal questions on as narrow and shallow basis as possible, and leaving fundamental and difficult constitutional questions open to democratic deliberation.”¹⁷⁴ Attorney John Elwood characterizes the *Fox Television Stations II* decision as

narrow not only in the sense of sidestepping the First Amendment claims but also in its application of the due process framework itself. It limited its analysis to just the notice aspects of due process, as applied to the three broadcasts at issue, avoiding broader concerns about whether the FCC’s policy was so unclear it could not be enforced going forward.¹⁷⁵

Professor Robert Richards concurs, observing that the Supreme Court in *Fox Television Stations II* “clarified very little with respect to what broadcasters could legally air on broadcast radio and television.”¹⁷⁶ He adds that “more than a decade after Cher crudely uttered her thoughts about her critics on live television, neither broadcasters nor the viewing public is any closer to understanding what language today is permissible in the broadcast media.”¹⁷⁷ Similarly, Professor Christopher Fairman writes that “after two trips to the Supreme Court, we still do not know the answer to one simple question: Is the live broadcast of a single fleeting expletive indecent?”¹⁷⁸

¹⁷¹ *Id.*

¹⁷² *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

¹⁷³ Ginsburg wrote that *Pacifica Found.* “was wrong when it [was] issued,” and that it now “bears reconsideration.” *Fox Television Stations II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring).

¹⁷⁴ Or Bassok, *The Court Cannot Hold*, 30 J.L. & POL. 1, 19 (2014).

¹⁷⁵ Elwood, Marwell & White, *supra* note 52, at 292.

¹⁷⁶ Robert D. Richards & David J. Weinert, *Punting in the First Amendment’s Red Zone: The Supreme Court’s “Indecision” on the FCC’s Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631, 633 (2012).

¹⁷⁷ *Id.* at 634.

¹⁷⁸ Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 568–69 (2013) (footnote omitted).

Why dodge the indecency question? Attorney Barry Chase argues that both *Fox Television Stations I* and *Fox Television Stations II* suggest “a judicial/political effort to avoid creating a firestorm among certain segments of the public who care deeply about their children being confronted with ‘Filthy Words.’”¹⁷⁹ One such segment likely is the Parents Television Council, with its mission “[t]o protect children and families from graphic sex, violence and profanity in the media, because of their proven long-term harmful effects.”¹⁸⁰

But beyond simply failing to address the meaning of indecency and to clarify the First Amendment implications of that definition, the Court dodged a much larger question. Professor William Lee asserts that the high court in *Fox Television Stations II*

punted and avoided the fundamental question of First Amendment technological neutrality. . . . [T]he Court had been squarely presented with the opportunity to reconsider the historically diminished First Amendment status of broadcasting. . . . Whether full First Amendment protection should be restored to broadcasting, in light of changing technological and market features, was postponed for another day.¹⁸¹

Ultimately, by saving the much larger issues for later, the Court in *Fox Television Stations II* engaged in its “second punt on revisiting *Pacifica*”¹⁸² and, in doing so, failed to settle an indecency doctrine that, as Professor Faith Sparr writes, is “quite unwieldy.”¹⁸³ Subsequent to the *Fox Television Stations II* decision, the FCC filled the void left by the Supreme Court by adopting what are, at best, stopgap measures on indecency. These include the FCC proposing to target only the most “egregious” indecency cases and throwing out more than one million aging—if not ossifying—indecent complaints.¹⁸⁴ Such FCC responses, of course, only further drew the wrath of the Parents Television Council.¹⁸⁵ Former FCC Chair Julius Genachowski was

¹⁷⁹ Barry Chase, *The FCC’s Indecency Jurisdiction: A Stale Blemish on the First Amendment*, 39 OHIO N.U. L. REV. 697, 718 (2013).

¹⁸⁰ *The PTC Mission*, PARENTS TELEVISION COUNCIL, <http://w2.parentstv.org/main/About/mission.aspx> [<http://perma.cc/8883-AEGR>].

¹⁸¹ Lee, *supra* note 161, at 297–98 (footnotes omitted).

¹⁸² Fairman, *supra* note 178, at 632.

¹⁸³ Faith Sparr, *From Carlin’s Seven Dirty Words to Bono’s One Dirty Word: A Look at the FCC’s Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMEND. L. REV. 207, 250 (2005).

¹⁸⁴ See Public Notice, FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, 28 FCC Rcd. 4082 (Apr. 1, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DA-13-581A1.pdf [<http://perma.cc/GN9R-MPDD>].

¹⁸⁵ See *PTC Responds to FCC’s Proposal to Limit Broadcast Decency Enforcement*,

even reduced to tweeting his views about indecency in late April 2013, after baseball player David Ortiz uttered the word “fucking” during a Boston Red Sox pregame ceremony that was broadcast live.¹⁸⁶

And then, as if waking up from a relatively protracted slumber on the indecency enforcement front,¹⁸⁷ the FCC in March 2015 issued a notice of apparent liability for forfeiture for \$325,000—the maximum possible amount—against a Roanoke, Virginia television station that very briefly aired an image of an erect penis in the corner of the screen during a news story.¹⁸⁸ The National Association of Broadcasters, the Radio Television Digital News Association, and the station now are fighting the proposed fine.¹⁸⁹ This may very well trigger yet another protracted battle that eventually could get the Supreme Court to resolve the First Amendment issues it ducked in both *Fox Television Stations I* and *Fox Television Stations II*. The bottom line, then, is that principles of both avoidance and minimalism in *Fox Television Stations II* have left the indecency doctrine in shambles.

C. Offensive Expression

In March 2011, the Supreme Court in *Snyder v. Phelps*¹⁹⁰ held that the First Amendment shielded the Westboro Baptist Church (WBC) and its leader, Fred W.

PARENTS TELEVISION COUNCIL (Apr. 1, 2013), <http://w2.parentstv.org/Main/News/Detail.aspx?docID=2771> [<http://perma.cc/FM6X-XEFC>].

¹⁸⁶ See Arthur Hayes, Opinion, *Boston F-Bomb Exemption*, USA TODAY (Apr. 25, 2013, 5:32 PM), <http://usatoday.com/story/opinion/2013/04/24/boston-f-bomb-exemption-column/21108251>.

¹⁸⁷ Since the start of 2014, the FCC has taken action in only three broadcast indecency cases, including the one against the Roanoke, Virginia station described in the text above. Press Release, FCC Plans Maximum Fine Against WDBJ for Broadcasting Indecent Programming Material During Evening Newscast (Mar. 23, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-332631A1.pdf. The other two cases involve fines or settlements of far smaller amounts, with the FCC reporting that,

[i]n April 2014, the Enforcement Bureau settled its investigation into allegations of the broadcast of vulgar language on radio station KRXA(AM), which resulted in a payment of \$15,000. In August 2014, Border Media Business Trust paid \$37,500 in penalties to settle an investigation into the use of indecent sexual language during a morning show on radio station KDBR(FM).

Id.

¹⁸⁸ See Notice of Apparent Liability for Forfeiture, *In re WDBJ Television, Inc.*, 30 FCC Rcd. 3024 (Mar. 23, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-32A.pdf.

¹⁸⁹ See Ted Johnson, *Broadcasters Protest FCC Indecency Fine to Roanoke TV Station*, VARIETY (July 28, 2015, 2:57 PM), <http://www.variety.com/2015/biz/news/fcc-indecency-roanoke-fine-wdbj-fleeting-expetive-1201550235/> [<http://perma.cc/G9NQ-69NH>].

¹⁹⁰ 562 U.S. 443 (2011).

Phelps, from tort liability under the theories of intentional infliction of emotional distress (IIED)¹⁹¹ and intrusion into seclusion,¹⁹² despite acknowledging the “certainly hurtful”¹⁹³ nature of the defendants’ speech.¹⁹⁴ *Snyder* thus is *not* an example of constitutional avoidance.¹⁹⁵ Indeed, the Court squarely tackled the constitutional issue and concluded that the First Amendment precluded plaintiff Albert Snyder from recovering tort damages.¹⁹⁶

The case, however, is better viewed as one of judicial minimalism or, perhaps more charitably put, judicial incrementalism.¹⁹⁷ That is because the Court broke little new ground in its offensive speech jurisprudence in which First Amendment interests collide with tort law principles.¹⁹⁸ Distilling the case down to its key elements, Chief Justice Roberts concluded for the majority that the WBC was protected largely because

¹⁹¹ Intentional infliction of emotional distress generally involves “four elements: (1) the defendant’s conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant’s conduct must cause the plaintiff emotional distress and (4) the distress must be severe.” Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL’Y 469, 476 (2000).

¹⁹² See RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977) (providing that “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”).

¹⁹³ *Snyder*, 562 U.S. at 460.

¹⁹⁴ As described by the Supreme Court, the signs carried by WBC members included the following messages:

“God Hates the USA/Thank God for 9/11,” “America is Doomed,”
 “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,”
 “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,”
 “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,”
 “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and
 “God Hates You.”

Id. at 454.

¹⁹⁵ See Jonathan S. Carter, *Passive Virtues Versus Aggressive Litigants: The Prudence of Avoiding a Constitutional Decision in Snyder v. Phelps*, 89 N.C. L. REV. 326, 328 (2010) (cogently arguing that, in *Snyder*, the “court’s refusal to consider non-constitutional grounds for disposing of this case was unjustified and constituted an abdication of the court’s self-imposed jurisprudential obligation to avoid unnecessary constitutional adjudication,” and asserting that by not briefing “the non-constitutional issues, the Phelpses were able to force a ruling on whether their widespread funeral protests and anti-homosexual demonstrations were protected by the First Amendment”).

¹⁹⁶ See *Snyder*, 562 U.S. at 460.

