

issue of a hierarchy of speech values, according to which some forms of expression, while protected, may be more readily subject to official regulation and perhaps suppression than other protected expression. These differences were compounded in cases in which First Amendment values came into conflict with other values, either constitutionally protected values such as the right to fair trials in criminal cases, or societally valued interests such as those in privacy and reputation.

Attempts to work out these differences are elaborated in the following pages, but the effort to formulate a doctrine of permissible content regulation within categories of protected expression necessitates a brief treatment. It remains standard doctrine that it is impermissible for the government to regulate protected expression on the basis of its content.<sup>1152</sup> Justice Stevens, however, has articulated a theory that would permit some governmental restraint based upon content. In Justice Stevens' view, there is a hierarchy of speech, and where the category of speech at issue fits into that hierarchy determines the appropriate level of protection under the First Amendment. A category's place on the continuum is guided by *Chaplinsky's* formulation of whether it is "an essential part of any exposition of ideas" and what its "social value as a step to truth" is.<sup>1153</sup> Thus, offensive but nonobscene words and portrayals dealing with sex and excretion may be regulated when the expression plays no role or a minimal role in the exposition of ideas.<sup>1154</sup> "Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."<sup>1155</sup>

<sup>1152</sup> See, e.g., *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991).

<sup>1153</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>1154</sup> *Young v. American Mini Theatres*, 427 U.S. 50, 63–73 (1976) (plurality opinion); *Smith v. United States*, 431 U.S. 291, 317–19 (1977) (Justice Stevens dissenting); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (Justice Stevens concurring in part and concurring in the judgment); *FCC v. Pacifica Foundation*, 438 U.S. 726, 744–48 (1978) (plurality opinion); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 80, 83 (1981) (Justice Stevens concurring in judgment); *New York v. Ferber*, 458 U.S. 747, 781 (1982) (Justice Stevens concurring in judgment); *R. A. V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Justice Stevens concurring in the judgment).

<sup>1155</sup> *Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion).