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CORRECTING THE GENERALLY ACCEPTED BUT UNJUSTIFIED INTERPRETATION OF THE FREE SPEECH CLAUSE

Michele Cotton*

I. INTRODUCTION

Many jurists as well as legal scholars subscribe to a “political speech theory” of the First Amendment. According to this theory, speech concerned with politics receives full constitutional protection while speech that has literary, commercial, scientific, or other value gets something less than that. However, this Essay contends that the political speech theory does not actually deserve the broad currency it has. First Amendment doctrine should not specially privilege political speech but rather recognize a general speech protection.

In demonstrating that the political speech theory lacks justification, this Essay first examines the theory as described by its most prominent proponents. Although the Free Speech Clause, on its face, gives no special protection to political speech, these proponents usually describe the historical evidence as nonetheless indicating that such was the Framers’ intent. However, this Essay considers the evidence and finds that it is far from clear that the Framers were trying to create a special protection for political speech—and, indeed, the evidence suggests otherwise.

On the other hand, a few prominent proponents endorse the political speech theory, even if supporting evidence of intent is lacking, based on what they see as logical inference. In their view, there must be something special about speech that explains its unique constitutional protection, and that something must be the essentiality of unfettered political speech to self-government, which indicates that the Free Speech Clause itself is about protecting political speech. Or they take the view

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1 See infra Section II.
2 Id.
3 Id.
4 See infra Section III.
5 See infra Section IV.
6 Id.
that its constitutional context supports the idea that the First Amendment serves a public purpose, and thus that the Free Speech Clause must be about political speech.\(^7\) This Essay points out critical shortcomings in these alternative bases for the political speech theory.\(^8\)

The Essay then proposes that the Framers were more likely motivated to give speech special constitutional protection because they recognized that speech is different in an important respect from virtually all other behaviors.\(^9\) Speech, unlike most other behaviors, usually does not impinge upon other persons’ autonomy in any significant way, in the sense that it does not impede them from taking whatever actions they would prefer to take. This aspect of speech, which was appreciated by the Framers, would better explain why they gave speech special protection, and indeed justifies treating it differently from other behaviors. Further, as this Essay demonstrates, such an understanding of the Free Speech Clause is also more workable in practice than the political speech theory as well as providing a better vision for our society.\(^10\)

II. THE POLITICAL SPEECH THEORY

Prominent First Amendment scholars have often taken the position that the First Amendment is primarily, or even exclusively, intended to protect political speech. Laurence Tribe describes “political advocacy” as the “kind of speech that the First Amendment is meant to protect most vigorously.”\(^11\) Alexander Meiklejohn goes further and explains that, in his view, “[t]he First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’ It is concerned, not with a private right, but with a public power, a governmental responsibility.”\(^12\) Cass Sunstein reiterates this theme when he remarks that “political speech . . . belongs at the First Amendment core.”\(^13\) He contends that “the distinction between political and nonpolitical speech is well-established, and properly so,” because it “protects speech that serves a central

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\(^7\) Id.
\(^8\) See infra Sections III–IV.
\(^9\) See infra Section V.
\(^10\) See infra Section VI.
\(^12\) Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255.
function of the [F]irst [A]mendment . . . .”\textsuperscript{14} Floyd Abrams agrees that it is “well-established . . . that political speech . . . is at the core of the First Amendment.”\textsuperscript{15} Robert Bork even takes the position that the Constitution protects only explicitly political speech.\textsuperscript{16}

The Supreme Court’s decisions have at times promoted and relied upon some version of the political speech theory. For example, the Court recently stated that political speech is “at the core of what the First Amendment is designed to protect”\textsuperscript{17} and that “speech on public issues occupies the highest rung on the hierarchy of First Amendment values.”\textsuperscript{18} The Court has emphasized that political speech “is entitled to the most exacting degree of First Amendment protection,”\textsuperscript{19} and is the form of speech to which “the First Amendment ‘has its fullest and most urgent application.’”\textsuperscript{20} The Court has also made decisions in which it has explicitly approved of governmental regulation of speech that is not in its view political or sufficiently political.\textsuperscript{21}

Justices have often attributed their endorsement of the political speech theory to the intention of the Framers. Justice Black remarked that “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

\textsuperscript{14} Cass Sunstein, 
\textsuperscript{15} Floyd Abrams, 
\textsuperscript{16} See Robert H. Bork, 
\textit{Neutral Principles and Some First Amendment Problems}, 47 IND. L.J. 1, 20 (1971) (“Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”).
\textsuperscript{17} Morse v. Frederick, 551 U.S. 393, 403 (2007) (citing Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion)).
\textsuperscript{21} See, e.g., Connick, 461 U.S. at 148 (finding that a survey about office transfer policies, developed and administered by an assistant district attorney and distributed to co-workers, involved speech unprotected by the First Amendment because it was not “of public import in evaluating the performance of the District Attorney as an elected official”). This case is discussed in further detail infra Section VI. More recent cases emphasizing the special protection given to political speech include McCullen v. Coakley, 134 S. Ct. 2518, 2536 (2014) (“Advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection.”) (internal citations and quotations omitted); Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (finding that the First Amendment is especially protective of “debate on public issues” and “less rigorous” where matters of public concern are not involved); Citizens United v. FEC, 558 U.S. 310, 329 (2010) (“Political speech . . . is central to the meaning and purpose of the First Amendment.”).
was to protect the free discussion of governmental affairs.”22 He further remarked: “There is nothing in the language of the First Amendment to indicate that it protects only political speech, although to provide such protection was no doubt a strong reason for the Amendment’s passage.”23 Justice Thomas similarly concludes that “[p]olitical speech is the primary object of First Amendment protection, . . . a proposition that ought to be unassailable,” and among the sources he cites for this conclusion is James Madison,24 who proposed the amendment to the First Congress and authored its initial version.25 There is, of course, a substantial difference between Thomas’s position that political speech is “the primary object” of the First Amendment and Black’s hedgier one that it is “a major purpose.”26 But these Justices share the sense that the First Amendment is particularly concerned with political speech and that such an interpretation vindicates the Framers’ intention.

Many legal scholars have likewise attributed such a perspective to the Framers. Sunstein concludes that

[t]he best view of the relevant history is that political speech was thought to form the core of the free speech principle. This does not mean that all other speech was entirely excluded; but it does mean that the framers’ principal fear was government censorship of political

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24 NIXON v. SHRINK MO. GOV'T PAC, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting) (citing James Madison, Report on the Resolutions, in 6 THE WRITINGS OF JAMES MADISON 347, 397 (Gaillard Hunt ed., 1906)). The source identified by Thomas as justifying his conclusion consists of a letter written by Madison in response to the Sedition Act. Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), in 6 THE WRITINGS OF JAMES MADISON at 397. The part to which Thomas refers is presumably where Madison’s letter says that “the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.” Id. Madison is certainly saying here that freedom to discuss candidates for office is essential to self-government. Given that he was responding specifically to the Sedition Act, which forbade certain kinds of statements against the government, it is not surprising that his letter would not discuss other uses of the First Amendment. However, Madison does not, in any event, say or imply here that “the primary object” of the First Amendment—in the words of Thomas—is protecting political speech.
25 See 5 THE FOUNDERS’ CONSTITUTION 20 (Philip B. Kurland & Ralph Lerner eds. 1987). Madison has been recognized as “the leader in the preparation of the First Amendment.” BRIDGES v. CALIFORNIA, 314 U.S. 252, 264 (1941).
26 Shrink, 528 U.S. at 410–11; Black, supra note 23.
speech. There can be little doubt that suppression by the government of political ideas of which it disapproved, or which it found threatening, was the central motivation for the clause.27

Similarly, other scholars have concurred that “[f]ree political speech . . . is the very core of what James Madison drafted and the Framers adopted when they guaranteed the people that ‘Congress shall make no law . . . abridging the freedom of speech.’”28 Accordingly, it has been argued that the sense of “a hierarchy in which political speech receives more protection than commercial or artistic speech . . . is consistent with the Founders’ goals in drafting the First Amendment, as Madison’s emphasis was on guaranteeing citizens the right to criticize and question the government.”29

This sense that the Free Speech Clause is focused on political speech has led to varying theories of application. Some scholars have defined political speech narrowly to mean that which is directly related to government decision-making,30 while others have defined it more broadly as any speech that contributes to public discourse.31 For those who view it narrowly, constitutional protection is limited to speech that facilitates self-government.32 For those who view it more broadly, constitutional protection differs in degree between

27 Sunstein, supra note 13, at 132. The footnote supporting Sunstein’s claim about the “best view of the relevant history” states that that view is derived from Leonard Levy’s Emergence of a Free Press and “also from a reading of the materials collected in” the Founders’ Constitution. Id. at 273 n.11; Leonard Levy, Emergence of a Free Press (1985); 5 Founders’ Constitution, supra note 25. Some sources from The Founders’ Constitution are discussed infra, Section III.


29 Susan Hanley Kosse & Robert H. Wright, How Best To Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?, 12 Duke J. Gender L. & Pol’y 53, 78 (2005) (emphasis omitted).

30 See, e.g., Bork, supra note 16, at 27 (“The category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel . . . .”).

31 See, e.g., Robert Post, Participatory Democracy as a Theory of Free Speech: A Reply, 97 Va. L. Rev. 617 (2011); James Weinstein, Participatory Democracy as the Central Value of American Free Speech Doctrine, 97 Va. L. Rev. 491 (2011). See also Sunstein, supra note 13, at 130 (describing speech as political “when it is both intended and received as a contribution to public deliberation about some issue”). Sunstein describes it as “a broad standard” that includes “all speech that bears on potentially public issues as falling within the free speech core. It is unnecessary to show that the relevant speech specifically calls for some change in the law, or tells government to do something. Public deliberation can deal with social norms as well as legal requirements.” Id. at 130–31.

32 See, e.g., Bork, supra note 16; Meiklejohn, supra note 12.
political and nonpolitical speech. In either situation, the scope of the speech covered by the Clause is narrower than it would be if the Clause was seen as protecting speech in general. For example, in Sunstein’s view, political speech cannot usually be regulated, while nonpolitical speech can be regulated whenever the government can show a “strong” and “legitimate” reason for doing so.

A significant trend in First Amendment jurisprudence and legal theory is that the Framers intended the Free Speech Clause to give special protection to political speech and to give less or even no protection to nonpolitical speech. If that is not actually an accurate understanding of the Framers’ intent, then the First Amendment decisions that depend upon such an understanding may be inadequately justified.

III. The Historical Evidence

Despite confident assertions from both jurists and scholars, the idea that Madison and the Framers intended the Free Speech Clause to be particularly concerned with political speech is subject to serious doubt. It is not even clear what has led to such confidence among the proponents of the political speech theory, since support for their assertions is often left nonspecific.

Indeed, the historical evidence for the political speech theory is, at best, equivocal. In presenting the Bill of Rights to the First Congress, Madison gave no specific explanation of the meaning of the Free Speech Clause. He described the amendments more generally as involving rights both designed to promote the formation of government and to protect persons against government. That does not rule out the possibility that the Free Speech Clause, like many of the provisions of the Bill of Rights, was intended to preserve a fundamentally private right (and thus was not oriented toward political speech).

Further, Madison’s initial wording of the provision was not designed to specially protect political speech. It stated: “The

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33 See, e.g., SUNSTEIN, infra note 59 and accompanying text.
34 SUNSTEIN, supra note 13, at 123. According to Sunstein, nonpolitical speech can be regulated when the government makes “a persuasive demonstration that a strong and legitimate government interest is promoted by the regulation at issue.” Id.
36 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).
37 Id. at 454 (“In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify positive rights, which may seem to result from the nature of the compact.”).
people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.” Nothing in this language indicates that the Free Speech Clause was meant to privilege political speech, just as the final version of the First Amendment gives no hint of such an intention.  

Although the Framers could nonetheless have assumed a special protection for political speech, some of those involved took great pains to emphasize the broad scope of what they had in mind. For example, a pseudonymous letter published in a Boston paper the year before Madison presented his version of the First Amendment to Congress opined that Americans felt themselves entitled to “speak, write and publish their sentiments with decency and independency on every subject . . . ” Thomas Jefferson’s preferred language for the First Amendment was similarly broad, calling for the freedom to speak, write, or publish “any thing but false facts affecting injuriously the life, property, or reputation of others or affecting the peace of the confederacy with foreign nations.” The Kentucky Constitution of 1799 legislated in the same vein: “The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.” These conceptions of free speech account for long-standing exceptions such as libel, but they are capacious rather than evincing a particular concern for speech about politics. Such examples do not prove that the Constitution’s version of free speech was intended to be similarly broad. But they do indicate that the context in which the Framers operated was hardly one in which we can see any shared sense that free speech meant political speech. Thus, it is harder to understand the language of Madison’s version of the First Amendment, and of the version ultimately adopted, as imbued with such an implicit concern.

Further, sources with which the Framers were likely familiar conceived of free speech more broadly. John Milton’s Areopagitica, published in 1644, defends the freedom not simply

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38 Id. at 451.
39 See U.S. CONST. amend. I.
41 Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 5 FOUNDER’S CONSTITUTION, supra note 25, at 130 (emphasis added).
42 Art. 10, Sec. 7, in 5 THE FOUNDERS’ CONSTITUTION, supra note 25, at 141 (emphasis added).
of the people to challenge their governors, including religious authorities, but also the freedom of playwrights and poets (such as Homer and Aristophanes) to create their works without prior restraint, and scientists like Galileo to present their views without censorship. Milton described free speech as beneficial to art and erudition generally, referring to it as “the nurse of all great wits,” and attributed it to an enlargement of the human capacity. Cato’s Letter No. 15 of 1720, which is known to have influenced the Framers, also made a case for such general protection. It is true that Cato describes freedom of speech as important to “publick liberty” and “essential to free government.” Moreover, he gives a number of examples of how the ability to criticize leaders had benefitted the governed throughout history, and remarks that freedom of speech “is the terror of traitors and oppressors.” However, Cato also points out that having such freedom “produces excellent writers, and encourages men of fine genius,” such that when it was denied “those great wits were no more.” These sources describe freedom of speech as desirable because it produces an environment generally fit for artistic and intellectual endeavors and do not describe it as having a “central” or “core” political value.

Madison did refer to freedom of the press in his original version of the First Amendment as “one of the great bulwarks of liberty,” which may suggest that he at least saw that adjacent right as particularly important to self-government. Madison’s fellow Virginian, George Mason, had described freedom of the press with the same wording in his Virginia Declaration of Rights. Both may have gotten this language from Cato’s letter, which had called freedom of speech “the great bulwark of liberty.” And both may have also been influenced by William Blackstone, who had written that “[t]he liberty of the [press] is indeed [essential] to the nature of a free

44 Id. at 135.
45 LEVY, supra note 27, at 113–14; see also CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953).
47 Id.
48 Id.
49 Id.
50 See ANNALS, supra note 36, at 451.
51 The Virginia Declaration of Rights § 12 (Va. 1776) (“That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments.”), http://www.constitution.org/bcp/virg_dor.htm.
52 TRENCHARD & GORDON, supra note 46.
So when Madison included freedom of the press in his version of the First Amendment, and singled it out as a “great bulwark[ ] of liberty,” that aspect of the wording could be seen as providing some support for the political speech theory.

Still, even freedom of the press was understood as having a broad rather than narrow meaning. Blackstone concluded that “'[t]o subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.’” Blackstone’s invocation of freedom of the press as a resource for “all controverted points in learning, religion, and government” evidently encompassed much more than matters of politics. Further, a letter from the Continental Congress to the Province of Quebec in 1774 extolled the freedom of the press not only for its value to self-government but also its contribution to “the advancement of truth, science, morality, and arts in general.” John Marshall described it as “signifying] a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only . . .” Thus, the “press” referred to in the First Amendment does not appear to have been a metonym intended to mean newspapers, as we are more likely to use it now, but rather appears to encompass all the materials produced by printing presses. Indeed, Madison’s 1800 Report on the Virginia Resolutions treated “the press” as synonymous with “printed publications.” Given that even the Free Press Clause seems to embody a broad protection for all manner of publications, the Free Speech Clause that accompanies it is unlikely to have been dedicated to political speech.

The conclusion of political speech theory proponents that the Free Speech Clause is primarily intended to protect

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53 4 WILLIAM BLACKSTONE, COMMENTARIES *151.
54 Id. at *152.
55 Id.
56 Letter from the Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774), in 1 FOUNDERS’ CONSTITUTION, supra note 25, at 442.
58 Id. at 142 (“The freedom of the press under the common law is, in the defences of the Sedition Act, made to consist in an exemption from all previous restraint on printed publications by persons authorized to inspect and prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.”).
political speech is not justified by either the original version of the Amendment, the conceptions that likely influenced it, or its final language. At least some of its sources support the idea that the clause was meant to describe speech more generally. Thus, there is considerable historical evidence that calls the political speech theory into question, despite proponents’ description of it as a matter of “little doubt” or even “unassailable.”

IV. THE “LOGIC” OF THE FREE SPEECH CLAUSE

Although it is not as clear as many claim, that protection of political speech is the intended purpose of the Free Speech Clause, the political speech theory does at least provide a possible explanation for why speech is treated differently under the Constitution than other behaviors. There must indeed be something about speech that led the Framers to give it special protection from regulation. That something, in the view of some political speech theorists, is that self-government cannot happen unless persons are free to engage in political speech.

This aspect has led some proponents of the political speech theory to endorse it, even where they view the historical evidence of intent as insufficient. For example, Bork considers the idea that the Free Speech Clause protects only political speech to be dictated by logic rather than by evidence of legislative intent. As he suggests, if there were no Free Speech Clause, freedom for political speech would still have to be inferred in order for self-government to function. He reasons that this is the only plausible explanation for the special distinction given to speech in the Constitution. And a corollary of this thinking is that speech that is not necessary to self-government is not constitutionally protected because it is not distinctive in this way from other behaviors that can be

60 See supra Section II.
61 Bork, supra note 16, at 22 (taking the position that “[t]he first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended”).
62 Id. at 23 (“The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.”).
63 Id. at 26 (“This function of speech, its ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity. But the difference exists only with respect to one kind of speech: explicitly and predominantly political speech.”).
CORRECTING THE INTERPRETATION OF THE FREE SPEECH CLAUSE

regulated.\textsuperscript{64} Although logic does indicate that political speech must be included in the category of constitutionally-protected free speech due to its essential role in self-government, it does not follow that the Free Speech Clause therefore only protects, or is only meant to protect, political speech.

Indeed, the words chosen by legislators presumably tell us whether a law is intended to be specific to a particular concern or more generic. The unrestrictive language of the First Amendment suggests that it is more generally concerned.\textsuperscript{65} It may be revealing to compare the First Amendment to the Fourteenth, about which we have more legislative history. Given the context of the Fourteenth Amendment, it can reasonably be inferred that it was intended to prevent discrimination against black Americans, who at the time of its adoption had been recently emancipated from slavery.\textsuperscript{66} However, the drafters of that amendment, and the other Reconstruction amendments, chose more general language, and it makes sense to think they did so to address not only the specific example of racial discrimination before them but other instances of discrimination that might be recognized as analogous. (Indeed, the legislative history of that amendment indicates that that is so).\textsuperscript{67} Thus, black Americans are certainly protected from discrimination by the Fourteenth Amendment, given that we know that its drafters were concerned about slavery and its aftermath.\textsuperscript{68} However, the amendment must protect others as well, since the language chosen by the legislators is broader than necessary to accomplish only that particular purpose. Similarly, the Framers likely chose their wording for the First Amendment advisedly and intended the broader meaning that goes with the broader wording. They

\textsuperscript{64} Id. at 28 ("[T]he rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct.").

\textsuperscript{65} See, e.g., United States v. Price, 383 U.S. 787, 800–01 (1966) (stating that “plain and unlimited” language of law should be enforced and given “a sweep as broad as its language”).

\textsuperscript{66} See, e.g., McLaughlin v. Florida, 379 U. S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

\textsuperscript{67} See Speech of Hon. J. A. Bingham, in CONG. GLOBE, 42nd Cong., 1st Sess. (1871), at 83–86 (acknowledging the importance of the amendment to the freed slaves, but also mentioning that it would apply to Native Americans as well, and concluding that it would also benefit poor people settling the frontiers).

\textsuperscript{68} See, e.g., David S. Bogen, Slaughter-House Five: Views of the Case, 55 HASTINGS L.J. 333, 337 (2003) (“The Fourteenth Amendment to the Constitution was adopted to deal with the aftermath of slavery and the racial discrimination that prevailed after the Civil War.”).
presumably would have chosen narrower wording had they intended a narrower meaning.

In addition, there is no reason to believe that the Framers were particularly unimaginative, or so much the creatures of a moment, that they did not foresee other uses for free speech than to constitute government. Indeed, the political speech theorists must not only imagine that the Framers did not, but also that they understood there to be distinct categories of “political” and “nonpolitical” that speech can be sorted into. That is not something evidenced by the sources that influenced the Framers or the announced views of the Framers themselves. In fact, defining what does and does not constitute political speech is not something even political speech theorists have been able to agree upon.\(^{69}\) Even if the Framers highly valued what we may conceivably as political speech, it might still be wrong to believe that they saw any meaningful distinction between political and nonpolitical speech or regarded such a distinction as a salubrious one to make.

For some proponents, contextual cues justify the conclusion that the Free Speech Clause is specifically about protecting political speech. Meiklejohn remarks that “the First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen’s speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation.”\(^{70}\) Such an interpretation implies that it is logically discernable from context that the Free Speech Clause vindicates the public concern of self-government rather than a private right.\(^{71}\) However, it is difficult to see how the “setting” of the Clause leads to such an interpretation. The First Amendment begins by referencing the Establishment and Free Exercise Clauses; then, after a semicolon, sets forth rights of speech and press; then, after another semicolon, concludes with peaceable assembly and petition of the government.\(^{72}\) This formulation includes at least one indubitably private right—free exercise—that shows that the First Amendment cannot be described as preoccupied with the tools of self-government.\(^{73}\) Further, as a matter of syntax, the amendment’s semicolons merely serve to pair the rights of free speech and press with

\(^{69}\) Compare Bork’s narrow definition, Bork, supra note 16, with the broader ones of Post, supra note 31, and SUNSTEIN, supra note 13.

\(^{70}\) Meiklejohn, supra note 12, at 256 (emphasis added).

\(^{71}\) Id. at 255.

\(^{72}\) The First Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

\(^{73}\) See id.
each other, rather than to orient them toward the ultimate, unannounced objective that Meiklejohn proposes.

Moreover, the idea that the First Amendment must be focused on self-government is undermined by the Framers' avowed concern for people's private interests. It is interesting in this regard to compare the Free Speech Clause with the Free Exercise Clause, which likely no one would argue was intended to protect religious exercise only to the extent that such exercise serves a public purpose. Free exercise is part of the Constitution because it is both a right people wanted protected for its own sake and one that is not inimical to the constitution of government. It is interesting in this regard to compare the Free Speech Clause with the Free Exercise Clause, which likely no one would argue was intended to protect religious exercise only to the extent that such exercise serves a public purpose. Free exercise is part of the Constitution because it is both a right people wanted protected for its own sake and one that is not inimical to the constitution of government. It is by side by side with an Establishment Clause that performs the valuable service to government of reducing sectarian conflict—although even that clause can also be seen as having the private benefit of keeping government out of the religious sphere. As with the Free Speech and Free Press Clauses, the private and public implications of the religion clauses are seemingly intermingled and complex rather than evincing any single logically-deducible "primary" purpose. Like most pieces of legislation, they represent a compromise between private interests and public needs, reflecting both, and, like most negotiated bargains, not solely defined by either. The Free Speech Clause, likewise, does not seem something that can be logically reduced to whatever public benefits it may have, given that the ability to speak without governmental intervention has considerable private importance.

Even if it is true that political speech must be protected for self-government to function, it does not follow that only

74 See, e.g., THE NEW FOWLER'S MODERN ENGLISH USAGE 699 (H.W. Fowler & R.W. Burchfield eds., 1996) (explaining that the semicolon indicates "a discontinuity of grammatical construction greater than that indicated by a comma but less than that indicated by a full stop" and "separates two or more clauses which are of more or less equal importance and are linked as a pair or series . . . .") (citations omitted).
75 As Madison remarks, "[a] reform . . . which does not make provision for private rights, must be materially defective." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE FOUNDERS' CONSTITUTION, supra note 25, at 646.
76 See, e.g., Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) ("[T]he purpose [of the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.").
77 See, e.g., McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) ("[A] purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife . . . .").
78 See, e.g., Engel v. Vitale, 370 U.S. 421, 431–32 (1962) ("The Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.").
79 Madison himself was sensitive to his role as representative: he proposed the amendments to the Constitution to, in his words, "fulfil the duty which I owe to myself and my constituents" and "to satisfy the public that we do not disregard their wishes." ANNALS, supra note 36, at 448.
political speech is protected, nor that what entitles speech to special protection must be its value to self-government. Further, there are reasons to suspect that something else accounts for the Framers’ conclusion that speech is entitled to special protection, given their choice of broad rather than specific language, and the lack of evidence that they even distinguished between political and nonpolitical speech. There is, in addition, nothing about the context of the Free Speech Clause that indicates that the Framers saw it as specially focused on the goal of facilitating self-government.

V. GENERAL SPEECH PROTECTION: AN ALTERNATIVE THEORY OF WHAT THE FRAMERS MEANT BY FREE SPEECH

Although the Framers must indeed have seen something distinctive about speech that led them to provide it with a special constitutional exemption from regulation, the most plausible candidate for that something is not the essentiality of free speech to self-government, but the important natural difference that exists between speech and most other behaviors. Speech is different from most other behaviors in that it generally does not impinge upon other persons’ autonomy in any significant way insofar as it does not prevent its hearers from taking whatever actions they would prefer to take. The general protection provided for speech in the First Amendment may thus be seen as reflecting a recognition of the naturally non-impinging quality that most speech has.

Speech can be seen as an extension of another behavior that has an exceptional non-impinging quality, and that is the act of thinking. Indeed, speech and thought are closely intertwined. Speech is the means by which we convey our thoughts to others and make them manifest—one can literally speak one’s thoughts aloud—and it is the means by which we receive thoughts from others. Regulation of speech would be akin to regulation of thought, and speech may be specially exempt from regulation for much the same reason that thought is exempt (or would be, if government had the power to regulate thought).

Recognition of the close relationship between speech and thought was apparent in the early influences on the Framers. Blackstone considered thought to be beyond regulation, concluding that there could not be “any restraint . . . laid upon freedom of thought or [in]quiry” or the “liberty of private sentiment.”80 He contrasted the power that government

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80 BLACKSTONE, supra note 53, at *152.
had under common law to punish wrong exercises of freedom of the press, such as libel, with the saving grace that such a power could not reach these thought- and sentiment-based freedoms.\(^{81}\)

Milton also drew a connection in his *Areopagitica* between thinking and speaking: “Give me the liberty to know, to utter and to argue freely according to conscience, above all liberties.”\(^{82}\) In this formulation, to “know” and to “utter” are kindred and adjacent faculties, similarly exceptional when it comes to government regulation.

Likewise, Cato began his influential letter endorsing free speech by remarking, “[w]ithout freedom of thought, there can be no such thing as wisdom; and no such thing as publick liberty, without freedom of speech . . . .”\(^{83}\) Although thereby making an explicit connection between freedom of speech and general liberty, Cato’s description also draws a parallel between freedom of thought and freedom of speech.\(^{84}\) Freedom of thought is a given in this conceptualization, and freedom of speech its analogue.\(^{85}\)

Madison himself was no stranger to such a concern for freedom of thought. Although making the point in the specific context of freedom of religion, he once remarked that he flattered himself that he had “in this country extinguished forever the ambitious hope of making laws for the human mind.”\(^{86}\) If regulation of thought is not a legitimate government activity, and if speech is akin to thought, then it makes sense to think of it as similarly exempt from regulation.

The Supreme Court has itself at times noted the connection between speech and thought. For example, Brandeis’s concurrence in *Whitney v. California* remarked that the Framers believed in the “freedom to think as you will and to speak as you think.”\(^{87}\) The Court has also in other cases described the First Amendment as protecting “individual freedom of mind”\(^{88}\) and “the right of freedom of thought.”\(^{89}\)

Restricting a person’s speech, to the extent that the speech conveys thought, is similar in its intrusiveness to restricting a person’s thought itself; it strikes close to the heart

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\(^{81}\) Id.


\(^{83}\) Trenchard & Gordon, *supra* note 46.

\(^{84}\) Id.

\(^{85}\) See id.

\(^{86}\) Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), in 2 The *Writings of James Madison*, 1783–87, at 216 (Gaillard Hunt ed., 1901).

\(^{87}\) 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).


of what it means to be a human being. Of course, as a practical matter, government is largely impeded from regulating people’s thoughts, but if such regulation were practical—and it one day may be—it would likely be criticized as an unjustified intrusion, and not merely to the extent that it involved regulation of political thoughts.

However, it is not just the importance of speech to persons as a conveyance of thought that makes speech special and worthy of particular protection. Indeed, there are many cherished behaviors that government can regulate quite intrusively without running afoul of the Constitution. For example, physical liberty is vitally important to persons as well, but there are many situations in which they are required by the government to sacrifice it—as in arrest and detention under reasonable suspicion, imprisonment after conviction of a crime, and conscription into military service, (not to mention jury duty). Physical liberty is not treated by the Constitution as subject to special protection even though it is undoubtedly of great value to human beings.

What makes speech special is rather the quality it shares with thought: it is usually the case that speech, like all thought, does not interfere with the liberty of others. Most of the time, speech that conveys the thoughts of another merely renders something conceived in a person’s mind into a form that another person’s mind can consider, and involves no more intrusion upon another’s liberty than is involved in triggering the other’s perception of the speech. And it is relatively easy for any person to escape this slight imposition placed on her by the speech of another: she can simply decide to stop listening to it. Most other behaviors, by contrast, cannot be deprived of impact so easily: to live somewhere limits another’s choices of where to live; to take a job deprives another person of an employment

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90 See, e.g., Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting) (“Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity.”).
91 Though the technology to control thought has yet to be invented, that has not prevented totalitarian governments from making the effort. For example, Mao Zedong attempted to achieve oversight of people’s thoughts by requiring them to write them down and share them with him for the purpose of “thought examinations.” See JUNG CHANG & JON HALLIDAY, MAO: THE UNKNOWN STORY 241–42 (2005).
92 See Kent Greenawalt, Free Speech Justifications, 89 COLUM. L. REV. 119, 145 (1989) (“Because communication is so closely tied to our thoughts and feelings, suppression of communication is a more serious impingement on our personalities than many other restraints of liberty . . . .”)
93 See, e.g., Cohen v. California, 403 U.S. 13, 21 (1971) (pointing out that those who were offended by a jacket that said “fuck the draft” “could effectively avoid further bombardment of their sensibilities simply by avert[ing] their eyes”).
opportunity; to consume resources reduces the resources available to others. Accordingly, it is necessary to regulate most behaviors in order to make collective society possible, but not so speech that simply conveys thought.

It is this non-impinging tendency that makes speech special and distinct from other behaviors in much the same way that thought is, and that likely influenced the Framers to endow it with a general protection from government regulation. If so, the only speech that should be regulated is the kind that does not have this non-impinging quality, that is, speech that directly interferes with the liberty of others. This view was originally promoted by Cato, who described free speech as “the right of every man, as far as by it he does not hurt and control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know.”

Certainly, some speech does operate as a restraint upon others’ liberty and therefore is not entitled to exemption from regulation. As Justice Holmes famously explained in *Schenck v. United States*: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.” Holmes’s remark hints at what makes such speech subject to regulation. It is speech that goes beyond merely persuading or urging others to act. Indeed, few people consider persuasive or even “pushy” speech constraining because it is well within the power of a competent adult to resist its encouragements. But shouting “fire!” in a crowded theater in effect “hijacks” the will of another, and thus does not resemble simple thought-conveying speech with its minimal effect on liberty. It is speech that is intended to, and does, deprive persons of their ability to choose the actions they otherwise would have chosen to engage in. It is therefore not the kind of speech the Free Speech Clause specially protects.

Speech that facilitates the commission of a crime likewise interferes with individuals’ liberty. It is this impact that the Supreme Court was referring to in *Giboney v. Empire Storage & Ice Co.* where it observed that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” In crimes such as the solicitation

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94 *Trenchard & Gordon*, supra note 46.
95 249 U.S. 47, 52 (1919) (citation omitted).
97 *Id.* at 502.
of murder or extortion of money, or with the threat of violence that accompanies a robbery, the speaker is using speech as a means of bringing about an end that is itself criminal. In such instances, speech functions something like a weapon to reduce the freedom of another. Accordingly, such speech can be regulated because it does not have the non-impinging quality of the speech the First Amendment protects.

What made speech special to the Framers could very well have been its similarity to thought and the extent to which it often shares, with thought, a characteristic non-impinging quality. Certainly, this aspect of speech was—and is—well appreciated. And it is more plausible as a basis for the Clause's special protection of free speech than that proposed by the political speech theory, especially given the broad nature of the protection implied in the general language of the Clause itself.

VI. THE WORKABILITY OF THE RESULTING LEGAL STANDARD

The idea that the First Amendment protects all speech, except speech that interferes with the liberty of others, implies a fairly straightforward analysis for contested speech. The focus of such an analysis should be on whether the speech at issue interferes with the ability of persons to do what they would choose to do, and therefore should be susceptible to regulation. Such would be the case with speech that misleads persons into doing what they would otherwise prefer not to do (as would falsely yelling “fire!” in a crowded theater) or that forces them to act contrary to their actual desires (as extortionate speech does).

Such an approach contrasts with the complicated evaluation needed to political speech theory. In practice, political speech has proven difficult to identify, even when defined in the narrow sense of being about speech that directly facilitates self-government.98 For example, in Connick v. Myers,99 the Supreme Court parsed a survey, administered by an assistant district attorney to her colleagues about the functioning of that office, to determine whether it qualified as political speech.100 The five Justices in the majority rejected the idea that the questions in the survey were sufficiently political to be protected, while the four Justices in dissent reached the opposite conclusion.101 Whether speech has political impact or

98 See, e.g., Bork, supra note 16, at 27 (“The category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel . . . .”).
100 Id. at 141.
101 Id. at 154, 163.
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significance is evidently difficult to ascertain. Furthermore, political speech theorists do not even agree on whether political speech should be defined as narrowly as the Court did in Connick. Proponents often define speech in the broader sense of speech that contributes to public discourse and social norms. However, such a definition gives even less guidance to a court as to what is and is not constitutionally-protected speech.

For example, Sunstein proposes that nonpolitical speech may not be regulated unless there is “a persuasive demonstration that a strong and legitimate government interest is promoted by the regulation at issue.” However, what constitutes the showing of a “strong” and “legitimate” government interest is seemingly subjective. Advertising for unhealthful products, pornography that dehumanizes women, video games that exalt violence, electrical wiring instructions for amateurs, and music and fiction valorizing recreational use of narcotics are a few among many examples of expression that government could be said to show a “strong” and “legitimate” interest in regulating, in the interest of people’s health and safety. It would be a guess as to what paternalistic regulations of speech would and would not be permitted under such a standard.

On the other hand, these examples are readily recognizable as instances of speech that do not impinge upon the liberty of others—they do not prevent other persons from being able to choose to do what they would prefer to do. Of course, hard cases could still arise—say, whether graphically violent video games cause minors to become violent and therefore amount to a constraint on others’ liberty—but such questions can be examined through an empirical lens to see if there is actual evidence of such an impact. But whether speech qualifies as “political”—or whether government can show a “strong” and “legitimate” interest in regulating it—is neither

102 Kent Greenawalt has observed that “distinguishing political speech from other kinds of speech is extremely difficult.” Kent Greenawalt, Speech, Crime, and the Uses of Language 233 (1989).
103 See Bork, supra note 16; Post, supra note 31.
104 See, e.g., Post, supra note 31, at 621; Weinstein, supra note 31, at 502. See also Sunstein, supra note 13, at 130–31 (“For present purposes I mean to treat speech as political when it is both intended and received as a contribution to public deliberation about some issue. This is a broad standard. It categorizes all speech that bears on potentially public issues as falling within the free speech core. It is unnecessary to show that the relevant speech specifically calls for some change in the law, or tells government to do something. Public deliberation can deal with social norms as well as with legal requirements.”) (emphasis added).
105 Sunstein, supra note 13, at 123.
capable of precise determination nor susceptible to empirical resolution.

Simply because the political speech theory does not provide for a very workable constitutional standard does not by itself disprove the notion that the Framers intended the Free Speech Clause to focus on political speech, but it is another factor that undermines the persuasiveness of that theory. Not only does the Free Speech Clause itself lack any indication that it is supposed to be focused on “political speech,” 106 but there is no reason to believe that the Framers would have necessarily seen such a concept as giving rise to a reasonably applicable standard.

A Free Speech Clause that protected speech unless that speech could be shown to interfere with the liberty of others would not only better adhere to the letter (and probable spirit) of the law, but would also be a more intelligible, more applicable standard.

VII. CONCLUSION

The First Amendment should be understood as protecting all speech and not as particularly addressing political speech. That prominent jurists and scholars have asserted that the Free Speech Clause is focused on protecting political speech has had a substantial impact on our understanding of the Free Speech Clause and has served to narrow its application in law. It is a theory that has largely rested on the premise that the Framers intended such a conception of the Clause. However, the historical evidence indicates that the Framers and those who influenced them were more ecumenical in their views, recognizing the importance of protecting nonpolitical as well as political speech, and perhaps not even making a conceptual distinction between these sorts of speech.

Some proponents have asserted nonetheless that the “logic” of constitutional construction leads to the conclusion that protection of political speech is the main or even sole object of the Free Speech Clause. But such logic requires a leap in the opposite direction of the general language of the Clause and the Framers’ stated concern for the protection of private rights.

This Essay’s alternative theory of what the Framers meant by free speech—that it was regarded as concomitant with thought and, in most instances, similarly non-impinging—is more consistent with the historical evidence, and proceeds from

106 U.S. CONST. amend. I.
more compelling logic. Further, this alternative theory of what speech is entitled to protection produces a more workable Free Speech Clause than does the political speech theory. In determining when regulation of speech is permitted, constitutional jurisprudence should not try to distinguish between political and nonpolitical speech but between speech that interferes with the liberty of others and speech that does not. Such an approach would more plausibly frame the issue, provide for more predictable application, and could promote the development of a more intelligible free speech doctrine. Supreme Court First Amendment jurisprudence that differentiates between political speech and other kinds of speech should be reconsidered, and the Free Speech Clause instead understood as creating a broad and general protection.

This conception of the Free Speech Clause also offers a better vision for our society. Under the political speech theory, it is quite possible to imagine a polity that allows the free exchange of political opinions, but that clamps down on whatever expressions in art, commerce, and science the majority of citizens happen to find objectionable. Such a conception fully achieves the aims of the Free Speech Clause as described by Meiklejohn as well as other political speech theorists, insofar as it fully protects those activities of thought and communication by which we govern. But there is good reason to believe the Framers actually had in mind such a general speech protection because it creates a better environment for human flourishing.

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107 Meiklejohn, supra note 12, at 255.
MARKETPLACE THEORY
IN THE AGE OF AI COMMUNICATORS

Jared Schroeder*

INTRODUCTION

The growing presence of artificially intelligent communicators as actors among self-governing citizens, particularly since the 2016 presidential election in the United States, has raised substantial concerns regarding the theoretical assumptions that have traditionally undergirded the marketplace of ideas conceptualization of the First Amendment. These concerns do not so much arise from the longstanding fear of *deus ex machina*—that we would create a “god from the machine”—but rather *de mundi machina*, which means to create “a world from the machine.” In other words, artificially intelligent (“AI”) entities bring with them the potential to substantially influence the world that humans *create* via the information and ideas each person encounters.

For this reason, AI communicators create concern because they increasingly influence the types and frequencies of ideas that individuals do and do not encounter within their virtual communities. These personal, self-selected online communities are characterized by individual decisions that citizens make regarding the types of information they wish to encounter. When AI actors become both the originators and carriers of massive amounts of information with individuals’ generally homogenous personal networks, the foundational theoretical framework of the marketplace of ideas theory—the Supreme Court’s most popular and longest-enduring tool for communicating how it understands freedom of expression—is threatened. The theory’s assumptions about the nature of truth, the nature of the human actors who take part in communicating

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1 Aside from being a popular literary tool that writers use to resolve difficult situations in their stories, *deus ex machina* can also be related more literally to the fear that humans will become subjects of the tools they create. German thinker Hannah Arendt discussed this concern in *Arendt, The Human Condition* 145–47 (1998). This fear is also depicted in numerous films. See, e.g., 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer Studios Inc. 1968); THE TERMINATOR (Orion Pictures Corp. 1984); EX MACHINA (A24 2015).

ideas, and the flow of information has been undermined; massive numbers of AI communicators are incompatible with the First Amendment’s marketplace of ideas.3

AI communicators are incompatible with self-governing citizens in the marketplace of ideas because they do not sleep, have families, vote, or become emotional. They also do not have any concern for their mortality or for a system of ethics.4 These communicators are, by their natures, an entirely new type of actor within the spaces philosophers and legal scholars have long conceptualized as a marketplace of ideas.5 Within these spaces, generally rational individuals who are for the most part free from government limitations on expression are capable of discerning truthful or correct ideas from false or wrong ones. Such an assumption was at the heart of English author and philosopher John Milton’s contention in Areopagitica that, “[w]here there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.” 6 Quite similarly, Justice Oliver Wendell Holmes, in introducing the marketplace metaphor into the United States’ legal vocabulary in 1919, concluded that “the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.” 7 As legal scholar Edwin Baker explained, the theory assumes “people are basically rational. People must possess the capacity correctly to perceive truth or reality.” 8 Crucially, the theory, and the assumptions that undergird it, was constructed based on assumptions about human processes regarding understanding and self-government that function substantially differently when AI communicators are taking part in the discourse.

Concerns about the marketplace theory itself are not new.9 The presence of AI entities, which represent only the vanguard of what scholars expect is to come regarding AI

4 GABRIEL HALLEVY, LIABILITY FOR CRIMES INVOLVING ARTIFICIAL INTELLIGENCE SYSTEMS 21 (2014).
6 JOHN MILTON, AREOPAGITICA AND OF EDUCATION 45 (George Sabine ed., Harland Davidson 1951).
8 BAKER, supra note 3, at 6.
functionality in the near future, merely exacerbates longstanding concerns regarding the assumptions of the theory.\textsuperscript{10} Scholars have long contended the theory’s conceptualization of the nature of truth, which assumes it is objective and generally universal to all, cannot be supported, and has long been disregarded.\textsuperscript{11} Others have emphasized that assuming individuals are rational and capable of making sense of the world around them fails to account for the vast array of human experiences that lead people to construct substantially different realities.\textsuperscript{12} People’s differing socioeconomic statuses, individual experiences, and societal roles can influence how individuals evaluate information.\textsuperscript{13} Thus, though individuals may generally be rational, that rationality will not always lead to the same conclusions about what is true or right. Similarly, scholars have noted the substantial differences in the availability of information for different groups and the fact that some messengers have the power to communicate ideas that others do not, meaning that those who have the most resources—rather than those who communicate the “truth”—often dominate the marketplace.\textsuperscript{14}

Exacerbating these concerns, the emergence and widespread adoption of networked technologies during the past few decades have provided AI communicators with an ideal environment in which to develop and interact with people in ways that were not possible in the past. The existence of such spaces has substantially shifted the nature of the marketplace itself. As much of political discourse has moved from physical forums to virtual ones, the way truth forms and the ways people create communities have changed along with them.\textsuperscript{15} Freed from the limitations of geographic boundaries when forming communities, individuals are increasingly joining interest-based collectives, which often, within the broader, fragmented, and


\textsuperscript{11} BAKER, supra note 3, at 6; Ingber, supra note 9, at 15.


\textsuperscript{13} ROBERT L. SCHAICH, WILLIAM JAMES’ PRAGMATISM 35–36 (1978); Ingber, supra note 9, at 15.


\textsuperscript{15} BENNETT & SEGERBERG, supra note 2, at 24; SUNSTEIN, supra note 2, at 108; Manuel Castells, The New Public Sphere: Global Civil Society, Communication, Networks, and Global Governance, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 84–86 (2008).
choice-rich overall marketplace, act as smaller, somewhat ideologically isolated community spaces. These communities have become, in many instances, walled gardens, which are smaller and less diverse, but more comfortable spaces, in which individuals are the primary architects. These environments are substantially different than traditional, physical, and societally constructed environments in which individuals have less control over how they present themselves and are faced with greater likelihood of social isolation if they act outside of expected or perceived community norms and values.

In other words, the choice-rich nature of online spaces has made it so that the broader marketplace has been replaced by fragmented, idea-based spaces where individuals often agree upon different truths than those in other communities. Across the Internet, for example, certain virtual communities have concluded that former United States President Barack Obama was born in Kenya and could not have legally been president. People in other communities have come to quite the opposite truth, finding the birther movement to be a disproven conspiracy theory. In this example, two versions of accepted realities persist, despite being in direct opposition to one another. This scenario is more possible and likely than it has been in the past because of the fragmented, interest-based virtual communities in which individuals communicate. Individuals, particularly in such a choice-rich environment, are more likely to accept


20 See SUNSTEIN, supra note 2, at 98–101.
information that reinforces their preexisting understandings and reject information that does not.\(^{21}\)

Thus, the marketplace metaphor, the dominant theoretical justification for freedom of expression protections in a democratic society, faces new problems regarding longstanding unresolved questions about its primary conceptual building blocks as we enter the fourth wave of the Internet. This fourth wave, Web 4.0, which has also been labeled the Symbiotic Web, is characterized by increasingly meaningful interactions and relationships between human and AI communicators.\(^{22}\)

This Article consists of five parts: Part I begins by examining the nature of these non-human communicators, as well as the networked environments in which they are flourishing. Part II examines how human discourse, in the form of intentional communities and other concerns, is changing as a result of networked communication. Part III examines the fundamental assumptions, as well as the primary concerns, that have historically surrounded the marketplace approach. Finally, in the absence of any specifically AI-related legal precedents in this regard, Part IV considers the conceptual rationales courts have used, particularly in regard to corporate speech and animal rights decisions, when deciding cases that involve non-human actors who seek human-like rights. Ultimately, in light of each of these considerations, Part V proposes a process-based approach for how the marketplace theory can remain functional in the era of AI communicators.

I. ARTIFICIAL ENTITIES AS ACTORS IN POLITICAL DISCOURSE

Although the Declaration of Independence promises that “all men are created equal,” the same cannot be said for AI communicators.\(^{23}\) Thus, while these entities have played substantial roles in the most recent major elections in the United States, France, and the United Kingdom, and are playing an increasing role in societal discourse, they cannot be understood as a homogenous group. In particular, substantial differences exist regarding whether AI entities are creating entirely new content or merely sharing or otherwise distributing existing messages. Similarly, these entities vary in their complexity, with

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\(^{22}\) Younghee Noh, Imagining Library 4.0: Creating a Model for Future Libraries, 41 J. ACAD. LIBRARIANSHIP 786, 789–90 (2015) (stating that Web 1.0 was characterized by massive information searchability and availability; Web 2.0 added increased content creation opportunities for citizen publishers, particularly via social media outlets; Web 3.0, the current wave, built upon these advancements, allowing for simpler connections between data and knowledge).

\(^{23}\) THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
some including only rudimentary capabilities and others possessing human-like capabilities when it comes to communication.24

**A. From Parking Tickets to Tinder Talk**

AI entities are created for a variety of purposes. Joshua Browder created “the world’s first robot lawyer,” a computer program that can help people get out of parking permits and receive flight refunds.25 Other programmers create AI actors to make money, such as those that sell followers for people’s Twitter accounts or views on YouTube.26 One of the largest contingencies of AI communicators in virtual spaces, however, are politics-related bots. These entities are created, at their most benign, to inform and persuade people about certain political beliefs and ideas. 27 At worst, however, they mislead and misinform.28 As bots have become easier to make, more and more people are creating them and using them as tools to communicate or spread ideas.29 Still, many of the political bots are attributed to domestic and foreign political actors who create and employ AI communicators to confuse or influence political

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discourse and remain relatively difficult to identify.\textsuperscript{30} About one-quarter of all Tweets that were posted about the 2016 presidential election in the United States were generated by non-human account holders.\textsuperscript{31} Similarly, just before the French presidential election in spring 2017, AI communicators posted thousands of Twitter messages, most of which were linked to false information.\textsuperscript{32} A few months later, partisans in the United Kingdom employed tens of thousands of bots on Tinder, the dating and hook-up app, to encourage younger voters to support Jeremy Corbyn, the Labour Party candidate.\textsuperscript{33} The Tinder bots automatically “swiped right,” thus indicating an interest in a match, on countless human users’ profiles.\textsuperscript{34} If the user also swiped right, the bot engaged them in a political, rather than romantic, dialogue regarding the Labour Party’s policies.\textsuperscript{35} In one example, the bot messaged, “heyy [sic] lovely. You gonna [sic] vote in the election? & for who?” and followed this with “The vote is so close and under 25s [sic] could actually swing it!!”\textsuperscript{36} Importantly, as with many interactions with AI communicators in networked spaces, the communicator impersonated a human and did not disclose its non-human nature.

AI communicators are doing more than working to influence elections. They are also producing substantial amounts of political rhetoric. During the debate in February 2018 that surrounded the Nunes memo, which accused the FBI of abusing its power while investigating Trump’s connections to Russia


\textsuperscript{34} Id.

\textsuperscript{35} Id.

during the 2016 United States election, thousands of bot-based accounts retweeted messages using the hashtag #releasethememo.  

Many of the posts tagged specific members of Congress, creating what could have easily appeared to be a real, grassroots effort by the public to call for the memo to be released. In an eleven-day span, certain Republicans were tagged in #releasethememo posts more than a half a million times. While the hashtag itself emerged organically, it was quickly picked up by bot programmers and used to create a unifying tool in certain partisans’ efforts to essentially create a world using the machine, the very *et de mundi machina* discussed earlier.

In response to these bots, humans would have a tough time contending with the deluge of regurgitation. When congressional staffers attended to lawmakers’ social media accounts, they were flooded with tens of thousands of messages per day, most of them from non-human communicators, calling for the memo’s release. Conversely, it would be extremely difficult for human publishers to communicate differing ideas and to have them appear in any comparable quantity within such a forum. Thus, the bots essentially flooded the marketplace with their “product,” pushing out human discourse and creating an alternate reality for those who viewed the messages in which their constituents wanted the memo released.

Bots were similarly weaponized after the March 2017 Westminster Bridge attack in London. As Great Britain reeled from the attack that killed five people and injured dozens more, bot-based accounts began to circulate a picture of a woman in a hijab who was walking by a crowd of people as they sought to help an injured person. The message read, “Muslim woman pays no mind to the terror attack, casually walks by a dying man . . . #PrayForLondon #Westminster #BanIslam.” Of course, the words took the image out of context, a fact that news organizations later established by speaking with the woman.

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38 Id.
39 Id.
40 Id.
41 Id.
43 Id.
44 Id.
The initial tweet regarding the image, which came from an account called Texas Lone Star (@SouthLoneStar), was from a Russian bot.\textsuperscript{45} The account had nearly 17,000 followers.\textsuperscript{46} White nationalist Richard Spencer quickly retweeted and commented on the image, using it to fuel his followers’ beliefs on social media.\textsuperscript{47} His tweet was liked by nearly one-thousand others and, as information flows in networked spaces, was almost certainly shared across others’ self-constructed, personal networks.\textsuperscript{48} Thus, in these instances, AI communicators were manipulated by certain interests and used to flood the marketplace with ideas that appeared to be conveyed by humans. The ideas moved seamlessly into the information flows that take place within virtual spaces and were received by many people, including those in positions of power.

Broadly, these communicators, with their fundamentally non-human natures, are often indistinguishable from human speakers and capable of spreading misleading or false information. By doing so, AI communicators can overwhelm the marketplace with a single product or idea.

\textit{B. Content Sharers vs. Content Creators}

The bots that were involved in the incidents discussed in the preceding passages, while important in considering the future of the marketplace, were relatively limited in their capabilities. They are best classified as content movers or communicators. These entities are more comparable to newspaper carriers than content creators or speakers, who share more in common with writers who craft messages.\textsuperscript{49} Other types of bot-based accounts, however, are creating new content regarding matters of public concern and thus coming much closer to resembling the characteristics of human speakers. Every Trump-ette (@everytrumpette), for example, was a Twitter-based bot that was programmed to draw fifteen-second snippets from then-candidate Trump’s speeches and combine them with a picture of the crowd from one of his rallies.\textsuperscript{50} As the audio clip plays, the image focuses in on a single person in the crowd.\textsuperscript{51} The profile’s

\textsuperscript{46} Dixon, \textit{supra} note 42.
\textsuperscript{48} Id.
\textsuperscript{50} Every Trumpette (@everytrumpette), TWITTER, https://twitter.com/everytrumpette, (last visited Nov. 13, 2018).
\textsuperscript{51} Id.
description on Twitter reads: “looking into the eyes of every trump [sic] fan.”52 This AI content-creator is different in kind from AI content-movers.

Similarly, other AI content-creators are a degree more innovative. Erowid Sarah Palin (@SarowidPalinUSA) was programmed to take parts of the former Alaska governor’s political speeches and combine them with entries from Erowid Experience Vaults, an online forum for people to describe what happened to them when they were high.53 The combinations included “[o]ur government needs to begin to show the same kind of range and adaptability as the mind on hallucinogens” and “I wasn’t nervous but as the colors began to waver I realized that everything was wrong. Crying. He isn’t going to make America great again.” 54 Comedian Stephen Colbert worked with programmers to create Real Human Praise (@RealHumanPraise), a bot that combines passages from movie reviews on Rotten Tomatoes with Fox News program names and personalities.55 It tweets every two minutes with messages such as “Mike Huckabee skillfully guides the audience through Huckabee’s fractured narrative, seeping his show in existential dread,” and “[w]hen Sean Hannity’s Hannity arrived in 1985, it set a benchmark in horror-comedy that few productions have matched since.”56

In these instances, AI communicators were programmed to draw information from constantly changing pools of data to create content that reached thousands of followers. Thus, the original programmer did not determine the content of the messages, only the pools from which they were drawn and their maximum length. The growing presence of content-creating AI entities raises a variety of questions about the future of the marketplace theory. In the preceding section’s examples, the primary concern was that the non-human communicators were effectively flooding the market with ideas, thus pushing out actual human discourse, and as a result, creating a world or conceptualization of the environment that would lead citizens to believe public opinion regarding a matter of concern is substantially different than it is in reality. The content-creating

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52 Id.
54 Id. (Nov. 7, 2016, 7:57 PM), https://twitter.com/SarowidPalinUSA/status/795837654344617984.
bots add another dimension to these concerns. The AI communicators are more autonomous in the messages they create and thus the nature of the ideas they contribute. When considered individually, such a concern might seem slight. When examined with the understanding that millions of these entities are performing such actions, however, it becomes clear the marketplace can easily be flooded by bot-based babble. These millions of messages by non-human entities substantially undermine the foundational assumptions of the marketplace metaphor: generally rational people will in most instances be capable of separating truth from falsity so long as the government has only limited influence in the marketplace.\footnote{See infra Section III.}

\textbf{C. Weak AI vs. Strong AI}

Despite these advancements in non-human communicators, fourth-wave iterations of these entities are generally classified as forms of “weak AI.”\footnote{STUART J. RUSSELL & PETER NORVIG, ARTIFICIAL INTELLIGENCE: A MODERN APPROACH 947 (2d ed. 2003).} Scholars classify weak AI as entities that can only recreate certain aspects of human thought or activity online.\footnote{JOHN FRANK WEAVER, ROBOTS ARE PEOPLE TOO: HOW SIRI, GOOGLE CAR, AND ARTIFICIAL INTELLIGENCE WILL FORCE US TO CHANGE OUR LAWS 3 (2014).} The #releasethememo and Westminster Bridge attack bots, for example, were capable of sharing information throughout networked environments. Erowid Sarah Palin and Real Human Praise added the capability of creating content and making it available to others.\footnote{See supra Section I.A.} Despite these emergent capabilities, these weak AI tools are limited in what they can accomplish, particularly regarding replicating human behavior. Strong AI, on the other end of the spectrum, represents entities that can exceed human capabilities and interact in social situations as a person would.\footnote{See, e.g., Anmar Frangoul, Alphabet’s DeepMind Uses A.I. To Detect Signs of Eye Disease, CNBC (Aug. 14, 2018, 4:42 AM), https://www.cnbc.com/2018/08/14/deepmind-uses-ai-to-detect-signs-of-eye-disease.html; Douglas Heaven, The World’s Most Prolific Writer is a Chinese Algorithm, BBC (Aug. 29, 2018), http://www.bbc.com/future/story/20180829-the-worlds-most-prolific-writer-is-a-chinese-algorithm.} While corporations such as Microsoft and Google are working on entities that can teach themselves through interacting with their environments, strong AI technology, for now, generally remains more of an idea than a reality.\footnote{Heaven, supra note 61; see also DEEPMIND, supra note 10; picdescbot (@picdescbot), TWITTER, https://twitter.com/picdescbot?lang=en (run by Microsoft Cognitive Services, this AI draws images from Wikimedia commons and seeks to describe what is in the images. While it occasionally succeeds, it often fails terribly).}
The limitations of weak AI entities do not make them easy to dismiss when considering the future of the marketplace of ideas. Although it is difficult to identify all account holders as human or non-human, such entities represent about 50 million, or 15 percent of all of Twitter’s users. The accounts are triggered to tweet at certain times, retweet certain messages, or to automatically respond to messages with certain key words or hashtags. Similarly, about 25 million of the more than 700 million Instagram users are bots. Bots on Instagram are often used to make certain accounts more prominent, to give them more legitimacy, or garner more interest online. When Instagram users buy bots to increase their presence, they are essentially purchasing influence in the marketplace. The sharing-based bots can automatically like and spread everything a social media user posts, thus broadcasting posts throughout virtual spaces and increasing the apparent popularity of the messages and, as a result, the impact of the account holder in the network. While such a process violates Instagram’s terms of service agreement, these entities persist as difficult-to-pin-down operators in these spaces. In short, the sheer volume of weak AI created material skews the market’s supply of ideas toward non-human communicators.

Relatedly, algorithms, computer programs that can sift through and organize unprecedented amounts of data, are a form of weak AI but they cannot be dismissed as unimportant influencers in today's marketplace of ideas. Algorithms are simply computer programs that provide step-by-step guidelines for resolving complex problems. Search engines such as Google use algorithms to sort through countless potential results to present Internet users with the information they seek. Of
course, these algorithms do not simply gather all of the potential responses. They include considerations such as the searcher’s location, the site’s traffic numbers, and the user’s past searches to organize the information.\textsuperscript{72} Similarly, Facebook’s news feed algorithm decides which items, out of countless possibilities, appear atop users’ apps and browsers when they use the social media outlet.\textsuperscript{73} One study, which was conducted by Facebook employees, explained that the social media giant’s algorithm considers how often a viewer visits the site, which people and groups they interact with, and which links they click on.\textsuperscript{74}

Social media algorithms have unprecedented control over how and what ideas are taken from the marketplace and presented to people. Facebook’s algorithm, because of the way it interprets users’ activities on the site, limits the range of political ideas people encounter.\textsuperscript{75} Facebook’s algorithmic choices have not gone unnoticed.\textsuperscript{76} In 2016, Facebook was accused of deliberately suppressing conservative information in its trending topics section.\textsuperscript{77} A year later, during the massive women’s protest marches that coincided with President Trump’s inauguration, Facebook was criticized for limiting attention to the protests in the same trending spaces.\textsuperscript{78} In 2018, the corporation shifted the algorithm’s preferences to place greater emphasis on posts from people with whom users are connected.\textsuperscript{79} In each of these instances, these algorithms, computer programs that can sift through and organize unprecedented amounts of data, have

\textsuperscript{72} Id. See also \textsc{Van Dijck}, \textit{supra} note 69, at 37 (explaining how Google’s “vertical integration of search engines, operating systems, browsers, user-based software systems, online advertising systems, content providers, and a host of other functions guarantees more control over the end-user experience and hence over user data”).

\textsuperscript{73} Will Oremus, \textit{Who Controls Your Facebook Feed}, \textsc{Slate} (Jan. 3, 2016, 8:02 PM), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html.

\textsuperscript{74} Eytan Bakshy, Solomon Messing & Lada A. Adamic, \textit{Exposure To Ideologically Diverse News and Opinion on Facebook}, 348 \textsc{Science} 1130, 1131 (2015).