¹⁹⁷ See Paul E. Salamanca, *Snyder v. Phelps: A Hard Case That Did Not Make Bad Law*, 2010–2011 CATO SUP. CT. REV. 57, 59 (2011) (asserting that the Court in *Snyder* “took the incremental tack of reiterating the importance of speech on matters of public concern and putting the protest in that category” (emphasis added)).

¹⁹⁸ See generally David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755 (2004) (providing an excellent overview of the Supreme Court’s efforts to apply First Amendment principles to speech-related torts).

its members “addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials.”¹⁹⁹

Roberts emphasized the minimalness of the decision, pointing out that “[o]ur holding today is narrow.”²⁰⁰ Furthermore, he added that “our opinion here is limited by the particular facts before us.”²⁰¹ He supported this proposition by quoting the Court’s 1989 ruling in *Florida Star v. B.J.F.*²⁰² that it should rely “on limited principles that sweep no more broadly than the appropriate context of the instant case.”²⁰³ All of this completely comports with judicial minimalism, which pivots on “adopting narrow constitutional rulings that decide the case under review rather than issuing broad directives that affect a large number of other potential conflicts.”²⁰⁴

The “particular facts” to which Roberts referred,²⁰⁵ when combined with “the Supreme Court’s long-established tradition of favoring speech protection even in cases involving offensive speech painted a clear picture” of why, as Professor Joseph Russomanno observed, the WBC had to win.²⁰⁶ A ruling by the Court against the WBC, Russomanno cogently concluded, “would have established a principle significantly at odds with its own cases, its own traditions—especially an unwillingness to create new categories of unprotected speech—and the First Amendment itself.”²⁰⁷

Justice Stephen Breyer wrote a concurring opinion in *Snyder* that emphasized the minimal nature of Chief Justice Roberts’s opinion by pointing out what it did *not* address.²⁰⁸ Breyer emphasized that the Court “does *not* hold or imply that the State is always powerless to provide private individuals with necessary protection.”²⁰⁹

¹⁹⁹ *Snyder*, 562 U.S. at 460.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² 491 U.S. 524 (1989).

²⁰³ *Snyder*, 562 U.S. at 460 (quoting *Fla. Star*, 491 U.S. at 533).

²⁰⁴ Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 474 (2012).

²⁰⁵ The Roberts majority emphasized the following contextual facts regarding the WBC’s speech and actions that arguably help to render the outcome anything but earth-shattering:

[T]he picketers complied with police instructions in staging their demonstration. The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence. That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church. The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing.

Snyder, 562 U.S. at 448–49 (citations omitted).

²⁰⁶ Joseph Russomanno, “*Freedom for the Thought That We Hate*”: *Why Westboro Had to Win*, 17 COMM. L. & POL’Y 133, 172 (2012) (footnote omitted).

²⁰⁷ *Id.* at 172–73.

²⁰⁸ See *Snyder*, 562 U.S. at 461 (Breyer, J., concurring).

²⁰⁹ *Id.* at 462 (emphasis added).

Indeed, the majority never wrestled with whether the status of the plaintiff as a private or public figure should make a difference. Only Justice Samuel Alito, in dissent, focused on Albert Snyder's private-figure status.²¹⁰ Alito's dissent is not at all shocking; as Ronald Collins writes, Alito is "the Roberts Court's most consistent critic of expanding First Amendment free speech rights."²¹¹ The majority, instead, simply reasoned that "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern."²¹² In brief, the majority concentrated on the nature of the *speech*, not the nature of the *plaintiff*.

This plaintiff-status omission is peculiar because, in its earlier landmark IIED decision in *Hustler Magazine, Inc. v. Falwell*,²¹³ the Court emphasized that its holding applied to only "public figures and public officials."²¹⁴ As Justice Alito wrote in his *Snyder* dissent, the plaintiff in *Falwell* "was a public figure, and the Court did *not* suggest that its holding would also apply in a case involving a private figure."²¹⁵

Breyer bridled openly at the *Snyder* Court's minimalist approach, writing that "[w]hile I agree with the Court's conclusion that the picketing addressed matters of public concern, I do not believe that our First Amendment analysis can stop at that point. A State can sometimes regulate picketing, even picketing on matters of public concern."²¹⁶ In brief, Breyer would have gone further, even in, perhaps, mere dicta.

Were opportunities missed in *Snyder* to address additional issues? Among other things, the majority's opinion in *Snyder* "seems to intentionally provide no direction to lower courts," Professor Strasser writes, on the question of regulating funeral picketing.²¹⁷ Indeed, the Chief Justice wrote that Maryland's funeral picketing statute "was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional."²¹⁸

Professor Strasser argues that *Snyder*, rather than clarify doctrine, "raises more questions than it answers."²¹⁹ He reasons that

lower courts seeking guidance from the Court cannot help but feel frustrated. Not only has the Court failed to tell them which

²¹⁰ See *id.* at 463 (Alito, J., dissenting).

²¹¹ Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 440 (2012).

²¹² *Snyder*, 562 U.S. at 451.

²¹³ 485 U.S. 46 (1988).

²¹⁴ *Id.* at 56.

²¹⁵ *Snyder*, 562 U.S. at 474 (Alito, J., dissenting) (emphasis added).

²¹⁶ *Id.* at 461 (Breyer, J., concurring).

²¹⁷ Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What is Next After Phelps?*, 61 AM. U. L. REV. 279, 321 (2011).

²¹⁸ *Snyder*, 562 U.S. at 457.

²¹⁹ Strasser, *supra* note 217, at 324.

factors are important in funeral protest cases in particular, but the Court has virtually extended an invitation to lower courts to modify the existing jurisprudence. Consequently, a relatively clear area of the law is likely to become more, rather than less, confused. While the result in *Phelps* may have been correct, the opinion itself has the potential to be a source of much regret.²²⁰

Ultimately, although the victory for offensive expression in *Snyder* represents what First Amendment scholar Rodney Smolla calls a “robust conception of free speech,”²²¹ *Snyder*’s scope was minimal and the decision “left much unaccounted for.”²²² Dean Chemerinsky writes that *Snyder* simply “reaffirmed one of the most basic principles of the First Amendment: speech cannot be punished, or speakers held liable, just because the speech is offensive, even deeply offensive.”²²³ Indeed, “the vast majority of legal scholars believe this case was an ‘easy,’ slam dunk decision for the majority.”²²⁴

The bottom line is that the Court’s minimalistic approach in *Snyder* has both pros and cons. As encapsulated by Professor Paul Salamanca:

[T]he Court took the modest tack of identifying a category of protected speech—speech on a matter of public concern—and refusing to make an exception to that category for Westboro’s protest. The Court was therefore justified in describing its holding as “narrow.” This approach has the advantage of being minimalist, which a court would undoubtedly prefer in a case with strong cultural implications. On the other hand, this approach perhaps has the disadvantage of creating false implications about the scope of unprotected speech.²²⁵

Given that the WBC already had prevailed in the Fourth Circuit²²⁶ and that eight Justices affirmed that result, one might reasonably wonder why the Court even took the case in the first place—unless it hoped to do something more. Granted, Chief

²²⁰ *Id.* at 326.

²²¹ Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499, 523–24 (2012).

²²² Brennan-Marquez, *supra* note 54, at 151.

²²³ Chemerinsky, *supra* note 28, at 723–24.

²²⁴ Max David Hellman, *The Protest Heard Around the World: Why the Supreme Court’s Decision in Snyder v. Phelps Protects Too Much Speech, Challenges the Court’s Historical Balance Between Free Speech and State Tort Claims, and Leaves Tort Victims with Little Remedy*, 49 CAL. W. L. REV. 51, 59 (2012).

²²⁵ Salamanca, *supra* note 197, at 78.

²²⁶ *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 562 U.S. 443 (2011).

Justice Roberts was able to pen some very expansive and memorable prose about the power of free expression and why it is important to protect even its most offensive varieties.²²⁷ But that big-picture dictum did not advance the doctrine; it just left a legacy of luxuriant language on to which jurists trying to protect offensive expression may hitch their legal wagons.²²⁸

More than five years have passed since the ruling in *Snyder*. Lower courts now are sorting out its scope and contours.²²⁹ One legal scholar observed that by 2014, at least three courts had cited and deployed *Snyder* in very free-speech-friendly fashion, yet had simultaneously failed to heed Chief Justice Roberts's explicit calls for *Snyder* to be construed narrowly and confined to its facts.²³⁰ How broadly or narrowly other courts interpret *Snyder* remains to be seen. And that, ultimately, is in accord with the view that "[w]hen the Supreme Court issues a minimalist opinion, it transfers decision costs to the lower courts."²³¹ This means that lower courts must adjudicate questions, such as whether the status of the plaintiff really matters any more in IIED speech-based cases, "with little guidance."²³² That is the price paid for minimalism.

D. Synthesis and Summary

Why did the Roberts Court embrace minimalism and avoidance in the areas of true threats, indecency, and offensiveness described above? One possible answer—scholars can never truly know why Justices do what they do, so they must deal only in possibilities—may be that all three cases could have plunged the Court deeply into the culture wars.

²²⁷ The Chief Justice wrote, in the concluding substantive paragraph of the majority opinion, that

[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Snyder, 562 U.S. at 460–61. One commentator accurately calls these closing words in *Snyder* "a breathtaking piece of rhetoric." Kiel Brennan-Marquez, *Judging Pain*, 31 QUINNIPIAC L. REV. 233, 245 (2013).

²²⁸ See, e.g., *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 408 (5th Cir. 2015) (Dennis, J., dissenting) (citing Chief Justice Roberts's language quoted in the footnote immediately above to support the view that a public high school student's posting of a violent-themed and offensive -language-laden rap song on the Internet should be protected under the First Amendment).

