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First Amendment Cases & Materials

Freedom of Speech:

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942): fighting words (words that by their very utterance inflict injury or tend to incite an immediate breach of the peace) are not protected by the First Amendment

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952): motion pictures are protected by the First Amendment

Roth v. United States, 354 U.S. 476 (1957): obscene material is not protected by the First Amendment

United States v. O'Brien, 391 U.S. 367 (1968): a criminal prohibition against draft-card burning does not violate the First Amendment because its effect on speech is only incidental, and it is justified by the significant governmental interest in maintaining as efficient and effective military draft system

Brandenburg v. Ohio, 395 U.S. 444 (1969): the mere advocacy of the use of force or violating the law is protected by the First Amendment, but inciting others to take direct and immediate unlawful action is not

Buckley v. Valeo, 424 U.S. 1 (1976): spending money to influence elections is a form of constitutionally protected free speech

Hustler Magazine v. Falwell, 485 U.S. 46 (1988): parodies of public figures are protected by the First Amendment, even when they are intended to cause emotional distress

Texas v. Johnson, 491 U.S. 397 (1989): laws criminalizing the desecration of the American flag are unconstitutional in violation of the First Amendment's protection of symbolic speech

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991): public indecency laws regulation nude dancing are constitutional because they further substantial governmental interests in maintaining order and protecting morality

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010): limits on corporate and union political expenditures during election cycles violate the First Amendment

Freedom of Religion:

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): public schools cannot override the religious beliefs of their students by forcing them to salute the American flag and recite the pledge of allegiance

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993): the government must show a compelling interest to pass a law targeting a religion's ritual, and failing to show such an interest, the prohibition of animal sacrifice is a violation of the Free Exercise Clause

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __ (2014): closely held, for-profit corporations have free exercise rights under the Religious Freedom Restoration Act of 1993, and the requirement of the Affordable Care Act that employers provide their female employees with access to contraception violates that right

Freedom of Association:

NAACP v. Alabama, 357 U.S. 449 (1958): the freedom to associate with organizations dedicated to the "advancement of beliefs and ideas" is an inseparable part of the Due Process Clause

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995): private citizens organizing a public demonstration have the right to exclude groups whose message they disagree with from participating

Boy Scouts of America v. Dale, 530 U.S. 640 (2000): private organizations are allowed to choose their own membership and expel members based on their sexual orientation even if such discrimination would otherwise be prohibited by anti-discrimination legislation designed to protect minorities in public accommodations

Law Review Articles:

Algorithims and Speech - UPenn – 2013

Associational Speech - Yale – 2011

Constitutional Law in an Age of Proportionality - Yale – 2015

Hate Speech and Political Correctness - Illinois – 1992

Low Value Speech - Harvard – 2015

Origins of Freedom of Religion - Harvard – 1990

Punishment for Prejudice - South Dakota – 1994

Restraining the Heartless - Indiana – 2009

State Restrictions on Violent Expression - Vanderbilt – 1993

The Forgotten Freedom of Assembly - Tulane – 2010

The Hobby Lobby Moment - Harvard – 2014

The Unsettling Well Settled Law of Freedom of Association - Connecticut – 2010

When to Regulate Hate Speech - Penn State – 2006

Other Commentary:

What Does "Freedom of Assembly" Mean for Occupy Wall Street?, HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW, Blog Post, November 5, 2011

ACLU-TN Victory in Protecting Free Speech of Occupy Nashville Protesters Federal Judge Rules State Violated Demonstrators' FirstAmendment Rights, ACLU, June 13, 2013

The Right to Peaceably Assemble: U.S. Constitutional Law and Occupy Wall Street, Constitutional Litigation Clinic at Rutgers School of Law-Newark

Law Review Articles

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ARTICLE

ALGORITHMS AND SPEECH

STUART MINOR BENJAMIN†

One of the central questions in free speech jurisprudence is what activities the First Amendment encompasses. This Article considers that question in the context of an area of increasing importance—algorithm-based decisions. I begin by looking to broadly accepted legal sources, which for the First Amendment means primarily Supreme Court jurisprudence. That jurisprudence provides for very broad First Amendment coverage, and the Court has reinforced that breadth in recent cases. Under the Court's jurisprudence the First Amendment (and the heightened scrutiny it entails) would apply to many algorithm-based decisions, specifically those entailing substantive communications. We could of course adopt a limiting conception of the First Amendment, but any nonarbitrary exclusion of algorithm-based decisions would

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require major changes in the Court's jurisprudence. I believe that First Amendment coverage of algorithm-based decisions is too small a step to justify such changes. But insofar as we are concerned about the expansiveness of First Amendment coverage, we may want to limit it in two areas of genuine uncertainty: editorial decisions that are neither obvious nor communicated to the reader, and laws that single out speakers but do not regulate their speech. Even with those limitations, however, an enormous and growing amount of activity will be subject to heightened scrutiny absent a fundamental reorientation of First Amendment jurisprudence.

INTRODUCTION 1446
I. WHAT IS AT STAKE 1448
II. THE CENTRALITY AND EXPANSION OF SUPREME COURT JURISPRUDENCE 1452
A. *A Note on Broadly Accepted Sources and Forms of Reasoning* 1452
B. *Expansion and Exceptions* 1456
III. SUPREME COURT JURISPRUDENCE AND ALGORITHM-BASED DECISIONS 1458
IV. PRODUCING A DIFFERENT RESULT 1472
A. *Relying on Particular Theories of the First Amendment* 1473
B. *An Algorithm-Based Line That Works* 1479
V. SCOPE 1482
A. *Requiring Communicating About Your Editing* 1484
B. *Regulations of Speakers Not Aimed at Their Speech* 1487
CONCLUSION 1492

INTRODUCTION

More and more of our activity involves not merely the transmission of bits, but the transmission of bits according to algorithms and protocols created by humans and implemented by machines.[1] Messages travel over the Internet because of transmission protocols, coding decisions determine the look and feel of websites, and algorithms determine which links, messages, or stories rise to the top of search engine results and web aggregators' webpages. Most webpages have automated components, as do most online articles and all video games.[2] Are these algorithm-based outputs "speech" for purposes of

[1] I am using "bit" as a convenient shorthand for information transmitted via electronic signals. In computing and telecommunications, data is encoded in binary digits (a.k.a. bits), but nothing in this Article turns on the binary nature of bits per se. The point is simply to emphasize the nature of the communication as electronic, as opposed to old-fashioned pen or printing press on paper.

[2] The list goes on and on. *See, e.g.*, CHRISTOPHER STEINER, AUTOMATE THIS: HOW ALGORITHMS CAME TO RULE OUR WORLD 7 (2012) ("Algorithms have already written

the First Amendment?[3] That is, does the Free Speech Clause of the First Amendment apply to government regulation of these or other algorithm-based changes to bits?[4]

In this Article I address that question. I conclude that if we accept Supreme Court jurisprudence, the First Amendment encompasses a great swath of algorithm-based decisions—specifically, algorithm-based outputs that entail a substantive communication. We could decide to reject Supreme Court jurisprudence, or read it narrowly in order to limit its application. But for the purposes of this Article, I will not apply that lens to the existing case law. Instead, I will look to broadly accepted sources and forms of legal reasoning—which in the First Amendment context means primarily Supreme Court jurisprudence—and consider whether those sources lead to the conclusion that algorithm-based outputs are speech for First Amendment purposes. I find that the answer is yes for most algorithm-based editing.

For some, this answer will be unwelcome. A wide range of commentators have expressed concerns about potentially expansive interpretations of the scope of the Free Speech Clause, such that much, if not most, government regulation is subject to heightened judicial scrutiny.[5] Such a concern may

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symphonies as moving as those composed by Beethoven, picked through legalese with the deftness of a senior law partner, diagnosed patients with more accuracy than a doctor, written new articles with the smooth hand of a seasoned reporter, and driven vehicles on urban highways with far better control than a human.").

3 The First Amendment encompasses more than the Free Speech Clause, of course. For the purposes of this Article, when I refer to the First Amendment I am referring to its Free Speech Clause component.

4 There is no single accepted definition of "algorithm." *See Algorithm Characterization*, WIKIPEDIA, http://en.wikipedia.org/wiki/Algorithm_characterizations (last updated Feb. 11, 2013) (stating that an "[a]lgorithm does not have a generally accepted formal definition" and discussing more than twenty different prominent characterizations). Broadly speaking, an algorithm is a set of instructions designed to produce an output. My use of the term in this Article focuses on its most common usage—as instructions or rules implemented by a computer. That is, I want to focus on nonhuman processes, and I use the term "algorithm" to refer to them. For ease, I will refer to decisions made by protocols, algorithms, and other computations as algorithm-based decisions. I could call them "code-based processes" or some other less-familiar and more ungainly term, but I choose "algorithm" simply because it has become more familiar shorthand.

5 *See generally* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-66 (1985); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14-25 (1979); Jedediah Purdy, *The Roberts Court v. America*, DEMOCRACY, Winter 2012, at 46, 49-53. The work of Frederick Schauer has been especially important in this regard. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1794-95 (2004) [hereinafter Schauer, *Boundaries*]; Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285; Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988); Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT 174 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

motivate, at least in part, the contrasting answer that Tim Wu reaches in his piece.[6] One possible response to these concerns is to articulate a theory of the Free Speech Clause that excludes algorithm-based decisions, or, perhaps more modestly, search engine results (which have been the focus of some commentators).[7] Any such exclusion, however, will entail a radical revamping of our Free Speech Clause jurisprudence. And, as it turns out, there are interpretations that are consistent with existing jurisprudence (and, in my view, desirable on their own terms) that would limit the scope of the Free Speech Clause. Of course, one could find those interpretations insufficient, but I conclude that the inclusion of algorithm-based decisions in the First Amendment's protections does not substantially advance the argument for a radical revamping.

In a previous article I asked how difficult it would be to find that mere transmission of bits constituted speech.[8] One way of framing that question is to ask how hard it would be to expand the definition of speech to include something (mere transmission) that ordinarily would fall outside it. In this Article I address the converse question: How hard would it be to narrow the definition of speech to exclude something that Supreme Court jurisprudence would encompass? What would such an exclusion mean for First Amendment jurisprudence?

I. WHAT IS AT STAKE

A huge range of bit manipulations involves the use of algorithms. Computer code is a set of instructions and algorithms.[9] Every webpage relies on many different algorithms for its structure, not to mention its transmission over the Internet. Indeed, every networked device depends on an electronic network built in part on algorithms.

Around the turn of this century, there was considerable focus on whether computer code itself was speech for First Amendment purposes, such that

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[6] *See* Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1498 (2013) ("Too much protection would threaten to constitutionalize many areas of commerce and private concern without promoting the values of the First Amendment.").

[7] *See, e.g.*, Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1193-1201 & n.239 (2008) (contending that the First Amendment, properly understood, does not cover search engine rankings).

[8] Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1695 (2011) (concluding that "argument that transmission qua transmission triggers the First Amendment is . . . weak").

[9] *See generally Algorithm*, WIKIPEDIA, http://en.wikipedia.org/wiki/Algorithm (last updated Mar. 29, 2013); *What Is a Computer Algorithm?*, HOWSTUFFWORKS, http://computer.howstuffworks.com/question717.htm (last visited Apr. 10, 2013).

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regulations on the distribution of code implicated the First Amendment.[10] The government had concerns about the proliferation of some computer programs (notably, those perceived as jeopardizing security), and it sought to regulate the circulation of the code itself—the instructions to a computer that would enable the feared activity.[11] For what it is worth, the few courts that considered the issue found by and large that regulations of computer code were regulations of speech.[12]

My focus here is not on the distribution of code, and thus not on whether code itself is speech. Rather, I consider whether the outputs of that code—the decisions created by algorithms—are speech for First Amendment purposes. The question whether the First Amendment applies to regulation of search engine results is different from the question whether the algorithms used by those search engines are speech. Even if the algorithms are not speech, their products may be.

What sorts of regulations of algorithm-based decisions might be at issue? The most prominent possibility, and the one that has inspired the most commentary, is the regulation of search engine results, and in particular (given its large market share) Google. A company frustrated by its low PageRank (which hurt its ability to find clients) brought an action against

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[10] *See, e.g.*, Steven E. Halpern, *Harmonizing the Convergence of Medium, Expression, and Functionality: A Study of the Speech Interest in Computer Software*, 14 HARV. J.L. & TECH. 139, 181 (2000) (discussing the application of the First Amendment to computer software); Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 716 (2000) (discussing whether encryption source code is covered by the First Amendment); Schauer, *Boundaries*, *supra* note 5, at 1794 ("The anti-Microsoft and anti-Hollywood claims of the open-source movement focus on the way in which computer source codes can be conceived of as a language and therefore as speech . . . ."); Katherine A. Moerke, Note, *Free Speech to a Machine? Encryption Software Source Code Is Not Constitutionally Protected "Speech" Under the First Amendment*, 84 MINN. L. REV. 1007, 1027 (2000) ("[B]ecause source code is the implementation of an idea, not the expression of it, it is not entitled to First Amendment protection as a type of speech.").

[11] The government has acted on these concerns on a number of occasions by restricting the distribution or export of computer software that it viewed as dangerous on a number of occasions, producing several lawsuits. *See, e.g.*, Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) (export of excryption software programs); Bernstein v. Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999) (distribution of encryption software pursuant to the International Traffic in Arms Regulations); Karn v. Dep't of State, 925 F. Supp. 1 (D.D.C. 1996) (designation of a computer diskette as a "defense article" pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations).

[12] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447 (2d Cir. 2001) (holding that the First Amendment covers computer programs, and stating that "[a] recipe is no less 'speech' because it calls for the use of an oven, and a musical score is no less 'speech' because it specifies performance on an electric guitar"); *Bernstein*, 176 F.3d at 1141 (concluding that "encryption software, in its source code form and as employed by those in the field of cryptography, must be viewed as expressive for First Amendment purposes"), *reh'g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999).

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Google for tortious interference with contractual relations, and Google successfully argued that the First Amendment applied to its search results.[13] Another company frustrated by its rankings on Google unsuccessfully argued that Google's search engine is an "essential facility" that must be opened to access,[14] and Frank Pasquale argued that Google should be understood as a new kind of bottleneck deserving of regulatory attention—an "essential cultural and political facility."[15] Pasquale and Oren Bracha have also argued that the government should be able to regulate search engines' ability to structure their results, and that the First Amendment does not encompass search engine results.[16] Eugene Volokh and Donald Falk, by contrast, have contended that all aspects of search engines' results are fully protected by the First Amendment.[17]

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[13] Search King, Inc. v. Google Tech., Inc., No. 02-1457, 2003 WL 21464568, at *3-4 (W.D. Okla. May 27, 2003) (order granting Google's motion to dismiss). "PageRank" is an algorithm that "measure[s] . . . the quantity and quality of links from one website to another." Victor T. Nilsson, Note, *You're Not from Around Here, Are You? Fighting Deceptive Marketing in the Twenty-First Century*, 54 ARIZ. L. REV. 801, 807 (2012); *see also* PageRank, WIKIPEDIA, http://en.wikipedia.org/wiki/PageRank (last updated Apr. 6, 2013).

[14] Kinderstart.com, LLC v. Google, Inc., No. 06-2057, 2007 WL 831806, at *4 (N.D. Cal. Mar. 16, 2007) (granting motion to dismiss) ("KinderStart asserts that the Google search engine is 'an essential facility for the marketing and financial viability of effective competition in creating, offering and delivering services for search over the Internet.'" (citation omitted)).

[15] Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, *in* THE NEXT DIGITAL DECADE 401, 402 (Berin Szoka & Adam Marcus eds., 2010), *available at* http://nextdigitaldecade.com/ndd_book.pdf.

[16] *See* Bracha & Pasquale, *supra* note 7; *see also* Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1117 (2007) (stating that in light of websites' free speech "right to reach an audience, and the listener's right to choose among speakers according to the listener's own criteria, free of extraneous discriminatory influences[,] . . . search engines should not manipulate individual search results except to address instances of suspected abuse of the system").

[17] *See* EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (2012), *available at* http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf. Volokh and Falk state that

> Google, Microsoft's Bing, Yahoo! Search, and other search engines are speakers. First, they sometimes convey information that the search engine company has itself prepared or compiled (such as information about places appearing in Google Places). Second, they direct users to material created by others, by referencing the titles of Web pages that the search engines judge to be most responsive to the query, coupled with short excerpts from each page. . . . Third, and most valuably, search engines select and sort the results in a way that is aimed at giving users what the search engine companies see as the most helpful and useful information.

Id. at 3. James Grimmelmann has taken a more nuanced position, focusing on search engines as advisors to their users. *See* James Grimmelmann, Search Engines as Advisors (2013) (unpublished manuscript) (on file with author).

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But, at least for some commentators, the concern is not limited to Google. For instance, Tim Wu has suggested that the important issue is computer-generated outcomes more generally. Wu has contended that "nonhuman or automated choices" should not be treated as speech for First Amendment purposes.[18] This framing is useful. Under the prevailing jurisprudence, the existence of anticompetitive concerns with respect to Google (or any other particular entity) might affect the application of First Amendment scrutiny but not whether the underlying activity is encompassed by the First Amendment in the first place.

The apparent motivation behind excluding algorithm-based decisions from First Amendment coverage is understandable. More and more of our activity involves bits, and those bits are frequently guided and shaped by algorithms. The more fully algorithm-based decisions are treated as speech, the more broadly First Amendment jurisprudence will apply. And this has real consequences. Content-based government regulations of speech are subject to strict scrutiny, which is very difficult to satisfy.[19] Content-neutral regulations are subject to intermediate scrutiny, which is an easier test to pass but still much more rigorous than the rational basis review applicable to ordinary regulation.[20]

Heightened scrutiny raises the costs of regulation, both in requiring more justification ex ante and in increasing the likelihood that the regulation will be rejected on constitutional grounds (since the chances of rejection on constitutional grounds for ordinary legislation are near zero). It could be that we, as a society, like this outcome because we decide that we want less government regulation of algorithm-related industries, but my point here is

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[18] Tim Wu, *Free Speech for Computers?*, N.Y. TIMES, June 20, 2012, at A29 ("[A]s a general rule, nonhuman or automated choices should not be granted the full protection of the First Amendment, and often should not be considered 'speech' at all."). I understand Wu to be making a different argument in his contribution to this Symposium, and I discuss it briefly in note 84, *infra*.

[19] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). Only one speech regulation has survived strict scrutiny in the Supreme Court. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010) (upholding a federal statute making it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization" in light of the particular deference due to the Executive regarding the combating of terrorism (quoting 18 U.S.C. § 2339B(a)(1) (2006))).

[20] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994) ("[A] content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

simply that we disincentivize regulation when heightened scrutiny applies. Subjecting every regulation that affects algorithm-based transmissions to intermediate scrutiny would have dramatic consequences.

Consider the Court's recent opinion in *Sorrell v. IMS Health Inc.*,[21] which involved a Vermont law restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors, as a way of thwarting data miners' perceived invasion of privacy.[22] Such a law would be unproblematically constitutional absent First Amendment coverage. That is, if it were understood not to trigger First Amendment scrutiny, it would easily pass constitutional muster. But, the Supreme Court flatly stated in *Sorrell* that "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard."[23] Similarly, the FCC's limits on the horizontal concentration and vertical integration of cable companies would be subject to fairly lenient review if applied to distributors of gas or electricity. But because the D.C. Circuit found that these regulations implicated the First Amendment and thus triggered intermediate scrutiny, the court invalidated the regulations and remanded them.[24] Even after that remand, and a much more detailed analysis by the FCC, the D.C. Circuit found that the FCC had failed to justify the numbers it had chosen and thus rejected them again.[25] Those limits—which are statutorily mandated, by the way—lie dormant. The FCC has not figured out how to write regulations that will survive heightened First Amendment scrutiny.

II. THE CENTRALITY AND EXPANSION OF SUPREME COURT JURISPRUDENCE

A. *A Note on Broadly Accepted Sources and Forms of Reasoning*

In this Article I want to apply broadly accepted sources and forms of legal reasoning. In the First Amendment context, that means primarily Supreme Court jurisprudence. This is fairly well-trodden ground, and my focus here is not to defend that proposition. I will simply note that, as a

21 131 S. Ct. 2653 (2011).
22 VT. STAT. ANN. tit. 18, § 4631(d) (2010).
23 *Sorrell*, 131 S. Ct. at 2659.
24 Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1137, 1143-44 (D.C. Cir. 2001).
25 Comcast Corp. v. FCC, 579 F.3d 1, 10 (D.C. Cir. 2009).

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textual matter, "speech" and "the freedom of speech" could be interpreted in any number of ways. Everyone might agree on some core elements, but the textual boundaries of these terms are not apparent.[26] And as Leonard Levy noted more than half a century ago, "The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been [as] obscure to us" as that of the Free Speech Clause.[27] Many commentators rely on underlying theories of the First Amendment—visions about what the freedom of speech really means, usually grounded in conceptions of the First Amendment's purpose. The main conceptions that have been offered

26 Akhil Amar has argued that intratextualism—identifying terms appearing in different parts of the Constitution and interpreting them to have similar meanings—illuminates the meaning of "speech" under the Free Speech Clause. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). In particular, he contends that the term "speech" in the Speech or Debate Clause, which provides that Senators and Representatives "shall not be questioned in any other Place" for "any Speech or Debate in either House," U.S. CONST. art. I, § 6, cl. 1, applies only to political speech, and therefore that we should interpret the Free Speech Clause to cover only, or at least primarily, political speech. Amar, *supra*, at 815. This line of argumentation has not been met with widespread agreement, however, and for purposes of this section I am addressing only broadly accepted interpretations. *See generally* Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730 (2000) (criticizing Amar's theory of intratextualism).

27 LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 4 (1960) [hereinafter LEVY, LEGACY]; *see also* Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press* ("The debates in Congress concerning the speech and press clauses shed scant light on the question of meaning. . . . Nor do we find enlightening comments in the state legislatures that considered the amendments or the local newspapers or pamphlets of the time."), *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82, 85 (Eugene W. Hickok, Jr. ed., 1991).

That said, Framing-era materials suggest that the Framing generation held a narrower conception of the freedom of speech than do modern courts, and many in the Framing generation adhered to Blackstone's position that the freedom of speech was best understood as a freedom from prior restraints. *See, e.g.*, LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 46 (1963) ("Jefferson . . . never protested against the substantive law of seditious libel . . . . He accepted without question the dominant view of his generation that government could be criminally assaulted merely by the expression of critical opinions that allegedly tended to subvert it by lowering it in the public's esteem."); LEVY, LEGACY, *supra*, at xxi ("The evidence drawn particularly from the period 1776 to 1791 indicates that the generation that framed . . . the First Amendment was hardly as libertarian as we have traditionally assumed."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("In colonial times and during and after the Revolution [early political leaders] displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse."); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 60 (2005) ("Since the First Amendment only applied against Congress, this approach assumed that the federal government could punish seditious, libelous, blasphemous, obscene, or indecent speech with impunity so long as it did not censor the speech in advance."); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *151 ("The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

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over the years are the marketplace of ideas and the search for truth, self-government, democratic deliberation, personal autonomy, individual self-expression, and the government-checking function.[28] For better or worse, no underlying conception of the First Amendment has been widely accepted as explaining or driving First Amendment doctrine and thus none can fairly be described as a broadly accepted source or form of reasoning.[29]

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[28] On the marketplace of ideas, see *infra* notes 30-32 and accompanying text. On the search for truth, see generally William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995). On self-government and democratic deliberation, see generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 119-78 (1995); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); and Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. On autonomy, see generally C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194-224 (1989); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); and Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979). On the checking function, see generally Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. On self-expression, see generally MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); and David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[29] *See, e.g.*, THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT at vii (1966) ("Despite the mounting number of decisions and an even greater volume of comment, no really adequate or comprehensive theory of the First Amendment has been enunciated, much less agreed upon."); DANIEL A. FARBER, THE FIRST AMENDMENT 6 (2d ed. 2003) ("For a while there was a trend toward single-value theories of First Amendment law, in which a scholar would posit a single underlying constitutional value and then attempt to deduce all First Amendment doctrine from that value. Such efforts, whatever their merits, never seemed to persuade many other scholars and were almost entirely ignored by the courts."); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2372 (2000) (noting that the Supreme Court has not consistently followed any one theory of the First Amendment). The absence of a consensus in support of a particular theory of the First Amendment is not surprising: each possible conception of the First Amendment can be subjected to legitimate criticism, and reaching agreement at that level of specificity is difficult for any group, Justices or otherwise. The Supreme Court's First Amendment jurisprudence is thus one of the many areas characterized by incompletely theorized agreements. Cass Sunstein characterizes this phenomenon as follows:

> Many judges are minimalists; they want to say and do no more than necessary to resolve cases. . . . [Minimalists] attempt to reach *incompletely theorized agreements*, in which the most fundamental questions are left undecided. They prefer outcomes and opinions that can attract support from people with a wide range of theoretical positions, or with uncertainty about which theoretical positions are best. In these ways, minimalist judges avoid the largest questions about the meaning of the free speech guarantee, or the extent of the Constitution's protection of "liberty," or the precise scope of the President's authority as Commander in Chief of the Armed Forces.

Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 48 (footnote omitted).

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The best-known conception, and that most commonly invoked by the Supreme Court, is the marketplace of ideas.[30] For instance, the Supreme Court stated in *Red Lion Broadcasting Co. v. FCC* (in language quoted many times since) that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[31] But the marketplace-of-ideas conception has many detractors, and the Supreme Court has emphasized different conceptions in some cases and in still other cases refrained from choosing any particular theory.[32]

Some theorists would argue (in mild rebuke to the Supreme Court) that one cannot usefully interpret the bare words of the Free Speech Clause without an underlying theory, and the Supreme Court (in mild rebuke to those theorists) interprets the Free Speech Clause without an agreed-upon theory.[33] One way of understanding the first part of this Article is that it

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[30] Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616 (1919), contains the first, and probably the most famous, articulation of the marketplace metaphor, one that "revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech." Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823-24 (2008). Holmes wrote,

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—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.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting). *See also* Blocher, *supra*, at 824-25 ("Never before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law. Its influence has been both descriptive and normative, dominating the explanation of and the justification for free speech in the United States.").

[31] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[32] *See supra* note 29 and accompanying text; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573-75 (1995) (emphasizing the centrality of autonomy to the First Amendment); *Turner I*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" (quoting EMERSON, *supra* note 29, at 9)); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

[33] *See, e.g.*, Post, *supra* note 10, at 716 ("Lee Tien is fundamentally misguided to believe that he can explain First Amendment coverage 'without appealing to a grand theoretical framework of First Amendment values.' If First Amendment coverage does not extend to all speech acts, then such a framework is at a minimum necessary in order to provide the criteria by which to select the subset of speech acts that merit constitutional attention." (quoting Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629, 636 (2000))).

Temple American Inn of Court - April 2016 Program - Research and Materials

considers how far broadly accepted forms and sources of reasoning can take us without relying on a theory of the Free Speech Clause.

The central broadly accepted form of legal authority with respect to the Free Speech Clause is Supreme Court jurisprudence. Free Speech Clause cases have been a significant part of the Supreme Court's docket for almost a century. The number of cases, combined with the broadly accepted common law approach to interpreting the Court's cases, makes for a fairly rich jurisprudence. Indeed, what is striking for my purposes is how broadly the Court has interpreted the scope of the Free Speech Clause, particularly in recent years, with the result that one can fairly answer most of the questions about algorithms without relying on any particular theories of the First Amendment. The ordinary lawyerly tools of case interpretation take us a fair distance.

B. *Expansion and Exceptions*

The history of the Supreme Court's First Amendment jurisprudence has been one of expansion. Libel and defamation were thought to be outside of the First Amendment's coverage until *New York Times Co. v. Sullivan*.[34] Commercial advertising was considered to be beyond the scope of the First Amendment until *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[35] And that expansion of the scope of the Free Speech Clause has continued. In the *IMS Health* litigation, many (including the government and the First Circuit) contended that data miners' sale, transfer, and use of prescriber-identifying information was conduct, not speech.[36]

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[34] *See* 376 U.S. 254, 268-69 (1964) (stating that although "[r]espondent relies heavily . . . on statements of this Court to the effect that the Constitution does not protect libelous publications . . . libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment").

[35] *See* 425 U.S. 748, 758, 770 (1976) (acknowledging that "in past decisions the Court has given some indication that commercial speech is unprotected," but holding that "commercial speech, like other varieties, is protected").

[36] The First Circuit, for example, stated:

> We say that the challenged elements of the Prescription Information Law principally regulate conduct because those provisions serve only to restrict the ability of data miners to aggregate, compile, and transfer information destined for narrowly defined commercial ends. In our view, this is a restriction on the conduct, not the speech, of the data miners. In other words, this is a situation in which information itself has become a commodity. The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech. We think that such an interpretation stretches the fabric of the First Amendment beyond any rational measure.

But the Supreme Court rejected this argument, emphasizing that "the creation and dissemination of information are speech within the meaning of the First Amendment."[37]

Not only has the Court expansively construed the coverage of the First Amendment (or, if you prefer, narrowed and eliminated assumed exceptions to First Amendment coverage), but it has also revealed an unwillingness to create new exceptions or construe existing categories of exceptions at a broader level of generality. This has been particularly clear in recent years. In *United States v. Stevens*,[38] *Brown v. Entertainment Merchants Association*,[39] and *United States v. Alvarez*,[40] the Supreme Court emphatically rejected arguments in favor of broadening the categories that are outside First Amendment coverage. Indeed, the *Alvarez* plurality rejected understanding existing exceptions that focus on falsity (like fraud and defamation) as part of a more general exclusion of false statements of fact from First Amendment coverage. The flavor of the Court's approach toward exceptions is encapsulated in the following paragraph from *Alvarez*, quoting *Stevens* in the first two quotations and *Brown* in the last:

> Although the First Amendment stands against any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with "persuasive

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IMS Health Inc. v. Ayotte, 550 F.3d 42, 52-53 (1st Cir. 2008), *abrogated by* Sorrell v. IMS Health, Inc. 131 S.Ct. 2653 (2011).

[37] *Sorrell*, 131 S. Ct. at 2667. The Court's discussion in *Sorrell* is illuminating:

> [T]he United States Court of Appeals for the First Circuit has characterized prescriber-identifying information as a mere "commodity" with no greater entitlement to First Amendment protection than "beef jerky." In contrast the courts below concluded that a prohibition on the sale of prescriber-identifying information is a content-based rule akin to a ban on the sale of cookbooks, laboratory results, or train schedules.
>
> This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.

Id. at 2666-67 (internal citations omitted).

[38] 130 S. Ct. 1577 (2010).

[39] 131 S. Ct. 2729 (2011).

[40] 132 S. Ct. 2537 (2012) (plurality opinion).

evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.[41]

I emphasize this backdrop because it highlights the Justices' apparent belief that their jurisprudence has laid out the relevant benchmarks for First Amendment coverage, subject only to "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[42]

III. SUPREME COURT JURISPRUDENCE AND ALGORITHM-BASED DECISIONS

I turn now to the Supreme Court cases most directly relevant to the coverage of algorithm-based outputs. That jurisprudence provides meaningful guidance. *Brown* is a good starting point. The *Brown* Court began its analysis of the legal issues in the case by stating flatly, "California correctly acknowledges that video games qualify for First Amendment protection."[43] After noting that "it is difficult to distinguish politics from entertainment, and dangerous to try" and quoting from *Winters v. New York*,[44] the Court concluded its discussion by stating categorically that "[v]ideo games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual

[41] *Id.* at 2547 (citations omitted) (quoting, respectively, *Stevens*, 130 S. Ct. at 1586, and *Brown*, 131 S. Ct. at 2734). The *Alvarez* plurality had earlier noted:

> [C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar . . . . Among these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called "fighting words"; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain. These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Id. at 2544 (citations and internal quotation marks omitted).

[42] *Brown*, 131 S. Ct. at 2734.

[43] *Id.* at 2733.

[44] 333 U.S. 507, 510 (1948).

Temple American Inn of Court - April 2016 Program - Research and Materials

world). That suffices to confer First Amendment protection."[45] In one short paragraph the Court concluded that video games are speech, period.

And there is a significant dog that didn't bark: the Court stated broadly that "video games" are covered by the First Amendment—not particular types of video games that entail certain kinds of interactions, but all video games.[46] The only possible limit implied by the Court's reasoning is that video games communicate ideas, but the Court's discussion makes it clear that it has a very low threshold for what constitutes such communication. Indeed, Justice Alito's concurrence argued at some length that video games were quite different from recognized forms of speech like books,[47] prompting the majority to respond that "[e]ven if we can see in them 'nothing of any possible value to society . . . , they are as much entitled to the protection of free speech as the best of literature.'"[48] It is certainly possible that a future Supreme Court could draw distinctions among video games, but nothing in *Brown* provides any support for such distinctions.

In *Turner Broadcasting System, Inc. v. FCC* (*Turner I*),[49] confronting a First Amendment challenge to a statute that required cable operators to air local broadcast television stations,[50] the Court flatly rejected the suggestion that this was ordinary economic regulation, and more specifically that cable operators were not engaged in speech for First Amendment purposes:

> There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to

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[45] *Brown*, 131 S. Ct. at 2733. The entirety of the Court's discussion is as follows:

> California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948). Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.

Id.

[46] *Id.*

[47] *See id.* at 2742 (Alito, J., concurring in the judgment) ("There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.").

[48] *Id.* at 2737 n.4 (quoting *Winters*, 333 U.S. at 510).

[49] 512 U.S. 622 (1994).

[50] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

Temple American Inn of Court - April 2016 Program - Research and Materials

> the protection of the speech and press provisions of the First Amendment. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats."[51]

This language suggests two—and only two—elements for First Amendment coverage: first, that cable programmers and operators either create programming or choose what to air; and, second, that in doing so they seek to communicate messages on a variety of topics.

Turner I's focus on seeking to communicate messages is consistent with Supreme Court jurisprudence that has always treated substantive communication or self-expression as a necessary condition for the application of the First Amendment.[52] In every case in which the Court has applied the First

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[51] 512 U.S. at 636 (alteration in original) (citation omitted) (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)). As the internal quotation indicates, the Court put forward the same test in *Preferred Communications*.

[52] *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 94 (1982) ("Communication dominates all the arguments that would with any plausibility generate a Free Speech Principle."); Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1274 (2010) ("The Supreme Court has been very clear about the First Amendment requirement that speakers must engage in definitive communication before receiving constitutional protection for speech."); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 920-21 (1979) ("The Court is saying that the communication of ideas is at once the essential first amendment purpose and the essential first amendment property. Without this purpose or property, activity is not protected by the first amendment.").

One might reasonably ask what work "self-expression" is doing in the formulation in the text, on the assumption that self-expression is a substantive communication. Adding "self-expression" clarifies the inclusion of forms of expression that have been recognized as implicating the freedom of speech even though they arguably do not entail a clear substantive communication—in particular, recognized forms of art and symbolism. As the Supreme Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*:

> The protected expression that inheres in a parade is not limited to its banners and songs . . . for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even "[m]arching, walking or parading" in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Temple American Inn of Court - April 2016 Program - Research and Materials

Amendment, abridgement of substantive communication has been the issue.[53] Some of those abridgements are content-neutral, but the key is that they interfere with a person's or entity's ability to communicate content. The touchstone of the Court's First Amendment cases has always been that the underlying activity entails an expression of ideas, even if it is not "a narrow, succinctly articulable message."[54] Communication thus seems to require, at a minimum, a speaker who seeks to transmit some substantive message or messages[55] to a listener who can recognize that message.[56] Thus, in order to communicate, one must have a message that is sendable and receivable and that one actually chooses to send.[57]

Choosing to send a sendable and receivable substantive message may be necessary for First Amendment coverage, but that does not mean they are sufficient for such coverage. Aren't those criteria incomplete?

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515 U.S. 557, 569 (1995) (citations omitted) (quoting, respectively, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 43 (1977) (per curiam); Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam).

53 *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (noting that the Supreme Court has "extended First Amendment protection only to conduct that is inherently expressive"); *Spence*, 418 U.S. at 409-10 (finding that the display of an American flag with peace symbols was an activity "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments").

54 *Hurley*, 515 U.S. at 569.

55 In the remainder of this Article, I will use the term "message" to refer to one or more messages for the sake of convenience and brevity.

56 *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 54 (1989) ("When the message is an aspect of what the actor is trying to do and is understood by the audience as such, we can say comfortably that the act communicates the message and that the free speech principle is relevant."); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) ("Whatever else may or may not be true of speech, as an irreducible minimum it must constitute a communication. That, in turn, implies both a communicator and a communicatee—a speaker and an audience."); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206 (1972) ("[By] 'acts of expression' . . . I mean to include any act that is intended by its agent to communicate to one or more persons some proposition or attitude.").

57 Tim Wu says that while this standard "accurately describes what the Court *says*, it doesn't come close to describing what courts *do*." Wu, *supra* note 6, at 1529. Some lower courts have issued opinions that may be in tension with this standard, but the Supreme Court has not done so, and my focus is on the Court's jurisprudence. *See infra* notes 58-62 and accompanying text. Wu's alternative formulation, by contrast, is not consistent with the prevailing Supreme Court jurisprudence. *See infra* note 84.

This should not obscure one of the important points on which Wu and I agree: the First Amendment standard I glean from the Court's jurisprudence includes a great deal within its purview. Indeed, this Article underscores that breadth, which raises the question whether the Court has gone too far. That question will become more salient insofar as algorithms increase the number of activities encompassed by the First Amendment standard. In this Article I argue that there is no nonarbitrary way to excise algorithm-based outputs from First Amendment coverage without significantly altering First Amendment jurisprudence more generally.

Temple American Inn of Court - April 2016 Program - Research and Materials

The answer may well be yes if we are considering the best definition of "speech" as a matter of first principles, but that is not my goal here. Such a foundational inquiry has felled many trees and is beyond the scope (and word limit) of this Article.

Instead, in keeping with my focus on Supreme Court jurisprudence as the source of widely accepted guideposts, I will ask two questions that focus on possible incompleteness through the lens of the Supreme Court's jurisprudence: First, is relying solely on the minima identified above (choosing to send a sendable and receivable message) and the exceptions the Court has articulated inconsistent with the Court's First Amendment jurisprudence? Second, can we adopt one of the competing theories of the First Amendment in a way that keeps algorithm-based decisions out of First Amendment coverage but isn't significantly inconsistent with the Court's First Amendment jurisprudence? I will address the second question in the next Part, but let me consider the first question here.

In posing this question, I am not asking whether the criteria I identify are complete for purposes of explicating the Supreme Court's approach to First Amendment coverage. They are not. The Court has articulated exceptions and qualifications applicable to, for example, expressive conduct,[58] specific kinds of communications (such as speech integral to criminal conduct),[59] and specific contexts (such as public fora).[60] Rather, I am asking whether applying the criteria identified above plus the exceptions the Court has articulated would be inconsistent with some elements of the Court's jurisprudence. Are the criteria plus exceptions so incomplete that they do not adhere to some of the Court's rulings? This question may seem nonsensical insofar as it can be boiled down to "Is the Supreme Court's jurisprudence inconsistent with itself?" But the question makes sense in the context of a multimember Court often reaching incompletely theorized agreements resolving specific disputes arising out of others' actions.[61]

The narrow answer is that the criteria and existing exceptions would not upend any existing Supreme Court jurisprudence. No Supreme Court

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[58] *See, e.g.*, *Rumsfeld*, 547 U.S. at 65-66 (discussing what sorts of conduct are expressive and covered by the First Amendment).

[59] *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). For a recent list of First Amendment exceptions, see United States v. Alvarez, 132 S. C.t. 2537, 2544 (2012) (including speech integral to criminal conduct, obscenity, and incitement, to name a few) (plurality opinion).

[60] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-85 (1992) (discussing the public forum doctrine).

[61] *See* Sunstein, *supra* note 29, at 48 (identifying incompletely theorized agreements as those "in which the most fundamental questions are left undecided").

holdings would be disturbed, no Supreme Court doctrines would have to be recast.[62] The Court has never found a substantive communication that was sendable, receivable, and actually sent to be outside First Amendment coverage unless it fell into one of the Court's articulated exceptions. The broader answer is that the breadth of First Amendment coverage suggested by these criteria might motivate us to find ways to narrow the application of First Amendment scrutiny, a topic I discuss later in this Article.

To return to the criteria identified above: The Court's reasoning indicates that the First Amendment encompasses many algorithm-based manipulations. Consider a person who creates a billboard or webpage entitled "Our National Debt" that presents a running (and thus increasing) tally of the U.S. national debt.[63] The central feature of this billboard or webpage is simply a dollar figure generated by a computer running a program designed to measure the national debt. There need be no human involvement beyond creating the billboard or webpage and the program measuring the debt. Yet I don't think there is any real doubt that such a billboard or webpage would constitute speech in light of the Supreme Court's jurisprudence. It conveys a substantive message. Its running total of the national debt reflects a focus on and interest in the size of the national debt. It may not be clear to viewers exactly what the creator is trying to say about the national debt, but if nothing else the billboard or webpage communicates that the national debt is sufficiently important to merit this focus.[64]

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[62] The same may not be true with respect to lower courts' jurisprudence. Most notably, lower courts have found that encyclopedias, how-to books, etc. are covered by the First Amendment, but have upheld liability for defective aeronautical charts without suggesting that such liability raised any First Amendment issues. *See, e.g.*, Aetna Cas. & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 341-44 (9th Cir. 1981) (addressing liability for a defective aeronoautical chart without discussing the First Amendment); *cf.* Brocklesby v. United States, 767 F.2d 1288, 1295 n.9 (9th Cir. 1985) (not reaching the First Amendment issue in a case involving an aeronautical chart because it was raised for the first time on appeal). It may be that aeronautical charts are best understood as falling into an exception that the Supreme Court has articulated. But it may well be that the Court's jurisprudence would treat these charts as speech for First Amendment purposes.

[63] This is not a product of my imagination, of course. There is a well-known, billboard-sized "National Debt Clock" in Manhattan. Its central features are tallies of the national debt and the debt per American family. (The only text reads "Our National Debt," "Your Family Share," and "The National Debt Clock.") The clock simply follows an algorithm to calculate the national debt and then displays the result. There are also websites that perform similar functions. *See, e.g.*, US DEBT CLOCK, http://www.usdebtclock.org (providing continuously updated information on the national debt and related numbers—gross domestic product, credit card debt, etc.).

[64] Note that the fact that the person or entity claiming to be engaged in speech does not create the underlying content is irrelevant for purposes of First Amendment coverage. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 570 (1995) ("First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication. . . . [T]he presentation of an edited compilation of speech

Significantly, many communications that the Supreme Court treats as speech do not express a clear viewpoint, from a banner stating "BONG HiTS 4 JESUS"[65] to almost every form of art. Given the ambiguities inherent in almost every piece of art, the Supreme Court's application of First Amendment protections to art precludes a requirement of a clear viewpoint or message. As the Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[66] In *Hurley* the Supreme Judicial Court of Massachusetts held that the Boston St. Patrick's Day parade was not speech for First Amendment purposes because "it is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."[67] But the U.S. Supreme Court, in reversing, unanimously rejected that argument, stating that "the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme."[68] The Court explained that, "[r]ather like a composer, the Council [running the parade] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[69]

Imagine that a person sets up a bulletin board (an old-fashioned, physical bulletin board) on which she posts every article she finds that uses some

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generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper." (citations omitted)); *Turner I*, 512 U.S. 622, 636 (1994) (finding that cable operators "engage in and transmit speech" by choosing channels to air); *see also* Danny Sullivan, *The New York Times Algorithm & Why It Needs Government Regulation*, SEARCH ENGINE LAND (July 15, 2010) http://searchengineland.com/regulating-the-new-york-times-46521 (analogizing Google to a newspaper).

[65] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007). The Court treated the banner as speech under the First Amendment even though "the message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all." *Id.* at 401.

[66] *Hurley*, 515 U.S. at 569 (citations omitted).

[67] Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Boston, 636 N.E.2d 1293, 1299 (Mass. 1994) (internal quotation marks omitted), *rev'd sub. nom Hurley*, 515 U.S. 557 (1995).

[68] 515 U.S. at 576.

[69] *Id.* at 574.

specific words (say, "God is dead"[70]). She is not creating the articles; she is merely collecting articles written by others. And she is not editing beyond looking for the words; she is indiscriminately amassing all articles that use these words. But I think we would regard the bulletin board as speech for First Amendment purposes. The bulletin board would be communicating a substantive message to those who viewed it. Her viewpoint might not be clear (does she agree or disagree that God is dead?) but, if nothing else, the bulletin board tells her viewers that she thinks this topic is important enough to merit special attention, in the form of her bulletin board. Presenting all articles containing the words "God is dead" (or "Boston St. Patrick's Day Parade," for that matter) would not present a single clear message; rather, as in *Turner I*, it would constitute an exercise of editorial discretion through which the bulletin board editor sought to communicate a message about the importance of articles containing the words "God is dead."

Now imagine that the bulletin board editor discovers the Internet, and she transmogrifies her physical bulletin board into a virtual one. She performs computer searches for "God is dead" and posts links to all the articles that incorporate this phrase. Then she realizes that she can largely automate this process, so she creates a macro that lets her hit a single key to search the Web for the words "God is dead," and another macro that lets her hit a second key to upload onto her bulletin board any link that is not already posted. She begins to tire of performing these searches and realizes that a trained monkey could perform this task. Fortunately for her, she has a trained monkey, so she decides to let the monkey hit the two keys. The bulletin board editor then combines the operation into a single key for the monkey. Finally, after the monkey tires of all this typing, the bulletin board editor realizes that she can create a program that will automatically perform the search and post the relevant links without needing the monkey. Once the program starts, it continually searches the Web. In these steps from a physical bulletin board to an automated process, nothing relevant to free speech coverage under the Supreme Court's jurisprudence has changed. When it was physical, the editor's bulletin board communicated the importance to her of articles containing the words "God is dead." The same thing is communicated when the process is automated.