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 1130.

\textsuperscript{77} Nellie Bowles & Sam Thielman, \textit{Facebook Accused of Censoring Conservatives, Report Says}, \textsc{Guardian} (May 9, 2016, 12:10 PM), https://www.theguardian.com/technology/2016/may/09/facebook-newsfeed-censor-conservative-news.


substantial power to determine which ideas become prominent and which ideas do not in the marketplace.\textsuperscript{80}

These algorithms are different than bots in that they do not actively communicate messages. Instead, they are limited to acting as gatekeepers to the ideas individuals encounter. Since private corporations maintain and hold these tools, their actual instructions regarding how information is to be organized and communicated remain unavailable to the public. Private ownership of algorithms and the virtual spaces in which they function has led to congressional hearings and garnered substantial media attention regarding the power of corporations to act as relatively arbitrary store managers within the marketplace.\textsuperscript{81} These corporations can decide which ideas will and will not be presented to individuals.\textsuperscript{82} Scholars have already established that AI communicators can convey the biases of their creators or limit ideas in their efforts to learn from their interactions with individuals.\textsuperscript{83} Thus, while algorithms might be considered one of the weakest forms of AI, they hold substantial power to determine the ideas that enter the marketplace.

\section*{II. \textbf{Intentional Communities and AI Actors}}

Human ideas can spread if the right environment exists; non-human ideas are the same. Although the actions of algorithms and AI communicators, particularly within political discourse, are crucial to understanding the challenges the marketplace approach faces in the networked era, the environment in which these entities thrive must also be considered.

\textsuperscript{80} See \textsc{Van Dijck}, supra note 69, at 37.


For more than half a century, AI communicators were imprisoned in mainframes and on desktop computer hard drives. The widespread adoption and development of the Internet was their ticket to freedom. It was the development of the World Wide Web, particularly since Web 2.0, which included the emergence of social media sites, that such entities have found an environment in which communication with people does not require human form. Indeed, the lack of physical presence is one of the crucial aspects of the shift to discourse in networked spaces—for AI entities and human actors alike. As the famous *New Yorker* cartoon explained at the beginning of the networked communication revolution in 1993: “On the Internet, no one knows you’re a dog.”

This shift has influenced both how individuals represent themselves and the types of information they encounter. Additionally, the lack of a physical presence online allows AI communicators to seamlessly interact with people and connects them to the much larger innovation, which is the ability of anyone with an Internet connection, anywhere in the world, to form a community with distant others. In other words, online communication made it so that time and space no longer limit the ideas and individuals that a person can encounter every day. Such a shift has substantial consequences for discourse in democratic society, particularly regarding how individuals understand themselves, others, and the information they encounter. In shifting how individuals understand themselves and others, as well as empowering people to limit the ideas they encounter, the choice-rich online environment can substantially distort the flow of the marketplace of ideas. Much as Amazon creates personalized marketplaces when it tracks peoples’ buying choices and searches and uses them to suggest future purchases, in the networked era, individuals essentially create their own marketplace of ideas. While convenient, both instances act to limit the spectrum of ideas individuals encounter.

A. Networked Identities

AI communicators fit more seamlessly into the marketplace of ideas and discourse in virtual spaces because

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85 See Noh, * supra* note 22, at 790.
human beings have already come to understand and represent themselves differently in such forums. The environments in which people communicate have always influenced identity and self-representation. The choice-rich, global, sharing-based, and often anonymous nature of virtual spaces, however, has allowed individuals to both intentionally construct carefully selected identities and, less purposively, to adjust the type of discourse in which they engage. Sociologist Manuel Castells emphasized that the emergence of networked communication tools has essentially rearranged the identity-forming influences in society. Castells concluded: “[a]lthough each individual human mind constructs its own meaning by interpreting the communicated materials on its own terms, this mental processing is conditioned by the communication environment.” Thus, the shift from identity forming interactions that were generally conducted in physical environments to interactions that occur in virtual spaces with unbounded geographical concerns has undermined locally and regionally based influences on identity formation. These globally based identities challenge the assumption of locally influenced communities of understanding.

Individuals now find solidarity and support for their beliefs and ideas in virtual spaces, which do not include the same socializing and shared-experience-building ingredients as traditional influencing institutions in their physical environments. In other words, networked spaces substantially broaden the potential range of influences in their choice-rich forums and allow individuals to limit their exposures to the types of ideas they would normally encounter in physical spaces. For example, a person in their physical environment might have found their belief in an extreme political or religious view unpopular and might have abandoned it. In networked spaces, they can find others who have similar beliefs and thereby further cultivate their otherwise unpopular understandings.

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88 See Papacharissi, supra note 17, at 207–11; Sherry Turkle, Reclaiming Conversation: The Power of Talk in a Digital Age 23 (2015) [hereinafter Turkle, Reclaiming Conversation].
90 Manuel Castells, Networks of Outrage and Hope: Social Movements in the Internet Age 5–7 (2015) [hereinafter Castells, Networks of Outrage].
91 Id. at 6.
93 Jenkins, supra note 92, at 27.
94 Castells, Power of Identity, supra note 92, at 6–12 (2010); see also Sunstein, supra note 2, at 9–10.
isolated ideological groups can embolden individuals to act out those beliefs where they live.  

The nature of virtual spaces is also influencing how individuals understand themselves. People have always been intentional about how they represent themselves to others.  

In virtual spaces, however, individuals can manipulate their identities by taking advantage of the lack of physical presence, a factor that is also significant for AI communicators. People generally represent themselves favorably online, highlighting personal successes and ignoring failures and aspects of their identities that they interpret as being potentially unpopular. Such carefully curated representations are more possible today because individuals generally act as gatekeepers to their identities in virtual spaces, whereas in physical spaces, people cannot as easily hide their negative behaviors, telling aspects of their appearances, or failures. In short, there are no Instagram filters for real life.

When individuals curate their online selves, they create feedback loops where those behaviors that are most consistently reinforced, via likes, shares, comments, and retweets, are repeated and highlighted on social media, while those behaviors that are not reinforced are ignored.  

As Sherry Turkle, a pioneer in studying how networked tools influence human behavior, explained, “you train yourself to post what will please.” Cumulatively, when members of intentionally formed, interest-based communities online are repeating this process of self-representation and reinforcement on a daily basis with others, the virtual self can gradually become a relatively narrow, more two-dimensional version of a person’s actual identity. Turkle found that, as we build our online selves, “[w]e recreate ourselves as online personae . . . . Our new media are well suited for accomplishing the rudimentary. And because this is what technology serves up, we reduce our expectations of each other.”

Those who program AI communicators have become particularly adept at emulating such limited self-representation patterns online. As a team of computer scientists explained,

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95 Castells, Networks of Outrage, supra note 90, 5–7.
96 Goffman, supra note 89, at 51–53.
98 Turkle, Reclaiming Conversation, supra note 88, at 41.
99 Id.
100 Sherry Turkle, Alone Together: Why We Expect More From Technology and Less From Each Other 11–12 (2011) [hereinafter Turkle, Alone Together].
social bots can “infiltrate popular discussions, generating topically interesting—and even potentially interesting—content, by identifying relevant keywords and searching online for information fitting that conversation.” 101 A curated online identity, influenced by AI communicators, can distort a person’s real identity and subsequent contributions to the marketplace of ideas.

The types of messages and ideas individuals most often communicate in virtual spaces further reinforce this more two-dimensional nature of online identity and open the door to AI entities. People have less control over whom they speak with online. 102 Certainly, individuals generally construct networks of like-minded individuals online, but those networks, whether they include hundreds, thousands, or more, often include different constituencies. 103 Such constituencies can make fine-tuning a tweet or post with the intent of reaching a particular group of people difficult as the individual seeks to act out their online identity. Furthermore, people are aware their messages can be shared outside their immediate network, often without context or with comments that can change the nature of the intended message. 104 Hence, as communication scholar Zizi Papacharissi concluded, “[t]he individual must then engage in multiple mini performances that combine a variety of semiological references so as to produce a presentation of the self that makes sense to multiple audiences.” 105 As a result, online communicators tend to limit the amount of subtlety and nuance people include in their messages. Rather than the more surgical efforts made in physical spaces with body language and other in-person social cues, they produce simpler, more blunt messages online. Broadly, online communication, by its nature, lends itself to being less personal and more limited in depth. Such simplified, less nuanced communication makes it easier for AI communicators to interact with humans without their knowledge.

B. Networked Communities

Taken as a whole, rather than as a series of individual identity and message decisions, the nature of human discourse in virtual spaces encompasses a continuous flow of interactions among individuals and ideas that are generally influenced by the unique self-representation efforts and limitations inherent in online discourse. When considered on a larger scale, the

101 Ferrara et al., supra note 84, at 99.
102 Papacharissi, supra note 17, at 209.
103 Id.; see also Van Dijck, supra note 97, at 202–03.
104 See Papacharissi, supra note 17, at 209.
105 Id.
community level, these aspects of discourse in virtual spaces become particularly important when it comes to understanding the marketplace of ideas in the twenty-first century. In particular, virtual communities, by their nature, are different from more traditional communities in crucial ways. These differences are substantially associated with the previous section's concerns regarding how individuals understand themselves and others in virtual spaces. Network communication scholars classify the relationships individuals share within social networks, in person or online, in terms of strong and weak ties. A “tie” refers to any type of relationship that exists “between communicators wherever they exchange and share resources such as goods, services, social support or information.” People who share enduring relationships exchange social capital by interacting with and helping each other. Those who have weak ties with others in their communities share limited social capital and are therefore less likely to trust others or interact with them in meaningful ways. Crucially, scholars have found individuals do not establish the same types of bonds in virtual spaces as they have historically formed in physical spaces.

Political scientist Robert Putnam explained how the nature of online tools changes how people interact. He found people who play cards in person, for example, construct stronger ties by talking before, during, and after the games. The social capital that is generated during these in-person interactions is more likely to lead to greater trust and a more meaningful understanding among such individuals. In card games in virtual spaces, the talk is lost. People focus on winning because the form of media generally limits the personal elements of the

107 See supra Section II.A.
108 Haythornwaite, supra note 17, at 386.
109 Id.
111 People are more likely to effortlessly join and leave online communities, such as forums, message boards, or Facebook groups. Joining and leaving online groups does not require the same amount of human interaction as in-person communities, where a person introduces you to others and offers to answer your questions. When people do not share strong bonds, they do not see others in the group as human and are less likely to trust them or consider their ideas seriously. See PUTNAM, supra note 110, at 104–05; Haythornwaite, supra note 17, at 386; TURKLE, ALONE TOGETHER, supra note 100, at 280–83.
112 PUTNAM, supra note 110, at 104–05.
113 Id.
114 Haythornwaite, supra note 17, at 386; TURKLE, ALONE TOGETHER, supra note 100, at 280–83.
115 PUTNAM, supra note 110, at 104–05.
interaction. As in other instances, the nature of virtual forums provides ample opportunities for AI communicators to seamlessly join online communities and take part in discourse. When a person plays cards online with strangers, it hardly matters whether those unknown others are human or not. In fact, very little of the experience humanizes the other players. Of course, these concerns expand to interactions that are more consequential than online card games. The relatively weak ties that individuals share online make them less trustworthy of each other and lead to consistent turnover in online communities as lightly committed individuals disconnect and move on as their interests wax and wane. In other words, virtual communities are generally weakly tied communities.

While individuals generally share less meaningful bonds with others in virtual spaces, the global, choice-rich online environment has allowed people unprecedented selectivity regarding whom they wish to engage with, which has led to widespread, interest-based engagement. Thus, the often-weaker bonds individuals share online does not limit engagement, it merely changes its nature. Importantly, the result of the combination between weaker ties and more choice has led to the formation of a multiverse of marketplaces in which individuals both intentionally and unconsciously limit the spectrums of ideas and other citizens they engage with. Political scientists Shanto Iyengar and Kyu Hahn found such a choice-rich environment leads to citizen-constructed echo chambers where individuals “limit their exposure to news or sources that they expect to find agreeable. Over time, this behavior is likely to become habituated so that users turn to their preferred sources automatically no matter what the subject matter.”

Of course, the creation of such intentional communities raises significant concerns regarding the functionality of a conceptual, shared marketplace. When individuals self-select the information sources they interact with, the range of products, or ideas, in the marketplace becomes limited. In other words, fragmented communities can become relatively empty storefronts, where only a few generally accepted ideas are

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116 Id.
117 JENKINS, supra note 92, at 57.
119 Iyengar & Hahn, supra note 118, at 34.
considered. Legal scholar Cass Sunstein made such a concern central to #Republic, in which he lamented the fading roles of the “general interest intermediaries,” such as daily newspapers, and of shared experiences that bind a society together.\footnote{Sunstein, supra note 2, at 41–44.} Both of these tools—the information sources that individuals once used to construct a common baseline of understanding about the world around them and the experiences that supported an idea of nationhood—have in many ways become casualties of the networked era.\footnote{For a discussion of how media help to influence how individuals construct understandings of nationhood, see generally Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism 6–26 (2016).}

When individuals essentially construct their own personal marketplaces of ideas, limiting the spectrum of information and speakers they encounter, it becomes far easier for AI communicators to spread false information. While the Court has repeatedly expressed that protecting some false expression can protect the marketplace, and therefore should be safeguarded, echo chambers filled with belief-affirming information that is false causes fundamental harm to the assumptions that truth will rise and falsity will fail in the marketplace of ideas.\footnote{New York Times v. Sullivan, 376 U.S. 254, 271–72 (1964); United States v. Alvarez, 567 U.S. 709, 718–19 (2012); Gertz v. Welch, 418 U.S. 323, 339–40 (1974).} Such a conclusion aligns with the Court’s conclusion in Hustler v. Falwell.\footnote{Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).} In its opinion, the Court emphasized, “false statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas.”\footnote{Id. at 52.; see also Gertz, 418 U.S. at 340.} The nature of these self-made marketplaces align with concerns raised by Iyengar and Hahn. They concluded that when individuals turn their information networks into echo chambers, they come to expect the information to reinforce their existing understandings, rather than allowing their beliefs to be challenged by new information.\footnote{Iyengar & Hahn, supra note 118, at 34.} Thus, false information that aligns with the accepted narratives within the intentional community is far more likely to be accepted as truthful. For example, after seventeen people were killed and dozens more were injured in a school shooting in Florida in February 2018, AI communicators played influential roles in the gun-rights-related discourse that followed.\footnote{Sheera Frenkel & Daisuke Wakabayashi, After Florida School Shooting, Russian ‘Bot’ Army Pounced, N.Y. TIMES (Feb. 19, 2018), https://www.nytimes.com/2018/02/19/technology/russian-bots-school-} First, bots engaged with the existing hashtag,
#Parklandshooting, spreading false information about the shooting suspect’s interest in Islam and framing his work as that of a “lone wolf” rather than a part of a larger problem regarding gun violence in the United States.\textsuperscript{127} Second, the bots were used to amplify extremist opinions that were created by human actors. One account, @Education4Libs, tweeted that the shooter was a registered Democrat and a member of Antifa.\textsuperscript{128} The account has nearly 250,000 followers and researchers have identified it as one of the accounts that bots most target by retweeting and magnifying its messages as well as tweeting at it with similar ideas.\textsuperscript{129} Essentially, the human-run account does the work of creating the messages and share bots simply spread it throughout their connections across networked spaces. Thus, discourse in these circumstances suffers both from the fragmented communities that are more susceptible to the false and misleading narratives that are spread by AI communicators and the magnification of otherwise limited ideas facilitated by sharing-focused bots. When a market of competing products is overrun with an avalanche of counterfeits, the market has failed.

As Sunstein contended, when individuals communicate only with like-minded others, as the choice-rich virtual spaces allow, they can only become more extreme in their positions, not less.\textsuperscript{130} Furthermore, individuals’ decisions to limit the expansiveness of their personal networks are not purely driven by their desire to be surrounded by like-minded individuals. The sheer size of virtual spaces, when considered without the communities’ individuals construct, are too vast in terms of information and choice for individuals to avoid certain spectrum-limiting decisions. Thus, individuals must choose to construct a network, ultimately providing a semblance of locality to a space that lacks physical presence. In this regard, Castells concluded individuals shrink “the size of the human experience to a dimension that can be managed and defended by people feeling lost in the whirlwind of a destructured world.”\textsuperscript{131} It is in this effort to restructure a fragmented, choice-rich world that

\textsuperscript{127} Id.
\textsuperscript{128} Educating Liberals (@Education4Libs), TWITTER (Feb. 15, 2018), https://twitter.com/Education4Libs; Mary Papenfuss, Russia-Linked Accounts Exploit Parkland Shooting on Twitter, Analysts Say, HUFFINGTON POST (Feb. 15, 2018), https://www.huffingtonpost.com/entry/bots-exploit-parkland-tragedy_us_5a860acce4b05c2bcac9fda0.
\textsuperscript{129} Griffith, supra note 126; Papenfuss, supra note 128.
\textsuperscript{130} SUNSTEIN, supra note 2, at 69–70.
\textsuperscript{131} CASTELLS, Power of Identity, supra note 92, xxiii–xxvi.
individuals limit the scope of the ideas they encounter and, at the same time, AI communicators become particularly influential in magnifying certain ideas, creating content, and engaging in discourse with citizens.

C. Ownership

Finally, before focusing on the marketplace metaphor itself, the nature of virtual spaces as forums for expression must be considered. Networked spaces, while they in many ways mimic the types of traditional public forums that for “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,” are privately controlled by the corporations that provide the spaces. They are thus more comparable to a department store than to a public park. The owners welcome visitors to their property, but if someone becomes disruptive or communicates ideas that are unpopular, they will be removed. Search engines and social media sites, the primary spaces in which AI communicators function and where substantial amounts of democratic discourse now occur, can be regulated by the whims of those who own them.

While the owners of such spaces have generally professed support for freedom of expression, they continuously face economic, political, and social pressures to limit expression in ways that would violate traditional conceptualizations of the First Amendment. Twitter and Facebook, for example, regularly block and shut down accounts. Facebook removed Myanmar’s senior military leaders’ accounts in August 2018.

135 For examples where the Supreme Court interpreted the First Amendment as protecting speech that would often be removed from social media sites, see Snyder, 562 U.S. at 443; Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971).
and, in October 2018, took down more shadowy accounts in Myanmar that appeared to be entertainment-based, but were actually run by the military. \(^{137}\) Of course, these actions were too late to help the more than 700,000 Rohingya Muslims who were forced from their homes after military attacks and ethnic violence, which many attributed to a propaganda effort that relied primarily on Facebook. \(^{138}\) Twitter has worked with the government to delete millions of accounts that are believed to be associated with terrorist organizations. \(^{139}\) The social media company has also purged countless accounts that were believed to be harmful political bots, a move which drew the ire of many conservative leaders. \(^{140}\) Similarly, Instagram deleted millions of harassing or spamming accounts in 2014. \(^{141}\) While the reasoning behind deleting these accounts might be generally agreeable, the companies' decisions reinforce the fact that these spaces are privately held and that traditional First Amendment barriers to limiting speech are not present. \(^{142}\) Furthermore, the corporations that own such spaces are not motivated by the necessity for democratic discourse. Therefore, the emergence of virtual marketplaces in networked spaces brings with it a change in the general freedom of expression regime under which such democratic discourse functions.


\(^{142}\) Allan, supra note 134; The Twitter Rules, supra note 134; Community Guidelines, supra note 134.
III. THE MARKETPLACE THEORY AND ITS PROBLEMS

Scholars have associated the marketplace approach with foundational assumptions that are based in Enlightenment-era understandings regarding truth, the rationality of individuals, and the role of citizens in democratic society. Importantly, this theoretical framework was not explicitly provided in Justice Holmes’s dissent in *Abrams*. Furthermore, though justices have consistently turned to the metaphor to communicate how they understand freedom of expression, they have never explicitly defined it. Instead, as time passed after Justice Holmes’s initial use of the metaphor in 1919, and as justices turned to it in constructing their reasoning on nearly every type of First Amendment question—including defamation, privacy, commercial speech, broadcast regulation, and online and corporate speech cases—these Enlightenment-based assumptions came to be understood as the foundational underpinnings of the theory.

Such a marriage between Enlightenment thought and the ideas Justice Holmes introduced in his dissent in *Abrams* bears substantial historical and theoretical support. First, the marketplace approach overlaps significantly with Milton’s seventeenth-century conceptualization of the competition between truth and falsity. He posited, for example, that “Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?” Also, Justice Holmes wrote to a friend that he re-read John Stuart Mill’s *On Liberty* in late February 1919, several months before the

145 *Hopkins*, supra note 5, at 40.
152 MILTON, supra note 6, at 50.
Court heard the Abrams appeal that October.\textsuperscript{153} Historian J. Salwyn Schapiro contended Justice Holmes drew from Mill’s work in his opinion for the Court in Schenck v. United States,\textsuperscript{154} which was announced in March 1919.\textsuperscript{155} Schapiro also associated the marketplace metaphor with Mill’s philosophy, contending the thinker did not believe freedom of expression was a natural right, but rather a necessity for rational individuals who sought to govern themselves.\textsuperscript{156} Thus, the marketplace theory came to be associated with the notion that truth is generally objective and universal and that, in an environment in which the government does not significantly interfere with the flow of ideas, rational, free individuals are capable of identifying truth and rejecting falsehood.

Since Justice Holmes’s time on the Court, Justices have, whether they intended to do so or not, generally associated such Enlightenment-founded assumptions with their uses of the marketplace theory.\textsuperscript{157} The Court rationalized its unanimous decision in Hustler Magazine Inc. v. Falwell,\textsuperscript{158} for example, by stating “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”\textsuperscript{159} The Court quoted and cited Justice Holmes’s marketplace-of-ideas-based reasoning a few sentences afterward.\textsuperscript{160} Later in the decision, Chief Justice John Rehnquist reasoned “it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”\textsuperscript{161} Similarly, in Red Lion Broadcasting Co. v. Federal Communications Commission in 1969, Justice Byron White explained that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .”\textsuperscript{162} Two years later, in Cohen v. California, the Court reasoned when the government restricts ideas based on the merits of their content, it takes away the ability of citizens and society more broadly to

\textsuperscript{154} 249 U.S. 47 (1919).
\textsuperscript{156} Id. at 154.
\textsuperscript{158} Hustler, 485 U.S. 46, 50 (1988).
\textsuperscript{159} Id. at 50.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 56 (quoting FCC. v. Pacifica Found., 438 U.S. 726, 745–46 (1978)).
decide what is true and best for society. Justice John Harlan wrote that free expression was designed with the “hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.” In each of these examples, the justices leaned upon assumptions about a generally objective, universal nature of truth and the rationality of citizens in constructing their rationales. Similarly, in *Gertz v. Robert Welch, Inc.*, three years after *Cohen*, Justice Louis Powell constructed his reasoning for the Court’s opinion upon these assumptions, concluding that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”

Finally, in Chief Justice Rehnquist’s detailed dissent in *Central Hudson & Electric Corp. v. Public Service Commission of New York*, he explicitly associated the marketplace theory with Enlightenment thought, citing Adam Smith’s *Wealth of Nations*, Milton’s *Areopagitica*, Mill’s *On Liberty*, and Justice Holmes’s dissent in *Abrams*. Having intertwined the marketplace theory with Enlightenment thinkers and their works, he concluded “[w]hile it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a ‘marketplace of ideas.’”

Thus, though the Chief Justice ultimately questioned the validity of the marketplace approach in deciding whether the First Amendment should protect commercial speech, he clearly intertwined it with Enlightenment thought. Each of the preceding examples helps to communicate ways that Supreme Court justices have used the marketplace approach to communicate their understandings regarding the First Amendment. More importantly, however, these cases highlight that the fundamental, Enlightenment-oriented assumptions about truth and the rationality of individuals in democratic society have come to be conceptualized as being synonymous with the marketplace theory.

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164 Id. at 24.
167 Id.
A. Scholarly Dissents

While Chief Justice Rehnquist critiqued the marketplace theory in his dissent in Central Hudson, the Court has generally employed the marketplace approach sans critical questions about its assumptions. Communication law scholar W. Wat Hopkins concluded justices have historically “accepted without question that the metaphor is effective because [of] the rationale upon which it is built . . .” Unlike the majority of the justices who have served on the Court since Justice Holmes, legal scholars have raised substantial concerns regarding the theory’s assumptions. Such concerns are particularly important in examining how the marketplace theory can or should function in the era of AI communicators. In particular, scholars have attacked the theory’s assumptions about the nature of truth and the rationality of individuals. Scholars have also questioned how information flows and reaches citizens. Legal scholar C. Edwin Baker concluded broadly the theory’s rationale is “not persuasive” and that it is “unworkable, dangerous, and inconsistent with a reasonable interpretation of the purpose of the first amendment.”

Scholars have paid particular attention to the approach’s assumptions regarding the nature of truth. Put simply, they have concluded truth is subjective and self-created rather than objective and universal. Such a conclusion substantially undermines one of the bulwarks of the marketplace approach. As legal scholar Stanley Ingber reasoned, “[i]f truth is to defeat falsity through robust debate in the marketplace . . . truth must be an objective rather than a subjective, chosen subject.” If truth is not objective, Ingber concluded, the marketplace theory fails. In contrast, legal scholar Frederick Schauer came to a similar conclusion regarding the nature of truth, but added that replacing such an assumption with a subjective approach to truth does not necessarily harm the theory itself. He explained “[i]f we reject the possibility of attaining objective knowledge, and reject as unsatisfactory any method of discovering truth, defining

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169 Hopkins, supra note 5, at 40.
170 BAKER, supra note 3, at 6; BARRON, supra note 9, at xiii–xiv; SCHAUER, supra note 3, at 16; Ingber, supra note 9, at 15–18.
172 BAKER, supra note 3, at 3.
173 Redish, supra note 171, at 617; BAKER, supra note 3, at 12–13; Ingber, supra note 9, at 15.
174 Ingber, supra note 9, at 15.
175 Id.
176 SCHAUER, supra note 3, at 20 (emphasis added).
truth as a *process* rather than a standard becomes compelling.”  

Such an approach aligns with more discourse-based theories of how knowledge and truth emerge through interactions among individuals in democratic society.  

Baker held less hope for the theory. He bluntly concluded “truth is not objective.” He explained that if truth is objective, if there is a shared reality that would lead to citizens accepting truth and rejecting falsehood, then the theory could potentially function. If truth is subjective, however, the theory must account for “why and how the usually unequal advocacy of various viewpoints leads to the ‘best choice.’”

Baker’s concern regarding the unequal nature of the marketplace represents another reoccurring concern regarding the theory. Most famously, legal scholar Jerome Barron contended the marketplace theory was “romantic” and “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.” Barron concluded the marketplace fails to account for the fact that not everyone has equal access to the marketplace. Individuals are not necessarily able to get their ideas into the crowded information marketplace. Similarly, not all messages receive the same amount of attention. Some communicators have the tools necessary to broadly communicate their messages or to package them in a way that makes them more interesting to citizens. Baker noted that traditional media outlets give greater attention to “dominant groups’ interests and reflects their view of reality.” Soon, the dominant group in the marketplace could become AI entities.

Finally, in a related sense, scholars have questioned the assumption that individuals are generally rational and, in most cases, capable of discerning truth from falsity. As individuals encounter some ideas and not others and they encounter some ideas at higher and more intensive frequencies than others, it is difficult to imagine a certain, shared truth will win out in the marketplace. Scholars have also found that repeated exposure to ideas, even if an individual initially rejected the ideas as false,

177 Id. (emphasis added).
179 Id. supra note 3, at 12.
180 Id. at 6.
181 Id. at 6.
182 Barron, supra note 14, at 1641.
183 Id. at 1644.
185 Baker, supra note 3, at 16.
can lead to eventual acceptance or, in the least, attitude change about the ideas. Furthermore, Ingber posited that citizens’ varying socioeconomic statuses, personal experiences, and roles in society will very likely influence the way in which they come to determine what is true and false among the ideas they encounter. Furthermore, in a diverse society, citizens are unlikely to accept ideas as truthful, no matter how strongly founded in rationality, if the ideas run counter to their personal or communal beliefs, interests, or biases. Such a concern is particularly relevant in an era when individuals construct idea and interest-based communities, while limiting their exposure to opposing ideas in virtual spaces.

B. Justice Holmes and Pragmatic Truth

Before examining the existing legal precedents that relate to freedom of expression rights and AI communicators, it is important to consider Justice Holmes’s legal and scholarly writings, as well as his voluminous personal correspondence. His extensive writings highlight that, despite introducing the marketplace theory, which would ultimately be undergirded by Enlightenment-era assumptions regarding truth and the rationality of individuals, he did not believe in absolute truth. In fact, Justice Holmes quite explicitly expressed in many instances he did not believe truth was objective and universal. In a 1929 letter to his friend Harold Laski, a British economist, he characterized truth as “the system of my intellectual limitations.” In the same letter, he concluded “absolute truth is a mirage.” Similarly, seventeen years earlier, as part of an extensive interaction with his friend Patrick Sheehan, an Irish Catholic priest, Justice Holmes explained:

[A] general fact rather is to be regarded like a physical

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187 Ingber, supra note 9, at 15.

188 Id. at 25–26.


190 Letter from Holmes to Sheehan, supra note 189, at 7; Letter from Holmes to Laski, supra note 189, at 107; Holmes, supra note 189, 40–41.

191 Letter from Holmes to Laski, supra note 189, at 107.

192 Id.
phenomenon—accepted like any other phenomenon so far as it exists—to be combated or got around so far as may be, if one does not like it, as soon as fully possible. I always say yes—whatever is, is right—but not necessarily will be for thirty seconds longer.193

In both instances, Justice Holmes communicated an understanding that truth is dependent upon the availability of information, which can be different from person to person.

In “Natural Law,” which appeared in Harvard Law Review in 1918, just a year before he authored the Court’s opinion in Schenck v. United States and penned the dissent in which he introduced the marketplace approach in Abrams, Holmes wrote “we all, whether we know it or not, are fighting to make the kind of world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief.” 194 He continued, “when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as it appears, his grounds are just as good as ours.”195 In these passages, as is the case in many of the Justice’s writings, he included war imagery to communicate his point. Justice Holmes contended that his experience fighting in the Civil War, in which he was shot three different times, changed his life.196 In his personal correspondences with friends, he in many ways blamed the outbreak of the war on the rigid positions the North and South held regarding their differences.197 In short, the war made him far more skeptical of any person’s claim that they possessed absolute truth. To Justice Holmes, truth was a process. Therefore, if a person claimed to have obtained absolute truth, that simply

193 Letter from Holmes to Sheehan, supra note 189, at 7.
194 Holmes, supra note 189, at 41.
195 Id.
meant they had decided to hold fast to their own personal prejudices and biases rather than to evolve as new experiences and information became available. These themes can also be found in Justice Holmes's dissent in Abrams, where he concluded that “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.”