²²⁹ See generally Clay Calvert, *Public Concern and Outrageous Speech: Testing the Inconstant Boundaries of IIED and the First Amendment Three Years After Snyder v. Phelps*, 17 U. PA. J. CONST. L. 437 (2014) (providing a now slightly dated analysis of how lower courts are interpreting *Snyder* in the context of lawsuits for intentional infliction of emotional distress filed against media defendants).

²³⁰ *Id.* at 473–74.

²³¹ Grove, *supra* note 19, at 21.

²³² *Id.* at 8.

Specifically, the unifying variable or component cutting across the realms of threats, indecency, and offensiveness is civility or, more accurately, the lack thereof.²³³ Anthony Elonis's postings were uncivil (to say the least),²³⁴ the utterance of variants of the word "fuck" on broadcast television by celebrities during times of day when children are in the audience is likely seen by some as uncivil,²³⁵ and the WBC's expression outside of funerals for U.S. soldiers killed abroad on duty, such as the one held for Matthew Snyder, is uncivil and insulting on several levels (familial, military, sexual, and religious, just to start with).²³⁶

When it comes to civility, the Court's admonition in the "Fuck the Draft" case of *Cohen v. California*²³⁷ still applies: "[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."²³⁸ In other words, *Cohen* admonishes the Court to stay out of the constitutionally thorny thicket of policing civility if at all possible. As Christopher Wolfe writes, "[T]he modern Court is reluctant to engage in making the distinctions necessary to maintain even a very limited public orthodoxy."²³⁹ Given this reluctance, it is not surprising that the Court:

²³³ See generally Bernard E. Harcourt, *The Politics of Incivility*, 54 ARIZ. L. REV. 345 (2012) (providing an excellent discussion of the meaning of civility, especially in the context of political expression). Professor Bernard Harcourt explains that

[t]he problem in the debate over civil discourse traces back to the slip-page in the use of the term *civility*. In its earliest sense, the word *civility* was coextensive with the "art of civil government," with "orderliness in a state or region," with the "absence of anarchy and disorder," with "citizenship," and "government"—more simply, it was coextensive with "politics." Civility meant the internal ordering of a *polis*, and in that sense, civility itself was just as "civil" as politics. In a curious way, "civil war" marked the outer bounds of *civility*.

Id. at 349 (footnotes omitted).

²³⁴ For example, one of the postings that landed Anthony Elonis in trouble reads as follows:

You know your s[hit]'s ridiculous
when you have the FBI knockin' at yo' door
Little Agent lady stood so close
Took all the strength I had not to turn the b[itch] ghost
Pull my knife, flick my wrist, and slit her throat
Leave her bleedin' from her jugular in the arms of her partner.

Elonis v. United States, 135 S. Ct. 2001, 2006 (2015).

²³⁵ See *supra* note 158 and accompanying text (setting forth the precise language at issue in *Fox Television Stations II*).

²³⁶ See *supra* note 194 and accompanying text (setting forth the messages on the WBC's signs).

²³⁷ 403 U.S. 15 (1971).

²³⁸ *Id.* at 25.

²³⁹ Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 80 (2000).

- In *Elonis*, evaded clarifying the fine line that separates protected offensive and uncivil speech from that which amounts to an unprotected true threat of violence;
- In *Fox Television Stations II*, failed to define the line that separates protected offensive and uncivil speech on the broadcast airwaves from that which amounts to regulable indecency; and
- In *Snyder*, failed to address whether the status of the plaintiff as a private figure will ever again be relevant for IIED tort liability purposes when offensive speech is involved and, instead, concentrated on only the nature of that expression as relating to matters of public concern.

The majority in *Snyder*, for instance, could have directly written the following: “The status of plaintiff Albert Snyder as a private figure is irrelevant in determining whether the First Amendment shields the WBC from IIED liability.” It did not, however, do that. Instead, it held that “this case turns *largely* on whether [the] speech is of public or private concern, as determined by all the circumstances of the case.”²⁴⁰

The italicized word “largely” is critical. That is because it necessarily suggests there is room for *other factors*—perhaps even the plaintiff’s status as a private figure—in future IIED speech-based cases to be relevant in determining liability. Omitting “largely” would have eliminated this possibility.

Furthermore, by not reaching the First Amendment issue and the underlying facts in *Elonis*, the Court dodged another facet of the culture wars—the legitimacy of rap as a form of artistic expression. As noted earlier, Anthony Elonis claimed the prosecuted posts were mere raps, mirroring those of popular artists like Eminem.²⁴¹ Rap, of course, is “at the center of the concern about the potential harmful effects of violent or misogynic lyrics on social behavior.”²⁴² Additionally, “[t]here is no denying that some sects of the adult culture find the language in some rap lyrics offensive.”²⁴³

Significantly, it also would have proved difficult for the Justices in *Elonis* to wrestle with the ambiguity of meaning in rap music and how that polysemy affects the true threats analysis. Richard Shusterman asserts that examining rap lyrics “will reveal in many rap songs not only the cleverly potent vernacular expression of keen insights but also forms of linguistic subtlety and multiple levels of meaning whose polysemic complexity, ambiguity, and intertextuality can sometimes rival that of high art’s so-called ‘open work.’”²⁴⁴ Avoiding these issues in *Elonis* made sense, perhaps, because rap is “not an area of expertise for the average judiciary. In spite

²⁴⁰ *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (emphasis added).

²⁴¹ See *supra* note 122 and accompanying text.

²⁴² Denise Herd, *Changing Images of Violence in Rap Music Lyrics: 1979–1997*, 30 J. PUB. HEALTH POL’Y 395, 395 (2009).

²⁴³ Jeanita W. Richardson & Kim A. Scott, *Rap Music and Its Violent Progeny: America’s Culture of Violence in Context*, 71 J. NEGRO EDUC. 175, 176 (2002).

²⁴⁴ Richard Shusterman, *The Fine Art of Rap*, 22 NEW LITERARY HIST. 613, 615 (1991).

of the fact that hip-hop is now a well-recognized and accepted genus of music, it is mostly a foreign language to courts, and is treated accordingly.”²⁴⁵

Ultimately, and regardless of why it chose to do so, the Court’s embrace of minimalism and avoidance in the past five years across the areas of true threats, broadcast indecency, and offensiveness has failed to advance First Amendment doctrine. The Article now examines how partisanship on today’s Court clouds other free speech doctrines.

III. PARTISANSHIP & RIFTS IN FIRST AMENDMENT DOCTRINES: WHEN POLITICAL LINES LEAVE DOCTRINES IN DISARRAY

This Part has three Sections, each of which illustrates how political partisanship among the Justices has hindered First Amendment doctrine since the start of 2011. Initially, Section A demonstrates how partisanship in 2015 in *Walker v. Texas Division, Sons of Confederate Veterans*²⁴⁶ left the controversial government speech doctrine in disarray. Section B then turns to the long-standing First Amendment doctrine that distinguishes between content-based and content-neutral laws and addresses how the Court’s 2014 decision in *McCullen v. Coakley*²⁴⁷ exposed partisan rifts in that doctrine’s application. Finally, Section C analyzes fractures on the application of the strict scrutiny along partisan lines in *Williams-Yulee v. Florida Bar*²⁴⁸ and, to a much lesser extent, in *United States v. Alvarez*.²⁴⁹

A. The Government Speech Doctrine

Government speech, Professor John Inazu observed in 2015, is an “undertheorized realm” of First Amendment jurisprudence.²⁵⁰ Unfortunately, partisanship among the Justices on the Supreme Court in 2015 in *Walker* did nothing to either theorize this doctrine or to clarify it.

As Professor David Anderson explains, four conservative Justices found that Texas’s specialty license plates constitute private speech, while four liberal Justices concluded they are government speech.²⁵¹ Only conservative Justice Clarence Thomas broke partisan ranks and joined the liberals, giving them the victory.²⁵² Referring to

²⁴⁵ Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 480 (2009).

²⁴⁶ 135 S. Ct. 2239 (2015).

²⁴⁷ 134 S. Ct. 2518 (2014).

²⁴⁸ 135 S. Ct. 1656 (2015).

²⁴⁹ 132 S. Ct. 2537 (2012).

²⁵⁰ John D. Inazu, *The First Amendment’s Public Forum*, 56 WM. & MARY L. REV. 1159, 1182 (2015).

²⁵¹ David A. Anderson, Essay, *Of Horses, Donkeys, and Mules*, 94 TEX. L. REV. SEE ALSO 1, 1–2 (2015).

²⁵² *Id.* at 2.

the opposite conclusions reached by the Breyer-authored majority opinion and the Alito-penned dissent described earlier in the Introduction,²⁵³ Professor Anderson surmises that “[t]he principal lesson to be gleaned from these opinions is that the government-private dichotomy offers no predictable way to decide cases; it only produces *ipse dixit* results.”²⁵⁴ That, of course, is no way to leave a doctrine that, when it does apply, gives the government vast power to suppress expression free from any and all First Amendment challenges.²⁵⁵

In *Walker*, Justice Breyer’s liberal-coalition majority relied on and applied the Court’s 2009 decision in *Pleasant Grove City v. Summum*²⁵⁶ in holding that Texas’s license plates are government speech.²⁵⁷ Writing in dissent for a block of four conservatives, Justice Alito also applied the same factors from *Summum*, yet reached the opposite conclusion.²⁵⁸ As Alito wrote, the characteristics that “rendered public monuments government speech in *Summum*, are not present in Texas’s specialty plate program.”²⁵⁹ He added that the Breyer majority “badly misunderstands *Summum*.”²⁶⁰ In brief, both the *Walker* majority and the dissent purported to apply the same *Summum* criteria, but both reached opposite conclusions in doing so. Government speech thus is a doctrine in disarray, with partisan cleavage (save for Justice Thomas, at least in a case involving the Confederate battle flag) driving the wedge.

