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I am honored to have the opportunity to deliver the keynote address at this extraordinary symposium. I will focus my remarks on the issue of sexual expression and, in particular, the issue of obscenity. I settled on this focus both because the issue itself is a fascinating one, especially in its evolution over time, and because it involves both the speech and religion facets of the First Amendment. Indeed, although the Supreme Court has declined to consider whether the predominantly religious motivation for laws against obscenity implicates the Establishment Clause, there can be no doubt that the primary impetus for restrictions on sexual expression is deeply rooted in religious belief. And with that understanding in mind, I will begin at the beginning.

I. SEX REGULATION BEFORE THE COMSTOCK ERA

In the ancient world, that is, the world of Greece and Rome, sex was generally thought of as a natural and positive part of human experience. Those societies did not see sex as bound up with questions of sin, shame, or religion. Thus, neither the ancient Greeks nor the Romans had any concept of “obscenity.” Greek and Roman literature and imagery routinely depicted sex quite explicitly and in all of its various forms. Any suggestion that the law should interfere with free sexual expression in this era would have been met with scorn. Although ancient Greece and Rome punished seditious, blasphemous, and heretical expression, they did not punish sexual expression because it was “obscene,” a concept that simply did not then exist.

Although the attitude towards sex in Western culture changed radically with the advent of Christianity, for most of Western history neither the Church nor the state censored sexual expression because it was thought to be obscene. Indeed, through the Middle Ages, the Renaissance, and the era of the

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1 Edward H. Levi Distinguished Service Professor of Law, The University of Chicago. Most of this Article is derived from my recent book, Sex and the Constitution: Sex, Religion and Law from America’s Origins to the Twenty-First Century (2017).

1 Professor Stone originally presented a version of this Article on November 16, 2018 as the keynote speech for the First Amendment Law Review Symposium “Sex and the First Amendment.”

Enlightenment, sexual expression and imagery were common, widespread, legal, and quite explicit, and this was true in the American colonies, as well as in England.3

In the eighteenth century, bookstores in the American colonies carried an extraordinary array of erotica, ranging from Boccaccio’s *Decameron*4 to such explicitly sexual works as *Venus in the Cloister*,5 *The Politick Whore*,6 and *Letters of an Italian Nun and an English Gentleman,*7 and there were no statutes forbidding obscenity during the entire colonial era. To the contrary, throughout this period, the distribution, exhibition, and possession of pornographic material was simply not thought to be any of the state’s business.8

The first obscenity prosecution in the United States did not occur until 1815, at the height of the evangelical explosion of the Second Great Awakening, which triggered a nationwide effort to transform American law and politics through the lens of evangelical Christianity. Arguing that only Christianity could save America from sin and desolation, the moral militia of the Second Great Awakening sought to mold the law to fit their understanding of Christian doctrine. This included concerted efforts to ban Sunday mail delivery, increase blasphemy prosecutions, prohibit alcohol, and condemn “sinful lust.” Indeed, Evangelical Christians, whose religious moralism condemned sexual expression as sinful, declared war against the “sins of the flesh.”9

It was in this spirit that the United States experienced its first obscenity prosecution in 1815, when Philadelphia tavern owner Jesse Sharpless was charged with exhibiting for a fee an image of “a man in an obscene, impudent, and indecent posture with a woman.”10 The Pennsylvania Supreme Court held that because exposure to such “lascivious” images could corrupt the morals of young people by “inflaming their passions,” it was a fit subject for criminal prosecution.11 Several years later, the Supreme Judicial Court of Massachusetts held that Peter Holmes could be punished for publishing what it termed “a

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3 *See id.* at 55–64.  
8 *See Stone,* *supra* note 2, at 83–87.  
9 *See id.* at 132.  
10 *See Pennsylvania v. Sharpless, 2 Serg. & Rawle.* 91, 92, 94 (Pa. 1815).  
11 *Id.* at 102.
lewds and obscene’ book—John Cleland’s Memoirs of a Woman of Pleasure—otherwise known as Fanny Hill.12

Such prosecutions were rare, however, and by the 1840s, as the Second Great Awakening waned, there was once again an upsurge in the availability of pornography. As industrialization and urbanization transformed the nature of cities, New York came to be known as the “carnal showcase of the Western world.” Daguerreotypes (an early form of photographs first introduced in the 1830s) of women in various stages of undress could be purchased from pushcart vendors who plied the city’s streets, and weekly newspapers like the Flash, the Rake, and the Libertine celebrated sexual freedom. By the end of the Civil War, a new breed of “concert saloons” began presenting live nude entertainment that combined the services of the bar, the theater, and the brothel. These new entertainments placed sex into the forefront of American society as never before.13

II. THE COMSTOCK ERA

Not everyone was cheering. In the years after the Civil War, the Young Men’s Christian Association (YMCA), which had been established by a group of ministers and righteous businessmen in the 1840s to give God-fearing young men a place for proper leisure activities outside of what they described as the “moral Maelstrom” of America’s cities, launched a comprehensive study to document the state of vice in New York City.14 The study detailed the existence of sexual materials so lurid that some members of the YMCA executive board could not believe they existed. Because New York still had no statute forbidding the distribution of obscenity, the YMCA board drew up proposed legislation to address the issue.

In 1868, after an aggressive lobbying campaign, the YMCA got its bill through the New York legislature. The new law made it a crime for any person to sell or give away any “obscene and indecent” book, pamphlet, drawing, painting, or photograph.” Having secured the enactment of this legislation, though, the YMCA board feared that law enforcement officials, who had more pressing priorities, would not devote sufficient resources to suppress the burgeoning market for indecent materials. The board therefore decided that extralegal methods were necessary to achieve the organization’s goals. The board

13 See Stone, supra note 2, at 154–56.
14 Id. at 156.
thus established its own private task force to ensure the vigorous implementation of its hard-won statute.15

The YMCA’s chief inspector in this campaign, Anthony Comstock, would dominate the national debate over obscenity for the next four decades. Based on an unwavering conviction that the devil’s temptations were omnipresent, Comstock believed to his very core that abstinence from all impure thoughts and behaviors was the only faithful path to righteousness. The leaders of the YMCA were so impressed with Comstock’s energy, enthusiasm, effectiveness, and religious zeal that they offered him a full-time job. He stepped easily into his new role.

After organizing his squad, which he named the “Committee for the Suppression of Vice,” Comstock led several successful raids on local publishers, but soon realized that to make a truly major impact he needed national legislation. With the backing of the YMCA, Comstock journeyed to Washington to lobby for a federal law. Comstock warned Congress that obscenity was a “hydra-headed monster” that required a potent legislative weapon.16 On March 3, 1873, President Ulysses Grant signed into law the “Act for the Suppression of Trade in, and Circulation of, Obscene Literatures and Articles of Immoral Use.”17 The new legislation established a broad ban on all items that could be deemed “obscene, lewd, lascivious, or filthy,” but it did not define those terms.18 The law authorized severe penalties, including hard labor, and it empowered the Post Office to censor and to confiscate any objectionable material. Comstock was appointed a special postal agent and, fittingly, the law came to be known as the Comstock Act.

In his writings and public lectures, Comstock passionately affirmed the sacredness of his mission. In his 1880 book Frauds Exposed, Comstock asserted that “lust defiles the body, debauches the imagination, corrupts the mind, . . . and damns the soul.”19 Comstock aggressively led the national campaign to suppress obscenity from 1873 until just before his death in 1915. During this era, even a single phrase, passage, or image involving sex was sufficient to warrant a criminal conviction. Material was deemed obscene if it had even the potential to corrupt an impressionable adolescent. This standard effectively limited adults to only those materials that

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15 See id. at 156–57.
17 Comstock Act, 42 Cong., Ch. 258, 17 Stat. 598 (1873).
18 Id.
19 COMSTOCK, supra note 16, at 416.
were deemed appropriate for children. For all practical purposes, any reference to sex in this era was unlawful.20

Just how far enforcement of the Comstock Act reached in this era is illustrated by the prosecution of Moses Harman, who published a letter to the editor in his journal in which the author of the letter related the true story of a wife who, after undergoing a difficult birth, had not yet healed sufficiently to resume intercourse. Her husband forced himself on her anyway, causing her death. The author of letter asked: “Can there be legal rape? Did the man rape his wife? . . . If a man stabs his wife to death with a knife, does not the law hold him for murder? If he murders her with his penis, what does the law do?”21 For publishing this letter, Harman was prosecuted and convicted for violating the Comstock Act. The court explained that Harman was guilty because the mere recitation of this story would shock “the common sense of decency and modesty.”22

By the early twentieth-century, though, the power of the nineteenth-century anti-obscenity societies began to wane, and with changing social mores courts began to embrace less speech-restrictive interpretations of the nineteenth-century obscenity laws. In 1913, in United States v. Kennerly,23 for example, Judge Learned Hand maintained that few people would be “content to reduce our treatment of sex to the standard of a child’s library.” He therefore maintained that the word “obscene” should be defined in terms of “the present critical point in the compromise between candor and shame at which the community may have arrived here and now.”

III. DIFFICULTY DEFINING OBSCENITY

Over the next several decades, though, courts struggled to give some clear, consistent, and coherent meaning to the legal concept of “obscenity.” In 1930, for example, taking a position quite different from the one advanced by Learned Hand, the Supreme Judicial Court of Massachusetts held that Theodore Dreiser’s acclaimed masterpiece An American Tragedy was obscene because it included a scene in which the main character visits a house of prostitution and another in which the

23 209 F. 119, 121 (S.D.N.Y. 1913).
main character and his pregnant girlfriend attempt to secure an abortion.\textsuperscript{24}

Throughout this era, it was universally assumed that, whatever obscenity was, it was not protected by the First Amendment. Indeed, the Supreme Court in these years simply took it for granted that “obscenity” was not within the “freedom of speech, or of the press” guaranteed by the Constitution. But that issue remained unresolved until 1957, when the Supreme Court finally addressed the question in \textit{Roth v. United States}.\textsuperscript{25}

In an opinion by Justice William J. Brennan, Jr., the Court accepted the conventional wisdom that something called “obscenity” is not protected by the First Amendment. Noting that sex “has indisputably been a subject of absorbing interest to mankind through the ages,” the Court held that the First Amendment permits the government to censor sexual expression only if the material, judged as a whole, appeals primarily to the prurient interest in sex, is patently offensive to contemporary community standards, and lacks any redeeming social value. In so doing, the Court sharply narrowed the constitutionally permissible scope of what could be deemed “obscene.”\textsuperscript{26}

This led to a significant upsurge in the availability of sexual expression, including a growing proliferation of sexually-oriented magazines, books, and movies. Moreover, in the years after \textit{Roth}, attitudes in the United States toward sexual expression began to change dramatically. The Victorian prudery that had previously carried the day was pushed aside by the dawning of the sexual revolution in the 1960s. With the advent of the pill, women’s liberation, and the publication of such works as Helen Gurley Brown’s \textit{Sex and the Single Girl} and Dr. David Reuben’s \textit{Everything You Always Wanted to Know About Sex\textsuperscript{*} (*But Were Afraid to Ask)}, sexual freedom and sexual explicitness began to reshape American culture. By the late 1960s, full-frontal male and female nudity appeared in the movie \textit{Medium Cool}, the X-rated \textit{Midnight Cowboy}, which featured both nudity and strong sexual content, won the Oscar for Best Picture, and the much more explicit Swedish import \textit{I Am Curious (Yellow)} played to packed houses in cities across the nation. In short, the nation had finally gotten back to what was both legal and commonplace in the eighteenth century.

\textsuperscript{24} Commonwealth v. Friede, 171 N.E. 472 (Mass. 1930).
\textsuperscript{25} 354 U.S. 476 (1957).
\textsuperscript{26} Id. at 486–87.
In the meantime, though, the Court struggled with the precise definition of obscenity. In *Redrup v. New York*, for example, the Court overturned obscenity convictions in three cases arising out of the sale of sexually explicit paperback books and magazines carrying such names as *Lust Pool*, *Shame Agent*, and *Swank*. In a brief, unsigned opinion, the majority of the Court (with each justice applying his own definition of obscenity) announced that that the materials were not obscene.

The Court's inability to articulate a clear definition of obscenity led to an era of chaos and confusion. Indeed, because the Court could not agree on a definition of “obscenity,” the justices felt the responsibility to review every obscenity conviction in the nation in order to determine for themselves whether the work at issue was or was not obscene.

Each year, the justices and their clerks had to gather in one of the Court's conference rooms to watch the movies that were at issue in pending obscenity cases. Justices Douglas and Black never went, because in their view there was no such thing as obscenity. At one point, Black quipped, “[i]f I want to go see [a dirty] film, I should pay my money.” In his final years on the Court, when Justice Harlan was losing his eyesight, his law clerks or a fellow justice had to describe to him in detail the action on the screen. This was, to say the least, awkward. There were moments of levity, however, mixed in with the misery of having to spend hours at this task. The law clerks, for example, frequently mocked Justice Potter Stewart's definition of obscenity, shouted out raucously in the darkened room: “That’s it, that’s it. I know it when I see it.”

In the meantime, Congress, concerned about the growing proliferation of sexually-explicit material, authorized President Lyndon Johnson to appoint a special blue-ribbon Commission on Obscenity and Pornography to determine whether exposure to sexually-explicit material caused “antisocial behavior.” After two years of comprehensive research and study, the Commission’s report, issued in 1970, found that eighty-five percent of adult men and seventy percent of adult women had seen explicit sexual material in recent years and that more than seventy percent of minors had been exposed to such images by the time they had reached age of eighteen. The Commission reported that most people said that their exposure to such material affected them more positively than negatively, and that most experts found that the exposure

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27 386 U.S. 767 (1967).
29 Id.
to sexually-explicit material did not have harmful effects on either adults or adolescents. In light of these findings, the Commission concluded that there was not sufficient justification to forbid “the consensual distribution of sexual materials to adults.”

The Commission’s report triggered a firestorm of criticism. Charles H. Keating, Jr., for example, the head of Citizens for Decent Literature, characterized the Commission’s recommendations as “shocking and anarchistic.” Keating declared that “[f]or those who believe in God, . . . no argument against pornography should be necessary.” By the time the Commission completed its report, Richard Nixon had succeeded Lyndon Johnson in the White House, and a great many Americans, especially those in the so-called “Silent Majority,” were appalled by what they saw as the rampant immorality of the “sexual revolution” of the 1960s. Nixon repudiated what he decried as the Report’s “morally bankrupt conclusions” and proclaimed that “so long as I am in the White House, there will be no relaxation of the national effort to . . . eliminate smut from our national life.”

Soon after he assumed the presidency, Nixon had the opportunity to appoint four justices to the Supreme Court, dramatically changing the overall makeup of the Court. The new Chief Justice, Warren Burger, loathed pornography. At one point, he observed that obscenity is “like filth in the streets that should be cleaned up and deposited in dumps.” He could hardly wait for the newly-constituted Burger Court to get its hands on the obscenity issue.

### IV. Sex Regulation Post-Miller and the Uphill Battle Against New Technologies

On June 21, 1973, the Supreme Court handed down its decisions in two landmark obscenity cases: *Miller v. California*

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31 Id. at 41–42.
32 Id. at 578, 580–82 (statement of Charles H. Keating, Jr., Commissioner).
34 See STONE, supra note 2, at 288.
35 WOODWARD & ARMSTRONG, supra note 28, at 233, 236, 295; STONE, supra note 2, at 288.
and Paris Adult Theatre I v. Slaton. With evident relish, Burger delivered the opinion of the Court in both cases, with Justices Douglas, Brennan, Stewart, and Marshall dissenting. Burger offered a new definition of obscenity: to find that any particular work is “obscene,” a court must conclude that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; that the work depicts or describes sexual conduct in a patently offensive manner; and that the work, taken as a whole, lacks “serious literary, artistic, political, or scientific value.”

The third prong of Burger’s test was critical, because his new definition of obscenity expressly jettisoned the utterly without redeeming social value test and held that a work now could be deemed obscene unless it had serious social value. With this profound change in the law, it seemed that America was headed into a new Victorian era with respect to sexual expression. It was Warren Burger’s hope that his opinions in Miller and Paris Adult Theater would reverse the tide of sexually explicit material in the United States.

But this was not to be. The social changes unleashed in the 1960s and 1970s, shifting cultural values, and the advent of new technologies—including VHS, DVD, cable television, and the Internet—simply overwhelmed the capacity of the law to constrain sexual expression. As the flood of sexual material outpaced the capacity of prosecutors to respond, community standards soon became more tolerant of what would once have been regarded as “patently offensive” depictions of sex, and the real-world definition of obscenity shrunk down to a small fraction of what had once been thought to be obscene. And as the category of sexual expression that could satisfy even the new Miller standard narrowed, so that only the very hardest of what had once been thought to be hard-core pornography could warrant conviction, it became less sensible for government officials to expend scarce prosecutorial resources on what increasingly came to be seen as an essentially futile effort to suppress the market for such expression.

When George W. Bush assumed the presidency in 2001, many of his supporters hoped for a resurgence of obscenity prosecutions. Bush stood, after all, for a return to traditional American values. Living up to that promise, Attorney General John Ashcroft proudly declared in 2002 that “[t]he Department of Justice is committed unequivocally to the task of prosecuting obscenity.” But despite the assurances of President Bush and Attorney General Ashcroft, the Department of Justice filed

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37 413 U.S. 49 (1973).
38 Miller, 413 U.S. at 24 (emphasis added).
fewer than ten adult obscenity prosecutions between 2001 and 2005. Conservative religious organizations were outraged. But if the government was going to bring cases it could actually win, it had no choice but to go after the most extreme fare, such as videos in which men urinate in a woman’s mouth, women have sex with horses, and women and men engage in violent sado-masochistic behavior.39

In a world of limited prosecutorial resources and changing social mores, as much as some people wanted to turn back the clock to the “good old days” when *Lady Chatterley’s Lover*, *Playboy*, and *Deep Throat* were thought to be obscene, those days were long gone. Technology had changed, society had changed, cultural values had changed and, as a result, the law had changed. By the early years of twenty-first century, given the pervasiveness of sexually explicit pornography on the Internet and elsewhere in society, we had for all practical purposes reached the end of obscenity. As Robert Peters, the president of Morality in Media, a religious organization established to combat pornography, reluctantly conceded, “[t]he war is over and we have lost.”40

The practical reality is that today, with the mere click of a button, search engines will instantaneously find virtually limitless websites that offer access to graphically explicit videos of masturbation, anal sex, oral sex, bondage, sadomasochism, and literally anything else the mind can imagine. Whether this is good, bad, or indifferent is at this point largely irrelevant. The law has simply been overwhelmed by technology and by changing social mores. The challenge for the future is no longer how to *ban* such material, but how to deal with its existence.

So, where does this leave us? Compared to the 1950s, when any depiction of sex in books, movies, or magazines was tightly constrained, we are now inundated with all sorts of sexually explicit material. We have gone from a world in which an airbrushed photograph of a partially naked woman was forbidden even to consenting adults, to one in which consenting adults can see pretty much anything and everything they can possibly imagine on the Internet.

The restrictions that now exist are quite specific and limited. First, there remains a strong presumption in favor of protecting unconsenting adults and children when they are out in public. Second, the government can constitutionally prohibit the sale or exhibition to children of material that is obscene for

39 See Stone, supra note 2, at 303–06.
minors, but only if it can do so without significantly interfering with the rights of adults. Third, the government can constitutionally prohibit the production, distribution, and possession of child pornography (that is, sexual images and videos made with real children). Beyond that, though, there are effectively no limits on what consenting adults can see.  

V. THE FUTURE OF SEX AND THE FIRST AMENDMENT

Has this triumph of free speech—and the consequent rejection of Comstockery—been good for the nation? On the one hand, a fundamental precept of American constitutional law is that, all things considered, the freedom of speech is a positive good. As a matter of first principles, the Constitution denies government the authority to decide for the American people what speech—what ideas, what values, what facts, what opinions, what images—they will be allowed to express or consider or hear or view.

But what of the consequences of greater freedom of sexual expression? Are they good or bad? On one side of this question there is, of course, the principle of freedom of speech. In some sense, in terms of individual liberty, the more freedom of expression, the better. But freedom of expression is not merely a principle. It has consequences. The greater availability of sexual expression, for example, enhances the ability of individuals to understand and to satisfy their own sexual needs and desires; gives them a much richer exposure to unconventional forms of artistic excellence; entertains, amuses, enlightens, and excites; and enables individuals to learn more about sex and its many varied possibilities. All of this, in varying degrees, captures at least some of the potential individual and social benefits of a much broader freedom of sexual expression.

What, though, of the other side of the question? What are the negative consequences of greater freedom of sexual expression? Those who are appalled by the current freedom of sexual expression insist that this state of affairs harms adults, children, families, and society in general. These harms, they insist, go well beyond the bare proposition that sexual explicitness is immoral.

Some researchers suggest, for example, that the increasing availability of sexual expression has negative as well as positive consequences. Although the findings are tentative, and although exposure to such expression does not affect all individuals in the same way, several significant harms are said

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41 For discussion of these issues, see Stone, supra note 2, at 313–34.
to be associated with the current availability of sexual expression. There is evidence, for example, that continued exposure to sexual imagery can cause in some users compulsive and obsessive behaviors that resemble behavioral addiction.\(^{42}\) Other researchers assert that the proliferation of certain kinds of sexual messages and imagery can cause particular harm to women by shaping cultural expectations about female sexual behavior in ways that enshrine relationships based on disrespect and abuse.\(^{43}\)

And, of course, there is the alleged harm to children. There is no doubt that minors are far more likely to encounter sexually explicit images today than ever before in American history. One study found that twenty-three percent of minors who came across such material on the Internet were “extremely” or “very upset” by the incident. Research also suggests that both adolescent boys and girls who regularly view such material online are more inclined to view women as sexual objects. Indeed, this might have triggered some of the apparent increase in recent years in sexual harassment and sexual assault on college campuses.\(^{44}\)

What are we to make of these concerns? The first and perhaps most important point is that free speech always comes at a cost. Speech that questions the wisdom of fighting a war may cause soldiers to desert. Speech that defends the morality of abortion may encourage women to engage in what others regard as immoral “baby-killing.” Religious condemnation of homosexuality can incite prejudice, discrimination, and violence against gays and lesbians, and can inflict serious emotional harm on minors who have discovered themselves to be homosexual. The central insight of the First Amendment, though, is that speech cannot constitutionally be censored merely because it might have harmful consequences.

This does not mean that we cannot mitigate what we perceive to be the negative consequences of sexually-explicit expression. To the extent that critics see sexually-explicit speech as akin to cigarettes, alcohol, and gambling in its capacity to overwhelm the individual’s will, the proper response

\(^{42}\) See MARY EBERSTADT & MARY ANNE LAYDEN, THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS 17–18 (Witherspoon Institute 2010); Alvin Cooper et al., Sexuality on the Internet, 30 PROF. PSYCHOL. 154 (1999).


\(^{44}\) See EBERSTADT & LAYDEN, supra note 42, at 31; Manning, supra note 43, at 106–07; NATIONAL CENTER ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE IX: TEEN DATING PRACTICES AND SEXUAL ACTIVITY 6 (2004).
is to warn people about the dangers of abuse and to help those who succumb to temptation.

To the extent that they fear that such expression can warp people's values, the proper response is to educate them about the "right" values and expectations. Of course, there is no guarantee that such efforts will carry the day. In the end, some of us will simply disagree with what others believe to be the "right" values to live by. In a free society, that is our right.

The issue is more complicated with respect to children because they do not have the same capacity to make responsible judgments for themselves about right and wrong. In part for that reason, the Court has continued to adhere to the doctrine that some sexually-explicit material is obscene for children, even though it is constitutionally protected for adults. In practical effect, though, it is difficult, if not impossible, to shield children in today's world from exposure to sexually-explicit expression.

The primary remedy therefore rests largely in the hands of parents. By using filters on home computers, by speaking with their children about the possibility that they might encounter sexually-explicit expression, by talking with them after they do encounter such material, by guiding them in what they believe to be "best" ways to think about intimacy and sex, and by educating themselves about the best ways to manage their parental responsibilities, parents can create a reasonably safe environment for their children. In truth, this is no different from the trust we place in parents more generally. In everything from crossing streets to playing near the water to choosing friends to walking alone at night to eating right to smoking and drinking and drugs, we rely upon parents to protect their children from harm. The same is true today in terms of protecting children from the harm caused by exposure to sexually-explicit expression.

Perhaps ironically, we are where we are today not because citizens intentionally voted to make the most extreme forms of sexual material legal, not because judges intentionally held that the Constitution should protect the most extreme forms of such material, but because technology overwhelmed the capacity of the law to constrain the availability of such material. The challenge for the future is to make the best of it.
THE FCC AND PROFANE LANGUAGE: THE LUGUBRIOUS LEGACY OF A MORAL PANIC AND A GROSSLY OFFENSIVE DEFINITION THAT MUST BE JETTISONED

Clay Calvert*

ABSTRACT

This Article examines the Federal Communications Commission’s (“FCC”) regulation of profane language since 2004. That year is when the FCC, facing a moral panic, radically altered its profanity tack. Unlike obscenity and indecency, profanity—a third content category over which the Commission holds statutory authority—is seldom analyzed.

This Article argues that the FCC’s current definition of profane language not only strips its meaning from its religious roots, but also: (1) is both unconstitutionally vague and overbroad; and (2) violates core First Amendment principles against censoring speech that merely offends. The U.S. Supreme Court’s reinvigorated emphasis on safeguarding offensive expression in cases such as Matal v. Tam and Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission further portends the unconstitutionality of the FCC’s profanity classification.

In brief, when the Commission abruptly gutted its old definition of profane language fifteen years ago, that term became an empty vessel. The FCC then poured into it an unconstitutionally nebulous effort to censor sexual speech that is neither obscene nor indecent. This Article concludes that Congress should jettison the FCC’s statutory power over profane language if the Commission fails to readily articulate a new definition that is narrow and clear.

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INTRODUCTION

Shortly after Ajit Pai became chairman of the Federal Communications Commission (FCC) in January 2017, he observed that “the law that is on the books today requires that broadcasters keep it clean so to speak.” The FCC’s Enforcement Bureau now can put that law to the test. That is because the Parents Television Council (PTC), which boasts a long history of “[h]olding the FCC’s metaphorical feet to the fire to enforce the law,” filed a complaint against a Washington, D.C.-area television station over a May 2018 episode of ABC’s *Good Morning America* that featured the word “fuck.”

As Melissa Henson, the PTC’s program director, described it in a letter to Rosemary Harold, chief of the FCC’s Enforcement Bureau, *Good Morning America* broadcast “a prerecorded piece about disgraced movie mogul Harvey Weinstein.” The segment incorporated an audio clip of SiriusXM satellite radio host Howard Stern interviewing actress Gwyneth Paltrow about an encounter she had with Weinstein. In that clip, Stern—referencing Paltrow’s then-boyfriend, actor Brad Pitt—exclaims “[w]hen you tell Brad, Brad says, ‘Fuck this

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8. Id.
9. Id.
guy I’m going to go over and confront him.” 10 Henson’s missive, copied to all five FCC commissioners, pointed out that Stern’s utterance of fuck “occurred during a taped and edited package segment. The network had every opportunity to edit the word out before it went to air.” 11

What can the FCC do about such language? It lacks the power to forbid or censor speech on the broadcast airwaves in advance of publication. 12 That rule squares with the time-honored First Amendment 13 doctrine that prior restraints on expression are presumptively unconstitutional. 14 Yet when it comes to subsequent punishments 15 —sanctions imposed on over-the-air broadcast stations for sexually explicit expression they have already carried 16—the FCC wields a regulatory trident.

Specifically, Congress vests the Commission with statutory authority under 18 U.S.C. § 1464 to punish broadcasters via license revocation, 17 monetary forfeitures 18 and cease-and-desist orders 19 for carrying three types of content: obscenity, indecency and profanity. 20 Although, the FCC

10 Id.
11 Id.
12 The Communications Act of 1934 provides that:
Nothing in this Chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

13 The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).
15 See generally Alexander v. United States, 509 U.S. 544, 550 (1993) (noting “the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments”); WXIA-TV v. Georgia, 811 S.E.2d 378, 386 (2018) (“In the context of the First Amendment, the courts traditionally have distinguished between prior restraints and subsequent punishments, and they usually have subjected prior restraints to more exacting scrutiny.”).
16 See generally Barrett v. Walker City Sch. Dist., 872 F.3d 1209, 1223 (11th Cir. 2017) (noting that subsequent punishments “regulate a given type of speech by penalizing the speech only after it occurs”) (emphasis in original).
20 See 18 U.S.C. § 1464 (2012) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).
punishes stations for airing obscenity at all times of the day;\textsuperscript{21} it penalizes them for indecency and profanity only during a sixteen-hour period stretching from 6 a.m. to 10 p.m.\textsuperscript{22} Of these three categories, profanity—in the parlance of our times—\textsuperscript{23} is the ugly (and ignored) stepchild. It also is this Article’s focus.

While the United States Supreme Court has addressed both obscenity\textsuperscript{24} and indecency,\textsuperscript{25} it has not directly analyzed the

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\textsuperscript{21} See 47 C.F.R. § 73.3999(a) (2018) (“No licensee of a radio or television broadcast station shall broadcast any material which is obscene.”).

\textsuperscript{22} See 47 C.F.R. § 73.3999(b) (2018) (“No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”); Obscenity, Indecency & Profanity—FAQ, FED. COMM. COMMISSION, https://web.archive.org/web/20170204143249/https://www.fcc.gov/reports-research/guides/obscenity-indecency-profanity-faq (last visited Mar. 1, 2019) (“FCC decisions also prohibit the broadcast of profane material between 6 a.m. and 10 p.m.”).

\textsuperscript{23} The ugly stepchild, although perhaps politically incorrect, is a common phrase in the news media. See, e.g., Rachel Abrams, Can Taco Bell Architect Duplicate Success at Chipotle?, N.Y. TIMES, Feb. 16, 2018, at B3 (“Instead of being the ugly stepchild, Taco Bell became frequently cited as one of the top chains in the Yum Brands empire, which also includes Pizza Hut and KFC.”); Gary Stoller, Hotel Schools Are in With Inn Crowd, USA TODAY, Jan. 8, 2008, at 1B (“Hospitality schools have long been regarded as the ugly stepchild on many campuses where teaching students how to serve hotel and restaurant customers has been perceived as inferior to other academic fields.”); Michael Upchurch, Real-Life Drama of Homicide Detectives, WASH. POST, June 12, 2016, at B8 (quoting journalist Del Quentin Wilber for the proposition that “[h]igh crime rates and underperforming schools have cast Prince George’s County as the ugly stepchild of the Washington region”).

\textsuperscript{24} The U.S. Supreme Court held more than sixty years ago that obscenity is not protected by the First Amendment’s guarantee of free speech. See Roth v. United States, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”). The current three-part test for obscenity, which was fashioned forty-five years ago, asks the factfinder to decide if the content at issue: (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) “lacks serious literary, artistic, political or scientific value.” Miller v. California, 413 U.S. 15, 24 (1973).

\textsuperscript{25} The U.S. Supreme Court first upheld the FCC’s regulatory authority over indecent speech in the face of a First Amendment challenge in 1978. FCC v. Pacifica Found. 438 U.S. 726, 728 (1978) (holding that “§ 326 does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting”). The Court there confronted the issue of “whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.” Id. at 729. The Court concluded that the First Amendment does not bar the FCC from regulating indecent speech in particular contexts and circumstances, such as the time of day and composition of the audience, when it would constitute a nuisance. Id. at 750–51. In reaching its decision, the Court emphasized that “broadcast media have established a uniquely pervasive presence in the lives of all Americans.” Id. at 748. It also focused on the fact that “broadcasting is uniquely accessible to children, even those too young to read.” Id. at 749. On this latter factor, the Court noted that indecent language on the broadcast airwaves can “enlarge[] a child’s vocabulary in an instant.” Id.

In 2012, the Supreme Court passed on an opportunity to reconsider its holding in Pacifica Foundation, finding it “unnecessary . . . to address the constitutionality of the current indecency policy.” FCC v. Fox Television Stations, Inc., 567 U.S. 239, 258 (2012). The Court advised the FCC, however, that it was “free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.” Id. at 259. In brief, the Court in Fox Television Stations
FCC’s power over, or its current definition of, profane language. Scholarly articles concentrating on the FCC’s definition of profanity, in turn, are scant and now dated.26

This Article examines the FCC’s problematic efforts to conceptualize profane language since it abruptly announced in 2004 it would no longer “limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation . . . .” 27 Blasphemy “is generally defined as the act of insulting or showing contempt or a lack of reverence for God or something considered sacred.”28 To paraphrase a song title by the band R.E.M., the FCC’s definition of profane language lost its religion fifteen years ago.29

That switch was somewhat odd, at least at first blush, because the historical nexus between profanity and blasphemy is longstanding. 30 For example, the Supreme Court of South Carolina noted more than a century ago that “profane language is language irreverent toward God or holy things.”31 In 1931, the U.S. Court of Appeals for the Ninth Circuit found that irreverently using the phrase “By God”32 and calling “down the curse of God upon certain individuals”33 during a radio broadcast constituted “profane language within the meaning of


30 The Supreme Court of Florida observed in 1944 that practically all of the state courts of last resort that had considered the meaning of profanity “define it as the use of words importing ‘an imprecation of Divine vengeance,’ of ‘implying Divine condemnation,’ or words denoting ‘irreverence of God and holy things,’ — blasphemous.” Cason v. Baskin, 20 So. 2d 243, 247 (Fla. 1944). See also Carter et al., supra note 26, at 3–4 (noting that the Latin roots of “profane” carry a “blasphemy-related meaning”).


32 Duncan v. United States, 48 F.2d 128, 134 (9th Cir. 1931).

33 Id.
that term as used in the act of Congress prohibiting the use of profane language in radio broadcasting.”

But, as author S.E. Hinton might put it, that was then, this is now. Today, the FCC defines profane language on its website as “grossly offensive’ language that is considered a public nuisance.” Might Howard Stern’s utterance of “fuck” on the Good Morning America segment mentioned earlier meet this definition? And what about an over-the-air radio or television station that uses the word “shithole” as allegedly uttered by President Donald J. Trump in early 2018 to describe Haiti and African countries whose citizens immigrate to the United States?

This definition of profane language, untethered from its religious roots, lingers today in a bizarre state of legal limbo. In 2007, the U.S. Court of Appeals for the Second Circuit declared the FCC’s 2004 secularized approach to profane language invalid under the Administrative Procedure Act (“APA”). The court’s holding was due to the Commission’s failure to offer any “independent reasons that would justify its newly-expanded definition of ‘profane’ speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition.” But in 2009, the Supreme Court reversed that decision in FCC v. Fox Television Stations, Inc.

On remand to the Second Circuit, the FCC abandoned its contention that the broadcasts at issue were profane, thus depriving the Second Circuit in 2010 of another opportunity to

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34 Id. When Duncan was decided, the relevant legislation was Section 29 of the Radio Act of 1927, which provided, in pertinent part, that “[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.” Id. at 129. The enforcing authority, in turn, was the Federal Radio Commission, the forerunner agency to the FCC. See Gen. Elec. Co. v. FRC, 31 F.2d 630, 631–32 (1929) (“The act established the Federal Radio Commission, with power . . . to make such regulations not inconsistent with law.”).

35 S.E. HINTON, THAT WAS THEN, THIS IS NOW (1971).


37 See Eggerton, supra note 6 (addressing the Good Morning America segment described here).


40 Fox Television Stations, 489 F.3d at 461.

address the profanity issue. This suggested, at least to one First Amendment scholar, that the FCC “appeared to have retired profanity as an independent category for indecency violations.”

“Appeared” is the operative word in that last sentence. This is because: (1) the FCC continues in 2019 to identify and define profane language on its website as a brand of speech over which it possesses authority; (2) the FCC’s statutory power over profane language remains on the federal code books; and (3) the FCC, in fact, still considers if content is profane when asked to do so.

For example, in December 2014, the FCC “reject[ed] the argument that the word ‘Redskins’ falls within the Commission’s definition of profanity.” In doing so, the Commission simply reasoned that its definition of profanity does not stretch to racial or religious epithets. Remarkably, the FCC offered no clarification of what its definition of profane language is. In brief, the Commission merely defined profanity in the negative by stating what profane language is not. In March 2015, the Commission made a point of noting that “[e]nforcing the statute and Rule restricting indecent, obscene, or profane broadcasts is an important part of the Commission’s overall responsibility for regulating broadcast radio and television operations.”

Despite such relatively recent indications that the FCC’s consideration of profane language is alive and well, it has not issued a single Notice of Apparent Liability for profanity (in contrast to indecency) since the Second Circuit decision in 2007.

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42 Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 327, n.7 (2d Cir. 2010), vacated, 567 U.S. 239 (2012).
44 See Obscene, Indecent and Profane Broadcasts, supra note 36 (providing a link to the FCC’s current articulation of profane language).
47 Id.
48 See id. (noting only that the Second Circuit in 2007 had invalidated its secularized and offensiveness-based nuisance definition that the FCC was confining to words involve a sexual or excretory meaning).
49 The FCC explained in Red Zebra:
While the Commission has “recognize[d] that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans,” it made clear its intent “to avoid extending the bounds of profanity to reach such language given constitutional considerations.” Accordingly, we reject the argument that the word “Redskins” falls within the Commission’s definition of profanity.
Id. (internal citation omitted).
declared the Commission’s definition invalid under the APA. In fact, with the exception of one high-profile incident in which it found in 2015 that a newscast briefly showing an erect penis was indecent, the FCC has been largely dormant in penalizing obscene, indecent and profane content since the Supreme Court invited it “to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.” In a variation of the parlor game of guessing whether a former celebrity is dead or alive, one might reasonably wonder today if the FCC’s policing of profane language is dead, dying, or dormant.

Sadly, all of this confusion and consternation easily could have been avoided and the answer could be a definitive “dead.” That is because, as described later, the FCC asked Congress in 1976 to eliminate its statutory power over profane language due to some of the same issues that now crop up in 2019. Congress, however, failed to heed the FCC’s recommendation, as evidenced by the presence today of the “profane language” clause in 18 U.S.C. § 1464.

To further explore and unpack this muddle, Part I reviews several key judicial opinions involving profane language. Part II then examines the FCC’s March 2004 decision to change its definition of profane language, contextualizing that shift within the framework of a moral panic highlighted by the Super Bowl halftime show featuring Janet Jackson just one month earlier. Next, Part III analyzes several problems with the FCC’s current definition of profane language, including its susceptibility to challenges under the vagueness and overbreadth doctrines, as well as its direct contravention of the general First Amendment

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52 See generally WDBJ, 30 FCC Rcd. 3024; Clay Calvert et al., Indecency Four Years After Fox Television Stations: From Big Papi to a Porn Star, an Egregious Mess at the FCC Continues, 51 U. Rich. L. Rev. 329 (2017) (criticizing the FCC’s Notice of Apparent Liability for Forfeiture issued against WDBJ Television, Inc.).
53 The word “largely” is purposefully chosen because the FCC has issued a few orders regarding indecency in the past half-dozen years. See Border Media Bus. Tr., 29 FCC Rcd. 9488, 9489 (2014) (invoking a $37,500 settlement over indecency allegations stemming from a radio broadcast); KRXA, LLC., 29 FCC Rcd. 3482, 3487 (2014) (invoking a $15,000 settlement over allegations involving violations of both sponsorship identification and indecency regulations); Liberman Broad. Inc., 28 FCC Rcd. 15397, 15404 (2013).
55 See, e.g., Erin Chack, Quiz: Is This Celebrity Dead or Alive?, BUZZFEED (Aug. 22, 2013), https://www.buzzfeed.com/erinack/quiz-is-this-celebrity-dead-or-alive.
56 Infra notes 318–328 and accompanying text.
57 18 U.S.C. § 1464 (2012) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).
58 Infra Part I.
59 Infra Part II.
rule against censoring speech merely because it offends. 60 Finally, Part IV concludes that Congress should repeal the FCC’s statutory authority over profane language unless the FCC acts immediately to redraft its definition in a more concise and constitutional manner. 61

I. REGULATING THE PROFANE IN THE FACE OF THE FIRST AMENDMENT: A PRIMER

In 1792, all fourteen states that had ratified the U.S. Constitution “made either blasphemy or profanity, or both, statutory crimes.” 62 That, of course, was more than 225 years ago—long before the U.S. Supreme Court launched its modern First Amendment free-speech jurisprudence “in the early twentieth century” 63 with the case of Schenck v. United States 64 in 1919. 65

So, if it seems as if profanity is among the few categories of speech not protected 66 by the First Amendment, then the likely culprit is a “famous passage” 67 in the Supreme Court’s 1942 decision in Chaplinsky v. New Hampshire. 68 There, the Court made the “highly problematic assertion” 69 that:

[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.

60 Infra Part III.
61 Infra Part IV.
64 249 U.S. 47 (1919).
66 See United States v. Alvarez, 567 U.S. 709, 717 (2012) (identifying categories of unprotected expression as incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and “speech presenting some grave and imminent threat the government has the power to prevent”); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”).
68 315 U.S. 568 (1942).
69 Burton Caine, The Trouble With “Fighting Words”: Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should be Overruled, 88 MARQ. L. REV. 441, 457 (2004). This passage is highly problematic because it “invented the theory that entire categories of speech are denied First Amendment protection.” Id. at 456.
These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 70

The above-quoted language is perhaps best known for creating the “fighting words” exception to the First Amendment. 71 It also was favorably cited by the Court in Roth v. United States 72 to buttress the notion that obscenity falls outside the ambit of First Amendment protection. 73 And, most significantly for this Article, profane expression also is placed by Chaplinsky among the “classes of speech as [falling] outside of the First Amendment’s coverage.” 74 Yet, the passage is largely dicta. 75 Dicta, as Professor Michael Dorf notes, “typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court.” 76 In other words, dicta are “comprised of statements

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70 Chaplinsky, 315 U.S. at 571–72 (emphasis added).
73 Specifically, the Roth Court cited Chaplinsky, among other decisions, to support its assertion that “numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.” Id. at 481.
75 See P. Brooks Fuller, The Angry Pamphleteer: True Threats, Political Speech, and Applying Watts v. United States in the Age of Twitter, 21 COMM. L. & POL’Y 87, 87 n.1 (“The Supreme Court of the United States outlined several categories of unprotected speech under the First Amendment in dicta in Chaplinsky . . . .”) (citing Chaplinsky, 315 U.S. at 571–72).
that do not constitute the court’s holdings.” 77 Chaplinsky’s observation that profane language falls beyond the purview of the First Amendment, therefore, is nonbinding.

The notion Chaplinsky carved out a new category unprotected of speech for profane language—at least to the extent that the term, as noted above, involved denigrating God or religion78—was put to rest one decade later in Burstyn v. Wilson.79 There the Court considered the constitutionality of a New York statute banning certain “motion picture films on the ground they are ‘sacrilegious.’” 80 In declaring the law unconstitutional, Justice Tom Clark wrote for the Court:

from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.81

To the extent that profanity was stripped of its religious connotations and now simply encompasses vulgar words that might offend, the Supreme Court’s 1971 decision in Cohen v. California affords First Amendment protection to such vulgar language.82 There the Court held government entities, “acting as guardians of public morality,”83 could not permissibly punish a man for peacefully wearing a jacket emblazoned with words “Fuck the Draft” in a Los Angeles courthouse.84 In its opinion, the Court noted that California “has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”85 Intimating the vagueness issues

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77 Lisa M. Durham Taylor, Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms, 57 Drake L. Rev. 75, 92 (2008).
79 343 U.S. 495 (1952).
80 Id. at 497.
81 Id. at 505.
83 Id. at 22.
84 Id. at 15.
85 Id. at 25.
plaguing the contested statute, which attempted to regulate “offensive conduct,” Justice John Marshall Harlan II reasoned for the majority that:

while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.87

In a nutshell, the Court in Cohen gave First Amendment protection to “the mother of all words commonly labeled lewd or profane” in the years since Chaplinsky.88 As Rodney Smolla explains, “the fate of the ‘F Word,’ now constitutionally protected in many circumstances notwithstanding Chaplinsky, is one of many examples of Chaplinsky as an overstatement of current outcomes in free speech cases.”89

The bottom line today is that “profanity’s categorical exclusion from the First Amendment is no more.”90 In fact, “[n]ot one of the Court’s opinions over the last half a century has mentioned profane utterances as uncovered by the First Amendment. Rather, profanity today is often protected from government sanctions.”91

Yet secularized profanity—profanity as a term for vulgar curse words, regardless of any religious overtones or implications—is not absolutely protected by the First Amendment. It can still be regulated in specific circumstances, such as when it is uttered by students in public high schools,92

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86 Id. at 16 n.1.
87 Id. at 25.
88 Smolla, supra note 74, at 501.
89 Id. at 502.
91 Id.
92 See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678, 682 (1986) (upholding a public high school student’s punishment for giving a speech that centered on “an elaborate, graphic, and explicit sexual metaphor,” and distinguishing the Court’s protection of profanity in Cohen v. California, by noting that “[i]t does not follow that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school”).
when it rises to the level of fighting words\textsuperscript{93} or when it targets airline personnel in an intimidating fashion.\textsuperscript{94}

In the last category, consider a federal statute that stipulates a punishment for “intimidating a flight crew member or flight attendant of the aircraft.”\textsuperscript{95} In \textit{United States v. Lynch},\textsuperscript{96} an apparently intoxicated first-class passenger shouted “f\textsuperscript{uck} this airline”\textsuperscript{97} and repeatedly yelled “f\textsuperscript{uck} you, c\textsuperscript{unt}”\textsuperscript{98} after a flight attendant stopped serving him alcoholic drinks.\textsuperscript{99} In upholding the passenger’s conviction under 49 U.S.C. § 46504, the U.S. Court of Appeals for the Tenth Circuit reasoned the statute “sets out a content-neutral prohibition on conduct in a specific time, place, and manner.”\textsuperscript{100} The Court added: “nothing in the statute prohibits profanity or any other content, per se.”\textsuperscript{101}

Anti-profanity statutes still exist.\textsuperscript{102} Despite some scholars’ contention that these laws are facially unconstitutional,\textsuperscript{103} they may be permissible if narrowly construed to apply only to situations where profanities are uttered as fighting words.\textsuperscript{104} Fighting words are those involving “a direct personal insult or an invitation to exchange fistcuffs.”\textsuperscript{105} As the Supreme Court wrote in \textit{Cohen v.}

\textsuperscript{93} See Gooding v. Wilson, 405 U.S. 518, 518 (1972) (affirming the unconstitutionality of a statute targeting “opprobrious words or abusive language” because its scope was not narrowed or limited in construction to fighting words scenarios). Anti-profanity statutes, in turn, are sometimes deemed constitutional if they are narrowly construed to apply only to fighting words scenarios. Johnson v. Quattlebaum, 664 F. App’x. 290, 291 (4th Cir. 2016). For instance, a South Carolina statute makes it a misdemeanor to use “profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church.” S.C. CODE ANN. § 16-17-530 (2018). In 2014, Krystal Johnson was prosecuted under the statute for uttering the decidedly nonreligious-based phrase “[t]his is some motherfucking shit.” Joseph, 664 F. App’x. at 291. The Fourth Circuit upheld the statute because a South Carolina intermediate appellate court had construed it “to require fighting words for a conviction.” Id. at 294.

\textsuperscript{94} See United States v. Lynch, 881 F.3d 812 (10th Cir. 2018).

\textsuperscript{95} 49 U.S.C. § 46504 (2012).

\textsuperscript{96} 881 F.3d 812 (10th Cir. 2018).

\textsuperscript{97} Id. at 814.

\textsuperscript{98} Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id. at 818.

\textsuperscript{101} Id.


\textsuperscript{103} See id. (quoting Professor Jennifer Kinsley for the proposition that “laws banning profanity are unconstitutional on their face” and for her observation that “[t]he sole justification for these laws is morality-based, which the Supreme Court has held insufficient to justify laws regulating fundamental rights”).

\textsuperscript{104} See id. (noting that “[t]he reason why such laws are sometimes considered constitutional is the fighting words doctrine”), S.C. CODE ANN. § 16-17-530 (2018) (providing an example an anti-profanity statute in South Carolina that was deemed constitutional because, as judicially construed, it was limited in scope to fighting words situations).

fighting words take the form of “a direct personal insult” and “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” Mental offense or discomfort sustained by hearing profanity, as one federal district court recently observed, does not give rise to a fighting words situation.

However, in the absence of either a statute such as the one in *Lynch* or a fighting words scenario, secular profanity uttered by adults is generally protected by the First Amendment. For instance, the Supreme Court of Connecticut recently tossed out the breach-of-the-peace conviction of Nina Baccala for calling a female supermarket manager “a ‘fat ugly bitch’ and a ‘cunt.’” The Nutmeg State’s high court conceded that Baccala, a customer, had “invoked one or more of the most vulgar terms known in our lexicon” to refer to the store manager’s gender. Yet, the Court reasoned that, per the fighting words doctrine, “[u]ttering a cruel or offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee’s position to immediately retaliate with violence under the circumstances.” Baccala was protected, the Supreme Court of Connecticut reasoned, because “the natural reaction of an average person in [the store manager’s] position who is confronted with a customer’s profane outburst, unaccompanied by any threats, would not be to strike her.”