Ultimately, late in his life, Justice Holmes described his understanding of truth by identifying himself as a “bettablitarian.” He explained that, since he did not believe in absolute certainty, the best he or any other person could do is bet on what is true, using past experiences and the information available. Such a conceptualization of truth is primarily process-based, noting that individuals make conclusions based upon their experiences and the information they have available and that these “truths” can evolve as time goes on. Justice Holmes’s bettablitarian approach is not substantially different from his conclusion in The Common Law in 1881, far earlier in his career, when he explained that the “life of the law has not been logic: it has been experience.” Importantly, Justice Holmes’s dissent in Abrams included substantial references to the bettablitarian approach. He concluded “all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.” Thus, the author who introduced the marketplace concept into the Supreme Court’s vocabulary conceptualized truth as something that evolves based on experience and available information, making it different for each person. Therefore, while the marketplace approach, as outlined in Abrams, does not include any citations regarding Justice Holmes’s influences in constructing it, he surrounded it with themes that, when placed in context with his other writings, represented how he conceptualized truth.

200 Letter from Holmes to Pollock, supra note 199, at 108 (attributing the “bettablitarian” idea’s foundation to Chauncey Wright, a member of the Metaphysical Club who died in 1875).
201 OLIVER WENDELL HOLMES, JR., THE COMMON LAW I (1881).
202 Abrams, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).
IV. AI SPEECH RIGHTS: FROM CORPORATIONS TO CATS

AI entities present a challenge to Justice Holmes’s marketplace theory and his conceptualization of truth. The Supreme Court has never explicitly addressed First Amendment rights as they might apply to AI communicators. State and federal courts have made only limited references to such concerns.203 Perhaps two of the most relevant cases so far regarding the rights of AI communicators and their place in democratic discourse dealt with the Google search engine’s algorithm-based outputs. In Search King v. Google, a 2003 federal district court case from Oklahoma, an online advertising firm sued Google after its placement in the company’s “PageRank” system suddenly dropped.204 The advertising firm sued for an injunction against Google, as well as damages, contending the company maliciously adjusted its algorithms so it would not appear as prominently in searches.205 Google argued the search results its algorithms produce are essentially opinions, which are protected by the First Amendment.206 Despite Search King’s contention that algorithms, since they are based on computer programs, are not capable of producing subjective results, the Court sided with Google. The judge reasoned while the algorithm “is objective in nature[,] . . . the result, which is the PageRank—or the numerical representation of relative significance of a particular web site—is fundamentally subjective in nature.”207 The court compared PageRanks with the ratings that financial lenders such as Moody’s publish, explaining that these ratings are based on complex formulas, but are, in the end, a representation of the lender’s opinion.208 Thus, the First Amendment protected the algorithmic outputs because they represented the company’s opinion.

Four years later, in another district court, an online publisher sued Google for refusing to allow advertising for his websites and for removing the sites from the search results that its algorithm produced for users.209 Google contended it would violate its First Amendment rights for the government to compel it to “speak” by forcing it to publish information. The judge agreed with Google, concluding the First Amendment provides

205 Id. at 3.
206 Id. at 9–10.
207 Id. at 10.
208 Id. at 9–10.
individuals the right to decide what “to say and what not to say.”\textsuperscript{210}

While both cases raised questions about algorithms and their power to influence what individuals see and do not see when seeking information online, the judges did little to address the extent to which First Amendment protections might be extended to computer-program-based, non-human communicators. Instead, the judges in both cases firmly associated the algorithmic outputs with the corporation’s speech. In other words, the AI communicators, which were the relatively weak AI found in algorithms, were not addressed as independent communicators, thus little light was shed on how judges might understand their rights in the future. In the absence of AI-specific rulings, we must turn to two other areas in which the Courts have made clear rulings regarding the rights of non-human communicators—animals and corporations.

\textit{A. Blackie the Cat Says “I Love You”}

Animals, with the help of owners and activists, have raised many legal challenges that have required courts to determine the extent to which non-human actors can claim protections that have historically been purely associated with humans. Of course, while animals are a type of non-human actor that the courts have considered in terms of human rights, they do not pose the same challenges to the foundational assumptions of the marketplace of ideas theory as AI entities. However, the cases in which they have claimed human-like rights—or at least lawyers and activist groups have on their behalf—have challenged judges to articulate rationales regarding the extent to which non-human actors should and should not receive human rights. In the most relevant case, \textit{Miles v. City Council of Augusta}, the owners of Blackie the Cat contended that being compelled to purchase a business license in order to collect donations from their pet’s performances violated both theirs and the cat’s First Amendment rights.\textsuperscript{211} Blackie the Cat was capable of saying “I love you” and “I want my Mama” on command.\textsuperscript{212} The Eleventh Circuit rejected the owners’ First Amendment claim and, in a footnote in the final lines of the case, scoffed at extending First Amendment rights to a cat.\textsuperscript{213} The court wrote it would “not hear a claim that Blackie’s right to free speech has

\textsuperscript{210} Id. at 630 (quoting Riley v. Nat’l Fed’n of the Blind of N.C., 487 U.S. 781, 796–97 (1988)).
\textsuperscript{211} 710 F.2d 1542, 1543 (11th Cir. 1983).
\textsuperscript{213} 710 F.2d at 1544 n.5.
been infringed.”\textsuperscript{214} The court continued, “although Blackie arguably possesses a very unusual ability, he cannot be considered a ‘person’ and is therefore not protected by the Bill of Rights.”\textsuperscript{215}

Other animal-related cases have resulted in similar conclusions by courts. Animals, as non-human actors, have generally been found to lack standing because they lack personhood and therefore cannot succeed in their claims. Most recently this reasoning was a part of a federal district court’s decision in the “monkey selfie” case in 2016.\textsuperscript{216} Naruto, a six-year-old crested macaque, took pictures of himself using a camera that David John Slater had left unattended.\textsuperscript{217} Slater used the photos, which led PETA and other animal rights groups to claim he had violated Naruto’s copyright. The judge concluded the Copyright Act was only intended to apply to humans.\textsuperscript{218} The judge cited Cetacean Community v. Bush, one of two other recent cases that involved animal rights questions, in constructing his reasoning.\textsuperscript{219} In Naruto, as well as in Tilikum v. Sea World, the federal courts reasoned the animals simply lacked standing.\textsuperscript{220} Importantly, in Tilikum, the Court concluded that killer whales could not succeed in a Thirteenth Amendment-based suit against Sea World—which argued that keeping the whales in confinement constituted slavery—because they were not human.\textsuperscript{221} The court reasoned the amendment “applies to humans, and not orcas.”\textsuperscript{222} In Cetacean, the court emphasized if Congress wished to extend existing or future laws to animals, it could do so, but no such wording, or evidence of intent regarding the inclusion of animals, was present in the relevant laws involved in the case.\textsuperscript{223} Thus, courts have consistently rejected claims made on the behalf of animals, which represent a type of non-human actor. These decisions, however clear they appear to be regarding the rights of non-human actors and how applicable they may seem regarding the rights of potential claims made by AI communicators, do not represent the only set of court decisions in this area.

\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).
\textsuperscript{217} Id. at 420.
\textsuperscript{218} Id. at 4.
\textsuperscript{219} Id. passim (citing Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004)).
\textsuperscript{220} Naruto, 888 F.3d at 420; Tilikum v. Sea World, 842 F. Supp. 2d 1259 (S.D. Cal. 2012).
\textsuperscript{221} Tilikum, 842 F. Supp. 2d at 1264.
\textsuperscript{222} Id.
\textsuperscript{223} Cetacean, 386 F.3d at 1179 (quoting Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 49 (D. Mass. 1993)).
B. The Corporate Speech Argument

Though fundamentally different than Blackie the Cat in nearly every way, corporations and the talking cat share one crucial aspect in common—they are both non-human communicators. Importantly, where Blackie the Cat, or at least his owners, failed to succeed in claiming First Amendment protections, corporations have succeeded. The reasons for their success are crucial to the central question of this Article. Beginning in the 1970s, first with Buckley v. Valeo and then with First National Bank of Boston v. Bellotti two years later, the Supreme Court concluded that the First Amendment protects corporate speech. In Bellotti, corporations challenged a Massachusetts law that limited their ability to communicate ideas about a ballot initiative that would have affected them and their interests. Importantly, the Court reasoned in the case that the identity of the speaker should not matter in First Amendment cases. Calling upon its reasoning from Mills v. Alabama in 1966, the Court explained that “a major purpose of the First Amendment was to protect the free discussion of governmental affairs.” Following this line of logic, Justice Louis Powell, in writing for the Court, concluded that “[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.” Finally, and crucially, he highlighted that “[t]he inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source.”

The Court’s decision in Bellotti overturned the Supreme Judicial Court of Massachusetts’s ruling in the case from the year before. The Massachusetts court had substantially based its conclusions upon its analysis of the nature of corporations and whether or not they should have rights that are afforded to human citizens. In referring to Article IV, Section 2 of the Constitution and the Fourteenth Amendment, the court concluded that corporations were not protected by the First Amendment because, much as was the case in the animal-related decisions, they were not citizens. The Massachusetts court drew from a 1906 Supreme Court ruling, which concluded the Fourteenth Amendment only extends to “the liberty of natural,  

226 Id. at 776–77 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
227 Id. at 777.
228 Id.
not artificial, persons.” Thus, the Supreme Court had this line of reasoning from Massachusetts’s highest court in front of it when it considered the appeal, but chose to go a different direction, ultimately concluding that the First Amendment protected corporations.

The Court reaffirmed this approach in 2010 in its decision in Citizens United. Importantly, Justice Anthony Kennedy, writing for the Court, emphasized that “[o]n certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.” The Court reasoned that, therefore, not only should corporations have a right to speak because political matters might affect their interests, as was the focus of the Court’s justification in Bellotti, but corporations are uniquely qualified to contribute to discourse in democratic society more generally. Chief Justice John Roberts, in a concurring opinion in Citizens United, emphasized that the First Amendment was “written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker.” Thus, the Court in these corporate-speech decisions communicated that an artificial entity that can contribute to discourse in democratic society should be protected by the First Amendment.

C. Reconciling Corporate Speech Rights with Blackie the Cat’s Failure in Court

The animal rights and corporate speech cases appear, on the surface, to represent two separate lines of thought regarding the extent to which First Amendment rights should be extended to AI communicators. The natures of the two different types of non-human actors in these cases, however, highlight important aspects of this Article’s larger questions regarding the future of the marketplace approach. If First Amendment protections are extended to AI communicators, then one effect will be that the spectrum of potential solutions for safeguarding the marketplace becomes substantially narrower. Therefore, the differences between the corporate speech and animal-related cases contribute important building blocks to this Article’s central question.

The first important difference between the lines of rulings is that corporations are collections of citizens. While they are “artificial legal entities,” each member of the corporation is

232 Id. at 392–93 (Roberts, C.J., concurring).
human, and humans are protected by the First Amendment. This observation aligns with the Supreme Court’s reasoning from *Bellotti* and *Citizens United*, where justices emphasized that corporations can contribute to discourse. Animals, however, generally lack the ability to contribute to discourse and are therefore not protected by the First Amendment.233

Second, and in a related sense, the nature of the messengers and their potential intents in communicating are different than the animal and corporation cases. Blackie the Cat was not actually expressing a meaningful message when he made noises that sounded like “I love you.”234 The cat was merely executing an action it was trained to perform when prompted. Similarly, Naruto the monkey unlikely intended to express himself when he took a picture using the photographer’s camera.235 As the judge explained, Naruto had seen many tourists and photographers operate cameras and was merely reenacting those behaviors.236 Conversely, corporations, as collections of individuals, can consider a variety of factors when constructing messages. Corporations, via those who work for them, select and create messages that are conveyed with specific purposes. Thus, as legal scholar Tim Wu highlighted, a distinction can be drawn between AI actors that communicate and those that speak.237 Wu explained “[t]hose who merely carry information from place to place (courier services) generally don’t enjoy First Amendment protection, while those who select a distinct repertoire, like a newspaper . . . do.”238 Blackie the Cat and Naruto, much like many forms of Weak AI, were certainly communicating, but they were not speaking in the sense that they intended to contribute ideas to the marketplace.

It is therefore reasonable that the question of First Amendment rights for AI communicators could come down to the nature of the communicator. If the entity merely provides information or automatically shares content, such as an algorithm or a bot that retweets every message a human account holder publishes, then it can be classified as more of a communicator than a speaker and should therefore not receive First Amendment protections. Conversely, if an AI entity is constructing original messages that contribute to democratic

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234 *Miles*, 710 F.2d at 1543.
235 *Naruto*, 2016 U.S. Dist. LEXIS 11041 at *3.
236 *Id.*
238 *Id.* at 1497.
discourse, the Supreme Court’s reasoning from the corporate-speech cases strongly support the conclusion that they should be protected. Justice Powell in his opinion in *Bellotti* and Chief Justice Roberts in his concurring opinion in *Citizens United* both emphasized that the First Amendment should focus on the speech and not the speaker, and it is clear that some AI communicators can contribute to discourse with their messages.239

V. **TOWARD A PROCESS-FOCUSED MARKETPLACE**

The marketplace of ideas, while it has persisted as the Supreme Court’s dominant rationale for freedom of expression for nearly a hundred years, faces new challenges in the twenty-first century. In addition to longstanding questions about the very foundational assumptions with which it has come to be associated, primarily those regarding the nature of truth and the rationality of citizens, the theory now faces substantial concerns about how it can function in an era when individuals—human actors—are often forming substantially fragmented communities of like-minded individuals and, at the same time, hordes of AI communicators are moving within these virtual communities, spreading false information and drowning out the exchanges of ideas that are taking place among citizens by overwhelming the forums with ideological messages.

In other words, networked technologies have allowed citizens to create a vast multiverse of relatively limited marketplaces that offer few ideas and even fewer challenges to the agreed upon “truths.” It is within these limited marketplaces that AI communicators are entering discourse with citizens and are finding substantial power to spread falsity and misinformation that reinforces pre-existing narratives. Beyond simply sharing untrue information, weak AI entities are being used to overwhelm these marketplaces with certain ideas and, in doing so, are drowning out other voices and ideas. This process was evident in the discourse that surrounded the Nunes Memo as bots were employed to take up the organically created #releasethememo hashtag and flood politicians’ Twitter feeds with a certain idea.240 Ultimately, the fundamentally inhuman nature of the AI communicators—the amount of data they can process and the speed at which they operate—allows them to fill the marketplaces with only their product. If other ideas were

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240 See supra Section I.A.
expressed, few, if anyone, could find their “product” amongst the crowded shelves of ideas that were expressed by the AI entities and the people who programmed them.

Thus, as indicated earlier, while it is unlikely we face the dilemma that comes from creating a “god from the machine,” deus ex machina, the capability that AI communicators have to essentially create our world, et de mundi machina, by influencing the ideas and information we encounter as individuals immerse themselves in discourse in virtual spaces, requires a careful look at the foundational assumptions of the marketplace of ideas. Considering these concerns, this Article has questioned how the marketplace approach can remain a dominant justification for freedom of expression, as well as a workable model for how the process of a free exchange of ideas functions, as the Fourth Wave of networked technology nears.

A. The Process-Based Marketplace

Ultimately, this Article proposes that two important steps must be taken. First, we must revise the foundational marketplace assumption that truth is generally universal and absolute and replace it with a more process-based approach. Such a revision allows for the theory to focus on being a justification for protecting the process through which citizens come to understand the world around them and, ultimately, govern themselves. In practice, this approach means that, rather than finding that freedom of expression was created to protect the ability of the truth to be discovered or to vanquish falsities, as the traditional marketplace approach has been understood, the process-based approach emphasizes that the First Amendment safeguards the process through which individuals come to their understandings. This approach can also be reconciled with recent speech cases regarding corporations and animals. Thus, when the courts face a First Amendment question, their concern should not be as much upon the outcome—the truth winning out amidst falsities—as the process that leads to understanding. This approach aligns more closely with Justice Holmes’s more pragmatic conceptualizations of how truth functions and, most importantly, situates the theory in a way that more adequately explains how free expression functions in the networked era.241

This process-based approach opens the door to the second important change. When protecting the process of information discovery and truth formation, information becomes a public

241 See, e.g., Letter from Holmes to Sheehan, supra note 189, at 7; Holmes, Natural Law, supra note 189, at 40; Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
good, something that has a certain inherent value. Good realization is crucial. When the objective truth requirement is removed from the marketplace’s foundational assumptions, the idea that truth will always win when it “grapples,” as Milton contends, becomes less salient as a justification for protecting the exchange of ideas. Thus, we no longer need to protect the ideas, so truth and falsity can battle. Instead, the exchange of ideas must be protected because truth is a process. If truth is a process, then the provision of truth becomes a public good, something that is justified by its contribution to the marketplace of ideas.

B. Reclaiming the Marketplace

The combination of the process-based understanding of truth and the public-good assumption that goes along with it provides the necessary building blocks for constructing a justification for safeguarding the marketplace in the era of AI communicators. The courts have generally rejected First Amendment and other claims by non-human entities in which the communicator merely repeated information, rather than creating and expressing ideas. Conversely, the Supreme Court has constructed a relatively strong precedential foundation for protecting the rights of non-human communicators that do convey ideas, particularly if those ideas hold the potential to be a public good that can contribute to the process of truth discovery. This dichotomy was seen in the animal-related cases, where Blackie the Cat and Naruto the Monkey, despite executing communicative acts, failed to receive protection for their expression. Conversely, the Supreme Court contended corporate speech should be protected because these artificial entities can contribute important ideas to discourse. Justice Kennedy in his opinion in Citizens United emphasized that “[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”

If these understandings are applied to AI communicators, the process-based, public-good model would allow for some

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243 See supra Sections IV.A–B.
246 Citizens United, 558 U.S. at 343.
regulation of those entities that merely repeat information but would protect those that construct and convey innovative ideas. The line between these two types of entities is, admittedly, not completely clear. The courts, however, could incorporate the originality test that was constructed in Feist v. Rural Telephone. In that case, the Supreme Court concluded that for a work to be protected under the Copyright Act, it must have a modicum of creativity.\(^\text{247}\) Using similar logic, in order for AI-based messages to be protected, the courts could require such works include a certain amount of originality. Thus, bots that draw from existing pools of information to create new posts, such as Every Trumpette (@everytrumpette), would be protected while bots that simply automatically retweet other tweets would not. Importantly, the original messages that are being shared, whether humans or AI entities publish them, would be protected under this approach. The retweeted or otherwise shared messages that are conveyed by AI entities, however, could be regulated, since they are simply communicating rather than speaking.

Similarly, this approach would allow some regulation of AI communicators that spread false and misleading information rather than factual information.\(^\text{248}\) Certainly, in many cases, such expression, if communicated by a human, would be protected unless it was defamatory or ventured into another area of already unprotected speech.\(^\text{249}\) The courts, however, have not indicated that non-human communicators have the same rights as humans. The animal rights and corporate-speech cases conveyed the understanding that non-human actors only receive First Amendment protections if their expression contributes to discourse and is, thus, a public good. For this reason, it makes sense some regulation that purely halts intentionally false information that is communicated by AI entities would not violate the First Amendment under this conceptualization of the marketplace approach. In particular, messages that merely repeat misinformation could be regulated, since there is no originality and since they lack the public good of contributing to


\(^{248}\) The Court has specifically delineated between regulation of false factual statements and ideas and opinions people believe to be false. In United States v. Alvarez, for example, the Court explained, """[l]aws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter.""" 567 U.S. 709, 731–32 (2012).

\(^{249}\) See Miller v. California, 413 U.S. 15, 18–19 (1973); see also Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Alvarez, 567 U.S. at 747.
the truth-discovery process. While a challenging, difficult area to regulate, careful work in these areas could help address the spread of intentionally false information within fragmented, echo-chamber-dominated virtual communities without limiting First Amendment protections.

More conceptually, the proposed revisions to the marketplace metaphor would provide the courts with a justification for freedom of expression that would guide them in such cases. Identifying this dividing line, while difficult to draw, would provide a path to eliminate the problem that arises when AI communicators, by their fundamentally non-human natures, flood the marketplace with countless thousands of messages, whether they are truthful or false, thus eliminating the ability for other ideas to be heard and creating the potential perception that one idea is more accepted or popular than others. At the same time, this approach avoids the First Amendment problems that would arise if the government sought to eliminate all AI-based communicators.

Without these revisions to the foundations of the marketplace approach, the theory will fail to remain relevant in the twenty-first century. AI communicators are, by their natures, fundamentally different than the human actors that were on the minds of the theory’s authors and the justices that have employed it during the past one hundred years. The process and public good revisions to the marketplace theory provide slight adjustments to how expression is justified. By focusing on protecting a process that leads to truth formation, the approach retains a strong foundational interest in protecting freedom of expression, but at the same time is clarified in a way allows for limited constraints on AI communicators that do not contribute to creating a marketplace that is focused upon protecting the development of truth for each citizen. If truth is a process, then that process must be protected.
WTF? FIRST AMENDMENT IMPLICATIONS OF POLICING PROFANITY

Alexandra Baruch Bachman *

INTRODUCTION

Growing up, parents and teachers alike preached to us the idea that some words are “bad words.” And we naive children, hearing this idea from towering authority figures, accepted their wisdom as law. Until we did not. Until that one daring day, be it at five or fifteen years old, when we first experimented with a “bad word,” and learned that saying something bad can feel so good. After crossing that threshold, and dropping our first f-bomb, the stigma began to fade. We realized that words are just words; we were not going to be thrown in jail for saying “h-e-double hockey sticks.” The parental penal code forbidding them was not a real thing.

The good news is that we were all mostly right: saying bad words is not a one-way ticket to jail. The bad news is, until 2011, North Carolina had a statute saying the opposite: it was a misdemeanor to use “indecent or profane language” in public.1 The worse news, at least for anyone in Virginia, is that the use of profanity in public is still a criminal offense.2 Fuck that.

As a U.S. citizen in the 21st century, taking free speech for granted is easy. Rewind a few centuries, however, and the foundational First Amendment that we conveniently invoke to protect our opinions and ourselves was not around.3 The fundamental idea 4 is that “Congress shall make no law

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3 See Amendment I: Freedom of Religion, Speech, Press, Assembly, and Petition, CONSTITUTIONCENTER.ORG, https://constitutioncenter.org/interactive-constitution/amendments/amendment-i (last visited Feb. 8, 2019) (stating that the First Amendment, originally passed in 1789 and ratified in 1791 as part of the Bill of Rights, helps comprise the foundation upon which the modern United States was built).

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respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.\(^5\) Although the drafters were explicit in declaring basic First Amendment freedoms to which all Americans are entitled, they failed to delve deeper and define their terms. The nation “shall make no law . . . abridging the freedom of speech,” because in the aftermath of the Revolutionary War, we valued the idea of speech without consequences.\(^6\) Unlike other nations, we decided that citizens ought not to be arrested (or worse) for criticizing the government.\(^7\) In the shadow of this progressive political movement, however, traditional or prudish approaches to profanity restricted just how free speech should actually be.\(^8\)

The First Amendment was not written on a blank slate; profanity was already penalized. “At common law, it [was] an offense to utter obscene words in public . . . .”\(^9\) The common law rule stems from the idea that “upon the foundations of the law of nature and the law of revelation all human laws depend.”\(^10\) Put differently, the common law rules were made to keep man in line, and part of what it meant to be “in line” was to “not offend against the rules of public decency” and instead “keep[] his wickedness to himself.”\(^11\) Further, “if [man] makes his vices public . . . it is then the business of human laws to correct them.”\(^12\) These common law rules applied to public profanity because, foundationally, it is indecent to expose “one’s person to the public view,”\(^13\) and, likewise, “outrageously vulgar and obscene words . . . if uttered in the ear of the public [are no] less likely to shock any one’s sense of decency, and to corrupt the

\(^5\) U.S. CONST. amend. I.
\(^9\) 67 C.J.S. Obscenity § 11 (2012); see also Bell v. State, 31 Tenn. 42, 45 (1851).
\(^10\) Id. at 44 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *42).
\(^11\) Id. (“[P]rovided he keeps his wickedness to himself and does not offend against the rules of public decency, he is out of the reach of human laws.”)
\(^12\) Id.; see also 4 WILLIAM BLACKSTONE, COMMENTARIES *41, *42 (reasoning, by distinguishing between public and private action, and drawing from English precedent, that “offences against good morals and public decency, if committed in private, belong properly and exclusively to the ecclesiastical courts . . . whenever they become public, so as thereby to become of pernicious example or offensive to public morals and decency, they fall within the proper jurisdiction of the temporal courts”).
\(^13\) Bell, 31 Tenn. at 46 (categorizing nudity as indecent).
morals of society.” Therefore, because expressing profanity “shock[ed] any one’s sense of decency,” profanity violated the common law.

Reconciling this common law demand for restricting speech with the Framers’ decision to draft a bill of rights is linear: the First Amendment was a repudiation of the common law. “There is, however, precious little record of what freedom of speech and of the press really meant to the framers.” Despite “insistent demand” for protection of the freedoms enumerated in the Bill of Rights, that demand “was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited.” Thus, the impact of the First Amendment on the common law prohibition against public profanity remains an open question.

What this open question, gap in knowledge, or missing intent means today is that both sides of the argument—over whether the modern law can restrict profane speech—have a legal basis. On the one hand, those against public profanity, can cite to common law principles and analogies that liken saying “fuck” to flashing a stranger. On the other hand, believers in free speech for its own sake can cite to the Bill of Rights.

Centuries have passed since Blackstone preached public decency, and we have seen a shift in what we, as a society, consider moral and decent. This progressive shift has changed not only what we consider immoral or indecent, but consequently how we interpret the First Amendment: As our moral corset loosens, the First Amendment is given greater room to breathe. Or is that generalization too broad? After all, North

14 Id.
15 Id. (“[W]ere there no analogy to be drawn from any decided case, we hold that, upon the broad principles of the common law which we have stated, this prosecution [for use of obscene language] is most amply sustained. Thus, fortified by sound principles—principles which lie at the foundation of every well-regulated community (and resting on a basis so immutable)—we are the more indifferent as to precedents exactly in point.”).
16 See generally id.
18 Id. (quoting LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 214–15 (1960)).
19 Bell, 31 Tenn. at 44.
21 See generally Bell v. State, 31 Tenn. 42 (1851).
Carolina rode the criminal public profanity train until 2011, and Virginia is still on board with penalizing profanity. This Note will analyze the current laws restricting profane speech in each state and examine the national pattern of repealing laws that mirror the Virginia statute, which continues to criminalize public profanity.

This Note consists of four Parts. Part I will explore and identify an anti-profanity statute deemed unconstitutional, how it originated, and why it has since been ruled unconstitutional. Part II will consist of a fifty-state survey evaluating the status of anti-profanity statutes, both past and present. Part III will consider how and why these statutes endure: is the statute the product of a conservative constituency? Has the statute been dormant in the depths of the penal code, effectively retired from use? Or is this a situation in which the perfect plaintiff has yet to come forward and challenge this law? Part IV will conclude that all anti-profanity statutes are unconstitutional.

I. AN UNCONSTITUTIONAL ANTI-PROFANITY STATUTE

Identifying an unconstitutional anti-profanity statute consists of two primary components. First, a statute that expressly restricts the use of “fighting words,” or has been construed to do so, is likely to be constitutional. Second, a statute that criminalizes profane language in a specific context or with a specific intent is less vulnerable to attack as unconstitutional. In order to identify unconstitutional statutory targets, it is first important to understand the constitutional statutes that are exempt from criticism.

In North Carolina, it was a Class 3 misdemeanor “on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, [to] use indecent or profane language.” This was the language of North Carolina General Statute 14-197 (hereinafter “N.C. 14-197”), and, spoiler alert, the law was held unconstitutional in 2011. This anti-profanity statute is an appropriate vehicle for learning how to identify other anti-profanity statutes, understand their breadth, and ultimately dismantle them.


24 See ACLU, supra note 1.
25 See Vozzella, supra note 2.
26 N.C. GEN. STAT. § 14-197 (2013), repealed by 2015 N.C. Sess. Laws. 286, § 1.1(1); see also Vozzela, supra note 2.
27 Id.
In pre-2011 North Carolina, N.C. 14-197 criminalized an extraordinary amount of behavior that the typical person would not normally recognize as punishable under the law. A group of students walking along Franklin Street, swearing loud enough for passersby to overhear, would be committing a Class 3 misdemeanor. Elderly friends strolling down the sidewalk, using colorful language at a volume the hearing-impaired among them can appreciate, would be committing a Class 3 misdemeanor. To a layperson, something seems strange about a statute that would yield these results. How then did it take 98 years for North Carolina to rectify this error?

A. Defining Profanity: Distinguishing Profanity, Obscenity, and Indecency

Profanity, the subject of this Note, is a narrow path through the world of censored content. Included in that world is obscenity (in its many forms) and indecent content—two similar yet distinct content categories. It is helpful in distinguishing these two descriptors to refer to their definitions as provided by the Federal Communications Commission (the “FCC”) as guidance. Per the FCC, “[p]rofane content includes ‘grossly offensive’ language.” In Miller v. California the U.S. Supreme Court determined that obscene content “does not have protection by the First Amendment” and, to be categorized as obscene, must satisfy the Supreme Court’s three-part test: “[i]t must appeal to an average person’s prurient interest; depict or describe sexual conduct in a ‘patently offensive’ way; and, taken as a whole, lack serious literary, artistic, political or scientific value.” Indecent content includes sexual content that fails to satisfy the obscenity test. Although the FCC guidance is helpful, states are of course free to tailor their definitions as they see fit. As a taste of where state courts have taken this idea, words that “imply divine condemnation” or “divine vengeance” have been considered profane words. Blackstone, the original anti-profanity puppet master, would be damn proud.