What is more, as if throwing up his hands in legal disgust, Justice Alito—somewhat snarkily, as if channeling his inner Scalia—proposed another test altogether.²⁶¹ It focuses simply on what a reasonable observer (positioned near a Texas highway) would perceive and believe about all 350-plus Texas specialty plates as they passed by:

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If

²⁵³ See *supra* notes 35–50 and accompanying text (analyzing the division in *Walker*).

²⁵⁴ Anderson, *supra* note 251, at 4.

²⁵⁵ See *supra* note 27 and accompanying text (describing the ramifications of the application of the government speech doctrine).

²⁵⁶ 555 U.S. 460 (2009).

²⁵⁷ See *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2246 (2015) (opining that “[i]n our view, specialty license plates issued pursuant to Texas’s statutory scheme convey government speech. Our reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem”).

²⁵⁸ See *id.* at 2261 (Alito, J., dissenting) (concluding that “the Texas specialty plate program has none of the factors that were critical in *Summum*”).

²⁵⁹ *Id.* at 2259.

²⁶⁰ *Id.* at 2258.

²⁶¹ *Id.* at 2255.

you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents?²⁶²

But the problems seemingly wrought by partisanship run deeper than creating a reasonable observer test where the result is in the eyes of a mythical beholder. Professor Anderson contends that the Court in *Walker* failed to resolve anything regarding situations when, as in that case, the speech constitutes a hybrid or combination of government and private elements.²⁶³ Anderson asserts that

[g]ranting certiorari in the *Walker* case would have made sense if the Court intended to use the opportunity to grapple with the phenomenon of hybrid government-private speech, but it did not even recognize that problem. One wonders why the Court took a case with so little real-world importance and resolved it in a way that has little precedential value.²⁶⁴

Beyond the criticisms of Professor Anderson, Dean Chemerinsky argues that the *Walker* Court failed to grapple with a perhaps even more troubling aspect of the government speech doctrine.²⁶⁵ Specifically, he contends that the high Court's approach to government speech in *Walker*

gives the government the ability to avoid free speech challenges by declaring that something is government speech. Could a city library choose to have only books by Republican authors by saying that it is the government speaking? Could a city allow a pro-war demonstration in a city park while denying access to an anti-war demonstration simply by adopting the former as its government speech?²⁶⁶

The possible answers to these questions are exceedingly problematic, especially in the public library scenario where the government clearly is the speaker, as it spends

²⁶² *Id.*

²⁶³ Anderson, *supra* note 251, at 7.

²⁶⁴ *Id.*

²⁶⁵ Erwin Chemerinsky, Opinion, *Free Speech, Confederate Flags and License Plates*, ORANGE COUNTY REG., <http://www.ocregister.com/articles/government-668320-texas-license.html> [<http://perma.cc/VQ78-DVGW>] (last updated June 25, 2015, 3:57 PM).

²⁶⁶ *Id.*

taxpayer dollars to select which books to purchase. As Chemerinsky intimates, the prospect of viewpoint-based censorship in a public library is not so far fetched unless the government speech doctrine is soon reined in.²⁶⁷

Writing in another forum, Chemerinsky queries whether, after *Walker*, “the government [can] issue license plates saying that abortion is murder or endorsing the Republican Party?”²⁶⁸ After all, if expression on a specialty plate is government speech, then plates bearing such messages are exempt from First Amendment challenges.

Chemerinsky concludes in his other article that the issue in *Walker* is

sure to recur in many contexts: When is the government the speaker as opposed to when is the government creating a forum for private speech? I worry that the court’s approach will make it too easy for the government to circumvent the First Amendment by claiming that it was the speaker.²⁶⁹

As such, he believes that the conservative Justices got it right in the *Walker* dissent.²⁷⁰

In brief, the partisanship displayed in *Walker* did nothing to clear up the government speech doctrine. If anything, *Walker* created more problems, at least if experts such as Professor Anderson and Dean Chemerinsky are correct.

Ultimately, given the Court’s failure to elucidate anything new about the government speech doctrine (beyond applying factors from the factually distinct *Summum* case), one is left sadly, yet quite reasonably, to surmise and speculate—fully embracing all the worst stereotypes in the process—that the liberal Justices simply objected to the offensive nature of the Confederate battle flag and thus chose to squelch it. Conservative Justice Clarence Thomas, in turn, joined them only because of his personal experience with racism as an African American and thus despises the Confederate battle flag, much as he attacked cross burning as another symbol of Southern bigotry and worse in 2003.²⁷¹ Again, these are the worst of stereotypes, but they are what one is left with to speculate. Indeed, as Chemerinsky writes about *Walker*:

It is easy to like the result in this case because Confederate battle flags convey a message of racism that is inherently hurtful and divisive.

Indeed, it may be for exactly this reason that Justice Clarence Thomas was the fifth vote in the majority—joining Justices Breyer,

²⁶⁷ *Id.*

²⁶⁸ Erwin Chemerinsky, *The Return of the Jedi: The Progressive October 2014 Term*, 18 GREEN BAG 2D 363, 374 (2015).

²⁶⁹ Chemerinsky, *supra* note 265.

²⁷⁰ *Id.*

²⁷¹ *Virginia v. Black*, 538 U.S. 343, 391 (2003) (Thomas, J., dissenting).

Ginsburg, Sotomayor and Kagan—in an alignment that is rare on the court. In *Virginia v. Black* (2003), Justice Thomas was the sole dissenter arguing that the government should be able to ban cross burning because of its vile history and hateful message.²⁷²

The *Walker* dissent, comprised of a solid block of conservative Justices, comports with the stereotype—at least in some quarters—that some modern conservative Justices are prone to protect offensive expression.²⁷³ As Kathleen Sullivan, former Dean of Stanford Law School, writes, “It used to be that censorship was associated with the right and free speech libertarianism with the left. Now we hear new calls for speech regulation from the left, and increasing endorsement of free speech from the right.”²⁷⁴ Save for Justice Thomas, Sullivan’s astute analysis fits the partisan-pattern breakdown in *Walker*. It also comports with Chemerinsky’s view that the “justices’ ideology influences the speech they are willing to protect.”²⁷⁵

B. Content-Based and Content-Neutral Regulations

First Amendment jurisprudence, Professor Randy Kozel writes, embraces a general “mandate to apply strict scrutiny to content-based restrictions on speech.”²⁷⁶ In contrast, intermediate scrutiny typically applies to content-neutral restrictions.²⁷⁷ Professor Volokh asserts that this “distinction between content-based and content-neutral rules has become famously critical in recent decades.”²⁷⁸ That is because, Professor Ashutosh Bhagwat notes, it is traditional “in First Amendment jurisprudence that content-based laws are of greater constitutional concern than content-neutral laws. For restrictions on speech itself, the doctrine imposes strict scrutiny on

²⁷² Chemerinsky, *supra* note 265.

²⁷³ Cf. David L. Hudson, Jr., *Chief Justice Roberts and the First Amendment*, FIRST AMEND. CTR. (Apr. 22, 2011), <http://www.firstamendmentcenter.org/chief-justice-roberts-and-the-first-amendment> [<http://perma.cc/XX9Q-2YW2>] (writing that “[c]onservatives are often portrayed as hostile or indifferent to First Amendment freedoms. But in the arena of free speech Roberts has not been a disaster—far from it”).

²⁷⁴ Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 440 (1995); see also Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 973 (1995) (writing that “[i]t used to be that censorship was associated with the right and free speech libertarianism with the left. But today . . . those political poles have switched. Now we hear new calls for speech regulation coming from the left and increasing endorsement of free speech from the right”).

²⁷⁵ See Adam Liptak, *For Justices, Free Speech Often Means ‘Speech I Agree With,’* N.Y. TIMES: SIDEBAR (May 5, 2014), <http://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html> (quoting Chemerinsky).

²⁷⁶ Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1184 (2015).

²⁷⁷ See Diahann DaSilva, *Playing a “Labeling Game”*: *Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 779 (2015).

²⁷⁸ Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 908 (2015).

content-based laws and a relatively deferential form of intermediate scrutiny for content-neutral laws.”²⁷⁹

Although the dichotomy between content-based and content-neutral regulations seems tidy in theory, Professor Leslie Kendrick observes that the Court’s application of it is criticized as “unprincipled, unpredictable and deeply incoherent.”²⁸⁰ That certainly was the case in the Court’s 2014 decision in *McCullen v. Coakley*,²⁸¹ where—but for Chief Justice Roberts crossing over to join the four liberal-leaning Justices—the Court split neatly along partisan lines in deciding whether the law at issue was content based or content neutral. Although all nine Justices agreed with the result in striking down Massachusetts’s abortion-clinic, buffer-zone law because it was not narrowly tailored,²⁸² they “were sharply divided on the rationale.”²⁸³ The result is a decision that embodies two of the key variables at the heart of this Article—partisanship and minimalism.

In *McCullen*, Chief Justice Roberts was joined by liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan in finding that the Bay State statute was content neutral and thus not subject to strict scrutiny.²⁸⁴ Conversely, Justice Scalia, who was joined by Justices Kennedy and Thomas in a concurring opinion, concluded the statute “should be reviewed under the strict-scrutiny standard applicable to content-based legislation.”²⁸⁵ Justice Samuel Alito, in turn, penned a separate concurrence that also rejected the majority’s determination of content neutrality.²⁸⁶ Alito found

²⁷⁹ Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1062 (2015) (footnotes omitted); see also Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL’Y 131, 131–32 (2008) (asserting that the Supreme Court “has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient intermediate scrutiny for those regulations deemed content neutral)”).