With this background on profanity rulings in mind, the Article next turns to the FCC’s decision in 2004 to change its definition of profane language and its subsequent effort in 2006 to refine that new definition. Part II contextualizes the Commission’s decision within the framework of a moral panic then facing the FCC.

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107 403 U.S. at 20.
108 403 U.S. at 20.
109 In *Pomicter v. Luzerne County Convention Center Authority*, the court held unconstitutional a ban on profanity and vulgarity during protests held in areas outside of the Mohegan Sun Arena, observing that “the vulgarity ban is not aimed at curbing ‘fighting words’ so much as words that may make the listener uncomfortable” and concluding that “potential discomfort alone does not elevate offensive speech to ‘fighting words.’” 332 F. Supp. 3d 558, 577 (M.D. Pa. 2018), amended by 2018 U.S. Dist. LEXIS 86338 (M.D. Pa. May 22, 2018). The court also added that “[w]ithout more concrete evidence, the Arena cannot justify its broad ban based on speculation of violence that may be incited by profanity.” 332 F. Supp. 3d 579.
110 See United States v. Lynch, 881 F.3d 812 (10th Cir. 2018).
112 403 U.S. at 13.
113 403 U.S. at 13.
114 403 U.S. at 16.
II. REFLECTING ON A MORAL PANIC FIFTEEN YEARS LATER: THE MOVE TO ALTER PROFANE LANGUAGE AT THE FCC

Moral panics are “over-heated periods of intense concern.” They arise when many people Harbor “intense feelings of concern about a given threat which a sober assessment of the evidence suggests is either nonexistent or considerably less than would be expected from the concrete harm posed by the threat.” The concept was coined by British sociologist Stanley Cohen more than forty-five years ago. Central to a moral panic is an “overreaction” or “a highly exaggerated response to the original negative event.”

Violence in movies, comic books, and video games has sparked moral panics, resulting in censorship efforts. For example, the music of rapper Marshall Mathers, better known as Eminem, spawned a moral panic more than fifteen years ago. New forms of media that are alien to older adults trigger moral panics. Perhaps more than any variety of media content, it is sexual expression that launches moral panics in the United States.

116 Id.
117 Cohen explained that a moral panic occurs when:
[a] condition, episode, person or group of people emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians, and other right-thinking people; socially accredited experts pronounce diagnoses; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.

122 See Christopher J. Ferguson & John Colwell, Understanding Why Scholars Hold Different Views on the Influences of Video Games on Public Health, 67 J. COMM. 305, 310 (2017) (“Moral panics often focus on newer forms of media that may not yet have been embraced by large swaths of society, particularly older adults. As a key element, a negative social narrative forms about this new media, initially based on moral repugnance, rather than data.”).
States. The country, as Professor Bruce Burgett observes, “has been characterized from the outset as . . . shaped through a history of recurring sex panics.” That remains true today. For example, concern over teen sexting a few years ago constituted a moral panic. And consistent with all moral panics that “eventually fade,” Professor Kimberlianne Podlas notes “it appears the moral panic about teen sexting has faded. Reporting on teen sexting had declined significantly.”

What are the key ingredients of moral panics? First, the media generally play a major role in fanning the flames of fright, be it intentionally or otherwise. As a 2016 article in *Journalism Practice* notes, “[j]ournalists and the media outlets they work for can contribute to moral panic by exaggerating events, publishing unsubstantiated claims, or giving preference to certain groups or individuals and ignoring others.” Second, the role of interest groups is important, with one article noting that a moral panic involves “the unanticipated and unintended outcome of moral crusades undertaken by particular interest groups (e.g., professional associations, the police, parent organizations) in an effort to draw public attention to, and curtail, a specific set of actions.” Other key players in moral panics include “the politicians, the experts, and the legislators.” Third, “moral

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127 Id.
128 See Shahira Fahmy & Thomas J. Johnson, *Mediating the Anthrax Attacks: Media Accuracy and Agenda Setting During a Time of Moral Panic*, 15 ATLANTIC J. COMM. 19, 23 (2007) (“Several studies have indicated the media play a major role in producing moral panics, which are when media or politicians sensationalize a social problem and present them as a threat to the social order, causing the public to have an exaggerated fear of the nature of the problem.”); Angela McRobbie & Sarah L. Thornton, *Rethinking ‘Moral Panic’ for Multi-Mediated Social Worlds*, 46 BRITISH J. SOC. 559, 560 (1995) (“Moral panics, once the unintended outcome of journalistic practice, seem to have become a goal.”).
panics often emanate from a key event.” All of these factors may coalesce to produce a response from the legal system.

This Article argues that a slowly simmering moral panic over racy broadcast content suddenly boiled over with a single event—the CBS télévised, MTV-produced halftime show of Super Bowl XXXVIII on February 1, 2004, featuring the uncovering of singer Janet Jackson’s right breast by Justin Timberlake. The very next month, the FCC radically changed and expanded its definition of profane language in pro-censorial fashion.

The game was watched by approximately ninety million people and, perhaps more importantly from a moral panic perspective, “as many as one in five American kids between the ages of 2 and 11 years caught that halftime show.” In vivid color, they witnessed Timberlake, reaching across Jackson’s “chest, pulling off the right cup of her bodice – which clearly was designed to break away easily, like a nursing bra, only black and with metal studs and rivets – and revealing her breast, which was adorned with a silver ‘nipple guard.’” In brief, the halftime show’s “wardrobe malfunction,” as Timberlake termed it, likely spawned the FCC’s definitional malfunction on profane language.

Professor Jeremy Harris Lipschultz notes that the Janet Jackson incident “sparked numerous calls for media decency in the United States.” However, problems were already festering

133 See Stabile, supra note 118, at 259 (“Rumor, mass media hype, and the institutional response to these cause people to panic about crime, which in turn causes them to support more stringent law and order measures.”).
134 See generally Gary Mihoces, Half Provides Kind of Exposure NFL Doesn’t Want, USA TODAY, Feb. 2, 2004, at 1C (reporting that “singer Janet Jackson’s breast was exposed on national TV during the Super Bowl XXXVIII halftime show,” and quoting an MTV statement for the proposition that “[t]he tearing of Janet Jackson’s costume was unrehearsed, unplanned, completely unintentional and was inconsistent with assurances we had about the content of the performance”); Daman Hack, Patriots Win 2nd Super Bowl in 3 Years, N.Y. TIMES, Feb. 2, 2004, at A1 (reporting that “Janet Jackson’s right breast was exposed at the end of her duet with Justin Timberlake when he pulled off part of her top”).
137 Id.
138 This was the term used by Justin Timberlake in a statement to describe what happened. See Kelefa Sanneh, Pop Review, During Halftime Show, a Display Tailored for Video Review, N.Y. TIMES, Feb. 2, 2004, at D4 (“Timberlake released a statement, too: ‘I am sorry if anyone was offended by the wardrobe malfunction during the halftime performance of the Super Bowl. It was not intentional and is regrettable.’”).
with broadcast content before the “wardrobe malfunction.” As Ann Oldenburg summed it up in USA Today, “[t]hough television has been pushing the sexual-innuendo envelope for decades, this flash of breast, on national television during a beloved annual sporting event seen by millions of families, suddenly became a culminating moment in a long-simmering culture clash.”\(^{140}\) Thus, while Jackson’s breast-baring was “[t]he flashpoint for conservative critics”\(^{141}\) over televised indecency, trouble had been brewing with salty language and racy images on the broadcast airwaves in the two years immediately before it.

For example, during her acceptance speech at the Billboard Music Awards in 2002, singer and movie star Cher proclaimed she “had my critics for the last forty years saying that I was on my way out every year. Right. So f*** ‘em.”\(^{142}\) Her words were broadcast on Fox network stations.\(^{143}\) In 2003, when the Billboard Music Awards were again broadcast on Fox, reality-television personality Nicole Richie queried before presenting an award, “[h]ave you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”\(^{144}\) Additionally that year, ABC television stations aired an episode of *NYPD Blue* that “showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.”\(^{145}\) Furthermore, during an acceptance speech at the 2003 Golden Globe Awards show on NBC, singer Bono of the Irish band U2 uttered the phrase “really, really, fucking brilliant.”\(^{146}\) And finally, just one week before the Janet Jackson fiasco, actress Diane Keaton said “shit” during a speech at the 2004 Golden Globes Award show.\(^{147}\)

It was these incidents that both primed the pump for the moral panic\(^{148}\) and later provided the FCC with the vehicle for

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\(^{143}\) Id.

\(^{144}\) Id.

\(^{145}\) Id. at 247–48.


\(^{148}\) See Chuck Barney, *Super Bowl Furor Fuels Culture War*, CONTRA COSTA TIMES (Cal.), Feb. 7, 2004, at A1 (reporting that prior to the Janet Jackson incident, “[a] furor over . . . foul-mouthed episodes had been building since October [2003], when the FCC ruled that Bono’s profanity was not a punishable offense”).
changing its definition of profane language in March 2004. Bono’s speech gave the public, as well as crusading interest groups such as the Parents Television Council, a propitious opportunity to apply enhanced pressure on the FCC to better police the broadcast airwaves in the months leading up to the halftime show at Super Bowl XXXVIII.

That is because in October 2003, David Solomon, chief of the FCC’s Enforcement Bureau, concluded that Bono’s statement “really, really, fucking brilliant” was not indecent. The FCC’s definition of indecency requires that speech “depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.” Solomon reasoned that Bono’s deployment of “fucking” was not indecent because it “did not describe sexual or excretory organs or activities. Rather, the performer used the word ‘fucking’ as an adjective or expletive to emphasize an exclamation.” Solomon, however, did not consider whether the language was profane; he found only it was neither indecent nor obscene.

The decision, as Frank Ahrens wrote in the Washington Post, “was criticized and derided.” Multiple members of the U.S. Senate proposed a resolution condemning it. The ruling also “elicited strong opposition from the Parents Television Council.” Professor Ira Robbins, in fact, contends it was the PTC that “convinced the Commission to review the decision.” Indeed, as one article noted in December 2003, Solomon’s conclusion did not sit “well with some, from the Parents Television Council (which organized most of the Bono complaints) to congressmen to FCC Chairman Michael Powell himself, who played no part in the ruling and deemed it ‘reprehensible’ that children might hear the F-word in any form on the air.” Powell, in fact, reportedly circulated a draft proposal in January 2004 designed to overturn Solomon’s.

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150 See The PTC Mission, supra note 4; Calvert & Richards, supra note 5.
152 Id. at 19860–61.
153 Id. at 19861.
154 Id. at 19861–62.
157 Paul Davidson, FCC: OK, Maybe You Shouldn’t Say That . . ., USA TODAY, Jan. 14, 2004, at 4D.
decision.\textsuperscript{160} During a talk that same month at the National Press Club in Washington, D.C., Powell called it “irresponsible for our programmers to continue to try to push the envelope on a reasonable set of policies that try to legitimately balance the interests of the First Amendment with a need to protect our kids.”\textsuperscript{161} Even Comedy Central’s animated show \textit{South Park} spoofed Solomon’s decision in an episode in which students are puzzled as “a teacher is shown saying that students can use a common swear word ‘only in the figurative noun form or the adjective form.’”\textsuperscript{162}

While the October 2003 Bono ruling garnered the attention of FCC commissioners, Congress and the PTC, it was the February 1, 2004 airing of the Super Bowl halftime show that got “seemingly all of America”\textsuperscript{163} contemplating what it means to go too far in airing explicit content. Indeed, “callers flooded CBS affiliate offices with complaints”\textsuperscript{164} the same night the game aired.

As Frank Rich of the \textit{New York Times} waggishly summed it up, “Janet Jackson’s breast (not even the matched set!) would lead to one of the most hysterical outbreaks of Puritanism in recent, even not-so-recent, American history.”\textsuperscript{165} In a nutshell, if the October 2003 ruling by Solomon on Bono’s exclamation lit the kindling, then “Janet Jackson’s Super Bowl exposure poured more fuel on the fire.”\textsuperscript{166} The latter incident, simply put, “brought indecency to the center of the national political discussion.”\textsuperscript{167}

In accord with the notion that moral panics feature interest groups on crusades,\textsuperscript{168} the one sparked by Janet Jackson involved the Parents Television Council. As media defense attorney Robert Corn-Revere writes, “policy entrepreneurs like Brent Bozell, who then led the Parents Television Council – and the FCC – immediately pounced on the 9/16-second flash of bejeweled breast flesh as a sign of the End of Days and a call to


\textsuperscript{165} Frank Rich, \textit{Apres Janet, A Deluge}, N.Y. TIMES, Mar. 21, 2004, at Section 2, 1.


\textsuperscript{167} Brown & Candeub, \textit{supra} note 26, at 1494.

\textsuperscript{168} Hier, \textit{supra} note 130 and accompanying text.
Indeed, just days after the Super Bowl incident, Bozell stated: "[w]e do not accept the apology of CBS, nor do we accept the statements of regret by MTV... It is absolutely reckless for CBS to claim it had no prior knowledge that such activity was likely to take place."  

FCC chairman Michael Powell immediately declared being "outraged at what I saw" during the Super Bowl, adding that "[o]ur nation's children, parents and citizens deserve better." He announced the FCC would investigate the halftime show, dubbing it "a classless, crass and deplorable stunt."

The halftime-show incident also fits neatly within the framework of a moral panic because, as Erich Goode and Nachman Ben-Yehuda point out, "many moral panics are about sex." Indeed, Janet Jackson and Justin Timberlake certainly served up a saucy, sexually-charged performance.

With panic swirling, the FCC on March 18, 2004—less than seven weeks after Super Bowl XXXVIII—reversed the Enforcement Bureau's October 2003 indecency ruling regarding Bono's acceptance speech. Specifically on the indecency issue, all five commissioners concluded that: (1) Bono’s speech "is within the scope of our indecency definition because it does depict or describe sexual activities;" (2) any variation of "fuck" used in any context "inherently has a sexual connotation;" (3) it is irrelevant in an indecency determination that a network did not intend to broadcast the language; and (4) "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."

But more significantly for purposes of this Article, the FCC did not end its review there. It also decided to address,
independent from its indecency determination,\footnote{See id. at 4981 (“We also find, as an independent ground, that the use of the phrase at issue here in the context and at the time of day here constitutes ‘profane’ language under 18 U.S.C. § 1464.”).} whether Bono’s speech was profane under 18 U.S.C. § 1464. As noted earlier, Enforcement Bureau Chief David Solomon never considered the profane-language issue in his October 2003 ruling, having only analyzed questions of indecency and obscenity.\footnote{Golden Globe Awards I, 18 FCC Rcd. 19859, 19861–62 (2003).} But that did not prevent the Commission from considering the issue \textit{sua sponte} the month following the Super Bowl halftime show debacle.

In particular, the Commission in March 2004 acknowledged its “limited case law on profane speech has focused on what is profane in the context of blasphemy.”\footnote{Golden Globe Awards II, 19 FCC Rcd. at 4981.} It told broadcasters, however, they were now “on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation.”\footnote{Id.} The Commission asserted it was free to expand its definition because none of its prior cases suggested “that the statutory definition of profane is limited to blasphemy.”\footnote{Id.} It also cited favorably the U.S. Seventh Circuit Court of Appeals’ 1972 decision in \textit{Tallman v. United States}.\footnote{465 F.2d 282 (1972).} The Seventh Circuit there opined that profane can be understood as “denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”\footnote{Id. at 286.} The Commission in March 2004 reasoned that there was nothing in its prior case law regarding profane language that held it “could not also apply the definition articulated by the Seventh Circuit”\footnote{Golden Globe Awards II, 19 FCC Rcd. 4975, 4981 (2004).} in \textit{Tallman} thirty-two years earlier.

So, what precisely would constitute profane language going forward? Unfortunately, the FCC “did not provide specific guidance for its new definition of profanity.”\footnote{Robbins, supra note 158, at 1443.} It merely announced profane language would now include not only “fuck,” but also “words (or variants thereof) that are as highly offensive as”\footnote{Golden Globe Awards II, 19 FCC Rcd. at 4981.} it when “broadcast between 6 a.m. and 10 p.m.”\footnote{Id.} and “depending on the context.”\footnote{Id.}
It was not until March 2006 that the Commission offered up its own definition of profane language.\footnote{In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664 (2006).} In considering multiple cases involving alleged broadcast indecency and profanity, the Commission announced that “as a general matter, we will analyze potentially profane language with respect to whether it is ‘so grossly offensive as to constitute a nuisance.’”\footnote{Id. at 2669 (emphasis added).} It drew part of that italicized language from the decades-old, Seventh Circuit decision in Tallman noted earlier.\footnote{Tallman v. United States, 465 F.2d 282, 286 (1972).}

The Commission also concluded that some words are presumptively profane.\footnote{Id.} The presumption, it noted, applies only to “the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home.”\footnote{Id.}

The Commission added, however, that even presumptively profane language may be protected in “rare cases.”\footnote{Id.} These include scenarios where the language “is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”\footnote{Id.} It also explained that the written word “fuck” is protected when it appears so briefly on screen that it “would not have been noticed by the average viewer.”\footnote{Id. at 2709.} In summary, the presumption that certain words are profane is rebuttable in special circumstances.

What words are presumptively profane? “Fuck” and “shit.” Specifically, the Commission wrote that “fuck” is “a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. It is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.”\footnote{Id. at 2685.} It concluded that “shit” also fits this same definition,\footnote{Id. at 2686.} adding that it “invariably invokes a coarse excretory image.”\footnote{Id. at 2684.}

Significantly, the Commission in 2006 also attempted to somewhat confine the scope of its new profanity definition by adopting “a presumption that our regulation of profane language
will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms.\textsuperscript{204} It thus found words such as “bitch,” “hell,” and “damn,” as well as variants thereof, are not presumed to be profane.\textsuperscript{205} While the words “ass” and “piss” “do describe sexual or excretory activities,”\textsuperscript{206} they are not presumptively profane but may fall within the definition of profane language depending on the context in which they are used.\textsuperscript{207}

The problem, however, with this sexual-or-excretory limitation on profane language is that it duplicates the Commission’s definition of indecency, which also requires that the words or images in question “describe or depict sexual or excretory organs or activities.”\textsuperscript{208} Indecency and profanity become redundant. Finally, the Commission in 2006 suggested that its use of “nuisance” within its new definition of profane language was on “sound constitutional footing”\textsuperscript{209} because the U.S. Supreme Court upheld the Commission’s reliance on a nuisance rationale in approving its authority over indecent content.\textsuperscript{210}

The Commission’s 2006 ruling was the last time it attempted to offer a definition and clarify the meaning of profane language after it decided to expand that concept in its 2004 Bono ruling. As noted earlier,\textsuperscript{211} the Second Circuit in 2007 struck down the FCC’s changes to profane language as unsupported under the Administrative Procedure Act, but the Supreme Court later reversed the Second Circuit’s opinion and on remand the FCC did not pursue a profane-language theory. That left the FCC’s definition of profane language in a state of legal limbo.\textsuperscript{212}

If moral panics involve “exaggerated responses to deviant acts,”\textsuperscript{213} then the FCC’s decision to radically alter its conceptualization of profane language in March 2004 was an exaggerated response to a deviant act of breast-baring witnessed

\begin{footnotes}
\item[204] Id. at 2669.
\item[205] Id. at 2713.
\item[206] Id.
\item[207] Id.
\item[208] In re WDBJ Television, Inc., 30 FCC Rcd. 3024, 3027 (2015).
\item[210] See FCC v. Pacifica Found., 438 U.S. 726, 750–51 (1978) (observing that the FCC’s decision to penalize the radio station for indecency “rested entirely on a nuisance rationale under which context is all-important,” and illustrating the nuisance theory with a pig-in-the-parlor comparison).
\item[212] See supra Introduction (providing and discussing examples of the ambiguities in the FCC’s definition of profanity).
\end{footnotes}
Reconsideration of the Bono incident simply afforded the Commission a ready-made opportunity to quickly prove its mettle to the public and to the Parents Television Council that it would aggressively police the airwaves after the Super Bowl and, in turn, restore the moral and social order. The FCC’s reaction to the one-two punch combination of Bono and Janet Jackson thus fits snugly within the notion that the response to threats sparking moral panics “is likely to be a demand for greater social regulation or control and a demand for a return to ‘traditional’ values.”

The FCC’s March 2004 decision broadening its definition of profane language was an overreaction in the immediate aftermath of the Janet Jackson incident. The Commission, as noted above, adjusted its indecency policy in that same ruling to reach unintentional and fleeting instances of sexual content in the future. It thus already had at its disposal regulatory power over indecency sufficient to punish broadcasters for fleeting and supposedly unscripted instances of sexual content on the airwaves. It simply did not need to alter its definition of profane language to do so. Expanding the definition of profane language thus amounted to agency overkill.

Ultimately, the reaction to the Janet Jackson incident falls in line with what Robert Corn-Revere calls “a historical context of successive panics about the latest scourge affecting our children.” And, consistent with the pattern that moral panics disappear, Professor Lipschultz observes that “[t]he furor that was the post-Janet Jackson 2004 Super Bowl era had calmed by 2006.”

What remains more than a decade later, however, is a muddle regarding profanity. It is a muddle provoked by a “less than one-second baring” of a breast—more precisely, “nine-sixteenths of one second”—and created in the crucible of an awards show containing a single, unscripted expletive uttered by an Irish singer. In brief, the moral panic may have died, but its lugubrious legacy—a troubling FCC conceptualization of profane language that is questionable under the First

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214 See De Moraes, supra note 136 and accompanying text (referencing the large number of young children who watched the Super Bowl halftime show during which Janet Jackson’s breast was exposed).
218 See Denham, supra note 213, at 366 (noting that “moral panics are volatile, arising and fading in a relatively short amount of time”) (emphasis omitted).
219 Lipschultz, supra note 139, at 183.
221 CBS Corp. v. FCC, 663 F.3d 122, 125 (3d Cir. 2011).
Amendment—lingers on. Key flaws with that conceptualization are addressed in the next part.

III. A FATALY FLAWED EFFORT TO RESTRICT SPEECH: ANALYZING PROBLEMS WITH THE FCC’S DEFINITION OF PROFANE LANGUAGE

This Part has two sections, each concentrating on a different weakness or defect with the FCC’s definition of profane language. Initially, Section A analyzes problems with the definition under both the void-for-vagueness and overbreadth doctrines.222 Section B then explores how the Supreme Court’s reenergized defense of offensive expression in recent cases hammers another metaphorical nail into the legal coffin of profane language at the FCC.223

A. Vagueness and Overbreadth Challenges

The FCC’s definition of profane language articulated today on its website is readily susceptible to facial challenges for both vagueness and overbreadth. This section initially analyzes that definition for vagueness problems. It then examines overbreadth issues. Importantly, these issues were never addressed by the U.S. Court of Appeals for the Second Circuit in its now-overruled 2007 decision in Fox Television Stations, Inc. v. FCC.224 The Second Circuit merely held that, under the Administrative Procedure Act, the FCC had failed to provide a reasoned analysis sufficient to justify changing its definition of profane language.225

Under the void for vagueness doctrine, as Professor Cristina Lockwood notes, “the Court’s concern has been whether the law at issue provides notice of what it allows or prohibits.”226 Thus, as Frank LoMonte explains, “[a] regulation may be declared void for vagueness if it fails to give intelligible notice of the behavior that will result in penalties.”227 Vague laws are therefore dangerous largely because “the uncertainty regarding how a speech regulation will be applied . . . creates a basis for self-censorship.”228 Self-censorship is tantamount to a chilling effect on speech under which individuals voluntarily

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222 Infra Part III.A.
223 Infra Part III.B.
224 489 F.3d 444 (2d Cir. 2007), rev’d, 556 U.S. 502 (2009).
225 Id. at 461–62.
227 Frank D. LoMonte, Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media, 9 J. Bus. & Tech. L. 1, 6–7 (2014).
silence themselves due to the fear of prosecution or liability based upon what they otherwise might say.229

In addition to fostering self-censorship, vague laws are problematic because they give too much leeway to those charged with enforcing them and thus can be applied unfairly and unevenly. As the Supreme Court wrote in 2018, the vagueness “doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”230

In brief, as the Court put it in 2012 when examining the FCC’s regulation of broadcast indecency, due process “requires the invalidation of laws that are impermissibly vague.”231 It went on to say that “the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”232 The Court added that “[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”233

A law thus will be declared unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”234 The key is that a law must provide “the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”235

Is the FCC’s current definition of profane language unconstitutionally vague under these principles? The Commission defines profane language today on its website as “‘grossly offensive’ language that is considered a public nuisance.”236 Although that definition is concise in terms of brevity, problems abound. First, the FCC offers no guidance on what it means by “offensive.” Second, it provides no description of what it means by “grossly.” Third, it is hard to fathom how

229 See ROBERT TRAGER ET AL., THE LAW OF JOURNALISM AND MASS COMMUNICATION 5 (5th ed. 2016) (“Vague laws relating to speech are unacceptable because they may chill or discourage speech by individuals who may choose not to speak rather than risk running afoul of an unclear law.”).
232 Id.
233 Id. at 253–54.
236 Obscene, Indecent and Profane Broadcasts, supra note 36.
using the word “grossly” to modify “offensive” adds clarity for a broadcaster seeking guidance and fair notice on how to avoid a possible civil penalty for airing profane content. All “grossly” does is ratchet up the level of offensiveness, but to an unspecified and nebulous degree. Modifying “offensive” with “grossly” thus does nothing to save the FCC’s definition from vagueness problems. The FCC’s use of “grossly” hearkens back to, at least in the author’s mind, a humorous scene from the movie A Few Good Men. There, Lieutenant Commander Joanne Galloway futilely adds the word “strenuously” to modify the word “object” after her initial objection to a judge is overruled. A flippant colleague later mockingly tells Galloway: “‘I strenuously object?’ Is that how it works? Hm? ‘Objection.’ ‘Overruled.’ ‘Oh, no, no, no. No, I STRENUOUSLY object.’ ‘Oh. Well, if you strenuously object then I should take some time to reconsider.’”

Even if one goes back to the Commission’s 2006 attempt to define the scope of profane language, problems persist. The Commission wrote then that it would confine profane language “to the universe of words that are sexual or excretory in nature or are derived from such terms.” If one cobbles this limitation onto the current definition on the FCC’s website, then profane language appears to mean grossly offensive sexual and excretorial words that amount to a public nuisance. The Commission also added in 2006 that presumptively profane words were “the most offensive words in the English language” that are “likely to shock the viewer and disturb the peace and quiet of the home,” seemingly adding flesh to the concept of a public nuisance. After combining this into a cohesive definition that arguably construes profane language in a narrow manner to save it from vagueness and overbreadth problems, one is left with this possibility: Profane language encompasses the most grossly offensive sexual and excretorial words that cause shock and disturb the peace and quiet of the home.

Beyond making the questionable assumption that the atmosphere in American homes is one of peace and quiet, the words “shock” and “disturb” are equally as vague as “grossly offensive.” What may shock one listener may not shock another

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240 Id. at 2669.
241 Id.
242 Id.
and, in fact, may be entertaining. What might disturb one home might not another. Furthermore, the more one hears words like “shit” and “fuck” uttered in everyday life, it stands to reason the shock and disruption power of those words decreases when they are repeatedly heard on the broadcast airwaves. In other words, the power of words to offend, shock and disturb is fluid and constantly evolving, thus denying broadcasters the fair notice that due process requires and that the void-for-vagueness doctrine demands for knowing what words, in fact, are profane.

We now live in a world in which the President of the United States discusses grabbing women by the pussy243 and refers to some countries as shitholes.244 To some this may offend, but to others this may make Trump more authentic and real. More than forty-five years later, Cohen’s maxim that “one man’s vulgarity is another’s lyric”245 illustrates why regulating speech based on its supposed offensiveness, as the FCC now attempts to do with profane language, is unconstitutional because it is plagued by vagueness issues. In brief, “some viewers take offense to cursing on television whereas others barely notice.”246

In addition to problems with vagueness, the FCC’s definition of profane language has overbreadth issues. In 2008, in United States v. Williams,247 the Court crisply explained the overbreadth doctrine in scenarios where free speech lies in the balance. Writing for the Williams majority, Justice Antonin Scalia wrote, “[a]ccording to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.”248 He added, “we have vigorously enforced the requirement that a statute’s overbreadth be substantial, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”249

The first step in an overbreadth analysis, Scalia explained, “is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”250 The second step is determining if the

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243 See Alexander Burns et al., Tape Reveals Trump Boast About Groping Women, N.Y. TIMES, Oct. 8, 2016, at A1 (discussing how Trump was caught on tape bragging ‘of a special status with women: Because he was ‘a star,’ he says, he could ‘grab them by the pussy’ whenever he wanted’

244 See Hendel, supra note 38.


246 Barry S. Sapolsky et al., Rating Offensive Words in Three Television Program Contexts, 14 MASS COMM. & SOC’Y 45, 46 (2011).


248 Id. at 292.

249 Id. (emphasis in original).

250 Id. at 293.
statute penalizes “a substantial amount of protected expressive activity.”\(^{251}\)

If the FCC’s definition of profane language is construed narrowly in the manner suggested above to encompass only the most grossly offensive sexual and excretorial words that cause shock and disturb the peace and quiet of the home, this still is overbroad because it is not hemmed in by the fighting words exception to the First Amendment. As addressed earlier, statutes targeting profanity are only permissible today if narrowly construed to apply in fighting words scenarios.\(^{252}\) Given that broadcast television inherently does not involve the in-person utterance of personally abusive epithets targeting a specific individual, the FCC’s definition of profane language fails an overbreadth analysis.

B. The Growing Wall of Protection for Offensive Expression

The FCC’s current definition of profane language centers directly on the alleged offensiveness of words.\(^{253}\) As this section illustrates, that focus strongly militates against the definition’s constitutionality under the First Amendment. That is especially true given the Supreme Court’s protection of offensive expression in multiple contexts under the leadership of Chief Justice John Roberts.

As discussed earlier, the Supreme Court in *Cohen v. California\(^{254}\)* made it clear that secularized profanity—in *Cohen*, the word was “fuck”—is sometimes protected by the First Amendment.\(^{255}\) Paul Robert Cohen’s conviction, the Court wrote, involved a statute that targeted “offensive conduct”\(^{256}\) and rested squarely “upon the asserted offensiveness of the words [he] used to convey his message to the public.”\(^{257}\)

Suggesting precisely the type of vagueness problems addressed in Section A that plague regulating speech based on offensiveness, the Court in *Cohen* wrote “one man’s vulgarity is another’s lyric.”\(^{258}\) In rejecting the argument that states such as California can punish the use of “fuck” in an effort “to maintain what they regard as a suitable level of discourse within the body politic,”\(^{259}\) the Court queried: “How is one to distinguish this from any other offensive word?”\(^{260}\) In brief, it concluded that

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\(^{251}\) *Id.* at 297.


\(^{253}\) See *Obscene, Indecent and Profane Broadcasts*, supra note 36 (“Profane content includes ‘grossly offensive’ language that is considered a public nuisance.”).

\(^{254}\) 403 U.S. 15 (1971).

\(^{255}\) *Id.* at 16–26 (1971).

\(^{256}\) *Id.* at 16 (citing CAL. PENAL CODE § 415 (1971)).

\(^{257}\) *Id.* at 18 (emphasis added).

\(^{258}\) *Id.* at 25.

\(^{259}\) *Id.* at 23.

\(^{260}\) *Id.* at 25.
regulating speech because of its supposed offensiveness “seems inherently boundless” \(^{261}\) and “governmental officials cannot make principled distinctions in this area.” \(^{262}\)

Subsequent to Cohen, the Court protected offensive speech in the 1980s in cases involving a man who burned an American flag in political protest \(^{263}\) and a magazine which suggested, in an advertisement parody, that a famous reverend had sex with his mother in an outhouse and was drunk while preaching. \(^{264}\) In the former case, Texas v. Johnson, \(^{265}\) Justice William Brennan opined for the majority that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” \(^{266}\) In the latter decision, Hustler Magazine v. Falwell, \(^{267}\) Chief Justice William Rehnquist called the speech in question “offensive” \(^{268}\) to plaintiff Jerry Falwell and “doubtless gross and repugnant in the eyes of most.” \(^{269}\) Nonetheless, a unanimous Court protected pornographer Larry Flynt’s flagship publication against a tort claim for intentional infliction of emotional distress based on its parodic speech. \(^{270}\) Rehnquist wrote that a jury could not be allowed “to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.” \(^{271}\)

In much more recent cases, the Court has reiterated the principle that speech must not be squelched simply because it offends—continuing a movement that spells additional trouble for the FCC’s definition of profane language that pivots on offensiveness. \(^{272}\)

For example, in penning the majority opinion in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, \(^{273}\) Justice Anthony Kennedy observed in 2018 that “it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.” \(^{274}\) Justice Clarence Thomas, in a concurrence joined by Justice Neil Gorsuch, added in

\(^{261}\) Id.
\(^{262}\) Id.
\(^{265}\) 491 U.S. 397 (1989).
\(^{266}\) Id. at 414.
\(^{267}\) 485 U.S. at 46.
\(^{268}\) Id. at 50.
\(^{269}\) Id.
\(^{270}\) See id. at 57.
\(^{271}\) Id. at 55.
\(^{272}\) See Obscene, Indecent and Profane Broadcasts, supra note 36 and accompanying text (setting forth the FCC’s current definition of profane language on its website).
\(^{274}\) Id. at 1731.
Masterpiece Cakeshop that “[s]tates cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified.” Thomas emphasized that a rule allowing the government to squelch speech because it is offensive or disagreeable “would allow the government to stamp out virtually any speech at will.”

In 2017—just one year before Masterpiece Cakeshop—the Court protected offensive speech in Matal v. Tam. The Court in Tam struck down part of a federal statute that allowed the U.S. Patent and Trademark Office to deny registration for marks that “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.” In delivering the Court’s judgment, Justice Samuel Alito concluded that this provision, known as the disparagement clause, “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” Alito added that “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”

Concurring in Tam, Justice Kennedy buttressed this point, writing that “the Court’s cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed.” Kennedy intimated that the marketplace of ideas provides the remedy for offensive speech, not government censorship, when he opined that:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s

275 Id. at 1746 (Thomas, J., concurring).
276 Id.
278 Id. at 1765 (citing 15 U.S.C. § 1052(a) (2017)).
279 Id. at 1751.
280 Id. at 1764 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).
281 Id. at 1767 (Kennedy, J., concurring).
benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.\textsuperscript{283}

Tam thus reaffirms “there is no categorical carve-out from First Amendment protection for either offensive or hateful speech.”\textsuperscript{284} In a nutshell, and as encapsulated by New York Times Supreme Court reporter Adam Liptak, Tam stands for the proposition “that the government may not refuse to register potentially offensive names.”\textsuperscript{285}

The Supreme Court also protected offensive speech in 2011 in Snyder v. Phelps.\textsuperscript{286} There, an eight-justice majority shielded the defendants from tort liability for expressing offensive messages including “‘God Hates Fags,’ ‘You’re Going to Hell’ and ‘God Hates You.’” Writing for the majority, Chief Justice John Roberts remarked that “[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt,” particularly when it involves matters of public concern.\textsuperscript{289} He added that “[i]n most circumstances, ‘the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.’”\textsuperscript{290} In a grand rhetorical flourish closing his opinion that explains why such offensive expression must be protected, Roberts wrote:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—infl...
public issues to ensure that we do not stifle public debate.291

Snyder, as Professor Joseph Russomanno summarizes it, fell in line with “the Supreme Court’s long-established tradition of favoring speech protection even in cases involving offensive speech.”292

Beyond safeguarding offensive words, the Roberts' Court has struck down statutes targeting graphic images some people might deem offensive. Specifically, in United States v. Stevens,293 the Court refused to carve out a new exception from First Amendment protection for images depicting animal cruelty.294 In the process, it declared as unconstitutionally overbroad a federal statute regulating such images.295 One year later, in Brown v. Entertainment Merchants Association,296 the Court struck down a California statute limiting minors’ access to video games depicting images of violence.297 Writing for the majority, Justice Antonin Scalia noted that there is no exception to First Amendment protection for “whatever a legislature finds shocking.”298

The Court has also protected statements at which one might take offense (offense in the sense of umbrage at the fact that someone would utter such a statement), even though the words used do not involve profanity or swearing. In particular, in United States v. Alvarez,299 the Court struck down a federal law that criminalized lies about having won a Congressional Medal of Honor.300 Justice Kennedy wrote there for a four-justice plurality that

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\text{[t]he Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find}
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291 Id. at 460–61.
292 Joseph Russomanno, “Freedom for the Thought That We Hate”: Why Westboro Had To Win, 7 COMM. L. & POL’Y 133, 172 (2012).
293 559 U.S. 460 (2010).
294 Id. at 472.
295 Id. at 482.
297 Id. at 805.
298 Id. at 793.
respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression.\(^{301}\)

Perhaps the only case under the leadership of Chief Justice Roberts in which the Court failed to protect offensive speech from government censorship came in the five-to-four decision in *Walker v. Texas Division, Sons of Confederate Veterans*.\(^{302}\) In *Walker*, the Court upheld Texas’s decision to deny an application for a specialty license plate featuring Confederate battle flag imagery “‘because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable.’”\(^{303}\)

*Walker*, however, is explained away as an outlier by the majority’s belief that specialty license plates in Texas constitute government speech, rather than private expression.\(^{304}\) This categorization, in turn, rendered nugatory any First Amendment-based speech challenges to Texas’s actions because, as Justice Stephen Breyer wrote for the majority, “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”\(^{305}\) Texas was thus “entitled to refuse to issue plates featuring” Confederate battle flag imagery.\(^{306}\)

In summary, the Supreme Court in recent cases including *Masterpiece Cakeshop*, *Tam*, and *Phelps* has reinvigorated its enduring doctrine of protecting offensive expression. As Professor Erica Goldberg recently observed, “America has uniquely expansive free speech protections, even for the most intolerant, offensive speech.”\(^{307}\) That certainly is true today, as this subsection indicates. All of this suggests yet another reason why the FCC’s definition of profane language revolving around offensiveness is likely unconstitutional in the Roberts’ Court era.

\(^{301}\) Alvarez, 567 U.S. at 729–30.

\(^{302}\) 135 S. Ct. 2239 (2015).

\(^{303}\) Id. at 2245 (quoting the Texas Department of Motor Vehicles Board).

\(^{304}\) See id. at 2246 (“In our view, specialty license plates issued pursuant to Texas’s statutory scheme convey government speech.”).

\(^{305}\) Id. at 2245.

\(^{306}\) Id. at 2253.

IV. CONCLUSION

It is important to understand that 18 U.S.C. § 1464, the statute that gives the FCC authority over profane language on the broadcast airwaves, is criminal in nature and carries with it a possible prison sentence. Specifically, it provides that broadcasters, who carry such content, “shall be fined under this title or imprisoned not more than two years, or both.”

Despite the gravity of such sanctions, the FCC’s current definition of profane language: (1) is problematically vague and overbroad; (2) overlaps with the Commission’s definition of indecency; and (3) has not been invoked by the FCC to punish broadcasters since at least 2012 when the Supreme Court invited the FCC to consider adjusting its indecency regime. Therefore, to the extent it penalizes profane language, 18 U.S.C. § 1464 is a prime example of “legal obsolescence” that should spark both its prompt reconsideration and revision by Congress. Furthermore, and to the point that it now is clear—Chaplinsky dicta to the contrary—that profanity is generally protected by the First Amendment, 18 U.S.C. § 1464’s prohibition on profane language is an example of what Guido Calabresi aptly called “legal petrification.” Congress must act because, as Calabresi concluded more than thirty-five years ago, “as a single solution to statutory obsolescence, the independent administrative agency and the government bureau have been a dismal disappointment.”

That assessment was not always true when it came to the FCC’s regulation of profane language. In fact, the FCC in August of 1976 recommended that Congress revoke the Commission’s authority over profane language due to concerns

308 See LIPSCHULTZ, supra note 139, at 8 (noting that “section 1464 is a criminal statute”).
309 The FCC’s authority under the statute is civil in nature, but “the United States Department of Justice has authority to pursue criminal violations. Violators of the law, if convicted in a federal district court, are subject to criminal fines and/or imprisonment for not more than two years.” Enforcement: Obscenity, Indecency and Profanity, FED. COMM. COMMISSION, https://www.fcc.gov/general/obscenity-indecency-and-profanity.
311 See supra Part III.A.
312 See In re WDBJ Television, Inc., 30 FCC Rcd. 3024, 3027 (2015). See also supra Part II.
315 See supra Part I.
316 Rhodes, supra note 90.
317 CALABRESI, supra note 314, at 7.
318 Id. at 45.
that it was likely unconstitutional.\textsuperscript{319} Richard E. Wiley, then chairman of the FCC,\textsuperscript{320} explained in a letter to Vice President Nelson Rockefeller and the members of the U.S. Senate that “[b]ecause of the serious constitutional problems involved, we have recommended deletion of the ‘profanity’ provision.”\textsuperscript{321}

In the “Explanation of Proposed Amendment” memorandum that accompanied Wiley’s letter, the FCC justified its effort to have Congress remove its power over profane language by noting, among other things, “the infrequency with which modern courts have construed the word ‘profane,’ and the sparsity of decisions which have upheld it against constitutional attack.”\textsuperscript{322} The memo cites the U.S. Supreme Court’s decision in \textit{Burstyn v. Wilson},\textsuperscript{323} addressed earlier in this Article,\textsuperscript{324} as casting doubt on definitions of “profane” involving religious overtones\textsuperscript{325} that “are drawn from decisions dating back into the last century.”\textsuperscript{326} The memo also contends that definitions “fraught with religious connotations”\textsuperscript{327} “raise questions under the Free Exercise Clause of the First Amendment as well as questions of vagueness and overbreadth.”\textsuperscript{328} Furthermore, the memo notes that \textit{Chaplinsky’s} language regarding fighting words would not apply to profanities on the broadcast media because “there is no physical contact between speaker and hearer in electronic communication.”\textsuperscript{329}

Congress, however, failed to take action on Chairman Wiley’s recommendation regarding profane language, as evidenced by the fact that “profane language” remains in 18 U.S.C. § 1464 today. Had Congress heeded his advice more than forty years ago, the muddle today (and this very article, in fact) would not exist.

When the FCC eventually did update its definition of profane language fifteen years ago, it did so only when

\textsuperscript{319} 122 CONG. REC. 26,3359–69 (1976).
\textsuperscript{320} After leaving the FCC, Wiley later was appointed in 1980 by President Ronald Reagan to lead the transition team at the Department of Justice shortly after Reagan was elected. T.R. Reid, \textit{Transition Office Chooses 13 ‘Team Leaders’}, \textit{WASH. POST}, Nov. 14, 1980, at A1. Wiley eventually founded the law firm of Wiley, Rein & Fielding (now known as Wiley Rein) and became “a premier lobbyist and a key behind-the-scenes confidant to top Government officials in the high-stakes arena of telecommunications policy.” Edmund L. Andrews, \textit{Telecommunications’ Ubiquitous Man of Influence}, \textit{N.Y. TIMES}, June 28, 1992, at F5.
\textsuperscript{321} 122 CONG. REC. 26,33359 (1976).
\textsuperscript{322} 122 CONG. REC. 26,33364 (1976).
\textsuperscript{323} 343 U.S. 495 (1952).
\textsuperscript{324} \textit{Id. at} 497–505; \textit{see also supra Part I}.
\textsuperscript{325} 122 CONG. REC. 26,33364 (1976).
\textsuperscript{326} 122 CONG. REC. 26,33365 (1976).
\textsuperscript{327} \textit{Id}.
\textsuperscript{328} \textit{Id}.
\textsuperscript{329} \textit{Id}.
threatened by a moral panic and, as the Second Circuit observed in 2007, set “forth no independent reasons that would justify its newly-expanded definition of ‘profane’ speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition.” The FCC will likely never, at least on its own volition in today’s political climate, publicly profess to ceasing enforcement of anti-profanity rules on the airwaves. After all, what administrative agency wants to be deemed a supporter of profanity? Surely, this would be the rallying cry of family-friendly public interest groups if the Commission announces its decision to engage in wholesale regulatory forbearance when it comes to enforcing its statutory power over profanity.

The phrase “profane language” thus should be eliminated by lawmakers from 18 U.S.C. § 1464 unless the Commission acts immediately to better define that term. Abolishing the Commission’s authority over profanity would still leave it with power over obscenity—a constitutionally troubling clout, as the Supreme Court holds that such speech falls outside the sphere of First Amendment protection—and indecency.

The bottom line is that times change, and the law, in turn, sometimes must change with it. The federal statute that grants the FCC power over profane language was adopted in 1948, while Section 29 of the Radio Act of 1927 gave the Federal Radio Commission (the precursor to the FCC) power over profane language. That is more than seventy years ago if one counts from 1948 and more than ninety years if one starts all the way back in 1927.

Either way, administrative agency statutory power over broadcast profanity has been on the books for decades without being revisited by Congress. It is, in brief, a legislative remnant of a bygone era when the profane was more closely related to

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330 See supra Part II.
333 See Roth v. United States, 354 U.S. 476, 485 (1957) (writing that “obscenity is not within the area of constitutionally protected speech or press”).
334 It was in 1948 that Congress transferred the FCC’s power over profane language to 18 U.S.C. § 1464. Edythe Wise, A Historical Perspective on the Protection of Children from Broadcasting Indecency, 3 VILL. SPORTS & ENT. L.J. 15, 22 (1996). See FCC v. Pacifica Found., 438 U.S. 726, 738 (1978) (“In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18.”).
335 See Pacifica Found., 438 U.S. at 735–37 (addressing the history of the power to punish obscenity, indecency and profane language on the broadcast airwaves).
religion and, in turn, does not comport with today’s linguistic culture. As this author contended elsewhere, “[a]ny piece of legislation captures only the concerns, agonies and worries of lawmakers, their constituents and, perhaps, the news media at a single point in time, akin to a static legislative snapshot rather than a continually unspooling reel of film.” Unless the FCC takes immediate action to redefine profane language in a constitutional manner, Congress itself should amend 18 U.S.C. § 1464 by removing “profane language” and not replacing it with another category of expression. Given that the Supreme Court today protects much speech that offends, adopting a new category of regulated expression to replace the profanity classification would almost inevitably prove to be constitutionally futile.

SEX AND THE FIRST AMENDMENT THROUGH THE LENS OF PROFESSIONAL SPEECH

Claudia E. Haupt*

First Amendment theory and doctrine apply in distinctive ways in the context of professional speech. Within the professional-client relationship, the law constrains professionals in various ways. Professionals are subject to licensing and malpractice regimes. They have fiduciary duties to their clients or patients. Because clients and patients seek professional advice in order to access knowledge they lack but need to make important decisions, professional advice must be comprehensive and accurate according to the insights of the relevant professional knowledge community. And dispensing professional advice within the professional-client relationship ought to remain free from state interference that seeks to prescribe its content in a way that contradicts professional knowledge.

Implicit in the professional speech story are themes of sex, gender, sexual orientation, and religion. Much of professional speech doctrine in the courts has most recently developed around conversion therapy laws and legislation concerning reproductive rights. In part due to continued contestation surrounding these issues, the development of professional speech doctrine has been uneven and still lacks theoretical coherence. This Article charts the sites of conflict that typically arise in the professional context, and further unpacks how professional speech theory and doctrine apply in likely future conflicts around reproductive rights and transgender healthcare.

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INTRODUCTION

Navigating the First Amendment universe through a lens of professional speech yields a perspective in which standard theory and doctrine apply in distinctive ways. When professionals speak to their clients to give professional advice within the confines of a professional-client relationship, the law in many ways constrains what they may say. Professionals who give bad advice are subject to malpractice liability, and the First Amendment provides no defense; this creates liability for some forms of “false speech,” unknown in other areas of speech protected by the First Amendment. Professionals have fiduciary duties to their clients; such duties between speakers do not exist elsewhere in First Amendment doctrine. And the state may require professionals to obtain a license before they dispense advice; a similar requirement outside the context of a professional-client relationship would likely be an impermissible prior restraint.

Clients and patients seek professional advice in order to access knowledge they lack but need to make important decisions. To that end, professional advice must be comprehensive and accurate, and must reflect the insights of the relevant professional knowledge community. Moreover,
dispensing professional advice within the professional-client relationship ought to remain free from state interference that seeks to prescribe its content in a way that contradicts professional knowledge, and I have previously argued that the First Amendment provides a shield against such state interference.6 Implicit in the development of professional speech theory and doctrine are themes of sex, gender, sexual orientation, and religion. This Article aims to foreground these themes, chart the sites of conflict that typically arise in the professional context, and further unpack how professional speech theory and doctrine cash out in likely future conflicts around reproductive rights and transgender healthcare. Much of professional speech doctrine in the courts has most recently developed around conversion therapy laws7 and legislation concerning reproductive rights.8 Because these issues remain contested, the development of professional speech doctrine in the courts has been uneven and still lacks a coherent theoretical basis. I have suggested elsewhere that the professions are best conceptualized as knowledge communities and have proposed a theory of First Amendment protection of professional speech based on this understanding.9 This discussion builds on that theory.

This Article proceeds in four parts. Part I traces the emergence of professional speech—implicitly in the jurisprudence of the Supreme Court and explicitly in the federal appellate courts—drawing out the themes of sex, gender, sexual orientation, and religion as they have surfaced in these cases.