30 See Obscene, Indecent and Profane Broadcasts, FCC CONSUMER GUIDES https://www.fcc.gov/consumers-guides/obscene-indecent-and-profane-broadcasts (last visited Sept. 2, 2018) [hereinafter Profane Broadcasts]. Note that these definitions are being used strictly for guidance in this context, and are not the legal standards or definitions applied to statutes generally.
31 Id.; see also Miller v. California, 413 U.S. 15, 18 (1973).
32 Profane Broadcasts, supra note 30.
33 Thomas Trenker, Annotation, Validity and Construction of Statutes or Ordinances Prohibiting Profanity or Profane Swearing or Cursing, 5 A.L.R. 4th 956 (1981).
For the limited purpose of analyzing statutes that criminalize words spoken in public, references made to “anti-profanity statutes” will include those statutes that condemn: offensive, profane, vulgar, and/or indecent language.\textsuperscript{35} N.C. 14-197, for example, forbade “indecent or profane language” when used in a boisterous manner.\textsuperscript{36}

\textbf{B. Identifying the Statute: Fighting Words vs. Fun Words}

Distinct from pure profanity, fighting words are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”\textsuperscript{37} In terms of constitutional protection, “guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{38} The line separating fun words and fighting words has thus been drawn; a statute criminalizing fighting words is a constitutional anti-profanity statute. Conversely, unconstitutional anti-profanity statutes target profanity for its own sake, unjustifiably punishing fun words.

The fighting words doctrine has been refined and narrowed over time.\textsuperscript{39} Whereas the doctrine originally focused on the words themselves, the present application considers the circumstances under which the words were said.\textsuperscript{40} Indeed “words may or may not be ‘fighting words,’ depending upon the circumstances of their utterance.”\textsuperscript{41} Explaining the rationale and importance of this consideration, “[i]t is unlikely, for example, that [alleged fighting words] . . . would have precipitated a physical confrontation between [a] middle-aged woman who spoke them and the police officer in whose presence they were uttered.”\textsuperscript{42}

The distinction between profanity and fighting words is therefore crucial as fighting words exist outside the bubble of

\textsuperscript{35} See infra Part II.
\textsuperscript{37} Cohen v. California, 403 U.S. 15, 20 (1971) (clarifying that the phrase “fuck the draft” on a jacket is protected under the First Amendment); see also Virginia v. Black, 538 U.S. 343, 359 (2003) (applying the definition of fighting words to Virginia’s cross burning statute).
\textsuperscript{39} Cohen, 403 U.S. at 20; see also Blasphemy and Profanity, 12 AM. JUR. 2D § 13 (2018).
\textsuperscript{40} Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring).
\textsuperscript{41} Id.
\textsuperscript{42} Id.
constitutional protection granted to speech generally. \(^{43}\) Profanity for its own sake, on the other hand, occupies a place comfortably within the constitutional bubble, \(^{44}\) much to the forever moral and decent William Blackstone’s chagrin. In the absence of a narrow exception, speech “is constitutionally protected regardless of how vulgar or lacking in taste or social, political or artistic content.” \(^{45}\) Explicitly, “[a] state may not punish the mere public utterance of the word ‘fuck’ in order to maintain what it regards as a suitable level of discourse within the body politic.” \(^{46}\)

Although there is overlap in the literal content of profanity and fighting words, their paths diverge when it comes to intent. To be considered “fighting words,” the speaker must be using personally abusive language and addressing another person. \(^{47}\) An example of the significant weight a speaker’s intent carries in this analysis is illustrated in Cohen v. California. \(^{48}\) Cohen “was observed in the Los Angeles County Courthouse . . . wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible.” \(^{49}\) Cohen’s jacket ultimately did not violate the First Amendment, and the use of “fuck” was not considered to be in the context of fighting words. \(^{50}\) “No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.” \(^{51}\) In the absence of a narrow exception, like the fighting words doctrine or hate speech, criminalizing speech for its own sake violates the First Amendment. \(^{52}\) Per Cohen, “the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.” \(^{53}\)

Returning to the language of N.C. 14-197, the statute did not satisfy the fighting words doctrine or any other narrow

\(^{43}\) Brandenburg, 395 U.S. at 447.

\(^{44}\) See id. at 456 (Douglas, J., concurring) (“The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”).

\(^{45}\) Commonwealth v. Zullinger, 450 Pa. Super. 533, 537 (1996) (noting such narrow exceptions to constitutional protections as “obscenity, defamation, and ‘fighting words’”).


\(^{48}\) Cohen, 403 U.S. at 20.

\(^{49}\) Id. at 16.

\(^{50}\) Id. at 20.

\(^{51}\) Id. at 20–21 (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.

\(^{52}\) Id. at 21.

\(^{53}\) Id. at 26.
exception to constitutional protection. Operating outside of the fighting words doctrine makes a statute like N.C. 14-197 ripe for constitutional attack. North Carolina’s Disorderly Conduct statute, on the other hand, includes language that falls under the fighting words doctrine, criminalizing “a public disturbance intentionally caused by any person who . . . makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.”

C. Understanding The Unconstitutional Anti-Profanity Statute’s Breadth: An Intent Requirement

Criminalizing language simply because it is profane, rather than because of the intent behind it triggers First Amendment protection. “[T]he [speech-restricting] statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.” In other words, as the Supreme Court clarified, “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

A reliable means of narrowing a statute such that it remains constitutional is to include an intent requirement or comparable limiting provision. A statute that prohibits “intentionally or knowingly . . . us[ing] abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace” is of course narrower than its counterpart in another state that prohibits “[a]ny person, who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language.”

From afar, this proposed theory mirrors the Brandenburg test prohibiting language “directed to inciting or producing imminent lawless action.” In the context of profane language, however, this idea becomes more complex. Acknowledging that narrowing the scope of a statute with a defined intent requirement means that the statute is less likely to be found void

55. Gooding v. Wilson, 405 U.S. 518, 522 (1972); see also Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). “In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”
57. 2013 TEX. GEN. LAWS 42.01.
for vagueness or overbreadth, states have adopted a range of intent requirements with varying degrees of success. 60

Using the North Carolina statute as an example, N.C. 14-197 was silent on intent, but included two other limiting provisions: the offense must take place “on any public road or highway” and “in the hearing of two or more persons.” 61 Although these requirements are limiting, they did little more than say it was acceptable to swear alone in an open field, or in a private place. The present Disorderly Conduct statute, N.C. Gen. Stat. § 14-288.4, explicitly requires that the individual use language “intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.” 62 Essentially, the present statute expressly criminalizes “fighting words” rather than any and all profane language. The literal or constructional difference between these statutes is that the former was sweeping and the latter far narrower. The functional difference is that the struck statute criminalized the speaker’s profane content (regardless of to whom it was addressed or in what context), while the modern statute considers intent first and content second.

Distilling a possible rule from this comparison, a statute that criminalizes behavior (profane language in a specific context with a specific intent) is constitutional; a statute that criminalizes speech (profane language in any context ignoring intent) is unconstitutional. 63 Unconstitutional anti-profanity statutes are an affront to the First Amendment and belong in history books, not “on the books.”

D. Dismantling the Statute: Unconstitutionally Void for Vagueness

In a perfect world, a citizen could reach out to his or her representative in the legislature, explain that an archaic law violates his or her freedom of speech, and that law would consequently be repealed. In reality, however, a combination of red tape, busy schedules, and lack of awareness combine to perpetuate ancient rules and ideas.

Navigating the dense thicket of tradition, standing, and creative arguments, attorneys and judges seeking to rid the world of unconstitutional anti-profanity statutes often forego the free speech approach in favor of a “void for vagueness” argument. 64

60 See infra Part II.
64 See Pinnamaneni & Shukman, supra note 23.
Illustrating this point, N.C. 14-197 was not struck down as violating the First Amendment—it was struck down as “unconstitutionally vague.”\textsuperscript{65} The lack of clarity as to what constituted “indecent or profane language” meant that the law risked inconsistent application and provided little guidance to North Carolinians as to what they could and could not say without risk of committing a misdemeanor.\textsuperscript{66} “There is no longer any consensus, if there ever was, on what words in the modern American lexicon are ‘indecent’ or ‘profane.’”\textsuperscript{67} Superior Court Judge Allen Baddour concluded: “[a] reasonable person cannot be certain before she acts that her language is not violative of this law, and it is therefore unconstitutionally vague.”\textsuperscript{68}

Funnelling through the conclusions above, identifying a potentially unconstitutional anti-profanity statute becomes a manageable task. First, a statute that expressly restricts the use of “fighting words,” or has been construed to do so, is less vulnerable to attack as unconstitutional. Second, a statute that criminalizes profane language in a specific context or with a specific intent is less vulnerable to attack as unconstitutional. The remaining statutes, those criminalizing profanity for its own sake, are without a constitutional defense. Unconstitutional anti-profanity statutes belong in history books, where they cannot infringe on citizens’ First Amendment rights.

II. ANTI-PROFANITY STATUTES ACROSS AMERICA: A FIFTY-STATE SURVEY

It would be wonderful to say that N.C. 14-197 was the last of its kind, and its death in 2011 marked the end of a repressive era. Unfortunately, that is not the case. The stubborn siblings of N.C. 14-197 live on, for reasons that will be explored in Part III.\textsuperscript{69}

Utilizing the methods of identifying anti-profanity statutes explained in Part I (profanity, fighting words, and intent) this survey will examine the present state of anti-profanity statutes across America, paying particular attention to those statutes that are vulnerable to constitutional challenge. First, this


\textsuperscript{68} Id.

\textsuperscript{69} See infra Part III.
Note will consider these statutes collectively, noting the commonalities that bind them despite state boundaries. Next, this Note will separate this body of statutory law into two categories: those with intent requirements, and those without, and evaluate the relative strengths and weaknesses of their language. Finally, this Note will delve deeper into a select few statutes that I consider the most dangerous, the most violative of Free Speech, and the most in need of timely repeal.70

A. Statutory Schemes and Similarities: Disorderly Conduct and Breach of the Peace

Upon examining all fifty states and the District of Columbia, every state has a law on the books regulating speech.71 The majority of states stash their anti-profanity statutes under the umbrella of “Disorderly Conduct,” thirty-nine states regulate public speech as Disorderly Conduct or a variation thereon.72 Nine additional states regulate speech as Breach of the Peace or similar terminology.73 Four states, including California and Oklahoma, have statutes that independently criminalize profane language.74

It is important to note that this is not a zero-sum game: There are not simply 50 states with 50 statutes—states are free to enact a multitude of similar statutes, more specific statutes, or seemingly overlapping statutes.75 Maryland regulates speech via a sub-section of a much broader statute and uses both of the

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70 This survey examined state statutes criminalizing profanity or synonyms thereof. Notably, I did not consider state constitutional provisions. I did not consider statutes criminalizing speech: over the telephone or email; on public transportation such as buses or trains; or as harassment. I did examine statutes pertaining to the distribution of obscene materials (including pornography) in general, or to juveniles. As accurately as possible, I limited the surveyed statutes to those that apply generally, and prohibit profane, offensive, or vulgar language.
71 Of course, this seemingly dramatic statement includes those statutes prohibiting fighting words, which are not included within the constitutional bubble of free speech protection.
73 States that fall under this category: Connecticut, Idaho, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, and Wyoming.
74 States that have independent statutes: California, Massachusetts, Mississippi, Oklahoma (which has two), and Virginia (which also has two).
75 Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under Blockburger, a court's task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial.").
aforementioned phrases. 76 Mississippi, on the other hand, regulates profanity in a specific and self-explanatory statute: Miss. Code 97-29-47 “Public Profanity of Drunkenness” 77 distinct from its general “Disturbance of the Peace” statute. 78 Oklahoma is the big winner, with two independent and specific statutes on the books: Okla. Stat. tit. 21 § 90679 and Okla. Stat. tit 21 § 1362, 80 prohibiting “Obscene Language” and “Disturbance by loud or unusual noise or abusive, violent, obscene, profane or threatening language.”

As one might expect, those states that have enacted independent anti-profanity statutes (contrasted against those that criminalize speech as a sub-part of a more general or broad statute) are those most blatantly violating the Constitution. Those states, via their independent anti-profanity statutes, are targeting profanity for its own sake. In addition to a lesser body of case law explaining the breadth of the provision, these independent statutes often omit an intent requirement, whereas speech regulation under the umbrella of Disorderly Conduct, for example, is subject to the intent requirement imposed on all behavior or activity that is punishable as disorderly.81

The relative advantages and disadvantages of these two disparate penal strategies are evident when one compares two statutes side-by-side.82 On the one hand, criminalizing profane language under the broader category of “Disorderly Conduct” in Montana makes it a crime to “knowingly disturb[] the peace by . . . using threatening, profane, or abusive language.”83 This statute is found among the other “Offenses Against Public Order,” and specifically “Conduct Disruptive of Public Order.”84 Because the statute is a sub-part of disorderly conduct, the law is explained by considerable legislative and judicial history, including bill drafts, editor notes,85 and more than fifty notes of decisions.86

79 OKLA. STAT. tit. 21, § 906 (2017).
80 Id. § 1362 (2018).
81 Comparing two Virginia statutes: Under VA. CODE ANN. § 18.2-415 (2006), “Disorderly Conduct” requires actors to have “the intent to cause public inconvenience, annoyance or alarm, or recklessly creat[e] a risk thereof.” Under VA. CODE ANN. § 18.2-388 (1990) relating to “Profane Swearing,” “[i]f any person profanely curses or swears or is intoxicated in public” the mere use of profanity is a crime, absent any intent requirement.
82 For comparative purposes, this Note examines VA. CODE ANN. § 18.2-388 (1990) and MONT. CODE ANN. § 45-8-101 (West 2017).
83 MONT. CODE ANN. § 45-8-101(1)(c) (West 2017).
84 Id.
85 MONT. CODE ANN. § 45-8-101 (West 2017).
86 Id.
On the other hand, criminalizing “[p]rofane swearing” in Virginia looks very different. Under Virginia law, “[i]f any person profanely curses or swears . . . he shall be deemed guilty of a Class 4 misdemeanor.” This statute is found among “Crimes Involving Morals and Decency,” and specifically among “Obscenity and Related Offenses.” As a (relatively) independent statute, there are fewer sub-sections and therefore fewer comments available. There is minimal legislative history available, and far fewer notes of decision, meaning that there is little guidance available for attorneys and judges.

There are, of course, bound to be commonalities among statutes across this country, including those explained above. Turning to the differences—and the most important line to draw among them—the presence or omission of an intent requirement is key.

B. Intent Requirements: Knowingly and Intentionally Using Profanity

Criminalizing an act that was intentionally or knowingly done is inherently more specific than criminalizing just the act itself. Missouri, for example, prefices its enumeration of what constitutes “Peace Disturbance” with the requirement that the act “[u]nreasonably and knowingly disturbs or alarms another person.” Nevada similarly requires a “Breach of Peace” be “maliciously and willfully” committed. In total, thirty-six of the states surveyed criminalize profanity in a statute that requires intent.

Criminalizing an act without providing intent via context is broad and vague (potentially to the point of being void). Mississippi, for example, requires only that “[i]f any person shall profanely swear or curse, or use vulgar and indecent language, . . . in the presence of two (2) or more persons, he shall, on

88 Id.
89 Id. This statute appears in Article 5. Obscenity and Related Offenses of Chapter 8. Crimes Involving Morals and Decency.
90 This law in its entirety criminalizes “[p]rofane swearing and intoxication in public”—although it is not strictly profane language, it is narrower than the larger “Disorderly Conduct” statute in Montana that included sub-sections (a) through (i).
91 VA. CODE ANN. § 18.2-388 (West 2018).
92 Id.
94 NEV. REV. STAT. § 203.010 (2017).
96 Given that some of the states surveyed have multiple relevant laws, there are more than 50 statutes being considered in this survey. For example, Oklahoma, Pennsylvania, and Virginia appear on both lists discussing intent.
conviction thereof, be fined . . . or be imprisoned.”

Similarly, in Michigan, “[a]ny person . . . who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor.”

Omitting an intent requirement in the context of anti-profanity statutes makes for a much more aggressive law. Although residents are nonetheless able to familiarize themselves with the laws, upon committing the offense (even by accident) there is little recourse. Under this strict liability-esque regime, to convict a citizen, the state need only prove that the event happened. Under such a statutory regime, saying “shit” on the street becomes akin to speeding—it does not matter why you did it, but you are damned if you do. In total, seventeen of the states surveyed criminalize profanity to this day without requiring any form of intent.

Sometimes, however, even a strong intent requirement (and neutral language) fails to save an anti-profanity statute from unconstitutionality. A Rhode Island case, *State v. Tavarozzi*, illustrates the failure of such a statute that was found unconstitutional based on its general prohibition on “loud and unreasonable noise.”

Ms. Dolores Tavarozzi was arrested after a “less-than-enviable set of circumstances” following a St. Patrick’s Day party at a local bar, which required police involvement. A visibly intoxicated Tavarozzi, upon being asked to leave the bar “stated her address as ‘Alaska’ and began speaking in a loud and vulgar manner.” As she reluctantly followed the officer outside, Tavarozzi used “very very vulgar language” and “attempted to kick [the officer].” She “continued kicking so vigorously in all directions that she kicked off both her high-heeled shoes.”

Convicted of both disorderly conduct and assault, Tavarozzi ultimately defeated the anti-profanity statute when the court

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99 Alaska, Arkansas, California, Washington D.C., Florida, Georgia, Hawaii, Iowa, Michigan, Mississippi, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Carolina, Virginia, and Wisconsin.
100 See *State v. Tavarozzi*, 446 A.2d 1048, 1053 (R.I. 1982) (holding that the relevant statute was “inapplicable to speech and . . . neither vague nor overbroad when applied to conduct other than speech”). Tavarozzi’s conviction for “loud, profane, and opprobrious speech” was consequently “constitutionally impermissible.” *Id.*
101 *Id.* See also 11 R.I. Gen. Laws § 11-45-1 (2008) (“A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly: . . . disturbs another person by making loud and unreasonable noise which under the circumstances would disturb a person of average sensibilities.”).
102 *Tavarozzi*, 446 A.2d at 1049.
103 *Id.* at 1050.
104 *Id.*
105 *Id.*
decided that “[the disorderly conduct statute] constitutionally cannot be applied to speech.”\textsuperscript{106} Although the statute did not even mention profanity or vulgar language, the Rhode Island Supreme Court concluded that “[t]he loud and unreasonable noise defendant was accused of making, however, consisted of loud and vulgar speech. In effect, the prosecution in this case is thereby seeking to punish potentially protected speech under the guise of noise.”\textsuperscript{107} In a victory for free speech, the court concluded “that the state may not impose criminal sanctions upon speech under the rubric of prevention of loud and unreasonable noise. Although speech may be noisy and profane, it may nevertheless be protected save for the rather narrow Chaplinsky exception.”\textsuperscript{108}

It is worth noting that at least five states have already repealed unconstitutional anti.profanity statutes and replaced them with laws that conform to constitutional precedents protecting freedom of speech.\textsuperscript{109}

C. The Worst of the Worst: An Unconstitutional Most Wanted List

Several news articles proclaiming that Virginia maintains an archaic law that criminalizes profanity inspired this Note.\textsuperscript{110} “In the state of Virginia, the code of law suggests that citizens use no profanity in public . . . [l]etting out an f-bomb in Virginia is a misdemeanor!”\textsuperscript{111} Unfortunately, these articles failed to mention the host of other states that maintain similarly restrictive (and unconstitutional) laws.\textsuperscript{112} The five statutes that follow are the most egregious unconstitutional anti.profanity statutes; the five statutes flailing and screaming to be repealed or revised.

1. New Mexico

In New Mexico, “[d]isorderly conduct consists of . . . engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace.”\textsuperscript{113} Despite case law interpreting this statute

\textsuperscript{106} Id. at 1052; see generally 11 R.I. GEN. LAWS § 11-45-1 (2008).
\textsuperscript{107} Tavarozzi, 446 A.2d at 1049.
\textsuperscript{108} Id. at 1053.
\textsuperscript{109} Arkansas, Indiana, Kentucky, North Carolina, and South Dakota.
\textsuperscript{111} Merrell, supra note 110.
\textsuperscript{112} Virginia, Georgia, Michigan, Nebraska, New Mexico, Oklahoma, South Carolina, and Wisconsin.
\textsuperscript{113} N.M. STAT. ANN. § 30-20-1 (2018).
as targeting only fighting words, it appears vulnerable to a constitutional challenge.\footnote{State v. James M., 111 N.M. 473, 478 (1990) (concluding that the New Mexico disorderly conduct statute was neither unconstitutionally vague nor overbroad).}

Comparing this statute to N.C. 14-197, they are functionally identical. N.C. 14-197 forbade “indecent or profane language,” used “on any public road or highway,” that was “in the hearing of two or more persons, in a loud and boisterous manner.”\footnote{See N.C. GEN. STAT. § 14-197 (2013), \textit{repealed by} 2015 N.C. Sess. Laws. 286 § 1.1(1).} N.M. Stat. Ann. § 30-20-1 forbids “indecent, [or] profane language” used in public, that is “boisterous, unreasonably loud, or otherwise disorderly conduct which tends to disturb the peace.”\footnote{See articles discussed, \textit{supra} note 110.} Remove the final clause, and these laws mirror one another exactly; maintain that final clause, and there is but one low wall protecting this law from being struck down. Side by side, this statute is vulnerable to constitutional challenge, as it violates the same rights that were disputed under N.C. 14-197.

Of course, states are not compelled to follow others, and North Carolina’s decision is not binding on New Mexico. However, if nothing else, North Carolina’s decision can inspire additional state challenges, and provide a rubric for future First Amendment successes.

2. Oklahoma

Under Oklahoma law, “[i]f any person shall utter or speak any obscene or lascivious language or word in any public place . . . he shall be liable to a fine . . . or imprisonment . . . ”\footnote{Brown v. Falls, 311 F. Supp. 548, 551–52 (1970) (explaining that contrary to party objection, “where the State statute is fairly subject to an interpretation which will avoid or modify the federal constitutional question, the court may properly abstain from the granting of declaratory relief”).} Unlike New Mexico, case law attempting to defend the constitutionality of this statute is lacking. Instead, federal courts in Oklahoma abstained from addressing the question to “afford the State Court the first opportunity” to interpret the law.\footnote{Brown v. Falls, 311 F. Supp. 548, 551–52 (1970) (explaining that contrary to party objection, “where the State statute is fairly subject to an interpretation which will avoid or modify the federal constitutional question, the court may properly abstain from the granting of declaratory relief”).}

Unlike the statutes in New Mexico and North Carolina, Oklahoma does not require that the speaker be in the presence of others, nor does it require the speaker to be boisterous. This distinction is the nail in Oklahoma’s statutory coffin: without requiring the speaker to be addressing others or using a specific tone, there is little to no support for an interpretation of this
statute as permissibly forbidding fighting words. As it is written, this statute criminalizes “obscene or lascivious language” for its own sake, and cannot seek constitutional refuge. Although the federal court addressing this statute in Brown v. Fallis concluded “we should not attempt to foreclose an interpretation that may be made to avoid any constitutional infirmity which might exist, as the Oklahoma courts do,” they were really leaving the door open to a state court challenge, which is likely to succeed.

3. South Carolina

“Any person who shall . . . use obscene or profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church . . . shall be deemed guilty of a misdemeanor” in South Carolina.

Very much like Oklahoma, South Carolina does not require that the profane language be addressed at another person, or with a particular intent or inflection. The additional clause that forbids profane language “in hearing distance of any schoolhouse or church” provides no constitutional support because the Constitution does not condone censorship in proximity to schools or churches. South Carolina consequently criminalizes the language for its own sake, this is not prohibiting fighting words, and it is therefore unconstitutional.

4. Wisconsin

Under this final violative statute, “[w]hoever, in a public or private place, engages in violent, abusive, . . . profane, boisterous, unreasonably loud or otherwise disorderly conduct . . . in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.”

This statute is both more specific and more vague than the others in two distinct ways, neither of which render it constitutional. First, unlike other anti-profanity, or even disorderly conduct statutes, Wisconsin is stepping into the

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119 Interestingly, under Okla. Stat. tit. 21, § 1362, “[i]f any person shall willfully or maliciously disturb, either by day or night, the peace and quiet . . . by loud or unusual noise, or by abusive, violent, obscene or profane language, whether addressed to the party so disturbed or some other person, or by threatening to kill, do bodily harm or injury, . . . or by running any horse at unusual speed along any street, alley, highway or public road, he shall be deemed guilty of a misdemeanor.” The horse clause is not particularly relevant, but it is interesting. Relevant here is the language expressly prohibiting fighting words. Comparing this statute to Okla. Stat. tit. 21, § 906 makes clear that the former is constitutional, whereas the latter is not.


121 Id. at 552.


private sphere by regulating both public and “private place[s].”124 Second, the threshold for legality under this statute is vaguely stated as behavior that “tends to cause or provoke a disturbance.”125 What is “a disturbance?”126 On the one hand, a tavern brawl sounds like a disturbance. On the other hand, exclaiming “shit” too loudly while passing a family on the street could also be a disturbance.

The Supreme Court of Wisconsin has yet to consider the constitutionality of this statute. Unfortunately, the case that brought this statute before the court in 2002 did not include a constitutional challenge, compelling the court to “decline to address the overall constitutionality of the statute in this case.”127

5. Virginia

Finally, the statute that launched a thousand words: Virginia’s blatantly unconstitutional prohibition on profanity. “If any person profanely curses or swears or is intoxicated in public, whether such intoxication results from alcohol, narcotic drug or other intoxicant or drug of whatever nature, he shall be deemed guilty of a Class 4 misdemeanor.”128 I intentionally did not abridge the language of this statute: it is fully intact, leaving no room for misinterpretation or persuasion.

Examining the statutory language, there is no intent requirement, nor any limiting clause narrowing the scope to fighting words. Instead, the statute criminalizes profane swearing or cursing no matter the context. Drawing the obvious parallel, this statute is as bad, if not worse, than N.C. 14-197. Under the now-dead North Carolina law, the profane speaker had to be “in the hearing of two or more persons” while being “loud and boisterous.”129 Although these limitations do not bring this law even an inch closer to constitutionality, they succeed in illustrating the sheer breadth of the unconstitutional and enduring Virginia statute by comparison. As it is written, the Virginia statute criminalizes profanity regardless of how many people can hear, meaning it could be zero people. As it is written, the Virginia statute criminalizes profanity regardless of the speaker’s tone, therefore including even conversational profanity. Applying the statute as written, I would commit a “Class 4 misdemeanor” by walking along a quiet street, tripping

124 Id.
125 Id.
126 Id.
127 State v. Schwebke, 644 N.W.2d 666, 680 (Wis. 2002).
on an uneven sidewalk, and saying “fuck” as I stubbed my toe before regaining my balance.

Although Virginia courts and federal courts have addressed the statute as recently as 2017, it has only been in regard to the intoxication clause, leaving the profanity clause to endure, like the fossil that it is.\(^{130}\)

The foregoing statutes are the culmination of rigorous research—the five statutes shouting and waving their arms for a constitutional challenge. After surveying the fifty states, exploring how courts have construed these statutes, and comparing the language and meaning to the now vanquished N.C. 14-197, these five statutes represent the clearest constitutional violations. The section that follows will consider how and why they remain good law, as well as how and why they should be put down in a timely manner.

### III. THE WHY AND HOW OF DISMANTLING AN UNCONSTITUTIONAL ANTI-PROFANITY STATUTE

As a member of the First Amendment Law Review, a law student, and a general advocate for Free Speech, I wholeheartedly believe that anti-profanity statutes like those specifically mentioned in Part II are an affront to the Constitution.\(^{131}\) As a human, I wholeheartedly believe that censorship is a stepping-stone to tyranny.\(^{132}\) As a product of these many considerations, I say “fuck you” to anyone who tells me profanity is un-ladylike, inappropriate, or against the law.\(^{133}\) That is my subjective view.\(^{134}\) Objectively, a state cannot make

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\(^{130}\) See United States v. Wilson, 246 F. Supp. 3d 1160 (E.D. Va. 2017) (denying defendant’s motion to dismiss charges, including charges under 18.2-388, after defendant cursed out a shop employee).

\(^{131}\) See David L. Hudson, Jr., Can Anti-Profanity Laws and the Fighting Words Doctrine Be Squared with the First Amendment?, ABA J. (Apr. 2018), http://www.abajournal.com/magazine/article/fighting_words_profanity_1st_amendment (“In my opinion, laws banning profanity are unconstitutional on their face.”).


\(^{134}\) My passion for profanity was ignited at an early age by the incomparable George Carlin, free speech fanatic and cunning linguist, whose “7 Dirty Words” (shit, piss, fuck, cunt, cocksucker, motherfucker, and tits) changed my life; it is a privilege to (hopefully) pay tribute to him with this piece. See Timothy Bella, The ‘7 Dirty Words’
constitutional something that fundamentally is not. Why then do these statutes continue to exist? On a basic level, the very idea that we have laws on the books that cannot be squared with the Constitution is confounding, and yet, that is the country in which we live. Anti-profanity statutes should be relics, not our reality.

First and foremost, unconstitutional anti-profanity statutes, like the five identified in Part II, need to be reshaped or repealed because they are unconstitutional in their present form. An additional consideration (and cause that I champion) is that rather than punishing profanity, we should be embracing it: embracing the health benefits, the expressive benefits, and the academic benefits, which are explained later in this Note. To establish a new pro-profanity regime, however, we must first dismantle the old laws. The sections that follow will examine how and why these offensive statutes continue to exist, as well as the numerous pro-profanity arguments and analyses.

A. How and Why Statutes Endure: Perfect Plaintiffs, Stubborn Conservatives, and Useless Legislators

“Flowers may die, and old soldiers may fade away, but statutes do neither.”

1. Wanted: The Perfect Plaintiff

Successfully challenging these unconstitutional anti-profanity statutes requires the perfect plaintiff. The perfect plaintiff is in the right place, at the right time, with the right cause of action.

“A well-selected plaintiff can provide a concrete context for abstract legal concepts and personalize the stakes.”

Beyond the crucial standing requirement that a plaintiff must satisfy, the ideal plaintiff “must be amenable to the spotlight and both

136 In a podcast exploring what it means to find the perfect plaintiff in the context of Supreme Court litigation, Edward Blum has personally found the perfect plaintiff for six Supreme Court cases, including Fisher v. University of Texas. Additionally, the podcast discusses the groundbreaking case of Lawrence v. Texas, and the necessity of identifying a suitable plaintiff even in cases where the law is so clearly unconstitutional. Edward Blum, More Perfect: The Imperfect Plaintiffs, NEW YORK PUBLIC RADIO (June 28, 2016), https://www.wnycstudios.org/story/imperfect-plaintiff.
138 Id. at 137.
sympathetic and relatable to the average person.” Of course, these ideas scale up and down depending on the judicial stage on which they are set: at the Supreme Court, with the eyes of the world on that forum, a plaintiff is “selected and groomed . . . with great care.” At the state level, on the other hand, the stakes are lower: the eyes of the world pay little mind to a meager state law challenge.