²⁸⁰ Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 233 (2012).

²⁸¹ 134 S. Ct. 2518 (2014).

²⁸² The statute provided that

[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.

Id. at 2526 (quoting MASS. GEN. LAWS, ch. 266, § 120E½(b) (West 2012)).

The measure exempted four classes of individuals from its reach, most notably individuals entering and leaving such healthcare facilities and the facilities’ own employees, who were free to talk with patrons entering them. *Id.*

²⁸³ Diane S. Sykes, *Minimalism and Its Limits*, 2014–2015 CATO SUP. CT. REV. 17, 24 (2015).

²⁸⁴ See *McCullen*, 134 S. Ct. at 2534 (concluding “the Act is content neutral”).

²⁸⁵ *Id.* at 2548 (Scalia, J., concurring).

²⁸⁶ *Id.* at 2549 (Alito, J., concurring).

it “clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.”²⁸⁷ Professor Catherine Fisk and attorney Jessica Rutter explain that “[b]oth Justice Scalia and Justice Alito . . . strenuously insisted that the Massachusetts law was unconstitutional because it discriminated based on the content and viewpoint of speech: it allowed clinic employees to speak to prospective patients in the buffer zone but prohibited others from doing so.”²⁸⁸

Why did four conservative Justices deem the law content based, while four liberal Justices characterized it as content neutral? Professor Kendrick argues the answer partly rests in the conservative Justices’ willingness to question and discredit Massachusetts’s asserted interests in adopting the buffer-zone statute and, in turn, to dig deeper into unspoken motivations: “Judges are likely to have different intuitions about what is ‘really going on’ with any number of laws. In *McCullen*, it is precisely this point upon which the Justices cannot agree.”²⁸⁹ Kendrick points out that “Justice Scalia simply rejects that the state’s asserted interests are actually the interests behind the law.”²⁹⁰ In contrast, she notes that the liberal “majority accepts the Commonwealth’s assertions that the interests behind the law are in patient safety and access, as well as preserving unobstructed use of the sidewalks.”²⁹¹

The macro-level problem, thus, is that, “[i]n the absence of a categorical rule, judges are left to use their intuitions to ferret out whether a particular law is suspicious.”²⁹² A 2014 *Harvard Law Review* article avers that, when it comes to distinguishing content-based laws from content-neutral ones in cases such as *McCullen*, the Court has “struggled to articulate its standards cogently.”²⁹³

The political partisanship that divided the Justices in *McCullen* could be due to the fact that the statute affected abortion—a topic often separating liberals from conservatives.²⁹⁴ Indeed, as legal affairs reporter David Savage of the *Los Angeles Times*

²⁸⁷ *Id.*

²⁸⁸ Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 306 (2015).

²⁸⁹ Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley*, 2014 SUP. CT. REV. 215, 236 (2014).

²⁹⁰ *Id.* at 234.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *First Amendment—Freedom of Speech—Content Neutrality—McCullen v. Coakley*, 128 HARV. L. REV. 221, 226 (2014).

²⁹⁴ See Clay Calvert, *Abortion Buffer-Zone Ruling in McCullen: The Supreme Court’s Facade of Unity and the Future of Abortion Rights*, HUFFPOST POL.: THE BLOG, http://www.huffingtonpost.com/clay-calvert/abortion-buffer-zone-ruling_b_5534697.html [http://perma.cc/6M43-HPEH] (last updated Aug. 26, 2014) (asserting that “[t]he bottom line is that despite agreement among all nine justices on the result in *McCullen*, abortion drives a deep wedge into the heart of the Supreme Court, even when the issue is not overruling *Roe v. Wade* but a First Amendment controversy”).

notes, “Abortion is perhaps the most divisive controversy the justices face.”²⁹⁵ This partisanship now takes on increased urgency, with the Supreme Court in November 2015 agreeing to consider the constitutionality of a Texas statute that severely restricts access to abortion facilities.²⁹⁶

Judge Diane Sykes, on the U.S. Court of Appeals for the Seventh Circuit, argued, in a lecture at the Cato Institute, that Chief Justice Roberts’s decision in *McCullen*, declaring the law content neutral, is substantively minimalistic.²⁹⁷ She asserted that, by characterizing the statute as content neutral, Roberts

achieved a unanimous judgment, and he did so by writing an opinion that might be characterized as minimalist in a more *substantive* sense. By ruling that the Massachusetts law was content neutral, the Court signaled that buffer-zone laws are permissible *if* properly tailored. That holding leaves room for political decision-makers to maneuver in this speech-sensitive area. If the decision on content neutrality had gone the other way, *all* abortion-clinic buffer-zone laws would be presumptively unconstitutional, and the Court’s controversial decision in *Hill v. Colorado*—which upheld a buffer-zone law—would have to be overruled or strictly limited to its facts.²⁹⁸

Delving deeper into comments made by Justice Ginsburg to a *National Law Journal* reporter regarding why Ginsburg voted with Roberts in *McCullen*, Sykes makes it clear that Roberts “joined with his more liberal colleagues to leave open the possibility of regulation in this area. The Court’s content-neutrality holding may be debatable, but there is clear deference to political policymakers here.”²⁹⁹ For Judge Sykes, this deftly fits within her conception of judicial minimalism as “a theory of deference.”³⁰⁰

Ultimately, whether it was partisanship, minimalism, or some combination thereof, *McCullen* causes confusion in distinguishing between content-based and content-neutral regulations. As Professor Kendrick asserts:

With regard to both content discrimination analysis and content-neutral scrutiny, the opinions in *McCullen* show some Justices ready to jettison rule-like frameworks and rely upon their own sense of what the Massachusetts legislature did, or what effects

²⁹⁵ David G. Savage, *High Court Reenters Abortion Debate*, L.A. TIMES, Nov. 14, 2015, at A8.

²⁹⁶ *Whole Woman’s Health v. Cole*, No. 15-274, 2015 WL 5176368 (U.S. Nov. 13, 2015) (granting petition for writ of certiorari).

²⁹⁷ See Sykes, *supra* note 283, at 25.

²⁹⁸ *Id.* (footnote omitted).

²⁹⁹ *Id.* at 26.

³⁰⁰ *Id.* at 22.

it had. In this, the case demonstrates both the need for rules and their potential futility in *highly polarized contexts*. In the end, the Court seems no more able than the litigants to rise above the level of the sidewalks and their confusing, cacophonous din.³⁰¹

In 2015, the Court once again addressed the question of whether a statute was content based or content neutral in the sign-ordinance case of *Reed v. Town of Gilbert*.³⁰² *Reed* is mentioned here not because it necessarily involves partisanship—certain opinions in it clearly do, particularly the first and fourth listed below—but because it does nothing to resolve the partisanship fracture evidenced in *McCullen*. To wit, *Reed* involved a whopping four opinions:

1. The opinion of the Court, authored by conservative Justice Clarence Thomas and joined by the four other conservatives and a lone liberal, Justice Sonia Sotomayor;³⁰³
2. A concurrence authored by Justice Samuel Alito and joined by Justices Anthony Kennedy and Sonia Sotomayor;³⁰⁴
3. A lone concurrence in judgment by Justice Stephen Breyer;³⁰⁵ and
4. A concurrence in judgment written by Justice Elena Kagan and joined by fellow liberal Justices Ruth Bader Ginsburg and Stephen Breyer and no conservatives.³⁰⁶

Kagan's concurrence, joined by two liberal Justices noted above, expressed obvious fear about the vast sweep of the conservative (save for Justice Sotomayor) majority's decision regarding when strict scrutiny applies.³⁰⁷ "I suspect this Court and others will regret the majority's insistence today on answering that question [whether strict scrutiny applies to sign ordinances containing a subject-matter exemption] in the affirmative," Kagan wrote.³⁰⁸

Although not addressing partisan divides, Professor Volokh points out the critical discrepancies between Justice Thomas's majority opinion in *Reed* and the concurring opinion authored by Justice Alito, in which Justices Kennedy and Sotomayor joined.³⁰⁹ Examining the list of nine supposedly content-neutral examples of sign

³⁰¹ Kendrick, *supra* note 289, at 242 (emphasis added).

³⁰² 135 S. Ct. 2218 (2015).

³⁰³ *See id.* at 2223 (Justice Thomas delivering the opinion of the Court, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Sotomayor).

³⁰⁴ *Id.* at 2233 (Alito, J., concurring).

³⁰⁵ *Id.* at 2234 (Breyer, J., concurring).

³⁰⁶ *Id.* at 2236 (Kagan, J., concurring).

³⁰⁷ *Id.* at 2237, 2239.

³⁰⁸ *Id.* at 2239.

³⁰⁹ Eugene Volokh, *Supreme Court Reaffirms Broad Prohibition on Content-Based Speech Restrictions, in Today's Reed v. Town of Gilbert Decision*, WASH. POST: VOLOKH CONSPIRACY

ordinances proffered in Alito's concurrence, Volokh asserts that two "actually seem content-based under the majority's test (which, recall, the three concurring Justices claim to endorse)."³¹⁰ Those two examples, according to Volokh, are rules distinguishing between on-premises and off-premises signs and rules imposing time restrictions on signs advertising a one-time event.³¹¹

Reed also illustrates Justice Breyer's rather squishy balancing notion of the First Amendment interests that tosses all established First Amendment doctrines—content-based versus content-neutral regulations included—to the wind.³¹² Breyer wrote in *Reed*, regarding content-based laws, that

[t]he better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it *as a rule of thumb*, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.³¹³

(June 18, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/> [<http://perma.cc/HZ2S-GS82>].