Part II examines the tensions arising in the professional context from the perspective of the profession. I first illustrate the dynamic of outward resistance against state interference with professional insights. Such interference is likely based on justifications that are not part of the profession’s shared knowledge basis, as most prominently displayed in the reproductive health context. Then, I turn to internal contestation within the professions and consider which role—if any—the

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6 Id. at 673.
7 See Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) and King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014) (both upholding laws prohibiting sexual orientation change efforts by licensed mental health providers for minors).
9 Haupt, Professional Speech, supra note 1, at 1241–42.
state should play in resolving contested matters. Finally, the discussion shifts to the client’s or patient’s perspective to illustrate how professional knowledge is ultimately conveyed, and what tensions in the professional-client (or doctor-patient) relationship result from state interference.

Part III takes the view of the individual professional seeking to depart from the consensus of the knowledge community. I have suggested that these individual professionals can be divided into internal and external outliers. First, I describe the different ways in which professional outliers depart from the knowledge community’s consensus. The key distinction is between those professionals who depart from professional consensus but base their advice on a shared methodology of the profession and those who depart from professional knowledge due to exogeneous—most likely religious, philosophical, or political—disagreement. Then, I examine ways in which the state endorses or reinforces professionals’ outlier status. Finally, here, too, I shift to the client’s or patient’s perspective, illustrating how the individual professional’s outlier status affects advice-giving.

Part IV identifies two likely sites of future conflict, namely the continuing struggle over access to comprehensive reproductive health services and the emergent contestation surrounding transgender healthcare. It then maps the application of professional speech theory and doctrine in those areas.

“For more than two centuries,” as Geoffrey Stone explains, “Americans have fought divisive social, political, and constitutional battles over laws regulating sex, obscenity, contraception, abortion, homosexuality, and same-sex marriage. These conflicts have been divisive in no small part because of the central role religion has played in shaping our laws governing sex.” Several of these themes, and the tensions they contain, converge in professional speech, resulting in questions as to the appropriate basis for giving professional advice, and the

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10 See Haupt, Unprofessional Advice, supra note 2, at 676.
availability of professional services— including, crucially, healthcare services—to the public.13

I. PROFESSIONAL SPEECH DOCTRINE AND THEORY

Landmark cases in the doctrinal history of professional speech are Rust v. Sullivan,14 Planned Parenthood of Southeastern Pennsylvania v. Casey,15 and National Institute of Family & Life Advocates (NIFLA) v. Becerra16 in the Supreme Court, as well as several reproductive rights and conversion therapy cases in the federal appellate courts.17 This Part examines those cases, and their role in the development of professional speech, more closely.

A. Reproductive Rights Cases

The starting point in the professional speech canon involving access to reproductive healthcare is the Supreme Court’s 1991 decision in Rust v. Sullivan.18 Under federal regulations, recipients of certain government funding were prohibited from giving advice on abortion, and providers were further prohibited from referring patients to abortion providers. The Court upheld these limits upon professionals as consistent with the First Amendment. The majority opinion’s framing of Rust as a case about selective government funding, however, concealed the true nature of the issue as one of professional speech.19 Justice Blackmun’s dissent makes the professional dimension clear in its reference not only to “the legitimate expectations of the patient,” but also “the ethical responsibilities

19 Haupt, Unprofessional Advice, supra note 2, at 683; Haupt, Professional Speech, supra note 1, at 1260.
Irrespective of funding, the argument goes, the patient and the profession demand that the professional provide comprehensive advice. It is instructive to read *Rust* alongside *Legal Services Corporation v. Velazquez* whereas the Court held the government funding scheme’s limits on abortion counseling to be constitutional under the First Amendment, it held unconstitutional restrictions placed on providing legal advice. The opposite outcomes are noteworthy because, as Justice Scalia observed, the two cases equally concern government funding of professional services: “the normal work of doctors” and “the normal work of lawyers.” Ultimately, the important takeaway for the development of professional speech doctrine from *Rust* is that the “Court did acknowledge the possibility of First Amendment protection in this professional context.”

A year after *Rust*, the Court offered another glimpse at its doctrinal understanding of professional speech in a famously opaque paragraph in *Casey* addressing the First Amendment:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . . We see no constitutional infirmity in the requirement that the physician

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20 *Rust*, 500 U.S. at 213–14 (Blackmun, J., dissenting).
23 See Haupt, *Unprofessional Advice, supra* note 2, at 683–85 (offering a parallel analysis of *Rust* and *Velazquez*). See also PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 253 (2013) (“The Court in *Rust* and *Velazquez* has the right idea about professional speech, but it lacks proper language with which to express it.”).
24 *Velazquez*, 531 U.S. at 562 (Scalia, J., dissenting).
provide the information mandated by the State here.\textsuperscript{26}

The federal appellate courts are markedly split as to the meaning of this statement. The Fourth Circuit, per Judge Wilkinson, rejected the Fifth and Eighth Circuits’ interpretations regarding the constitutionality of abortion regulations under the First Amendment.\textsuperscript{27} With respect to the paragraph in \textit{Casey}, Judge Wilkinson noted that it “does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech . . . .”\textsuperscript{28} By contrast, the Fifth and Eighth Circuits had held that \textit{Casey} as well as \textit{Gonzales v. Carhart} permit significant regulation of physician speech on the topic of abortion,\textsuperscript{29} an interpretation that Judge Wilkinson criticized as “read[ing] too much into \textit{Casey} and \textit{Gonzales}.”\textsuperscript{30}

Another site of conflict involved deceptive practices at Crisis Pregnancy Centers (CPCs), facilities which dispense anti-abortion counseling under the guise of reproductive healthcare. In response, California enacted the Reproductive Freedom, Accountability, Comprehensive Care and Transparency Act (FACT Act).\textsuperscript{31} The statute, which applied to both licensed and unlicensed facilities, required CPCs to post certain disclosures. Licensed facilities had to post “a notice stating the existence of publicly-funded family-planning services, including contraception and abortion.”\textsuperscript{32} Unlicensed facilities had to “disseminate a notice stating that they are not licensed by the State of California.”\textsuperscript{33} Upon First Amendment challenge, the Ninth Circuit upheld the FACT Act, holding the disclosures were professional speech and properly regulated as such by the Act.\textsuperscript{34} The Supreme Court, however, reversed and remanded the

\begin{itemize}
  \item \textsuperscript{26} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) (citations omitted).
  \item \textsuperscript{27} See \textit{Stuart v. Camnitz}, 774 F.3d 238, 248 (4th Cir. 2014) (rejecting compelled ultrasounds as violating the First Amendment). \textit{See also supra} Part II.A.
  \item \textsuperscript{28} \textit{Id.} at 249.
  \item \textsuperscript{29} \textit{Id.} at 248–49 (citing Planned Parenthood Minn., N.D., S.D., v. Rounds, 686 F.3d 889 (8th Cir. 2012); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012); Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008)).
  \item \textsuperscript{30} \textit{Stuart}, 774 F.3d at 249.
  \item \textsuperscript{31} \textit{CAL. HEALTH & SAFETY CODE} \textsection 123470 (West 2018).
  \item \textsuperscript{33} \textit{Harris}, 839 F.3d at 829.
  \item \textsuperscript{34} \textit{Id.} at 845.
\end{itemize}
decision, striking down the disclosure requirements as unconstitutional under the First Amendment. 35 Both the Ninth Circuit’s decision upholding the FACT Act and the Supreme Court’s majority opinion, authored by Justice Thomas, contain extensive discussions of professional speech doctrine. While the Ninth Circuit explicitly relied on an—as I have argued, overly expansive—36 theory of professional speech, 37 the Supreme Court’s NIFLA majority rejected the analysis, insisting that the Court had never recognized professional speech as a distinct category of speech. 38

The doctrinal development of professional speech has suffered as a result of the NIFLA litigation in at least two respects. First, the Ninth Circuit’s broad concept of professional speech uncoupled doctrine from theory, because “[t]he content of the disclosures in NIFLA was too far removed from expert knowledge to be properly attributed to the realm of professional expertise.” 39 But professional speech must be linked to expertise in order to achieve its distinctive goal, namely, to ensure that the client or patient receives accurate and comprehensive advice from the professional in accordance with the insights of the relevant professional knowledge community. 40 Second, the Supreme Court’s opinion may very well have been influenced by the topic of abortion, potentially making it difficult to apply its rationale to other areas of professional advice-giving. 41

B. Conversion Therapy Cases

Another area in which federal appellate courts have addressed professional speech is conversion therapy. Conversion therapy laws “prohibit licensed mental health professionals, such as psychiatrists, psychologists, social workers, psychoanalysts, and counselors, from engaging in conversion therapy with minors, with conversion therapy defined as practices or treatments that seek to eliminate or reduce sexual or romantic

35 Becerra, 138 S. Ct. 2361.
36 Haupt, The Limits of Professional Speech, supra note 3, at 189 (“In classifying the CPC disclosures as professional speech, the Ninth Circuit defined professional speech too broadly.”).
37 Harris, 839 F.3d at 840.
38 Becerra, 138 S. Ct. at 2372 (“This Court’s precedents do not recognize such a tradition for a category called ‘professional speech.’”).
40 Id. at 195 (suggesting that “professional speech should be defined . . . as speech that communicates a knowledge community’s insights from a professional to a client, within a professional-client relationship, for the purpose of giving professional advice. If speech does not fall within that definition, it should not be considered professional speech”).
41 See infra Part IV.A.
attractions or feelings towards individuals of the same sex.” 42 Notably, “[i]t was not until the late nineteenth century that persons drawn to same-sex sex came for the first time to be seen as having a distinctive psychological identity.” 43 Reflecting prevailing societal attitudes “in which the dominant religion deemed homosexuality a heinous sin, the law branded homosexuals as criminals, and the medical profession diagnosed homosexuals as ‘strange freaks of nature,’ . . .” 44 The medical profession, however, has since dramatically changed its assessment. 45

In 1973, the American Psychiatric Association declassified homosexuality as a mental illness, but it took the medical mainstream until the 1980s to distance itself from conversion therapy. 46 Since then, proponents of conversion therapy have progressively migrated from the professional mainstream to the fringe. In the end, “[f]rom the perspective of mental health professionals, advising minors to subject themselves to conversion therapy has become unprofessional advice.” 47 California was the first state to prohibit conversion therapy by licensed mental health providers for minors in 2012. 48 Several states, the District of Columbia, and a number of cities followed. 49 Several of these laws were subsequently challenged on the theory that they violated the First Amendment’s speech or religion clauses.

In the development of professional speech doctrine, the Ninth Circuit’s decision in Pickup v. Brown 50 and the Third Circuit’s decision in King v. Governor of New Jersey, 51 upholding respectively the California and New Jersey conversion therapy laws, stand out. The Ninth Circuit in Pickup articulated as an analytical framework a speech continuum that locates a professional’s speech in public discourse at one end, professional speech in the professional-client relationship at the mid-point, and professional conduct at the other end. 52 The standard of scrutiny tracks along the continuum, highest in public discourse.

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43 STONE, supra note 11, at xxx.
44 Id.
45 George, supra note 42, at 801–10.
46 Id. at 801.
47 Haupt, Unprofessional Advice, supra note 2, at 717.
48 George, supra note 42, at 795.
50 Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).
51 King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014).
52 Pickup, 740 F.3d at 1227–29.
lower at the midpoint within the professional-client relationship, and lowest when regulation governs conduct. Ultimately, the *Pickup* court upheld the conversion therapy law as a regulation of professional conduct.

By contrast, the Third Circuit in *King* considered the New Jersey conversion therapy law to govern “speech that enjoys some degree of protection under the First Amendment.” Analogizing professional speech to commercial speech, the court noted that the “level of protection is diminished” for individuals “speaking as state-licensed professionals within the confines of a professional relationship.” While the analogy of professional and commercial speech for the purpose of establishing the level of scrutiny is problematic, the important takeaway here is that the Third Circuit considered professional speech to be a category of speech separate from commercial speech.

The Ninth Circuit in subsequent litigation also confronted the challenge of drawing the line between professional and religious advice in the context of conversion therapy. As conversion therapy moved out of the mainstream, it found its way “into evangelical politics, further reinforcing the relationship between conversion therapy and religion.” But the Ninth Circuit upheld California’s conversion therapy law against challenges under the Free Exercise and Establishment clauses, reasoning that the law only concerns speech within “the confines of the counselor-client relationship.” The court explained that “[t]he law regulates the conduct of state-licensed mental health providers only; the conduct of all other persons, such as religious leaders not acting as state-licensed mental health providers, is unaffected.” Further, “even the conduct of state-licensed mental health providers is regulated only within the confines of the counselor-client relationship; in all other areas of life, such as religious practices, the law simply does not apply.” In short, the Ninth Circuit considered the speech within a professional-client relationship to be subject to a different set of rules than speech outside of that relationship, including religious speech.

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53 Id.
54 Id. at 1222.
55 *King*, 767 F.3d at 224.
56 Id.
59 George, *supra* note 42, at 801.
60 *Welch*, 834 F.3d at 1045.
61 Id.
62 Id.
These doctrinal developments reflect both the courts’ awareness that speech within the confines of the professional-client relationship is somehow distinctive, and the absence of a theoretical basis to account for this distinctiveness. Indeed, some scholars suggest that professional speech ought to be regarded as ordinary speech.63 The Ninth Circuit in Pickup offers perhaps the most thoughtful theoretical discussion, though I ultimately disagree with the court’s speech continuum theory.64 The NIFLA majority, by contrast, leaves largely unexplained why speech within the professional-client relationship can be governed by a separate doctrinal framework that includes malpractice liability and informed consent, among other features. The lack of theoretical engagement makes the NIFLA decision of only limited use for lower courts grappling with questions surrounding First Amendment protection for professional speech. One such question concerns the conversion therapy laws just discussed. As a doctrinal matter, commentators on NIFLA have noted that it is now “uncertain . . . whether laws restricting speech in order to enforce professional standards, such as previously upheld bans on ‘conversion therapy’ for lesbian, gay, bisexual, and transgender people, will now be subjected to strict scrutiny.”65 The important question in the professional speech context ought to be “what professional speech is scrutinized for.”66 If the goal of professional advice-giving is to convey expertise, restrictions on what a professional may say—whether or not the courts want to identify a separate category of speech—must be measured against the knowledge community’s insights.67 Since the conversion therapy laws enshrine the professional standard, they should survive any type of inquiry that scrutinizes speech within the professional-client relationship in light of its underlying purpose.

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The current status of professional speech remains contested. Most recently, the Supreme Court in NIFLA expressed doubt as to whether professional speech is a distinctive

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65 Wendy E. Parmet et al., The Supreme Court’s Crisis Pregnancy Center Case—Implications for Health Law, 379 N. ENGL. J. MED. 1489, 1490 (2018).
66 Haupt, supra note 64, at 171.
67 Id.
category of speech, though the decision left open that possibility. Yet a review of the doctrinal basis of professional speech illustrates that the very question of whether it is a new category of speech may be misguided. Rather, descriptively identifying the phenomenon is simply an acknowledgement of the traditionally distinct doctrinal nature of professional speech that has been implicit in the Court’s decisions at least since Justice White’s concurrence in Lowe v. SEC. Among these unique doctrinal features are the imposition of malpractice liability for bad advice as well as informed consent, both of which the NIFLA majority explicitly, and without further analysis, recognized as consistent with the First Amendment. This makes the majority opinion in NIFLA theoretically incoherent because “professional speech cannot logically be the same as other speech, yet be governed by a different doctrinal framework.” Throughout the remainder of this Article, I will highlight the potential implications of the NIFLA decision.

II. PROFESSIONAL PERSPECTIVE: PROFESSION VERSUS OUTSIDE INTERFERENCE

Historically, state involvement with the professions emerged alongside processes of professionalization. As disciplinary knowledge developed, states, under their police powers, started navigating the line between regulating the
profession and regulating professional speech.\textsuperscript{74} Licensing regimes, for example, frequently emerged in cooperation with the professions.\textsuperscript{75} But sometimes, the dissemination of emergent disciplinary knowledge was quashed by state interference before it could fully develop.

During the Second Great Awakening, “Charles Knowlton, a Massachusetts physician, published Fruits of Philosophy; or, The Private Companion of Young Married People, a path-breaking work that ‘attempted to apply science to sexual relations.’ Knowlton argued that people’s understanding of sex and sexuality must move into the realm of medicine.”\textsuperscript{76} This effort, however, was cut short by state intervention. “Knowlton was sentenced to hard labor by a Massachusetts court, which took the evangelical line and officially declared all books discussing contraception, even those written by physicians in a medical manner, morally unacceptable.”\textsuperscript{77} Indeed, “the Commonwealth of Massachusetts, invoking the still-nascent doctrine of obscenity, repeatedly prosecuted Knowlton for The Fruits of Philosophy, even though the text was clearly intended to convey health information about birth control in a responsible and thoughtful manner.”\textsuperscript{78}

The federal Comstock Act equally functioned to restrict the dissemination of emergent expert knowledge, as illustrated by the prosecution in 1876 of public health advocate Dr. Edward Bliss Foote. His “popular home guide, Plain Home Talk About the Human System, served a large and eager medical-advice market by providing clear and practical information about sex and contraception. . . .”\textsuperscript{79} Nonetheless, “Foote was prosecuted and convicted for distributing information about contraception. The presiding judge ruled that medical advice was not exempt from the statutory prohibition.”\textsuperscript{80}

Today, external interference—primarily by state legislatures—equally occurs in the reproductive health context, and it tends to largely contradict professional knowledge.\textsuperscript{81} This

\textsuperscript{74} See, e.g., Lowe v. SEC, 472 U.S. 181, 228–29 (1985) (White, J., concurring in the result).
\textsuperscript{75} Haupt, Licensing Knowledge, supra note 4, at 8 (discussing emergent professions’ “calls for state intervention to establish admissions regulations, or licensing regimes”).
\textsuperscript{76} STONE, supra note 11, at 146–47.
\textsuperscript{77} Id. at 147.
\textsuperscript{78} Id. at 182–83.
\textsuperscript{79} Id. at 160.
\textsuperscript{80} Id.
\textsuperscript{81} See, e.g., Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012) (upholding a state law requiring doctors to inform patients seeking an abortion of an increased risk of suicide to obtain informed consent). See also Rick Rojas, Arizona
Part discusses those laws that contradict an existing professional standard before turning to contestation of professional knowledge within the profession and its relation to state interference. The key question is how the state should account for internal professional disagreement around expert knowledge.

A. External Interference

Perhaps the most prominent examples of government interference at odds with professional insights come from the reproductive rights context. State legislatures are increasingly chipping away at the fundamental right to choose articulated in\textit{Roe v. Wade}\textsuperscript{82} and reaffirmed in\textit{Casey}.\textsuperscript{83} As part of this process, various states have passed laws requiring professionals to advise patients in a manner inconsistent with professional insights.

The Eighth Circuit, for example, upheld a South Dakota informed consent statute that requires abortion providers to warn against an alleged increased risk of suicide ideation and suicide, inconsistent with medical knowledge.\textsuperscript{84} A panel of the Eighth Circuit held the suicide advisory unconstitutional under the First Amendment as “compelling untruthful and misleading speech,” and thereby “viola[t] doctors’ First Amendment right to be free from compelled speech that is untruthful, misleading, or irrelevant.”\textsuperscript{85} Upon en banc review limited to the issue of the suicide advisory, the Eighth Circuit reversed. Relying on\textit{Gonzales v. Carhart},\textsuperscript{86} the plurality emphasized the state’s ability to compel the disclosure even in the face of “medical and scientific uncertainty.”\textsuperscript{87} Two separate concurrences, however, indicate that the physician may still exercise individual professional judgment in either tailoring the disclosure itself\textsuperscript{88} or supplementing the disclosure,\textsuperscript{89} thereby granting “somewhat more weight to professional knowledge and deference to the

\begin{flushleft}
\textit{Orders Doctors to Say Abortions with Drugs May Be Reversible}, N.Y. TIMES (Mar. 31, 2015), http://nyti.ms/1DpDo0Q (“Arizona . . . became the first state to pass a law requiring doctors who perform drug-induced abortions to tell women that the procedure may be reversible, an assertion that most doctors say is wrong.”).
\end{flushleft}

\textsuperscript{82} 410 U.S. 113 (1973).
\textsuperscript{83} 505 U.S. 833 (1992).
\textsuperscript{85} Planned Parenthood of Minn., N.D., S.D v. Rounds (\textit{Rounds I}), 653 F.3d 662, 673 (8th Cir. 2011).
\textsuperscript{86} 550 U.S. 124 (2007).
\textsuperscript{87} \textit{Rounds II}, 686 F.3d at 904.
\textsuperscript{88} Id. at 906 (Loken, J., concurring) (interpreting the decision to “require only a disclosure as to relative risk that the physician can adapt to fit his or her professional opinion of the conflicting medical research on this contentious subject”).
\textsuperscript{89} Id. at 907 (Colloton, J., concurring) (suggesting that “the physician [is] free to augment that description based on his or her professional judgment”).
individual professional.” Critics suggest that “a more robust First Amendment inquiry” in this case would have focused on “ensuring clinically and professionally appropriate speech within the doctor-patient relationship.” Indeed, such an inquiry would have required “the judge . . . to determine whether the knowledge community’s insights are being communicated.”

The Fourth Circuit struck down a North Carolina statute that required mandatory sonograms as unconstitutional under the First Amendment—on the reasoning that, while truthful, it is up to the professional to decide whether or when the information conveyed is relevant—whereas the Fifth Circuit upheld a similar Texas law. Other examples from the reproductive rights context include an ultimately unsuccessful effort by Arizona to require advice that medication abortion is reversible.

Taken together, these opinions show that, when confronted with legislative interference into professional advice that contradicts professional knowledge, courts have a mixed record. Especially in the reproductive rights arena, outcomes are inconsistent. In the context of conversion therapy legislation, by contrast, courts have signaled more willingness to defer to professional consensus.

B. Internal Contestation

Conversion therapy and reproductive health provide useful illustrations of internal contestation in light of emergent

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90 Haupt, Professional Speech, supra note 1, at 1298.
92 Haupt, Professional Speech, supra note 1, at 1299.
93 Stuart v. Camnitz, 774 F.3d 238, 254 (4th Cir. 2014).
96 The Eleventh Circuit likewise signaled deference to the professional standard when it held a Florida statute prohibiting doctors to inquire about gun ownership as a matter of course unconstitutional under the First Amendment. Wollschlaeger v. Governor of Fla. 848 F.3d 1293, 1301 (11th Cir. 2017). In this case, however, the court displayed considerable ambiguity when choosing its ultimate rationale. Haupt, supra note 64, at 151 (noting that “a three-judge panel of the Eleventh Circuit issued three consecutive, contradictory decisions” before “the court handed down an en banc decision that offers yet another analysis. . . .”).
or changing knowledge upon which professionals base their advice. Here, too, historical antecedents exist. Professional knowledge is neither static nor monolithic, and professional insights change over time. This is true both for scientific insights as well as professional groups’ positions on individual issues. Contrast the role of the American Psychiatric Association and its declassification of homosexuality as a mental disorder97 with the American Medical Association’s early anti-abortion advocacy.98 Both areas also have an additional challenge in their religious salience that may at times be difficult to separate out from matters of expertise.

The internal professional developments that form the backdrop of contemporary conversion therapy legislation illustrate how professional knowledge leaves the mainstream, becoming so discredited that a professional consensus forms against it. This trend within the profession has been reflected in the courts. Consider, for example, the exclusion of expert testimony in a conversion therapy case, Ferguson et al. v. JONAH, Jews Offering New Alternatives for Healing (“JONAH” f/k/a Jews Offering New Alternatives to Homosexuality) where “a New Jersey court, after jury trial, found conversion therapy providers to be engaged in consumer fraud.”99 During the trial, the court excluded a number of expert witnesses who were to testify on the benefits of conversion therapy.100 Plaintiffs in that case relied on the American Psychiatric Association’s 1973 removal of homosexuality as a mental disorder from the Diagnostic and Statistical Manual of Mental Disorders (DSM) and argued “because the belief that homosexuality is a mental disorder is false and lacks any basis in science, any expert opinion derived from that false initial premise is unreliable and should be excluded.”101 JONAH, however, argued that “reliance on the DSM is misplaced because the removal of homosexuality was a political, rather than scientific, decision.”102 The judge, excluding the pro-conversion therapy witnesses, noted “[t]he overwhelming weight of scientific authority concludes that homosexuality is not a disorder or abnormal. The universal acceptance of that scientific conclusion—save for outliers such

97 See discussion supra Part I.B.; George, supra note 42.
99 Haupt, Unprofessional Advice, supra note 2, at 718.
101 Id. at *4.
102 Id. at *5.
as JONAH—requires that any expert opinions to the contrary must be barred.” 103 Whether the reasons for changing the DSM were scientific or political, moreover, is not for the court to decide. 104 Likewise, it is not for the court to decide on the accuracy of the professional community’s assessment. 105 In short, the court’s assessment of internal contestation follows the profession.

By contrast, in the reproductive rights context the courts’ response to internal contestation is instructive because at times it seems to take the opposite approach. Take the “partial birth” abortion cases, Stenberg v. Carhart106 and Gonzales v. Carhart,107 as an example. Aziza Ahmed has carefully charted the shifts in the jurisprudential treatment of expertise in the abortion context.108 Comparing the Stenberg and Gonzales decisions, Ahmed notes that both concerned “nearly identical evidence and expertise,” but resulted in opposing outcomes.109 This raises questions about “how medical experts with conflicting opinions legitimate themselves through participating in adjudication, and how medical expertise and evidence constrains judicial decision-making.”110 The Court in Stenberg was faced with medical questions that were unresolved as a matter of professional knowledge regarding certain procedures and their associated risks. Thus, the Court confronted “numerous competing sources of opinion, each deemed to be medically and scientifically authoritative, but providing differing advice, guidance, and

103 Id. at *6.
104 Id. at *8 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 414 (1992)) (noting that “a trial court should not substitute its judgment for that of the relevant scientific community.”).
105 Id. (“It is not a proper inquiry for a court to determine the correctness of the APA’s decision to generally accept that homosexuality is not a disorder, and no proper basis has been advanced on which a court may reassess the scientific accuracy of the psychiatric categorization of homosexuality.”).
108 See Aziza Ahmed, Medical Evidence and Expertise in Abortion Jurisprudence, 41 AM. J. L. & MED. 85 (2015). Outlining a shift over time, Ahmed notes: “In Roe and Casey, where the Court portrayed the medical establishment as objective and neutral, the Justices were able to defer to medical expertise and evidence. In the post-Stenberg context, however . . . judges must now arbitrate medical evidence and expertise.” Id. at 106.
109 Id. at 88.
110 Id. There are several larger themes at issue—especially the question of objectivity of scientific insights looms large. For purposes of this discussion, however, I will focus on the distinct problem of indeterminacy or contestation within the professional knowledge community and the state’s role (here embodied by the courts) to resolve the issue. Id. at 88–89. See also Haupt, Licensing Knowledge, supra note 4, at 28–35 (discussing epistemology of scientific knowledge in the sociology of the professions literature).
knowledge on the actual procedure.”111 As Ahmed puts it, “[i]n the face of conflicting data, the Court became an arbiter of medical and health knowledge.”112 Importantly, the Court explicitly acknowledged that expert opinion was divided; “[t]his explicit acknowledgement of a divided body of literature is important as we approach Gonzales v. Carhart, in which the Court cited to non-medical anecdotal evidence partly due to a perceived lack of clarity amongst medical experts.”113

Stone explains this dynamic with respect to the justices’ reasoning in Gonzales v. Carhart. Justice Kennedy’s majority opinion acknowledged “that medical opinion was divided on whether intact D&E abortions might be safer for some women in some circumstances,” but “Kennedy noted that Congress had made a finding in enacting the challenged legislation that partial-birth abortion ‘is never medically necessary.’”114 Thus, the majority deferred to Congress regarding the internal conflict, rather than the profession. In other words, the Court here intervened in an internal dispute of the relevant professional knowledge community, picking winners and losers by deferring to congressional judgment which did the same.

The dissent by Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, criticized this deference to Congress on a contested professional matter. Reliance on congressional findings inconsistent with professional knowledge, she noted, was inappropriate. Stone recounts “Ginsburg insisted that the congressional finding relied upon by the majority could not ‘withstand inspection.’ To the contrary, she . . . concluded, Congress’s bare assertion that ‘there was a medical consensus that the banned procedure is never necessary’ was completely inconsistent with the . . . facts.”115 In the end, the case thus not only disregards contestation within the knowledge community, but also enshrines an erroneous interpretation of medical knowledge into legal doctrine.

The Court’s differential treatment of expertise raises several larger questions relevant to professional speech. Among them are: deference to whom and deference for what?116 Stone’s discussion of Gonzales v. Carhart highlights the misguided

112 Id. at 99–100
113 Id. at 101.
114 Stone, supra note 11, at 426 (emphasis added) (quoting Gonzales v. Carhart, 550 U.S. 124, 161, 164 (2007)).
115 Id. (quoting Gonzales, 550 U.S. at 171–76 (Ginsberg, J., dissenting)).
deference to medical expertise as interpreted by Congress; the Court appropriately should have deferred to the knowledge community’s expertise as interpreted by the profession. And, as illustrated in the discussion of Rounds, the suicide advisory case, the Eighth Circuit has taken the misguided approach in Gonzales v. Carhart as permission to uphold a statute that disregards even broader consensus in the medical community. In order to ensure the accuracy of professional expertise, however, other experts—rather than legislators or judges—should be the arbiters of its content.

C. Client/Patient Perspective

From the perspective of the client or patient, the importance of safeguarding professional knowledge against outside interference that contradicts professional insights comes into sharp relief. The client or patient must rely on professional advice. The premise of the professional-client or doctor-patient relationship is that the professional has knowledge that the client or patient lacks. The fiduciary relationship between them demands that the professional gives comprehensive and accurate advice.

By interfering, the state injects its authority into this relationship. When legislation aligns with professional insights, as in the conversion therapy example, state involvement is relatively unproblematic, though even here it is important to reiterate that professional insights are neither monolithic nor static. The state ought not choose one approach if the professional consensus allows several. Nor should the state halt innovation. But much more serious problems arise when state interference contradicts professional insights, as in the reproductive health examples. Here, the fundamental premise of the professional relationship—based on giving comprehensive and accurate advice—is in jeopardy.

To be sure, the states have an interest in regulating citizens’ health and welfare via the police powers. But the site of expertise lies with the profession, so the content of accurate and comprehensive advice must be determined by the profession, as the malpractice liability regime has traditionally recognized.

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117 See supra Part II.A.
118 Haupt, Professional Speech, supra note 1, at 1294–95.
119 Haupt, Unprofessional Advice, supra note 2, at 721.
120 Id. at 691. The same applies to the Florida gun case, discussed supra note 96. See Wollschlaeger v. Governor of Fla. 848 F.3d 1293.
III. INDIVIDUAL PERSPECTIVE: PROFESSIONAL VERSUS PROFESSION

Another site of potential conflict lies in the relationship between the individual professional who departs from the professional consensus on the one hand, and the profession on the other hand. 121 This could be the pro-conversion therapy therapist, the anti-vaccine doctor, or the pharmacist who refuses to dispense birth control medication they believe to be abortifacients. But this could also be the doctor who believes marijuana is medically beneficial, or the doctor who finds mammograms useless. 122

A. Professional Outliers

When considering professional outliers, that is, individual professionals who depart from the professional consensus, it is useful to identify the basis upon which they justify their departure. 123 Outliers who use the shared methodology of the profession to justify their departure (internal outliers) should be considered part of the discourse of the profession. These professionals, in fact, could be the particularly innovative individuals ahead of the curve whose insights subsequently are embraced by a wider professional consensus. 124 The shifting views regarding the benefits of medical marijuana serve as a prime example. 125 Alternatively, these outliers’ views could be tested and refuted by the profession; here, the refuted link between certain childhood vaccines and autism is a useful example. 126 Outliers who use exogenous justifications for departure (external outliers), however, place themselves outside of the professional discourse that assumes shared ways of

121 I use the term “consensus” to mean “agreement relative to the relevant knowledge community.” See Haupt, Unprofessional Advice, supra note 2, at 675 n.14. See also Sheila Jasanoff, Serviceable Truths: Science for Action in Law and Policy, 93 TEX. L. REV. 1723, 1741 (2015) (“[T]he argument is not that science has been able to access unvarnished truth, but rather that relevant scientific communities have been able to set aside all theoretical and methodological disagreements to come together on a shared position. If most or all members of the relevant thought collective are in agreement, then that collective judgment surely demands a high degree of respect from society in general and the law more particularly.”).
122 See Haupt, Unprofessional Advice, supra note 2, at 672–73.
123 Haupt, Unprofessional Advice, supra note 2, at 676; Haupt, Religious Outliers, supra note 13, at 179–85.
124 Haupt, Unprofessional Advice, supra note 2, at 690 (“To the extent that a professional’s outlier status is grounded in disagreement based on shared notions of validity, departure from the knowledge community’s insights must be permissible. Indeed, dynamic development and refinement of professional insights will often depend on such divergent assessments.”).
125 Id. at 721–24.
126 Id. at 715–16.
knowing and reasoning. Typically, religious, philosophical, or political disagreement with the profession creates external outliers. Most prominently among them are healthcare professionals who invoke religious disagreement with professional standards and justify their departure from the professional standard accordingly.

Importantly, however, there is a line between expertise and moral or value judgments where no special claim to expertise exists. As I have explained elsewhere, “professional determinations based on medical expertise can be made regarding the total and irreversible cessation of all brain functions (‘brain death’) and its diagnostic criteria.” But “it is a value judgment whether this medical diagnosis constitutes the end of life of the individual; this is a matter with ethical, philosophical, and religious dimensions beyond medical expertise.” Similar questions regarding the limits of professional expertise may arise in the abortion context. To be sure, this line between expertise and moral or value judgment can be quite elusive at times. Some emergent reproductive rights controversies will likely fall in this area where the underlying science is evolving, but moral disagreement persists.

B. Government Endorsement of Outlier Status

There are various ways in which the state can endorse or reinforce professional outlier status of individual professionals against the profession. Most notably, such endorsement may

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127 Id. at 690 (explaining that “outlier status based on exogenous reasons undermines the status of the professional as a member of the knowledge community founded in shared notions of validity and common ways of knowing and reasoning”).
128 Id. at 672.
129 Haupt, Religious Outliers, supra note 13, at 177 (“The knowledge community has a superior understanding of issues directly related to its core knowledge. But no amount of specialized training, for instance, by itself makes a professional more competent to render general value judgments on moral issues unrelated or only tangentially related to professional insights.”).
130 Haupt, Religious Outliers, supra note 13, at 177.
131 Id.
come in the form of religious exemptions.\textsuperscript{133} Another way to frame the issue is to consider how the government may insulate dissenters.\textsuperscript{134}

The Department of Health and Human Services (HHS) has created a “Conscience and Religious Freedom Division” that “was established to hear complaints from medical professionals . . . who feel they have been pressured into providing medical services that conflict with their religious beliefs.”\textsuperscript{135} Based on newly issued regulations, HHS can “enforce protections for religious medical providers.”\textsuperscript{136} In effect, this results in state enforcement of individual professionals’ outlier status against the profession. Whether such government involvement in the profession’s arguably internal affairs is justified depends on the extent to which departure from the professional consensus for personal reasons ought to be permissible. Importantly, the profession typically will accommodate its members to a certain extent. The American Medical Association, for instance, in Opinion 1.1.7 addresses “Physician Exercise of Conscience.”\textsuperscript{137} It is worth considering whether the fundamental decision in favor of certain self-regulating professions—justified on the idea of respecting the locus of expertise within the profession—warrants granting a large degree of autonomy to the profession in deciding to what extent departure from professional knowledge ought to be permissible. The perspective of the client or patient to whom the professional owes a fiduciary duty should guide the appropriate answer.

\textbf{C. Client/Patient Perspective}

From the client’s or patient’s perspective, receiving limited advice constricts the otherwise available range of options among which to choose. Indeed, the client or patient has a strong


\textsuperscript{136} Id.

\textsuperscript{137} \textit{Code of Medical Ethics} § 1.1.7 (AMA 2016).
autonomy interest that the professional’s fiduciary obligations, as well as the imposition of informed consent requirements, protect. The ultimate decision, in short, has to remain with the client or patient. In order to make a fully informed choice, however, the patient should know what is being withheld. To achieve this, scholars offer various solutions. Nadia Sawicki has proposed a common law duty to disclose limitations.138 Similarly, I have suggested that full advice also means advising on what is left out.139 These approaches acknowledge that the client or patient has an important interest in receiving comprehensive professional advice.

IV. FUTURE SITES OF CONFLICT

To illustrate how themes of sex, gender, sexual orientation and religion continue to play a role in the professional speech context, this Part focuses on two likely future sites of conflict. The first concerns the continuing contestation over reproductive rights. Between the Supreme Court decisions in NIFLA140 and Whole Women’s Health v. Hellerstedt,141 new fault lines emerge that implicate the interaction between professional advice and state activities in seeking to limit access to abortion. The second area of likely future conflict involves transgender healthcare. Here, professional standards are beginning to emerge. At the same time, however, state interference is becoming increasingly probable.

A. Reproductive Rights

With respect to the content of advice, a shift has taken place between the “partial birth” abortion decisions142 and Whole Women’s Health.143 Whereas the Court relied on questionable assumptions in the former set of cases, it deferred much more clearly to scientific evidence in the latter. States increasingly moved to protecting women’s health as a justification for imposing limits on access to abortion.144 In Whole Women’s

139 Haupt, Religious Outliers, supra note 13.
141 136 S. Ct. 2292 (2016).
143 136 S. Ct. 2292 (2016).
144 See generally Linda Greenhouse & Reva B. Siegel, Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice, 125 YALE L.J. 1428 (2016).
Health, however, the Court closely hewed to scientific insights in evaluating these justifications.  

Linda Greenhouse and Reva Siegel explain that the Court's approach in Whole Woman's Health "closely scrutinizes scientific evidence marshaled by opposing parties." The type of "[e]vidence-based balancing" displayed in the decision has significant impact on the lower courts' approaches to a range of "health-justified restrictions on abortion," including "scientifically inaccurate warnings that abortion causes breast cancer," state laws that, contrary to scientific insights, "requir[e] abortion providers to inform women that they are more likely to experience psychological harm if they obtain abortions than if they carry their unplanned pregnancies to term," and "abortion restrictions that rest on contested factual claims—for example, claims that abortion before viability inflicts fetal pain."  

The NIFLA decision, however, has arguably unsettled the regulation of abortion-related speech more generally. As commentators note, the decision "raises the troubling possibility that the courts may be more apt to apply the informed-consent exception to laws that regulate the speech of abortion providers than to those that regulate the speech of abortion opponents." In light of the unequal treatment for abortion-related speech that had been found to exist prior to NIFLA, one question is "whether this unequal application of the First Amendment will continue after NIFLA or whether the courts will now apply strict scrutiny more broadly to all regulations of abortion-related speech, including state laws that require abortion providers to give patients medically inaccurate information."  

With respect to controversy around the "domestic gag rule," the problem is giving comprehensive professional advice. As such, the contestation is similar to that surrounding Rust v. Sullivan and, in the legal context, Legal Services Corp. v. Velazquez. In response to the HHS announcement of the final

146 Id. at 159–61.
147 Parmet et al., supra note 65, at 1490.
149 Parmet et al., supra note 65, at 1490.
rule limiting Title X funding, the AMA has expressed deep concern regarding the new regulation’s impact on access to comprehensive healthcare. The AMA’s position is that the regulation “would limit women’s access to care and force doctors to withhold information about all of their health care options.”

In addition to interfering with the doctor-patient advice-giving relationship, the AMA argues that the new rule will force physicians into a conflict with the professional code of ethics.

B. Transgender Healthcare

As transgender healthcare moves into the mainstream of healthcare service delivery, the dynamics of internal contestation and outside interference will likely become more apparent in this area. Standards of care are in the process of development; the content of good professional advice is still in its formation stages. Moreover, medical education is only starting to incorporate trans healthcare into the curriculum. The American Academy of Pediatrics, for example, released a new policy statement regarding healthcare for transgender and gender diverse children and adolescents in September 2018.

At the same time, state involvement in this area is becoming more likely. According to news reports, the Trump administration is in the process of redefining “gender” under federal civil rights law. HHS in particular is reportedly drafting a memo arguing that “[s]ex means a person’s status as male or female based on immutable biological traits identifiable by or

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154 Id. (“‘Protecting the integrity of the patient-physician relationship and defending the freedom of communication between patients and their physicians is a fundamental priority for the AMA,’ Dr. McAneny added. ‘With this action, the administration wants to block physicians from counseling patients about all of their healthcare options and from providing appropriate referrals for care. This is a clear violation of patients’ rights in the Code of Medical Ethics.”).


156 Id. at 1786 (discussing emergent standard of care). See also Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 987 (2019) (“Health care providers are beginning to recognize the unique needs of nonbinary patients, and finding ways to provide more support and affirming care.”).


before birth. . . The sex listed on a person’s birth certificate, as
originally issued, shall constitute definitive proof of a person’s
sex unless rebutted by reliable genetic evidence.”¹⁵⁹ One area
acutely affected by such a change is the Affordable Care Act’s
prohibition of sex discrimination by providers, which courts
have interpreted to include gender-identity discrimination.¹⁶⁰
Commentators note that the contemplated change “would be
tragic not just for patients, but for the health care profession as
well.”¹⁶¹ The ACA provision, they suggest, provides guidance to
patients and providers, “and it has been welcomed by physician
groups such as the American Medical Association.”¹⁶² The HHS
memo, by contrast, not only contradicts court decisions on
gender-identity discrimination but also takes away important
legal guidance for providers.¹⁶³ Moreover, the HHS memo’s
definitional interference contradicts expert knowledge—or at the
very least obscures internal contestation.¹⁶⁴

In addition, the HHS conscience and religious freedom
directive¹⁶⁵ may permit providers to opt out of educational
requirements concerning sexual and gender minority
healthcare.¹⁶⁶ Notably, educators have found “[a]ppeals to
professional competence—the ability to care for any person who
walks through the practice’s doors” to be successful when
confronted with providers who were ambivalent based on
“personal, cultural, or religious views about sexual orientation
or gender identity.”¹⁶⁷ Thus, it seems that as professional
knowledge in this area develops, conflicts along the lines of
profession versus outside interference as well as professional
versus profession are likely.

¹⁵⁹ Erica L. Green et al., ‘Transgender’ Could Be Defined Out of Existence Under Trump
Administration, N.Y. TIMES (Oct. 21, 2018),
administration-sex-definition.html.
¹⁶⁰ Clarke, supra note 156, at 988; Jocelyn Samuels & Mara Keisling, The Anti-Trans
Memo—Abandoning Doctors and Patients, 380 N. ENGL. J. MED. 111, 112 (2019),
¹⁶¹ Id. at 112–13
¹⁶² Id. at 112.
¹⁶³ Id.
¹⁶⁴ See, e.g., Denise Grady, Anatomy Does Not Determine Gender, Experts Say, N.Y.
trump-biology.html.
¹⁶⁵ See discussion supra Part IV.A.
¹⁶⁶ Ard & Keuroghlian, supra note 157, at 2391.
¹⁶⁷ Id. at 2390–91.
V. Conclusion

For the most part, the advice clients and patients receive from their professionals is uncontroversial. Thus, state legislatures will not likely find reason to intervene when the subject of advice-giving concerns broken bones, damaged joints, or torn ligaments. The expertise clients and patients seek will be provided within a regulatory framework that ensures professionals are qualified and provide accurate and comprehensive advice according to the insights of the profession. Of course, Justice Thomas in NIFLA is right to note that professional malpractice liability and informed consent are firmly entrenched in American law. Nonetheless, this does not negate the need for a theoretical basis. Yet, the underlying contestation over sex, gender, sexual orientation, and religion explains why professional speech doctrine itself may sometimes be controversial.

168 See discussion supra Part I.A.
IMBALANCE BETWEEN SPEECH & HEALTH: HOW UNSUBSTANTIATED HEALTH CLAIMS IN SECONDARY EFFECTS REGULATIONS OF SEXUALLY ORIENTED BUSINESSES THREATEN FREE SPEECH

Kyla P. Garrett Wagner & Rachael L. Jones

ABSTRACT

In 2013, Vivid Entertainment, a leader in the adult film industry, sought to invalidate Los Angeles County’s Safer Sex in the Adult Film Industry Act, a local ordinance that requires pornography actors to use condoms while producing sex scenes. Vivid’s claim failed when the U.S. Court of Appeals for the Ninth Circuit deemed the law constitutional because, though content-based, the law targeted the secondary effects of speech—transmission of sexually transmitted diseases among actors and the public.

This case is the most recent in a line of secondary effects doctrine cases that targets a particular type of speech because of its alleged secondary health effects. Sexually Oriented Businesses (SOBs), like the pornography industry, are often the target of this type of, supposedly, content-neutral form of regulation. However, such regulation requires evidence to prove that local and state governments intend to place mere time, place, and manner restrictions on SOBs for the benefit of the public. This study argues that the evidence local and state governments typically use to support their claims against these SOBs tend to be both broad and unsubstantiated in their support of public health, thus creating an imbalance between the protection of speech and the protection of health. The conclusions drawn from this analysis provide recommendations on how to improve the secondary effects doctrine to restore balance between protecting speech and protecting health.

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I. Introduction

In November 2012, the citizens of Los Angeles County, California, passed the Safer Sex in the Adult Film Industry Act.1 This local ordinance, commonly known as “Measure B,” set new requirements for adult films produced within the county.2 The law requires that persons who act in pornographic films wear condoms while producing sex scenes.3 Proponents of the law, such as the AIDS Healthcare Foundation, advocated for condom usage in the adult film industry to protect actors—and, in turn, the public—from sexually transmitted diseases.4 Though the law champions public health interests on its face, it was highly contested by members of the adult film industry and by free expression advocates.5

Opponents of the law argued the requirements infringed on the First Amendment rights of speech and expression of actors and filmmakers in the industry. Moreover, members of the adult film industry argued that the requirements imposed by the law would lead to changes in their production and income. This would force film production out of Los Angeles County and result in massive loss of tax income for the area.6 When the law passed, leaders of the adult film industry challenged the law on constitutional grounds,7 but the challenge ultimately failed, and the law remains active in Los Angeles County.8

At its core, Measure B is internally conflicted between the protection of speech and the protection of health. Measure B

1 L.A. CTY. CODE, CAL., tit. 11, div. 1, ch. 39, (Nov. 6, 2012) [hereinafter Measure B].
2 Id.
3 Id. § 090 (“The use of condoms is required for all acts of anal or vaginal sex during the production of adult films to protect performers from sexually transmitted disease.”).
5 Actors and representatives of the adult film industry, such as the Freedom of Speech Coalition (FSC), spoke out against the condom mandate. For example, in response to the decision by the 9th Circuit Court of Appeals to uphold the mandate, the CEO of the FSC, Diane Duke, stated “While this intermediate decision allows that condoms may be mandated, it doesn’t mean they should be. We have spent the last two years fighting for the rights of adult performers to make their own decisions about their bodies, and against the stigma against adult film performers embodied in the statute. Rather than protect adult performers, a condom mandate pushes a legal industry underground where workers are less safe. This is terrible policy that has been defeated in other legislative venues.” FSC: ‘Measure B Decision Will Hurt Performers’, AVN, https://avn.com/business/articles/legal/fsc-measure-b-decision-will-hurt-performers-582729.html (Dec. 15, 2014).
7 Vivid Entm’t, LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014) (dismissing Vivid Entertainment’s argument that the law was an unconditional infringement on pornography actors’ and film producers’ First Amendment rights to freedom of speech and expression).
sacrifices a degree of protection for a form of speech and expression to increase protections for public health. This type of public health regulation on speech is common: In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act, requiring warning labels on food and drugs,⁹ and in 1970 broadcast advertisements for cigarettes were banned as a means of discouraging the use of tobacco.¹⁰

Despite the general similarities, Measure B differs from previous public health regulations of this nature. Previous regulations compel and control messages, but Measure B controls how speech is made. It eliminates personal rights of the actors to choose how they protect themselves from sexually transmitted diseases (STDs), and it dictates how filmmakers must produce their films. Measure B is content-based on its face due to its focus on a specific type of expression (condom usage in adult films). However, the U.S. Court of Appeals for the Ninth Circuit deemed Measure B’s mandated condom use provision as content-neutral because the law is aimed at the secondary effects of speech at issue rather than controlling speech.¹¹ Regulations of this nature are not unique: secondary effect-based regulations are common for sexually oriented businesses (“SOBs”), such as adult bookstores,¹² or nude dancing clubs.¹³ Typically, these regulations deal with zoning and crime prevention, based on the argument that the presence of SOBs will lead to a rise in crime in surrounding areas. In contrast, Measure B’s primary objective is to protect health.

Measure B is, thus, unique to the law and the legal literature. While there is a vast body of literature on secondary effect regulations, little of it addresses secondary effect regulations that are driven by public health concerns.