In terms of identifying the perfect plaintiff to combat an anti-profanity statute, the biggest hurdle is less likely to be finding one with the perfect personality, and more likely to be finding one with a cause of action. It is obvious but nonetheless important to emphasize that to challenge a law, one must suffer an injury under that law. Therefore, until someone is arrested pursuant to an anti-profanity statute, that statute can linger in legal limbo seemingly forever.

“It’s an unfortunate truth that, once a law is passed, it is rarely removed from the books.” Moreover, as long as they are not being used, and thus not being challenged, dusty, archaic (and unconstitutional) laws endure. “Statutes may become obsolete or fall into desuetude . . . but they retain their force and effect until repealed by the legislature or held unconstitutional by the courts.” It is for this reason that strange and obscure state laws remain intact. In Nebraska, for example, “[n]o person who is afflicted with a venereal disease shall marry.” In Illinois, “[a] person commits fornication when he or she knowingly has sexual intercourse with another not his or her spouse if the behavior is open and notorious.” Both of these laws seem vulnerable to challenge, but, like anti-profanity statutes, they are unlikely to reach the court absent the perfect plaintiff.

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139 Id.
140 Id. at 138 (citing Amanda Terkel et al., Meet the Couples Fighting to Make Marriage Equality the Law of the Land, HUFFINGTON POST (June 17, 2015, 2:58 PM), http://www.huffingtonpost.com/2015/06/17/supreme-court-marriage_n_7604396.html.
143 Larkin & Seibler, supra note 135 (defining desuetude as “a legal term used to describe anachronistic and rarely (if ever) enforced laws”).
North Carolina was fortunate: Samantha Elabanjo was the perfect state law plaintiff. She was in the right place on Franklin Street, at the right time, saying “you need to clean your damn dirty car” to the right “asshole” police officers who arrested her for “use of profanity on a public roadway.” In order for courts in other states to have the authority to strike these statutes, the attorneys need to find their Samantha.

2. Conservatives Fear Change, or Profanity, or Both

Aside from, or in addition to, statutes enduring because they are unchallenged, there is a second possible explanation: conservative representatives and their constituencies like them. Conservatives can be “less tolerant of compromise; see the world in ‘us’ versus ‘them’ terms; . . . are ‘motivated to punish violators of social norms (e.g., deviations from traditional norms of sexuality or responsible behavior) and to deter free riders.”

Potentially damning for the pro-profanity cause is the idea that “[t]he old-fashioned ways' and 'old-fashioned values' still show the best way to live,” a sentiment that conservatives, rather than liberals supported in a recent survey.

Not only are conservative values a potential motivator for maintaining anti-profanity statutes, those conservative constituencies elect conservative representatives whom they believe will champion their conservative causes. To make matters worse for the pro-profanity supporters, a recent study indicated that “[p]oliticians tend to vastly overestimate just how conservative their constituents really are.” Conservative representatives, to a greater degree than their liberal counterparts, “appear to believe that they represent a district that is more conservative . . . than the most conservative legislative district in the entire country.”

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147 See ACLU, supra note 1.


149 Id.

150 Sal Gentile, Study: Politicians Think Voters Are Way More Conservative Than They Actually Are, NBC NEWS (March 10, 2013, 7:47 AM), http://www.nbcnews.com/id/51115737/1/study-politicians-think-voters-are-way-more-conservative-they-actually-are/ (reporting that conservative politicians can underestimate constituency support by “as much as 20 percentage points[,]” and that liberal politicians are also fallible, though “not by nearly as much”).

151 Id.
In terms of how this overestimation impacts the struggle to repeal unconstitutional anti-profanity statutes, it seems less and less likely that a conservative legislator would even attempt to appear pro-profanity if she (erroneously) believes that her (über-conservative) constituents would be against it.

3. Legislators Spend Time Making Law, Not Unmaking Law

“More often than not, though, elected officials are too busy making new laws to spend time getting rid of the obsolete ones already on the books.”152 Successfully getting a law repealed is therefore an uphill battle, and one that requires national publicity and divisive issues that rally support.153 Legislators working to appease their constituents and colleagues have a full schedule without the added consideration of working to repeal a statutory relic. But what if there was a bureaucratic solution to combat a legislator’s finite amount of time and energy?

Professor Glenn Reynolds has theorized such a solution: “a third house of Congress whose sole function is to repeal laws.”154 This “House of Repeal” would create a congressional body that is incentivized to subtract rather than add to our current body of law.155 This solution, which would necessitate a constitutional amendment, would remedy the issues of inadequate legislator time and demanding constituents.156 Although Reynolds’ theory is geared toward the federal system, it could just as easily be applied to the states. Of course, this radical idea would require fundamentally altering our system of government at the state or federal level. That being said, drastic measures are sometimes necessary “usually when the populace thinks that the existing system is letting them down.”157 As Reynolds sees it, “the prospects for constitutional change don’t look so bad.”158

B. Why Support Profanity? It is a Path to a Smarter, Healthier Populous

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152 Moore, supra note 142.
155 Id.
156 Id.
158 Id.
“People who curse are smart as f—k!”

Beyond what I hope is the now obvious reason that anti-profanity statutes should be dismantled (just see the U.S. Constitution), there are persuasive and scientific justifications for promoting profanity both personally and professionally. On the professional side, profanity “promot[es] trust and teamwork in the office.” Profanity can also “increase the effectiveness and persuasiveness of an argument” and help to “communicate how [one] feel[s] about a certain subject.” On the personal side, profanity both: (1) increases health and happiness, and (2) indicates worthwhile personal traits.

Behavioral psychologist Richard Stephens concluded that “swearing really does allow you to withstand pain for longer” based on a study he conducted that involved submerging subjects’ hands in ice water. Compared to those subjects who could not use profanity, those who did use profanity could “keep their hands in the iced water for half as long again” than their neutral counterparts. Profanity can help alleviate pain by having “a similar soothing effect to drugs like morphine” that results from the body’s “release of natural, pain-relieving chemicals.” Profanity also serves as an indicator of personality traits and intellectual ability. “A recent study found that people who swear often lie less and have higher levels of integrity,” noting a correlation between “those who cursed and their honesty levels.” These byproducts of profanity are worthy causes, and bolster the idea that we ought to celebrate profanity rather than regard it as taboo, or (more importantly) illegal.

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161 Id.
163 Id.
165 See id.
166 Worrall, supra note 160.
167 Id. (emphasis added).
168 Holmes, supra note 162.
169 Id.
Although “use of obscene or taboo language—or swearing, as it’s more commonly known—is often seen as a sign that the speaker lacks vocabulary, cannot express themselves . . . or even lacks intelligence[,]” studies have proven the opposite.170 In addition to being more honest, pro-profanity people are thought to have larger vocabularies and “the habit [of swearing] may be linked with a higher IQ.”171 According to psychologists at Marist College, the relationship between “verbal fluency” (which measures a person’s general vocabulary abilities), and “swearing fluency” (which measures a person’s vocabulary of swear words or profanity) indicates that “people who scored highest on the verbal fluency test also tended to do best on the swearing fluency task.”172

Dispelling the myth that profanity is indicative of lesser intelligence, “swearing appears to be a feature of language that an articulate speaker can use in order to communicate with maximum effectiveness.”173 Not only are unconstitutional anti-profanity statutes trampling First Amendment rights, they are furthering false ideas to the detriment of smart, honest, well-spoken people to whom swearing is second nature.

IV. CONCLUSION

For three key reasons, anti-profanity statutes are fucking ridiculous. First and foremost, they are blatantly unconstitutional.174 In a perfect world, unconstitutional laws wouldn’t exist, but in our world, shit happens. Second, anti-profanity statutes remain on the books because they are not a legislative priority and rarely get their day in court.175 Unfortunately, we have to hope for citizens to have their constitutional rights violated and be arrested under an unconstitutional statute in order for these laws to be struck down. Alternatively, we lobby our legislators to repeal these statutes. This option would save innocent citizens from being arrested in the name of profanity, but would require heavy reliance on busy, potentially conflicted representatives. Ultimately, there is not a shortcut to constitutionality, however backwards that conclusion

171 See Holmes, supra note 162.
172 Stephens, supra note 170 (citing Kristin L. Jay & Timothy B. Jay, Taboo Word Fluency and Knowledge of Slurs and General Pejoratives: Deconstructing the Poverty-of-Vocabulary Myth, 52 LANGUAGE SCI. 251, 257 (2015)).
173 Id.
174 See supra Part I.
175 See supra Part III.
might be. Finally, state residents would benefit from uninhibited use of profanity.\textsuperscript{176} And yet, despite the pros vastly outweighing the cons, anti-profanity statutes endure. Criminalizing profanity stifles intellectuals, who swear more than others.\textsuperscript{177} Criminalizing profanity demands that a car wreck victim suppress her swearing, abide the law, and endure greater pain, rather than use profanity and violate the law.

Be it during one's formative years or final years, the freedom to say fuck is protected under the First Amendment. Unconstitutional anti-profanity statutes that criminalize profanity for its own sake, rather than in the context of fighting words, trample this First Amendment right.

\textsuperscript{176} Id.
\textsuperscript{177} See \textit{supra} Part III.
Modern First Amendment law on the freedom of speech and press is, in an important way, originalist. This claim runs contrary to the perception of many. This Article explains the originalist pedigree of the First Amendment. The original meaning of the First Amendment in 1791, standing alone, does not protect as much expression as the modern Supreme Court’s jurisprudence says it does. The Constitution’s structure, however, protects liberty. The original legal meaning of the First Amendment, taken in conjunction with the original understanding of the enumerated powers scheme of Article I, Section 8, the rights protecting rule of construction in the Ninth Amendment, and the reservation of powers to the States in the Tenth Amendment, protects a greater sphere of speech and press than does the First Amendment alone. It may protect all of it, from the federal government at least. This was the Jeffersonian argument in opposition to the Sedition Act of 1798, that the First Amendment barred all federal government regulation of speech and press. That argument became the law of the First Amendment through the theory of liquidation. Liquidation is a theory for how ambiguous constitutional meaning can be fixed or settled to a more refined meaning. Through liquidation, the original meanings of the Constitution’s multi-faceted structural protections for speech and press liberties was condensed entirely into the confines of the First Amendment. The Jeffersonian construction of the First Amendment that emerged from this contest over the Amendment’s meaning, was importantly connected to the original meaning of the Constitution and its First Amendment. It is also the foundation for the Supreme Court’s modern First
Amendment jurisprudence. This pedigree of the First Amend-
ment makes it originalist in an important way.

This Article walks readers through this historical process of legal change in the original meaning of the First Amendment. Originalism does not prevent legal change. It requires that law be changed in accordance with the law. This Article does not ar-
rive at the final word on the meaning of the First Amendment. It
does not claim to argue what the correct interpretation of the
First Amendment is or what its meaning should be. Yet, it does
degree that in an important way our First Amendment law is
originalist. That fact is of importance for our understanding of
the First Amendment’s meaning and its correct application to
concrete legal problems.

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INTRODUCTION

James Madison wrote that the First Amendment “is a denial to Congress of all power over the press[.]”1 But was the “Father of the Constitution” right? Weighed against Ratification-era sources, Madison’s interpretation of the First Amendment was a novel invention2 and not part of the First Amendment’s original meaning.3 Yet, Madison’s succinct articulation of the Jeffersonian interpretation of the First Amendment became the law of the United States4 and is still considered the foundation of modern First Amendment jurisprudence by the Supreme Court.5 If the Jeffersonian interpretation is incorrect, it should follow that a great deal of First Amendment case law is consequently incorrect.6 I argue that the original legal meaning of the First Amendment, properly situated in the constitutional superstructure, may not require the overturning of many seminal First Amendment cases, even if those cases could have been decided with a firmer grounding in originalism. Further, I argue that through a theory known as liquidation, the fixing of ambiguous constitutional meaning, the Jeffersonian interpretation of the First Amendment may be the original law of the First Amendment.

This Article attempts to define and explain a theory of “Original Law Originalism” as applied to the First Amendment. It begins by first restating the original meaning of the First

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2 Jud Campbell, The Invention of First Amendment Federalism, 97 TEX. L. REV. (forthcoming 2019) [hereinafter Campbell, First Amendment Federalism].
3 Id. at 21.
4 Id. at 5.
6 Jud Campbell, Natural Rights and the First Amendment, 127 YALE L.J. 246, 263–64 (2017) [hereinafter Campbell, Natural Rights] (“A huge swath of modern case law, after all, falls outside of the First Amendment’s original legal ambit, including its ban on prior restraints and its protection for well-intentioned statements of one’s thoughts. If an originalist wanted First Amendment doctrine to track Founding Era judicial reasoning, the Supreme Court’s decisions in Texas v. Johnson, Boy Scouts of America v. Dale, Citizens United v. FEC, and Snyder v. Phelps, among many, many others, would likely have to go.”); see also Cass R. Sunstein, What If the Founders Had Free Speech Wrong? A Scholar’s Jarring Claim: America’s Framers Meant to Protect a Lot Less Speech than Most of Us Think, BLOOMBERG (Dec. 14, 2017, 8:00 AM), https://www.bloomberg.com/view/articles/2017-12-14/what-if-the-u-s-has-free-speech-all-wrong (“Campbell’s research raises serious questions for ‘originalists’...”). But see Campbell, Natural Rights, supra note 6, at 264 (“[O]ther originalists argue that judges are empowered, or even duty-bound, to give concrete meaning to underdeterminate constitutional provisions. If one accepts this view, then modern law might still comport with original meaning.”).
Amendment (Campbell’s view) then explaining how that original meaning was “changed” or “liquidated” by the Jeffersonians. It connects the legal history of the First Amendment to its modern legal meaning to demonstrate that, by its pedigree, our modern First Amendment law is originalist. 

Original Law Originalism is a theory of originalism and of legal change. It is “a particular way to understand where our law comes from, what it requires, and how it can be changed.”

The theory rests on the principle that law has a meaning at the time it is adopted and that that meaning can change. It can only change, however, if it is legally changed by the proper method authorized by the law for making that legal change. The proposition is that “our law”—that is, American law—“happens to consist of their law, the Founders’ law, including lawful changes made along the way.” Consequently, to understand what our law is today, we must understand the content of the Founder’s law and then, if it was changed, how it was changed. This Article applies that Original Law Originalism definition of our law’s legal content to the First Amendment to explain the current foundation of First Amendment jurisprudence and to provide a means for discovering the Amendment’s true legal meaning.

The natural place to begin our inquiry is the text of the First Amendment and its legal content at the time of enactment in 1791. The “freedom of speech, or of the press” in the law of the First Amendment has two distinct meanings; and the meaning of those legal words proceeds from two sources. One springs from the Framers’ conception of the natural rights of speaking, writing, and publishing. The other is a fundamental positive right, the liberty of the press, derived from the common law, which carries with it certain established customary legal rules about what government can and cannot do in regards to regulating the press. What the legal content of the First Amendment consists of is its original meaning. Professor Campbell defines that original meaning as “the First Amendment recognized (either implicitly or outright) the ordinary natural right of expressive freedom along with (either

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7 This Article heavily relies upon Professor Campbell’s recently published article Natural Rights and the First Amendment for understanding the First Amendment’s original meaning. See Campbell, Natural Rights, supra note 6.
9 Id. (emphasis omitted).
10 U.S. CONST. amend. I.
11 See infra Section I.D.
12 See id.
absolute or presumptive) protection for a set of customary rules with more determinate legal meanings.”

This Article agrees with Campbell’s original understanding of the First Amendment; however, I argue that there is more to it. The meaning of the First Amendment is decidedly shaped by its relationship to governmental power and historical practices. Both the Federalist and later Republican view (that developed out of the Anti-Federalist view) share that the First Amendment’s interactions with the exercise of governmental power help define its protective content. Each camp’s distinct views of how the First Amendment applies to resolve concrete cases hinges as much on different conceptions of federalism and governmental power, at the state and federal level, as they do on the meaning of the text of the Amendment itself. Therefore, the ultimate question of how the Constitution protects freedom of speech and press is resolved by practices and events in Founding-Era history.

Finally, this Article will conclude with a discussion of how the law of the First Amendment can be changed, or more accurately, how a more settled meaning can crystalize out of a range of plausible original meanings. Though there may be other original methods of authorized legal change available, this Article purports to apply a theory of liquidation that explains how ambiguous constitutional meanings can be resolved through historical practices. Liquidation theory is the idea that the meaning of an ambiguous provision in the Constitution can be settled by a course of historical practice that consistently employs a certain meaning of the provision. The historical course of practice settles or liquidates the meaning of that provision as the meaning that is used in practice. Liquidation theory is often employed in constitutional interpretation and construction to determine a provision’s meaning, sometimes under the modality of historical practices, but the Founding-Era version is known as liquidation and has some definitive and distinguishing components.

13 Campbell, Natural Rights, supra note 6, at 308.
15 Federalists argued that a bill of rights was unnecessary because of the Constitution’s limited grant of enumerated powers and Republicans argued that rights provisions, i.e. the First Amendment, categorically bar the exercise of certain governmental powers.
17 Id.
18 Id. at 3–4.
19 Id. at 1–4.
In the context of First Amendment Originalism, this Article will look to the arguments made by Federalists and Republicans over the meaning of the First Amendment during debates over the Sedition Act of 1798. This investigation into legal history will analyze if the Federalist or Republican position has the better understanding of the original meaning of the First Amendment. Then this Article will look to the Republican victory vindicating the principles of '98 in the Election of 1800 and ask if that election and subsequent historical practices settled or liquidated the Republican interpretation of the First Amendment. In the alternative, the settlement of the First Amendment’s legal meaning that occurred after the election of Thomas Jefferson to the Presidency might have been an unauthorized legal change in the First Amendment’s original meaning. As part of that legal change analysis, this Article will ask if the change in meaning of the First Amendment brought about by the Jeffersonian Republicans was an authorized or unauthorized change in legal meaning and how that determination is affected by the interpretation of governmental power granted in Article I, Section 8.

In sum, this Article will analyze what the state of the law relating to speech and press was at the time of the First Amendment’s enactment; how the First Amendment’s enactment as written law changed the state of the law at that point, i.e. what the original law of the First Amendment is; and if the Jeffersonian-Republican interpretation of the meaning and effect of the First Amendment’s textual enactment was consistent with the Original Law Original Meaning of the First Amendment. Regardless of whether one is persuaded that the liquidation of the First Amendment’s meaning on the Jeffersonian construction in the aftermath of the Sedition Act controversy of 1798 was a valid or invalid use of that legal concept, a more concrete meaning of the Amendment emerged from that historical contest and it established an originalist pedigree in our current First Amendment law.


21 See Banning, supra note 14, at 246–70 (defining the “Principles of Ninety-Eight” as the principles that the Republicans espoused in their opposition to the Federalist passage, support for, and execution of the Sedition Act that led to the Jeffersonian electoral victory in 1800).

22 The Fourteenth Amendment also legally changes the meaning of the First Amendment and/or its relationship vis-a-vis state and federal power but that is beyond the scope of this paper, which seeks to define only the original meaning of the First Amendment to its Framers.
This Article explains the originalist pedigree of First Amendment law. This Article applies a theory of originalism (Original Law Originalism) to the First Amendment and explains how the meaning of the First Amendment was fixed or liquidated in the Jeffersonian “Revolution of 1800” and from this liquidation explains how through these moments of creation and liquidation our First Amendment law is originalist. Part I begins with an exploration of the intellectual and legal world in which the Framers created the First Amendment to give the reader an original understanding of the water that the First Amendment is swimming in and to provide a language for original law rights discussion. Part II explores an ambiguity in the original meaning of the First Amendment in the context of its place within the legal structure of the Constitution. The question presented here is: regardless of the First Amendment, did the federal government have constitutional authority to regulate speech and press at all in 1789 (before the First Amendment was ratified). This part of the Article pays particular attention to the interaction between notions of power and of liberty in the Constitution, from the Federalist and Anti-Federalist perspectives, pre-ratification of the Bill of Rights and post-ratification, accounting for significant historical practices that shaped the meaning of constitutional provisions in the 1790’s. Part III then explains the originalist roots of modern First Amendment law. It explains how the meaning of the First Amendment was liquidated by the historical practices of the Jeffersonian opposition to the Sedition Act. It further explains how liquidation could validly occur in this situation because the Jeffersonian legal view is connected to the Anti-Federalist conception of power, liberty, and constitutional purpose—views that were present during Ratification. This Article concludes that in an important way, our First Amendment law is originalist.

I. THE FRAMEWORK FOR DISCUSSING THE FIRST AMENDMENT’S ORIGINAL MEANING: SOCIAL CONTRACT THEORY AND NATURAL RIGHTS PHILOSOPHY

The Framers of the United States Constitution, the founding generation, and ratifying public, understood their constitutional rights in the context of the interplay between social contract theory and natural rights philosophy. It is important for understanding the meaning of the First Amendment to understand the legal and intellectual world into which it was
drafted and enacted. Social contract theory was the founding generation’s way of understanding how society and governments were formed by intellectually analyzing hypothetical stages of political development. This theory—derived from a kind of thought experiment—was the foundation of Founding-Era constitutionalism and rights discourse. This Section of the Article will first lay out the Framers’ concept of the “state of nature.” Then follows an explanation of the social contract theory, of which the state of nature is a part, and its connection to the Constitution. The next step is to explain how Founding-Era rights discourse emerged from this state of nature/social contract theory framework. The section concludes by inserting the First Amendment into that intellectual and legal framework to arrive at the original meaning of the First Amendment. It is this meaning of the First Amendment that Original Law Originalism and liquidation theory acted on during the decade following ratification.

A. The State of Nature

The first stage in the development of a political society under social contract theory was the state of nature. In the context of Original Law Originalism, this is the framework that holds the roots of the First Amendment’s legal content. The state of nature—like social contract theory itself—is something of a legal fiction, an abstract hypothetical. In the state of nature,

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24 See Jud Campbell, Republicanism and Natural Rights at the Founding, 32 Const. Comment. 85, 87 (2017) [hereinafter Campbell, Republicanism] (“Social contract theory . . . underpinned most of Founding-Era constitutionalism . . . .”).
25 See, e.g., Campbell, Natural Rights, supra note 6, at 252 n.13; John Locke, Two Treatises of Government 276–77 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (“For ‘tis not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing together mutually to enter into one Community, and make one Body Politick . . . .”); James Madison, Essay on Sovereignty, in 9 The Writings of James Madison 568, 570 (Gaillard Hunt ed., 1910) (1835).
26 See, e.g., Campbell, Republicanism, supra note 24, at 87 (2017) (explaining that the state of nature was “imagining what things would be like without a government”); Alexander Hamilton, The Farmer Refuted (1775), reprinted in 1 The Papers of Alexander Hamilton 81, 86 (Harold C. Syrett ed., 1961).
27 Sachs, supra note 8, at 818 (explaining that Original Law Originalism is a “particular way to understand where our law comes from, what it requires, and how it can be changed.”) (emphasis added).
28 See Campbell, Natural Rights, supra note 6, at 87; John P. Reid, Law and History, 27 Loy. L.A. L. Rev. 193, 213 (1993) (“The social contract was a legal fiction explaining the stipulations under which individuals left the state of nature and created societies.”); 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 14 (John B. Windham ed., 1795) (“I doubt whether a state of nature ever did, or
there is no government, people possess their natural liberty in full, and thus they possess all of their natural rights. 29 Natural rights were considered easily identifiable because they were “self-evident”—encompassing all the liberties that people could exercise in the absence of government or governmental action. 30 In other words, natural rights were those things people could do in a state of nature. 31 Such things as walking, talking, hunting, and praying were seen as natural rights. 32

Natural laws circumscribed natural rights. Natural laws were seen as governing human nature, like gravity governed nature itself, and it was believed that humans could naturally discern these laws. 33 Natural law and the interaction of one person’s natural liberty with another’s were the only theoretical limitations on the exercise of humans’ natural rights in a state of nature. 34 Thus, natural law and natural rights, in some sense, defined the parameters of the state of nature.

The Declaration of Independence recognized the state of nature. That upon the separation of the American colonies from Great Britain, the people had “assume[d] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” 35 This was an express recognition that the state of humans without government is the state of nature. The separation from Great Britain had brought

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29 Campbell, Republicanism, supra note 24, at 88; Thomas Hobbes, Leviathan 64 (Richard Tuck ed., 1996) (1651) (“The Right of Nature . . . is the Liberty each man hath, to use his own power as he will himself for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything which, in his own Judgement and Reason, he shall conceive to be the aptest means thereunto.”); Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819) in 14 The Papers of Thomas Jefferson: Retirement Series, Feb.–Aug. 1819, 201–02 (J. Jefferson Looney ed., 2017).

30 Swift, supra note 28, at 176 (“Natural rights consist in our possessing and enjoying the power, and privilege of doing whatever we think proper, without any other restraint than what results from the laws of nature.”).

31 In the “intellectual world commonly known as ‘the Founding[,]’” natural rights meant something different than the modern understanding. Natural rights were not concrete trumps on governmental action nor determinate legal privileges and immunities. Campbell, Republicanism, supra note 24, at 86. “Rather, embracing natural rights meant embracing a mode of reasoning” with the purpose of creating and serving the best form of republican representative government. Id. (emphasis in the original).

32 Id. at 91.

33 See Montesquieu, The Spirit of the Laws 3 (“Antecedent to [positive] laws are those of nature; so called because they derive their force entirely from our frame and existence.”).

34 James Wilson, Of the Natural Rights of Individuals, in 2 Collected Works of James Wilson 1056 (Kermit L. Hall & Mark D. Hall eds., 2007) (“In a state of natural liberty, every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature.”).

35 The Declaration of Independence para. 1 (U.S. 1776).
about a state of nature among the national polity by dissolving the colonies’ social contract with England.\footnote{Id.}

B. The Social Contract and the Constitution

Realizing that the state of nature was insufficient to safeguard their natural rights, people entered into a social contract.\footnote{See Campbell, Republicanism, supra note 24, at 88.} A social contract predated the formation of a government and was “an agreement among isolated individuals in a state of nature to combine in a society.”\footnote{WOOD, supra note 23, at 283.} The social contract was something to which all the people had to consent, because the individual was viewed as the “original sovereign.”\footnote{Chisholm, Ex’r. v. Georgia, 2 U.S. 419, 456 (1793) (Wilson, J., concurring) (explaining the concept of the individual as the original sovereign for purposes of social contract theory).} By nothing but the universal consent of all individual sovereigns, so the theory went, could the people be bound by the social contract.\footnote{See Campbell, Republicanism, supra note 24, at 89; see also RANDY BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 74–76 (2016) (describing the Founders’ view of supposed or implicit consent).} With the creation of a social contract, individuals formed the body politic,\footnote{See Campbell, Republicanism, supra note 24, at 88; MASS. CONST. OF 1780 pmbl. (“The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”).} which was the new sovereign, united in the pursuit of their common good and individual happiness.\footnote{LOCKE, supra note 25, at 330–31 (“The only way whereby any one divests himself of his Natural Liberty, and puts the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.”) (emphasis in the original).} The body politic as the sovereign governed through majority rule.\footnote{Id. at 331 (“When any number of men have so consented to make one community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to act and conclude the rest.”) (emphasis in original).}

The next step was for the body politic to create and adopt a form of government, to organize and govern the society formed by the social contract. The preamble to the United States Constitution recognized that the American body politic, by whom and for whom the Constitution was formed, was already in existence before the Constitution was written. That pre-existent body politic is acknowledged as “We the People.”\footnote{U.S. CONST. pmbl; see also Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (remarks of William Findley), reprinted in 2 THE DOCUMENTARY HISTORY OF
theory of societal and governmental formation forms the legal backbone for the constitutional structure into which the First Amendment was inserted. In that respect, these underlying philosophies of government are an intellectual and legal history of the original meaning for the First Amendment.

The Declaration of Independence goes on to explain that governments derive “their just powers from the consent of the governed,” (the body politic) and further that “Governments are instituted” to “secure . . . rights” including “Life, Liberty, and the pursuit of Happiness.” So if the purpose of government formed out of these hypothetical stages of political development is centrally to protect natural rights, or, as the Declaration refers to them, “unalienable Rights,” then what are these rights? Under the broad umbrella of social contract theory there exists a taxonomy of rights that is rooted in and descends from natural rights philosophy. It was this taxonomy that the Founders understood, and that shaped their discourse about rights, including speech and press rights.

C. Founding-Era Rights Talk

Descending from natural rights philosophy and stemming from the common law tradition, the Founders understood rights in a particular way. They were well versed in this taxonomy of rights and their conception of it informed how they talked and wrote about rights, including those codified in the First Amendment. This taxonomy first broke down into two camps, rights that are retained portions of human beings' natural liberty and positive rights that are granted by the government. This taxonomy included several categories of rights: inalienable natural rights, natural rights generally, retained natural rights,
fundamental positive rights, and ordinary positive rights. Founding-Era natural rights philosophy, consistent with social contract theory, understood the existence of rights to predate society, and viewed them as inherent in the nature of humans, existing in the state of nature, or developing out of experience. As Randy Barnett succinctly put it, “first come rights and then comes government.”

Natural rights were liberties which people could readily exercise independent of the existence of government. Thus speaking, writing, and publishing were clearly identified as natural rights. These natural rights, by and large, could be regulated by representative government pursuant to the common good—the object for which society and constitutions are formed. Under this conception, far more regulations of First Amendment “natural rights” would be permissible under the original meaning of the First Amendment (the Campbell-Federalist view) if the representatives decided such regulations promoted the public good.