³¹⁰ *Id.*

³¹¹ *Id.* Volokh explains the problems:

Whether a sign advertises a one-time event turns on "the communicative content of the sign": To borrow the majority's John Locke example, "if a sign informs its reader of the time and place a book club will discuss John Locke's *Two Treatises of Government*" on one occasion, "that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election." And distinctions between on-premises and off-premises signs likewise turn on "the communicative content of the sign"—a sign communicating something related to what is on the premises ("Home of the John Locke Society") would be treated better than a sign communicating something related to an off-premises activity ("Vote for Joe Schmoe").

Id.

³¹² See Linda Greenhouse, *The Breyer Project: "Why Couldn't You Work This Thing Out?,"* 4 CHARLESTON L. REV. 37, 39 (2009). As a former *New York Times* legal correspondent Linda Greenhouse observes about Breyer's doctrinal disdain, "even in cases that do not prompt ideologically polarized responses, the Court approaches many important doctrinal areas through a priori labels, categories, and tiers of scrutiny—devices that shield the Court from direct encounters with the facts of many of the cases it decides, to Justice Breyer's evident frustration." *Id.*

³¹³ See *Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring) (emphasis added).

This logic about proportionalism³¹⁴ and rules of thumb ultimately represents what Harvard Professor Mark Tushnet aptly calls “Justice Breyer’s partial *de-doctrinalization* of the First Amendment.”³¹⁵ Thus, although Breyer’s concurrence was solo in *Reed*, and thus cannot be viewed as creating a *partisan* divide, it is imperative to note that he alone causes doctrinal disruption. As Professors Vikram David Amar and Alan Brownstein note, Breyer tends to engage in a “free-form balancing approach”³¹⁶ or, more favorably put by Federal Judge Jack B. Weinstein, a “nuanced view of the need for flexibility in interpreting the Constitution.”³¹⁷ This, in the authors’ opinion, is the antithesis of doctrinal adherence, and it further suggests that *Reed*, with its four separate opinions, does little to heal the partisan rifts exposed in *McCullen* when it comes to identifying when laws are content based.

C. Strict Scrutiny

As *McCullen* indicates, sometimes partisanship on the Roberts Court prevents the Justices from agreeing on when a statute is content based or content neutral. But as this Section reveals, even when all of the Justices concur that a statute is content based,³¹⁸ partisanship nonetheless still affects how they apply and interpret the relevant doctrine—strict scrutiny—for examining such laws. In brief, it is *not* just a matter of identifying the correct doctrine but of deciding *how* it applies.

Strict scrutiny is supposed to be demanding. As Professor Bhagwat explains, “[M]odern free-speech law is based on the foundational premise that content-based restrictions on speech are subject to strict scrutiny, and will almost always be invalidated.”³¹⁹ Professor Massaro concurs regarding the theoretical rigorosity of strict

³¹⁴ See Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1268 (2014) (noting that “in recent years, Justice Stephen Breyer regularly advocated an incremental and case-specific analysis of First Amendment issues tied to an evaluation of ‘proportionality’ as a way to avoid the ‘straitjacket’ that accompanies the dichotomies of content neutrality”).

³¹⁵ Mark Tushnet, Essay, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 511 (2014) (emphasis added).

³¹⁶ Vikram David Amar & Alan Brownstein, *The Voracious First Amendment: Alvarez and Knox in the Context of 2012 and Beyond*, 46 LOY. L.A. L. REV. 491, 497 (2013).

³¹⁷ Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 34 (2008).

³¹⁸ See Todd E. Pettys, *Weddings, Whiter Teeth, Judicial-Campaign Speech, and More: Civil Cases in the Supreme Court’s 2014–2015 Term*, 51 CT. REV. 94, 101 (2015) (noting that in *Williams-Yulee v. Fla. Bar*, “[e]veryone agreed that Florida was discriminating against Williams-Yulee’s speech because of its content”).

³¹⁹ Ashutosh Bhagwat, *Reed v. Town of Gilbert: Signs of (Dis)Content?*, 9 N.Y.U. J.L. & LIBERTY 137, 144 (2015).

scrutiny, asserting that “[i]n the free speech context, true strict scrutiny has been construed to set an extremely high bar for the government.”³²⁰

But writing just a few years before both Bhagwat and Massaro, Matthew Bunker, along with Clay Calvert and William Nevin, argued that “First Amendment strict scrutiny, now more than a half-century old, is arguably a weaker judicial tool today for measuring the constitutionality of laws targeting speech than it was in the past.”³²¹ Furthermore, Professor Aziz Huq notes that, in its application, “strict scrutiny is internally variegated.”³²² Such skeptical sentiments proved prophetic in April 2015 when the Supreme Court ruled in *Williams-Yulee v. Florida Bar*.³²³

Chief Justice Roberts, writing for a five-Justice majority and joined by all four of the Court’s liberal members (as he was in *McCullen*), upheld a canon of Florida’s Code of Judicial Conduct that forbids incumbent judges and candidates for judgeships in the Sunshine State from personally soliciting campaign funds.³²⁴ Significantly, the majority found that the canon passed muster under the supposedly rigorous strict scrutiny standard, with the Chief Justice noting that “[a] State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.”³²⁵

Roberts called *Williams-Yulee* “one of the rare cases in which a speech restriction withstands strict scrutiny.”³²⁶ The question now, of course, is whether such cases will become less “rare” after *Williams-Yulee*.

That is an important question because, in stark contrast to Roberts’s view—and demonstrating how partisanship on the Court negatively affects the application of strict scrutiny—a block of four conservative Justices issued three separate dissenting opinions.³²⁷ All four dissenting conservative Justices agreed with the Roberts-joined, liberal-coalition majority that strict scrutiny was the proper standard to apply.³²⁸ For example, Justice Scalia wrote in a dissent joined by Justice Thomas that the canon in question “presumptively violates the First Amendment. We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny—that is to say, only if it shows that the Canon is narrowly tailored to serve a compelling interest.”³²⁹

³²⁰ Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 397 (2014).

³²¹ Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 377 (2011).

³²² Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 16 (2012).

³²³ 135 S. Ct. 1656 (2015).

³²⁴ *Id.* at 1662.

³²⁵ *Id.* at 1665.

³²⁶ *Id.* at 1666.

³²⁷ *See id.* at 1675 (Scalia, J., dissenting) (joined by Justice Thomas); *id.* at 1682 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

³²⁸ *Id.* at 1676 (Scalia, J., dissenting); *id.* at 1685 (Kennedy, J., dissenting); *id.* at 1685 (Alito, J., dissenting).

³²⁹ *Id.* at 1676 (Scalia, J., dissenting).

Furthermore, none of the conservative Justices quibbled with the majority's finding that there was, in fact, a compelling interest at stake.³³⁰ Instead, the conservatives ripped into the majority on the narrow-tailoring prong of strict scrutiny. As Justice Alito wrote:

Florida has a compelling interest in making sure that its courts decide cases impartially and in accordance with the law and that its citizens have no good reason to lack confidence that its courts are performing their proper role. But the Florida rule is not narrowly tailored to serve that interest.

Indeed, this rule is about as narrowly tailored as a burlap bag.³³¹

The key difference between the majority and dissenting Justices was in how rigorously, or loosely, they applied the “fit” prong of strict scrutiny. As Justice Kennedy wrote in dissent, the majority erred “in the application of strict scrutiny. The Court’s evisceration of that judicial standard now risks long-term harm to what was once the Court’s own preferred First Amendment test. As Justice Scalia well explains, the state law at issue fails strict scrutiny for any number of reasons.”³³² Specifically, Kennedy found that the majority’s application of the narrow-tailoring prong was far too lax, asserting that Florida’s judicial canon “comes nowhere close to being narrowly tailored.”³³³

As with Justices Alito and Kennedy, Scalia also focused on the narrow-tailoring prong of strict scrutiny. He opined that the judicial canon

does not narrowly target concerns about impartiality or its appearance; it applies even when the person asked for a financial contribution has no chance of ever appearing in the candidate’s court. And Florida does not invoke concerns about coercion, presumably because the Canon bans solicitations regardless of whether their object is a lawyer, litigant, or other person vulnerable to judicial pressure. So Canon 7C(1) fails exacting scrutiny and infringes the First Amendment.³³⁴

³³⁰ *See id.* at 1677 (writing that “I accept for the sake of argument that States have a compelling interest in ensuring that its judges are *seen* to be impartial,” and also assuming “that a judicial candidate’s request to a litigant or attorney presents a danger of coercion that a political candidate’s request to a constituent does not”).

³³¹ *Id.* at 1685 (Alito, J., dissenting).

³³² *Id.* (Kennedy, J., dissenting) (emphasis omitted).

³³³ *Id.*

³³⁴ *Id.* at 1677 (Scalia, J., dissenting).

The bottom line is that—with the lone exception of Chief Justice Roberts—eight Justices differed dramatically along partisan lines in interpreting and applying the narrow-tailoring prong of strict scrutiny. Whether *Williams-Yulee* signals the start of a trend, or is an outlier when it comes to applying strict scrutiny in laxer fashion and along partisan divides, remains to be seen. For now, the dissenting conservatives in *Williams-Yulee* applied what some might call “strict scrutiny with teeth,”³³⁵ while the liberals deployed a version of what might be dubbed semi-strict scrutiny.

Finally, it is important to mention here the Court’s 2012 decision in *United States v. Alvarez*,³³⁶ which evidences fracturing of the strict scrutiny doctrine, albeit only *partially* along partisan lines. In *Alvarez*, a block of three conservative Justices in dissent artfully dodged the application of strict scrutiny altogether and, in doing so, issued an opinion that would have upheld the Stolen Valor Act.³³⁷ Justice Alito, joined by Justices Scalia and Thomas, simply adhered to what he called “a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”³³⁸ For Alito, “[t]he lies covered by the Stolen Valor Act have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment’s scope.”³³⁹ In brief, partisan ideology can affect the application of strict scrutiny simply by emboldening some Justices to hold that strict scrutiny is not even relevant if the entire category of speech ostensibly is not protected.

Although more moderate conservatives Kennedy and Roberts were part of the *Alvarez* plurality that applied what Kennedy called “exacting scrutiny”³⁴⁰—he avoided the phrase strict scrutiny—to strike down the Stolen Valor Act, their conservative brethren arguably went rogue, as it were, to avoid strict scrutiny in an effort to uphold the law. Alito “nominally based his reasoning on a categorical rejection of protection for false speech,” although it can also “be read as an application of definitional balancing where Justice Alito weighs the broad value of false statements regarding military honors against the broad harms that could result (or not) from their suppression.”³⁴¹

Somewhere in between—not surprisingly, given the earlier discussion of his opinion in *Reed v. Town of Gilbert*³⁴²—the application of strict scrutiny and the categorical rejection of protection for false speech that causes harm and serves no value was

³³⁵ See Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2004–2005 CATO SUP. CT. REV. 159, 169 (2005) (using this phrase).

³³⁶ 132 S. Ct. 2537 (2012).

³³⁷ *Id.* at 2556–57 (Alito, J., dissenting).

³³⁸ *Id.* at 2557.

³³⁹ *Id.* at 2563.

³⁴⁰ *Id.* at 2548 (plurality opinion).

³⁴¹ John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 35 (2014).

³⁴² See *supra* notes 312–17 and accompanying text (describing Breyer’s concurrence in *Reed* and his overall judicial philosophy regarding doctrines).

Justice Breyer. He applied what he called “intermediate scrutiny”³⁴³ to conclude that the Stolen Valor Act “as presently drafted works disproportionate constitutional harm. It consequently fails intermediate scrutiny, and so violates the First Amendment.”³⁴⁴

Justice Breyer’s approach in *Alvarez* has been described as one of “proportionality review.”³⁴⁵ This tack, as Harvard Law School Professor Vicki Jackson writes, embodies “the idea that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less severe ones.”³⁴⁶ She asserts that in *Alvarez*, “[a]rguably, both the plurality opinion and Justice Breyer’s combined the ‘less restrictive means’ test with a *sub silentio* evaluation of ‘proportionality as such.’”³⁴⁷

Professor Tushnet argues that “Justice Breyer’s concurrence in the judgment in *United States v. Alvarez* provides another example of partial de-doctrinalization.”³⁴⁸ Tushnet points out that Breyer’s analysis of the less restrictive means prong in *Alvarez* consists of his “seat-of-the-pants evaluation of alternative means, here not backed up . . . by empirical studies.”³⁴⁹ A complete discussion of Justice Breyer’s First Amendment philosophy is beyond the scope of this Article, as others have more than adequately addressed it.³⁵⁰ Yet, it is important to note that Breyer alone, regardless of whether he attracts fellow liberal Justices,³⁵¹ throws a monkey wrench into the doctrinal machine. As Kathleen Sullivan notes, Breyer pays attention “to consequences rather than categories” and “favors flexibility.”³⁵² Indeed, Professor Laura Krugman Ray wryly writes that Breyer’s “body of opinions . . . has at times defied easy predictions about Breyer’s jurisprudence.”³⁵³

Ultimately, Dean Rodney Smolla argues in an article devoted to *Alvarez* that “the Supreme Court has lacked doctrinal discipline in adhering to any consistent and

³⁴³ *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring).

³⁴⁴ *Id.* at 2556.

³⁴⁵ Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3097 (2015).

³⁴⁶ *Id.* at 3098.

³⁴⁷ *Id.* at 3141.

³⁴⁸ Tushnet, *supra* note 315, at 511 (footnote omitted).

³⁴⁹ *Id.* at 514.

³⁵⁰ See, e.g., Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1681 (2006) (asserting that “Justice Breyer’s core idea is that the First Amendment’s role is not simply to protect individuals from direct government restraints on speech,” and adding that in Breyer’s view, “[t]he First Amendment’s freedom of speech seeks not only to protect a negative liberty, but also to promote active liberty by encouraging the exchange of ideas, public participation, and open discussion”).

³⁵¹ See Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1699 (2006) (categorizing Breyer as “a liberal (though a moderate one)”).

³⁵² Kathleen M. Sullivan, Essay, *Tribute to Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 25, 27 (2008).

³⁵³ Laura Krugman Ray, *The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg*, 115 PENN ST. L. REV. 83, 115 (2010).

clear set of doctrinal principles when analyzing content-based regulation of speech. This lack of disciplined consistency, highly visible in *Alvarez*, diminishes stability and predictability in First Amendment analysis.³⁵⁴ He points out that Breyer “appeared to invoke no principled methodology at all, other than to announce that intermediate scrutiny was the proper standard,”³⁵⁵ while Kennedy, in writing for the plurality, “at times seemed grounded entirely in the ‘categorical’ approach, yet at other times appeared to apply something akin to the *analysis* commonly associated with ‘strict scrutiny,’ while borrowing *language* commonly associated with ‘intermediate scrutiny.’”³⁵⁶ Thus, although *Alvarez* does not involve the clear partisan cleavage found in the more recent case of *Williams-Yulee* when it comes to applying strict scrutiny, it nonetheless cannot be ignored.

In summary, this Part of the Article illustrated how partisan divisions on the Court (along with the one-man doctrinal wrecking crew that is Justice Breyer) in the past five years have negatively affected the government speech doctrine, the choice of whether to label a statute content based or content neutral, and the application of the strict scrutiny doctrine.

CONCLUSION

This Article is not a referendum on the merits and drawbacks of the doctrines of avoidance and minimalism. Indeed, as one commentator notes, “Many have praised Chief Justice Roberts and the Roberts Court for its judicial minimalism.”³⁵⁷ Others, in turn, have critiqued—if not eviscerated—minimalism for its flaws.³⁵⁸

This Article, instead, more narrowly examined how avoidance and minimalism, along with political partisanship, have detrimentally affected multiple First Amendment doctrines during the past five years. Those doctrines stretch from established ones, such as the long-standing dichotomy between content-based and content-neutral laws, to nascent ones, such as the government speech doctrine.

A critical caveat here is that avoidance, minimalism, and partisanship—either individually or collectively—cannot fully explain the outcomes in any of the cases examined or the long-term impact of those cases on First Amendment doctrines. Rather, they simply are factors or variables that offer possible explanations for the problems identified in this Article. Other variables are likely in play, either overtly or perhaps more subtly as latent forces, pushing the Court to engage in avoidance and minimalism.

³⁵⁴ Smolla, *supra* note 221, at 499.

³⁵⁵ *Id.* at 511.

³⁵⁶ *Id.*

³⁵⁷ Molly McQuillen, Note, *The Role of the Avoidance Canon in the Roberts Court and the Implications of Its Inconsistent Application in the Court's Decisions*, 62 CASE W. RES. L. REV. 845, 845 (2012).

³⁵⁸ See, e.g., Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005).

For instance, and as suggested earlier,³⁵⁹ the Court's avoidance in *Fox Television Stations II* of the First Amendment question might have been as much driven by the Justices' reticence to stride into the cultural quicksand of offensive language as it was by some deep-seated belief that avoidance, as a constitutional doctrine in and of itself, is always the wisest path to follow. This possibility, of course, comports with social theories of the law that, as Professor Lawrence Friedman writes, focus on culture as a social force influencing the law.³⁶⁰ It also jibes with facets of legal realism theory, under which law is "embedded in (and the product of) societal realities."³⁶¹

Why, in other words, open up another can of legal and cultural worms akin to *Cohen v. California*,³⁶² in which the majority wisely counseled "that the Constitution leaves matters of taste and style so largely to the individual."³⁶³ As explained earlier, the high court in *Cohen* upheld the right of Paul Robert Cohen to wear a jacket emblazoned with the words "Fuck the Draft" in a Los Angeles courthouse corridor in April 1968 "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."³⁶⁴ Writing for the *Cohen* majority, Justice John Marshall Harlan rhetorically asked, "How is one to distinguish this from any other offensive word?"³⁶⁵ He added that "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."³⁶⁶ This aphorism—one man's vulgarity is another's lyric—captures the gist of the Court's void for vagueness doctrine.³⁶⁷

Similarly, drawing lines today between fleeting expletives uttered on the broadcast airwaves—more than forty years post-*Cohen* and more than three decades after *Pacific Foundation*—is a daunting task. Perhaps it was the cultural and legal dangers

³⁵⁹ See *supra* notes 233–45 and accompanying text.

³⁶⁰ Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1581 (1989) (noting that social theories "may isolate some particular 'social force,' and assign it the lion's share of responsibility for law and legal institutions; or they may credit some mixture of factors in the outside world. They may focus on politics, on economic organization, or on tradition or *culture*" (emphasis added)).

³⁶¹ Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. 1185, 1216 (2010).

³⁶² 403 U.S. 15 (1971).

³⁶³ *Id.* at 25.

³⁶⁴ *Id.* at 16 (quoting *California v. Cohen*, 81 Cal. Rptr. 503, 505 (Cal. Ct. App. 1969)).

³⁶⁵ *Id.* at 25.

³⁶⁶ *Id.*

³⁶⁷ As the U.S. Supreme Court explained in 2008:

Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

United States v. Williams, 553 U.S. 285, 304 (2008); see also *Johnson v. United States*, 135 S. Ct. 2551, 2556–61 (2015) (addressing when a law is unconstitutionally vague).

of running point, as it were, into this linguistic and cultural landmine-laden battlefield that the Court in *Fox Television Stations II* did not wish to tread. In other words, the doctrine of avoidance provided a clean and clear way out of the etymological abyss.

Furthermore, from a pro-First Amendment, free speech perspective, the Court's minimalistic decision in *Snyder* was, of course, an extremely positive thing. The Court simply reaffirmed—rather than charting a new path forward or, conversely and more damagingly, reversing direction—the long-standing importance of safeguarding offensive expression.³⁶⁸ Although the majority avoided wrestling with the private-figure versus public-figure plaintiff issue in *Snyder* by instead focusing “largely” on the nature of the speech,³⁶⁹ some scholars view the case as expanding the First Amendment doctrine from *Hustler Magazine, Inc. v. Falwell*³⁷⁰—a public-figure plaintiff IIED case—to now encompass any and all private-figure plaintiff IIED cases.

Professor Lidsky, for instance, predicts that *Snyder* will “likely . . . be an unmitigated boon to media defendants litigating tort cases in years to come.”³⁷¹ Professor Tushnet adds that *Snyder* can be interpreted as adopting “a rule that a victim cannot recover for a speaker's intentional infliction of emotional distress if the vehicle for inflicting that distress is a comment on a matter of public concern.”³⁷²

In addition to the free speech victory for the WBC in *Snyder*, the constitutional avoidance demonstrated in *Elonis* yielded a free speech victory—at least a statutory one—for Anthony Elonis. After all, the Court reversed the decision of the U.S. Court of Appeals for the Third Circuit, which had upheld his conviction.³⁷³ And as George Washington University Professor Jonathan Turley asserts, had the Court ruled for the government in *Elonis*, “it would have created a clearly intended ‘chilling effect’ for everyone posting comments that they could be arrested if ‘reasonable people’ would view their comments as threats.”³⁷⁴

Thus, although avoidance in *Elonis* certainly left the true threats doctrine in disarray, it nonetheless helped to free Anthony Elonis from a forty-four-month federal prison sentence.³⁷⁵ The micro-level victory, however, may prove short-lived, as “prosecutors have said they will likely retry him.”³⁷⁶

³⁶⁸ See *supra* note 223 and accompanying text.

³⁶⁹ See *supra* note 212 and accompanying text.

³⁷⁰ 485 U.S. 46 (1988).

³⁷¹ Lidsky, *supra* note 85, at 1825 (footnote omitted).

³⁷² Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 109 (2012).

³⁷³ *Elonis v. United States*, 135 S. Ct. 2001, 2013 (2015).

³⁷⁴ Jonathan Turley, Opinion, *Facebook Threats Case Still Menace to Free Speech*, USA TODAY (June 1, 2015, 7:08 PM), <http://www.usatoday.com/story/opinion/2015/06/01/facebook-rap-supreme-court-speech-elonis-column/28310025> [<http://perma.cc/T5QK-55SM>].

³⁷⁵ See *Elonis*, 135 S. Ct. at 2007 (noting that “Elonis was sentenced to three years, eight months’ imprisonment and three years’ supervised release”).

³⁷⁶ Riley Yates, *After SCOTUS Victory, Anthony Elonis Also Acquitted of Domestic Assault*, MORNING CALL (Sept. 29, 2015, 8:19 PM), <http://www.mcall.com/news/breaking/mc>

In brief, then, the Court—by engaging in minimalism and/or avoidance—was able to deal free speech victories to, for lack of a better word, scoundrels like Fred Phelps³⁷⁷ and Anthony Elonis.³⁷⁸ Similarly, by avoiding the First Amendment issue and, instead, concentrating on the Fifth Amendment question of fair notice,³⁷⁹ the Court in *Fox Television Stations II* was able to shield a broadcast network from liability for airing tawdry statements such as, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”³⁸⁰ In brief, broadcasters scored a clean victory for dirty speech and the Court, in turn, escaped the much more knotty question of whether such speech is indecent and whether the FCC’s policy of targeting fleeting expletives violates the First Amendment.

In summary, *Elonis*, *Snyder*, and *Fox Television Stations II* all produced micro-level (or individual-level) wins for free expression. Yet, at the larger level of First Amendment doctrine, that same trio of cases failed to advance the field.

When it comes to partisanship fracturing the Court on the doctrinal issues addressed above, it is important to note that Chief Justice Roberts crossed lines twice—in *McCullen v. Coakley* and *Williams-Yulee v. Florida Bar*—to join a block of four liberal Justices. Similarly, Justice Thomas crossed lines once—in *Walker v. Texas Division, Sons of Confederate Veterans*—to join the liberal Justices. The reasons Thomas may have done so were addressed earlier.³⁸¹

Chief Justice Roberts, of course, has more famously crossed political lines to join the four liberal Justices on the constitutionality of the Affordable Care Act, angering conservative Court observers in the process.³⁸² As Adam Liptak wrote for the *New*

-freemansburg-anthony-elonis-domestic-assault-verdict-20150929-story.html [http://perma.cc/R3S8-UFNG].

³⁷⁷ Fred Phelps, the lead defendant in *Snyder v. Phelps*, was aptly described shortly after his death in 2014 as “the vitriol-spouting leader of Westboro Baptist Church who picketed military funerals and espoused hatred for gays.” Rick Jervis, *Fred Phelps’ Death May Mean End of Westboro Church*, USA TODAY (Mar. 21, 2014, 12:29 PM), <http://www.usatoday.com/story/news/nation/2014/03/20/westboro-church-fred-phelps-gay-controversy/6664703/> [http://perma.cc/23XF-J3CL]. The term “scoundrel” thus seems appropriate for the late Reverend Phelps.

³⁷⁸ The speech in question of Anthony Elonis targeted his estranged wife and was written “in a prose style reminiscent of the violent, misogynistic lyrics of rap artists he admired.” Robert Barnes, *Supreme Court Case Tests the Limits of Free Speech on Facebook and Other Social Media*, WASH. POST (Nov. 23, 2014), http://www.washingtonpost.com/national/supreme-court-case-tests-the-limits-of-free-speech-on-facebook-and-other-social-media/2014/11/23/9e54dbd8-6f67-11e4-ad12-3734c461eab6_story.html [http://perma.cc/MHF7-5SLA]. As Professor Jonathan Turley put it, “[t]here is no question that Elonis has the mentality of an angry toddler” and that *Elonis v. United States* “could not have had a less redeeming character at its core.” Turley, *supra* note 374. The term “scoundrel” thus seems suitable for Anthony Elonis.

³⁷⁹ See *supra* note 171 and accompanying text (addressing how the Court in *Fox Television Stations II* addressed only the Fifth Amendment issue).

³⁸⁰ See *supra* note 158 and accompanying text.

³⁸¹ See *supra* notes 41–43 and accompanying text.

³⁸² Richard Wolf & Brad Heath, *First Take: Roberts to the Rescue on Obamacare, Again*,

York Times in September 2015, Roberts faced a “barrage of criticism” from conservatives after completing his tenth term as Chief Justice.³⁸³

So, why did the Chief Justice join the liberals and abandon the conservatives in *Williams-Yulee* to uphold a statute limiting the speech of judges in the face of strict scrutiny review? Brianne J. Gorod, appellate counsel at the Constitutional Accountability Center, argues that Roberts has “often said that he wants the justices to be seen as different than politicians, and whether all of his votes are consistent with that goal, this one clearly was. As he explained, ‘Judges are not politicians, even when they come to the bench by way of the ballot.’”³⁸⁴ In brief, Roberts sought in *Williams-Yulee* “to make a larger point about the role of the judiciary.”³⁸⁵

If this really is the case, then perhaps *Williams-Yulee* is a one-off type of case—confined to speech by members of the judiciary—when it comes to how rigorously or laxly strict scrutiny is applied. Indeed, Harvard Professor Laurence Tribe writes that *Williams-Yulee* “may simply reflect an ad hoc judiciary-only exception to the Court’s libertarian streak”³⁸⁶ when it comes to political speech and speech-and-money cases.

In closing, doctrinal disorder in First Amendment jurisprudence is nothing new. University of Virginia Professor Lillian R. BeVier remarked, in 2005 at a symposium on free expression, that

[e]very participant at this symposium is familiar with *the doctrinal disorder that is First Amendment jurisprudence*. Each of us has struggled to make sense of the myriad views about the Amendment’s objectives and the ultimate ends that it serves or ought to serve. Each of us has tried to understand the doctrines and to make them cohere, even as we have watched them proliferate.³⁸⁷

This Article ultimately illustrated how avoidance, minimalism, and partisanship contributed to this doctrinal predicament over the past five years on the Roberts Court. It now will be interesting to see whether and how, particularly in light of Justice Scalia’s death in February 2016, this trio of variables affects First Amendment jurisprudence in the coming years.

USA TODAY (June 25, 2015, 1:26 PM), <http://www.usatoday.com/story/news/politics/2015/06/25/supreme-court-obamacare-first-take/29267581/> [<http://perma.cc/ND26-9HJ5>].

³⁸³ Adam Liptak, *Chief Justice Amasses a Conservative Record, and Wrath from the Right*, N.Y. TIMES, Sept. 29, 2015, at A16.

³⁸⁴ Brianne J. Gorod, *A Big Year at the Supreme Court*, 18 GREEN BAG 2D 391, 403 (2015) (footnote omitted).

³⁸⁵ *Id.*

³⁸⁶ Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 CONST. COMMENT. 463, 490 (2015).

³⁸⁷ Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1280 (2005) (emphasis added).