hibitions on public discussion of an entire topic.[1148] Although, as discussed below, there are certain categories of speech that fall outside of First Amendment scrutiny, such as obscenity or defamation, the Court is generally reluctant to add new exceptions.[1149] The Court has suggested that while new categories of unprotected speech may be identified in the future, that such categories as already exist have long-established roots in First Amendment law.[1150]

Originally the Court took a "two-tier" approach to content-oriented regulation of expression. Under the "definitional balancing" of this approach, some forms of expression are protected by the First Amendment and certain categories of expression are not entitled to protection. This doctrine traces to *Chaplinsky v. New Hampshire*,[1151] in which the Court opined that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent those utterances and punish those uttering them without raising any constitutional problems. If speech fell within the *Chaplinsky* categories, it was unprotected, regardless of its effect; if it did not, it was covered by the First Amendment and it was protected unless the restraint was justified by some test relating to harm, such as clear and present danger or a balancing of presumptively protected expression against a compelling governmental interest.

For several decades, the decided cases reflected a fairly consistent and sustained march by the Court to the elimination of, or a severe narrowing of, the "two-tier" doctrine. The result was protection of much expression that before would have been held absolutely unprotected (*e.g.*, seditious speech and seditious libel, fighting words, defamation, and obscenity). Later, the march was deflected by a shift in position with respect to obscenity and by the creation of a new category of non-obscene child pornography. But, in the course of this movement, differences surfaced among the Justices on the permissibility of regulation based on content and the interrelated

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[1148] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (citing Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 537 (1980)).

[1149] *See* United States v. Stevens, 559 U.S. ___, No. 08–769, slip op. (2010) (striking down a federal law that makes it a felony to knowingly create, sell, or possess a depiction of animal cruelty); Brown v. Entertainment Merchants Association, 564 U.S. ___, No. 08–1448, slip op. (2011) (strking down a state law that imposes a civil fine of up to $1000 for selling or renting "violent video games" to minors, and requires their packaging to be labeled "18").

[1150] For instance, child pornography, which appears to be a relatively recently identified category of unprotected speech, see New York v. Ferber, 458 U.S. 747 (1982), is "intrinsically related" to the sexual abuse of children, and thus falls into the previously existing category of speech facilitating criminal activity. *Stevens*, 559 U.S. ___, No. 08–769, slip op. at 8.

[1151] 315 U.S. 568, 571–72 (1942).