Similarly, consider the following progression: a time-pressed reporter realizes that she can write more articles if she uses some standard boilerplate to communicate information that arises repeatedly. She starts with cutting and pasting but finds that too laborious. So she creates macros for standard

[70] This example is not of my own making; I adapted it from elsewhere.

Temple American Inn of Court - April 2016 Program - Research and Materials

descriptions (e.g., "Team *A* scored seven runs in the third inning, and team *B* then scored nine runs in the third inning"). The macros become more complex, and utilize fancier language (e.g., "in one inning the visitors notched an impressive 7 runs in the top half of the third inning, but the home team responded with a whopping nine runs in the bottom of the third"). The macros become so sophisticated that the reporter can create a template for virtually every outcome, and by adding some facts can stitch together blocks of text that produce a coherent article. Eventually, the reporter's computer skills become so advanced that she can input some basic data from a spreadsheet (e.g., the box score from a baseball game) and run a macro that creates an entire article based on those facts. Finally she creates a macro that gathers those facts and writes the article, leaving her creative input entirely in the creation of the programs.

This is not a fanciful example. A company called Narrative Science "produce[s] content by way of algorithm, no human reporting necessary," for publications such as *Forbes*.[71] Narrative Science employs "meta-writers" and engineers who work with its clients to determine what facts and angles are of interest to them, compile a relevant vocabulary, and create algorithms to construct the articles.[72] As with the example of the "God is dead" bulletin

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[71] *See The State of the News Media 2013: Annual Report on American Journalism*, PEW RES. CTR.'S PROJECT FOR EXCELLENCE JOURNALISM, *available at* http://stateofthemedia.org/2013/overview-5 (last visited Apr. 10, 2013); *see also* NARRATIVE SCIENCE, http://narrativescience.com (last visited Apr. 10, 2013) ("Using complex Artificial Intelligence algorithms, [our program] extracts and organizes key facts and insights and transforms them into stories, at scale.").

In fact, the baseball example comes from an article quoting the following from a Narrative Science article:

> Friona fell 10-8 to Boys Ranch in five innings on Monday at Friona despite racking up seven hits and eight runs. Friona was led by a flawless day at the dish by Hunter Sundre, who went 2-2 against Boys Ranch pitching. Sundre singled in the third inning and tripled in the fourth inning . . . Friona piled up the steals, swiping eight bags in all.

Steven Levy, *Can an Algorithm Write a Better News Story than a Human Reporter?*, WIRED (April 24, 2012), http://www.wired.com/gadgetlab/2012/04/can-an-algorithm-write-a-better-news-story-than-a-human-reporter/all (quoting a Narrative Science article). Not bad for a computer, eh?

[72] *See* Amy Hadfield, *Narrative Science, Newsblaster Show that Algorithm-Writing Articles Have a Key Role to Play in Journalism's Future*, EDITORS WEBLOG (Aug. 8, 2012), http://www.editorsweblog.org/2012/08/22/narrative-science-newsblaster-show-that-algorithm-writing-articles-have-a-key-role-to-pla (noting that Narrative Science "employs a team of 'meta-writers'—journalists who work alongside the company's engineers to produce a set of templates that give the story its 'angle,' the most interesting element of the event it is writing up. To construct sentences, the algorithms draw on topic-specific lists of vocabulary provided by the meta-writers, and then place these sentences within pre-set article frameworks").

This is not unique to articles, nor is it that new. In 2008 a Russian publishing company programmed software to create a novel that was a variation on Leo Tolstoy's Anna Karenina written

Temple American Inn of Court - April 2016 Program - Research and Materials

board, it is hard to see how any step in this progression crosses a line between speech and nonspeech that arises from the Court's jurisprudence. The reporter/programmer is producing a substantive communication via editorial decisions. She designs the boilerplate and the mechanisms to put it together, and she does so in order to convey substantive information. Note that in all the steps of the progression, the reporter/programmer is relying to some degree on boilerplate that she did not create specially for the occasion. With each step she pushes more of her input to the front end (the creation of the boilerplate and the macros to input them), and leaves more implementation for the programs she has created.[73]

Most of the examples above involve webpages that focus on one particular area of interest. Does the analysis change without that focus? No. Suppose someone decides to create a website with the most important news of the moment, and the creator's substantive judgment is that importance is a function of popularity: the more popular an item is, the more important it is. So she creates an algorithm to identify news-oriented websites and to measure the popularity of items appearing on those websites, and the product of those algorithms yields an ever-changing set of links (in order of popularity) on her webpage. Above the links, her webpage says, "Here is the most important news, and by 'most important' I mean most popular." Her page would just be an automated collection of links, but under *Turner I* it would be speech. Similarly, a search engine that tells users "We prioritize websites that are family friendly" is communicating a substantive message in its deletion of adult-oriented links. Or, in a different vein, an aggregator or search engine that promises "We prioritize links that have the most outrageous porn on the Web" is sending a substantive message that its users will receive, and that the Supreme Court's jurisprudence would treat as speech.

That brings me to a search engine called blekko.[74] It presents itself on its main page as "the spam-free search engine,"[75] and beyond that states flatly: "blekko biases towards quality sites. We do not attempt to gather all of the world's information. We purposefully bias our index away from sites with

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in the style of Haruki Murakami (whose books were uploaded into the program). *See* Irina Titova, *Book Written by Computer Hits Shelves*, ST. PETERSBURG TIMES (Russ.) (Jan. 22, 2008), *available at* http://www.sptimes.ru/story/24786. The publisher's chief editor explained, "Today publishing houses use different methods of the fastest possible book creation in this or that style meant for this or that readers' audience. Our program can help with that work." *Id.* He added, "However, the program can never become an author, like PhotoShop can never be Raphael." *Id.*

[73] We have not yet, to my knowledge, reached that point with law review articles. Beep.

[74] *See* BLEKKO, http://blekko.com (last visited Apr. 10, 2013).

[75] *Id.*

Temple American Inn of Court - April 2016 Program - Research and Materials

low quality content."[76] Not much translation is needed here: blekko is making editorial decisions based on quality. Blekko is not generating the linked-to content on its own, but the same is true of most of the examples above (and of the Drudge Report and other link aggregators).[77]

That said, there are two distinctions between blekko and most of the examples above that might seem relevant for First Amendment purposes. First, whereas one might surmise that the creators of the National Debt webpage and the "God is dead" link page are motivated by a particular viewpoint (even if one might guess incorrectly what that viewpoint was), one cannot plausibly ascribe any viewpoint to blekko, as it is a general interest tool. Second, rather than collect items of interest in advance, it searches for them based on the user's preferences. These two points are closely related. Search engines respond to users' queries and present information in light of those queries, and they do not screen for or focus on particular viewpoints.

As to the first point, under the prevailing jurisprudence, First Amendment coverage is not limited to speakers with a specific viewpoint, or even to speech of particular value.[78] Magazines that publish articles on politics from every political perspective engage in what everyone would agree is speech, even if the editors themselves have no identifiable political views of their own. Regarding the second point, this seems to be a distinction without a difference for First Amendment purposes. Consider two platforms. The first compiles in advance a list of all the information sources

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[76] *About*, BLEKKO, http://blekko.com/about (last visited Apr. 10, 2013).

[77] A search engine called DuckDuckGo adopts a strategy that is in some ways between blekko and Google, in that it focuses on blocking spam as a proxy for relevance. *See* DUCKDUCKGO, https://duckduckgo.com (last visited Apr. 10, 2013). DuckDuckGo's founder Gabriel Weinberg explained in an interview that "[t]he main benefit you see right away is we try to get way better instant answers. . . . We're also way more aggressive with spam." Jose Vilches, *Interview with DuckDuckGo Founder Gabriel Weinberg*, TECHSPOT (Aug. 21, 2012), http://www.techspot.com/article/559-gabriel-weinberg-interview/page2.html. Weinberg added,

> There's been a lot of the data that shows that initially when people click on content farm results, they actually like them because they often match their query exactly. But we believe that in the long run you won't like them, because they're often low quality content. So, that's a hard problem for search engines because a lot of the metrics they use for relevance show those results are very relevant, even though I think that they're not.

Id.

[78] *See* United States v. Stevens, 130 S. Ct. 1577, 1591 (2010) ("*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation. Even '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" (quoting Cohen v. California, 403 U.S. 15, 25 (1971))).

that it judges to be of high quality, and it lets users search among and select those sources in a variety of ways. The second platform does not compile anything in advance, but instead selects the information sources it judges to be of high quality in response to users' queries. We can call the first platform "digital cable television that emphasizes quality" and the second platform "blekko." They are making the same judgments (well, assuming a digital cable television operator that in fact emphasizes quality). The only difference is the users' browsing experience, for users who choose to browse rather than simply search. It is difficult to see how anything of constitutional significance could turn on this distinction. Even if it did, it is not clear which way the distinction would cut. Having an installed library of choices allows users to passively graze (or channel surf, in the digital cable context), whereas giving only the choice of search requires more active participation on the part of the user. The result is that the product of that search may be less reflective of the decisions of the platform and more reflective of the decisions of the user, but it is not clear whether that makes this product more or less clearly "speech." In any event, nothing seems to turn on the level of user participation, because both platforms are best understood as engaging in speech under the Court's First Amendment jurisprudence.

Is Google different from blekko under the Supreme Court's jurisprudence? I think not. Google often articulates its goals in terms of quality. For instance, it presented its 2011 changes to its algorithms (known as Panda) as a means of returning more high-quality websites.[79] Google also articulates its goals in terms of relevance and usefulness for its users.[80]

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[79] *See* Matt Cutts, *Another Step to Reward High-Quality Sites*, GOOGLE WEBMASTER CENTRAL BLOG (Apr. 24, 2012, 2:45 PM), http://googlewebmastercentral.blogspot.com/2012/04/another-step-to-reward-high-quality.html ("The goal of many of our ranking changes is to help searchers find sites that provide a great user experience and fulfill their information needs. We also want the 'good guys' making great sites for users, not just algorithms, to see their effort rewarded. To that end we've launched Panda changes that successfully returned higher-quality sites in search results.").

[80] This relates to an interesting and revealing episode involving Google searches. In 2004, the top result in Google searches for "jew" was Jew Watch, which markets itself as "An Oasis of News for Americans Who Presently Endure the Hateful Censorship of Zionist Occupation" and features stridently anti-Jewish content. *See* JEW WATCH, http://www.jewwatch.com (last visited Apr. 10, 2013); *see also* James Grimmelmann, *The Google Dilemma*, 53 N.Y.L. SCH. L. REV. 939, 943-45 (2008–2009); Somini Sengupta, Opinion, *Free Speech in the Age of YouTube*, N.Y. TIMES, Sept. 23, 2012, at SR 4. This led a Jewish activist to link the word "jew" to a Wikipedia article instead of Jew Watch, followed by neo-Nazi efforts to point "jew" back to jewwatch.com. *See* Grimmelmann, *supra*, at 943. Activists also requested that Google change its search results so that they would exclude Jew Watch entirely, or, at a minimum, exclude it from search results for "jew." *Id.* As Grimelmann has noted, "Google could easily have changed their software so no trace of Jew Watch remained in its results pages, no indication that anything other than the usual process of looking for relevant results had ever taken place." *Id.* Google chose not to demote or remove Jew

Temple American Inn of Court - April 2016 Program - Research and Materials

What if we assume that Google (or another algorithm-based provider) does not care about "quality," but instead only about relevance and usefulness for the user? Are Google's algorithm-based outputs based on its understanding of relevance and usefulness speech under the Supreme Court's jurisprudence? Yes. Google disclaims any adoption of the expression in the sites it finds,[81] but it is making all sorts of judgments in determining what its customers want.[82] There is a reasonable argument against this conclusion, flowing from the position that editing and transmitting information based

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Watch, but it added a link to a Google site as one of the top results for "jew," with Google's own message. *Id.* at 943-44. The website, entitled *An Explanation of Our Search Results*, begins by stating, "If you recently used Google to search for the word 'Jew,' you may have seen results that were very disturbing. We assure you that the views expressed by the sites in your results are not in any way endorsed by Google." *An Explanation of Our Search Results*, GOOGLE, http://www.google.com/explanation.html (last visited Apr. 10, 2013). The website goes on to explain:

> A site's ranking in Google's search results relies heavily on computer algorithms using thousands of factors to calculate a page's relevance to a given query . . . .
>
> The beliefs and preferences of those who work at Google, as well as the opinions of the general public, do not determine or impact our search results. . . . We will, however, remove pages from our results if we believe the page (or its site) violates our Webmaster Guidelines, if we believe we are required to do so by law, or at the request of the webmaster who is responsible for the page.