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¹¹ *Vivid Entm’t*, 965 F. Supp. 2d at 1125. “Secondary effects” refer to adverse side effects of certain forms of speech or expression. In some cases, the Secondary Effects Doctrine is employed by law-makers as a means of regulating specific types of speech under a content-neutral guise. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 87 (1976). Secondary effects have been the subject of debate ever since: in *Barnes v. Glen Theatre, Inc.*, Justice Souter was the voice for morality when the Court determined the constitutionality of an ordinance prohibiting nudity. Souter agreed with the majority that the law was content neutral, but differed from the majority in that he felt the law was content-related—just not to the extent that the law was unjustified. Rather, Souter considered nude dancing akin to prostitution and sexual violence, deeming them the “secondary effect” of the nude dancing. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585–86 (1991) (Souter, J., concurring).
¹² See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 55 (1976) (showing that as early as the 1970s, zoning restrictions on SOBs were implemented for the purposes of protecting property value and reducing crime).
¹³ *Id.*
Specifically, there is little information about the arguments supporting public health-driven regulations of this nature or their substantiating evidence. As a result, it is unknown what impact, or potential threat, these types of arguments and lack of evidence pose to SOBs and the freedom of speech, generally.¹⁴ This is problematic, as public health-driven regulations are on the rise for SOBs. For example, since 2016, five states have declared pornography a “public health crisis” and passed resolutions calling for research on and regulation of adult entertainment.¹⁵ Thus, as these regulations continue to emerge, information and scholarly recommendations on these types of regulations are needed.

This study analyzes cases where SOBs challenged public health-driven secondary effect regulations. Specifically, the analysis identifies the health claims against SOBs and the substantiating evidence used to support such claims. These findings were compiled to draw conclusions about the balance between protecting health and protecting speech.

Part II of this Article provides the history and development of the secondary effects doctrine. Part III is a discussion on the related legal research. Part IV details the study’s methodology. Part V contains the case analysis, including the identification of the health claims and their substantiating evidence within the cases, and a discussion on what this information suggests about the balance between speech and health.

II. DEVELOPMENT OF THE SECONDARY EFFECTS DOCTRINE

The Secondary Effects Doctrine deems facially content-based restrictions content-neutral because the objective of these regulations is not to control speech, but to control the related or resulting conduct that stems from the targeted speech.¹⁶ For the Secondary Effects Doctrine to apply, a regulation cannot directly suppress the message of the speech, only the “secondary effects”

¹⁴ Regulations may target concerns for public health and safety together, but this study is only concerned about the secondary effect regulations that target public health as these are potentially an impermissible basis for restriction.
associated with the speech; must serve a substantial government interest; and cannot limit access to the speech.\textsuperscript{17} To demonstrate a substantial interest, the government must provide evidence that shows the SOB causes—or is associated with—the asserted secondary effects, and that the proposed regulation is a reasonable measure that will reduce those particular effects.\textsuperscript{18} If the presence of secondary effects and the efficiency of a regulation has been proven to effectively target the specific conduct that a local or state government seeks to address, it may simply cite the findings of research conducted by other districts to satisfy this requirement.\textsuperscript{19}

This doctrine was first discussed by the United States Supreme Court in \textit{Young v. American Mini Theatres, Inc.}\textsuperscript{20} In \textit{Young}, the City of Detroit implemented two zoning ordinances that prohibited adult theaters from opening within certain distances of residential districts and city buildings.\textsuperscript{21} The city claimed the ordinances were enacted in the name of neighborhood preservation.\textsuperscript{22} A chain of local adult film theaters, American Mini Theatres, contested the ordinances as unlawful, arguing that they infringed upon the company’s First Amendment rights.\textsuperscript{23} The Court determined that the erotic material in question could not be completely suppressed but deemed the ordinances constitutional because they did not directly suppress the message of the speech, only the secondary effects associated with the speech.\textsuperscript{24} Moreover, the Court found that the ordinances served a substantial government interest and did not limit access to the speech.\textsuperscript{25} The Court ruled that sexual expression may be regulated and, further, that subsequent regulations attempting to minimize the secondary outcomes

\textsuperscript{17} Id.
\textsuperscript{18} Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 462 (7th Cir. 2009) (citing City of Los Angeles v. Alameda Books, 535 U.S. 425, 435 (2002)). The plurality opinion in \textit{Alameda Books} reasserted the Renton standard, where a municipality may rely on any evidence that is “reasonably believed to be relevant” for demonstrating a connection between speech and a substantial, independent government interest. Id.
\textsuperscript{19} Playtime Theatres, 475 U.S. at 51–52.
\textsuperscript{20} 427 U.S. 50, 71 n.34 (1976).
\textsuperscript{21} The ordinances specified that “an adult theater may not be located within 1,000 feet of any two other ‘regulated uses’ or within 500 feet of a residential area.” Id. at 52. The term “regulated uses” includes ten different kinds of establishments in addition to adult theaters, including adult bookstores, cabarets, bars, taxi dance halls, and hotels. Id. at 52 n.3.
\textsuperscript{22} Id. at 54.
\textsuperscript{23} Id. at 55.
\textsuperscript{24} Id. at 70.
\textsuperscript{25} Id. at 71–73.
from sexual speech would be subject to the Secondary Effects Doctrine.  

Over the next decade, similar zoning regulations against SOBs continued. The next major challenge came in 1986 in the case of City of Renton v. Playtime Theaters, Inc. In Renton, the Court ruled on the constitutionality of a city zoning ordinance that regulated adult movie theater locations in the name of curbing the secondary effects associated with the adult film industry. Like in Young, the Court ruled in favor of the city. This time, however, the Court provided crucial reasoning that explained a facially content-based regulation on speech can be assessed as content-neutral where the speech restriction is “justified without reference to the content of the regulated speech,” so long as the ordinance in question does not “contravene the fundamental principle” that government may not limit speech based on content or message it finds unfavorable. In addition, the Renton Court stated the government need not substantiate its interest with evidence or research specific to the geography and adult business for which the ordinance(s) applies, noting:

[T]he First Amendment does not require a city, before enacting [a zoning ordinance regulating SOBs], to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Fifteen years passed before the Court addressed the Secondary Effects Doctrine again. In 2002, the Court heard City of Los Angeles v. Alameda Books, Inc., a case involving another city zoning ordinance on SOBs. In Alameda Books, the respondents—adult bookstores—sought injunctive relief against

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26 Id. at 70–71 (“[T]he State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.”).  
28 Id. at 43 (upholding an ordinance prohibited “adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school”).  
30 Id.  
31 Id. at 51–52.  
a Los Angeles municipal ordinance that prohibited SOBs within 1,000 feet of other SOBs and within 500 feet of any school, public park, or religious institution.\textsuperscript{33} The Court held that a local or state government cannot rely on “shoddy data or reasoning” to support its ordinances and that “evidence must fairly support the municipality’s rationale for its ordinance.”\textsuperscript{34} However, the Court ruled in favor of the city, stating that because the city based its ordinance off of a previous study that linked the presence of SOBs with “higher rates of prostitution, robbery, assaults, and thefts in surrounding communities,” it had presented substantive evidence to support the law.\textsuperscript{35}

Since \textit{Alameda Books}, there has not been another Supreme Court case to impact the application of the Secondary Effects Doctrine. However, the doctrine has been the subject of much debate among legal scholars. In the following section is a review of the notable critiques of the doctrine.

\section*{III. Literature Review}

\textit{A. An Overview of the Criticisms of the Secondary Effects Doctrine}

Scholarly criticisms of the Secondary Effects Doctrine range from frustrations about a lack of a clear definition of “secondary effects” to outcry that the doctrine could undermine the First Amendment. In his assessment, John Fee criticizes the Court for not providing a clear or consistent distinction between primary effects and secondary effects.\textsuperscript{36} In an effort to find the distinction between these two types of effects, and provide practitioners with a clear definition of secondary effects, Fee determined that four possible definitions of “secondary effects” emerge from the Court’s First Amendment jurisprudence, none of which fully encompasses all the ways the Court has applied the doctrine.\textsuperscript{37} Fee, in turn, argues that the Court likely utilizes different conceptions of “secondary effects” to fit contextual factors of a case: “\textquote{[p]}erhaps the term secondary effect is convenient only because it is capable of more than one meaning

\textsuperscript{33} Id. at 430.
\textsuperscript{34} Id. at 438 (plurality opinion).
\textsuperscript{35} Id. at 430. “The city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime.” Id. at 438.
\textsuperscript{37} Id. at 306.
while appearing to be objective, and can therefore easily mask a subjective balancing process.”

Other scholars take issue with the classification of the Secondary Effects Doctrine as content-neutral. Generally, the argument against content-neutral classifications of this nature stems from concern that they create a legal loophole for lawmakers to target certain types of speech with impunity, which causes confusion for the courts. Also, it is difficult to determine which secondary effects are so severe that they warrant regulation. For example, previous cases have deemed visual clutter, traffic congestion, noise, loss of a profession’s integrity, and sexual arousal of readers as problematic secondary effects. Deeming these types of secondary effects as problematic, and therefore subject to regulation, is worrisome; regulation of these “lesser” effects could lead to a slippery slope where regulation may result in greater loss of speech protection. Moreover, the Secondary Effects Doctrine can easily limit commercial and political speech. Regulations aimed at secondary effects have also impeded political and commercial speech, such as the South Carolina city ordinance that prohibited the creation a public mural due to presumed secondary effects that would harm the city’s authenticity, property values, and tourism; an Indiana town ordinance that prevented a reporter from using a tape

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38 Id. at 316.
41 David L. Hudson, Jr., The Secondary Effects Doctrine: “The Evisceration of First Amendment Freedoms”, 37 WASHBURN L.J. 55, 77–78 (1997) (“Some of the secondary effects include: increased criminal activity, prostitution, residential privacy, visual clutter, interference with ingress and egress, traffic congestion, noise, security problems, appearances of impropriety, employment discrimination, economic vitality in business districts, property values, preserving the educational appearance of a college dormitory, preventing blockbusting, loss of a profession’s integrity, identifying unfit judges, maintaining public order, equal employment opportunities, street crime associated with panhandling, negative effects of gambling, competition in the video programming market, congestion at the polls and confusion for election officials tabulating votes, delay and interference with voters, sexual arousal of readers, signal bleed and harm to children.”).
42 See id. at 84–85; see also Brandon K. Lemley, Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine, 35 J. MARSHALL L. REV. 189 (2002).
recorder while attending a KKK march due to the secondary effect concern that march attendees could injure themselves when holding “personal items” at such events; and a Rhode Island anti-picketing ordinance that silenced anti-abortion protesters in an effort to curtail the secondary effects of traffic interference and risk of privacy violations. Overall, the current consensus among scholars is that the Secondary Effects Doctrine improperly allows state and local legislatures to stretch current First Amendment protections thin for certain forms of speech and expression, putting the freedom of expression at risk.

B. The Validity of Secondary Effects Research on Sexually Oriented Businesses

The literature that explores the validity of the research presented in secondary effects and SOB cases is divided into two types. The first type of research explores whether the asserted secondary effects from SOBs actually exist. The second type investigates whether an assessment of the research presented by the government establishes that it is scientifically credible.

Governments typically opt to regulate SOBs based on the suggestion that such businesses are associated with increased crime and decreased property value. This notion has been the subject of scholarly scrutiny. For example, in an empirical examination of the relationship between adult erotic dance clubs and the potential secondary effect of increased crime rates, researchers found that, when comparing a community with an erotic dance club against three communities that did not, the community that had the erotic dance club had the least amount of reported crime. Similarly, in an assessment of a Texas city ordinance that contends “human display establishments” produce crime, researchers determined that SOBs were not to blame for the community crime. Rather, alcohol-related establishments and the community demographic characteristics (such as income level, age range, and race/ethnicity) were to blame. Taken together, these findings call into question the

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45 Potts v. City of Lafayette, 121 F.3d 1106, 1112 (7th Cir. 1997).
47 Young, 427 U.S. at 69.
50 Id. (“In short, the empirical evidence tempers the San Antonio City Council’s contention that the presence of human display establishments produces crime. Instead, the results point to weak institutions, namely alcohol outlets and community characteristics associated with social disorganization theory as causes and correlates of crime.”).
quality and validity of the research supplied by the government in secondary effects cases.

Assessments of the research quality and validity applied in secondary effects case law found that, with few exceptions, most of the studies used by municipalities “do not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions necessary to calculate an error rate.”51 Moreover, the assessments determined that scientifically credible studies demonstrated that either (1) there was no “negative secondary effect associated with adult businesses,” or (2) there was “a reversal of the presumed negative effect.”52 But governments are not the only parties guilty of providing poor science: scholars found that “studies” used by SOBs to refute secondary effects regulations were also flawed.53 Nonetheless, there is substantial evidence to demonstrate that not only is the research used by local and state governments scientifically flawed, but scientifically credible research has not been used to rebut alleged secondary effects.

In sum, this research suggests that local and state governments’ research on SOBs and their alleged negative secondary effects are typically flawed. However, this research focuses only on crime, property value loss, and overall community degradation as the purported secondary effects. There is no published research that assesses the validity of negative secondary effects on public health stemming from SOBs. This study seeks to answer the following research questions:

(1) What health claims do local and state governments make against SOBs?
(2) What is the substantiating evidence for these health claims?
(3) What do these findings suggest about the Secondary Effects Doctrine and the relationship between speech and health?

52 Id.
53 Alan C. Weinstein & Richard McCleary, The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence, 29 CARDOZO ARTS & ENT. L.J. 565, 586 (2011) (“The problem is that these claims either ignore theoretically relevant characteristics of adult businesses or are methodologically flawed. In particular, such claims ignore the routine activity theory of crime associated with adult businesses or use inappropriate data sources and methods to demonstrate that adult businesses are not associated with secondary effects or both.”).
IV. Methodology

To date, there are over 500 state and federal cases in which a SOB has challenged regulations aimed at secondary effects. Only twenty of these cases involve regulations aimed at protecting health. Prior to this analysis, an initial review of the studies was completed to classify the types of regulations involved in the cases and to ensure the cases met the study’s requirements.

The initial review yielded seventeen cases, which presented three types of public health-driven secondary effect regulations: zoning, licensing, and internal regulations. Zoning regulations refer to the locations and distance restrictions placed on SOBs; for example, SOBs are only allowed in certain parts of a community or must be outside a certain distance from other businesses, schools, etc. Licensing regulations refer to the requirements for adult business license acquisition and grounds for a license suspension or revocation. Internal regulations refer to policies restricting or limiting the practices and activities of an adult business. For example, requirements that dancers may not touch patrons, dancers cannot be nude, stages must be a certain height . . . etc. In total, there were nineteen regulations present in the seventeen cases: three licensing, five zoning, and eleven internal. This information is applied in the analysis as a way to categorize and elaborate on the findings. The table below shows

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54 These twenty cases were identified through Westlaw’s search results for First Amendment and secondary effect regulations concerning “health,” “public health,” “disease,” or “infection.” There is a chance that there are cases missing from this analysis due to the limitations of the search results. However, the initial identification of twenty cases is sufficient for the analysis.

55 The initial review determined three cases to be ineligible for analysis because they did not concern public health-driven secondary effect regulations. Instead, these cases simply referenced public health-driven secondary effect regulations, which likely explains why they were included in Westlaw’s results.

the citations for the seventeen cases analyzed and the type of regulation involved in the case.

Table 1: Regulation type present in each case

<table>
<thead>
<tr>
<th>Case</th>
<th>Internal</th>
<th>Zoning</th>
<th>Licensing</th>
</tr>
</thead>
<tbody>
<tr>
<td>DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (1997)</td>
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<td>X</td>
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<tr>
<td>Dream Palace v. County of Maricopa, 384 F.3d 990 (2003)</td>
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<tr>
<td>McDoogal’s East, Inc. v. County Com’rs of Caroline County, 341 Fed. App’x. 918 (2009)</td>
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<td>X</td>
</tr>
<tr>
<td>T.K.’s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir. 1994)</td>
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</tbody>
</table>
V. Analysis

A. The Health Claims

The first task of this study was to identify the health claims against SOBs. The analysis identified three types of health claims typically presented by local governments to justify their regulations: (1) preventing the spreading of disease (specifically, STDs), (2) concern for increased danger or harm to health, and (3) the need to protect, promote, and preserve the health of business patrons and the local citizens.

The most commonly cited health claim—the secondary effect—was that adult businesses are associated with the spread of disease.57 Thirteen cases indicated that diseases, sexual or otherwise, stem from the adult businesses, and cited such diseases as the basis for government regulation.58 Of these thirteen cases, all but one case59 explained that the regulation in question was established to address STDs, in particular, HIV/AIDS.60 Moreover, eight of the thirteen cases asserting this claim specifically stated that regulation would prevent the spreading of STDs that result from the sexual activity that occurs at adult businesses.61 The remaining four cases also reported that

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58 Id.

59 Keepers, Inc., 944 F. Supp. 2d at 129.

60 Dream Palace, 384 F.3d at 1014 (“Specifically, those secondary effects include prostitution, drug abuse, health risks associated with HIV/AIDS, and infiltration and proliferation of organized crime for the purpose of drug and sex related business activities.”).

61 In T.K.’s Video, Inc., the court stated that “sexually oriented business are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature.” T.K.’s Video, Inc. v. Denton Cty., 830 F. Supp. 335, 340 (E.D. Tex. 1993), aff’d in part, vacated in part, T.K.’s Video, Inc. v. Denton Cty., 24 F.3d 705 (5th Cir. 1994). Other cases that cited this include City of Erie v. Pap’s A.M., 529 U.S. 277, 290 (2000); Dream Palace v. Cty. of Maricopa, 384 F.3d 990, 996 (9th Cir. 2004); Currence v. City of Cincinnati, 28 F. App’x 438, 446 (6th Cir. 2002); DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312, 321 (1997); Ocello v.
the secondary effects regulations targeted the spread of STDs, but these cases did not explain or identify a source for STDs.\footnote{McDoogal's East, Inc. v. Cty. Comm'rs of Caroline Cty., 341 F. App'x. 918 (4th Cir. 2009); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (M.D. Fla. 2004); DiMa Corp. v. The Town of Hallie, 60 F. Supp. 2d 918 (W.D. Wis. 1998), aff'd, 185 F.3d 823 (7th Cir. 1999).}

This is to say that, unlike the eight cases that justified enactment of regulations as a response to the spread of STDs stemming from sexual activity occurring at adult businesses, these four cases did not provide an explanation for how STDs were spreading in the community in question.

The other two types of health claims cited by governments referred to broad and generalized health concerns. For example, in five cases\footnote{City of Erie v. Pap's A.M., 529 U.S. 277, 280 (2000); Dream Palace v. Cty. of Maricopa, 384 F.3d 990, 1014 (9th Cir. 2004); Currence v. City of Cincinnati, 28 F. App'x 438, 446 (6th Cir. 2002); Entm't Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008), aff'd, 588 F.3d 372 (6th Cir. 2009); U.S. Partners Fin. Corp. v. Kansas City, 707 F. Supp. 1090, 1095 (W.D. Mo. 1989).} the government did not cite a specific health concern but instead stated that adult businesses generally pose “greater danger to neighborhood health,”\footnote{City of Erie v. Pap's A.M., 529 U.S. 277, 280 (2000).} threaten “impact on the public health,”\footnote{Currence v. City of Cincinnati, 28 F. App'x 438, 446 (6th Cir. 2002).} or lead to “increased unhealthful conduct.”\footnote{Keepers, Inc. v. City of Milford, 944 F. Supp. 2d 129 (D. Conn. 2013), aff'd in part, vacated in part, remanded, 807 F.3d 24 (2nd Cir. 2015); Dream Palace v. Cty. of Maricopa, 384 F.3d 990 (9th Cir. 2004); Centerfolds, Inc. v. Town of Berlin, 352 F. Supp. 2d 183 (D. Conn. 2004); Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc). See E. Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995); Annex Books, Inc. v. City of Indianapolis, 333 F. Supp. 2d 773 (S.D. Ind. 2004), aff'd in part, and remanded in part, 581 F.3d 460 (7th Cir. 2009); Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery Cty., 256 F. Supp. 2d 385 (D. Md. 2003); Golden Triangle News, Inc. v. Fisher, 717 A.2d 1023 (Pa. 1998).} Similarly, in nine cases,\footnote{City of Erie v. Pap's A.M., 529 U.S. 277, 280 (2000).} the government argued that the objective of the regulation was “to protect and preserve the health, safety, and welfare of both the patrons of adult-oriented establishments and the citizens”\footnote{Golden Triangle News, 700 A.2d at 1063.} of the community.
that surrounded the SOBs. As a whole, these cases assert claims that are arguably vague and unlimited, especially when compared to the specific health claims about the spread of disease.\textsuperscript{69}

To further explicate these findings, the health claims were analyzed in accordance with regulation type. Below is a table of the three types of regulation and the health claims identified within those regulations.

\textit{Table 2: Health claims cited by regulation type}

<table>
<thead>
<tr>
<th>Zoning</th>
<th>Risk of Disease</th>
<th>Endanger or Threaten Health</th>
<th>Need to Protect Health</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, Maryland, 256 F. Supp. 2d 385 (2003)\textsuperscript{a}</td>
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<tr>
<td>Ranch House, Inc. v. Amerson, 146 F. Supp. 2d 1180 (2001)\textsuperscript{b}</td>
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<td>X</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Licensing</th>
<th>Risk of Disease</th>
<th>Endanger or Threaten Health</th>
<th>Need to Protect Health</th>
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<tbody>
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</table>

\textsuperscript{69} E.g., Keepers, Inc., 944 F. Supp. 2d at 129.
Several conclusions may be drawn from Table 2. The table reflects all seventeen cases cited at least one type of health claim. Interestingly, the most health claims emerged in cases involving internal regulations, which tended to cite multiple health claims. Table 2 also shows the different types of health claims are distributed across the types of regulations. For example, none of the cases involving licensing regulations claimed that SOBs posed a threat to or endangered health. Conversely, zoning and internal regulations presented all three types of health claims in at least one case.

Collectively, this analysis concludes that each case and regulation type cite at least one type of secondary health effect of SOBs. In many cases, the claims are broad and unexplained, but, unfortunately, specificity is not required of secondary effect regulation. This lack of specificity might explain why local and state governments implementing the same type of regulation cite different types of health claims to support regulation. On the other hand, it is possible that citing different health claims to support the same type of regulation is the result of different evidence substantiating the regulations. Therefore, the following analysis is based on the evidence used by local and state governments to substantiate their health claims against and regulations on SOBs.

B. The Substantiating Evidence

The Secondary Effects Doctrine requires that a secondary effect regulation must serve a substantial government interest. To demonstrate that substantial interest, the burden rests on the local or state government to present evidence that demonstrates the SOB in question not only causes or is associated with the alleged secondary effects, but that the proposed regulation is a
reasonable measure that will reduce those particular effects.\textsuperscript{70}

Therefore, subsequent to identifying the health claims in these cases, this analysis identified the evidence used by governments to substantiate their health claims.

Upon analysis, however, only six cases contained substantiating evidence claims.\textsuperscript{71} In each of the seventeen cases, there was at least one mention of the government in question “examining” or “reviewing” evidence of secondary effects and SOBs, but almost two-thirds of the case law made no mention of substantiating evidence. Further, it is possible that within the case filings evidence is present to substantiate the health claims. However, only six case opinions mention evidence that spoke to substantiate the alleged health claims. As a result, the following discussion concerns only those six cases that contained evidence to substantiate the secondary effect health claims.

The analysis identified three types of evidence used to substantiate the secondary effect health claims: (1) secondary effects studies conducted by other municipalities, (2) secondary effects studies conducted by the municipality in question, and (3) testimony from health officials. The most commonly cited evidence by governments was studies conducted by other municipalities. In five of the six cases, the defending government stated that secondary effects health claims stemmed, either in part or entirely, from research conducted by other cities that identified connections between sexually oriented businesses and adverse health effects.\textsuperscript{72} However, none of the opinions reported any statistical findings from the research. This is to say, when the courts cited research findings that pointed to SOBs causing adverse health effects, there were never any inclusions of

\textsuperscript{70} Annex Books, Inc. v. City of Indianapolis, 581 F.3d 460, 464 (7th Cir. 2009) (citing City of Los Angeles v. Alameda Books, 535 U.S. 425, 438 (2002)). The plurality opinion in \textit{Alameda Books} reasserted the \textit{Renton} standard, under which a municipality may rely on any evidence that is “reasonably believed to be relevant” for demonstrating a connection between speech and a substantial, independent government interest. \textit{Alameda Books}, 535 U.S. at 438 (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986)).


numeric or statistical data—only broad and generalized statements. This phenomenon further demonstrates the lack of government substantiation for its public health-based regulations of SOBs.

The lack of reported statistical data is also prevalent in cases where the government utilized other types of substantiating evidence, such as studies conducted by the municipality in question and testimony from health officials. Only one case, *Entertainment Productions, Inc. v. Shelby County*,73 presented a scenario where the government relied on research conducted by the city itself:

> Upon review of the record, the Shelby County ordinance adopting the Act cites numerous studies on the effects of adult entertainment in Memphis and Shelby County . . . The ordinance further relies upon the Tennessee legislative findings that the Act sought to “address some recognized deleterious secondary effects commonly associated with adult-oriented establishments, including but not limited to an increase in crime, the spread of sexually transmitted diseases, the downgrading of property values, and other public health, safety, and welfare issues.”74

Similarly, *Ocello v. Koster*75 was the only case where the government cited testimony from its own local health officials to further substantiate its health claims: “[t]he government also relied on testimony from health department officials in Missouri describing the health problems associated with sexually oriented businesses. Among other issues, the officials discussed that people infected with [STDs], including HIV, frequent [SOBs], and often engage in anonymous and unprotected sex.”76 Still, just like the cases that cited studies conducted by other municipalities, neither of these opinions report any statistical findings to substantiate the health claims against the SOBs.

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73 545 F. Supp. 2d 734 (W.D. Tenn. 2008).
74 Id. at 742.
75 Ocello v. Koster, 354 S.W.3d 187 (Mo. 2011) (en banc).
76 Id. at 206.
To continue the analysis, the evidence was next analyzed in accordance with regulation type. Below is a table of the three types of regulations and the evidence identified within those regulations.

**Table 3: Evidence cited by regulation type**

<table>
<thead>
<tr>
<th>Zoning</th>
<th>Studies by other cities</th>
<th>Studies by the city in question</th>
<th>Testimony from health officials</th>
</tr>
</thead>
<tbody>
<tr>
<td>DiMa Corp. v. City of St. Cloud, 562 N.W.2d 312 (1997)</td>
<td></td>
<td>X</td>
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<tr>
<td>Licensing</td>
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<tr>
<td>Internal</td>
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<td>X</td>
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</tbody>
</table>

Table 3 reflects the finding that six cases cited at least one type of substantiating evidence. Interestingly, for each type of regulation, the defending governments relied on other municipalities' studies. Granted, this analysis reviewed only one zoning regulation and one licensing regulation. Nonetheless, these findings show the proliferation of other municipalities' research in local and state government secondary effects regulation. Additionally, the table shows that one case, *Entertainment Productions, Inc. v. Shelby County*, utilized two types of evidence: studies by other municipalities and studies conducted by the municipality in question. Finally, Table 3 shows different types of evidence reside entirely in the internal regulations; all three types of evidence (studies by other municipalities, the municipality in question, and testimony by health officials) are prevalent only in the internal regulations, while only studies for other municipalities emerge in zoning and licensing regulations.

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77 See Entm’t Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734, 742 (W.D. Tenn. 2008), aff’d, Entm’t Prods., Inc. v. Shelby Cty., 588 F.3d 372 (6th Cir. 2009).
Coupled with the health claim findings, the data reveals a pattern of vagueness in these cases measuring the validity of public health-driven secondary effects regulations. Regarding the health claim findings, the defending governments typically do not supply specifics on the health claims they make against SOBs. Moreover, when the courts discuss the substantiating evidence provided by the governments, either no health-specific evidence is reported, or the evidence reported is vague and lacks statistical support. Together, these findings suggest that there are serious problems with the Secondary Effects Doctrine based on the threshold for evidence required. Further, the identification of the health claims and substantiating evidence within these seventeen cases affords a larger discussion on these public health-driven secondary effect regulations and their impact on the balance between protecting health and protecting speech.

C. The Imbalance between Speech & Health

Based on the cases studied, it is evident that courts do not require defending governments to present specific, scientifically supported evidence to support their claims against SOBs. This is apparent in the nine cases that consisted of broad and unspecified claims about the need to “protect and promote” the health of business patrons and local citizens. Likewise, the five cases that contained all-encompassing claims alleging SOBs pose “greater danger to neighborhood health” and threaten “impact[s] on the public health.” Moreover, none of the opinions provide instruction to the defending governments on how to specify their claims or present evidence to support their claims. Instead, in each case the courts held that the government in question was well within its legislative power to create and enforce ordinances that address secondary health effects, regardless of breadth or ambiguity of the government’s characterization of those effects.

80 City of Erie v. Pap’s A.M., 529 U.S. 277, 280 (2000); Dream Palace v. Cty. of Maricopa, 384 F.3d 990, 1014 (9th Cir. 2004); Currence v. City of Cincinnati, 28 F. App’x 438, 446 (6th Cir. 2002); Entm’t Prods., Inc. v. Shelby Cty., 545 F. Supp. 2d 734 (W.D. Tenn. 2008), aff’d, 588 F.3d 372 (6th Cir. 2009); U.S. Partners Fin. Corp. v. Kansas City, Mo., 707 F. Supp. 1090, 1095 (W.D. Mo. 1989).
81 City of Erie, 529 U.S. at 291.
This freedom to assert broad and vague health claims in an attempt to regulate certain forms of expression poses a great risk to speech, sexual or otherwise. While it is within the power of local and state governments to enact measures that protect public health, the existing case law demonstrates that there is only limited restraint on lawmakers to regulate this area, allowing them to paint with broad strokes about health effects that stem from certain types of speech and expression, and even disfavor certain forms of expression without providing reliable support. In short, for scholars who criticize the secondary effects doctrine, this analysis shows their worst fears are true. This precedent opens the door to a slippery slope, which could present a scenario where local and state governments can lawfully regulate any speech so long as the regulations concern protecting health or curbing “increased unhealthful conduct.” At the very least, this precedent exposes SOBs to unsubstantiated overregulation. These threats undermine First Amendment freedoms and demonstrate a need for change in the current application of the Secondary Effects Doctrine.

One solution is for courts to require a higher standard of support when adjudicating public health-driven secondary effect regulations. Courts should not accept vague and/or overly broad claims alleging harm to public health when reviewing local or state regulation of SOBs or other businesses. Rather, courts should require local and state governments to explicate specific, scientifically sound evidence to justify regulations aimed at curbing public health-driven secondary effects. By adopting a more rigorous standard to support such public health-driven claims, local and state governments must clear a higher hurdle to limit the speech and expression of SOBs and similar businesses. In adopting a more stringent standard, courts will require stronger justifications, and stronger contentions, from the governments that the regulations presented truly target harmful effects, solidifying that such regulations are indeed content-neutral. Adopting this standard will protect speech of SOBs and other sexual or adult speech as well as improve the current analysis of secondary effects overall. Additionally, this places accountability on our local and state governments to only enact regulation where there are true, identified health claims—not simply target speech the state may find mature or suggestive.

In regard to substantiating these claims and regulations, precedent requires that local and state governments merely provide evidence that shows the regulations are reasonable and will reduce the identified secondary effects. However, our

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82 Hudson, Jr., supra note 41 at 77–78.
analysis found that even so, only six cases reported evidence to support the regulations. The lack of reported evidence, statistical or otherwise, means that in practice it is not necessary for governments to provide specific evidence to substantiate their claims against SOBs or to substantiate that the regulations in question curb their health claims. This makes existing matters worse considering that the threshold for evidence required by the Secondary Effects Doctrine is already low. Existing precedent holds that governments are not allowed to rely on “shoddy data or reasoning,” but, ironically, the Court has explained it is not the courts’ job to assess the validity of the substantiating evidence.

Hence, there is a great contradiction in this matter: courts require evidence for the claim, but evidence is not used to determine the regulation’s validity. Coupled together, the low threshold of evidence and the contradiction between evidence requirement and evidence assessment turns the Secondary Effects Doctrine into a mere checklist of requirements, not a fair balancing test. This rubberstamping has created a body of cases that favor the protection of health over the protection of speech, and that have very little scientific or other support. When dealing with controversial speech, such as SOBs, it presents a dangerous loophole that lawmakers have capitalized on to censor or limit speech they find troublesome or unfavorable.

D. A Solution

Therefore, remedies to close this content-based loophole in the Secondary Effects Doctrine are needed to ensure a fair test and to establish a balance between speech and health. This balance can be achieved through specified and supported health claims and by raising the standard for the quality and type of evidence required to substantiate such claims in court. The natural path to achieve this goal would be through legislative or judicial action. However it is approached, the threshold should require local and state governments to supply evidence for each of its claims and evidence that shows the regulation will further the cited interests. Specifically, when such regulations are challenged in court, defending governments should be required to supply jurisdiction-specific and data-driven evidence. To ensure the threshold of evidence is met, courts must resolve the conflict with evidence presence and evidence assessment.

Although the role of the court is to be a rational voice interpreting the law that is not contingent on science or data, in cases involving speech regulation for the purposes of protecting public health, it is crucial for the courts to consider the validity of the evidence presented. Recent case law involving content regulations on speech, such as mandated graphic warning labels on tobacco products, show that courts may assess the quality and conclusions of the evidence supplied by defending governments. This practice of evidence assessment should be carried over to secondary effect regulations. Collectively, through a requirement that local and state governments provide specific health claims, raising the threshold of evidence to support public health-driven secondary effects regulation, and resolving the contradiction between evidence presence and evidence assessment will provide a fair test for assessing public health-drive secondary effect regulations.

VI. CONCLUSION

At their core, public health-driven regulations implicate a challenging conflict between speech and health. On the one hand, efforts are made by local and state governments to protect the public’s health from the negative effects that stem from SOBs. On the other hand, constitutionally protected freedoms of speech and expression for controversial business, like SOBs, are threatened. It has been recognized in the First Amendment jurisprudence that sexual speech—and thus SOBs—are accorded less protection. However, lesser protection does not equate to a total loss of protection. Lawmakers should not be able to target SOBs or other such businesses under the guise of content-neutral regulations where their claims are unsubstantiated.

Our case analysis shows that local and state governments are free to manipulate the Secondary Effects Doctrine through regulations drafted with broad strokes about the health claims they make against SOBs, and without having to support those claims with evidence. This freedom has been afforded to them through the Secondary Effects Doctrine, but at the cost of certain speech protections. The low threshold for evidence and the courts’ inactivity in assessing the supplied evidence’s validity

87 Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70–71 (1976). The plurality opinion in Young asserted the low-value status of non-obscene sex speech, like the speech found in SOBs, when it stated: “it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire’s immortal comment.” Id.
leaves SOBs and the freedom of speech ripe for unsubstantiated overregulation. But these risks can be remedied by requiring specific health claims, raising the threshold of evidence, and resolving the contradiction between evidence presence and evidence assessment. If such steps are taken, this particular loophole in the Secondary Effects Doctrine may be remedied and a balance will be struck between protecting health and protecting speech. Otherwise, the Secondary Effects Doctrine creates a slippery slope for First Amendment protections to slip away—not just for SOBs, but for everyone.
RELIGIOUS ARGUMENTS, RELIGIOUS PURPOSES, AND THE GAY AND LESBIAN RIGHTS CASES

Steve Sanders*

I. INTRODUCTION

The Supreme Court’s four major gay and lesbian rights decisions—Romer v. Evans, Lawrence v. Texas, United States v. Windsor, and Obergefell v. Hodges—were not cases about the First Amendment or religion. But collectively, often implicitly and sometimes explicitly, these cases teach us something about the role which religion should play in questions of constitutional equality and liberty.

These gay and lesbian rights cases, especially the first three, have been understood to stand for the principle that government may not enact laws aimed at expressing moral disapproval, or “animus,” toward homosexuality or same-sex relationships. In turn, this association between animus and opposition to gay and lesbian equality has led some commentators (and dissenting justices) to accuse the Court’s majority of imposing an “orthodoxy” and of demonstrating hostility toward Americans whose religious views lead them to oppose homosexuality or legal rights for gays and lesbians.

This criticism, however, misses the mark, because it confuses religious belief and advocacy by private persons and organizations, on the one hand, with the imposition of religion-based policies by government, on the other. In Lawrence and Obergefell in particular, the Court went out of its way to acknowledge that many people supported laws restricting gay and lesbian liberty and equality out of good-faith religious convictions. But religious arguments in the public square are

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5 See, e.g., Dale Carpenter, Windsor Products: Equal Protection from Animus, 2013 SUP. CT. REV. 183, 188 (2013) (arguing that Romer, Lawrence, and Windsor “cumulatively make it clear that the perceived social harm of homosexuality, along with simple moral disapproval of it, is no longer a proper basis on which to carve out gay people from legal protection”).

6 Obergefell, 135 S. Ct. at 2642 (Alito, J., dissenting).

7 See Lawrence, 539 U.S. at 571; Obergefell, 135 S. Ct. at 2594. See also Michael J. Perry, Religion in Politics, 29 U.C. DAVIS L. REV. 729, 756 (1996); Who We Are, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/about-us (last visited Mar. 7, 2019).
different from government-imposed religious purposes. The former must be freely allowed; the latter violate the Constitution.

We cannot and should not seek to banish religion-based arguments from the public square. After all, religious beliefs may inform the positions of individual citizens and lawmakers on a wide variety of public policy questions—protecting the environment, punishing sex crimes, or granting asylum to refugees, just to name a few. Yet in such cases, the laws themselves are not understood to be enacting religion. Persuasive and non-hypothesized secular rationales are available to describe the government’s purpose and interest in the law. Such was not the case for laws punishing homosexuality and disadvantaging homosexuals.

My purpose in this Essay is to illuminate the difference between religious arguments and religious purposes in the gay and lesbian rights cases; to demonstrate how the Court rejected laws which lacked plausible secular purposes, without disparaging the convictions of conscience which had led citizens and lawmakers to support those laws.

Although they are grounded as a formal matter in the Constitution’s guarantees of equal protection and due process, the gay and lesbian rights decisions are informed by the Establishment Clause value that government must make law only on the basis of secular, rationally understandable and defensible reasons, not religious doctrine or beliefs. Nothing about that idea suggests that arguments arising from personal religious conscience should not be part of public debate. But it does suggest that as a matter of Fourteenth Amendment doctrine, only secular government purposes should satisfy review under the Equal Protection Clause or the Due Process Clause.

II. THE COURT’S REJECTION OF RELIGIOUS PURPOSES FOR ANTI-GAY LAWS

A. Background

During the period from Romer to Obergefell, 1996 through 2015, the opposition to gay and lesbian political advancement and legal equality was defined almost exclusively by religious arguments and religious-political organizing. The major political and legal organizations opposing gay and lesbian rights at the state or national levels typically defined themselves by reference

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8 As the Court explained in one of its canonical Establishment Clause cases, to avoid conflict with the Religion Clauses, a law “must have a secular legislative purpose.” Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
Beginning in the 1970s, opposition to rights for gays and lesbians was “central” to the “political practice and social vision” of American religious conservatives (which usually meant Christian conservatives). While it is certainly true that “individual men and women who happen to be secular can be homophobic to varying degrees,” the opponents of marriage equality and other gay and lesbian rights “are, for the most part, uniformly religious” and come to their positions “in large part, as a result of their religion.” In the United States today, “in terms of political mobilization, social movement activity, and organized public outcry, there is no secular mobilization opposing equal rights for gays and lesbians.”

It is not surprising, then, that the laws struck down by the Supreme Court in Romer, Lawrence, Windsor, and Obergefell, laws which enacted various forms of punishment against homosexuality or disfavored treatment against gays and lesbians, all were impelled by identifiable religious purposes. To be clear, this is not to say that every legislator or voter who supported these laws did so for religious reasons. But the genesis and justifications for all of the laws at issue in these cases can be traced to religiously based views about homosexuality and same-sex relationships, or to the derivative belief that gays and lesbians present a moral threat to society.

Admittedly, these religious purposes are almost never meaningfully explored in the Court’s opinions. Yet understanding how religion drove the laws at issue in these cases requires little more than basic familiarity with the social and political history of the times. The Court’s opinions in these cases often seem diffident about the role of religion in laws punishing or disadvantaging gays and lesbians. While the Court sometimes nods respectfully toward religious beliefs and arguments about homosexuality, it says little if anything about the underlying religious rationales behind the laws struck down in these cases. Nor does it comment on the religious-political activism operating

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12 Id.
in the background of these laws. Moreover, the religious impetuses behind these laws often were obscured because the government lawyers defending them eschewed discussing the actual history behind the laws and devoted their energies instead to hypothesizing non-religious purposes to attempt to justify them. As a result, the analysis in these cases can seem opaque. But at least this much is clear: in all four cases, the challenged laws ultimately foundered on their lack of any actual, discernible, non-hypothesized secular purpose.

B. Romer

Colorado’s Amendment 2, the issue in *Romer*, was a state constitutional amendment which rolled back all existing non-discrimination protections for gays and lesbians in Colorado municipalities and prohibited the enactment of any new such laws at the state or local level.\(^{14}\) Colorado for Family Values (“CFV”), which sponsored Amendment 2, was formed by religious-conservative activists who were inspired by the views that “America has deteriorated because it has turned away from literal interpretations of the Bible, and fundamentalist church teachings must play a bigger role in government.”\(^{15}\) Amendment 2 was a “by-product of what religious right leaders had labeled a national ‘cultural war’ over whose ‘family values’ would be preeminent in society.”\(^{16}\) The authors of a study of the campaign to enact and defend Amendment 2 described it as “the first statewide test of a new prototype for antigay initiatives resulting from the collaboration of national and local conservative organizations seeking to secure a role for religion in government.”\(^{17}\) CFV told the Court in its amicus brief in *Romer* that the measure was impelled by concern over “the effect that government legitimization of homosexuality would have on the traditional family and community morality.”\(^{18}\)

In defending Amendment 2, the State of Colorado acknowledged these religious purposes only obliquely. It claimed that its state interests in the law were “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,” along with an “interest in conserving resources to fight discrimination against other groups.”\(^{19}\)

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\(^{15}\) Booth, supra note 9, at A7.

\(^{16}\) KEEN & GOLDBERG, supra note 9, at 105.

\(^{17}\) Id. at 9.


\(^{19}\) *Romer*, 517 U.S. at 635.
The Court treated Amendment 2 as essentially a political-process problem. Making no reference to the religious impetus behind Amendment 2 or to CFV’s explanation for the measure it had developed and advocated, the Court professed a certain amount of bewilderment about the law, calling it “at once too narrow and too broad” and observing that it “confounds [the] normal process of judicial review.”\(^{20}\) The Court found Amendment 2 to be “a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”\(^{21}\) The Court briefly considered the state’s purported interests in Amendment 2—protecting certain landlords and employers, and conserving resources to fight other types of discrimination—but rejected them as “so far removed” from the broad and harsh consequences of Amendment 2 that “we find it impossible to credit them.”\(^{22}\) The Court suggested that the lack of serious and substantial government purposes behind Amendment 2 gave rise to an inference that the measure’s real purpose was “animus toward the class it affects.”\(^{23}\) But it did not discuss the campaign to enact Amendment 2 and did not describe the animus as being grounded in religion.

Acknowledging the state’s professed concern for landlords and employers with “personal or religious objections to homosexuality” is the closest the majority opinion came to acknowledging the religiously infused purposes behind Amendment 2. Yet it is implausible to imagine that the justices were unaware of the religious politics behind Amendment 2 and similar initiatives. The majority’s reticence stands in contrast with Justice Scalia’s dissent, which tellingly and accurately identified Amendment 2 is the product of a “Kulturkampf”\(^{24}\) (a term denoting cultural struggle that was coined in reference to the battles between secular and religious forces in Germany in the late 19th century).

*Romer* treated homosexuality, in effect, as a morally neutral phenomenon, and it discussed gays and lesbians as essentially just another minority group entitled to use the political process to advance its interests. Amendment 2, the Court said, could not be reconciled with the principle, stemming both from the Equal Protection Clause and the “idea of the rule of law” itself, that “government and each its parts [should]

\(^{20}\) Id. at 633.

\(^{21}\) Id. at 635.

\(^{22}\) Id.

\(^{23}\) Id. at 632.

\(^{24}\) Id. at 636 (Scalia, J., dissenting).
remain open on impartial terms to all who seek its assistance.”

In so doing, and by pointedly ignoring CFV’s explanation of the religious purposes behind Amendment 2, the Court implicitly but unmistakably signaled that the question of legal and political rights for gays and lesbians should be resolved on secular terms.

C. Lawrence

Sodomy laws, the issue in Lawrence, historically were grounded in the religious view that homosexual conduct is unnatural. The core religious objection to homosexuality is that it supposedly violates the design and purpose of sexuality for humans as God created them. On this view, homosexual conduct is “a clear perversion of, or turning away from, the core activity of human sexuality, which is male-female marital intercourse,” and thus is “a crime against the nature of the people involved.” This religious view was long embedded in law. William Blackstone, the great expositor of the common law, denounced homosexuality as a “disgrace to human nature” and inconsistent with “the express will of God.”

In Lawrence, the State of Texas, unlike Colorado in Romer, did not shrink from forthrightly discussing the religious purposes behind its sodomy law. Texas told the Court that the criminal prohibition on homosexual conduct represented “the continued expression of the State’s long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity,” and asserted that this was a legitimate state interest. The Court did not comment on, or even acknowledge, the state’s moral justifications. It simply concluded that the Texas sodomy law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” The Court “examined the conduct at issue to see if it was properly an aspect of liberty (as opposed to license), and then asked the government to justify its restriction, which it failed to do adequately.” As in Romer, the Court insisted on applying a secular legal framework—in this case, substantive due process—to a law with an obvious religious pedigree.

25 Id. at 633.
27 Id. at 29.
That is not to say the Court did not acknowledge that sodomy laws have been defended with religious arguments. “[F]or centuries,” it said, “there have been powerful voices to condemn homosexual conduct as immoral,” condemnation that was shaped at least in part by “religious beliefs.” The Court said it respected that “[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.” But the critical passage of the opinion came next:

These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

In short, in a pluralistic society, religious beliefs and arguments must be respected, but such a society may not impose religious doctrine through civil law.

D. Windsor

Laws prohibiting same-sex marriage were driven almost entirely by religious-political activist groups seeking to “defend” marriage and roll back gay and lesbian political and legal advancements. This was true both of the federal Defense of Marriage Act (“DOMA”), which was invalidated in Windsor, and the state marriage bans which were struck down in Obergefell.

For example, The Alliance Defending Freedom, the legal group which defended California’s Proposition 9 in the first federal lawsuit against a state marriage equality ban and which has been active in a large number of other cases opposing gay rights, describes its mission as helping “Christians . . . unite in order to defend religious freedom before it [is] too late.” The National Organization for Marriage, one of the leading national groups that fought against marriage equality (and, now, other matters of equality for gays, lesbians, bisexuals, and transgender

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32 Lawrence, 539 U.S. at 571.
33 Id.
34 Id. (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
35 Who We Are, supra note 7.
persons), describes itself as “working to defend marriage and the faith communities that sustain it.”

Gary Simson has argued that both DOMA and the state marriage bans could be “readily understood as examples of lawmakers . . ., consciously or unconsciously, incorporating into law their religious beliefs or . . . the religious beliefs of many of their constituents.” Thus, Simson argued, “regardless of what lawmakers opposed to same-sex marriage may be willing to state publicly as their reasons for voting against same-sex marriage, courts should find that laws prohibiting same-sex marriage violate the Establishment Clause.”

In enacting the federal DOMA, Congress aligned itself squarely and expressly with those who opposed same-sex marriage for reasons of religion. As the House of Representatives put it in the official Judiciary Committee report on DOMA:

For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. As

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[https://advance.lexis.com/api/permalink/ddd32880-51e9-46b2-a7b5-120793e8785d/?context=1000516].
Representative Henry Hyde, the Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396: “[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate . . . . And in so doing it trivializes the legitimate status of marriage and demeanes it by putting a stamp of approval . . . on a union that many people . . . think is immoral.” It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government’s legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws. 39

In Windsor, the Court treated this language about morality and religion as, in essence, a smoking gun which confirmed that DOMA was not grounded in any constitutionally proper secular purpose. As it had in Romer, the Court raised the likelihood of “animus” lurking behind DOMA. 40 But unlike Romer and Lawrence, the Court in Windsor was more direct in its rejection of religious purposes. Citing to the above passage of the House Judiciary Committee report, the Court observed that “[t]he history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.” 41

In the Windsor litigation, something called the Bipartisan Legal Advisory Group of the House of Representatives (“BLAG”) had stepped in to defend DOMA when the Obama administration declined to. BLAG in effect disavowed the actual purposes Congress had set forth for DOMA by not addressing them. Instead, BLAG devoted most of its merits brief in the Supreme Court to setting forth a list of benign sounding

41 Id.
hypothesized secular purposes it said supported the law, such as “ensuring that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside” and “avoid[ing] uncertain and unpredictable (but presumed negative) effects on the federal fisc.” But the Court’s opinion completely ignored BLAG’s post-hoc rationalizations for DOMA.

Thus, Windsor suggests that not only must a law stand on secular, rather than purely religious, purposes, those secular purposes also must be plausible and genuine, not simply made up for use in litigation.

E. Obergefell

The fourth and most recent case in the Court’s gay/lesbian rights quadrilogy, Obergefell, held that state laws prohibiting same-sex marriage violate the fundamental right to marry under the Due Process Clause.

By the time Obergefell was briefed and argued, government lawyers defending the marriage bans were aware that it was untenable to rely on religious purposes to justify these laws. And so, faced with the fact that they could not acknowledge the actual (that is, religiously inspired) reasons why these laws were promoted and enacted, the states, like BLAG in Windsor, turned to hypothesized purposes—that is, purposes which were supposedly served by the laws, but which were constructed post-hoc, in an effort to save the laws. “It matters not,” Ohio’s brief told the Supreme Court, “if the reasons offered in court are [actually] the reasons why lawmakers (or voters) approved the law.” The states relied mainly on the argument of “responsible procreation.” As Michigan’s brief to the Court explained this argument:

[M]arriage as a public institution—separate from other relationships that have an emotional connection—springs from a feature of opposite-sex relationships that is biologically different than all other relationships (including opposite-sex platonic friendships and same-sex relationships): the sexual union of a

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43 Id. at 38.
man and a woman produces something more than just an emotional relationship between two people—it produces, without the involvement of third parties or even a conscious decision, the possibility of creating a new life. Michigan’s marriage definition is designed to stabilize such relationships, to promote procreation within them, and to be the expected standard for opposite-sex couples engaged in sexual relations.

The Court did not buy it, dismissing the responsible-procreation rationale as “unrealistic” and “wholly illogical.”

The Court did not seek to identify any other purposes behind the state marriage bans, religious or otherwise. But it did address the difference between religious advocacy in the public square, and state action which advances religious purposes, and it did so in a more candid and direct manner than it had in the three previous gay and lesbian rights cases. The Court acknowledged that many people “who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.” But to respect religious arguments about public policy is not to acquiesce in the enactment of religious purposes. “[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”

III. GAY RIGHTS, RELIGION, AND DEMOCRACY

The Court’s insistence in the gay and lesbian rights cases that laws must be justified by secular purposes rests on a sound and, frankly, mainstream understanding of the relationship between law and religion in a pluralistic democracy. After all, the requirement of a secular purpose, not a purpose to advance or impose religion, is a core principle of Establishment Clause jurisprudence. In the gay and lesbian rights cases, the Court

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46 Id. at 2602.
47 Id.
applied the same principle through the Equal Protection and Due Process clauses. Yet at the same time, the Court tried to make clear that it had no intention to disparage or constrain religious argument and advocacy.

That latter point may be cold comfort for citizens and legislators who believe they were entitled to enact religious beliefs into law. But there is nothing unusual or objectionable about drawing a clear line, as the Court did in Obergefell, between religious arguments in public debate and religious purposes in state action. As the distinguished religion and law scholar Michael J. Perry has argued, in regulating human conduct, “neither legislators nor other public officials should rely on a religious argument about the requirements of human well-being unless a persuasive independent secular argument reaches the same conclusion.”48 In the same vein, Douglas Laycock—like Perry, a scholar who is certainly not a strict separationist when it comes to the relationship between government and religion—argues that the Constitution “does not limit the arguments that a free people can make in political debate,” nor does it “limit what the people can do to influence government; rather, it limits what government can do to the people.”49 Simply put, the Constitution “limits political outputs, the laws that government can enact—not political inputs, the arguments that citizens can make.”50

In this Essay, I have sought to demonstrate how the Court in the gay and lesbian rights cases worked within the sort of framework Laycock suggests. An enduring and important legacy of Romer, Lawrence, Windsor, and Obergefell is not only how they advanced the dignity of gays and lesbians, but also the lessons they provide about how First Amendment values can inform Fourteenth Amendment analysis of equality and liberty.

48 Perry, supra note 7, at 756.
50 Id.
COMPELLED SUBSIDIES AND ORIGINAL MEANING

Jud Campbell*

“Almighty God hath created the mind free, and manifested his supreme will that . . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.”

–Thomas Jefferson, A Bill for Establishing Religious Freedom

ABSTRACT

The rule against compelled subsidization of speech is at the forefront of modern First Amendment disputes. Challenges to mandatory union dues, laws preventing discrimination on the basis of sexual orientation, and the federal “contraceptive mandate” have all featured variants of the anti-subsidization principle, reasoning that the government cannot compel people to support the objectionable activities of others. But the literature currently fails to evaluate modern compelled-subsidy doctrine in terms of the original meaning of the First Amendment. This Essay takes up that task.

Approaching any question of original meaning requires a willingness to encounter a constitutional world that looks very different from our own. And that is especially true when it comes to the First Amendment. In certain contexts, some Founders argued that compelled subsidies violated their rights. But these were contested arguments. The challenge, then, is to situate Founding Era ideas in a historical frame that may bear little resemblance to modern law. Such a frame, this Essay argues, indicates that rights of expression and religious exercise—undergirded by freedoms of thought and conscience—neither entirely excluded nor inviolably privileged arguments against compelled subsidies. Rather than providing determinate answers, the Founding-Era conception of rights encouraged active debate about the boundaries of governmental power. Compelled-subsidy doctrine thus sits in a precarious position—within the bounds of reasonable historical argument but also deeply novel in its modern rigidity and judicial enforceability.

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1 THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM, reprinted in 2 PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed., 1950) (emphases omitted).
INTRODUCTION

Compelled-subsidy doctrine generally prevents the government from forcing individuals to pay for the speech activities of others. The Supreme Court has held, for instance, that non-union employees have a First Amendment right against being legally obliged to fund a union’s political advocacy.2 The underlying logic of this principle is hardly obvious,3 but scholars and judges usually frame it in terms of conscience.4 Perhaps not surprising, then, concerns over compelled subsidies frequently come up in religious freedom debates as well.5

The constitutional basis for compelled-subsidy doctrine, however, is deeply contested. “It is simply not true,” Robert Post insists, “that First Amendment concerns are implicated whenever persons are required to subsidize speech with which they disagree.”6 Indeed, legally compelled funding of potentially objectionable speech is routine. “[E]ach of us must pay taxes that will in part go to spread opinions many of us disagree and abhor,” William Baude and Eugene Volokh point out,

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5 For example, claims brought under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a)–(b) (2012), often rely on objections to the activities of others. See Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L.J. 2516, 2518–19 (2015) (“[R]eligious objections to being made complicit in the assertedly sinful conduct of others . . . now represent an important part of courts’ religious liberties docket.”). These types of religious accommodation claims are generally no longer viable under the Free Exercise Clause because of the Supreme Court’s decision in Emp’t Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990), which held that individuals do not have a Free Exercise right against the enforcement of neutral, generally applicable laws. Drawing on a similar anti-subsidization rationale, a group of scholars has asserted a constitutional limit on religious accommodations that impose burdens on third parties. Forcing individuals to support religious-freedom claims of others, they argue, is a type of compelled subsidy. See Micah Schwartzman et al., The Costs of Conscience, 106 KY. L.J. 881, 885 (2018) (“Citizens who bear costs so that others may observe their faith can rightfully complain that their liberty of conscience has been implicated.”); see also Frederick M. Gedicks & Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 HARV. C.R.-C.L. L. REV. 343, 379 (2014) (“Applying RFRA to exempt such employers from the Mandate thus violates the Establishment Clause prohibition of permissive accommodations that shift the material costs of accommodation from believers to nonadherents and other third parties.”).
concluding that “requiring people only to pay money, whether to private organizations or to the government, is not a First Amendment problem at all.” And while scholars have also taken the opposite view, nearly everyone agrees that the Supreme Court’s jurisprudence in this area is mercurial and undertheorized.

Largely unexplored, however, is the historical basis for compelled-subsidy doctrine. In fact, this area of law seems to rest almost entirely on an appeal—repeated over and over in Supreme Court opinions—to Thomas Jefferson’s argument that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.” This reliance has led some scholars to refer to the rule against compelled subsidies as “the Jeffersonian proposition.”

This Essay investigates whether compelled-subsidy doctrine is defensible in terms of the First Amendment’s original meaning—an inquiry of interest to nearly all interpreters. In short, my argument is that rights of expression and religious

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1 Baude & Volokh, supra note 6, at 171.
2 See, e.g., Schwartzman, supra note 4, at 380–82.
4 For two of the most thorough explorations of the doctrine, see Klass, supra note 6, and Baude & Volokh, supra note 6. Neither of these works discusses Founding Era history, other than brief mentions of Jefferson. See Klass, supra note 6, at 1114; Baude & Volokh, supra note 6, at 184–85.
5 See, e.g., Janus v. Am. Fed. of State, Cty., & Mun. Empls., 138 S. Ct. 2448, 2464 (2018); Teachers v. Hudson, 475 U.S. 292, 305 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977); Machinists v. Street, 367 U.S. 740, 790 (1961) (Black, J., dissenting). Jefferson’s quotation is often paired with Madison’s contemporaneous opposition to religious establishments, and particularly his statement: “Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?” JAMES MADISON, Memorial and Remonstrance Against Religious Assessments (1785), reprinted in 8 THE PAPERS OF JAMES MADISON, 295, 300 (Robert A. Rutland et al., eds., 1973); see, e.g., Abood, 431 U.S. at 234 n.31 (citing both Madison and Jefferson). The explicit anti-establishment focus of Madison’s quotation may account for why the quotation is often either heavily abridged, see, e.g., Teachers, 475 U.S. at 305, or omitted in later speech-related opinions, see, e.g., Janus, 138 S.Ct. at 2464; Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 572 (2005) (Souter, J., dissenting); Keller v. State Bar of Cal., 496 U.S. 1, 10 (1990).
exercise—undergirded by freedoms of thought and conscience—neither entirely excluded nor inviolably privileged constitutional arguments against compelled subsidies. This may seem odd to modern readers, but the idea flows from a Founding Era conception of rights that was often less determinate (and less judicially enforceable) than how we typically view constitutional rights today. In particular, rights at the Founding were generally subject to regulation in promotion of the public good, and the First Amendment itself “left unresolved whether certain restrictions . . . promoted the public good.” The rigidity of modern compelled-subsidy doctrine, by comparison, reflects a libertarian turn in our understanding of rights and, relatedly, a view of rights as more determinate, judicially enforceable limits on governmental power.

This Essay proceeds in three Parts. It begins in Part I with a preliminary but important point: Compelled-subsidy doctrine’s reliance on Jefferson is profoundly misplaced for a variety of methodological and historical reasons. Part II then describes how the Founders generally approached questions of rights, focusing particularly on historical understandings of natural rights—including the rights of conscience, religious exercise, and expression—and how those rights circumscribed governmental power. Part III shows how this general framework accounts for what might otherwise appear to be contradictory historical evidence about the constitutionality of compelled subsidies.

Overall, the argument against compelled subsidies was available at the Founding, and thus in some sense can be understood as consistent with claims of original meaning. But it also was neither dispositive nor judicially cognizable. The Founding Era conception of rights thus leaves modern compelled-subsidy doctrine in a precarious position: within the bounds of available historical argument but also deeply novel in its modern rigidity and judicial enforceability.

I. RECONSIDERING JEFFERSON

Compelled-subsidy doctrine flows from a basic axiom of modern First Amendment law: the government cannot force

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16 See Jamal Greene, Foreword: Rights as Trumps?, 132 HARV. L. REV. 28, 35 (2018) (“[T]he presumptive absolutism that characterizes the modern frame for evaluating American constitutional rights is an artifact of the second half of the twentieth century.”).
people to express a particular view or idea. Indeed, constitutional protections in this field are especially robust because, as the Supreme Court has explained, “[w]hen speech is compelled . . . individuals are coerced into betraying their convictions.” Compelling individuals to speak, in other words, may force them to violate their consciences. Consequently, even when the government otherwise has authority to compel speech, the First Amendment provides a right of exemption for objectors. Compelling a person to subsidize the speech of other private speakers,” the Court has explained, “raises similar First Amendment concerns.

Although it has never attempted a historical defense of compelled-subsidy doctrine, the Supreme Court routinely invokes Thomas Jefferson’s famous line that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.” That reliance, this Part argues, is deeply problematic. It begins by explaining why Jefferson’s statement does not support a right against compelled subsidies. The Part then explains how Jefferson’s ideas about religious freedom were not widely held at the Founding and are thus an unreliable guide to the First Amendment’s original meaning.

A. The Fallacy of the Jeffersonian Proposition

Compelled-subsidy doctrine’s reliance on Jefferson is off the mark. First and foremost, Jefferson was not asserting a conscience-based right against compelled subsidies, and certainly not one enforceable as a matter of constitutional law. Rather, Jefferson proposed a wholesale denial of any governmental authority over religious matters. Faithfully adhering to Jefferson’s ideas, rather than selectively quoting one
line in the preamble of his proposal, would lead to a radically different approach to modern doctrine.\textsuperscript{25}

But the problem is deeper. Jefferson firmly rejected the idea of constitutionally required religious accommodations, making him a perplexing (and certainly unwitting) progenitor of modern conscience-based rights against compelled subsidies. As Michael McConnell points out, “Jefferson espoused a strict distinction between belief, which should be protected from governmental control, and conduct, which should not.”\textsuperscript{26} Jefferson was concerned about individual conscience, to be sure, but his approach to addressing that concern was a sweeping denial of governmental power over the field of religion—while remaining opposed to mandatory rights of religious accommodation. Relying on Jefferson to support a conscience-based right thus turns history on its head.

Moreover, even if reliance on Jefferson were internally consistent, Jefferson explicitly disclaimed that his argument was legally binding. The Bill for Religious Freedom—effectively a legislative resolution—straightforwardly announced that it had “no effect in law.”\textsuperscript{27} Indeed, Justice Scalia emphasized this fact when he presented a historical case against rights of religious accommodation under the Free Exercise Clause. Historical evidence about “what was thought to be legislatively or even morally desireable” during the 1780s religious freedom debates in Virginia, he wrote in \textit{City of Boerne v. Flores}, do not necessarily “describe what was constitutionally required (and judicially enforceable).”\textsuperscript{28} The exact same point applies to reliance on the Jeffersonian proposition in the context of compelled subsidies.

It hardly needs mentioning that picking out an isolated statement in a preamble and then extending that statement well beyond its historical context is not a sound approach to constitutional interpretation. For instance, the preamble of the Bill for Religious Freedom also declares that “to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy,”\textsuperscript{29} leading some scholars to conclude that the First Amendment’s Speech and Press Clauses originally barred sedition

\textsuperscript{25} Modern doctrine provides for challenges to the \textit{application} of compelled subsidy laws against those who object to the enforcement of the laws \textit{against} them. It is not a way of “facially” challenging the laws themselves.

\textsuperscript{26} McConnell, supra note 14, at 1451.

\textsuperscript{27} \textit{Jefferson}, supra note 1, at 546.

\textsuperscript{28} 521 U.S. 507, 541 (1997) (Scalia, J., concurring in part). In this passage, Justice Scalia was discussing James Madison’s \textit{Memorial and Remonstrance Against Religious Assessments}, but the argument plainly applies just as much to the Bill for Religious Freedom.

\textsuperscript{29} \textit{Jefferson}, supra note 1, at 546.
prosecutions. Granted, this inference has rhetorical force today. But it also turns out to be a fallacious way of understanding constitutional history. And that is because the inference attributes far, far too much weight to a single line in the preamble of a single state bill that by its own terms had “no effect in law.”

In fact, Justice Scalia is not the only proponent of compelled-subsidy doctrine who has nonetheless decried reliance on Jefferson with respect to other aspects of First Amendment law. “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history,” then-Justice Rehnquist wrote in dissent in Wallace v. Jaffree, “but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor [of a wall of separation between church and state] for nearly 40 years.” Jeffersonian sound bites, Rehnquist implies, are not a reliable guide to constitutional meaning.

Recent developments in constitutional theory reinforce this point. For several decades, interpreters have gravitated toward arguments about original meaning of the Constitution’s words and phrases—usually in reference to a provision’s legal meaning, public meaning, or some blend of the two—and away from selectively quoting the intentions of particularly revered Framers (or, in Jefferson’s case, non-Framers). On this view,

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30 See ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH 31 (1920).
31 See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”).
33 JEFFERSON, supra note 1, at 546.
34 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). Although the Supreme Court has previously described Jefferson, along with his political ally James Madison, as playing “leading roles” in the “drafting and adoption” of the First Amendment, Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 13 (1947); Abingdon Sch. Dist. v. Schempp, 374 U.S. 203, 234 (1963) (Brennan, J., concurring) (describing Jefferson and Madison as the “architects” of the First Amendment), Rehnquist noted that “Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States.” Jaffree, 472 U.S. at 92 (Rehnquist, J., dissenting).
the views of one man—even an iconic man like Jefferson—make little difference. What matters, instead, is the meaning of the Constitution to a broader audience.\(^{36}\)

Moreover, even if Jefferson’s isolated statement were good evidence of the First Amendment’s original meaning, it would likely *undermine* modern doctrine. Nowadays, First Amendment law strictly separates compelled subsidies for *private* speech, which are constitutionally proscribed, and compelled subsidies for *governmental* speech, which raise no First Amendment problem at all.\(^{37}\) The latter principle is crucial given the ubiquity of viewpoint-based governmental speech—supported, of course, through compulsory taxes.\(^{38}\) Without exempting governmental speech, compelled-subsidy doctrine would founder. But this exemption for governmental speech has no grounding in the Jeffersonian proposition. To be sure, Jefferson was objecting to a proposed scheme that would have required Virginians to fund private ministers—not government-run religious services. But Jefferson’s objections did not turn on this aspect of the funding scheme. Indeed, it seems likely that direct governmental propagation of religious views would have

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\(^{36}\) These arguments might not be determinative on their own. Jefferson’s claim, after all, was enshrined (with some revisions) in the Act for Establishing Religious Freedom—an official act of the Virginia General Assembly in 1786 that was reprinted in newspapers in several other states. *See, e.g., Penn. Packet* (Phila.), Feb. 2, 1786, at 3. But as this Part shows, the arguments in the Act did not reflect the dominant understanding of religious freedom at the time.

\(^{37}\) *See Schwartzman, supra* note 4, at 370. For illustrations of the modern doctrine, see, *e.g.*, *Johans v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (“Our compelled-subsidy cases have consistently respected the principle that compelled support of a private association is fundamentally different from compelled support of government. Compelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.”) (quotation marks and alteration omitted); *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (“The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”).

\(^{38}\) *See generally Joseph Blocher, Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011) (discussing the “governmental speech” exception to general First Amendment principles).
aggravated the constitutional problem for Jefferson. Again, whatever the merits of modern doctrine, its apparent reliance on Jefferson is self-defeating.

Scholars occasionally also point out that Jefferson was talking about religious freedom, and not rights of conscience more generally.\(^{39}\) According to William Baude and Eugene Volokh, “Jefferson was specifically talking about the propagation of religious opinions, which is regulated by a separate constitutional provision—the Establishment Clause.”\(^{40}\) This critique, however, strikes me as less persuasive. To be sure, Jefferson was talking about religious freedom, and he certainly saw unique harms in religious dogmatism. Yet many of the ideas in his proposed Bill for Religious Freedom were rooted in broader freedoms of thought and opinion.\(^{41}\) He was explicating principles of natural law\(^ {42}\) and natural rights\(^ {43}\)—not a religion-focused Establishment Clause, which Virginia then lacked.

In the end, however, the fact that Jefferson was relying on natural-rights principles, rather than a state-level ban on religious establishments, further undermines modern reliance on Jefferson. Understanding why requires a closer look at the actions of the First Congress when it considered whether to propose constitutional amendments (later known as the “Bill of Rights.”).\(^ {44}\)

\(^{39}\) My reference here assumes that religious objections are a variant of “rights of conscience” more generally. Importantly, however, that was not the dominant linguistic practice at the Founding, see McConnell, supra note 14, at 1483–84 (noting the interchangeable usage of “liberty of conscience” and “free exercise of religion” at the Founding), and even today rights of “conscience” can be defined in various ways, see Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. Ill. L. Rev. 1457, 1489–94 (discussing other definitions of “conscience”).

\(^{40}\) Baude & Volokh, supra note 6, at 184–85 (emphasis in original) (footnote omitted); see also Klass, supra note 6, at 1114 (“Jefferson’s statement . . . concerns only the compelled subsidization of religious activities . . . .”); cf. Schwartzman, supra note 4, at 323 n.13 (arguing that Jefferson’s point, though made in the context of religious assessments, is not properly limited to that context).


\(^{42}\) That is, the dictates of reason—notwithstanding the fact that Jefferson couched these ideas in terms of divine will.

\(^{43}\) Jefferson, supra note 1, at 546–47 (“[T]he rights hereby asserted, are of the natural rights of mankind.”). Jefferson was drawing on a long tradition of philosophers who viewed the right to religious belief as inalienable. See, e.g., Francis Hutcheson, *An Inquiry Into the Original of Our Ideas of Beauty and Virtue: In Two Treatises* 185 (Knud Haakonsen ed., Liberty Fund Inc. 2004) (1726); John Locke, *A Letter Concerning Toleration, reprinted in Two Treatises of Government and a Letter Concerning Toleration* 246 (Ian Shapiro ed., 2003) (arguing from natural-rights principles that “nobody ought to be compelled in matters of religion either by law or force”); John Locke, *An Essay Concerning Human Understanding* 82 (Oxford Univ. Press 2008) (1690) (“[I]n bare naked Perception the Mind is, for the most part, only passive; and what it perceives, it cannot avoid perceiving.”) (emphasis in original).

B. The Idiosyncracy of Jefferson

By the time Congress proposed the amendments in 1789, Americans had articulated two competing views about the relationship between the inalienable right of conscience and various aspects of religious establishments, including religious assessments. The dominant view seems to have been that religious establishments did not necessarily violate rights of conscience. Indeed, state constitutions generally treated rights of conscience (or free exercise) distinctly from their allowance or disallowance of religious establishments. But a competing approach to religious freedom—championed most famously by Jefferson and Madison in their fight against religious assessments in Virginia—saw a fundamental opposition between conscience rights and religious assessment schemes. So which of these understandings of religious freedom prevailed when Congress debated and passed the First Amendment?

Debates and votes in the House of Representatives (our only direct source of evidence) comport with the view that rights of conscience were not inherently incompatible with religious establishments. In other words, Jefferson’s arguments in the Bill for Religious Freedom apparently did not shape how the members of the First Congress thought about religious freedom. Evidence demonstrating this point begins with the structure of Madison’s initial proposal.

When Madison proposed amendments on June 8, 1789, he insisted on adding protection for the natural rights of expressive freedom and religious conscience against the federal and state governments alike. Madison’s proposed Establishment

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45 My point here is, of course, not that any state establishment scheme would necessarily comport with free exercise. One can imagine an obvious violation of free-exercise rights if a state forced everyone to worship at a particular church. Rather, my point is that the dominant understanding of free exercise rights was not inherently incompatible with more tolerant forms of religious establishments—contrary to Jefferson’s innovative argument in the mid-1780s. See Philip A. Hamburger, Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights, 1992 SUP. CT. REV. 295, 353 (noting the innovative nature of Jefferson’s position).

46 See Wesley J. Campbell, Religious Neutrality in the Early Republic, 24 REGENT U. L. REV. 311, 323 [hereinafter Campbell, Religious Neutrality] (“[Establishment-related] provisions . . . were often in separate sections and generally did not affect the scope of free exercise protections.”).

47 Because the Senate proceedings were closed to the public, records of Senate debates (with rare exception) do not exist.

48 My methodology is a comparison of the logic of the Jeffersonian argument to the logic of the various proposals and arguments considered in the First Congress. For a different methodology, arguing more broadly that Jefferson’s Bill for Religious Freedom had very little influence on the Founders, see Mark David Hall, Madison’s Memorial and Remonstrance and Jefferson’s Statute for Religious Liberty, and the Creation of the First Amendment, 3 AM. POL. THOUGHT 32 (2014).

49 See 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789–1791: LEGISLATIVE HISTORIES 10 (Charlene B. Bickford & Helen E. Veit eds., Johns
Clause, by contrast, banned only the creation of "any national religion,"50 without a comparable limit on state authority. Thus, although Madison wanted speech and press freedoms and the "equal rights of conscience" to be protected in the federal Constitution against both federal and state action, only the federal government would be federally barred from creating an established church.

Madison’s proposal reveals a simple but crucial point: Contrary to Jefferson’s arguments in the Bill for Religious Freedom, the natural rights of expressive freedom and religious conscience did not necessarily ban religious establishments. Otherwise, the language of Madison’s proposed amendments made no sense: for one thing, the Establishment Clause would have been superfluous (since a recognition of the inalienable right of conscience would already have deprived the government of authority to establish a religion), and for another, the Establishment Clause’s apparent limitation to the federal government would have been unjustified, so long as states were also federally bound to respect rights of conscience. “It is indeed stressing the obvious,” Joseph Snee concludes, “that, in [Madison’s] mind at least, . . . the establishment of a religion by law is not per se an infringement of the equal rights of conscience.”51

Madison’s colleagues apparently agreed. Although the House of Representatives revised his language, it kept the basic substance and structure of the initial proposal: Protection of expressive and religious freedom against the federal and state governments, coupled with an anti-establishment rule to limit

50 A DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 49, at 10 (emphasis added).
only federal power.52 Nobody so much as hinted that the extension of religious and expressive freedom rights against state governments might threaten state religious establishments, notwithstanding the fact that Jefferson’s prior arguments against religious assessments proceeded explicitly from natural-rights principles.53 In other words, nobody in the House of Representatives seems to have interpreted Madison’s 1789 proposal in light of Jefferson’s arguments several years earlier.

Nor is it likely that members of the House of Representatives simply overlooked such a startling implication for state religious establishments. Madison’s colleagues were acutely aware of the political need to protect state religious establishments. In debates over the proposed amendments, Representatives Peter Silvester of New York and Benjamin Huntington of Connecticut each voiced concerns that the proposed language—“no religion shall be established by law”—would be misconstrued in ways that might obstruct the operation of state religious establishments.54 It went without saying that entirely dismantling state religious establishments was a complete non-starter.55 Samuel Livermore of New Hampshire then suggested language that carried the day: “[C]ongress shall make no laws touching religion, or infringing the rights of conscience.”56 With that change, representatives apparently

52 Their proposed third and fourth amendments read: “The Third. Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed. The Fourth. The Freedom of Speech and of the Press . . . shall not be infringed.” 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 49, at 36. Meanwhile, the proposed fourteenth amendment read: “No State shall infringe . . . the rights of conscience, nor the freedom of speech, or of the press.” Id. at 39.


54 Id. at 1260 (Silvester); id. at 1261–62 (Huntington).

55 See Muñoz, supra note 49, at 1104 (“Proposing an amendment to apply against the states was audacious in itself; an amendment that would have made a widespread state practice immediately unconstitutional probably would not have had any chance of being ratified.”). Muñoz’s qualifier “probably” is unnecessary.

56 Id. at 1262. To be clear, I am not attempting to explicate the meaning of the Establishment Clause, or, particularly, whether it permits or forbids governmental support of religion. One scholar has proposed that “limitations [in state constitutions] on religious establishments imposed a prohibition beyond or different from taxpayer funding of religion.” Vincent Philip Muñoz, Church and State in the Founding-Era State Constitutions, 4 AM. POL. THOUGHT 1, 26 (2015). This Essay does not enter that debate. Rather, my point is that the recognition of the natural rights of religious and expressive freedom (as the House of Representatives proposed to extend against state governments) did not of their own force forbid state measures, like religious assessments, that Jefferson and Madison had previously argued were categorically incompatible with the inalienable right of conscience. In other words, the First Congress’s decision to extend rights of religious and expressive freedom against state governments, combined with the First Congress’s desire not to disturb existing state laws (like religious assessment schemes in New England), demonstrates
thought that state religious establishments were sufficiently guarded against federal interference. And when it came time to debate the proposal to protect religious and expressive freedom against state infringement, nobody said anything that suggested any threat to state establishments of religion.57

Of course, the Senate ended up deciding not to endorse the House’s proposed amendment that would have limited state governments.58 But we do not know why.59 Senate records from this period are sparse. The only recorded opposition to the amendment came in the House of Representatives when Thomas Tudor Tucker of South Carolina objected that “[i]t will be much better . . . to leave the state governments to themselves, and not to interfere with them more than we already do.”60 He never suggested that the amendment would have had any particular impact on state religious establishments.

Of course, none of this is to deny the historical importance of the Bill for Religious Freedom to the broader cause of disestablishment. But records from the House of Representatives indicate that Jefferson’s earlier arguments were not on the minds of the framers of the First Amendment.

In sum, the Supreme Court’s myopic reliance on the Jeffersonian proposition as a guide to the First Amendment’s original meaning is profoundly flawed. But debunking this historical mythology does not prove that compelled subsidies are consistent with the original meaning of the First Amendment. Far from it. For that inquiry, we must step back into the eighteenth century and try to comprehend the meaning of the First Amendment in its own time.

that those rights had a more limited reach than what Jefferson and Madison had previously argued in Virginia. Whether religious assessments constituted an “establishment” of religion makes no difference for purposes of this Essay.


59 See Muñoz, supra note 49, at 1108 (“No reason [for the Senate’s rejection of the amendment] was recorded, though given that Senators at the time were elected by state legislatures, it may be that the Senate thought it improper to adopt an amendment applied against the States.”). Interestingly, Justice Brennan posited that the “amendment was defeated in the Senate by the forces Madison feared most, those who wanted the states to retain their systems of established churches.” William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. REV. 535, 537 (1986). Brennan, however, seems to have mistakenly relied on a source that said nothing of the sort. See IRVING BRANT, JAMES MADISON, THE FATHER OF THE CONSTITUTION 271 (1950) (discussing the Senate’s rejection of a state-restraining amendment).

II. NATURAL RIGHTS AT THE FOUNDING

The key to a historical understanding of the First Amendment—as I have argued elsewhere and summarize in this Part—is to step back from a search for the meaning of particular rights and instead try to appreciate how the Founders thought about rights more generally.61 Indeed, the Founders thought very differently about rights than we do today.

For most Americans now, a constitutional “right” is a legally enforceable privilege or immunity—something that the government has to provide us (e.g., our “right” to a jury trial) or something that the government cannot take away (e.g., our “right” to possess personal firearms for self-defense).62 But American elites in the late eighteenth century understood their “rights” differently. For the Founders, rights were divided into two categories: natural rights and positive rights. And unless we approach the task of constitutional interpretation on their terms rather than on ours, the First Amendment’s original meaning will remain elusive.

Natural rights were all the things that we could do simply as humans, without the intervention of a government. As Thomas Paine once put it, “[a] natural right is an animal right, and the power to act it, is supposed . . . to be mechanically contained within ourselves as individuals.”63 Eating, walking, thinking, and praying, for instance, were all things that individuals could do without a government, so they were all natural rights. Meanwhile, positive rights were defined explicitly in terms governmental authority.64 The rights to a jury trial and to habeas corpus, for instance, were positive rights because they were procedures provided by the government.

61 What follows in this Part is mostly derivative of my earlier work, and the text is based on a short summary of that work in Jud Campbell, What Did the First Amendment Originally Mean?, RICH. L. MAG. (2018). The innovative moves in this Essay are limited to Parts I and III.
62 See Richard H. Pildes, Dworkin’s Two Conceptions of Rights, 29 J. LEGAL STUD. 309, 311 (2000) (“I believe [a view of rights as ‘trumps’] is the dominant view of rights in the contemporary political culture (though I do not know how one would prove that).”). Pildes nonetheless argues that this common conception of rights inaccurately describes modern rights jurisprudence, see Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. LEGAL STUD. 725, 729 (1998) (“Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channeling the kinds of reasons government can invoke when it acts in certain arenas.”). I largely agree. See Campbell, Natural Rights, supra note 15, at 315–16.
64 The notion of “positive” rights, then, is contrasted with “natural” rights. It does not refer to the common distinction between “positive” and “negative” rights.
With these definitions in view, the Founders had no need to write out long lists of which types of rights were natural and which were positive. The distinction, to them, was obvious. Thinking, believing, speaking, writing, publishing, and worshipping, for instance, were all things that people could do without a government, so they were readily recognizable as natural rights. When James Madison introduced amendments in the first Congress, for instance, he only mentioned in passing that the freedoms of speech and conscience were among the “natural rights, retained.” Madison’s audience easily understood his point. Expression and religious belief are innate human capacities, so they are clearly natural rights.

We still have not quite arrived at the original meaning of the First Amendment. For that, we need to understand how natural rights constrained governmental power. Surely the First Amendment imposes some limits on Congress. (It starts, after all, with “Congress shall make no law . . . .”) What were those limits?

For the Founders, natural rights were rooted in a philosophical system called social-contract theory. According to this theory, the proper scope of governmental authority is discoverable by first imagining our situation as if there were no government and then considering why we would come together and agree to form a political society through an agreement known as a social contract (or “social compact”). The political society would then agree to a constitution that created a government and granted it certain powers.

Although some ancillary features of social-contract theory were contested, virtually every American political leader in the late 18th century agreed about its core features. Most importantly, the Founders recognized two crucial limitations that social-contract theory imposed on governmental power to restrict natural rights. First, natural rights could be restricted only when the people themselves consented to the restriction, either in person or through their political representatives. This principle was a rallying cry for American colonists advocating

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65 James Madison, Notes for Speech in Congress (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 193, 194 (Charles F. Hobson et al. eds., 1979) (italics omitted).
66 U.S. CONST. amend. I.
68 Id. at 88–89. The term “social compact” is more historical, but it is avoided in this Essay to prevent confusion with the separate notion of “compact” frequently invoked in historical debates over the nature of the federal union.
69 Id. at 98 (“[A]lthough American elites spoke in radically different ways . . . they widely agreed on the substance—that retained natural rights could be regulated in the public interest by the people or their representatives.”).
70 Id. at 92–93.
71 Id. at 92–93, 97–98.
for independence rather than submitting to British taxation when they had no representation in parliament. 72 Second, the government could restrict natural rights only when doing so promoted the public good—that is, the aggregate happiness and welfare of the entire political society. 73 Individuals entering a political society, John Locke explained in his widely read Second Treatise, surrender “as much . . . natural Liberty . . . as the Good, Prosperity, and Safety of the Society shall require.” 74

As a general matter, therefore, the concept of natural rights helped define who could restrict individual liberty (i.e., a representative legislature) and why they could do so (i.e., to promote the public good). But natural rights were not a set of determinate legal privileges or immunities that the government could not abridge. Natural rights, it bears emphasis, could be restricted by law to promote the good of the society. “[T]he right to speak and act,” American patriot James Otis explained at the onset of the colonial conflict, “is limited by the law—Political liberty consists in a freedom of speech and action, so far as the laws of a community will permit, and no farther.” 75 Effectively, this put the legislature—not judges—in primary control over how far to restrict expression and how far to extend rights of religious freedom. The idea of natural rights, in other words, was primarily philosophical, not legal.

At the same time, the Founders also appreciated that certain regulations of expression and religious exercise were not in the public interest and were therefore beyond the scope of legislative power. 76 The famous “rule against prior restraints”—prohibiting the government from requiring pre-approval of publications—is one example in the context of expression. 77 Another is that well-intentioned criticisms of the government could not be punished. 78 (Deliberate efforts to mislead the public were an entirely different matter.) Meanwhile, the Founders widely agreed the government could not punish individuals or deprive them of basic civil privileges on the basis of their religious

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72 Id. at 98.
73 Id. at 93–94.
74 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 130 (1690), reprinted in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 156 (Ian Shapiro ed., 2003).
76 Campbell, Natural Rights, supra note 15, at 291 (“Governmental powers recognized at common law were presumptively acceptable, while common-law limits on those powers (such as the rule against prior restraints) recognized presumptively unjustified abridgments of natural rights.”).
77 Id. at 289–90.
78 Id. at 280–87.
views.\textsuperscript{79} The First Amendment thus prevented temporary legislative majorities from abandoning these settled principles.

How much further the First Amendment went, though, was up for debate precisely because the Founders often disagreed about exactly what restrictions of expression promoted the public good. This conflict was especially clear in the late 1790s as Americans clashed over the constitutionality of the federal Sedition Act.

Members of the Federalist Party—the party of President John Adams—argued that maintaining a republican government required punishing those who falsely and maliciously criticized the government.\textsuperscript{80} “[E]very individual is at liberty to expose, in the strongest terms, consistent with decency and truth all the errors of any department of the government,” Federalist jurist Alexander Addison wrote.\textsuperscript{81} But this hardly implied constitutional protection for deliberately misleading the public. “Because the Constitution guaranties the right of expressing our opinions, and the freedom of the press,” Federalist congressman John Allen asked rhetorically, “am I at liberty to falsely call you a thief, a murderer, an atheist?”\textsuperscript{82} Stopping the spread of lies, Federalists insisted, was essential to maintaining a well-informed electorate and, thus, a republican government.

In response, Jeffersonian-Republican opponents of the Sedition Act did not even try to defend the notion that all speech is beneficial. “It may perhaps be urged, and plausibly urged, that the welfare of the community may sometimes, and in some cases, require certain restrictions on [an] unlimited right of enquiry,” Elizabeth Ryland Priestley admitted.\textsuperscript{83} The problem for Republicans, however, was the prospect of governmental abuses of power. Authority to punish sedition, Priestley explained, “once conceded, may be extended to every [opinion] which insidious despotism may think fit to hold out as dangerous.”\textsuperscript{84} In other words, Republicans still assessed questions of free speech in terms of the public good, but they worried that Federalists were pursuing their own narrow partisan

\textsuperscript{79} My point here is not to make any effort to settle the precise boundaries of this right. Rather, it is indisputable that Americans widely accepted basic principles of religious freedom embodied in, for instance, the Toleration Act. 1 W. & M., ch. 18.

\textsuperscript{80} Campbell, Natural Rights, supra note 15, at 283.

\textsuperscript{81} ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY, ON THE PROCEEDINGS OF SUNDRY OF THE OTHER STATES IN ANSWER TO THEIR RESOLUTIONS 42 (Philadelphia, Zachariah Poulson, Jr. 1800).

\textsuperscript{82} 8 ANNALS OF CONG. 2097 (1798) (statement of Rep. John Allen).


\textsuperscript{84} Id. at 63–64.
interests rather than the general welfare and that these abuses of power would stifle useful public debate.\(^{85}\)

In sum, the founders thought the First Amendment required Congress to infringe expressive and religious freedom only in promotion of the public good, while also guaranteeing more specific legal rules that had long protected these rights. The Amendment, in other words, stood for a general principle—one that left room for considerable debate about how it should be applied in practice—and also for the entrenchment of more specific settled rules. The First Amendment thus shaped debate about expressive and religious freedom while also standing as a bulwark against constitutional backsliding. The Amendment was not simply a counter-majoritarian limit on legislative power. However, once the people agreed on core principles, the legislature could not turn back.

This process of accumulating and refining constitutional limits over time through political means is mostly foreign to Americans today. Rights in the modern sense are counter-majoritarian constraints on legislative power, so it seems strange that their scope could somehow depend on political decisions. For modern Americans, judges have that job.\(^{86}\)

For people born and raised in the tradition of the customary British constitution, however, the logic of recognizing constitutional limits through political rather than judicial means made perfect sense. “A customary law carries with it the most unquestionable proofs of freedom,” explained James Wilson, a delegate to the Constitutional Convention and later a Supreme Court justice.\(^{87}\) Politicians do abuse power, of course. But for the Founders, once legislators—acting on behalf of the people—agreed on a constitutional principle, and once that settlement remained in place for considerable time, the principle became binding.\(^{88}\) “[L]ong and uniform custom,” English jurist Richard Wooddeson noted in 1792, “bestows a sanction, as evidence of universal approbation and acquiescence.”\(^{89}\) It was, in other words, as if the people themselves had spoken.

The First Amendment fit within this familiar tradition. Well-established principles about expressive and religious

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\(^{85}\) For more detailed analysis of Republic concerns, emphasizing Republican fears of political bias in the enforcement of a Sedition Act, see Jud Campbell, The Invention of First Amendment Federalism, 97 TEX. L. REV. 517 (2019).

\(^{86}\) See generally Greene, supra note 17 (assessing American views of rights, including the development of those views).

\(^{87}\) JAMES WILSON, Municipal Law, reprinted in 1 COLLECTED WORKS OF JAMES WILSON 549, 569 (Kermit L. Hall & Mark David Hall eds., 2007).

\(^{88}\) Campbell, Natural Rights, supra note 15, at 290–92.

\(^{89}\) RICHARD WOODDESON, ELEMENTS OF JURISPRUDENCE: TREATED OF IN THE PRELIMINARY PART OF A COURSE OF LECTURES ON THE LAWS OF ENGLAND 46 (London, T. Payne & Son 1783).
freedom would limit Congress, and judges and juries could enforce those settled boundaries of governmental authority. But otherwise the First Amendment would leave the task of defining the public good to the people and their representatives. For the founders, judges could not create new limits on governmental authority.  

III. COMPULLED SUBSIDIES

This Part considers historical evidence regarding compelled subsidies in light of the general framework just laid out. My argument is that Founding Era rights of expression and religious exercise—undergirded by freedoms of thought and conscience—neither entirely excluded nor inviolably privileged constitutional arguments against compelled subsidies. This Part begins by applying the theory in Part II to the problem of compelled subsidies. Next, it shows how that theory maps onto available historical evidence.

A. Applying a Natural Rights Framework

From the standpoint of social-contract theory, compelled subsidies plainly infringe natural liberty. Forcing someone to do something—particularly something that itself does not violate the natural rights of others—clearly implicates the general principle that the government may not restrict natural liberty unless doing so promotes the public good.

Indeed, the expansive breadth of natural rights meant that the Founders had no need to engage in the extensive categorization efforts that abound in modern rights jurisprudence—defining, for instance, what activities count as “speech” or what activities count as “religious.” 91 This is not to say that inquiries of this sort were necessarily irrelevant at the Founding. People back then, for example, could invoke natural-rights premises to argue that government had authority over non-religious issues but not over religious concerns. 92 But this was merely an argument—and one that relied on a series of contestable premises and conclusions about the effects of

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91 Campbell, Natural Rights, supra note 15, at 287 n.188; see also Greene, supra note 17, at 38 (noting how, under the modern approach to rights, “analysis is weighted toward threshold interpretive questions”).

92 See, e.g., MADISON, Memorial and Remonstrance, supra note 11.
governmental power vis-à-vis religion. Someone else might just as easily argue using entirely different categories—perhaps a narrower category (e.g., non-harmful religious views) or a broader one (e.g., thoughts). In other words, terms like “speech” and “religion” were not references to fixed categories of natural rights with clearly delineated boundaries. Nor did the First Amendment suggest anything of the sort. (If it had, the Ninth Amendment would have immediately dispelled that suggestion.) In this sense, a constitutionally grounded argument against compelled subsidization was readily available at the Founding—either under the First Amendment or under general principles of social-contract theory.

Nonetheless, this threshold inquiry about the scope of rights was far less significant back then for the simple reason that the public good took priority. Forcing individuals to subsidize objectionable activities—whether related to speech, religion, or anything else—did not necessarily violate fundamental law. To be sure, any compelled subsidy—whether in the form of taxes, personal services, or otherwise—implicated the general principles of social contract theory, but compelled subsidies were not therefore categorically disallowed. Consequently, the Founders had no need to analyze whether compelled subsidies for speech operated as abridgments of “speech” within the meaning of the First Amendment. Outside the more determinate limits on governmental authority set by fundamental positive rights, natural rights of all sorts—speech-related or not—enjoyed the same basic protections under fundamental law.

Natural rights at the Founding thus did not impose fixed limits on governmental power to compel people to turn over money or resources. In their famous protests against taxation without representation, for instance, the American colonists invoked their “unalienable” natural right of property, but this

93 See Campbell, Natural Rights, supra note 15, at 269–70 (noting the fluidity of terminology and categories).
94 U.S. CONST. amend IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); see Campbell, Natural Rights, supra note 15, at 307. As argued elsewhere, the enumeration of retained natural rights in the text of a constitution or bill of rights had no effect on the judicial enforceability of those rights. See Jud Campbell, Judicial Review, supra note 15, at 572–76. The same thing was not necessarily true of positive rights. See id. at 577 (“By the late 1780s, however, enumerating rights was not always just a declaratory exercise. Constitutional enumeration also had come to provide an avenue for recognizing the fundamentality of positive rights not supported by custom.”).
95 Cf. Baude & Volokh, supra note 6, at 172–94 (extensively analyzing whether being compelled to give money that is used for speech is an abridgment of “speech” within the meaning of the First Amendment).
96 See Campbell, Natural Rights, supra note 15; see discussion, supra note 79, and accompanying text.
97 See Campbell, Republicanism, supra note 15, at 98.
argument hardly suggested a general protest against any governmental authority to tax, nor did it suggest any exemption from taxes based on conscientious objections. Rather, the taxing authority was circumscribed by axioms of social-contract theory, which required representative consent and pursuit of the public good. The same principles straightforwardly applied to any other compulsory payments.

B. Compelled Subsidies at the Founding

So far, this Part has proceeded deductively—taking the framework outlined in Part II and applying it to the problem of compelled subsidies. A more inductive approach, focused on how particular Founders viewed the constitutionality of compelled subsidies for speech, is not feasible for the simple reason that no such controversies are known. But, debates over legally compelled payments did arise with respect to another natural right mentioned in the First Amendment: free exercise.

Evidence from religious-freedom disputes reinforces that compelled subsidies could implicate natural-rights concerns. At the same time, however, recorded debates indicate that these natural rights against compelled subsidization were subject to legislative regulation, without any suggestion of judicial oversight.

This Part focuses on two sources of evidence: First, debates in the First Congress over whether those who religiously objected to bearing arms should have to make an “equivalent” payment in lieu of militia service, and, second, religious-assessment provisions in various state laws and constitutions.

1. “Equivalents”

As the First Congress convened in 1789, several state constitutions or declarations of rights accommodated individuals who religiously objected to militia service. But there was often a catch. As New Hampshire’s 1783 constitution put it, “No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.”

Several other states had comparable provisions,

98 Id.

99 Outside of this particular context, some early commentators endorsed a judicial check on extreme abuses of legislative authority, where there was manifest disregard for the public good. See Campbell, Judicial Review, supra note 15, at 573–74.


101 See, e.g., N.Y. CONST. of 1777, § XL, reprinted in The Complete Bill of Rights 277 (Niel Cogan ed., 2d ed. 2015) (“That all such of the Inhabitants of this State being of the People called Quakers, as from Scruples of Conscience may be averse to the bearing of Arms, be therefrom excused by the Legislature; and do pay to the State such Sums of Money in Lieu of their personal Service, as the same may, in the
and when the ratifying conventions in Virginia, North Carolina, and Rhode Island met, they each recommended a federal constitutional amendment providing “[t]hat any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.”\(^{102}\) (This practice was also known as paying for a “substitute.”)

Madison responded to these proposals by including in his original draft of the Second Amendment a concluding provision that “no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.”\(^{103}\) Notably, Madison’s proposal—unlike those submitted by Virginia, North Carolina, and Rhode Island—seemed to make the issue of equivalents a matter of legislative discretion, not constitutional command.\(^{104}\) The committee that initially revised Madison’s proposals reported—perhaps at the behest of Roger Sherman of Connecticut\(^{105}\)—a slightly different version, potentially broadening the scope of the accommodation: “no person religiously scrupulous shall be compelled to bear arms.”\(^{106}\)

The removal of “in person” from Madison’s initial proposal did not go unnoticed. When the amendment came up for debate in the full house, James Jackson of Georgia “moved to amend the clause, by inserting at the end of it ‘upon paying an equivalent to be established by law’.”\(^{107}\) Conscientious objectors, in other words, would have to compensate the government for their refusal to bear arms.

\(^{102}\) See Muñoz, supra note 49, at 1111 (emphases added) (citing 5 THE FOUNDERS’ CONSTITUTION 16, 18 (Philip B. Kurland & Ralph Lerner eds., 1987).


\(^{104}\) See McConnell, supra note 14, at 1500.

\(^{105}\) The removal of “in person” also appears in a committee draft attributed to Roger Sherman, see THE COMPLETE BILL OF RIGHTS 264 (Niel Cogan ed., 2d ed. 2015), and as noted below, Sherman was a leading opponent of requiring Quakers to pay an equivalent.


Jacksons’s proposal implicated the problem of compelled subsidies. Many Quakers, after all, did not simply object to bearing arms in person. They were, as Roger Sherman quickly pointed out, “equally scrupulous of getting substitutes or paying an equivalent; many of them would rather die than do either one or the other.”\(^{108}\) John Vining of Delaware echoed this claim.\(^{109}\) To be sure, the funds were not to be used for speech or religious exercise. But they do implicate the conscience-based logic of modern compelled-subsidy doctrine. As Sherman and Vining emphasized, Quakers conscientiously objected to paying an equivalent because of the way that the funds would be used.\(^{110}\)

From the standpoint of natural rights, however, such accommodations—although preferable, when possible—were not absolutely required. “No man can claim this indulgence of right,” Egbert Benson of New York insisted, arguing against a specific, constitutionally ossified protection for religious dissenters.\(^{111}\) A few days later, Thomas Scott of Pennsylvania echoed Benson’s point. Recognizing a right against being compelled to bear arms, Scott argued, would also bar the government from collecting “an equivalent.” He was not against such a right as an “indulgence by law.” But Scott stressed the countervailing challenges of administering an accommodation regime, the importance of maintaining viable militias, and concerns that atheists might take advantage of the law to avoid militia service. Consequently, Scott “conceive[d] it is a matter of legislative right altogether”—not the sort of thing that ought to be enumerated in the Constitution.\(^{112}\)

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\(^{108}\) Id. at 1286–87.

\(^{109}\) Id. at 1287 (“[He] hoped the clause would be suffered to remain as it stood, because he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the government, was the same as if the person himself turned out to fight.”). For purposes of this paper, what matters is the perception of Quaker beliefs among members of the First Congress—not the actual beliefs. On that issue, there is some debate about the extent to which Quakers and others objected to the payments of equivalents. See Philip Hamburger, Religious Freedom in Philadelphia, 54 EMORY L.J. 1603, 1606 n.6 (2005).


\(^{111}\) CONG. REG. [Philadelphia], Aug. 17, 1789, reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 53, at 1287. Benson’s reference to “right” in a non-discretionary sense indicates that he was referring to the lack of any determinate legal immunity (i.e., a fundamental positive right); he was not, on my reading, saying anything about natural rights, except by implication denying that those rights translated in this context into determinate legal immunities. See Campbell, Natural Rights, supra note 15 (distinguishing between natural rights and fundamental positive rights).

Elias Boudinot of New Jersey then defended the proposed accommodation regime, emphasizing practical and ethical problems with forcing individuals to violate their consciences. “What dependence can be placed in men who are conscientious in this respect?” he asked, noting that “[i]n forming a militia we ought to calculate for an effectual defence, and not compel characters of this description to bear arms.”113 People who would “rather die than use [arms],” Boudinot was suggesting, would not be very good soldiers. Plus, compelling people to violate their consciences would violate principles of “justice.”114

At the end of the discussion (the rest of which was not recorded), the House of Representatives voted to add “in person” to the conscientious-objector provision,115 ensuring that conscientious objectors would not have to bear arms but also, by implication, accepting that they could be forced to pay an equivalent. The Senate later rejected the entire clause, though no records survive explaining why.116

Only two years later, the topic of equivalents resurfaced in debates over a proposed bill to regulate state militias. Again, the issue was not exactly compelled subsidies for speech. But the payments were to be used in a way that implicated natural rights, so they provide the best available evidence of how the members of the First Congress viewed mandatory payments that potentially abridged First Amendment rights. Once again, the leading view was to exempt Quakers from militia service but nonetheless require them to pay an equivalent.

The debate began when Aedanus Burke of South Carolina spoke out in favor of exempting Quakers not only from militia service but also from any attendant fines or payments for non-service. “[I]t was not consonant with the principles of justice to make those conscientiously scrupulous of bearing arms pay for not acting against the voice of their conscience,” he insisted.117 Nobody was supposed to “suffer[ ] on account of his conscientious scruples,” Burke explained, “and yet we are going to make a respectable class of citizens pay for a right to a free exercise of their religious principles: It was contrary to the constitution; it was contrary to that sound policy, which ought to direct the house in establishing the militia.”118

Responding, once again, to the argument against equivalents was James Jackson of Georgia. Determining who

113 Id. at 1309.
114 Id.
115 Id.
116 Muñoz, supra note 49, at 1116.
118 Id.
genuinely objected to militia service was a fools errand, he stated: “Who was to know . . . what persons were really conscientiously scrupulous?” If Quakers and others like them were not even required to pay an equivalent, Jackson implored, “it was laying the axe to the root of all militia.”119 “[O]peration of this privilege,” he asserted when debate resumed the following day, “would . . . make the whole community turn Quakers.”120

But Jackson’s argument was deeper. He also emphasized the undergirding principles “of the social compact.”121 Those principles, he noted, required equal treatment as well as reciprocal recognition of social duties. Requiring Quakers to pay for their non-service, Jackson insisted, was not a special tax on their religion. “[I]t is an equivalent for personal service due to society. . . . [A]ll should pay it for the benefit of society; some may pay it in personal service—those averse to this mode should pay it in money.”122 Jackson, in other words, was arguing against equivalents from within the framework of social-contract theory, invoking the undergirding principle of impartial treatment.

Once again, John Vining and Roger Sherman were outspoken in favor of religious accommodations. Conscientious objectors, Vining argued, could be required to pay a fine “applied to a civil use, in which case even the persons scrupulous of bearing arms could make no reasonable objection.”123 Exempting them from militia service while forcing them to pay toward militia expenses, however, was “not granting them any kind of privilege: it is like inviting them to a splendid banquet, and shutting them out; saying ‘walk in gentlemen,’ and yet taking care to keep the door bolted within.”124 Sherman similarly argued against forcing Quakers to pay an equivalent toward militia costs, proposing instead that Congress might lay a general capitation tax that exempted members of the militia, thus addressing Jackson’s concerns about unequal burdens while also accommodating religious objections.125 Madison stated his

119 Id.
121 GEN. ADVERTISER (Phila.), Dec. 24, 1790, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 120, at 123. This is a different newspaper report of the same speech by Jackson on December 22, 1790.
122 Id. at 123.
123 PENN. PACKET (Phila.), Dec. 28, 1790, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, supra note 120, at 141. This, too, is a different newspaper report of the debates in the House of Representatives on December 22, 1790.
124 Id.
sympathy for this view but—sensing the prevailing mood—
noted that granting religious accommodations without requiring
an equivalent was politically “impracticable.”

Eventually the House decided to leave the issue to the
discretion of each state rather than set a uniform national rule for
militia exemptions. But the debate revealed two points
relevant to compelled subsidies. First, although some
representatives argued that forcing religious objectors to pay an
equivalent would violate the Constitution, and others thought
that not forcing them to pay an equivalent would violate the basic
terms of the social contract, the dominant view was somewhere
between these poles. The issue was, in short, understood as one
within legislative discretion. Certainly nobody suggested that
judges would step in to decide the matter under the Free Exercise
Clause.

Second, although Congress ended up leaving the issue to
the states, the debate revealed a nuanced perspective on how
compelled payments might implicate constitutional principles.
Interestingly, most members of the First Congress who spoke
treated compelled payments as somehow less offensive to
religious freedom than compelled militia service, even though
representatives on both sides of the issue apparently understood
Quakers to be just as opposed to paying an equivalent as to
directly serving in the militia. This poses something of a
puzzle.

Perhaps some people silently agreed with William Giles
of Virginia that compelled subsidies were categorically different
than compelled conduct. “He was in favor of exempting every
many from doing that, which his general conduct evinced was
contrary to his conscience,” Giles explained, “but it cannot be
said that it is against the conscience of a Quaker to hold and
possess property.” In other words, because only money was at
stake, equivalents posed no threat to conscience. (Decades later,
Massachusetts Justice Theophilus Parsons famously restated this

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126 Id. at 162; see also id. at 164 (“[Madison] said he should acquiesce in an
equivalent—tho he would prefer a gratuitous exemption.”).
127 See Militia Act of 1792, § 2, 1 Stat. 271 (1792) (“[A]ll persons who now are or may
hereafter be exempted by the laws of the respective states, shall be, and are hereby
exempted from militia duty . . . .”).
128 See, e.g., remarks of James Jackson, Dunlap’s Am. Daily Advertiser (Phila.),
Jan. 5, 1791, reprinted in 14 Documentary History of the First Federal
Congress at 177 (“Quakers . . . pray not for exemption only, but to be exempted
without the payment of an equivalent. It will afford them no redress, nor given them
any satisfaction.”); remarks of Roger Sherman, Penn. Packet (Phila.), Dec. 31,
1790, reprinted in 14 Documentary History of the First Federal Congress at
149 (“As to their being obliged to pay an equivalent, gentlemen might see that this
was as disagreeable to their consciences as the other.”).
129 Gazette of the United States (Phila.), Dec. 29, 1790, reprinted in 14
Documentary History of the First Federal Congress at 163.
view, writing that a compelled-subsidy claim “seems to mistake a man’s conscience for his money.”)

Yet nobody except Giles articulated such an absolutist approach during debates in the First Congress. Most representatives, it seems, thought that being forced to pay for objectionable activities at least implicated principles of religious freedom—even though such compulsion was not categorically barred by the First Amendment. Although no speaker explicitly resolved this paradox, my suspicion is that the general preference for allowing Quakers not to bear arms in person but nonetheless requiring payments proceeded from policy-based rationales—exactly the type of assessments of the general welfare that social-contract theory demanded. As several members noted, for instance, requiring Quakers to pay an equivalent would help stem potential problems with fraudulent claims while avoiding the counterproductivity of including pacifists in the militia.

In sum, evidence from the First Congress comports with the general approach to rights laid out in Part II. Members of the House—both in discussing the proposed Second Amendment and in later debates over the militia bill—seemed to think both that compelled subsidies could at least implicate rights of conscience and that those duties were not necessarily violations of the First Amendment.

2. Religious Establishments

Objections to compelled subsidies for religion could easily arise in the context of religious establishments. And, once again, the way that the Founders responded to this problem reveals a diversity of approaches, bolstering the thesis that the Founders had a less categorical or legalistic approach to rights than we generally do today.

Many states guaranteed a right against compelled subsidization of religion as part of the state’s guarantee of free exercise. “[N]o man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent,” Delaware’s

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130 Barnes v. Inhabitants of the First Parish in Falmouth, 6 Mass. (6 Tyng) 401, 408 (1810); see also Campbell, Religious Neutrality, supra note 46, at 342–43 (discussing the Barnes case).

131 Of course, newspaper reports of congressional proceedings were not necessarily comprehensive.


133 Many states did not use the term “free exercise,” but they each had (in some form) a statutory or constitutional guarantee of religious exercise.
Declaration of Rights stated.\textsuperscript{134} These provisions did not necessarily disallow religious assessment schemes, but they did ensure that opt-out provisions accommodated people who preferred not to fund a particular religion.\textsuperscript{135}

Some state protections, though, were less generous with respect to opt-outs. Georgia and New Hampshire, for instance, each protected only a right against compelled subsidization of religious instructors of other denominations.\textsuperscript{136} Parishoners did not have a choice about whether to financially support pastors of their own denomination. Meanwhile, Massachusetts permitted individuals to earmark their payments for “the support of public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends;

\textsuperscript{134} Delaware Declaration of Rights of 1776, § 2, \textit{reprinted in The Complete Bill of Rights} 15 (Niel Cogan ed., 2d ed. 2015); \textit{see also} N.J. Const. of 1776, art. XVIII, \textit{reprinted in The Complete Bill of Rights} 24 (Niel Cogan ed., 2d ed. 2015) (“nor shall any Person within this Colony ever be obliged to pay [toward religion] contrary to what he believes to be Right, or has deliberately or voluntarily engaged himself to perform.”); N.C. Const. of 1776, § XXXIV, \textit{reprinted in id.} at 29 (“neither shall any Person, on any Pretence whatsoever, be compelled to attend any Place of Worship, contrary to his own Faith or Judgment; nor be obliged to pay for the purchase of any Glebe, or the building of any House of Worship, or for the Maintenance of any building of any house of worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all Persons shall be at Liberty to exercise their own Mode of Worship.”); Penn. Const. of 1776, Declaration of Rights, art. II, \textit{reprinted in The Complete Bill of Rights} 31 (Niel Cogan ed., 2d ed. 2015) (“[N]o man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent.”); S.C. Const. of 1778, \textit{reprinted in The Complete Bill of Rights} 38 (Niel Cogan ed., 2d ed. 2015) (“No Person shall, by Law, be obliged to pay towards the Maintenance and Support of a religious Worship that he does not freely join in, or has not voluntarily engaged to support.”); VT. Const. of 1777, ch. I, § 3, \textit{reprinted in The Complete Bill of Rights} 39 (Niel Cogan ed., 2d ed. 2015) (“no Man ought or of Right can be compelled to attend any religious Worship, or erect, or support any Place of Worship, or maintain any Minister contrary to the Dictates of his Conscience.”); Virginia Bill for Religious Freedom of 1786, \textit{reprinted in The Complete Bill of Rights} 48 (Niel Cogan ed., 2d ed. 2015) (“That no many shall be compelled to frequent or support any religious worship, place or ministry whatsoever.”). New York’s Constitution guaranteed “free Exercise and Enjoyment of religious Profession and Worship” but did not make any statements about religious assessments. \textit{See} N.Y. Const. of 1777, art. XXXVIII, \textit{reprinted in The Complete Bill of Rights}—25 (Niel Cogan ed., 2d ed. 2015).

\textsuperscript{135} \textit{See, e.g.}, Maryland Declaration of Rights of 1776, § 33, \textit{reprinted in The Complete Bill of Rights} 17 (Niel Cogan ed., 2d ed. 2015) (permitting the legislature to “lay a general and equal tax for the support of the Christian religion, leaving to each individual the power of appointing the payment over of the money collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular country”).

\textsuperscript{136} Ga. Const. of 1777, art. LVI, \textit{reprinted in The Complete Bill of Rights} 16 (Niel Cogan ed., 2d ed. 2015); N.H. Const. of 1783, Part I, Art. VI, \textit{reprinted in The Complete Bill of Rights} 22 (Niel Cogan ed., 2d ed. 2015); \textit{see also} Ga. Const. of 1789, art. IV, § 5, \textit{reprinted in The Complete Bill of Rights} 16 (Niel Cogan ed., 2d ed. 2015) (“All persons shall have the free exercise of religion; without being obliged to contribute to the support of any religious profession of their own.”).
otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said monies are raised.”

Although not always clear, these protections against compelled subsidization seem to have been part of—and not merely supplementary to—the right of free exercise. Georgia’s Constitution of 1789, for example, stated that “All persons shall have the free exercise of religion; without being obliged to contribute to the support of any religious profession of their own,” indicating that the second clause (against some compelled subsidies) clarified the first clause (guaranteeing free exercise).

Once again, Founding Era evidence shows that compelled subsidies could implicate not just property rights but also rights of conscience, depending on how the money was used. State constitutional provisions further point against any widespread acceptance of William Giles’s argument in the First Congress that rights of property were entirely separate from rights of conscience. Nonetheless, the diversity among these clauses also indicates the lack of any fixed, rigid rule against forced subsidization that abridged individual conscience.

IV. Conclusion

It is long past time for the Supreme Court to reconsider its reliance on Thomas Jefferson’s famous statement that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.” Not only does evidence from the First Congress disprove that the framers of the First Amendment were relying on Jefferson but current doctrine is not even consistent with his actual views. Plus, modern constitutional interpreters of nearly all stripes now focus on some form of original meaning—not superficial reliance on isolated statements of particularly revered “Founding Fathers.” As a foundation for modern law, the Jeffersonian proposition needs to go.


138 GA. CONST. of 1789, art. IV, § 5, reprinted in THE COMPLETE BILL OF RIGHTS 16 (Niel Cogan ed., 2d ed. 2015). Along similar lines, the Delaware Declaration of Rights of 1776 coupled the right against compulsory subsidization of ministers with a right against “be[ing] compelled to attend any religious worship”—a right that clearly fell within the scope of the more general guarantee of “the free exercise of religious worship” guaranteed in the same provision. Delaware Declaration of Rights of 1776, § 2 reprinted in THE COMPLETE BILL OF RIGHTS 15 (Niel Cogan ed., 2d ed. 2015).

139 See Campbell, Religious Neutrality, supra note 46.

140 JEFFERSON, supra note 1, at 545.
A broader survey of Founding Era ideas about rights of religious and expressive freedom reveals that modern compelled-subsidy doctrine sits in an uneasy tension with original meaning. On the one hand, the Founders generally thought that compelling people to furnish money could at least implicate rights of conscience. But on the other hand, legal protections against compelled subsidies were left almost entirely to legislative judgment, without the judicial oversight that defines our modern approach to constitutional rights. Looking back to Founding Era debates about compelled subsidies thus reinforces an important but often neglected point: The Founders understood the entire concept of rights very differently than Americans do today.
THE COMPLICATED STORY OF FOSTA AND SECTION 230

Eric Goldman*

INTRODUCTION

In 1996, Congress enacted 47 U.S.C. § 230 (“Section 230”), which effectively protects online services from liability for third party content.1 This simple policy set the legal foundation for the modern Internet. For many of the most popular online services, publishing third party content is their core value proposition.2 Section 230 enables those services to start, grow, and thrive without crippling legal exposure or expensive editorial staffs. The result is that Section 230 now casts a long shadow over the Internet and, by extension, our society. Indeed, many Americans interact with Section 230-immunized services dozens of times per day.3

Section 230 was enacted in the mid-1990s, during the height of optimistic and utopian views about the Internet.4 Over the past two decades, the pendulum of public opinion has swung the other direction. Prevailing views about the Internet have turned increasingly pessimistic and cynical.5 Given Section 230’s outsized role in the modern Internet, it is not surprising that views about its policy result have similarly degraded.

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3 This includes every time you check your email, use a search engine, visit any social media service like Facebook and Twitter, check Wikipedia, shop at online marketplaces like Amazon or eBay, use a sharing service like Airbnb, play many types of interactive online games, and visit consumer review services like Yelp or TripAdvisor.
4 Eric Goldman, The Third Wave of Internet Exceptionalism, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 165 (Berin Szoka & Adam Marcus eds., 2010).
Congress has occasionally tinkered with Section 230 over the decades, generally to enhance its scope.\(^6\) Congress never materially diminished the scope of Section 230’s immunity in its first 22 years.\(^7\)

In 2018, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), designed to attack the online promotion of sex trafficking victims, in part, by, reducing Section 230’s scope.\(^8\) FOSTA thus represents new ground for Congress and the Internet; it peels back Section 230 to create some new legal exposure for online services for the first time in over two decades.

Unfortunately, FOSTA almost certainly will not accomplish Congress’ goals of protecting sex trafficking victims and reducing their victimization. This essay explains why Congress passed FOSTA, how FOSTA modified existing law, why FOSTA has little chance of succeeding, and what FOSTA signals about the future of Section 230 and the Internet.

I. BACKGROUND ON ONLINE COMMERCIAL SEX ADS

People have advertised commercial sex online for a long time. In the 2000s, sex worker advertising consolidated in Craigslist’s “Erotic Services” category. Not all “Erotic Services” are illegal,\(^9\) but many listings advertised illegal prostitution.\(^10\) This led to a key lawsuit (plus other threats of lawsuits) against Craigslist, which it defeated on Section 230 grounds because the ads came from third parties.\(^11\) Nevertheless, the pressure grew so


\(^7\) In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act, which had an ambiguous effect on Section 230’s scope. Eric Goldman, Unlawful Internet Gambling Enforcement Act of 2006, TECH. & MKTG. L. BLOG (Dec. 13, 2006), https://blog.ericgoldman.org/archives/2006/12/unlawful_intern.htm. I am not aware of any litigation exploring Section 230’s revised boundaries due to this amendment.

\(^8\) See infra Part II.

\(^9\) For example, advertisements for “bachelor party strippers” or “nude housekeeping” may be completely legal. Cf. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (holding that the First Amendment protects nude dancing).


\(^11\) See id. at 969.
great that Craigslist finally abandoned the category (which it had renamed “Adult Services”) in 2010.12

A. The Rise of Backpage

After a brief period of chaos, commercial sex advertising reconsolidated on another online classified service, Backpage.com.13 Unlike Craigslist, which generally viewed such ads as an unavoidable consequence of its open-door approach to classified ads, Backpage allegedly sought to maximize its profits from these advertisements.14 Backpage’s apparent venality inflamed regulators, who viewed Backpage’s aggressiveness as blatantly illegal and Backpage’s lack of liability for third party classified ads as outrageous.

Furthermore, some listings for commercial sex on Backpage advertised victims of sex trafficking.15 Backpage claimed it took steps to find those ads and report them to law enforcement.16 However, many regulators felt that Backpage was not doing enough and instead profited from their victimization.

Despite Backpage’s facilitation of commercial sex advertising and possible complicity in sex trafficking victimization, Backpage won a series of courtroom victories based on Section 230 (because the classified ads were third party content and Section 230 shields websites from liability for third party content), the First Amendment (among other reasons, because holding publishers liable for third party advertisements may not be the least restrictive option), and other grounds.17 This left regulators aghast—surely Section 230 did not make it impossible to shut down Backpage’s seemingly illegal activity?

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14 Id.
15 “Sex trafficking” means paid sexual activity by minors or someone compelled or forced to engage in such activity. See, e.g., 18 U.S.C. § 1591(a)(2).
B. Congress Responds to Backpage

Congress routinely introduces numerous legislative proposals to fight sex trafficking. These legislative proposals routinely garner substantial congressional support—appropriately so given the horrors of sex trafficking. The Backpage situation virtually ensured a collision in Congress between some anti-sex trafficking advocates and Section 230 proponents.

In 2015, Congress enacted the SAVE Act, expressly targeting Backpage. Its provisions extended the existing federal sex trafficking crime to include knowingly advertising sex trafficking victims. Though the SAVE Act did not amend Section 230 directly, it fit within Section 230’s existing exclusion for federal criminal prosecutions.

Backpage unsuccessfully challenged the SAVE Act preemptively. The court dismissed the challenge on procedural grounds and flatly declared that the First Amendment does not protect ads for illegal sex trafficking. Despite the SAVE Act’s targeting of Backpage, the SAVE Act’s new crime apparently has never been used against Backpage or anyone else.

In 2017, despite the SAVE Act’s apparent failure to eradicate Backpage, Congress revisited the Backpage problem. In Spring 2017, Representative Ann Wagner, who had sponsored the SAVE Act, introduced a complex and harsh House bill named “Allow States and Victims to Fight Online Sex Trafficking Act” (“FOSTA”). In Summer, the Senate introduced a similar, but slightly less harsh, bill: “The Stop Enabling Sex Traffickers Act” (“SESTA”).

The Senate moved more quickly than the House. After a Senate Commerce Committee hearing in September 2017, SESTA’s sponsors introduced a slightly revised version.
leading Internet trade association, the Internet Association, dropped its opposition and endorsed the revised SESTA.\textsuperscript{27} Other Internet company advocates still objected, but the bill passed the Senate Commerce Committee.\textsuperscript{26}

In the House, the House Judiciary Committee introduced and passed a substitute version of FOSTA which focused on commercial sex advertising, not sex trafficking.\textsuperscript{29} The substitute FOSTA version was intended as a policy alternative to SESTA, and SESTA opponents viewed it as less harmful to the Internet.\textsuperscript{30} However, after some backroom negotiations, a compromise was struck: instead of picking between SESTA and the substitute FOSTA, the two disparate policy solutions were combined into a new “Worst of Both Worlds” version of FOSTA.\textsuperscript{31} The Worst of Both Worlds FOSTA passed both chambers by overwhelming margins—the House in February 2018,\textsuperscript{32} and the Senate in

\begin{footnotesize}

\textsuperscript{28} Press Release, S. Comm. on Com., Sci., and Tech., Senate Commerce Approves the Passage of S. 1693 by the Committee (Nov. 8, 2017).


\end{footnotesize}
II. WHAT FOSTA DOES

Combining the revised SESTA and substitute FOSTA into a single bill produced an extremely complex bill. The bill consists of six main provisions.

First, FOSTA created a new federal crime (§ 2421A) for anyone who “owns, manages, or operates an interactive computer service” (or conspiring/attempting to do so) with the “intent to promote or facilitate” prostitution. There are steep enhanced penalties if the prostitution involves sex trafficking.

Second, FOSTA expanded the existing federal sex trafficking crime (§ 1591) to include “knowingly assisting, supporting, or facilitating” sex trafficking. Like the SAVE Act, both the new § 2421A and the revised § 1591, as changes to federal criminal law, fit into Section 230’s existing exclusion for federal criminal prosecutions.

Third, FOSTA added a new Section 230 exclusion for state criminal prosecutions of activity that violates § 1591. Thus, state crimes that are coextensive with § 1591 can be prosecuted without a Section 230 defense.

Fourth, FOSTA added a new Section 230 exclusion for state criminal prosecutions of activity that violates § 2421A.

Fifth, FOSTA added a new Section 230 exclusion for civil causes of action based on behavior that violates § 1591. However, as an artifact of the SESTA/FOSTA combination, civil causes of action for behavior that violates § 2421A apparently are not subject to this exclusion, even though that seems inconsistent with FOSTA’s purposes.

Sixth, FOSTA authorizes state attorneys general to bring parens patriae civil claim for residents affected by violations of § 1591.

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36 Id. § 2421A(b).
37 Id. § 1591(e)(4).
39 Id. § 230(e)(5)(C).
40 Id. § 230(e)(5)(A).
Despite FOSTA’s addition of new exclusions to Section
230, FOSTA retained Section 230(c)(2)(A)’s\(^{42}\) applicability to
to items 3–5.\(^{43}\) In contrast to Section 230(c)(1), which protects
against liability for publishing third party content, Section
230(c)(2) protects good faith content removals.\(^{44}\) However,
Section 230(c)(2) does not make sense in this context because
online services principally face FOSTA-related liability for
content they publish, not content they remove.\(^{45}\) Defendants
could try to argue that Section 230(c)(2) protects them from
FOSTA liability for items they missed so long as they made good
faith efforts to remove problematic content, but this argument is
untested.

III. FOSTA’S DENOUEMENT

FOSTA’s story is still being written, but before the end of
its first month as law, several notable developments took place.

A. Backpage’s Seizure and Prosecution

On April 6, 2018—after Congress passed FOSTA but
before President Trump signed it into law—the FBI and other
federal government enforcement agencies raided Backpage,
seized all of its assets, and shut down the website.\(^{46}\) Along with
the seizure, the U.S. Department of Justice (“DOJ”) and several
state attorneys general filed criminal charges against Backpage
and several of its principals, alleging Travel Act\(^{47}\) violations
(based on prostitution crimes) and money laundering.\(^{48}\) In
conjunction with the seizure—again, before President Trump
signed FOSTA on April 11—the Backpage corporate entity and
its CEO, Carl Ferrer, pled guilty to the charges.\(^{49}\) Ferrer took a

\(^{43}\) Id. § 230(e)(3)(5).
\(^{44}\) Eric Goldman, Online User Account Termination and 47 U.S.C. §230(c)(2), 2 U.C.
\(^{45}\) See Eric Goldman, How SESTA Undermines Section 230’s Good Samaritan Provisions,
\(^{46}\) Press Release, U.S. Dep’t of Justice, Justice Department Leads Effort to Seize
Backpage.Com, the Internet’s Leading Forum for Prostitution Ads, and Obtains 93-
Count Federal Indictment (Apr. 9, 2018) (on file with the Department of Justice),
\(^{49}\) Plea Agreement at 1, U.S. v. Ferrer 1, No. 2:18-cr-00464-DJH (D. Ariz. Apr. 6,
plea deal to testify against his collaborators in exchange for a more favorable jail sentence. Both Ferrer and Backpage agreed to make restitution to victims of up to $500 million.  

The seizure and prosecution did not happen overnight. Indeed, a federal grand jury in Phoenix had been investigating Backpage since before February 2017. Yet, the exact timing was curious. Congress had passed the SAVE Act and FOSTA as anti-Backpage measures. Nevertheless, the DOJ and state attorneys general shut down Backpage and obtained a guilty plea from its CEO without using either of the new crimes (§ 2421A or the modifications to § 1591) that Congress had specially designed to target Backpage. Instead, the successful seizure and prosecution was based on crimes that had been on the books from the beginning.

So why did Congress need to enact the SAVE Act or FOSTA? Why didn’t the DOJ bring an enforcement action earlier? Had the seizure and shutdown taken place a couple weeks earlier, the Senate might have decided not to pass FOSTA. With Backpage already out of the market, which mooted the proponents’ principal justification for FOSTA, why did President Trump sign the law on April 11?

All along, FOSTA’s opponents told Congress FOSTA was unneeded because existing crimes already covered Backpage, and encouraged Congress to wait until the FBI and


53 For example, the House Judiciary Committee report references Backpage 17 times. See H.R. Rep. No. 115-572, pt. 1 (2017–2018), https://www.congress.gov/congressional-report/115th-congress/house-report/572. Of course, FOSTA could be intended to reach “the next Backpage” that would emerge after Backpage’s demise, but the legislative drafters could only speculate about what that service might look like, whether it would even emerge, and whether the statutory changes would reach it.

DOJ completed their work.\textsuperscript{55} The seizure and prosecution seemingly proved that the opponents were 100% correct; Backpage was gone and its CEO destined for jail before FOSTA even became law.

\textbf{B. Civil Claims Against Backpage.}

FOSTA was also intended to provide financial restitution for sex trafficking victims. If Backpage had profited on their victimization, should it not pay for this? However, Section 230 made civil lawsuits against Backpage challenging, including the First Circuit’s \textit{Doe v. Backpage} ruling in 2016 which emphatically held that Section 230 prevented the victims’ civil claims.\textsuperscript{56} Thus, to FOSTA supporters, Section 230 needed revision to let victims obtain a financial remedy.

Then again, § 1591 has a mandatory victim restitution provision,\textsuperscript{57} and so if the DOJ successfully prosecuted Backpage pursuant to § 1591, victims would be compensated. Plus, Ferrer’s and Backpage’s restitution plea deal—based on pre-FOSTA law—will provide victim compensation without any further litigation by victims.

Section 230’s seemingly impenetrable protection for Backpage degraded during FOSTA’s development. Throughout 2017, new evidence emerged about Backpage’s involvement with its advertisements that raised increased doubts that Backpage could continue to rely on Section 230 to avoid liability.\textsuperscript{58} Thus, FOSTA opponents argued that Section 230 did not need an amendment because victims were likely to use the new evidence to overcome Section 230 in future litigation.\textsuperscript{59}

On March 29, 2018 and March 31, 2018—after the Senate’s passage of FOSTA and before President Trump’s signing—two federal district courts issued opinions holding that


\textsuperscript{56} Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 23 (1st Cir. 2016).

\textsuperscript{57} 18 U.S.C. § 1593 (2012).


victims’ claims against Backpage survived Backpage’s Section 230-based motion to dismiss. While these rulings do not guarantee financial payouts to the victims, they proved—before FOSTA became law—that Section 230 did not prevent civil lawsuits against Backpage.

In short, before President Trump signed FOSTA, Backpage was gone, its CEO was convicted, victim restitution was guaranteed, and two different courts held that Section 230 did not prevent victims’ civil claims from going forward. Yet, FOSTA became law anyway.

C. The Internet Shrank

Because FOSTA imposes criminal liability based on what online services “know” about third party content, FOSTA effectively resurrects a dilemma that Section 230 had been designed to eliminate: Should Internet services try to moderate third party, even if these moderation efforts are imperfect, or should they simply do the minimum possible moderation? After FOSTA, online services that moderate third party content face a risk that—because of their moderation efforts—they will be deemed to “know” of any sex trafficking promotions on their service (even if they did not want those promotions) and face extreme criminal liability. As a result, services have three primary options:

1. Perfectly implement content moderation efforts to ensure no such promotions appear on the service, and if any promotions slip through despite these moderation efforts, hope that the service has done enough to satisfy prosecutors and the courts that they did not “know” of the rogue promotions.
2. Turn off content moderation efforts to negate the possibility of “knowing” about the content.
3. Exit the industry.

Most of the brand-name players, including Google and Facebook, almost certainly will adopt the first strategy. They will

expand their content moderation operations, eliminate any content that looks dubious, and pray that they can convince prosecutors and judges that they should not be liable for whatever they missed. For these services, FOSTA increases their legal and business risk and increases their costs, but it will have only a modest effect on their day-to-day operations.

In contrast, several smaller services have already chosen the third option to shut down. The most prominent was Craigslist, which turned off its “Personals” section entirely.\(^{62}\) Dozens of other services that enabled dating or catered to the sex worker community shut down as well.\(^ {63}\) In addition, there were reports that Microsoft and Google took a number of steps to shut down more content on their services in response to FOSTA’s threat, including deleting private files from Google Drive.\(^ {64}\)

**D. Will FOSTA Help Sex Trafficking Victims?**

It would be easier to overlook FOSTA’s many flaws if the law actually helped ameliorate sex trafficking. Unfortunately, there are many good reasons to believe that it will not help—and might even hurt. Professor Alex Levy, an expert on sex trafficking, wrote:

> There is no good evidence that the internet has caused an increase in child sex trafficking or that it has put more minors at risk of being victimized. FOSTA’s proponents frequently point to a recent rise in reports of suspected commercial sexual exploitation of minors as evidence that platforms are responsible for an “explosion in sex trafficking.” Shared Hope, “*White Paper: Online Facilitation of Domestic Minor Sex Trafficking*” (August 2014), http://sharedhope.org/wp-content/uploads/2014/09/Online-

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\(^{62}\) *FOSTA, Craigslist*, https://www.craigslist.org/about/FOSTA (last visited Mar. 1, 2019).


\(^{64}\) *Documenting Tech Actions, supra* note 63.
Facilitator-White-Paper-August2014.pdf (noting that “[t]echnology, including classifieds websites, is widely viewed as responsible for the explosion in sex trafficking in the United States”). Besides the lack of evidence that the internet is causing a rise in sex trafficking, there is some reason to doubt that sex trafficking has increased in the first place. See Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015) (No. 15-3047) (discussing evidence that trafficking may have declined in the early 2000s).

The argument that the internet has caused an increase in child sex trafficking is flawed insofar as it conflates the frequency with which sex trafficking is reported with the frequency with which it happens. Indeed, it ignores the critical possibility that the rise in reports is due to the fact that platforms make it easier to notice and alert law enforcement to trafficking.

If FOSTA succeeds in shutting down high-traffic, high-visibility websites, it will suppress a key means of detecting and reporting sex trafficking, thus decreasing trafficking victims’ chances of being recovered. Victims who are trafficked on high-visibility websites are regularly discovered by family members, good Samaritans, and non-profit organizations. See, e.g. Caitlin Randle, Brother takes action after girl, 14, is advertised online for sex, officers say, SUN SENTINEL (Aug. 11, 2017), http://www.sun-sentinel.com/local/broward/deerfield-beach/fl-
There have also been numerous reports of how FOSTA and the associated shutdown of Backpage has been devastating to voluntary sex workers. By advertising on Backpage.com, sex workers were able to develop their own customer base without relying on pimps (and the associated physical coercion and financial control exercised by pimps), and sex workers could vet prospective customers for safety concerns before agreeing to meet with them. Furthermore, making arrangements online with customers allowed sex workers to pick safe venues for their meetings, which markedly differs from the physical safety concerns posed by “walking the streets.” By eliminating online advertising by sex workers, FOSTA pushed sex workers back to the streets, where they once again become subject to the


dominion of pimps, and where they lose some of the physical safety protections they had gained through online negotiations.

Worse, post-FOSTA, there have been reports that arrests for sex trafficking have gone down, while arrests for prostitution have increased.67 The likely explanation is that pursuing sex trafficking cases have become harder now that law enforcement cannot find potential criminals or victims by perusing Backpage.com or setting up sting operations at Backpage.com or Craigslist. Accordingly, law enforcement resources likely have been redirected away from sex trafficking enforcement and towards more traditional enforcement against sex workers and their customers.

Sex trafficking is a horrific crime, and we should all support legislative efforts to combat it. FOSTA, however, was not that solution. Instead, the in-the-field outcomes of FOSTA include increased physical violence against sex workers, fewer prosecutions against sex trafficking criminals, and lower odds that law enforcement will rescue sex trafficking victims. Especially in light of the fact that FOSTA was not needed to “take down” Backpage.com (assuming that was a good policy goal in the first place), FOSTA appears to have caused more misery for sex workers and sex trafficking victims with zero offsetting policy benefits. Accordingly, FOSTA may be one of Congress’ worst achievements in Internet regulatory policy.

IV. WHAT’S NEXT FOR SECTION 230?

For its first twenty years, Section 230 seemed politically untouchable. Everyone loved the Internet, no one wanted to undermine its potential, and Google and Facebook spent a lot of time and money on lobbying and posed a formidable challenge to potential opponents.68

In what felt like an instant, the political calculus changed completely. Some factions of the anti-sex trafficking advocacy community proved to be far more effective at lobbying than the Internet community. At the same time, many people have fallen out of love with the Internet—and especially with Google and Facebook, who many regulators and consumers think have

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acquired too much power and therefore require regulatory intervention.69

So, what happens to Section 230 post-FOSTA? One scenario is that some anti-sex trafficking advocates were uniquely effective at lobbying due to the extreme sympathy they engender. If so, other victim advocacy groups or anti-Google/Facebook lobbying efforts may find it hard to achieve the same outcome.

Another scenario is that FOSTA is just the first of a string of new statutory exceptions to Section 230, as every victims’ group queues up to ask for their exception, and every regulator thinks that amending Section 230 is a good way to stick it to Google and Facebook (even though amendments to Section 230 are far more likely to hurt Google/Facebook rivals and entrench the incumbents’ dominant position). If the latter scenario comes to pass, the cumulative effect of the amendments could easily undermine Section 230’s integrity, so that plaintiffs can almost always easily maneuver into one of the multitudinous exceptions—making Section 230 functionally worthless.

It will be interesting to see if regulators, and the general population, can fall back in love with the Internet. The Internet enables truly miraculous activity, along with acting as a “mirror” to display the anti-social activity that has always been a part of our society. To the extent we focus on the anti-social behavior, and ignore the Internet’s remarkable aspects, further amendments to Section 230 seem inevitable. Or, if we keep in mind the Internet’s stunning contributions to society,70 we might be more amenable to preserving Section 230. In that sense, future battles over Section 230 will be a proxy for our overall optimism or cynicism about the Internet’s impact on society generally.

69 Goldman, 230 Overview, supra note 1, at 14.
FEARLESS SPEECH

Mary Anne Franks*  

ABSTRACT

The American conception of free speech is primarily defined as the freedom to say whatever one wants, with little regard for the quality, context, or impact of the speech. Thus, American free speech doctrine is often characterized as neutral with regard to the speaker and the content of speech; in practice, however, it consistently privileges powerful over vulnerable speakers and harmful over critical speech.

From Philadelphia to Skokie to Charlottesville, the First Amendment has been interpreted to protect speech by white men that silences and endangers women and minorities. As free speech doctrine and practice become increasingly concerned with private as well as state action, free speech becomes even more of a monopoly and monoculture dominated by the interests of white men. The impoverished and elitist conception of free speech that governs current American legal theory and practice undermines all three values the First Amendment is meant to protect: autonomy, truth, and democracy.

This Article proposes that First Amendment theory and practice should be reoriented around ancient Greek concept of parrhesia, or fearless speech. As the philosopher Michel Foucault describes it, the speaker of parrhesia “chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.” Parrhesia is, in essence, the act of speaking truth to power. The more fearless the speech, the more protection and encouragement it should receive, both from state and private actors; the more reckless the speech, the less protection and encouragement it should receive. The ideal of fearless speech, rather than free speech, is a superior guide for a society with democratic aspirations.

* Professor of Law, University of Miami School of Law. President, Cyber Civil Rights Initiative. I would like to thank Gordon Hull in particular for pointing me to Michel Foucault’s writings on parrhesia.
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INTRODUCTION

“How can we expect righteousness to prevail when there is hardly anyone willing to give himself up individually to a righteous cause? Such a fine, sunny day, and I have to go, but what does my death matter, if through us, thousands of people are awakened and stirred to action?”

– Sophie Scholl, 1943

Sophie Scholl was 21 years old when she was guillotined by the Nazis. Sophie was the only female member of The White Rose, a secret group of university students who distributed pamphlets denouncing Nazi atrocities between 1942 and 1943. In one pamphlet, the group wrote, “[S]ince the conquest of Poland three hundred thousand Jews have been murdered in a bestial manner. . . ‘Is this a sign that the German people have become brutalized in their most basic human feelings, that the sight of such deeds does not strike a chord within them, that they have sunk into a terminal sleep from which there is no awakening, ever, ever again?’” Another leaflet promised that the group “will not be silent. We are your bad conscience. The White Rose will not leave you in peace!”

Sophie and her brother, Hans, both students at the University of Munich, brought a suitcase full of pamphlets to their campus on February 18, 1943. Jakob Schmid, a university janitor and member of the Nazi party, observed Sophie throwing copies of the pamphlet from a balcony overlooking a courtyard where students were walking. He reported the siblings to the Gestapo. During her interrogation, which left her with a broken leg, Sophie was offered the chance to save her life in exchange

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2 Katie Rickard, Memorializing the White Rose Group, in MEMORIALIZATION IN GERMANY SINCE 1945 (B. Niven & C. Paver eds., 2009); Lara Sahgal & Toby Axelrod, Hans and Sophie Scholl: German Resisters of the White Rose 9 (2016).
4 Id. at 198.
5 Id. at 145.
6 Id. at 146.
7 Id.
for implicating her brother and pledging allegiance to Hitler, but she refused.\textsuperscript{8}

After four days in custody, Sophie, Hans, and a third member of the White Rose, Christoph Probst, appeared in the so-called “People’s Court” for trial. The defendants were not given an opportunity to speak, but Sophie nonetheless interrupted the judge, Roland Freisler, shouting, “Somebody had to make a start! What we wrote and said is what other people are thinking. They just don’t dare say it out loud!”\textsuperscript{9} The judge sentenced all three to death. As she was led to the guillotine only hours later, Sophie spoke these last words:

How can we expect righteousness to prevail when there is hardly anyone willing to give himself up individually to a righteous cause? Such a fine, sunny day, and I have to go, but what does my death matter, if through us, thousands of people are awakened and stirred to action?\textsuperscript{10}

Thirty-three years later, in 1976, the National Socialist Party of America (NSPA) announced its intention to march through the town of Skokie, Illinois, wearing Nazi-style uniforms and displaying banners featuring swastikas.\textsuperscript{11} Members distributed pamphlets and made unsolicited phone calls to Skokie residents with Jewish-sounding names promoting the march.\textsuperscript{12} At the time, around half of Skokie’s population was Jewish, including thousands of Holocaust survivors.\textsuperscript{13} The town of Skokie passed a series of ordinances to prevent the march from taking place.\textsuperscript{14} The NSPA, represented by the American Civil Liberties Union (ACLU), successfully argued that the march was free speech protected by the First Amendment.\textsuperscript{15}

\begin{footnotesize}
\begin{enumerate}
\item[8] Id. at 151; see also Margie Burns, Sophie Scholl and The White Rose, INT’L RAUL WALLENBURGER FOUND., http://www.raoulwallenberg.net/holocaust/articles-20/sophie-scholl-white-rose/ (last visited Mar. 1, 2019).
\item[12] Id. at 1216.
\item[13] Id. at 1199.
\item[14] Id.
\item[15] Ron Grossman, Flashback: 'Swastika War': When the Neo-Nazis Fought in Court to March in Skokie, CHI. TRIB. (Mar. 10, 2017, 1.01 PM),
\end{enumerate}
\end{footnotesize}
In striking down Skokie’s efforts to prevent the march, the Illinois Supreme Court analogized the case to the 1971 Supreme Court case *Cohen v. California*.\(^{16}\) In that case, the Court reversed the conviction of Robert Cohen, who had been charged with disturbing the peace for wearing a jacket displaying the words “Fuck the Draft” inside a courthouse.\(^{17}\) The Court rejected the argument that speech could be restricted on the basis of its offensiveness.\(^{18}\) It was just as impermissible to prohibit the display of swastikas in public demonstrations, the Illinois Supreme Court held, as it was to punish Cohen for the profane phrase on his jacket.\(^{19}\) The court asked, rhetorically,

> How is one to distinguish [the swastika] from any other offensive word (emblem)? . . . While the particular four-letter word (emblem) being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.\(^{20}\)

Following the *Cohen* tradition, the Skokie case is a classic illustration of the American approach to free speech. Free speech in America is primarily framed as the freedom to say whatever one wants, with little regard for the quality, context, or impact of that speech.\(^{21}\) The harmfulness of speech does not disqualify it from protection; in fact, speech that is deeply harmful is often afforded greater protection than other kinds of speech.\(^{22}\) This holds true regardless of how reckless the speech, how powerful the speaker, or how vulnerable the target.

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\(^{17}\) *Cohen v. California*, 403 U.S. 15, 16 (1971).

\(^{18}\) *Id.* at 23.

\(^{19}\) *Skokie*, 373 N.E.2d. at 24.

\(^{20}\) *Id.* at 23–24.

\(^{21}\) See generally Steven H. Shiffrin, *What’s Wrong with the First Amendment?* (2016).

\(^{22}\) *Id.* at 2–3.
Taking advantage of the privileges afforded by their race and gender, the NSPA organized a campaign in Skokie to terrorize a vulnerable group using symbols of white supremacy and genocide. Their goal was best summarized by a slogan on one of the signs they planned to carry during their march: “Free Speech for the White Man.” 23 According to expert testimony regarding the impact of the proposed march on Skokie’s inhabitants:

[The words of any Nazi to any Jew have, by definition, lost the usual intent and limitation of words: they are symbolic continuations of the Holocaust, literal perpetuations of the climate of the Holocaust, and preparations for a new Holocaust. No matter what words their placards bear, when Nazis march in Skokie, their presence and their regalia says to Jews: “You thought you escaped. You did not. We know where you are. When our strength is sufficient and when the time is ripe, we will come and get you.”24

The members of the NSPA did not speak out on behalf of the truth or of the greater good, but out of hatred. Their actions required no sacrifice of their own self-interest but involved substantial and unjustified risk of harm to others. In this sense, their “free speech” was reckless speech.

The American approach espoused by the neo-Nazis and their defenders stands in sharp contrast to the ancient Greek approach to free speech, parrhesia. 25 Parrhesia literally means “to speak freely,” but “freely” in this context is best translated, as philosopher Michel Foucault has done, as “fearlessly.” 26 To be fearless, speech must involve frankness, criticism, and above all, risk. As Foucault describes it, the speaker of parrhesia “chooses

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23 See Mary Anne Franks, Beyond ‘Free Speech for the White Man’: Feminism and the First Amendment, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 366 (Robin West & Grant Bowman eds., 2019) [hereinafter Franks, Beyond Free Speech].
frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.”27 **Parrhesia** is, in essence, the act of speaking truth to power.

The resistance activities of Sophie Scholl and the White Rose were an example of fearless speech. Sophie was born into a middle-class German family and was a member of the girls’ branch of the Hitler Youth as a child.28 Instead of continuing to enjoy the safety and security of her privileged social status during wartime Germany, Sophie chose to risk her life by criticizing Nazi atrocities against the Jewish people.

Though American free speech doctrine is often characterized as being neutral regarding the speaker and the content of speech, in practice it tends to privilege the powerful over the vulnerable and to reward reckless speech over fearless speech. From Philadelphia to Skokie to Charlottesville, the First Amendment has been interpreted to protect the harmful speech of white men over the critical speech of women and minorities. As free speech doctrine and practice continues to expand in application and influence—to conduct as well as speech and to private as well as state action—the monopolization of speech by white men’s interests and the preferential treatment of reckless speech over fearless speech is further entrenched. The current conception of free speech has become impoverished, elitist, and toxic, and it ultimately undermines all three of the values the First Amendment is meant to protect: autonomy, truth, and democracy.29

To reverse this course, First Amendment theory and practice should be reoriented around fearless speech. Speech that is sincere, critical, and brave should set the standard by which First Amendment protection is measured. The more fearless the speech, the more protection and encouragement it should receive, by both state and private actors; the more reckless the speech, the less protection and encouragement it should receive. The ideal of fearless speech, rather than free speech, is a superior guide for a society with democratic aspirations.

This Essay has three main Parts. Part I details the flaws of the current free speech paradigm, including its monopolistic and monocultural nature, its false premises and false promises,
and its fetishization of white men’s reckless speech. Part II explains the alternative concept of parrhesia, describes its origins and distinguishing features, and provides examples of literary, historical, and modern-day fearless speech. Part III explores how to encourage a fearless speech culture, focusing on the role of universities as state actors and online platforms as private actors.

I. THE NEED FOR A NEW FREE SPEECH PARADIGM

The First Amendment is meant to promote the values of autonomy, truth, and democracy. The protection of free speech is essential to the development and flourishing of the individual human personality, the pursuit of truth, and the equal exercise of self-governance. But contemporary First Amendment theory and practice fails to serve these three goals. The current free speech paradigm is not only monocultural and monopolistic, but it is based on false premises and false promises. Current free speech doctrine and culture fetishizes white men’s reckless speech, resulting in the silencing of women and minorities.

A. Monopoly and Monoculture

To begin with the obvious: the First Amendment was created by white men for white men. The Framers excluded all women and people of color from participation in the political process, and the institutions of slavery and coverture ensured that these groups remained subjected to, not subjects of, the Constitution. To be sure, they spoke in the name of “we the people,” but, as Caroline Forell writes,

The “we” has been mythologized to mean that all Americans had a voice in the founding of the new nation when in fact the real “we” was entirely male, white, and propertied. And whether the “we” is described as “people” or “men,” the authors had in mind those who resembled themselves. The purportedly universal “we” actually represented a particular gender, a

31 See Franks, Beyond Free Speech, supra note 23.
particular race, and a particular class of people.\textsuperscript{34}

It is no coincidence, then, that the conception of free speech enshrined in the First Amendment reflects white, wealthy men’s experiences and interests. The First Amendment is a prohibition against interference with speech, not a positive guarantee of speech, and as such, benefits only those who have access to speech in the first place. In Catharine MacKinnon’s analysis:

The First Amendment was written by those who already had the speech; they also had slaves, many of them, and owned women. They made sure to keep their speech safe from what threatened it: the federal government. You have to already have speech before the First Amendment, preventing government from taking it away from you, does you any good.\textsuperscript{35}

At the time the First Amendment was written, black people did not have rights over their own bodies, to say nothing of a right to speak freely.\textsuperscript{36} Neither, to a great extent, did most women, who under coverture were considered to have no independent legal existence apart from their husbands.\textsuperscript{37} Black men were not allowed to exercise the most basic form of political expression, the vote, until 1870; for women, the formal recognition of that right did not come for fifty more years.\textsuperscript{38} Long after the Reconstruction Amendments and 19th Amendment were passed, women and non-white men continued to be barred from the political, employment, and educational opportunities available to white men, meaning that their voices were excluded


\textsuperscript{35} CATHARINE A. MACKINNON, \textit{Feminism Unmodified: Discourses on Life and Law} 204 (1987).