A subset of natural rights is “inalienable natural rights.” The Founders used this terminology to describe two sets of

47 Federal Farmer No. 6 (Dec. 25, 1787), in 20 The Documentary History of the Ratification of the Constitution 979, 983–84 (John P. Kaminski et al. eds., 2004) (describing different types of rights, Madison said “[o]f rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; . . . and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.”); see also James Madison, Remarks (June 8, 1789), in Creating the Bill of Rights: The Documentary Record from the First Federal Congress 64, 81 (Helen E. Veit et al. eds., 1991) [hereinafter Creating].
48 Campbell, Republicanism, supra note 24, at 90–91.
49 Barnett, supra note 40, at 44.
50 Campbell, Natural Rights, supra note 6, at 252 (listing Founding-Era sources defining natural rights).
51 Id. (listing Founding-Era sources that defined the natural rights of speaking, writing and publishing).
52 Barnett and others make a counter or parallel claim that the object of society and of constitutions is to protect natural rights, though it very well may be that the common good and protection of natural rights were one in the same in the Founders’ conception. See Barnett, supra note 40, at 44.
53 This view of the First Amendment has a great deal of parity with the Blackstone-Mansfield view of freedom of speech and of the press. See generally Leonard W. Levy, Emergence of a Free Press 191 (1985) (providing the Blackstonian definition of freedom of the press); see also Campbell, Natural Rights, supra note 6, at 263–64 (explaining the “original legal ambit” of the First Amendment, the “Campbell-Federalist view”).
54 Statutes in the Founding Era contained preambles that stated the purpose of the statute and many believed the Constitution would be interpreted in common law fashion as a kind of “super-statute” and thus the purpose laid down in the preamble, including promotion of the public good, was relevant to interpretation and construction of the document. See generally H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 908 (1985).
natural rights. Sometimes they referred to rights that were considered so fundamentally endowed in human nature that a person could not give them up, even willingly; and this was because individuals lacked control over them. This included the right of conscience or having thoughts, something seen as non-volitional. The other way the Founders used the phrase “inalienable natural rights” was to refer to rights retained by the people that could be given up only by consent. However, under their theory of republican government—a body politic that governed through majority rule—legislative representation could give consent.

Retained natural rights, a further subset of inalienable natural rights, on the other hand, consisted of that portion of natural liberty that the people reserved for themselves in the terms of the social contract or constitution—some argued that all of natural liberty was retained and others argued only a limited sphere of natural liberty was retained within the bounds of established legal rules. Regardless, natural rights generally could only be restricted in the interest of the public good. Consequently, representative government determined the scope of retained natural liberty by legislating (in theory) in accordance with the common good. In this way the people’s liberties were tied to the public good through representative government—designed to encourage good government and promote the public happiness.


56 Campbell, Republicanism, supra note 24, at 97.

57 Federal Farmer No. 2 (Oct. 9, 1787), reprinted in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 214, 216, (John P. Kaminski et al. eds., 2003) (“There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed . . . .”).

58 Letter from Thomas Jefferson to Francis W. Gilmer (June 7, 1816), in 15 WRITINGS OF THOMAS JEFFERSON 23, 24 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905) (“[T]he idea is quite unfounded, that on entering into society we give up any natural right.”).

59 1 WILLIAM BLACKSTONE, COMMENTARIES *121–22 (“Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.”).

60 Campbell, Republicanism, supra note 24, at 93–96.

61 Madison makes a similar move in The Federalist, arguing that individual rights should be tied to representative republican government thereby the individual’s natural liberty would be tied to the common good so that in defending their natural liberty they will in turn be defending the common good. See THE FEDERALIST NO. 51 (James Madison) (“The provision for defense must in this, as in all other cases, be
Positive rights, by contrast, were legally defined privileges and immunities that were cast in terms of government action or inaction and included rights such as habeas corpus and trial by jury. These positive rights developed over time from experience and adjudications primarily contained in the principles, precepts, and precedents of the common law. Some were deemed fundamental or essential and often overlapped with the people’s natural rights, while others were simply statutory rights. A positive right became fundamental by widespread consensus and acceptance of the inviolability of the right, or, in America, by enumeration. Given the way in which many positive rights protected natural rights, there was a perceived harmony between natural rights and the common law; the former was the source of liberty, and the latter defined its legally protected contours and ensured that the liberty was safeguarded.

D. The First Amendment’s Place in this Framework

Social contract theory and natural rights philosophy served as a framework for early discussions about the rights—natural and positive—contained in the First Amendment. The Amendment’s original meaning cannot be understood without first understanding its philosophical, intellectual, and legal context. Founding-Era constitutional interpretation often began with principles derived from social contract theory framework of how political society developed. As stated in the introduction, Professor Campbell, through an extensive dive into this framework and the place of the First Amendment within it, developed an understanding of the original meaning of the First Amendment: “[T]he First Amendment recognized (either

made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”).

62 THOMAS PAINE, Candid and Critical Remarks on a Letter Signed Ludlow (June 4, 1777), reprinted in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 274 (Philip S. Foner ed., Citadel Press 1945) (explaining the difference between natural and positive rights by stating that “[a] natural right is an animal right; and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals. Civil rights are derived from the assistance or agency of other persons; they form a sort of common stock, which, by the consent of all, may be occasionally used for the benefit of any.”).

63 Campbell, Natural Rights, supra note 6, at 253 (listing Founding-Era sources defining positive rights).

64 Campbell, Republicanism, supra note 24, at 99.

65 See id. (discussing how confrontation became a fundamental positive right in the late sixteenth century and the prohibition on press licensing in the seventeenth).

66 Campbell, Natural Rights, supra note 6, at 291; see also R. H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 97–98 (2015).

67 See supra Sections I.A–C.
implicitly or outright) the ordinary natural right of expressive freedom along with (either absolute or presumptive) protection for a set of customary rules with more determinate legal meanings. The former recognized an inalienable natural right to the “freedom to make well-intentioned statements of one’s thoughts” that was not subject to government control and then also recognized the natural rights of speaking, writing, and publishing that could be regulated by government in the interest of the public good. The latter recognized the common law positive right “liberty of the press,” which required a ban on prior restraints. In America, an additional defense of truth developed, the Zenger defense, and was recognized in many jurisdictions.

However, all of the content of this common law positive right was additionally protected by the jury trial, which was the only means of obtaining a conviction for laws prosecuting alleged abuses of the press freedom. This dual meaning—the one grounded in natural rights and the other in common law legal rights (positive rights)—is key to understanding the First Amendment’s relation to governmental power and the debates over its meaning between Federalists and Republicans.

Campbell’s definition of the First Amendment’s original meaning represents a unified original understanding of the Amendment itself, one that most of the public at the time of its ratification understood the Amendment to mean. But I argue that the original understanding of speech and press freedoms at the federal level may have more bite if fully situated within the superstructure of the Constitution. Campbell himself acknowledges that there is more to the First Amendment’s

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68 Campbell, Natural Rights, supra note 6, at 308.
69 Id. at 283.
70 Id. at 276.
71 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (“The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”).
72 See Andrew Hamilton Defends Zenger, in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 43, 54 (Leonard W. Levy ed., 1966) (“I beg Leave to insist, That the Right of complaining or remonstrating is natural; And the Restraint upon this natural Right is the Law only, and that those Restraints can only extend to what is false . . .”).
73 Campbell, First Amendment Federalism, supra note 2, at 16 (“Commentators during the ratification debates explicitly linked jury rights to concerns about governmental suppression of dissent.”).
74 By superstructure of the Constitution I mean taking the Constitution as a whole—situating the First Amendment in the whole constitutional text that includes limits on power in Article I, Section 8, unenumerated rights in the Ninth Amendment, and reserved powers in the Tenth Amendment.
original meaning than his consensus definition, but that its scope is to be determined by representative republican government. The debates over liberty and power that pervade the early national period in American history initiated a process of constitutional theory known as liquidation that serves to further clarify and determine the First Amendment’s meaning and connect our modern doctrine to the original understanding.

II. Power, Liberty, and Ambiguity

Before the First Amendment was adopted, the debates over the ratification of the Constitution reveal an ambiguity in the understanding of governmental power over the freedom of the press. A single argument was made repeatedly by the Federalists against the Anti-Federalists’ fierce insistence that a Bill of Rights be added to the new federal Constitution in the context of speech and press freedoms. That argument was that protection for the freedom of the press was not necessary because, as Charles Cotesworth Pinckney declared in the South Carolina Ratifying Convention, “[t]he general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press.” Pinckney was expressing a common Federalist position. Hamilton, in Federalist No. 84, further explained the position. He wrote that a provision for protecting the liberty of the press was not only unnecessary but dangerous. He asked: “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? . . . I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.” Perhaps, Hamilton recognized the limited legal content of a speech and press provision like the First

75 Campbell, Natural Rights, supra note 6, at 246 (“Founding-Era elites shared certain understandings of speech and press freedoms, as concepts, even when they divided over how to apply those concepts.”).
76 Id. at 259, 321.
77 See Baude, Constitutional Liquidation, supra note 16, at 1.
78 This ambiguity will be important for the application of liquidation theory to the First Amendment.
79 Debates in the Legislature and in Convention of the State of South Carolina, on the Adoption of the Federal Constitution (Jan. 18, 1788) (statement of Charles Cotesworth Pickney), in 4 Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, 253, 315 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter Debates].
80 Id.
81 The Federalist No. 84 (Alexander Hamilton).
Amendment. The danger in codifying, in writing, the legal content inherent in an amendment protecting speech and press was that it would be less protective of those general rights than enumerating powers and leaving rights unenumerated. Given that enumerating the rights of speech and press might imply that the government had power over speech and press generally, other than the limited protective legal content of the Amendment’s text. The Federalists argued that the enumerated powers of the new government did not contain a power over the press, and this would operate as a greater protection for the rights by denying power over them. In a sense, silence would speak louder than words.

The Federalists argued that the liberty of the press was protected by the original Constitution, even before a Bill of Rights expressly protecting that liberty was added. They argued that the right was protected by the limitations on power inherent in the Article I, Section 8 enumeration. Some even referred to that enumeration as a “Bill of Powers” and that which was not granted was reserved. But what was meant by the “liberty of the press” in these arguments? Did they intend “no power over the press” to mean no power over a distinct set of common law positive rights protections, such as no prior restraints on publications in the press, but legislative power over all other natural rights pursuant to the public good? Or when the Federalists argued that there is no power over the press enumerated in the Constitution, did they mean that the federal government is deprived of all power over the press, ordinary or extraordinary? There is some ambiguity here.

83 Id.
84 Id. at 82 (“It has been said that in the federal government they [a bill of rights] are unnecessary, because the powers are enumerated, and it follows that all that are not granted by the constitution are retained: that the constitution is a bill of powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government. I admit that these arguments are not entirely without foundation . . . .”) (emphasis added).
85 BLACKSTONE, supra note 71, at *151.
86 MADISON, supra note 1, at 340 (“[I]t would seem scarcely possible to doubt, that no power whatever over the press, was supposed to be delegated by the constitution, as it originally stood; and that the amendment was intended as a positive and absolute reservation of it.”).
87 James Iredell best captures this ambiguity by straddling both sides of the debate at different times in his career. During the Ratification debates, Iredell went as far as to argue that Congress could not create any new crimes not listed in the enumerated powers of Congress. See James Iredell, Answers to Mr. Mason’s Objections to the New Constitution Recommended by the Late Convention at Philadelphia. By Marcus, (Jan. 8, 1788), reprinted in 3 THE PAPERS OF JAMES IREDELL 359–60 (Donna Kelly & Lang Baradell eds. 2003). Then, in 1798, while a Supreme Court Justice charged with interpreting and applying the Sedition Act, he was one of the strongest advocates for
Between these competing ideas, James Wilson clearly articulated his view in the Pennsylvania ratification debate. Beginning with the well-rehearsed line that a Bill of Rights was unnecessary because “this Constitution says nothing with regard to [the subject of the press], nor was it necessary because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty,” Wil  

son goes on, however, to define the liberty of the press: “that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.” This seems to support an original intent that the deprivation of power over the press, in the unamended original Constitution, is only preventing power to institute prior licensing. But then Wilson’s arguments reveal an ambiguity as to when the author can be held responsible for his press attacks, whether the power to punish common law crimes, such as sedition and libel, can only be proscribed by a state where they are published or if the federal government may possess such a power.

It is possible that there is an original intent and original public meaning disagreement in this instance. This would mean that the Federalists were arguing that the document limits only extraordinary power over the press, such as instituting prior restraints, but allows traditional governmental power over it, such as passing sedition and libel laws. Meanwhile, the public was hearing the Federalists’ promise that their new government shall have no power to infringe the freedom of the press, speaking, writing, and ultimately publishing whatsoever. Perhaps this view would leave such unenumerated traditional state powers over speech and press to the states or as rights retained by the people, given the inherent nature of American federalism, later codified in the Ninth and Tenth Amendments.

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89 Id. at 455.
90 Id. (recognizing a federalism inherent in libel prosecutions; that if a libel is prosecuted it must be tried in the state where it is committed).
91 See Debates, supra note 79, at 315.
92 The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution (June 16, 1788) (Statement of George Mason), in 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 441–42 (Jonathan Elliot ed., 2d ed. 1836) (arguing that
Either way, practice under the new Constitution would come to liquidate the scope of the Necessary and Proper Clause.

The Necessary and Proper Clause in Article I, Section 8 was seen as giving the government wide latitude in exercising unenumerated powers by implication, at least in the context of the National Bank, if not more broadly. This liquidation of the scope of the federal government’s power has a latter effect on the First Amendment’s meaning as applied to the Sedition Acts and speech and press freedoms.

All of this is to reiterate the main point of this Section: that the power of the federal government to impinge on speech and press freedoms before the adoption of the First Amendment was ambiguous. The adoption of the First Amendment was influenced by these two possible understandings of governmental power over the liberty of the press. Particularly so if it was designed to codify rights and protections already inherently protected in the document, and even if it was designed to supplementally protect specific legal concepts of speech and press. Understanding this ambiguity illuminates the contested meaning over how much federal power was granted in the Constitution over the liberty of the press. Did Article I, Section 8 completely deprive Congress of power to pass any law governing the press because no such power was enumerated and was therefore reserved to the states? Or were the enumerated powers merely limited from being construed to infringe the concrete common law legal content of the “liberty of the press”? A. The Sweeping Clause and the First Amendment

This view of federal power’s interaction with the freedom of speech and press, prior to the adoption of the First Amendment, depends significantly on the original meaning of the Necessary and Proper Clause. Also called the Sweeping Clause by many in the Founding-Era, it reads “[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the

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93 Baude, Constitutional Liquidation, supra note 16, at 19–22.

94 Campbell, First Amendment Federalism, supra note 2, at 4 (“The Republican account of the First Amendment departed substantially from prevailing ideas about speech and press freedoms.”).

95 Campbell, Natural Rights, supra note 6, at 300 (“Federalist denials of authority to abridge the liberty of the press relied on the lack of any enumerated power that would justify a licensing regime.”).

96 Id. at 299 (“[M]any [Federalists] explained that bills of rights were merely declaratory of pre-existing rights and were therefore legally unnecessary.”).
Government of the United States, or in any Department or Officer thereof.” All of the Framers acknowledged that this and Article I, Section 8, Clause 1 were not unlimited grants of power—indeed, there were powers that were clearly not within the grant of power to the federal government. Several legal scholars have written about the original meaning of the Sweeping Clause, and many have found that the power over the press was outside the bounds of the powers therein granted to Congress and the federal government.100

Thus, this Article’s argument builds upon Campbell’s work on the original meaning of the First Amendment, which might allow for more restrictions on speech and press in the interest of the public good than current law does.101 It also suggests that the federalism-based Jeffersonian interpretation of the First Amendment is not a mere “invention” of the 1790s, which would make it incompatible with the original meaning of the Amendment.102 This Article suggests that the Jeffersonian viewpoint might have an intellectual link to the viewpoints of many Anti-Federalists who participated in the Constitution’s ratification, and a link to a literalist interpretation of Federalist

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97 U.S. CONST. art. 1, § 8, cl. 18.
98 Id. § 8, cl. 1. (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 464 (1833) (“In this sense, congress has not an unlimited power of taxation; but it is limited to specific objects,—the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority.”).
99 ALEXANDER HAMILTON, Opinion on the Constitutionality of a Bank, reprinted in 8 THE PAPERS OF ALEXANDER HAMILTON 103, 103 (Harold C. Syrett & James E. Cooke eds., 1965) (“It may be truly said of every government, as well as of that of the United States, that it has only a right, to pass such laws as are necessary [and] proper to accomplish the objects intrusted to it. For no government has a right to do merely what it pleases.”) (emphasis in original).
100 See generally Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L. J. 267, 319 (1993); see also Randy Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. PA. J. CONST. L. 183–221 (2003); William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738, 1822 (2013) (“Perhaps the First Amendment is merely a confirmation of the broader, structural principle that Congress lacks any implied authority to regulate the press, because regulation of the press is a great power. Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers.”).
101 See Campbell, Natural Rights, supra note 6, at 263–64; see also Sunstein, supra note 6.
102 See generally Campbell, First Amendment Federalism, supra note 2 (arguing that the Jeffersonian opposition to the Sedition Act was based on a novel interpretation of the First Amendment, not principally as a rights provision, but as a federalism rule).
ratification arguments, giving it a foothold in the original meaning and opening the door to liquidation post-ratification.\textsuperscript{103}

The “core axiom” of Thomas Jefferson’s constitutionalism was that the purpose of a constitution, in fact its very reason for existence, was “to limit government and the power that might endanger liberty.”\textsuperscript{104} This “core principle” put Jefferson philosophically in the Anti-Federalist camp that sought to protect liberty and strengthen states with the addition of a Bill of Rights.\textsuperscript{105} The Jeffersonian conception of the First Amendment springs from that interpretation of the Constitution’s meaning.\textsuperscript{106} The original law, therefore, may still provide for more robust speech and press protections as originally understood, not through the First Amendment standing alone, but through an original understanding of governmental power in Article I, Section 8 and in the nature of American government in the Ninth and Tenth Amendments. Alternatively, but interconnectedly, greater protection for speech and press is afforded in the original law through the theory of liquidation operating on the Sweeping Clause and on the federalism-based Jeffersonian interpretation of the First Amendment.

\textbf{B. The Original Meaning of the Sweeping Clause}

The question becomes: what power does the federal government have over the freedom of speech and press? There is no enumerated power given to the federal government over either. If a federal power exists at all to enact something like the Sedition Act, it is contained in the Sweeping Clause. Two principal perspectives then arise: first, the Sweeping Clause gives the federal government implied incidental powers over speech and press only limited by limitations on power inherent in the Constitution and by the definitive legal content of the First Amendment. Second, such power is altogether outside the bounds of federal power by virtue of the limited grant of power and the structure of the Constitution rather than by the specific textual meaning of the First Amendment alone. The answer to this ambiguity hinges on the original meaning of the Sweeping Clause.

\textsuperscript{103} See id. (arguing that the Jeffersonian opposition to the Sedition Act was based on a novel interpretation of the First Amendment, not principally as a rights provision, but as a federalism rule).
\textsuperscript{105} Id.
\textsuperscript{106} Id.
1. Necessary

The Sweeping Clause reads: “The Congress shall have Power . . . To make all Laws which shall be necessary and proper to carry into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”107 The famous exposition of this clause’s meaning is given by Chief Justice John Marshall in *McCulloch v. Maryland*,108 however, this case has generally been misunderstood by the courts as proving too much.109 Marshall himself explained his position as standing for a less high-toned view than many have since made it out to be.110 He makes this point in a pseudonymously published essay explaining and defending his opinion in *McCulloch*.111 Marshall defended his opinion by arguing that his definition of “necessary,” meaning “convenient, or useful, or essential to another,”112 did not extend the powers of Congress by implication beyond the Constitution, but, to the contrary, “[t]he whole opinion of the court proceeds upon this basis, as on a truth not to be controverted. The principle it labors to establish is not that congress may select means beyond the limits of the constitution, but means within those limits.”113 Marshall recognized limits to the Sweeping Clause’s allowances and recognized that the Court would police the discretion exercised by Congress in the use of its power.114

There was another, stricter meaning of the Sweeping Clause, advanced by Jefferson, Madison, and Randolph,115 that powers implied through it must “be limited to means necessary to the end, and incident to the nature of the specified powers.”116 If there was no limit on what powers could be implied through

107 U.S. CONST. art. I, § 8, cl. 18.
108 17 U.S. 316, 413–14 (1819) (“To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”); see also HAMILTON, supra note 99, at 102–03.
109 17 U.S. 316, 421 (1819) (“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.”). See also Barnett, supra note 100, at 199–200.
111 Id.
113 Marshall, supra note 110, at 477.
114 Barnett, supra note 100, at 215.
115 Id. at 188–96.
116 1 ANNALS OF CONG. 1947 (1791).
the Sweeping Clause’s connection with an enumerated power, then “[t]he essential characteristics of the Government, as composed of limited and enumerated powers, would be destroyed[.]”\textsuperscript{117} and further, “[i]f implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.”\textsuperscript{118} No matter what interpretive track one takes on the meaning of the clause, it is true that “[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress.”\textsuperscript{119}

It is likely that the Sweeping Clause’s original meaning is somewhere in between the strong reading of the language in \textit{McCulloch} and the position asserted by Jefferson, Madison, and Randolph.\textsuperscript{120} Its meaning is principally contained within its two central words: “necessary” and “proper.”\textsuperscript{121} Everyone at the time and to this day recognized that the word “necessary” requires a means-ends fit.\textsuperscript{122} The decision between “convenience” and “absolute necessity,” however, was and is a false dichotomy.\textsuperscript{123} Madison and Hamilton, on different sides of the debate, both espoused a similar interpretation of the Sweeping Clause’s meaning that has been lost in a strong interpretation of \textit{McCulloch’s} language.\textsuperscript{124} Madison stated that the clause’s words should be “understood so as to permit the adoption of measures the best calculated to attain the ends of government, and produce the greatest quantum of public utility.”\textsuperscript{125} Hamilton, in his opinion on the National Bank, argued that “[t]he relation between the measure and the end; between the nature of the mean employed towards the execution of a power, and the object of that power; must be the criterion of constitutionality; not the more or less of necessity or utility.”\textsuperscript{126} Under this view of “necessary,” some powers can be implied and some cannot. The test is a middle ground between so strict a means-ends fit that no

\textsuperscript{117} \textit{Id.} at 1947.
\textsuperscript{118} \textit{Id.} at 1949.
\textsuperscript{119} \textit{Id.} at 1947.
\textsuperscript{120} Barnett, \textit{supra} note 100, at 206–07 (“All parties to the first bank debate agreed that absolute necessity was not required, but at the same time all agreed that some degree of means-end fit was needed. . . . In modern terms, a showing of necessity should neither be so "strict" that no statute can pass muster . . . .”).
\textsuperscript{121} \textit{Id.} at 206.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 215.
\textsuperscript{125} \textit{DEBATES, supra} note 79, at 417–18.
\textsuperscript{126} \textit{HAMILTON, supra} note 99, at 104 (emphasis omitted).
statute can be upheld and so loose a fit that any statute can be affirmed.\textsuperscript{127}

2. Proper

The other key word in the clause, “proper,” has gotten less attention and may have received its first real treatment by the Supreme Court only recently in the opinion of Chief Justice Roberts in \textit{National Federation of Independent Business v. Sebelius}.\textsuperscript{128} As persuasively argued by Randy Barnett, Gary Lawson, and others, “proper” has an independent and important meaning distinct from “necessary.”\textsuperscript{129} According to Lawson:

\begin{quote}
The Sweeping Clause requires valid executory laws to be “proper.” If the word “proper” in that clause has a jurisdictional meaning, then the authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular national institution whose powers are carried into execution.
\end{quote}

The argument then hones in on three properties of the word “proper” in the original meaning of the Sweeping Clause:

\begin{quote}
In view of the limited character of the national government under the Constitution, Congress’s choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the “proper” allocation of authority within the federal government; second, such a law would have to be within the “proper” scope of the federal government’s limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be
\end{quote}

\textsuperscript{127} Barnett, \textit{supra} note 100, at 206–07.
\textsuperscript{128} 567 U.S. 519, 546–49 (2012).
\textsuperscript{129} Lawson & Granger, \textit{supra} note 100, at 275–76.
within the “proper” scope of the federal government’s limited jurisdiction with respect to the people’s retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.  

This understanding of the Sweeping Clause is known as the jurisdictional interpretation.  

130 Barnett has formulated a three-part understanding of what is required by the word “proper” under this approach.  

131 He writes that “for a law to be ‘proper’ it must not only be necessary, it must also be within the jurisdiction of Congress.”  

132 He goes on: “[t]his propriety of jurisdiction is determined in at least three ways: (1) according to principles of separation of powers, (2) according to principles of federalism, and (3) according to the background rights retained by the people.”  

133 Further, he emphasizes the third requirement of “proper,” which is important in the First Amendment natural rights context, saying “[g]iven the importance of natural rights to constitutional legitimacy in the absence of unanimous consent, let me focus on the third element: laws are improper when they violate the background rights retained by the people.”  

134 Chief Justice Roberts appears to track a form of this understanding of “proper” in his opinion in Sebelius, stating that “we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not ‘consistent with the letter and spirit of the constitution,’ are not ‘proper [means] for carrying into Execution’ Congress’s enumerated powers.”  

135 The Chief Justice recognized that the propriety requirement of the Sweeping Clause ensures that Congress stays within its jurisdiction when exercising power by implication and does not violate the “structure of government,” which is limited by

130 Id. at 297.  
131 Id.  
132 Barnett, supra note 100, at 217.  
133 Id.  
134 Id.  
135 Id.  
principles of separation of powers, federalism, and also by individual rights.\textsuperscript{137}

Given this original understanding of the scope of the Sweeping Clause predating the First Amendment, the power of the federal government to regulate speech and press is at best uncertain, and many have argued such regulation is outside the bounds of implied federal power altogether.\textsuperscript{138} William Baude has articulated this interpretation of federal powers and Article I, Section 8 as “a great powers theory.”\textsuperscript{139} Even before the ratification of the First Amendment, it is wholly possible that regulations of speech and press—indeed of a tight fitting connection between means employed to attain the ends of an enumerated power—was an unconstitutional exercise of federal legislative power.\textsuperscript{140} This parallels the Federalist argument that a Bill of Rights was unnecessary because no power existed over any of those rights.\textsuperscript{141} It may also explain why Campbell’s argument for the meaning and definitive legal content of the First Amendment protects such a limited sphere of individual rights, by modern standards, and leaves so great a realm of discretion to Congress on how they will regulate speech and press, natural and positive rights, in the interest of the public good.\textsuperscript{142}

3. Federalism Considered

Federalism is also relevant to this analysis. The Tenth Amendment underscores the foundational principle of federalism in the American constitutional system and forms a component of the superstructure of the Constitution that protects speech and press more broadly under an originalist interpretation of all the Constitution’s parts than does the original meaning of the First Amendment standing alone. Constitutional structure protects liberty. State provisions identical to the First Amendment can operate within the structure of state

\textsuperscript{137} See id.

\textsuperscript{138} Baude, supra note 100, at 1822 (“So the First Amendment’s Press Clause would not have been unnecessary, but even without it, perhaps the idea was that Congress could not use its implied powers and the Necessary and Proper Clause to regulate the press.”).

\textsuperscript{139} Id. (“Perhaps the First Amendment is merely a confirmation of the broader, structural principle that Congress lacks any implied authority to regulate the press, because regulation of the press is a great power. Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers.”).

\textsuperscript{140} Id. (“Under a great powers theory, Congress might still be able to restrict the press when regulating under its expressly enumerated powers. Copyright laws restrict one’s ability to publish the thoughts of others without their consent. Hamilton acknowledged that the power to tax included the power to tax books.”).

\textsuperscript{141} Campbell, First Amendment Federalism, supra note 2, at 300–01.

\textsuperscript{142} See Campbell, Natural Rights, supra note 6, at 263–64.
constitutions differently than the First Amendment does within the federal Constitution’s structure. This is not because there is a difference in the legal content of the rights provisions, but because a different conception of governmental power existed at the federal and state levels.\textsuperscript{143} As Madison observed in Federalist No. 45:

\begin{quote}
The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.\textsuperscript{144}
\end{quote}

Against the constitutional background of social contract theory, natural rights philosophy, separation of powers, federalism, and limited government powers, it could be improper for Congress to pass laws that infringed not only on the inalienable natural right of freedom of opinion but on all natural rights to speak, write, and publish, which are arguably retained by the people through the Ninth Amendment’s rule of construction.\textsuperscript{145} Perhaps these non-inalienable natural rights are protected not only implicitly in Article I, Section 8 but also explicitly under the Ninth Amendment’s rule of construction applied to federal powers and the First Amendment.\textsuperscript{146}

This is not just an argument about federal power, however. It is also important that the nature of state governments is different from that of the federal government.\textsuperscript{147} Campbell

\begin{footnotes}
\footnote{\textsuperscript{143} See Lawson & Granger, \textit{supra} note 100, at 280.}
\footnote{\textsuperscript{144} \textit{The Federalist} No. 45 (James Madison).}
\footnote{\textsuperscript{145} U.S. \textit{Constitution} amend. IX.}
\footnote{\textsuperscript{146} Id.}
\footnote{\textsuperscript{147} See Lawson & Granger, \textit{supra} note 100, at 280.}
\end{footnotes}
argues that there is no evidence that the First Amendment operated on the powers of the federal government any differently than its state counterparts operated on state powers.\textsuperscript{148} This statement does not properly situate speech and press protecting provisions against the inherent differences between the powers of the federal and state governments. As Lawson notes, a state government “is a general government, possessing all legislative powers not specifically restricted by its constitution, whereas the national government is limited to its constitutionally enumerated powers.”\textsuperscript{149} This is a crucial difference. A state level speech and press clause is designed as a carve out of state general power,\textsuperscript{150} whereas the First Amendment recognizes a limitation that Federalists already argued was inherent in the limited powers of Congress.\textsuperscript{151} The Federalists were expressly enumerating rights to placate the fears of Anti-Federalists, who still in many respects opposed the Constitution, especially so long as a Bill of Rights was absent from it.\textsuperscript{152}

Therefore, it is possible that identical rights protecting or rights recognizing provisions could operate differently at the federal and state level. This is supported by the inherent limitations on federal power in the enumeration of Article I, Section 8, and the later addition of the First, Ninth, and Tenth Amendments. The rule of construction in the Ninth Amendment is an additional recognition of this fact.\textsuperscript{153} Even if the First Amendment protects only the limited and defined legal content, which Campbell ably demonstrates and the historical record shows that it does, the Ninth Amendment explains that the enumeration of powers in Article I, Section 8, culminating in the

\textsuperscript{148} Campbell, First Amendment Federalism, supra note 2, at 5 n.8.
\textsuperscript{149} Lawson & Granger, supra note 100, at 280; see also The Federalist No. 45 (James Madison).
\textsuperscript{150} Id.
\textsuperscript{151} This is the reason Federalists argued a Bill of Rights was superfluous to begin with. However, a different way of understanding the Federalists' argument is that enumerating a protection for speech and press liberties would threaten those rights because it would be supplemental, not merely recognizing what was already protected. In this way, Congress could potentially imply a greater power over speech and press minus only the limited legal content of a protection for “the freedom of speech, and of the press.” Without enumerating a protection for “the freedom of the press” it would be the other way around. As it stood before 1791, Federalists argued that federal regulations on speech and press rights could only come as implied powers in furtherance of the Article I, Section 8 enumerated powers. If the rights were enumerated, it might imply a greater power over speech and press. I owe this point to Professor Jud Campbell.
\textsuperscript{152} CREATING, supra note 8, at 78 (“[Y]et still there is a great number of our constituents who are dissatisfied with it [the Constitution] . . a great body of the people falling under this description . . . feel much inclined to join their support to the cause . . . if they were satisfied in this one point: We ought not to disregard their inclination . . . ”).
\textsuperscript{153} U.S. CONST. amend. IX.
Sweeping Clause is not to be construed to “deny or disparage others retained by the people.” Against the constitutional background of natural rights philosophy and the Federalist insistence that the powers of the federal government could not be legally expanded to regulate the press, the Ninth Amendment might contain protections for the natural rights of speaking, writing, and publishing that were recognized by all as inherent natural rights and that many state constitutions expressly recognized as protected rights. Thus, the limited protection afforded by Campbell’s recovered original meaning of the First Amendment is actually much broader when one situates it in the full structure of the Constitution—its limited grant of power, further separation of those powers, additional safeguard of federalism, and its rights favoring rule of construction expressed in the Ninth Amendment. The structure of the Framer’s Constitution protects liberty over and above the protections of its individual parts.