Id. Thus Google, in both the content and placement of this webpage, engaged in speech, and a key element of that speech was its denial of the relevance of its workers' beliefs and preferences (though it noted the relevance of its guidelines in making its decisions about what to remove). As Grimmelmann noted in response:

> Is it really the case that search engine results are purely automated, impersonal things that don't reflect anyone's opinion at all? In one sense, passing the buck and saying "don't blame us, the computers did it" is an uncomfortable position for any computer programmer to take. Who, after all, gave the computer its instructions? The programmer did. Everything that Google's automated ranking system does, it does because Google programmers told it to. A computer is just a glorified abacus; it does what you tell it to. . . .
>
> And, of course, the "beliefs and preferences" of Google's employees and users do enter into its search results in another sense. The employees *prefer* that Google return results that the users *believe* to be useful. They optimize their algorithms all the time to make the results more relevant to their users' questions. They don't want you to get Jew Watch if you search for "mongolian gerbils."

Grimmelmann, *supra*, at 944.

[81] *See An Explanation of Our Search Results*, *supra* note 80 ("We assure you that the views expressed by the sites in your results are not in any way endorsed by Google.").

[82] *See* Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 189, 192 (2006) (titling his first section "Search Engines Make Editorial Choices" and stating that "search engines make editorial judgments just like any other media company"). For an example of Google debating how to improve searches for its customers, see Google, *Search Quality Meeting: Spelling for Long Queries (Annotated)*, YOUTUBE (Mar. 12, 2012), http://www.youtube.com/watch?v=JtRJXnXgE-A (showing Google's search quality team deliberating on algorithmic decisions during a meeting held on December 1, 2011).

Temple American Inn of Court - April 2016 Program - Research and Materials

on what users want is not an expression of the speaker's own desires and thus is not real speech. As I discuss in the next Part, however, the Supreme Court has not adopted that position and its jurisprudence is not consistent with it.

Many algorithm-based outputs will not constitute speech under this jurisprudence because they are not sending a substantive message. Transmission Control Protocol and Internet Protocol (often referred to as TCP/IP) route information through the Internet, but its creators are not communicating a substantive message in doing so.[83] But when people create algorithms in order to selectively present information based on its perceived importance or value or relevance, *Turner I* indicates that they are speakers for purposes of the First Amendment (or the Supreme Court's jurisprudence, at any rate). Nothing in the Court's jurisprudence supports the proposition that reliance on algorithms transforms speech into nonspeech. The touchstone is sending a substantive message, and such a message can be sent with or without relying on algorithms.[84]

One final note: many trees were felled before *Brown* was decided, as courts and commentators debated whether video games constituted speech for First Amendment purposes.[85] And yet the Court treated this as a

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[83] For an explanation of the TCP/IP protocols, see Jonathan Strickland, *How Does the Internet Work?*, HOWSTUFFWORKS (May 7, 2010), http://computer.howstuffworks.com/internet/basics/internet1.htm.

[84] In his contribution to this Symposium, Tim Wu argues that under the prevailing jurisprudence, the key inquiry is whether the alleged speaker adopts the information it provides as its own. *See* Wu, *supra* note 6, 1530 ("Neither the newspaper nor cable operator cases support the idea that the First Amendment protects something like an index, as opposed to content adopted or selected by the speaker as its own. It is that step—the adoption of information, as a publisher, as opposed to merely pointing the user to it—that marks the difference."). I agree with Wu that the Supreme Court's jurisprudence does not support treating an unedited index as speech, but I do not think the line he articulates arises from, or is consistent with, that jurisprudence. The Court in *Turner I* held that cable operators engage in speech because of their editing, without any suggestion that cable operators do, or need to, adopt as their own the communications of the channels they carry. *See* 512 U.S. 622, 636 (1994) ("Through . . . 'exercising editorial discretion over which stations . . . to include in its repertoire,' cable . . . operators 'see[k] to communicate messages . . . ."); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 570 (1995) (noting that "even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper" "fall[s] squarely within the core of First Amendment security"). Under *Turner I*, engaging in substantive editing sends a message and thus triggers application of the First Amendment—no adoption or endorsement of the carried programming is needed. To use Wu's example, no one who watches Fox News, MSNBC, or any other cable channel addressing topic *X* says, "Look what my cable operator said about *X* yesterday," or, "It was interesting what my cable operator had to say about *X*." Nonetheless, the First Amendment encompasses the cable operator's selection of channels. *See* Wu, *supra* note 6, at 1528 (using the quoted language to illustrate the line he sees between speech and nonspeech in the jurisprudence relevant to search engines); *see also infra* note 98 (discussing the implications of Wu's line).

[85] *See, e.g.*, Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1133-34 (E.D. Mo. 2002) (finding that video games are not speech for First Amendment purposes),

Temple American Inn of Court - April 2016 Program - Research and Materials

question with an obvious answer. Indeed, part of what is so striking about the opinion is how easy the Court found the answer to be.[86]

IV. PRODUCING A DIFFERENT RESULT

As I noted above, there are a host of competing conceptions of free speech, none of which has been widely accepted as explaining or driving First Amendment doctrine.[87] But let me now ask whether adopting one of the competing theories of the First Amendment would produce a different result without upending existing case law. More broadly, how easy or hard would it be to craft a coherent exception to the prevailing First Amendment jurisprudence such that algorithm-based decisions, or search results more specifically, would not be encompassed by the First Amendment but most of the remaining First Amendment jurisprudence would remain? This is different from asking whether, in the first instance, any theory of the First Amendment would exclude algorithm-based decisions from coverage. The answer to that question is yes. That is, we could rely on a particular conception of the First Amendment that would radically rethink the Supreme Court's existing approach in ways that would exclude search engine results and much else. We could, for example, limit "the freedom of speech" in the First Amendment to core political speech, or speech that directly promotes a meaningfully constrained notion of democratic deliberation or self-

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rev'd, 329 F.3d 954 (8th Cir. 2003); America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (same); Marc Jonathan Blitz, *A First Amendment for Second Life: What Virtual Worlds Mean for the Law of Video Games*, 11 VAND. J. ENT. & TECH. L. 779, 785 (2009) (arguing that even nonnarrative video games and other "communication-free forms of electronic imagery" should be "staunchly protected"); Terri R. Day & Ryan C. W. Hall, *Déjà Vu: From Comic Books to Video Games: Legislative Reliance on "Soft Science" to Protect Against Uncertain Societal Harm Linked to Violence v. the First Amendment*, 89 OR. L. REV. 415, 450 (2010) (arguing that video games are "no less deserving of First Amendment protection than movies, works of art, and literature"); Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 101, 122 (2004) (arguing against full First Amendment protection for video games); Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 194-205 (2005) (arguing against viewing video games as unprotected speech); Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. L. REV. 51, 101-05 (arguing that video games are noncommunicative and not speech for First Amendment purposes); Anthony Ventry III, Note, *Application of the First Amendment to Violent and Nonviolent Video Games*, 20 GA. ST. U. L. REV. 1129, 1131 (2004) (arguing that "courts should apply a case-by-case approach in determining whether video games are constitutionally protected speech instead of deciding conclusively that all video games are (or are not) protected speech").

[86] *See supra* notes 43-48 and accompanying text; *see also* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2659 (2011) ("Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.")

[87] *See supra* notes 28-32 and accompanying text.

Temple American Inn of Court - April 2016 Program - Research and Materials

government, and thereby exclude search engine results, as a category, from the ambit of the First Amendment.[88] We would also exclude most forms of art, however.[89] My question in this Part is, without radically changing our First Amendment jurisprudence, how easy would it be to exclude algorithm-based decisions, or search engine results more specifically?

A. *Relying on Particular Theories of the First Amendment*

The most obvious possibility would be to focus the First Amendment analysis on individuals. This could lead to a suggestion that communications by corporations do not constitute speech. But newspapers and magazines are owned by corporations, and a revamping of the First Amendment to exclude those publications as speech would be a radical departure from our existing jurisprudence.

One might instead try to exclude from First Amendment coverage speech that a corporation makes purely for its own benefit. The problem is that it is difficult to come up with any articulation of speech in a corporation's interest that would exclude algorithm-based decisions, or more specifically search engine results, without also excluding newspapers and magazines. A distinction based on speech that is in a corporation's interest fails to distinguish newspapers and magazines. Same for excluding speech that is aimed solely at increasing a corporation's value. Indeed, for a newspaper or magazine owner who is a faithful agent, with shareholders who want the highest possible return on their investment, presumably all the owner's actions would be undertaken in order to maximize shareholder value. Simply stated, search results are in the search engine's interests in the same way that compelling content is in the interest of any conveyor of content, whether newspaper, political website, or porn website.[90]

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[88] *See, e.g.*, Bork, *supra* note 27, at 20 ("Constitutional protection should be accorded only to speech that is explicitly political.").

[89] We could avoid such a result if we adopted a very broad definition of "core political speech," "democratic deliberation," or "self-government," but then we would end up back where we started. As Frederick Schauer has noted,

> Theories based on self-government or democratic deliberation have a hard time explaining why (except as mistakes, of course) the doctrine now covers pornography, commercial advertising, and art, inter alia—none of which has much to do with political deliberation or self-governance, except under such an attenuated definition of "political" that the justification's core loses much of its power.

Schauer, *Boundaries*, *supra* note 5, at 1785.

[90] This is obviously different from the question involved in *Citizens United v. FEC*, which involved limits on the use funds from the general treasuries of corporations. 130 S. Ct. 876 (2010).

Temple American Inn of Court - April 2016 Program - Research and Materials

A more conventional line would distinguish commercial speech. A number of theorists have argued for the exclusion of commercial speech from First Amendment coverage.[91] This would be a fairly significant reworking of First Amendment jurisprudence.[92] Excluding commercial speech also would not affect most algorithm-based decisions. It would apply to search engines' (and newspapers') advertisements, but most search engine results are not paid advertisements.[93]

A different way of emphasizing individuals would focus on their expression. Theories focused on self-expression, for example, emphasize that it is an individual's self-expression that matters, and autonomy-based theories similarly emphasize individual autonomy. The problem is that many algorithm-based decisions similarly involve the creator's self-expression and autonomy. Depending on the algorithm, algorithm-based decisions may well constitute self-expression, enhance autonomy, and contain meaningful thought. The algorithm is simply a means to gather relevant information, but the creator chooses what to gather. The person who creates the National Debt webpage, or the "God is dead" linkpage, is expressing a view about the importance of those topics. Or consider a webpage that uses an algorithm to amass links to articles with the words "Obama sucks" or "Romney sucks." These webpages require less curating than does the Drudge Report, but all of them reflect autonomous expression.