\textsuperscript{36} Richard Delgado & David Yun, \textit{“The Speech We Hate”: First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics}, 27 ARIZ. ST. L.J. 1281, 1298 (1995).

\textsuperscript{37} 1 WILLIAM BLACKSTONE, \textit{Commentaries on the Laws of England} *430, *442–45 (1765) ("[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.").

from legislatures, juries, public spaces, workplaces, and schools.\textsuperscript{39}

Fifty years after the Constitutional Convention, a second convention was held in Philadelphia\textsuperscript{40} that provided a dramatic illustration of exactly who was meant to be included in “we the people.” The Anti-Slavery Convention of American Women was scheduled to take place in May 1838 at Pennsylvania Hall just a few blocks away from Independence Hall.\textsuperscript{41} The speakers and invitees included women and black men, all advocates for the abolition of slavery and the recognition of women’s rights—advocates, that is, for transforming “we the people” from rhetoric into reality.\textsuperscript{42} In the weeks leading up to the Convention, notices appeared around Philadelphia urging those “who cared about their jobs and the Constitution” to “protest this convention of ‘amalgamators.’”\textsuperscript{43} On the day of the event, several thousand protestors flooded into Pennsylvania Hall, hissing, shouting, smashing windows, and threatening the female speakers with bricks and rocks.\textsuperscript{44} When the organizers of the event appealed to the mayor to intervene, he refused, stating that they “had brought this chaos on themselves.”\textsuperscript{45} As speakers and audience members fled, the mob took over the hall and set it on fire.\textsuperscript{46}

A contemporaneous newspaper account of the event offered the following justification of the mob’s actions: the activists committed “abominations,” including allowing “Negro fellows” to accompany “white ‘ladies’” in the street and to sit together with them on the same benches:\textsuperscript{47}

\begin{quote}
Such practices, outraging the moral sense of the community, and if continued, tending inevitably to throw society into confusion, and to engender immorality and vice, it could not be expected, that any people, having respect for
\end{quote}


\textsuperscript{40} SALLY G. MCMILLEN, SENeca FALLS AND THE ORIGINS OF THE WOMEN’S RIGHTS MOVEMENT 67 (2008).

\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.

\textsuperscript{44} Id. at 67–68.

\textsuperscript{45} Id. at 67.

\textsuperscript{46} Id. at 68.

themselves or affection for their children, would permit to endure.\footnote{144x654}

The May 1838 burning of Philadelphia Hall made clear, if there had been in any doubt, that the very thought of women and black men exercising freedom of speech was enough to provoke white men into a violent rage.

The United States has come a long way since 1838, but white men’s monopoly on free speech, as well as on power more generally, has largely remained intact. Today, white men account for roughly 30% of the American population,\footnote{144x308} but make up 60% of federal judges\footnote{144x308} and 80% of members of Congress.\footnote{144x308} Every U.S. president has been male, and all but one has been white.\footnote{144x308} The Supreme Court, which holds the formidable power to decide who and what the First Amendment protects, was exclusively white until 1967 and exclusively male until 1981.\footnote{144x308} Of the 113 Supreme Court Justices that have served in its 228-year history, all but six have been white men.\footnote{144x308} It is not only the people hearing First Amendment cases who are overwhelmingly white and male; it is also those bringing the cases and representing the parties. Of the roughly 500 First Amendment freedom of expression cases the Supreme Court has heard, 89% were brought by men, and 93% were litigated by men.\footnote{144x308} Further, First Amendment scholarship is dominated by men as well. Of the 32 individuals listed in the Wikipedia entry for “First

\footnote{144x695}


\footnote{144x308} Presidents of the United States, \textsc{Encyclopedia Britannica}, https://www.britannica.com/place/United-States/Presidents-of-the-United-States (last visited Mar. 1, 2019).


\footnote{144x308} Id.

\footnote{144x308} Research compiled from Westlaw searches, finding 515 cases involving First Amendment freedom of expression, of which 59 were brought by women and 38 were litigated by women. These search results were acquired on September 7, 2018, by searching United States Supreme Court cases using “First Amendment” and “free speech” as search terms.
Amendment Scholars,” 25 are male.56 Of the top 20 most-cited constitutional law scholars from 2013-17, nineteen are male.57 Aside from the government system and academia, recent scandals from the Catholic Church to Hollywood, from Silicon Valley to the White House, have revealed that male-dominated institutions and industries are frequently rife with misogyny, abuse, exploitation, and corruption.58

The stifling and elitist monoculture of free speech created by white men’s outsized influence over the creation, interpretation, and application of First Amendment doctrine and practice calls out for its own reckoning.

B. False Premises and False Promises

The danger of chilling effects, the merits of the marketplace of ideas, and the importance of protecting freedom for the speech we hate, are settled tenets of First Amendment orthodoxy.59 As such, their validity is often assumed rather than demonstrated. Under close examination, however, these articles of faith are undeserving of such confidence.

1. Chilling Effects

One of the key concepts underpinning the free speech monoculture is the doctrine of “chilling effects.” A chilling effect is “a concern that an otherwise legitimate rule will curb protected expression outside its ambit. This phenomenon generally arises when would-be speakers, faced with the uncertainties of the legal process, refrain from making protected statements.”60 Concern about chilling effects drives what is sometimes called an absolutist approach to the First Amendment, one that is characterized by intense skepticism about most forms of speech regulation.61 In this view, even regulations of unprotected speech are dangerous because of their potential to discourage protected speech.

59 See Franks, supra note 33.
Also, laws that are considered overly broad or vague can be struck down on First Amendment grounds partly because of their potential for chilling effects. 62 Overly broad laws restrict both unprotected and protected speech, whereas vague laws make it difficult for people to know what speech is restricted and what is not. 63 According to the doctrine of chilling effects, both kinds of laws create the risk that citizens will self-censor or be otherwise deterred from engaging in protected speech. 64

In New York Times v. Sullivan, 65 the Court held a public official suing for defamation must prove that the speaker or publisher of the statement acted with “actual malice,” which the Court defined as either knowing that the statement was false or acting with reckless disregard to its truth or falsity. 66 Defamation is not protected by the First Amendment; nonetheless, the Court held that because an “erroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’” 67 This case in effect used the First Amendment to grant an affirmative right of negligent defamation with regard to public officials, a right later extended to defamation of all public figures. 68

But as intuitively appealing as the chilling effects theory may be, Leslie Kendrick has observed that “the Supreme Court has founded the chilling effect on nothing more than unpersuasive empirical guesswork.” 69 Objective evidence of chill is hard to come by, a troubling fact in light of how much influence the theory has in law and policy decisions. Indeed, the overwrought fear of chilling effects has produced what could be called a “hothouse effect”—an excessively solicitous approach to free speech that cultivates the right in an unnaturally isolated environment, one that has been stripped of all risk of competition or challenge. 70

Even more troubling, concern about chilling effects tends to be highly selective. 71 If the underlying concern is how people are being silenced or deterred from speaking due to fear of negative consequences, then it is notable how little attention is

63 Id.
64 Id.
66 Id. at 280.
67 Id. at 272.
69 Kendrick, supra note 60, at 1684.
70 See Franks, supra note 33.
71 The White Knights of the First Amendment, MS. MAG. (Sept. 14, 2016), http://msmagazine.com/blog/2016/09/14/the-white-knights-of-the-first-amendment/ (noting that “there is far more evidence that the people attacked by free speech activists are the ones who are experiencing actual chilling effects”).
paid to the chilling of women and non-white men’s speech. Harassment, threats, genocidal rhetoric, hate speech, “doxing,” and revenge porn all have silencing effects, and their primary targets are women, non-white men, and sexual minorities.\textsuperscript{72}

Ample empirical evidence exists for how harassment chills freedom of expression, mobility, and association. Cynthia Bowman observes that “the continuation and near-general tolerance of street harassment . . . inflicts the most direct costs upon women, in the form of fear, emotional distress, feelings of disempowerment, and significant limitations upon their liberty, mobility, and hopes for equality.”\textsuperscript{73} According to a 2014 study on street harassment, women’s responses to street harassment include no longer visiting certain places alone; changing the way they walk, behave, or dress; giving up on outdoor activities; quitting jobs, or moving. Mari Matsuda writes that victims of racist speech “have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor.”\textsuperscript{74}

In short, the evidence shows that harassment against minorities and women causes a greater chilling effect than any governmental action.

2. The Marketplace Myth

According to the “marketplace of ideas” theory, unfettered competition in speech ultimately leads to truth.\textsuperscript{75} Early versions of the concept can be found in some form in the writings of John Milton, John Stuart Mill, and Thomas Jefferson, but it is Justice Oliver Wendell Holmes’s dissent in \textit{Abrams v. United States}\textsuperscript{76} that did the most to establish the concept in First Amendment jurisprudence:

\begin{quote}
But 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
\end{quote}

\textsuperscript{72} See Franks, supra note 33.
\textsuperscript{76} 250 U.S. 616, 618 (1919).
ideas—that the best test of truth is
the power of the thought to get itself
accepted in the competition of the
market, and that truth is the only
ground upon which their wishes
safely can be carried out. That, at
any rate, is the theory of our
Constitution.77

From this, there are two interrelated assumptions in the
marketplace of ideas theory: that markets are truly competitive,
and competition leads to truth. Neither assumption is backed up
by reality.

a. The Myth of Competition

One of the foundational problems with the marketplace
of ideas theory is the equation of markets with unfettered
competition. No market, economic or otherwise, is actually
“free.”

First, economic markets are subjected to extensive
regulation, from corporate structuring to securities regulation to
quality and safety standards. As Thomas Joo writes, “equating
‘markets’ with unregulated competition ignores the fact that
markets require, and receive, some degree of regulation in order
to operate properly. Regulation and markets are complementary,
not antithetical, institutions.”78

The marketplace of speech is similarly subject to
extensive regulation; indeed, many economic regulations are
also speech regulations. Contrary to a claim often made by First
Amendment fundamentalists, it is not true that the First
Amendment protects the vast majority of speech against
regulation. In addition to explicitly unprotected categories such
as obscenity, true threats, incitement, defamation, speech
integral to criminal conduct, child pornography, and fighting
words, the government also regulates the marketplace of ideas
through trade secrets law, products liability, antitrust law,
copyright, trademark, privacy law, antidiscrimination law,
perjury, evidence law—and the list goes on.79

Recognizing that marketplaces are extensively regulated
makes it possible to see how access to marketplaces is not equal
across society. The rules of the marketplace have a great deal of

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77 Id. at 630 (Holmes, J., dissenting).
78 Joo, supra note 75, at 415.
79 See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary
[hereinafter Schauer, Boundaries of the First Amendment].
influence over who gets to participate in the marketplace. Many people are denied access to the marketplace in whole or in part due to factors entirely unrelated to the quality of their ideas: because of their gender, race, sexual orientation, or economic status. Similarly, many people are granted a disproportionate amount of access to the marketplace based not on their merit but on privileges associated with those same arbitrary factors.

b. The Myth of Truth

In the marketplace mythology, competition, not regulation, is always the answer to conflict; the unregulated marketplace is supposed to provide the most beneficial outcomes for the general welfare. In an echo of Second Amendment fundamentalists who insist that the best response to gun violence is more guns, First Amendment fundamentalists insist the best response to bad speech is more speech. In the context of free speech, competition is often couched in terms of “counter-speech” and beneficial outcomes in terms of “truth.” In Justice Louis Brandeis’s famous formulation, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” The optimistic embrace of counter-speech as the cure for falsity and injury is, however, unfounded.

First, as an initial matter, there is no basis for the belief that markets produce truth. Markets merely reflect the preferences of those who use them. While those preferences might favor truth, they equally might not. The most that can be said about an idea that has triumphed in the marketplace is that many people like it, or that the people with the most power in the marketplace like it. Second, even if people had strong preferences for the truth, there is no reason for confidence that the marketplace would help them discover it. As the “fake news” epidemic has amply demonstrated, Americans are neither necessarily interested in nor particularly gifted at discerning truth from falsity or fact from opinion. Short attention spans, lack of education, and confirmation bias, lead many people to believe

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82 See FRANKS, supra note 33.
84 Joo, supra note 75, at 408.
things that are demonstrably false.\textsuperscript{86} Being constantly plugged into the Internet, a medium allowing nearly unfettered and instantaneous exchange of information, has worsened, not improved, this situation. It is important to recall that Justice Brandeis’s praise of counter-speech was contingent, not absolute: the remedy of more speech is efficacious only “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education.”\textsuperscript{87} In an age of instantaneous transmission, there often is literally no time to correct falsehoods before they go “viral.”

Even when truth does emerge in the market, it often does so too late to correct first impressions or undo harm. As the expression goes, “a lie can get halfway around the world before the truth has a chance to get its pants on.”\textsuperscript{88} What is more, “market correction not only takes time, it is not unidirectional. Incorrect notions in economic markets and in the ‘marketplace of ideas’ do not simply rise and then permanently fall. They rise and fall . . . in endless repetition: truths and falsehoods alike come and go.”\textsuperscript{89}

Attempts to correct untruths can actually backfire, due to a phenomenon psychologists refer to as the “illusory truth effect.” Repeated exposure to false information, even in a corrective context, increases the likelihood that the false information will be remembered as true.\textsuperscript{90} Recent studies have confirmed that when people view false headlines, they are more likely to accept them as true when they encounter them again.\textsuperscript{91}

Finally, there are many forms of speech that simply cannot be countered in any meaningful way. Justice Brandeis spoke of “falsehood and fallacies” that can be averted by “processes of education.”\textsuperscript{92} But it is not only false information that can inflict great injury, as Brandeis himself knew well. In his 1890 article co-authored with Samuel Warren, \textit{The Right to Privacy}, Brandeis argued that every person had the right to keep

\begin{footnotesize}
\textsuperscript{87} Whitney, 274 U.S. at 377 (Brandeis, J., concurring) (emphasis added).
\textsuperscript{88} This saying, or some version of it, is often incorrectly attributed to Winston Churchill. Joshua Gillin, NFL’s Colin Kaepernick Incorrectly Credits Winston Churchill for Quote About Lies, PUNDITFACT (Oct. 9, 2017, 5:21 PM), https://www.politifact.com/punditfact/statements/2017/oct/09/colin-kaepernick/nfls-colin-kaepernick-incorrectly-credits-winston/.
\textsuperscript{89} Joo, supra note 75, at 414.
\textsuperscript{90} See generally Lisa K. Fazio et al., \textit{Knowledge Does Not Protect Against Illusory Truth}, 144 J. EXPERIMENTAL PSYCHOL. 993, 993–1002.
\textsuperscript{92} Whitney, 274 U.S. at 357–77 (Brandeis, J., concurring).
\end{footnotesize}
truthful, intimate information out of public view.93 In contrast to the law of defamation, which involves the right “to prevent inaccurate portrayal of private life,” the law of privacy protects the right to “prevent its being depicted at all.”94 There is no “counter-speech” to the publication of a person’s nude image, the dissemination of a home address, or the disclosure of undocumented status, and no “process of education” can undo their damage.

In addition to violations of privacy, there are other forms of effectively unanswerable speech, such as eliminationist propaganda, stalking, and emerging hyper-realistic forms of defamation using manipulated photographs and videos, sometime referred to as “deep fakes.”95 Such unanswerable speech can only be prohibited, not countered.

3. The Speech We Hate

The term “hate” tends to generate more heat than light in the context of free speech. The mutually exclusive assertions that “the First Amendment protects hate speech” and “the First Amendment does not protect hate speech” are made with nearly equal frequency and confidence, and both statements are essentially meaningless. “Hate speech” is not a category of speech recognized by the Supreme Court.96 If what is meant by hate speech is merely unpleasant, unpopular, or crude expression, then it is largely true the First Amendment protects hate speech. If what is meant by hate speech is true threats, incitement, defamation, obscenity, fighting words, or certain kinds of discriminatory expression, then it is not true that the First Amendment protects hate speech. “hate” and “hatefulness” are subjective, vague, and arbitrary terms.

The meaning of “freedom for the thought we hate” is further obscured by the ambiguity of the word “we.” All speech is hateful to someone. What it looks like to protect the thought we hate varies considerably depending on who “we” are—the general public? The Supreme Court? Women? The Jewish community? Neo-Nazis?

According to First Amendment orthodoxy, it should not concern us that free speech protection seems to follow a hierarchy of gender, race, and class. Self-styled First Amendment champions are quick to emphasize they do not defend

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94 Id. at 218.
96 See NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP xxi (2018).
pornographers, tobacco advertisers, and white supremacists because they like their speech; it is the very distasteful nature of their speech that makes it so important to defend. 97

In explaining why it so often defends “controversial and unpopular entities” such as neo-Nazis and the KKK, the ACLU states:

We do not defend them because we agree with them; rather, we defend their right to free expression and free assembly. Historically, the people whose opinions are the most controversial or extreme are the people whose rights are most often threatened. Once the government has the power to violate one person’s rights, it can use that power against everyone . . . [W]e subscribe to the principle that if the rights of society’s most vulnerable members are denied, everybody’s rights are imperiled. 98

This is an illuminating answer, but probably not in the way it was intended. The professed animating principle, that the rights of the vulnerable should be protected not only for their sake but for the sake of the general welfare, is noble. It echoes the social justice insights of Kimberlé Crenshaw’s intersectional scholarship99 and Mari Matsuda’s concept of “looking to the bottom.”100

But the way the ACLU actually applies the concept of vulnerability distorts the principle beyond recognition. It is a skillful sleight of hand: “unpopular entities” with “controversial or extreme” opinions become “vulnerable members” of society whose “rights are threatened.” But whether a group is unpopular, or an opinion is controversial is, first, in the eye of the beholder, and, more importantly, being unpopular is not the

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same as being vulnerable and being disliked is not the same as being threatened.

By equating being disliked with being vulnerable, the ACLU can claim that Nazis, KKK members, and pornographers are vulnerable members of society in need of protection. This is perverse for two reasons. First, these groups are neither universally disliked in an objective sense; they in fact enjoy considerable popularity and power.\footnote{Morrison Torrey, Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority, 21 WOMEN’S RTS. L. REP. 25, 35 (1999).} Second, classifying these groups as vulnerable erases truly vulnerable groups who are often exploited by the very groups that the ACLU spends its considerable resources to protect.\footnote{Delgado & Yun, supra note 36, at 1296.}


But the civil libertarian assumption that “the thought we hate” means sexist, racist, and other speech expressing contempt and hatred is telling. A closer look at the case that birthed the principle of “freedom for the thought we hate” complicates the picture considerably.

Schwimmer was the first Supreme Court free speech case argued by a woman, Olive H. Rabe.\footnote{Mary Anne Franks, The Free Speech Fraternity, CONCURRING OPINIONS (Sept. 20, 2018), https://concurringopinions.com/archives/2018/09/fan-200-first-amendment-news-mary-anne-franks-the-free-speech-fraternity.html.} It is also one of the few free speech cases that was brought by a woman, Rosika Schwimmer.\footnote{Schwimmer, 279 U.S. at 646.} Technically, the case is not about the First Amendment at all, but about statutory interpretation.\footnote{Id. at 646.} Schwimmer was a Hungarian-born pacifist whose citizenship application was denied due to her stated refusal to take up arms to defend the country.\footnote{Id. at 646.} The majority felt that this refusal
indicated that Schwimmer was “not well bound or held by the ties of affection to any nation or government” and thus “liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization.”

In dissent, Justice Holmes wrote that while Schwimmer’s position “might excite popular prejudice,” it should not be punished on that basis.

In the quintessential case of “freedom for the thought we hate,” Justice Holmes defended a woman’s refusal to comply with the demands of power against her conscience. Such speech has very little in common with what is often referred to as “hate speech” today, which generally means speech that supports white male supremacy. The former challenges power; the latter seeks to entrench it.

Donald Trump’s sexist and racist speech helped him win the presidency in 2016. A 2017 poll found that more than a third of Americans feel that “America must protect and preserve its White European heritage,” while nearly 40% believe that white people “are currently under attack in this country.” One in ten Americans believes the country has “gone too far” to achieve gender equality and 40% believe women should be forced to carry pregnancies to term against their will. Less than half of Americans believe that sexual assault should disqualify a person from becoming a Supreme Court Justice.

Unlike Schwimmer’s refusal, free

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109 Id. at 652.

110 Id. at 654.

111 See Franks, Free Speech Fraternity, supra note 105.


speech in the service of white male supremacy is not a radical act of speaking truth to power—it is an attempt to maintain the status quo.

C. Reckless Speech

One of the most egregious features of current free speech doctrine and practice is that it not only idealizes but trivializes cowardly and violent speech. Misogynist and racist speech is often characterized as “offensive,” a fuzzy concept that allows for absurd equivocations.\(^\text{118}\) When civil libertarians warn that any law that could be used to suppress the speech of a neo-Nazi could be used against a civil rights champion, it creates a false equivalence. The problem with messages of racial extermination is not that they are offensive; it is that they are dangerous. The message that “Jews are an inferior people” may be merely offensive. The message that “Jews should be exterminated” is not. By contrast, a message of racial equality is not dangerous, no matter how offensive it might be to bigots.

Censoring the expression of preferences for certain races or beliefs in the superiority of particular religions because they are offensive is indeed open to abuse and likely counterproductive. But speech advocating violence and discrimination against individuals or groups on the basis of race, religion, or gender is not merely offensive. That kind of speech not only undermines democratic values but creates a substantial and unjustified risk of other forms of injury to its targets, including physical injury. That is, these forms of speech are reckless.\(^\text{119}\)

1. It Began with Words: The Thin Line between Speech and Conduct

A 2018 study by University of Warwick researchers Karsten Müller and Carlo Schwarz concluded that “social media can act as a propagation mechanism between online hate speech and real-life violent crime.”\(^\text{120}\) Müller and Schwarz examined more than 3000 anti-refugee attacks over a two-year period in Germany, along with a range of variables—including wealth, demographics, newspaper sales, the number of refugees, and

\(^\text{118}\) See Franks, Beyond Free Speech, supra note 23.

\(^\text{119}\) The Model Penal Code defines recklessness as consciously disregarding “a substantial and unjustifiable risk” of harm. MODEL PENAL CODE § 2.02 (AM. LAW INST. 2017).

Facebook use—in the communities where they occurred. ¹²¹ What they found was startling: “Wherever per-person Facebook use rose to one standard deviation above the national average, attacks on refugees increased by about 50 percent.” ¹²²

The researchers note that previous studies had demonstrated other media’s power to influence action: “Television has also been shown to be associated with short-lived outbursts of domestic violence . . . exposure to pornographic material on the internet is associated with increased sex crime.” ¹²³ Müller and Schwarz “do not claim that social media itself causes crimes against refugees out of thin air.” ¹²⁴ Their suggestion is, rather, “that social media can act as a propagating mechanism for hateful sentiments. . . [and] that quasi-random shifts in exposure to anti-refugee sentiment on social media can increase the number of anti-refugee attacks.” ¹²⁵

Less than two weeks after the election of Donald Trump as president of the United States, white nationalists gathered a few blocks from the White House in a federal building named for Ronald Reagan. ¹²⁶ In front of a crowd of mostly young men, the group’s leader, Richard Spencer, celebrated the election of Trump and waxed poetic about the superiority of the white race. ¹²⁷

He railed against Jews and, with a smile, quoted Nazi propaganda in the original German. America, he said, belonged to white people, whom he called the “children of the sun,” a race of conquerors and creators who had been marginalized but now, in the era of President-elect Donald J. Trump, were “awakening to their own identity.”

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¹²² Id.
¹²³ Müller & Schwarz, supra note 120, at 5.
¹²⁴ Id.
¹²⁵ Id.
¹²⁷ Id.
As he finished, several audience members had their arms outstretched in a Nazi salute. Mr. Spencer called out: “Hail Trump! Hail our people!” and then, “Hail victory!”—the English translation of the Nazi exhortation “Sieg Heil!” The room shouted back.128

The Washington, DC-based U.S. Holocaust Museum issued a statement about the event, which included the somber reminder that “[t]he Holocaust did not begin with killing; it began with words.”129

II. FEARLESS SPEECH

Racist and misogynist speech is in no danger of suppression by the government. There has perhaps never been a safer time in America to express virulently misogynist, racist, and xenophobic speech. Donald Trump’s successful presidential campaign was fueled by such speech.130 His cabinet and advisors are overwhelmingly white, male, radical conservatives.131 Many of them have personal histories of violence against women132 and open prejudices against racial minorities, the LGBT community, immigrants, and Muslims.133 Republicans control every branch of the federal government134 and the majority of state governments.135 They operate enormous media enterprises that

128 Id.
130 See Jacobs, supra note 112.
produce a steady stream of rightwing propaganda in television, radio, and the Internet outlets. Multibillionaire “philanthropists” like the Koch brothers use their vast wealth to shape politics and educational institutions toward conservative ends.

White men have throughout history used their expansive privileges of free speech to threaten and incite violence against those that challenge their supremacy. In the current free speech paradigm, white men’s reckless speech is overprotected while the critical speech of women and non-white men is under-protected. This status quo should be disrupted.

A. Origins of Parrhesia

The ancient Greeks recognized two different conceptions of freedom of speech, isegoria and parrhesia. Both were rights protected by the Athenian constitution and both are often translated as “free speech,” but the two concepts differ in significant ways. “In ancient Athens, isegoria described the equal right of citizens to participate in public debate in the democratic assembly,” whereas parrhesia is “the license to say what one pleased, how and when one pleased, and to whom.” Keith Werhan writes that parrhesia “described the freedom to speak one’s mind frankly and with complete openness, to say the whole truth as one understands the truth. The truth-telling prescribed by parrhesia typically had a confrontative, critical bite.”

The French philosopher Michel Foucault was fascinated by the interplay of power and risk inherent in the concept of parrhesia, which he translated as “fearless speech.” Foucault devoted a series of lectures to the concept in the 1980s at the University of Berkeley. Foucault describes parrhesia as a kind of verbal activity where the speaker has a specific relation to truth through frankness, a certain relationship to his own life through danger, a certain type of relation to himself or other people through

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137 See generally JANE MAYER, DARK MONEY (2016).
139 Id.
140 Werhan, supra note 25, at 316.
141 Simon, Parrhesiastic Accountability, supra note 26, at 1421–22.
criticism (self-criticism or criticism of other people), and a specific relation to moral law through freedom and duty. More precisely, parrhesia is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself). In parrhesia, the speaker uses his freedom and chooses frankness instead of persuasion, truth instead of falsehood or silence, the risk of death instead of life and security, criticism instead of flattery, and moral duty instead of self-interest and moral apathy.\(^{142}\)

While Foucault clarified that parrhesia did not always involve the risk of death, it always involved risk of some kind and required “courage in the face of danger: it demands the courage to speak the truth in spite of some danger.”\(^{143}\)

Jonathan Simon writes that Foucault was drawn to the complex questions about power and truth raised by parrhesia, including

Who is able to tell the truth? What are the moral, the ethical, and the spiritual conditions which entitle someone to present himself as, and to be considered as, a truth-teller? About what topics is it important to tell the truth? . . . What are the consequences of telling the truth? What are the anticipated positive effects for the city, for the city’s rulers, for the individual?, etc. And finally: What is the relation

\(^{142}\) Foucault, *Discourse*, supra note 27, at 5.

\(^{143}\) *Id.* at 4.
between the activity of truth-telling and the exercise of power?144

B. Key Features

Over the course of the Berkeley lectures, Foucault identifies several key features of fearless speech. Three of these features in particular are useful to the project of reorienting the American approach to free speech: sincerity, criticism, and courage.

1. Sincerity

Parrhesia, Foucault says, is distinct from rhetoric. Where rhetoric seeks to persuade through logic or manipulation, parrhesia is direct and transparent.145 This feature of parrhesia is often rendered as “frankness” because the speaker says:

“everything he has in mind: he does not hide anything, but opens his heart and mind completely to other people through his discourse. In parrhesia, the speaker is supposed to give a complete and exact account of what he has in mind so that the audience is able to comprehend exactly what the speaker thinks.”146

A more precise term, I believe, would be sincerity, Foucault notes that “the speaker makes it manifestly clear and obvious that what he says is his own opinion.”147 Foucault contrasts the fearless speaker with the rhetorician, who uses whatever strategy is most likely to convince her audience regardless of her own view. Instead, “the parrhesiastes acts on other people’s mind by showing them as directly as possible what he actually believes.”148 By taking full accountability for what he says – as Foucault writes, “the parrhesiastic enunciation thus takes the form: ‘I am the one who thinks this and that’”149 – the fearless speaker exhibits transparency and good faith, not cynicism or devil’s advocate posturing.

145 Foucault, Discourse, supra note 27, at 7.
146 Id. at 2.
147 Id.
148 Id.
149 Id.
2. Criticism

According to Foucault, speech must be critical to be fearless.150 “What makes parrhesia dangerous,” writes Simon, “is that it is likely to be critical. It is not parrhesia to praise the sovereign or flatter one’s friends, even if one believes what one says.”151

But while fearless speech is always critical, not all critical speech is fearless. Importantly, to be a fearless speaker, the parrhesiastes must be less powerful than the audience he addresses:

Parrhesia is a form of criticism, either towards another or towards oneself, but always in a situation where the speaker or confessor is in a position of inferiority with respect to the interlocutor. The parrhesiastes is always less powerful than the one with whom he or she speaks. The parrhesia comes from “below”, as it were, and is directed towards “above”. This is why an ancient Greek would not say that a teacher or father who criticizes a child uses parrhesia. But when a philosopher criticizes a tyrant, when a citizen criticizes the majority, when a pupil criticizes his or her teacher, then such speakers may be using parrhesia.152

To criticize those with less power may be justified or even necessary, but it can never qualify as fearless speech. In order to be an act of parrhesia, criticism must “punch up,” not “punch down.”

3. Courage

This relationship to power is intimately linked to the most important feature of parrhesia, which is courage in the face of danger. Simon writes, “[t]he danger in parrhesia must come from another, the interlocutor, who is in a position to hurt the speaker.”153 Foucault repeatedly stresses that dangerous speech

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150 Id. at 4.
151 Simon, Killing State, supra note 144, at 1391.
152 Foucault, Discourse, supra note 27, at 4–5.
153 Simon, Killing State, supra note 144, at 1392.
is speech that goes against the majority: “If there is a kind of ‘proof’ of the sincerity of the parrhesiastes,” says Foucault, “it is his courage. The fact that a speaker says something dangerous—different from what the majority believes—is a strong indication that he is a parrhesiastes.”

Importantly, this willingness to risk danger is directed inward, not outward. The fearless speaker “says something which is dangerous to himself and thus involves a risk.” This risk can take different forms, but it is always a risk to the speaker’s self-interest. Sometimes what the parrhesiastes risks is “his privilege to speak freely when he discloses a truth which threatens the majority”; in its most extreme form, the risk the speaker takes is the risk of death.

C. Examples of Fearless Speech

1. Ancient Greece

The philosopher Socrates is perhaps the most well-known example of a parrhesiastes in ancient Greek history. In his famous dialogues, Socrates questioned and critiqued the values of the Athenian elite. He undertook this speech for the greater good, namely, to help his fellow Greeks understand themselves more deeply and to live more fulfilled lives. Socrates’ speech so angered the powerful majority that he was punished for his speech by death.

Foucault undertakes close readings of several Greek plays to find other examples of parrhesia. One of the most compelling comes from Foucault’s analysis of Euripides’ tragedy Ion. Ion tells the story of a woman named Creusa, who is raped by the god Apollo when she is a girl. Creusa becomes pregnant and hides in a cave to give birth alone. Full of shame and fearful that her parents will learn what has happened, Creusa abandons her newborn son to exposure and wild animals. Unknown to her, Apollo sends his brother Hermes to take the child to his

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154 Foucault, Discourse, supra note 27, at 3.
155 Id. (emphasis added).
156 Id. at 5.
157 Id. at 8.
158 Id. at 38.
159 Id. at 40.
160 Id. at 13–21.
161 It is interesting to note Foucault’s rumination on the distinction between rape and seduction: “Is it a rape or a seduction? For the Greeks, the difference is not as crucial as it is for us. Clearly, when someone rapes a woman, a girl, or boy, he uses physical violence; whereas when someone seduces another, he uses words, his ability to speak, his superior status, and so on.” Id. at 14.
162 Id.
163 Id.
164 Id.
temple, the oracle at Delphi. The boy, Ion, is raised as a servant in the temple, and Apollo tells no one, not even Ion himself, that he is his son.

After Creusa marries a foreigner named Xuthus and discovers that they are unable to have children, she wonders if her son by Apollo is dead or alive. As the oracle at Delphi was the place mortals could come to ask the gods for the truth, Creusa and Xuthus decide to visit the oracle to ask if they will ever have children. The question Xuthus plans to ask the oracle is straightforward: he only wants to know if he and Creusa will ever have children. Creusa, however, has a different, secret question: she wants to know what has happened to the son she had by Apollo.

When they arrive at the temple, they are met by Apollo’s servant, Ion. None of them, including Ion himself, knows that he is Creusa’s son. Creusa is still ashamed of her story, and so she tells Ion that she is consulting the oracle for a friend. Creusa relates the rape by Apollo to Ion as though it happened to this friend, and asks Ion if he thinks Apollo will answer her question. Ion, a faithful servant to Apollo, tells Creusa that if Apollo has done what she describes, the god would be too ashamed to answer:

ION: . . . is Apollo to reveal what he intends should remain a mystery?
CREUSA: Surely his oracle is open for every Greek to question?
ION: No. His honor is involved; you must respect his feelings.
CREUSA: What of his victim’s feelings? What does this involve for her?
ION: There is no one who will ask this question for you. Suppose it were proved in Apollo’s own temple that he had behaved so badly, he would be justified

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165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id. at 15.
171 Id.
172 Id.
173 Id.
174 Id.
in making your interpreter suffer for it. My lady, let the matter drop. We must not accuse Apollo in his own court. That is what our folly would amount to, if we try to force a reluctant god to speak, to give signs in sacrifice or the flight of birds. Those ends we pursue against the gods’ will can do us little good when we gain them . . . .

When Xuthus asks his question of Apollo, Apollo lies to him and tells him that Ion is his own son. When Xuthus tells Creusa that Apollo has given him a son, she flies into a rage: not only will Apollo not admit to his wrongdoing, nor tell her whether her child is alive, but he also (so it appears) gives her husband a son who will be a stranger to her. In her anger and despair, she speaks the truth about what Apollo has done:

Clinging to my pale wrists as I cried for my mother’s help you led me to bed in a cave, a god and my lover, with no shame, submitting to the Cyprian’s will. In misery I bore you a son, whom in fear of my mother I placed in that bed where you cruelly forced me.

As Foucault describes it,

Creusa’s tirade against Apollo is that form of parrhesia where someone publicly accuses another of a crime, or of a fault, or of an injustice that has been committed. And this accusation is an instance of parrhesia insofar as the one who is accused is more powerful than the one who accuses. For there is the danger that because of the accusation made, the accused

175 Id.
176 Id. at 17.
177 Id. at 20.
may retaliate in some way against his or her accuser.178

2. Modern Day
According to Jonathan Simon, \textit{parrhesia} is rare in modern society, though “not, however, wholly absent from contemporary political life. The western tradition of critical \textit{parrhesiastic} speech by intellectuals, a recognizable genealogy that stretches from Socrates through Emile Zola to Daniel Ellsberg, remains alive today but only episodically.”179 Simon makes the intriguing argument that “[t]oday, crime victims have emerged as perhaps the most important source of \textit{parrhesia}.”180 The victim who speaks takes a risk in two ways:

First, the reprocessing of the traumatic experiences that underlie \textit{parrhesiastic} truth may do damage to the speaker through his own circuits of memory and emotion. Second, the truth spoken may offend powerful members of the audience who may seek to retaliate. “[I]n \textit{parrhesia} the danger always comes from the fact that the said truth is capable of hurting or angering the interlocutor.” In both senses, \textit{parrhesiastic} speech is fearless speech because it knowingly embraces risk.181

\textit{a. Christine Blasey Ford}
In July 2018, Judge Brett Kavanaugh of the United States Court of Appeals for the D.C. Circuit was rumored to be on Donald Trump’s shortlist of nominees for the Supreme Court to replace retiring Justice Anthony M. Kennedy.182 When she

\begin{footnotesize}
178 Id.
180 Simon, \textit{Parrhesiastic Accountability}, supra note 26, at 1451 (“The role of victims in the criminal justice system has recently drawn interest and mostly skepticism from legal scholars examining the practice of victim-impact statements in capital trials and in other aspects of capital punishment.”).
\end{footnotesize}
learned of this, Dr. Christine Blasey Ford reached out to her Congressional representative, Anna Eshoo, and the Washington Post. After consulting with Eshoo, she sent a letter to Senator Dianne Feinstein, the ranking Democrat on the Judiciary Committee, which described an incident involving Dr. Ford and Judge Kavanaugh when both were teenagers. Dr. Ford asked Sen. Feinstein to keep the letter confidential and did not go on the record with the Washington Post “as she grappled with concerns about what going public would mean for her and her family — and what she said was her duty as a citizen to tell the story.”

Ford hired lawyer Debra Katz, an expert in sexual harassment cases, who advised her to take a polygraph test in anticipation of accusations that she was lying. Katz provided the results of the test, which indicated that Ford was telling the truth about her allegation, to the Post. Ford decided in August not to go public with her accusation, believing that it would “upend her life” and likely have no effect on Kavanaugh’s nomination, which seemed to be a foregone conclusion. “Why suffer through the annihilation if it’s not going to matter?” Ford told the Post.

Because she had promised to keep the letter confidential, Sen. Feinstein did not mention the allegation during Kavanaugh’s initial confirmation hearings. On September 12, 2018, The Intercept reported that it had learned from other Democratic members of the Judiciary Committee that Sen. Feinstein was in possession of a document relating to Kavanaugh, without naming Ford. At that point, Feinstein sent Ford’s letter to the FBI, which sent the letter to the White House with Ford’s name redacted, which in turn sent the letter to the full Senate Judiciary Committee.

On September 16, 2018, Ford went public as the author of the allegations. As she told the Washington Post, she “decided that if her story is going to be told, she wants to be the

183 Id.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id.
190 Id.
192 Brown, supra note 182.
193 Id.
one to tell it.” She told the Post on the record that in 1982, when she was 15 years old, Kavanaugh had sexually assaulted her at a party. According to her account, Ford was pushed into a bedroom where rock music was playing. An intoxicated 17-year-old Kavanaugh held her down on a bed, tried to pull her clothes off and covered her mouth with his hand to stifle her screams. She managed to escape when Kavanaugh’s friend Mark Judge, who was watching the incident, fell on top of them. She fled to a bathroom and locked herself in, waiting until she heard the two teenagers going down the stairs before leaving the house.

According to Ford, she told no one what had happened at the time, terrified that her parents would discover that she had attended a party where teenagers were drinking. In addition to the polygraph results, Ford gave the Post therapist session notes from 2012 that recount the assault. Kavanaugh’s name is not mentioned in the notes, but they give the details of Ford’s attack “by students ‘from an elitist boys’ school’” who went on to become “highly respected and high-ranking members of society in Washington.” Ford’s husband stated that Ford had identified Kavanaugh as her attacker when she told him of the attack in 2012.

After she went public, Ford’s private information was posted online, her email was hacked, and she received death threats that forced her and her husband and sons to leave their home. Her credibility and character were attacked by multiple Republican members of Congress and by President Donald Trump. On September 21, 2018, President Trump, who has himself been accused of sexual misconduct by more than 20

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194 Id.
195 Id.
196 Id.
197 Id.
198 Id.
199 Id.
200 Id.
201 Id.
202 Id.
203 Id.
women, stated in a Twitter post that:

I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities by either her or her loving parents. I ask that she bring those filings forward so that we can learn date, time, and place.

According to a statement issued by her lawyers on September 23, 2018, “[d]espite actual threats to her safety and her life, Dr. Ford believes it is important for senators to hear directly from her about the sexual assault committed against her.” Four days later on September 27th, Dr. Ford testified in an open Senate hearing about her allegations.

If Ford was telling the truth, her speech qualifies as an act of parrhesia, one that echoes in many ways Creusa’s speech against Apollo in the play Ion. It exhibits the three key features of fearless speech: sincerity, criticism, and courage. Ford’s story is a direct account of her experience with Judge Kavanaugh. Her account of the assault describes the event as she remembers it, free of rhetorical manipulation or embellishment. Commentators have noted that the story has the ring of authenticity because it contains awkward details that a fraudulent account would not, such as the presence of a third party and the admission of imperfect memory. The speech is critical, constituting a very

serious attack on Kavanaugh’s character and fitness as a judge, especially as he is being considered for a lifetime appointment on the nation’s highest court. Her speech is courageous because she risks the wrath not only of a man more powerful than she is but also of his extremely powerful supporters, including multiple high-ranking members of Congress and the President of the United States. Nearly as soon as she went public with her story, Ford faced serious attacks on her safety and wellbeing in the form of death threats and harassment, attacks that have continued months after her testimony. Ford nonetheless voluntarily chose to continue her speech act by testifying before Congress, exposing her to the hostility of Republican supporters of Judge Kavanaugh as well as to the judgment and scrutiny of the world at large.

As Simon writes, crime victims have a special relationship with parrhesia, because their speech is doubly risky: they face risk in the secondary traumatization of recounting the crime, and in the potential for abuse by “powerful members of the audience who may seek to retaliate” against her for her speech. In this, Ford’s speech is reminiscent of Anita Hill’s, who testified before a hostile Senate twenty-seven years ago about sexual harassment allegations against then-judicial nominee Clarence Thomas. Ford’s speech also highlights the risky nature of sexual misconduct allegations generally, especially against powerful men. As the #MeToo movement has demonstrated, women who bring accusations of sexual assault routinely face malicious and misogynistic scrutiny by the public, the press, and social media, as well as threats to their physical safety, their families, their employment, and their property.

b. Other Examples

Other examples of modern-day fearless speech include the outspoken teenage survivors of the Parkland school shooting, many of whom have been subjected to death threats, defamation campaigns, conspiracy theories, and the exposure of their private


212 Simon, Killing State, supra note 144, at 1390.


information in response to their protests against gun violence and political corruption. Similarly, other political protesters attempting to speak truth to power have been harassed, vilified, and sometimes arrested for their speech, among them Black Lives Matter protesters (including Colin Kaepernick), the Dakota Access Pipeline protesters, and protesters against political figures such as Donald Trump and Judge Kavanaugh. They also include female politicians, journalists, professors, and activists who continue to speak out about abuses of power, the persistence of inequality, and the existence of misogyny in the face of overwhelming online and in-person harassment, from cultural critics targeted by GamerGate to the academics singled out for intimidation by right-wing groups such as the Professor Watchlist.

D. Distinguishing Fearless Speech from Reckless Speech

In the age of the Internet, virtually any speech act can draw criticism from some quarter, especially if the speaker is high-profile. This creates the possibility that a very broad range of speakers may attempt to cast themselves as engaged in parrhesia, pointing to the negative consequences engendered by their controversial opinions. Indeed, a key tactic of the “alt-right” is to engage in offensive and outlandish speech in the hopes of provoking violent backlash, which is then offered as proof of the speaker’s courage. This is the modus operandi of right-wing “provocateurs” such as Milo Yiannopoulos, who present themselves as people with ideas so dangerous they are constantly

being suppressed by “leftists,” the “establishment,” “mainstream media,” and the like.²²²

But such speakers can be distinguished from truly fearless speakers by carefully evaluating their speech in terms of sincerity and their access to power. Many self-styled provocateurs, such as Alex Jones, admit that much of what they say is a performance calculated to inflame their supporters’ prejudices, not to arrive at truth or serve the common good.²²³ Such an attitude is fundamentally insincere, making it incompatible with parrhesia. As Werhan writes,

> The brave and honest parrhesiast, devoted to enhancing the welfare of the polis rather than his own power and prestige, would never stoop to ingratiating himself with his audience. He would neither flatter his listeners nor appeal to their prejudices. To do so would constitute an abuse rather than an exercise of parrhēsia, because such a speaker would have focused on pleasing his audience rather than on confronting it with the truth.²²⁴

What is more, the risk in parrhesia depends on the relationship of the speaker to power. A powerful person who criticizes a less powerful person is not engaging in parrhesia. As Foucault expresses it, “[i]t is because the parrhesiastes must take a risk in speaking the truth that the king or tyrant generally cannot use parrhesia; for he risks nothing.”²²⁵ A President who uses speech to attack a citizen, as Donald Trump has done repeatedly,²²⁶ is not engaged in fearless speech. Rather, when powerful figures use speech to attack less powerful figures, they often engage in reckless speech, creating a substantial and unjustified risk of harm to the person they target.

²²⁵ Foucault, *Discourse, supra* note 27, at 4.
²²⁶ Paul Blumenthal, *Are Trump’s Belligerent Tweets Against Critics Also an Attempt At Censorship?,* HUFFINGTON POST (June 27, 2018), https://www.huffingtonpost.com/entry/donald-trump-twitter-harassment-first-amendment_us_5b32aa2ee4b0b745f1789352.
Finally, *parrhesia* implies a certain level of competence and knowledge. The positive form of *parrhesia* can be contrasted with its pejorative sense of *parrhesia* (“negative *parrhesia*”) which “consists in saying any or everything one has in mind without qualification.”227 Foucault elaborates,

This pejorative sense occurs in Plato, for example, as a characterization of the bad democratic constitution where everyone has the right to address himself to his fellow citizens and to tell them anything—even the most stupid or dangerous things for the city.228

Likewise, those with specific criticisms could refuse to risk frank speech. In democracy, “negative *parrhesia*” might have taken the form of “ignorant outspokenness” by those poorly informed to guide the polity.229

III. ENCOURAGING A FEARLESS SPEECH CULTURE

To evolve from a free speech culture to a fearless speech culture, First Amendment theory and practice should be reoriented around fearless speech. Speech that is sincere, critical, and brave should set the standard by which First Amendment protection is measured. The more fearless the speech, the more protection and encouragement it should receive, both by state and private actors; the more reckless the speech, the less protection and encouragement it should receive.

A. Fearless Speech v. Expansionist Speech

The reorientation around fearless speech should be distinguished from what could be called the “expansionist” approach to the First Amendment, which has been gaining popularity over the last several years.230 This approach has been primarily championed by self-styled civil libertarians of the Internet age, but more recently has also been taken up by

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227 Foucault, Discourse, supra note 27, at 3.
228 *Id.*
229 Simon, Killing State, supra note 144, at 1394.
conservatives who complain that free speech is under attack at universities and online spaces.\footnote{See Adam Liptak, \textit{How Conservatives Weaponized the First Amendment}, \textsc{N.Y. Times} (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html.}

As discussed briefly above, the First Amendment on its face provides a narrow and negative right of free speech: “Congress shall make no law ‘abridging the freedom of speech.’”\footnote{U.S. CONST. amend. I.} Literally interpreted, this only prohibits the creation of federal laws—and after incorporation, state laws—that infringe upon the freedom of speech. The Supreme Court has further clarified that the First Amendment does not apply equally to all speech and does not apply to some speech at all.\footnote{See Schauer, \textit{Boundaries of the First Amendment}, supra note 79.}

The expansionist approach attempts to expand the First Amendment in three ways: who is bound by it, how they are bound by it, and what counts as speech. Expansionists call for the First Amendment obligations to apply not only to state, but also private actors; for First Amendment obligations to include not just refraining from infringement of speech but to affirmatively providing opportunities for speech; and for a definition of speech that includes things like money, computer code, and the public display of firearms.\footnote{See \textsc{Alan K. Chen et al., Free Speech Beyond Words: The Surprising Reach of the First Amendment} (2017).}

Thanks to the expansionist agenda, it is becoming increasingly commonplace for private universities, social media platforms, and other non-state actors to be accused of “censorship” when they choose not to provide platforms to certain speakers or to exclude certain kinds of speech.\footnote{See, e.g., Jason Abbruzzese, \textit{Trump Echoes Conservative Claims That Social Media Companies Censor Conservatives}, \textsc{NBC News} (Aug. 18, 2018), https://www.nbcnews.com/tech/tech-news/trump-echoes-conservative-claims-social-media-companies-censor-conservatives-n901876; Jeffrey Adam Sachs, \textit{There Is No Campus Free Speech Crisis: A Close Look at the Evidence}, \textsc{Niskanen Ctr.} (Apr. 27, 2018), https://niskanencenter.org/blog/there-is-no-campus-free-speech-crisis-a-close-look-at-the-evidence/.} Not only does this approach risk expanding First Amendment doctrine beyond all intelligible limits, but it is also clear that many proponents are motivated by a desire to reinforce, rather than challenge, the existing speech hierarchy.

The fearless speech approach, by contrast, is not expansionist. It does not attempt to collapse the distinction between free speech in the doctrinal sense and free speech in the cultural sense, although it recognizes the two inform each other. What it attempts to do is to provide a guide for how to prioritize free speech concerns. Free speech doctrine is made, not found.
Free speech rights are recognized, defended, and championed through the actions and attention of multiple actors, including governments, courts, litigants, the general public, lobbyists, the media, and civil liberties organizations. How any of these actors decide to allocate their attention and resources has a great impact on free speech theory and practice.