III. LIQUIDATION OF THE FIRST AMENDMENT’S MEANING

A. Liquidation Theory

The concept of liquidation, the fixing of ambiguous or open-textured constitutional meaning through historical practices, was a commonplace theory in the Founding-Era. It has been the subject of significant attention recently in legal academia and it has sparked some significant debates while being the subject

154 Id.
155 Campbell, Natural Rights, supra note 6, at 309 n.281.
156 See generally Baude, Constitutional Liquidation, supra note 16.
157 During the Founding Era, especially the 1790s, numerous constitutional questions were purported to be decided through liquidation. See Stephen E. Sachs, The “Unwritten Constitution” and Unwritten Law, UNIV. ILL. L. REV. 1797, 1806–07 (2013) (stating that “[p]erhaps the most famous case of a supposed liquidation is the ‘Decision of 1789,’ ” which discussed liquidating the removal power of the President); see also Baude, Constitutional Liquidation, supra note 16, at 19–26 (discussing the constitutionality of chartering a national bank); Baude, Constitutional Liquidation, supra note 16, at 26–29 (discussing constitutional scope of federal spending power).
of deeper exploration in legal scholarship.\textsuperscript{159} Following the recent decision by the U.S. Supreme Court in \textit{NLRB v. Noel Canning},\textsuperscript{160} which invoked the constitutional concept of liquidation for the first time in the Court's recent history,\textsuperscript{161} it remains to be seen how the modern court may invoke the theory to solve future cases and controversies in constitutional law.\textsuperscript{162}

This Article's contribution to the scholarly enterprise reveals how the theory of liquidation has been applied to the First Amendment. The theory of liquidation as applied to the difficult question of discovering the First Amendment's original meaning and understanding the Court's modern First Amendment jurisprudence may provide clarity to an otherwise ambiguous subject and partially describe what has actually happened in the Supreme Court's seminal free speech and press cases—connecting current doctrine to the First Amendment's original meanings to show that our First Amendment law is originalist.

The work of Professor Campbell has provided an intellectual pathway into the Founding-Era conception of First Amendment rights.\textsuperscript{163} His view of the Amendment's meaning, however, was quickly dispensed with in the aftermath of the debates over the Sedition Act of 1798, when the federalism-based Jeffersonian interpretation of the First Amendment's meaning became the dominant view.\textsuperscript{164} These 1790's historical practices open a door to understanding how the Founding-Era views on the First Amendment's legal meaning were settled, clarified, or fixed—liquidated—and how disagreements about the scope or application of that meaning have been and can be resolved through a course of historical practices.\textsuperscript{165} Thus, it is arguable

\begin{itemize}
\item \textsuperscript{160} 134 S. Ct. 2550 (2014).
\item \textsuperscript{161} But see United States v. Se. Underwriters Ass'n, 322 U.S. 533, 550 n.33 (1944) (citing Madison's use of the word "liquidat[ion]" in \textit{Federalist} No. 37).
\item \textsuperscript{162} In \textit{Noel Canning}, the Court cites nine cases in which it has used Madison's theory of liquidation: Mistretta v. United States, 488 U.S. 361, 401 (1989); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); The Pocket Veto Case, 279 U.S. 655, 689–90 (1929); Ex parte Grossman, 267 U. S. 87, 118–19 (1925); United States v. Midwest Oil Co., 236 U.S. 459, 472–74 (1915); McPherson v. Blacker, 146 U.S. 1, 27 (1892); McCulloch v. Maryland, 17 U.S. 316 (1819); Stuart v. Laird, 5 U.S. 299 (1803).
\item \textsuperscript{163} See Campbell, \textit{Natural Rights}, supra note 6, at 249–57.
\item \textsuperscript{164} See Campbell, \textit{First Amendment Federalism}, supra note 2, at 45–47.
\item \textsuperscript{165} I argue that the Republican approach to the meaning of the First Amendment, while in some important respects was innovative or novel, was in fact connected to
\end{itemize}
that the Jeffersonian interpretation of the First Amendment, extrapolated from original meanings and Anti-Federalist original intent, became the law consistent with the original law or the Founders’ law.166

The part of the Founders’ law that makes this arguably possible is the original method of liquidation. Liquidation is a theory for how historical practices can “settle” or “clarify” the meaning of an otherwise ambiguous constitutional provision.167 The word is derived from the Latin word “liquidus,” which can have the meaning “clear” or “evident.”168 To liquidate constitutional meaning in this context means clarifying or making clear, “to render unambiguous; to settle.”169

The primary proponent of the constitutional theory of liquidation was James Madison, who developed the theory170 and employed it throughout his life.171 It was central to the way he thought about the Constitution172 One of his earliest references to liquidation theory emerged in Federalist No. 37. Commenting on the difficulty of writing laws, he wrote that even laws “penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”173 Madison’s explanations of liquidation are scattered among his papers, mostly letters, and though he does not give us a scholarly exposition of exactly what he meant by the idea, three concepts emerge as essential to a Madisonian theory of liquidation.174

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166 See id.
167 Baude, Constitutional Liquidation, supra note 16, at 12.
168 Id. at 11.
169 Id.
170 Id. at 3–4.
171 Id.
173 THE FEDERALIST NO. 37 (James Madison).
174 Baude, Constitutional Liquidation, supra note 16, at 12.
The three features of liquidation are, as Will Baude explains, “an indeterminacy, a course of deliberate practice, and settlement.”\(^{175}\) Indeterminacy occurs in cases of “doubtful or contested meanings” and comes in two primary flavors: vagueness and ambiguity.\(^{176}\) Not everything in the Constitution is indeterminate. A constitutional provision \textit{must} be indeterminate to be open for liquidation—indeterminacy is a barrier to entry for liquidation.\(^{177}\) This requirement means that not every clause is up for grabs for liquidation purposes.\(^{178}\)

A course of practice takes on the form of a kind of precedent, not merely judicial but legislative, and it could potentially be a series of similar actions taken by the branches of the federal government, the states, and the public at large that settles a particular meaning of a constitutional provision from a range of plausible meanings.\(^{179}\) The course of practice had to be deliberative—a deliberate exposition on meaning—the successive acts had to amount to a showing of acquiescence, and the course of practice had to “happen repeatedly and consistently.”\(^{180}\) The course of practice could also \textit{not} be sheer political will or expediency, it had to be a deliberate debate and a series of actions taken on the basis of a constitutional interpretation.\(^{181}\)

Lastly, there must be settlement to render liquidation complete.\(^{182}\) As Baude phrased it, “the course of deliberate practice had to stick.”\(^{183}\) The settlement required that the meaning established through a course of practice had to have some force independent and greater than individual actors.\(^{184}\) It required acquiescence, or agreement, between opposing parties or institutions, and public sanction, approval by the people, that this course of practice was applying the appropriate meaning.\(^{185}\) In other words:

\begin{quote}
[T]he people’s role as the ultimate source of binding constitutional norms made them the ultimate source of constructing its meaning
\end{quote}

\(^{175}\) \textit{Id.} at 13.
\(^{176}\) \textit{Id.}
\(^{177}\) \textit{Id.}
\(^{178}\) \textit{Id.} at 14–15.
\(^{179}\) \textit{Id.} at 15–16.
\(^{180}\) \textit{Id.} at 16.
\(^{181}\) \textit{Id.}
\(^{182}\) \textit{Id.} at 17.
\(^{183}\) \textit{Id.}
\(^{184}\) \textit{Id.} at 17.
\(^{185}\) \textit{Id.}
as well. (Though, to be sure, this expression of popular sovereignty was presumably lesser in stature than the formal enactment of constitutional text, which is why it could “expound” but not “alter.”)\textsuperscript{186}

By this process of liquidation that has existed since the Founding, historical practices can fill the gap in indeterminate meaning and provide a more specific meaning out of a previous constitutional indeterminacy.\textsuperscript{187}

Through the original method of liquidation, the meaning of governmental power and individual liberty were, in a sense, inversed. Reflecting on having lost the debate over the meaning of the Sweeping Clause in the debate over the constitutionality of a National Bank in the early 1790s,\textsuperscript{188} Jefferson and Madison had to look beyond limits imposed by enumerated powers to oppose the constitutionality of the Sedition Acts in the late 1790s.\textsuperscript{189} They turned to a tool that was not in the Constitution during the first debates: the Bill of Rights, specifically the First Amendment.\textsuperscript{190} As the original meaning of the Sweeping Clause was liquidated with a vastly more expansive scope than originally intended, the First Amendment was liquidated as having a larger protective force, internally and of its own force, than originally intended.\textsuperscript{191} The result? The federal government was deprived of a power that it had not possessed under the original meaning of Article I, Section 8 but that it had acquired through a liquidated meaning of the Sweeping Clause, best expressed in a strong reading of McCulloch \textit{v. Maryland}.\textsuperscript{192} The federal government was thereafter deprived of the ability to

\textsuperscript{186} \textit{Id.} at 19. This Madisonian theory of the people acting to expound the meaning of their Constitution fits neatly with Jefferson’s conception of a “republic.” \textit{See} Letter from Thomas Jefferson to John Taylor (May 28, 1816), in \textsc{Thomas Jefferson Writings} 1392 (Merrill D. Peterson ed., 1984) (stating that the term republic “purely and simply, . . . means a government, by it’s [sic] citizens, in mass, acting directly and personally, according to rules established by the majority: and that every other government is more or less republican in proportion as it has in it’s [sic] composition more or less of this ingredient of the direct action of the citizens”).


\textsuperscript{189} \textit{Id.} at 264–65.

\textsuperscript{190} The Bill of Rights was ratified by the requisite three-fourths of the states on December 15, 1791.

\textsuperscript{191} Campbell, \textit{First Amendment Federalism}, supra note 2, 3–6.

\textsuperscript{192} \textit{Supra} Section II, at 20; \textit{see also} Barnett, supra note 100, at 215.
exercise power over speech and press rights not by implied limits on power generally but by the made-powerful enumeration of federalism rights in the liquidated Jeffersonian construction of the First Amendment.


The first major challenge to speech and press freedoms and the meaning of the First Amendment arose in the Federalist passage of the Sedition Act in 1798 and the Republican opposition to it. The following section will recount this history through the lens of liquidation and explain how the original meaning of the First Amendment was liquidated as the federalism-based Jeffersonian interpretation that Professor Campbell describes as an “invention.”

The indeterminacy of how much protection was afforded speech and press freedoms in the original constitution is already established in the discussion above. There were at least two distinct views of the meaning of the First Amendment at its adoption. The “majority view,” that the available evidence shows to be the most legally sound claim to the First Amendment’s original meaning at the time of its adoption. This is the view expressed by Professor Campbell. The second is the “dissenting view”: this is the view developed or “invented” by Madison and the Jeffersonian Republicans but it has its roots in Federalist and Anti-Federalist ratification arguments over the need for a Bill of Rights and if the First Amendment was a mere codification of those arguments or not. That view is that

194 Campbell, First Amendment Federalism, supra note 2, at 1.
195 Supra Section II (specifically, at 26–28, 30–3 discussing Federalists and Anti-federalists differing conceptions of governmental power and the scope of Article I Section 8’s Sweeping Clause as well as the substantive limitations on power in the original Constitution prior to the First Amendment’s ratification).
196 Campbell, Natural Rights, supra note 6, at 307 ("[P]erhaps the Speech and Press Clauses in the First Amendment recognized both the natural right of expressive freedom (in which the Speech and Press Clauses had a common meaning) and the more determinate customary protections for expression (in which the Speech and Press Clauses had distinct meanings).") (emphasis added).
197 BANNING, supra note 14, at 92–160 (explaining the “Antifederal connection” between Jeffersonian constitutionalism and the views of the Anti-Federalists at Ratification).
198 Supra Section II at 15–16.
199 See Campbell, Natural Rights, supra note 6, at 310 ("The Founders widely viewed enumeration as a conservative project meant to preserve existing rights, not to change their meaning or scope . . . The purpose of enumeration, in other words, was to guarantee at the federal level the rights already recognized by state constitutions and social contracts."); see also Campbell, First Amendment Federalism, supra note 2, at 44
the new government established by the Constitution had no power over speech and press whatsoever because it was unenumerated and out of the scope of the original meaning of the Necessary and Proper clause. Further indeterminacy arises when putting all of these moving parts—the First Amendment liberties, the Sweeping Clause and limited governmental powers, and the Ninth and Tenth Amendment rules of construction favoring retained rights and reserved powers—together in an as applied challenge mounted by the Jeffersonian Republicans against the Sedition Act of 1798.

C. Course of Practice

The Sedition Act was passed into law on July 14th, 1798, and provided a constitutional challenge and an opportunity for liquidation to occur. The immediate controversy and opposition that surrounded its consideration and passage, based primarily on constitutional grounds, was a testament to the indeterminacy of the power of the federal government over prosecutions of speech and press as well as the meaning of the First Amendment in relation to the exercise of that power. The debate that surrounded the Sedition Act sharpened and polarized the opposing viewpoints. The Federalists took a Blackstone-Mansfield view on governmental power over speech, press, and common law crimes. The Republicans took a federalism approach to speech and press freedoms—that the federal government had no power over these liberties, and that there were no federal common law crimes aside from those listed in the Constitution. They argued further that any such laws and

("The First Amendment did not change the meaning of these rights [freedom of speech and press] that confined legislative power; rather, the American innovation was to enumerate them.") (emphases in original).

200 Supra Section II.
202 A large part of that challenge is the argument that this law is not in the interest of the public good. This is an argument that holds water in the original meaning of the First Amendment because the natural rights it recognizes can only be regulated in the interest of the public good. See Campbell, Natural Rights, supra note 6, at 272. This is a different argument from the Jeffersonian interpretation of the First Amendment that is grounded in principles of federalism. See Campbell, First Amendment Federalism, supra note 2, at 8. Federalism was an obvious place in which liquidation would occur because it is “difficult to define” and its boundaries are hard to “ring-fence.”
203 But see Campbell, First Amendment Federalism, supra note 2, at 46–47 (expressing skepticism of using post-ratification history as evidence of original meanings).
204 See generally Bird, supra note 20, at 251 (discussing how previously speech and press protective Federalist judges after the passage of the Sedition Act and the ensuing controversy took a less protective hardline Blackstonian view of the liberty of the press).
205 Id. at 84.
prosecutions had to take place at the state level. As has been shown above, both of these views had intellectual lineage to the Constitution’s ratification and the resultant dueling meanings of liberty and power were primed for a liquidation in the event of a challenge or crisis, which the Sedition Act provided.

Baude’s piece on constitutional liquidation provides a framework for thinking about how a meaning of a constitutional provision is liquidated. He presents the debate over the constitutionality of the national bank as a paradigm case of constitutional liquidation. That debate primarily involved an interpretation of the Sweeping Clause. The events surrounding that episode in American constitutional history include striking parallels to those surrounding the Sedition Act crisis and provide an analogical roadmap to show how the meaning of the First Amendment was liquidated. It is also interesting to note that the liquidated meaning of governmental power in relation to the constitutionality of chartering a national bank may account for why much of the Republican constitutional opposition to the Sedition Act hinged on the First Amendment, despite the majority original public understanding explained by Campbell, rather than on an interpretation of Article I, Section 8.

The course of practice that liquidated the Jeffersonian position on the First Amendment begins, not in the Sedition Act controversy itself, but with the Election of 1800. This first practice is analogous to the passage of the bill to charter a national bank over fierce opposition that was a first practice in what would become an established course for liquidating the meaning of the Sweeping Clause to justify the exercise of that power. The Sedition Act controversy, however, was important in giving Jeffersonians an event to express their view of the meaning of the First Amendment, which would begin to be liquidated by Jefferson’s election. The Election of 1800 that

206 Id. at 320–21.
207 Baude, Constitutional Liquidation, supra note 16, at 19–27.
209 As has already been demonstrated by Professor William Baude in his article on liquidation, Madison and most others (President Jackson and the Jacksonian-Democrats excluded), agreed that the Marshall view of the Sweeping Clause and constitutionality of the national bank had been liquidated and the remainder of American history after Jackson would bear out Madison’s view further—not just that the view of McCulloch had been liquidated, but that the strong reading of McCulloch had been liquidated. See Baude, Constitutional Liquidation, supra note 16, at 22, 25–26.
210 Banning, supra note 14, at 266–70.
211 Baude, Constitutional Liquidation, supra note 16, at 19–22.
swept Republicans into two-thirds of the federal government, the Congress and the Presidency, was an initial vindication by the people of their view of the First Amendment as depriving the federal government of any power to regulate speech and press.\footnote{\textit{Fleming}, \textit{supra} note 188, at 288–92.}

The next event in the course of practice that leads to liquidation is President Jefferson’s actions after taking office. He ended all prosecutions under the Sedition Act and pardoned all persons convicted under it.\footnote{New York Times Co. \textit{v.} Sullivan, 376 U.S. 254, 276 (1964) (‘‘Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: ‘I discharged every person under punishment or prosecution under the sedition law because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.’’) (citing Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in \textit{4 Jefferson’s Works} 555, 556 (Washington ed., 1904)).}

This was analogous to President Washington signing into law the bill chartering a national bank over the opposition opinions of Secretary of State, Thomas Jefferson, and Attorney General, Edmund Randolph.\footnote{Baude, \textit{Constitutional Liquidation}, \textit{supra} note 16, at 21.} Both actions amounted to Presidential approval of a particular view of constitutional meaning following a thoughtful deliberation on the matter. It is at this point that the Republican view of the First Amendment may have been liquidated, especially given the fact that it was not challenged in subsequent years.\footnote{\textit{See generally Sullivan, 376 U.S. 255; See also Air Wis. Airlines Corp. \textit{v.} Hoeper, 134 S. Ct. 852 (2014) (the most recent case examining and relying on \textit{New York Times Co. v. Sullivan} as persistently valid Supreme Court precedent).}

Indeed, Madison, as President in 1815, several years before the Supreme Court decided \textit{McCulloch v. Maryland}, had already found the constitutional question of the national bank’s constitutionality to be a settled question. This was primarily due to the public acceptance following its signing into law by President Washington.\footnote{Baude, \textit{Constitutional Liquidation}, \textit{supra} note 16, at 21.}

The continued elections of Republicans, especially the back to back Jeffersonian protégés,\footnote{\textit{See Jon Meacham, Thomas Jefferson: The Art of Power} 188–204 (2012).} coupled with the lack of significant challenges to speech and press freedoms until at least the Civil War, displays additional acquiescence by the majority to the Jeffersonian interpretation of the First Amendment.\footnote{\textit{Id.}} The Madison Presidency is of particular interest to this analysis of historical practices, not just because he was the leading intellectual proponent of constitutional liquidation, but because it is generally agreed that one of his greatest achievements as president was that his administration did not infringe civil
liberties during war times. Madison was faced with an even greater military crisis and existential threat to the republic than the Federalists had been in 1798. The War of 1812 was no quasi-war with Britain, it was a full-scale military engagement on American soil. Despite all the noted hardships of that war, Madison never suppressed speech or press rights, though there was a great deal of both speech and press that were critical of “Mr. Madison’s War.” In so doing, the Federalists did not succeed in making a triumphant return to the political scene to vindicate their view that legislation, like the Sedition Act, was needed during war times. Instead, the party that had passed the Sedition Act as a war measure was extinguished in the wake of the War of 1812, never to return.

It is this course of practice, the Republican opposition to the Sedition Act, that led to the Jeffersonian ascendance to the Presidency and to Republican control of Congress, as well as the ultimate decline and fall of the Federalist Party that liquidated the federalism-based Jeffersonian interpretation of the First Amendment. The events in this “Revolution of 1800”—relating to, federalism, civil liberties, and the freedom of speech, and of the press are the events that ultimately liquidated the Jeffersonian interpretation of the First Amendment. An interpretation that had its roots, not simply in the creation of the First Amendment, but in the ratification arguments over a lack of federal government power over the liberties of speech and press and in the Antifederalists’ understanding of the purpose of a Constitution and Bill of Rights.

D. Settlement

For settlement to occur, the course of practice must stick. The practices have to reach a “uniformity” and acquire “some kind of cumulative force that transcended one’s own personal interpretation.” The two elements of settlement are acquiescence and public sanction. Acquiescence means that “the losers in some sense gave up.” The legislature and executive

220 Id.
222 Id. at 708 (“By the second decade of the nineteenth century the Republicans had won such an overwhelming victory that the Federalist ‘aristocrats’ no longer seemed to matter either politically or socially.”).
223 See sources cited supra notes 25–26, 36.
224 Baude, Constitutional Liquidation, supra note 16, at 17.
225 Id.
226 Id. at 18.
both became Republican, the Federalist Party never achieved national power again and would die out in short order. All the branches of government, even the courts, acquiesced. The public sanction was not only displayed in the Election of 1800 and continued electoral dominance by the Republicans, but in the overarching trend toward public acceptance of a view of freedom of speech and press that is decidedly broader than Blackstone’s traditional common law view. The Jeffersonian interpretation of speech and press had both acquiescence and public sanction. Perhaps the strongest indication that the Jeffersonian view of the First Amendment was liquidated actually comes in one of the most famous First Amendment cases of all time, in which, paradoxically, the Jeffersonian view is simultaneously recognized and changed. That case is *New York Times v. Sullivan*.

In *New York Times v. Sullivan*, the Court spends a great deal of time discussing the public controversy over the Sedition Act of 1798, recognizing that it “first crystallized a national awareness of the central meaning of the First Amendment.” This language of crystallization is synonymous with Madison’s description of the meaning of liquidation. The Court goes on to say that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” Again, this reference to “the court of history” seems to indicate an understanding that historical practices had crystallized the central meaning of the First Amendment. In other words, a course of practices had liquidated the meaning of the First Amendment. The Court also recognized the broad consensus of public opinion and the acquiescence of the institutions of government to the Republican position on the

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228 Sunstein, supra note 6 (“[N]oting that in the founding period, there was vigorous debate about the Sedition Act of 1798, under which people could be fined or imprisoned for writing, printing, uttering or publishing . . . [f]rom the standpoint of law in the 21st century, that’s plainly unconstitutional. But in the founding-era, most people seemed to think that it was fine.”).
229 Campbell, *First Amendment Federalism*, supra note 2, at 6 (recognizing the Court’s decision in *NY Times v. Sullivan* as having numerous parallels to the meaning of the Amendment espoused by the Jeffersonian opposition to the Sedition Act and connecting modern free speech doctrine to originalism).
232 *Sullivan*, 376 U.S. at 276.
233 *Id.* at 272–76.
Sedition Act—an essential component of liquidation or crystallization.\textsuperscript{234}

\section*{IV. Conclusion}

Ultimately, to fully understand the Constitution’s relationship to the “freedom of speech, or of the press,”\textsuperscript{235} one must understand the original meaning of several different provisions of the Constitution. First, the Sweeping Clause and governmental power over speech and press in Article I, Section 8. Second, the First Amendment itself and its definitive legal content as originally understood. In the background of all of this is the federal common law or general law over speech and press as originally understood, the Ninth and Tenth Amendments, as well as Founding-Era original methods, such as liquidation.

These sources of law are distinct and independent of one another while still interacting. The original meaning of the Sweeping Clause is between the strong reading of \textit{McCulloch} and the Jeffersonian position, something along the lines of Marshall’s own view of what \textit{McCulloch} stood for.\textsuperscript{236} It was, and has come to be, liquidated as a much stronger version of \textit{McCulloch} than Marshall himself seems to have intended.\textsuperscript{237} The original meaning of the First Amendment is best expressed in the work of Professor Campbell and has definitive legal content. Under that approach, the First Amendment enumerates the natural rights of speaking, writing, and publishing, all capable of being restricted in the interest of the public good. Except the inalienable freedom to express one’s honest opinion and the common law positive right to the liberty of the press as best expressed by Blackstone, including the Zenger defense of truth, which cannot be restricted at all.\textsuperscript{238}

Liberty and power interact in this context. The natural rights enumerated in the First Amendment could only be regulated according to the enumerated powers in Article I, Section 8, including authorized implied powers, and as such there is an ambiguity as to whether speech and press can be regulated at all at the federal level and if so, how much? This ambiguity comes into play in what is meant when one says there is no danger posed to the press by the Constitution because there

\begin{itemize}
\item \textsuperscript{234} \textit{Id.} at 276 (“These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.”).
\item \textsuperscript{235} U.S. CONST. amend. I.
\item \textsuperscript{236} \textit{See supra} Section II.
\item \textsuperscript{237} Barnett, \textit{supra} note 100, at 215.
\item \textsuperscript{238} \textit{See supra} Section I.
\end{itemize}
is no enumerated power over the press. Does this mean that the federal government has no power over the press at all or no power to infringe the common law liberty of the press?

At the very least, this ambiguity of governmental power over speech and press creates an indeterminacy that sets the stage for a liquidation of the meaning of that power and those liberties.\textsuperscript{239} The liquidation of the Sweeping Clause at its most broad reading and the loss of the Jeffersonian position as relates to that power in the debates over the constitutionality of the national bank led the Jeffersonians to oppose the Sedition Act’s constitutionality not from the perspective of power but from the perspective of federalism and liberty.\textsuperscript{240} In so doing, the Jeffersonian view of the First Amendment, that the federal government is categorically deprived of all power over speech and press, is liquidated as the First Amendment’s meaning. That meaning is not disturbed until at least the Civil War and Reconstruction adoption of the Fourteenth Amendment. At any rate, the liquidated federalism-based Jeffersonian interpretation continues to be foundational to the modern courts understanding of the First Amendment, beginning with \textit{New York Times v. Sullivan} and animating its jurisprudence right up to the present day.\textsuperscript{241}

Although \textit{New York Times v. Sullivan} recognized the liquidation that occurred during the Sedition Act controversy, it simultaneously changed the requirements of the First Amendment from the Jeffersonian federalism rule to the actual malice standard of modern First Amendment law.\textsuperscript{242} Some Originalists, most notably Justice Thomas and the late Justice Scalia, have questioned whether this actual malice standard can possibly be the correct original understanding of the First Amendment.\textsuperscript{243}

Justice Thomas’s recent concurrence in \textit{McKee v. Cosby} questions the rightness of \textit{New York Times v. Sullivan}. Throughout the concurrence—in similar tones to the Campbell-Federalist
Justice Thomas touches on the founding-era common law of defamation and libel. At other times, he takes a federalism approach that resembles the Jeffersonian view stating that the States may be the proper venues for “striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.” Thomas’s concurrence could provide a method of restoring a more originalist rule to First Amendment law—relying heavily on the positive law rules of the common law and leaving the regulation of these issues to the states. In both his common law history and reliance on federalism, Justice Thomas’s concurrence is tapping into the currents of the original understanding of the First Amendment.

This Article does not take a firm stand on the correct originalist interpretation of the First Amendment’s speech and press protections. It only states that the “official story” of our First Amendment law is originalist in important respects and embraces, rather than rejects, a form of originalism. Leaving the door open to getting the original meaning of the First Amendment right if the current understanding is incorrect as a matter of original law.

This Article does not purport to be the final word on the meaning of the First Amendment, many arguments can be made about what speech and press freedoms consist of and how the law protects them. This Article does, however, demonstrate that our modern doctrine has an originalist pedigree. Whether the moves made are all legally valid originalist moves is for a different article to examine. The fact is that these moves were made and, in some important ways, they are originalist moves. This means that in some sense our First Amendment law is originalist even if “the freedom of speech, and of the press”

McKee, 586 U.S. at ____ (slip. op., at 6-9).
Id. at ____ (slip. op., at 14).
It is possible that an Originalist answer to the question of the First Amendment’s meaning could hold that both Congress and State legislatures (under incorporation) are barred from legislating on matters of speech and press (the Jeffersonian view) leaving the regulation of libel, defamation, and the like to the common law. See id. at 10, fn. 3 (stating “[b]y its terms, the First Amendment addresses only ‘law[s]’ ‘made’ by ‘Congress.’ For present purposes, I set aside the question whether the speech and press rights incorporated against the States restrict common-law rights of action that are not codified by state legislatures.”).
See generally William Baude & Stephen E. Sachs, Grounding Originalism, 113 NW. UNIV. L. REV. 1 (forthcoming 2019) (“Our system’s official story is that we follow the law of the Founding, plus all lawful changes made since.”).
U.S. CONST. amend. I.
means not exactly the same thing in 1788, 1791, 1800, and 1964. Which of these points in time, if any or all, encapsulates an accurate original meaning of the First Amendment depends on one’s theory of originalism, but the point is that originalism is, in an important way, our First Amendment law.

249 The ratification of the Constitution.
250 The adoption of the First Amendment.
251 The election of Thomas Jefferson to the Presidency.
252 The year New York Times Co. v. Sullivan was decided.
253 This is the “official story” of our First Amendment law. See generally William Baude & Stephen E. Sachs, Grounding Originalism, 113 NW. UNIV. L. REV. 1 (forthcoming 2019).