Search engines are a closer question, but a definition of self-expression that excludes them would be a fairly crabbed one. Start with a search engine that focuses on family-friendly material (or, if you prefer, porn). This seems to encode autonomous expression—"We value family-friendly material/porn, and we want to make it easier for you to find it." Of course, the creators'

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[91] *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[G]iven the existing form of social and economic relationships in the United States, a complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory."); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 123, 127 (1993) (arguing for little protection of advertising because it does not contribute to democratic deliberation).

[92] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) ("The First Amendment . . . protects commercial speech from unwarranted governmental regulation."); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (applying First Amendment scrutiny to the regulation of commercial advertisements).

[93] Some early search engines relied heavily on payments in determining what to present and where to present it. One of Google's selling points was that it used page-rank algorithms and that what little paid content it had was clearly demarcated as such. Newer search engines have followed Google's lead. Google and its newer competitors realized that they could attract users by prioritizing relevant quality websites, and make more money from advertisers relegated to the side because of the large number of people who would be attracted by the promise of search results containing relevant websites.

actual motivation might be more base—most obviously, "We just want to make money." But that may well be the true motivation for many newspapers and magazines, and many artists, for that matter (I'm looking at you, Jeff Koons). And because theories of self-expression and individual autonomy treat art as squarely within their understanding of speech, those who emphasize self-expression or autonomy usually do not focus on the speaker's subjective motivation, but instead on the apparent expression reflected in the message. In this case there is an apparent expression, as I noted above.

It is a very small step from that expression to blekko's expression. Instead of "We value family-friendly material/porn, and we want to make it easier for you to find it," the expression would be "We value quality websites, and we want to make it easier for you to find them." And it is then another small step to Google's expression. As I noted above, Google, too, articulates quality as its goal. But even if we credit only its focus on relevance, substituting "relevant" for "quality" in the expression does not make it any less of an expression. In all cases, the algorithm creators are expressing their views about what they value.

Perhaps Google in particular (and maybe blekko, too) is different, insofar as its message is not so much "We value relevant websites" but more like "We select for you what you want." In the latter formulation, Google arguably is not expressing its own preferences so much as it is indicating that it wants to satisfy ours.

Differentiating Google for purposes of First Amendment coverage based on its catering to users' interests would be a significant shift in First Amendment jurisprudence, as publications and editors that frankly focus on their viewers' or readers' interests would be unprotected. It has not mattered in the past whether a magazine owner (or cable operator) was merely responding to a market opportunity or was expressing its own subjective preferences, but now that difference would be dispositive. If we define unprotected speech to include speech that responds to public demand, only the few publications that push their ideas regardless of public interest[94] would be speakers, and that would upend most First Amendment law.

Beyond that, this would be a mighty thin reed on which to rest a distinction. We can recharacterize Google's position as "Our preference is to select for you what we believe you find valuable." If we substitute "is" for "you find," or change the locution to "we believe you *should* find valuable," there is clearly expression. So we would be putting an enormous amount of weight on the creators' articulation as focused on what others want.

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[94] We usually call these "vanity publications."

Temple American Inn of Court - April 2016 Program - Research and Materials

Articulating one's goal in terms of serving others is still an exercise of autonomy and a form of self-expression. "What makes you happy makes me happy" is an expression of self—one that looks to another for one's happiness, but an expression of personal motivation nonetheless. In the same way, the artist who proclaims that she is guided by what her viewers want has still made a self-defining and art-defining statement.[95]

It also bears noting that decisions about what users want are analogous to the decisions of cable operators that the Court found to be speech in *Turner I*. In their briefs, the cable operators stressed that a key consideration in choosing what channels to include was what they thought their customers wanted.[96] Indeed, a major element of the cable operators' argument that there was no sufficient justification for the statute was their assertion that cable operators would be guided by viewer interest and thus would air the most popular channels whether or not they had an ownership interest in them.[97] The cable operators, in choosing what channels to air, were engaged in editing, on whatever substantive basis they chose, and those editorial decisions constituted speech. The cable operators claimed they were editing in light of their sense of their customers' wishes, and Google is doing the exact same thing.[98]

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95 *Cf.* THE KINKS, GIVE THE PEOPLE WHAT THEY WANT (Arista Records 1981).

96 *See, e.g.*, Reply Brief for Appellants Turner Broad. Sys., Inc. at 19-20, *Turner I*, 512 U.S. 622 (1994) (No. 93-44), 1993 WL 664649 ("A cable operator's very raison d'etre is to choose from among the enormous variety of sources of video programming available in order to put together a package of programming that will be appealing to television viewers."); Reply Brief for Appellants Discovery Commc'ns, Inc. and the Learning Channel, Inc. at 6, *Turner I*, 512 U.S. 622 (No. 93-44), 1993 WL 664652 (emphasizing the role of market forces in cable operators' choices of which channels to carry).

97 Nothing in the Court's opinion suggests that any aspect of First Amendment coverage turned on the degree to which a cable operator chose channels purely on mechanistic measures of popularity.

98 Tim Wu's contribution to this Symposium contends that under the Supreme Court's jurisprudence the crucial question is whether the alleged speaker adopts the information provided as its own. *See* Wu, *supra* note 6, at 1530. As I noted above, this distinction is inconsistent with the prevailing Supreme Court jurisprudence. Beyond that, it would not exclude all algorithm-based outputs from First Amendment coverage. The National Debt billboard, the "God is Dead" webpage, and the articles written by the journalist using boilerplate and by Narrative Science all entail adoption by their creators. Wu's focus on functionality would exclude certain categories of substantive editing, whether they were produced by humans or algorithms. His emphasis on search engines "merely pointing the user to [information]" applies with equal strength to human and nonhuman pointers. So a human who manually performs the functions of a search engine or an automated concierge would not be engaged in speech. By hypothesis, such a human would not adopt the information provided but instead would search for and retrieve it exactly as an algorithm would. Algorithms make such nonadoptive retrieval more common, but in Wu's formulation the line between algorithms and non-algorithms is not central to First Amendment coverage. This is an important area of

A different tack would entail a focus on the audience. Some Supreme Court opinions and some commentators have emphasized the importance of listeners and viewers having access to a wide range of views.[99] But a "right to receive information" is articulated as an addition to the rights of speakers, as opposed to a substitute for them, and so would not limit the treatment of algorithm-based decisions as speech.[100] It does bear noting, though, that a focus on the rights of the audience might buttress the position of some algorithm-based outputs—in particular, search engines. One way of conceptualizing the rights of listeners and viewers is as a right to unencumbered access to information.[101] Such a conceptualization would lend support to the

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agreement between Wu and me: algorithm-based outputs underscore the breadth of the test that the Supreme Court has developed, but do not provide a useful line at which to limit that breadth.

In light of my focus on algorithms, in this Article I do not address the normative attractiveness, on their own terms, of proffered lines between speech and nonspeech that do not focus on algorithms (e.g., limiting First Amendment coverage to political speech, *see supra* note 88). Wu's line may well be a desirable one. I would note, though, that the line between adoption and pointing is no clearer than other lines in First Amendment coverage, and arguably much less clear. Many Web aggregators that would constitute speakers under most every definition of "speech" consist of links to webpages without any clear adoption or endorsement. *See, e.g.*, ARTS & LETTERS DAILY, http://www.aldaily.com/ (last visited Apr. 10, 2013); REDDIT, http://www.reddit.com/ (last visited Apr. 10, 2013). On which side of the line do they fall? An individual at Arts & Letters Daily chooses the articles to which to link whereas Reddit uses an algorithm based on the popularity of a given link, but, as I noted above, nothing in Wu's focus on adoption turns on whether the entity choosing the links is a human or an algorithm created by humans. *See Arts & Letters Daily*, WIKIPEDIA, http://en.wikipedia.org/wiki/Arts_%26_Letters_Daily (last updated Feb. 10, 2013); *Reddit*, WIKIPEDIA, http://en.wikipedia.org/wiki/Reddit (last updated Apr. 4, 2013). And the line between Reddit (which displays the most popular links of the moment at its top) and a search on Google for "the most popular links right now" is not obvious.

[99] *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) (noting that the First Amendment affords the public "access to discussion, debate, and the dissemination of information and ideas"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (stating that the "freedom of speech 'necessarily protects the right to receive'"); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas." (internal quotation marks omitted)); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (stating that the freedom of speech includes "the right to receive"); *see also* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 ("It is clear at the outset that the right to know fits readily into the first amendment . . . ."); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (arguing that the First Amendment protects listeners' access to information and viewpoints and thereby protects autonomy).

[100] *See Va. State Bd. of Pharmacy*, 425 U.S. at 756 ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both.").

[101] *See, e.g.*, *id.*; Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2670-71 (2011) ("[T]he fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.")

Temple American Inn of Court - April 2016 Program - Research and Materials

treatment of an individual's search results as part of the information that is encompassed by the Free Speech Clause. A different conceptualization would interpret the rights of listeners and viewers as justifying government regulation of information providers, but application of such arguments to exclude information providers from coverage by the Free Speech Clause would be a radical change in First Amendment jurisprudence.[102] For better or worse, the Supreme Court's jurisprudence has decisively rejected this vision.[103]

Yet another direction would focus on the government's purpose or motive in enacting a particular regulation. Some commentators (including then-professor Elena Kagan) have suggested that First Amendment coverage should turn on the government's purpose or motive, such that an economic motive should not trigger First Amendment coverage but a censorious motive should.[104] Whatever the merits of this approach, and whatever its application to algorithm-based outputs, it is inconsistent with a significant number of Supreme Court cases that applied the First Amendment despite the fact that the underlying regulation had an economic motive.[105]

(citations and internal quotation marks omitted); Edenfield v. Fane, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. . . . [T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.").

102 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (suggesting that the freedom of speech includes "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666 (1967) ("It is to be hoped that an awareness of the listener's interest in broadcasting will lead to an equivalent concern for the reader's stake in the press, and that first amendment recognition will be given to a right of access for the protection of the reader, the listener, and the viewer.").

103 *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 4, 20-21 (1986) (plurality opinion) (holding that a state utility commission could not constitutionally compel a private utility company to include in its billing envelopes materials produced by an adverse group); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding unconstitutional a state statute guaranteeing political candidates media access to respond to criticism). Indeed, the Supreme Court has largely abandoned its intimation in *Red Lion* that the First Amendment empowers the government to give access rights to listeners and viewers. As it turns out, broadcasting is the only area that the Court has treated as justifying a right of access—and even there, the Court has held that broadcasters have First Amendment rights (just diminished ones).

104 *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing "that First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775-79 (2001) (asserting the centrality of a law's purpose in determining the appropriate application of the First Amendment).

105 *See Sorrell*, 131 S. Ct. at 2665 (applying First Amendment scrutiny to a regulation motivated by economic considerations and stating that, "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression"); United States v. United Foods,

Temple American Inn of Court - April 2016 Program - Research and Materials

There are of course other theories of the First Amendment, but all would either draw arbitrary lines or exclude much that we currently consider to be speech.

B. *An Algorithm-Based Line that Works*

As the discussion above indicates, crafting a First Amendment exclusion only for algorithm-based decisions would be arbitrary, and crafting a nonarbitrary category that excludes algorithm-based decisions would exclude much of what we regard as speech and thus significantly change our jurisprudence. Because of the similarity of algorithm-based decisions to communications that are clearly speech under the prevailing Supreme Court jurisprudence, there do not appear to be any principled distinctions that would leave algorithm-based decisions uncovered without upending significant aspects of that jurisprudence. But a different line is tenable and might do significant work in the future even if it would not do any at present: excluding outputs that do not reflect human decisionmaking.