Given that state actors are directly restrained by the First Amendment, their primary obligation in a fearless speech culture is negative: to avoid punishing or censoring fearless speech. As private actors are not restrained by the First Amendment, their primary obligation in a fearless speech culture is positive: to encourage fearless speech.

B. State Action

Fearless speech cannot flourish if it is subjected to official government suppression. Accordingly, defending acts of fearless speech from state censorship, including indirect censorship, should be the top priority of free speech defenders.

In concrete terms, this means that speakers who engage sincerely, critically, and courageously with those more powerful than themselves should be given as much breathing room as possible without jeopardizing public welfare. That means, for example, that protests mobilized against powerful institutions, such as law enforcement, university administrations, the prison system, and government actors, should be vigorously defended against government suppression. Even indirect attempts at suppression of this speech, such as President Trump’s repeated calls for punishment of the media and retaliation against figures such as Colin Kaepernick, should be denounced and challenged.

C. Private Action

Though private actors have no First Amendment obligations, they should take their role in setting norms and practices of free speech seriously. Private actors can best serve a fearless speech culture by devoting their platforms to highlighting fearless speech and by exercising their own free speech rights to ignore or quarantine low-quality, false, or otherwise reckless speech. Internet platforms have a particularly influential role to play in free speech culture, as they exert arguably greater power over free speech norms and practices than many government entities.

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236 Travis Waldron, Does Colin Kaepernick Have a First Amendment Case Against Donald Trump?, HUFFINGTON POST (June 5, 2018), https://www.huffingtonpost.com/entry/kaepernick-trump-first-amendment-nfl-national-anthem_us_5b15b680e4b093ac33a0f94c.
1. Online Platforms and Fearless Speech

Tech platforms, as non-state actors not restrained by current First Amendment doctrine, have a unique opportunity to develop and model the standard of fearless speech. They can encourage fearless speech by boldly exercising their right to moderate or prohibit reckless speech, especially violent or false content.

Unfortunately, tech platforms have for decades instead encouraged reckless speech. Today’s Internet is awash in threats, harassment, misinformation, conspiracy theories, doxing, and “revenge porn.” These forms of harmful expression inflict serious and often irremediable injury on their targets, including the chilling of their speech. A 2016 report by Data & Society Research Institute found that 47% of Americans had experienced online harassment or abuse,\(^{237}\) and that 27% self-censor to avoid potential abuse.\(^{238}\)

These consequences are not evenly distributed across society. As Alice Marwick writes,

> Men and women are equally likely to face harassment online, but women experience a wider variety of online abuse, including more serious violations. Young people also experience such behavior far more than older adults. Thus, young women have it the worst; they’re much more susceptible to doxing, sexual harassment, cyberstalking, and in-person attacks than men or older women. Lesbian, gay, and bisexual people are also more likely to experience harassment.\(^{239}\)

The more frequent and more serious forms of online abuse that women experience help explain why women self-censor at greater rates than men. The Data & Society Research Institute study found that 41% of women in the 15–29 age group


\(^{238}\) Id. at 4.

self-censor online, as compared to 33% of men in that same age group. As Marwick writes, social media sites “function as hosts for public conversations on a huge variety of social issues. If women, people of color, and LGB internet users are shying away from contributing because of well-founded fears of retaliation, their voices will be missing from this important civic sphere.”

For many years, online platforms have done very little to respond to harassing and abusive content. Tech companies have justified their laissez-faire approach by invoking First Amendment rhetoric: that the best response to bad speech is more speech and that censorship is the greatest evil to be avoided. Kate Klonick has explained that “a common theme” exists in the evolution of the three major technology platforms—YouTube, Facebook, and Twitter:

> American lawyers trained and acculturated in American free speech norms and First Amendment law oversaw the development of company content-moderation policy. Though they might not have “directly imported First Amendment doctrine,” the normative background in free speech had a direct impact on how they structured their policies.

This implicit reliance on the First Amendment has long been praised by civil libertarians, who view the replication of American free speech norms across the global Internet as unquestionably positive. But given the elitist and anti-democratic tendencies of current First Amendment doctrine and practice, the fact that online platforms operate in the shadow of the First Amendment should instead be cause for grave concern.

The Internet has contributed significantly to the degradation of free speech. The immediacy and anonymity of online communication removes many of the incentives for refraining from abusive and harmful expression as well as making it harder to investigate such expression. The net result

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240 Lenhart et al., supra note 237, at 4.
241 Marwick, supra note 239.
242 See FRANKS, supra note 33.
has been to privilege the speech of white men over all others online as well as offline. By building their approach to free speech on the First Amendment, online platforms have replicated and intensified the limitations of American free speech theory and practice rather than transcending them.

a. Turning the Tide

Over the last few years, tech industry leaders have finally begun to take some of the issues relating to online abuse—and their impact on the free speech of women, minorities, and other marginalized groups—seriously. Tech companies have developed tools and policies to address revenge porn, racist message boards, mugshot sites, fake news, and terrorist propaganda. Several major companies have taken the step of banning high-profile speakers who violate their terms and services. While expansionist critics complain that such actions violate the principle if not the law of free speech, these online platforms are in fact exercising their own free speech rights in ways that help encourage a culture of fearless speech. The attempts to curb abuse on online platforms have not only reduced harassment and hateful speech but have fostered more speech by more diverse groups.

Beginning in July 2018, several major online platforms began removing content produced by Alex Jones, a high-profile, far-right radio show host and creator of the conspiracy theorist website Infowars. Jones is notorious for claiming, among other things, that the Sandy Hook shooting did not take place and for promoting the “PizzaGate” conspiracy theory. In July,

See FRANKS, supra note 33.


Pizzagate was a viral conspiracy theory that began in the fall of 2016, after the personal email account of Hillary Clinton’s campaign manager, John Podesta, was hacked and many of his emails were published by WikiLeaks. Some users on
YouTube removed several of Jones’ videos for violating the company’s policies, as well as demonetizing his YouTube channel. Following YouTube’s action, Facebook removed several of Jones’s videos and issued a 30-day ban preventing Jones from posting on his personal Facebook page. Spotify, Stitcher, and Apple all removed some of Jones’s podcasts soon after. By the first week of August, Pinterest, LinkedIn, Mailchimp, Vimeo, and even YouPorn had deleted content by or relating to Jones. For several weeks, the only major online platform not to take action against Jones was Twitter. On September 6, 2018, Twitter announced that it was permanently suspending Jones and the Infowars account.

The mass banning of Alex Jones is only one example of online platforms exercising their rights to remove or limit reckless speech. On February 24, 2015, Reddit, the self-described “front page of the Internet,” became the first major online platform to ban the unauthorized disclosure of intimate images (often referred to as “revenge porn”). The announcement came as a surprise to many, as only months before, Reddit had been one of the primary circulation points of nude photos hacked from the private accounts of over a hundred celebrities. Around the same time, Reddit began to “quarantine” some of the site’s most controversial subreddits, or communities and to ban others outright. When a subreddit is banned, it is deleted altogether from the site; when a subreddit is quarantined it is still accessible, but it is flagged with a warning prompt and cannot

message boards such as 4chan and Reddit claimed that mentions of “pizza” in the emails were coded references to child sex trafficking. Proponents of the theory accused several high-ranking Democratic officials of involvement with a child sex ring run out of a pizzeria in Washington, D.C. called Comet Ping Pong. In December 2016, a North Carolina man armed with a rifle traveled to the restaurant to investigate this conspiracy. See Andrew Breiner, Pizzagate, Explained: Everything You Want To Know About the Comet Ping Pong Pizzeria Conspiracy Theory but Are Too Afraid to Search for on Reddit, SALON (Dec. 10, 2016, 9:00 PM), https://www.salon.com/2016/12/10/pizzagate-explained-everything-you-want-to-know-about-the-comet-ping-pong-pizzeria-conspiracy-theory-but-are-too-afraid-to-search-for-on-reddit/.

See Wells, supra note 250.

Id.

Id.

Id.


Id.

See Franks, Revenge Porn Reform, supra note 246, at 1270–71.

Id.

Among the subreddits that Reddit has banned are r/fatpeoplehate, which encouraged mockery of overweight individuals, r/CoonTown, a subreddit dedicated to racial invective; and r/GreatAwakening, which is devoted to the rightwing conspiracy theory QAnon.

Other examples include the web hosting and security services that dropped the white supremacist website The Daily Stormer after its creator celebrated the murder of Heather Heyer at the 2017 Unite the Right rally in Charlottesville, Virginia, and the decision of Airbnb, Uber, and Lyft to deny service to the white supremacist attendees of that rally.

Such measures have drawn intense criticism from civil libertarians and, more recently, conservatives who claim that they constitute leftwing censorship. According to Jillian York, the director for International Freedom of Expression at the Electronic Frontier Foundation (EFF), Reddit “has for years proclaimed itself a place for free speech, which is one of my criteria for when a platform is ‘too big to censor.’” The EFF is a co-founder of a project called Onlinecensorship.org, which tracks the content moderation policies of major social media companies. According to York, while online platforms may “not consider their policies to constitute censorship,” “[w]e challenge this assertion, and examine how their policies (and their enforcement) may have a chilling effect on freedom of expression.” ACLU lawyer Chris Hansen expressed a similar view in a 2017 interview:

the greater censorship dangers today involve attempts by nongovernmental entities—such as Facebook, Twitter, Google, and other internet companies—to

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262 Id.
266 Id.
267 See Anderson et al., supra note 248.
268 Id.
decide what speech is appropriate online, and those efforts largely are
directed at hate speech. Facebook
and other internet companies aren’t
bound by the First Amendment,
which only applies to the
government. As the government
increasingly pressures companies to
remove online content, we’re
creating a censorship system that
applies to an enormous amount of
communications that don’t enjoy
constitutional protections.269

b. “Strategic Silence”

But what expansionist critics ignore is that the belated
and imperfect efforts of online platforms to counter abuse are
actually creating the space for more, not less, speech. As we have
seen in the offline context, indulging the reckless speech of the
powerful inevitably results in the silencing of the vulnerable.270
Even if such indulgence by state actors can be justified by the
First Amendment, private actors’ lack of First Amendment
obligations should leave them free to experiment with other
approaches to free speech.

The Internet has demonstrated perhaps more clearly than
any other form of communication how a laissez-faire approach
to speech fails to serve the values of autonomy, truth, or
democracy. More and more online platforms are confronting the
reality that the best answer to bad speech is not, in fact, more
speech, leading them to undertake the kind of measures that Joan
Donovan and Danah Boyd have called “strategic silence.” 271

Donovan and Boyd explain that strategic silence existed
long before the Internet. They point to the work of Felix
Harcourt, who describes how the 1920s Ku Klux Klan relied on
media coverage—even or especially negative media coverage—
to amplify their recruitment efforts and to gain influence over
public opinion.

269 Noa Yachot, The ‘Magna Carta’ of Cyberspace Turns 20: An Interview with the ACLU
Lawyer Who Helped Save the Internet, ACLU (June 23, 2017),
https://www.aclu.org/blog/free-speech/internet-speech/magna-carta-cyberspace-
turns-20-interview-aclu-lawyer-who-helped.
270 Delgado & Yun, supra note 36, at 1296.
271 Joan Donovan & Danah Boyd, The Case for Quarantining Extremist
Ideas, GUARDIAN (June 1, 2018),
https://www.theguardian.com/commentisfree/2018/jun/01/extremist-ideas-
media-coverage-kkk.
Knowing they could bait coverage with violence, white vigilante groups of the 1960s staged cross burnings and engaged in high-profile murders and church bombings. Civil rights protesters countered white violence with black stillness, especially during lunch counter sit-ins. Journalists and editors had to make moral choices of which voices to privilege, and they chose those of peace and justice, championing stories of black resilience and shutting out white extremism. This was strategic silence in action, and it saved lives.272

As Donovan and Boyd write, “[a]ll Americans have the right to speak their minds, but not every person deserves to have their opinions amplified, particularly when their goals are to sow violence, hatred and chaos.”273 Private actors, especially highly influential private actors like online platforms, should embrace their freedom to amplify fearless speech that challenges power over reckless speech that aims to silence and injure the vulnerable.

Contrary to First Amendment orthodoxy, suppressing reckless, inflammatory, and violent speech does not make it grow stronger. Since Alex Jones was banned from multiple online platforms, his influence has weakened.274 The same is true for rightwing provocateur Milo Yiannopoulos, who was permanently suspended from Twitter in 2016,275 and for white nationalist leader Richard Spencer, whose website was removed by web hosting service GoDaddy in 2018.276 All three have watched their followers dwindle and their sources of financial support dry up: “once you remove the biggest megaphones from

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272 Id.
273 Id.
bad actors, their power diminishes and their ability to attract larger audiences and sow disinformation decreases.”

CONCLUSION

Jonathan Simon laments that “[f]reedom of speech plays a critical role in contemporary democracy, but fearless speech does not.” This does not have to be the case. We can reorient our free speech culture by placing fearless speech at the heart of First Amendment protection. We can shift our resources and attention away from the reckless, cowardly speech of the powerful toward the speech of the sincere, critical, and brave. In doing so, we will come much closer to achieving the aspiration of free speech for “we the people” instead of free speech for the privileged few.

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ABSTRACT

U.S. cybersecurity law is largely an outgrowth of the early-aughts concerns over identity theft and financial fraud. Cybersecurity laws focus on protecting identifiers such as driver’s licenses and social security numbers, and financial data such as credit card numbers. Federal and state laws require companies to protect this data and notify individuals when it is breached, and impose civil and criminal liability on hackers who steal or damage this data.

This Article argues that our current cybersecurity laws are too narrowly focused on financial harms. While such concerns remain valid, they are only one facet of the cybersecurity challenge that our nation faces. The cybersecurity profession too often overlooks the harm to individuals, such as revenge pornography and online harassment. Accounting for such harms in our conception of cybersecurity will help to better align our laws with these threats. This Article explains how a broadened understanding of cybersecurity can inform our laws regarding data breach notification, security requirements, and computer hacking.

INTRODUCTION

The RSA Conference in San Francisco is the cybersecurity industry’s most prominent annual gathering, bringing together thousands of leaders from the corporate, government, and academic worlds to discuss emerging cyberthreats, trends, and new technologies to better secure systems, networks, and data.1 The conference boasts an impressive schedule of panels and presentations, many of which are in break-out format.2 The most attended—and coveted—

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spots are the keynote presentations. When the RSA released the schedule for its April 2018 conference, there was one glaring problem: of the 20 keynote speakers, there were 19 men.³ Monica Lewinsky, an anti-cyber-bullying advocate, was the only female speaker scheduled for the conference. The keynote imbalance was noteworthy but not terribly surprising; just a few months earlier, CES, the consumer electronics trade industry conference in Las Vegas, hosted zero female keynoters.⁴ RSA, to its credit, quickly responded to the criticism and added more female keynote speakers, including Homeland Security Secretary Kirstjen Nielsen,⁵ whose department is responsible for civilian cybersecurity and had more reason to be speaking at the conference than any other official in the United States government.

Although RSA attempted to rectify its gender imbalance, the initial list of keynoters speaks volumes about the overwhelmingly male perspective that shapes the cybersecurity field. One study estimates that women comprise only 14 percent of the U.S. cybersecurity workforce.⁶ When major conferences such as RSA all but completely exclude female keynote speakers, they discourage women from pursuing careers in the field. Such exclusionary behavior is always appalling, but it also is a significant national and economic security issue, as the cybersecurity industry faces a dire shortage of workers.⁷

The insular nature of the cybersecurity profession is more than just a workforce issue. The leadership of the public and private sector determines the fields’ priorities: including what we consider to be cybersecurity threats, and how we will combat them. The current patchwork of laws that purport to address cybersecurity are focused largely on preventing economic harms

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⁴ See Adam Lashinsky, That Metaphorically Appropriate Power Outage at CES, FORTUNE (Jan. 11, 2018), http://fortune.com/2018/01/11/ces-power-outage-tech-backlash/ (“While waiting for Ford CEO Jim Hackett’s enlightening keynote Tuesday morning I listened to CES poo-bah Gary Shapiro mouth words about diversity. This from the head of an organization that didn’t see fit to program one woman as a keynote speaker at its annual event.”).
⁷ Id. (“A study last year by Frost & Sullivan, a consulting firm, found that North America will face a shortage of 265,000 cybersecurity workers by 2022.”).
such as identity theft. This Article argues that the cybersecurity field—and its laws and policies—focus too narrowly on these economic harms, at the exclusion of other harms that often are disproportionately suffered by women and minority groups.

Case in point: the only woman who was initially scheduled to deliver an RSA keynote—Lewinsky—is not the standard RSA speaker. She is not a technology executive, nor is she a lawmaker. Lewinsky has become one of the most prominent advocates to address online bullying and harassment. Lewinsky—whose name was thrown into the public spotlight via an online gossip blog in 1998—understands these reputational harms better than possibly anyone else in the United States; as she put it, she was “patient zero” of the cyber-bullying era.  

Lewinsky urged the audience to protect particularly sensitive information that could be used against victims. “Make people more aware of cybersecurity and how to protect themselves, particularly the young,” she said.

Lewinsky’s message would not have been as impactful coming from anyone else in the crowd of RSA regulars. Her life experiences—some of which are well known to the public in great detail thanks to the Internet—have shaped her unique view on cybersecurity threats and solutions. Yet the agenda for RSA—and the cybersecurity industry at large—is shaped by the standard roster of technology executives, hacking whizzes, and government officials. Voices such as Lewinsky’s have largely been left out of our discussions about what it means to secure cyberspace. And it shows.

This Article ultimately argues that the legal system must broaden its focus on cybersecurity to include non-economic harms, such as online harassment, cyberbullying, and revenge pornography. Part I examines the types of personal harms that individuals face in cyberspace, and argues that the current system of civil lawsuits and criminal prosecutions does not sufficiently deter bad actors, in part because of the First Amendment protections for online speech. Part II provides an overview of the current framework of statutes, regulations, and that broadly encompasses cybersecurity law, and argues that these laws do not adequately cover many of the personal harms. It suggests improvements and modernizations to cybersecurity law to better protect individual rights.

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9 Id.
I. CYBER THREATS TO THE PERSON

The term “cybersecurity” is often associated with white-hat and black-hat hackers engaging in digital battles against one another in a battle to protect servers, confidential trade secrets, and cyber-physical systems. To be sure, such national security and macroeconomic concerns are pervasive—and legitimate. Too often overlooked, however, are the harms that individuals face, stemming not only from attempts to steal their money, but also pervasive harassment and hateful online activities. States have increasingly passed statutes to address cyberbullying and revenge pornography, though these admirable efforts have encountered some First Amendment challenges and other obstacles. This Part argues that while these after-the-fact remedies are an important component of fighting cyberthreats to the person, they are not sufficient.

Perhaps the most comprehensive look at these individual harms was Danielle Citron’s 2014 book, *Hate Crimes in Cyberspace*. Citron succinctly describes the wide range of individual harms that exist in cyberspace:

> Cyber harassment involves threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks. Victims’ in-boxes are inundated with threatening e-mails. Their employers receive anonymous e-mails accusing them of misdeeds. Fake online advertisements list victims’ contact information and availability for sex. Their nude photos appear on sites devoted to exacting revenge. On message boards and blogs, victims are falsely accused of having sexually transmitted infections, criminal records, and mental illnesses. Their social security numbers and medical conditions are published for all to see. Even if some abuse is

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taken down from a site, it quickly reappears on others. Victims’ sites are forced offline with distributed-denial-of-service attacks.  

A. New Threats, New Harms

As social media and newer technology proliferates, we learn about new ways that individuals suffer at the hands of bad actors. Sextortion is a prime example of this trend. A 2016 Brookings report reviewed court filings to find 80 cases of “sextortion” involving at least 3,000 victims. The authors of the report define sextortion as “old-fashioned extortion or blackmail, carried out over a computer network, involving some threat—generally but not always a threat to release sexually-explicit images of the victim—if the victim does not engage in some form of further sexual activity.” The report provided a chilling example of how sextortion works:

It started with an email from an unknown sender with the subject line, “Read this and be smart.”

When the victim opened the email, she found sexually explicit photos of herself attached and information that detailed where she worked. Following that were details of her personal life: her husband and her three kids. And there was a demand.

The demand made this hack different: This computer intrusion was not about money. The perpetrator wanted a pornographic video of the victim. And if she did not send it within one day, he threatened to publish the images already in his possession, and “let [her] family know about [her] dark

\[13\] Id. at 11.
side.” If she contacted law enforcement, he promised he would publish the photos on the Internet too.

Later in the day, to underscore his seriousness, the hacker followed up with another email threatening the victim: “You have six hours.”

This victim knew her correspondent only as yosoylammer@hotmail.com, but the attacker turned out to be a talented 32-year-old proficient in multiple computer languages. Located in Santa Ana, California, his name was Luis Mijangos.

On November 5, 2009, yosolammer@hotmail.com sent an email to another woman with the subject line: “who hacked your account READ it!!” In the email, Mijangos attached a naked photo of the victim and told her “im [sic] in control of your computers right now.”

B. Barriers to Common-Law Claims

Victims of revenge pornography, cyber-harassment, cyber-bullying, sextortion, and other highly personal cyberattacks face a tough road if they want to hold bad actors liable. Consider, for instance, the case of Alyssa Backlund. In 2009, Christopher Stone posted a picture of a girl on his website, StickyDrama.com. Alongside the picture was a description claiming that the photo “appears to depict Alyssa Marie Robertson masturbating next to an infant. Such an act, in addition to being morally repugnant, probably violates several statutes pertaining to exposing children to obscenity.” Stone posted Backlund’s contact information alongside the image, even though Backlund was not the person in the photo.

14 Id. at 1.
16 Id.
post was viewed thousands of times. Visitors commented the Backlund was a “whore,” and contacted her directly. Backlund allegedly contacted a friend of Stone. A few months later, after obtaining a topless picture of Backlund, Stone publicly tweeted to her, “[m]essage him again, and your floppy titties are spammed all over the place. Last warning.” Backlund claims that Stone filed a defamation lawsuit against her in small claims court but did not serve it, and that he encouraged the visitors to his website to campaign for his case to be heard on *Judge Judy*.

After Stone had threatened Backlund on Twitter, Backlund had been pseudonymously quoted in a Gawker article entitled “StickyDrama’s Christopher Stone is a ‘Sextortion’ Expert in More Ways Than One.” Quoted as “Sarah,” Backlund stated, “[h]e scares me shitless . . . he’ll take anything he can to smash you.” Backlund sued Stone for defamation and false light invasion of privacy, and her claim survived an initial motion to strike, and Stone did not appeal the denial.

But that was not the end of the legal wrangling for Backlund. After he lost his motion to strike, he sued Backlund for defamation and intentional infliction of emotional distress arising from the Gawker article. Stone claimed to protect “naive and unsuspecting [Internet] users [who] are easy prey to sex offenders[.].” Stone disputed the claim that he had committed sextortion. “I did not engage in `sextortion' because I never demanded that Backlund send me additional topless photos or any money or property in exchange for refraining from posting her photograph,” he wrote in a declaration. Backlund moved to strike the claims under California’s anti-SLAPP statute. The trial court denied the motion, concluding that the subject of the claims was not a public interest matter, but rather Backlund’s “own comments, regarding an individual experience, concerning alleged threats” by Stone. The allegations of Backlund “blindly answering questions about one’s individual experience, without any awareness of the author’s intended topic of the publication, distinguishes it from others described in

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17 Id.
18 Id. at *3.
19 Id.
20 Id. at *6.
21 Id. at *7.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
published opinions, where defendants themselves speak on issues of public interest,” the trial court reasoned.29

The California Court of Appeal reversed the denial of the motion to strike, concluding that Backlund’s statements to Gawker “were a public comment about a publicly disseminated threat against her made by public figure Stone.”30 Although Backlund ultimately escaped liability, she was forced to not only litigate her defamation claim against Stone, but to defend against his counter-claims in two different courts. Backlund’s case demonstrates the difficulty that victims face in using common-law remedies such as defamation and privacy torts. The extensive litigation, uncertainty, significant personal legal risks, and public attention serve as a strong disincentive for a victim to bring such civil litigation, even in cases that involve appalling facts.

C. Addressing New Harms Via Statute

Recognizing the limits of common law torts, many states have passed statutes that specifically address cyberbullying, revenge pornography, cyberstalking, and online harassment. But even these statutes, which provide criminal or civil penalties, have faced constitutional obstacles.

For instance, North Carolina’s state legislature enacted a statute that made it “unlawful for any person to use a computer or computer network to . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor” “[w]ith the intent to intimidate or torment a minor.”31 A male North Carolina high school student posted on Facebook a text message that a classmate had accidentally sent him.32 Robert Bishop, who also attended the same high school, commented below the post that the message was “excessively homoerotic.”33 Other classmates posted similar comments.34 The mother of the boy who was the subject of the Facebook post found him in his room, hysterically crying.35 After viewing the Facebook post, she called the police, which launched the investigation.36 Bishop and other students involved in the Facebook comments were charged under the North Carolina

29 Id.
30 Id.
32 Id.
33 Id.
34 Id.
35 Id. at 816.
36 Id.
cyberbullying law. After Bishop’s conviction, he appealed, arguing that the statute violates the First Amendment. Although the North Carolina Court of Appeals rejected his appeal, the North Carolina Supreme Court in 2016 agreed with Bishop that the cyberbullying statute was unconstitutional. The Court reasoned that the cyberbullying statute “restricts speech, and not just nonexpressive conduct; that the restriction created is content based, not content neutral; and that the statute’s scope is not sufficiently narrowly tailored to serve the State’s asserted interest in protecting children from the harms resulting from online bullying.” Although the state’s goal to prevent cyberbullying is “laudable,” the Court wrote, the North Carolina law “‘create[s] a criminal prohibition of alarming breadth.’”

Likewise, Albany County, N.Y., passed a law that imposed misdemeanor penalties of up to a year in jail and a $1,000 fine for the offense of cyberbullying, which it defined as:

any act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person.

An Albany County high school student, Marquan M., pseudonymously posted on Facebook detailed allegations of classmates’ sex lives. Marquan was charged under the county cyberbullying law, and after the trial court rejected his First

37 Id.
38 Id.
39 Id.
40 Id. at 817.
41 Id. at 821 (quoting United States v. Stevens, 559 U.S. 460, 474 (2010)).
42 LOCAL L. NO. 11 OF COUNTY OF ALBANY § 1 (2010).
43 People v. Marquan M., 24 N.Y.3d 1, 6 (2014).
Amendment objections to the law, he pleaded guilty with the right to appeal the constitutionality. On appeal, the New York Court of Appeals agreed with Marquan, finding that the county law was of “alarming breadth,” and that it would “criminalize a broad spectrum of speech outside the popular understanding of cyberbullying, including, for example: an email disclosing private information about a corporation or a telephone conversation meant to annoy an adult.” The county acknowledged that portions of its law were unconstitutionally overbroad but as applied to Marquan, comported with the First Amendment. As the New York Court of Appeals characterized the County’s position, it believed the law only applies to “particular types of electronic communications containing information of a sexual nature pertaining to minors and only if the sender intends to inflict emotional harm on a child or children.” The Court refused to sever the portions of the law that the County conceded to be unconstitutional while retaining the remainder. “[T]o accept the County’s proposed interpretation, we would need to significantly modify the applications of the county law, resulting in the amended scope bearing little resemblance to the actual language of the law,” the majority wrote. “Such a judicial rewrite encroaches on the authority of the legislative body that crafted the provision and enters the realm of vagueness because any person who reads it would lack fair notice of what is legal and what constitutes a crime.”

Such First Amendment obstacles extend to state efforts to combat revenge pornography. For instance, Texas enacted a revenge pornography statute that provides:

A person commits an offense if:

(1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts

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44 Id.
45 Id. at 9.
46 Id.
47 Id. at 7.
48 Id. at 11.
49 Id.
50 Id.
exposed or engaged in sexual conduct;

(2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;

(3) the disclosure of the visual material causes harm to the depicted person; and

(4) the disclosure of the visual material reveals the identity of the depicted person in any manner.\[51\]

The statute defines “intimate parts” as “the naked genitals, pubic area, anus, buttocks, or female nipple of a person.”\[52\] It defines “visual material” as “any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide”\[53\] and “any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.”\[54\]

The constitutionality of this statute soon came under question when Jordan Bartlett Jones, who was charged under the statute, facially challenged the law as a First Amendment violation.\[55\] The trial court rejected his pretrial argument, but in April 2018, the Court of Appeals of Texas reversed.\[56\] The court concluded that the ban was a content-based speech regulation, requiring strict scrutiny.\[57\] Texas argued that the law survived strict scrutiny because the government had a compelling interest in protecting individuals’ privacy.\[58\] The Court found particularly “problematic” the application of the law to either visual material

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51 TEX. PENAL CODE ANN. § 21.16(b) (West 2017).
52 Id. § 21.16(a)(1).
53 Id. § 21.16(a)(5)(A).
54 Id. § 21.16(a)(5)(B).
56 Id.
57 Id.
58 Id.
“obtained by the person” or “created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.”59 To illustrate its problem with the wide range of potentially covered materials, the Court provided a hypothetical:

Adam and Barbara are in a committed relationship. One evening, in their home, during a moment of passion, Adam asks Barbara if he can take a nude photograph of her. Barbara consents, but before Adam takes the picture, she tells him that he must not show the photograph to anyone else. Adam promises that he will never show the picture to another living soul, and takes a photograph of Barbara in front of a plain, white background with her breasts exposed.

A few months pass, and Adam and Barbara break up after Adam discovers that Barbara has had an affair. A few weeks later, Adam rediscovers the topless photo he took of Barbara. Feeling angry and betrayed, Adam emails the photo without comment to several of his friends, including Charlie. Charlie never had met Barbara and, therefore, does not recognize her. But he likes the photograph and forwards the email without comment to some of his friends, one of whom, unbeknownst to Charlie, is Barbara’s coworker, Donna. Donna recognizes Barbara and shows the picture to Barbara’s supervisor, who terminates Barbara’s employment.60

59 Id. (quoting TEX. PENAL CODE ANN. § 21.16(b) (West 2017)).
60 Id.
Chief Justice James T. Worthen, writing for the panel, wrote that Charlie and Donna—in addition to Adam—could be liable under Texas’s law.61 Charlie, he wrote, “had no reason to know that the photograph was created under circumstances under which Barbara had a reasonable expectation that the photograph would remain private.”62 Although the charges against Jones only involved images that he allegedly obtained, the Court sought an extreme hypothetical to justify a facial invalidation of the law.63 In September 2018, the Texas Court of Criminal Appeals agreed to hear an appeal of the ruling.64

The rulings from North Carolina, New York, and Texas demonstrate the significant limitations that legislatures face when they enact laws intended to penalize perpetrators of cyberbullying, revenge pornography, and other similar acts. Even if the laws appear to be tailored to protect a compelling interest, they may overreach into other speech. Of course, if legislatures draft their laws too narrowly, they might not fully address the harms.

D. Free Speech or Equality?

It is difficult to read these court opinions without thinking about the criticisms of First Amendment protections for pornography advanced by Catharine Mackinnon. Working with Andrea Dworkin, MacKinnon had convinced Indianapolis to prohibit certain types of trafficking in pornography.65 Dworkin, MacKinnon, and other supporters of the ban argued that pornography led to the suppression of women, encouraging men to treat women as sexual objects.66 The Seventh Circuit struck down the ordinance as a First Amendment violation.67 “Speech treating women in the approved way — in sexual encounters ‘premised on equality’ — is lawful no matter how sexually explicit,” Judge Frank Easterbrook wrote.68 “Speech treating women in the disapproved way — as submissive in matters sexual or as enjoying humiliation — is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints

61 Id.
62 Id.
63 See id.
65 Am. Bookseller’s Ass’n v. Hudnet, 771 F.2d 323, 324 (7th Cir. 1985).
66 Id. at 325.
67 Id.
68 Id.
in this way.”69 MacKinnon rejected Easterbrook’s comparison of the Indianapolis ordinance to restrictions on political speech.70 “Behind his First Amendment façade, women were being transformed into ideas, sexual traffic in whom was protected as if it were a discussion, the men uninhibited and robust, the women wide-open,” MacKinnon wrote.71 “Judge Easterbrook did not say this law was not a sex discrimination law, but he gave the state interest it therefore served—opposition to sex inequality—no constitutional weight.”72

Just as MacKinnon and Dworkin faced insurmountable First Amendment barriers in their attempts to restrict pornography, so to do people who seek to reduce the amount of cyberbullying, revenge pornography, and other types of harmful online speech. By restricting speech, they inevitably will encounter First Amendment objections that likely will limit their efforts.

However, the First Amendment is not the only reason that cyber-harms cannot be addressed purely through retrospective penalties. There is another significant barrier to relying on victims to file lawsuits or bring criminal charges: the immense personal toll of reliving a traumatic experience. As Danielle Citron aptly summarized:

Victims are often reluctant to sue privacy invaders because they do not want to further expose their lives to them. As David Bateman and Elisa D’Amico (who represent victims of nonconsensual pornography on a pro bono basis) have explained, victims often fear the exposure that discovery inevitably entails. They do not want their medical records revealed to their attackers. They are anxious about sitting across from their abusers during a deposition. It is not hard to see why many victims do not sue privacy invaders.73

69 Id.
70 CATHARINE MACKINNON, ONLY WORDS 98 (1993).
71 Id.
72 Id.
Laws that penalize people for revenge pornography and cyberbullying play an important role in combatting cyber-harms to the person. However, these backward-looking laws have limits. In some cases, the laws as applied or facially will be struck down as unconstitutional. And, even when the cases do not fail on constitutional grounds, civil litigants or prosecutors face significant burdens to demonstrate harm that already has occurred. While these laws are integral in combatting online harassment, they should not be the only part of the equation. We need to look at prophylactic legal measures that stop these wrongs from occurring in the first place. As the above cases demonstrate, our current laws are woefully inadequate.

II. A Broader Conception of Cybersecurity Law

Despite the efforts of legislators, prosecutors, and litigants, civil litigation and criminal prosecution only addresses one aspect of cyber-harms to individuals. These punitive measures not only face constitutional challenges, but they largely penalize behavior after the harm has occurred. In addition to these retrospective laws, we should consider how to best align prospective cybersecurity laws to reduce the likelihood of these cyber threats. In other words, legislatures have determined when and how to punish certain types of online behavior. The next step is to figure out how the law might prevent this behavior from occurring in the first place.

The United States has very few laws that explicitly use the term “cybersecurity.” This is likely because many cybersecurity-related laws were enacted decades ago, before the term “cybersecurity” was commonplace. This Part provides an overview of the statutes that broadly fall underneath the umbrella of cybersecurity, analyzes the harms that they seek to protect against, and explains how they could better protect individuals from the types of harms outlined in Part I.

A. Notification Laws

The first general category of cybersecurity laws are statutes that require companies to notify individuals, regulators, and credit bureaus of data breaches. The United States does not have a national data breach notice law; instead, every state and the District of Columbia has enacted its own statute that requires

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74 See Jeff Kosseff, Defining Cybersecurity Law, 103 IOWA L. REV. 985, 1010 (2018) (“[T]here are a number of U.S. state and federal statutes, regulations, and court opinions regarding data security, hacking, and related issues that address some aspects associated with cybersecurity law.”).
notification in certain circumstances.\textsuperscript{75} The laws are triggered only if there is unauthorized access to “personal information.”\textsuperscript{76} All of the statutes include in their definition of personal information an individual’s name in combination with at least one of the following: social security number, driver’s license or state identification number, or full financial account number.\textsuperscript{77} Some states protect additional categories of data; North Dakota, for instance, includes birth date and mother’s maiden name in its definition of “personal information.”\textsuperscript{78} Maryland’s breach notice law, passed in 2007 but updated in 2017, also includes health insurance account numbers and biometric identifiers.\textsuperscript{79} Although some states, like Maryland, are gradually updating their breach notification to reflect more modern threats, the breach notice statutes are largely a creature of the few years after California became the first state to pass a breach notice law. Although crimes such as revenge pornography and online harassment existed at the time,\textsuperscript{80} regulators and the media were heavily focused on identity theft and financial crimes with amendments to the Fair Credit Reporting Act in 2003.\textsuperscript{81}

What do data breach notification laws not cover? For starters, they do not require individuals to be notified of the disclosure of information that could be used to stalk, harass, or dox them. Let’s say that a company is breached and a list of its customers’ names, home addresses, work addresses, personal email addresses, and home phone numbers is disclosed. No state breach notification law requires companies to notify the individuals, law enforcement, or regulators about that disclosure. Of course, such a breach would be less likely to be used for financial fraud than, say, the disclosure of a Social Security number. However, such information could—and is—used not only for directly sending threats, but to launch systematic online harassment campaigns. For instance, in October 2018, a Washington D.C. man was arrested for posting on Wikipedia the home addresses, phone numbers, mobile phone numbers, and

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} N.D. CENT. CODE §§ 51-30-01–51-30-03 (2017).
\textsuperscript{79} MD. CODE ANN., COM. LAW §§ 14-3501–3503.
\textsuperscript{80} See, e.g., Barnes v. Yahoo, 570 F.3d 1096 (9th Cir. 2009) (describing a case of revenge pornography that occurred in 2004).
email addresses of three United States senators.\textsuperscript{82} It is unclear how he obtained the information, but such contact details are not typically available to the public. Had he obtained the data via a breach of a public company, that company would be under no legal obligation to notify the senators or law enforcement unless the breach also included protected information such as Social Security numbers or driver’s license information.

In addition to the narrow definition of personal information, most state data breach notification laws also contain “risk of harm” thresholds, which allow a company to avoid notifying if it determines that the breach does not pose a serious risk of harm to individuals. As with the definition of personal information, these thresholds are typically focused on financial harm. For instance, Ohio’s breach notification law is triggered only if the unauthorized access and acquisition of data “causes or reasonably is believed will cause a material risk of identity theft or other fraud to the resident.”\textsuperscript{83} While the term “other fraud” might be charitably read to include some types of harassment, the wording suggests that the statute is more focused on notifying individuals who are at risk of financial harms such as identity theft.

Breach notification laws should require companies to notify individuals of the unauthorized disclosure of non-public information that could be used to harm them. In addition to requiring notification regarding financial information and data that could be used for identity theft, the laws should notify individuals of unauthorized disclosure of information about their families, home addresses, personal phone numbers, and any other details that could be used to intimidate, harass, or threaten.

The notification laws also should reach beyond the concept of data breaches, and cover other compromises that could lead to harm to an individual. For instance, if the maker of an Internet-connected camera discovers a vulnerability that allows unauthorized parties to access video feeds, that manufacturer should face an obligation to notify individuals of the problem and help them to patch it.

\textit{B. Data Security Laws}

Another category of laws that generally falls into the category of cybersecurity are data security requirements. The United States does not have a single general law, at the federal


\textsuperscript{83} \textit{Ohio Rev. Code Ann.} § 1349.19(B)(1).
level, that sets data security standards. The closest thing that the United States has to a general data security and privacy regulator is the Federal Trade Commission, but its legal authority is limited. The FTC does not have explicit authority to regulate cybersecurity. Instead, it claims data security enforcement authority under Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” 84 The FTC challenges data security practices as deceptive if companies have misrepresented how they secure data. 85 Under the statute, an act is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 86 Although the FTC has issued informal guidance as to the types of data security practices that might be “unfair,” 87 it does not have formal rulemaking authority for data security. In addition to the lack of specificity, the FTC’s data security enforcement authority falls short because it typically enters into consent decrees with companies, requiring some changes to security practices but not levying a monetary fine for a first violation. Contrast this with Europe’s General Data Protection Regulation, which penalizes companies up to 4 percent of global annual revenues or 20 million Euros, whichever is greater. 88

More stringent data security requirements are found in some federal sector-specific laws. The Gramm-Leach-Bliley Act allows federal financial regulators to set standards for regulated financial institutions. 89 The Health Insurance Portability and Accountability Act of 1996 allows the Department of Health and Human Services to regulate the data security of health plans, healthcare clearinghouses, healthcare providers, and their business associates. 90 Although protecting financial and healthcare data is crucial to privacy values, these laws are limited only to particular types of businesses. Even though health data could be used to blackmail or harass an individual, many types

90 See 42 U.S.C. § 1320d.
of companies that might hold individuals’ health data are not necessarily covered by HIPAA’s rigorous requirements.

C. Personal Information Security

In addition to these sector-specific laws, about a dozen states have enacted general data security laws that apply to the personal information of their residents. Most of these statutes do not have terribly specific requirements; for instance, Indiana’s data security statute requires that a company that owns a data base with personal information of Indiana residents “implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect and safeguard from unlawful use or disclosure any personal information of Indiana residents collected or maintained by the data base owner.” 91 Massachusetts has the most detailed general data security requirements, with its regulations spelling out the specific components of written information security plans that companies must adopt. 92 Massachusetts also requires specific technological safeguards, such as “reasonable monitoring of systems” and “encryption of all transmitted records and files containing personal information that will travel across public networks.” 93

The primary shortcoming of these state laws is that they adopt the narrow definition of personal information seen in the data breach notification laws. For instance, the Massachusetts data security regulation only protects “personal information,” which it defines as

a Massachusetts resident’s first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident: (a) Social Security number; (b) driver’s license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or

91 IND. CODE § 24-4.9-3.3.5(b).
92 See 201 MASS. CODE REGS. 17.00 (2019).
93 Id. § 17.04.
password, that would permit access to a resident’s financial account.  

The Massachusetts regulations do not apply to “information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public.”

The Massachusetts regulation does not require companies to protect a wide swath of personal information about Massachusetts residents, such as information that could be used to stalk, harass, or embarrass them. Like the breach notification laws, it is an outgrowth of the concern over financial harm and does not adequately address the harms to individuals that increasingly encountered online.

D. Protecting the “Internet of Things”

Both the data security and breach notice laws also largely fail to account from the growing threat of attacks on connected devices. Known as the “Internet of Things,” everyday devices connected to the Internet are proliferating, driven in part by the shift in the Internet Protocol system to IPv6 that has increased the number of IP addresses available. Internet of Things connects everything from cars to webcams to refrigerators. With the new technological benefits come new risks. In 2015, the FTC staff spoke with security and industry experts and issued a report on Internet of Things privacy and security issues. The staff concluded that the connected devices “may present a variety of potential security risks that could be exploited to harm consumers by: (1) enabling unauthorized access and misuse of personal information; (2) facilitating attacks on other systems; and (3) creating safety risks.” Indeed, connected devices are notoriously insecure. This lack of security can lead to personal harms such as sextortion. For instance, the Brookings report on sextortion found that although some of the extortion involved images obtained without authorization from individuals’ computers or social media accounts, some involved “the actual hacking of their computers and the remote controlling of their

94 Id. § 17.02.
95 Id.
96 See Charles Sun, No IoT Without IPv6, COMPUTERWORLD (May 19, 2016, 4:00 AM), https://www.computerworld.com/article/3071625/internet-of-things/no-iot-without-ipv6.html (“How much of a difference would IPv6 make? A lot. It has a total of 340 undecillion (that is 340 trillion trillion trillion) addresses. Even with the IoT fulfilling Cisco’s expectations, that should be enough for years to come.”).
webcams.” As the Brookings report concluded, webcams are “often insecure and offer extortionists and other bad cyber actors literal visibility into the activity of non-consenting targets. Similarly, relatively lax password controls—and relatively simple password recovery—on social media platforms makes hacking accounts too easy.”

Only one state—California—has attempted to address Internet of Things security, passing a law in 2018 that requires connected device manufacturers to adopt “reasonable” security features that are (1) “[a]ppropriate to the nature and function of the device,” (2) “[a]ppropriate to the information it may collect, contain, or transmit,” and (3) “[d]esigned to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure.” While the new law is well-intentioned, it does not provide specific guidance as to the technical measures that manufacturers should take to secure connected devices. It only states that if the device can authenticate outside of a local network, the manufacturer should ensure that either “[t]he preprogrammed password is unique to each device manufactured” or “[t]he device contains a security feature that requires a user to generate a new means of authentication before access is granted to the device for the first time.”

Although this requirement is a good start, as security expert Robert Graham has written, it only addresses one of many vulnerabilities in Internet of Things devices.

III. MATCHING LAWS TO THE HARMS

To better align cybersecurity laws with the harms to individuals, this Article provides six recommendations for lawmakers to consider. As I argue in a forthcoming article in *Wake Forest Law Review*, such reforms should, when possible, occur at the federal level, given the inherently interstate nature

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98 Wittes et al., supra note 12, at 17.
99 Id. at 28.
100 CAL. CIV. CODE § 1798.91.04 (West 2019).
101 Id.
102 Robert Graham, California’s Bad IoT Law, ERRATA SECURITY (Sept. 10, 2018), https://blog.erratasec.com/2018/09/californias-bad-iot-law.html#W9MnZ2hKjIW (emphasis in original) (“It’s based on the misconception of adding security features. It’s like dieting, where people insist you should eat more kale, which does little to address the problem you are pigging out on potato chips. The key to dieting is not eating more but eating less. The same is true of cybersecurity, where the point is not to add ‘security features’ but to remove ‘insecure features’. For IoT devices, that means removing listening ports and cross-site/injection issues in web management. Adding features is typical ‘magic pill’ or ‘silver bullet’ thinking that we spend much of our time in infosec fighting against.”).
of cybersecurity and the benefits of uniform requirements for service providers, manufacturers, and other companies:

This uncoordinated regulatory approach is ill-suited to any field, and particularly to one as vital as cybersecurity. Cybersecurity regulation is determined by more than 7,000 state legislators, and enforced by 50 governors and 50 state attorneys general, and their staffs. This bouillabaisse of state cybersecurity laws makes it impossible for the United States to develop a cohesive strategy to secure itself from increasingly persistent and advanced cyber threats. Although new cybersecurity threats emerge daily, many state cybersecurity laws are more than a decade old and have not changed, addressing the threats of the mid-aughts rather than today.103

First, companies should be required to notify individuals not only of breaches of their social security numbers and financial account information, but also of any personal data that reasonably could be contemplated of causing harm to their person or reputation. Because this conceivably could include data such as home address, email address, and private communications, this should be defined broadly. The United States should consider a definition of covered “personal data” that is in line with the General Data Protection Regulation in Europe: “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”104

This definition is not narrowly tied to a particular type of harm, and ensures that individuals (and regulators) will be aware of potential harms. Risk of harm thresholds for notifications should consider not only risks of economic harm, but also harm to individuals’ privacy, safety, and reputation.

Second, companies should face specific and rigorous requirements to secure a similarly broad swath of personal data. Data security threats evolve at a rapid pace, as do the safeguards that best protect against these threats. For both political and practical reasons, legislatures cannot keep up with the new technological developments. If Congress passes a national data security law, it should delegate rulemaking authority to an expert agency, likely the FTC. The agency’s experts could promulgate regulations that set forth specific requirements for safeguarding this more broadly defined category of personal information.

Third, just as companies are required to notify individuals of breaches of their personal information, Internet of Things device manufacturers and service providers should be obligated to notify individuals upon discovery of vulnerabilities that could compromise their privacy, security, or safety. For instance, if a webcam manufacturer learns of a vulnerability that could allow hackers to surreptitiously record people, the manufacturer should face a specific requirement—outside of general tort liability—to inform users and help remediate the problem.

Fourth, data security requirements should evolve to more comprehensively cover cybersecurity. These requirements should cover not only personal information, but also the security of devices, systems, and networks. California’s Internet of Things statute is a good first step, but a more comprehensive bill at the national level would address issues beyond password security, and would allow for regulations that require more specific and effective technological safeguards. To be sure, a number of cyber-related harms are caused by compromises of data confidentiality, however, as seen with cases such as the hijacking of webcams, cybersecurity reaches beyond mere data breaches.

Fifth, the government should collaborate with service providers and other companies to crack down on cyberharassment, sextortion, and similar acts. The FBI and state and local law enforcement may be best positioned to understand how, for instance, sextortionists remotely hijack webcams. Just as the Department of Homeland Security, through US-CERT, shares information with companies regarding botnets and software vulnerabilities, the government should work with service providers to ensure that they are aware of emerging threats that target individuals (such as IP addresses associated
with bad actors, tools that they use to carry out their acts, and vulnerabilities that they exploit).

Sixth, once cybersecurity is viewed as more than an economic threat, but also a threat to individual safety, the nation could begin more comprehensive efforts to educate the public about cybersecurity. Beginning in elementary school and lasting into adulthood, individuals should be educated about online safety and methods to reduce the likelihood of falling victim to a cybercriminal. Although there are some steps to educate the public, such as the October National Cybersecurity Awareness Month, cybersecurity should be an integral part of classroom education, and it should receive the same level of attention from law enforcement as non-digital crimes and wrongdoings.

IV. CONCLUSION

Nearly two decades ago, state legislatures recognized that identity theft and other economic crimes required laws to protect data security. As individuals continue to be victimized online, we need to reimagine cybersecurity laws to address these broader harms. Cybersecurity laws should protect a wider range of data, and they should require manufacturers and service providers to adopt safeguards that protect individuals. To be sure, we cannot rely on cybersecurity law alone to prevent harms to individuals. Like retrospective tort lawsuits and criminal prosecution, cybersecurity laws only address part of the problem. However, cybersecurity should be one part of a more comprehensive long-term strategy to make the Internet safer for all.