A key element of the discussion so far is that there is a human mind behind all the algorithms. The fact that an algorithm is involved does not mean that a machine is doing the talking. Individuals are sending a substantive message in such a way that others can receive it. What happens to the analysis, however, if humans are no longer meaningfully creating the message? That is, how should we analyze a situation in which artificial intelligence has developed to the point that a set of algorithms have freed themselves from human direction such that the product of the algorithms does not reflect human decisionmaking about what to communicate?

Computer scientists have developed programs that engage in massive data analysis that would take humans eons to complete, but those programs do not develop the models and analyses on their own. Compilers change programs from high-level to low-level languages (e.g., Java to assembly code), but those compilers are not exercising any independent judgment in doing so.

Some programs use random variation as a means of experimentation and possible adaptation. For instance, some programs use not only formulas but also some prescribed points of randomness to allow the computer program to produce a range of outcomes. A particularly enjoyable example is The

Inc., 533 U.S. 405, 408, 417 (2001) (applying First Amendment scrutiny to an agricultural assessment requirement on the grounds that it compelled mushroom handlers to fund speech with which they disagreed); *Turner I*, 512 U.S. 622, 638 (1994) (applying First Amendment scrutiny to legislation while also finding that "Congress' overriding objective in enacting [a law requiring cable carriage of local television broadcasters] was . . . to preserve access to free television programming for the 40 percent of Americans without cable").

Temple American Inn of Court - April 2016 Program - Research and Materials

Nietzsche Family Circus, a webpage which, with each hit of the "refresh" button, pairs a randomized Family Circus cartoon with a randomized Friedrich Nietzsche quote.[106] Whatever meaning we find in this randomized process and its results is due to the program's clever (human) designer and our reactions to that design. After all, the same effect could be achieved (à la John Cage) by throwing grains of rice emblazoned (in *very* tiny letters) with Nietzsche quotations into the air above a checkerboard of Family Circus cartoons. There would likely be all sorts of interesting pairings, but we wouldn't attribute any agency in generating a message to the grains of rice.

A bit closer to home, programmers have created programs that generate random papers, at least one of which was accepted at a recent conference.[107] But the random processes are not crafting substantive messages.[108] Humans are crafting messages about academic standards and are employing randomness to do so. As the webpage of the Postmodernism Generator (which "creates realistic-looking but meaningless academic papers about postmodernism, poststructuralism and similar subjects") notes, "The papers produced are perfectly grammatically correct and read as if written by a human being; any meaning found in them, however, is purely coincidental."[109] That is the substantive message, and it derives from decisions made by the human designers. The programs are fun precisely because we may ascribe meaning even to the result of random processes, whether random words or random

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[106] *See* NIETZSCHE FAMILY CIRCUS, http://www.losanjealous.com/nfc (last visited Apr. 10, 2013).

[107] *See, e.g.*, SCIGEN—AN AUTOMATIC CS PAPER GENERATOR, http://pdos.csail.mit.edu/scigen/#relwork (last visited Apr. 10, 2013) ("SCIgen is a program that generates random Computer Science research papers, including graphs, figures, and citations. It uses a hand-written context-free grammar to form all elements of the papers. Our aim here is to maximize amusement, rather than coherence." (emphasis omitted)); timothy, *Randomly Generated Paper Accepted to Conference*, SLASHDOT (Apr. 13, 2005, 2:00 PM), http://entertainment.slashdot.org/story/05/04/13/1723206/randomly-generated-paper-accepted-to-conference ("Some students at MIT wrote a program called SCIgen . . . [and] one of their randomly generated paper[s] was accepted to [the 2005 World Multiconference on Systemics, Cybernetics, and Informatics]. Now they are accepting donation[s] to fund their trip to the conference and give a randomly generated talk." (emphasis omitted)).

[108] The whole point is that humans are prone to find messages and meaning even in random collections of words and numbers.

[109] POSTMODERNISM GENERATOR, http://page112.com/iphone/pomo/ (last visited Apr. 10, 2013). The creators of The Postmodern Generator added the elegantly understated caveat that "submitting generated texts to journals or academic courses is not recommended." *Id.*

This is different from the process used by Narrative Science, *see supra* notes 71-73 and accompanying text, because Narrative Science *does* try to communicate substantive messages with its choice of words, just as a human author does. Just as a writer (or law professor) who cuts and pastes boilerplate into her article does so in order to communicate a substantive message (just one that can be communicated via off-the-shelf language), so too Narrative Science utilizes its boilerplate in order to communicate information.

raindrops on the pavement. Those raindrops have not in fact sent us a substantive message; we just choose to read something into the random picture they create.

Other programs use randomness for purposes of experimentation and adaptation toward a prescribed goal. Programmers have, for example, created programs that break into multiple offshoots, each of which has some decision points at which randomness comes into play and thus produces different outcomes. The program itself (or the programmer) then determines which of these permutations comes closest to achieving a prescribed goal (modeling past stock movements and predicting future stock movements are popular), and there can be multiple generations of such permutations, resulting in unguided adaptation toward a goal. This is also how some computer viruses work: they are programmed to use randomness at key points (often in response to the host program's defenses), in the hope that some versions of the virus will become more effective at propagating and achieving the programmer's goal. This is different from random raindrops on the pavement, because once we see what adaptation best achieves our goal (e.g., "add yesterday's closing price of Wal-Mart's stock to the previous day's rainfall in Seattle and divide by the previous night's number of viewers of the PBS NewsHour"), we can replicate its pattern. But the adaptation is not communicating a substantive message. We find the adaptation useful because it happens to move us toward a goal that *we* have chosen. We are supplying the volition and all the meaning.[110]

That said, artificial intelligence could cross, or at least blur, this line.[111] Imagine that artificial intelligence advances to such a level that machines are in some meaningful sense choosing their own goals and what substantive communications will achieve those goals. Just as a machine may at some point satisfy the Turing test,[112] it may at some point demonstrate a level of

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[110] To put the matter a bit differently, telling the world that this formula, or the price of tea in China, predicts the stock market's movements is a form of substantive communication. But that fact does not mean that the formula, or the price of tea in China, is independently communicating anything.

[111] *See, e.g.*, SAMIR CHOPRA & LAURENCE F. WHITE, A LEGAL THEORY FOR AUTONOMOUS ARTIFICIAL AGENTS (2011) (extending legal principles to the unique challenges posed by the evolution and increasing sophistication of artificial agents).

[112] On the Turing test, see David Dowe & Graham Oppy, *The Turing Test*, STANFORD ENCYCL. OF PHIL. (Jan. 26, 2011), http://plato.stanford.edu/entries/turing-test (noting that a machine passes the Turing Test when a person is unable to detect that she is conversing with a machine instead of a fellow person). On the legal implications of machines capable of meeting the Turing standard, see generally JAMES BOYLE, BROOKINGS INST., ENDOWED BY THEIR CREATOR? THE FUTURE OF CONSTITUTIONAL PERSONHOOD 6 (2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/3/09%20personhood%20boyle/0309_personhood_boyle ("In the coming century, it is overwhelmingly likely that constitutional law will have

Temple American Inn of Court - April 2016 Program - Research and Materials

choice or volition that is indistinguishable from that of humans. At that point, we might say that the connection to the human creators is sufficiently attenuated that the results no longer reflect humans' decisions about how to determine what to produce, such that there is no longer a human sending a substantive message. No human would be communicating anything. Extending the First Amendment to messages produced by this artificial intelligence would raise the specter that may underlie Tim Wu's concerns: we would be treating the products of machines like those of human minds.[113] We could then say that "speech" was truly created (and not just transmitted, or aided) by a machine.[114]

V. SCOPE

Does this mean that heightened scrutiny will apply to almost every regulation of entities that produce words via algorithm? No. Two hurdles to First Amendment coverage are particularly significant. First, the algorithm must send a substantive message. Algorithms that are designed to speed transmission, or make a network operate more efficiently, are not sending any substantive message. Your landline telephone (remember those?) might work better if the telephone company installed algorithms that reduce background noise, but the telephone company has not substantively communicated anything by doing so.[115] Second, laws of general applicability like antitrust and tax laws are treated as laws that do not abridge the freedom of speech and thus do not implicate the First Amendment.[116]

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to classify artificially created entities that have some but not all of the attributes we associate with human beings.").

113 *See* Wu, *supra* note 18.

114 Of course, this assumes we would regard such machines as materially different from humans in the first place. As James Boyle has noted, our grandchildren might view such machines as rightfully entitled to all the protections of personhood. *See* BOYLE, *supra* note 112. But I leave that scenario for another day.

115 *See* Benjamin, *supra* note 8, at 1686.

116 *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."). The Supreme Court has invoked this principle in a long line of antitrust cases. *See infra* note 123 and accompanying text. Some have argued that *Cowles Media*'s statement sweeps too broadly. *See Cowles Media*, 501 U.S. at 676-77 (Souter, J., dissenting) ("[T]his case does not fall within the line of authority holding the press to laws of general applicability where commercial activities and relationships, not the content of publication, are at issue."); Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087, 1095 (2001) ("[T]he fact that a law is generally applicable does not necessarily mean there is no need for further First Amendment analysis."); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1294 (2005) (distinguishing "a facially speech-neutral law, which

Temple American Inn of Court - April 2016 Program - Research and Materials

Paying income taxes may well limit the ability of a speaker (algorithm-based or not) to communicate as she wishes, but such a limitation is not covered by the Free Speech Clause. One could reject either of these limitations, but such a rejection would constitute a significant remaking of First Amendment jurisprudence.

Each of these axes of limitation can and should extend further. As I noted above, my view is that the mere existence of substantive editing is not sufficient for status as speech under the Free Speech Clause. A substantive communication entails a message that can be sent and received, and that has been sent.[117] And not only should generally applicable laws be exempt from First Amendment scrutiny, but so too should laws aimed more specifically at speakers that do not regulate their speech.

Both of these interpretations of the scope of the First Amendment are consistent with the Supreme Court's jurisprudence but arguably not compelled by it. Their adoption would also have the effect of reducing the potential universe of situations in which heightened scrutiny under the Free Speech Clause would apply, and thus alleviating the concerns of those who think that the First Amendment has been applied too broadly. To be clear, I think these are the best readings of the materials and thus would adopt them whether or not they limited the scope of the Free Speech Clause. But insofar as that scope is a concern, these interpretations diminish those concerns to some degree.

I offer these two interpretations because I think they are sound in their own right and consistent with Supreme Court jurisprudence. Both limit the breadth of what "the freedom of speech" might encompass without changing First Amendment jurisprudence. If one's goal were to limit the impact of the Free Speech Clause on the government's ability to regulate, there are other proposals one could advocate—for example, lowering the level of scrutiny entailed in the tests that courts apply to regulations of speech. I do not suggest such changes both because limiting the government's ability to

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is to say a law applicable to a wide variety of conduct, whether speech or not," from "a facially press-neutral law, which is to say a law applicable equally to the press and to others," and stating that the language from the *Cowles Media* majority opinion quoted above "only means that the press gets no special exemption from press-neutral laws. The Court didn't consider whether speakers were entitled to protection from speech-neutral laws, especially when those laws are content-based as applied"). None of these critics argues, however, that generally applicable laws not aimed at content, such as antitrust and tax laws, should in fact be subject to First Amendment scrutiny. *See* Garfield, *supra*, at 1094 ("[O]ne can hardly disagree . . . that the press is not exempt from laws of general applicability. Surely the First Amendment does not immunize the press from obeying fire safety laws in its buildings or from having its delivery trucks obey the speed limits."); Volokh, *supra*, at 1294.

117 *See supra* notes 52-62 and accompanying text; *see also* Benjamin, *supra* note 8, at 1701.

Temple American Inn of Court - April 2016 Program - Research and Materials

regulate is not my goal and because I am focusing here on interpretations of the scope of the Free Speech Clause that are fully consistent with the existing Supreme Court jurisprudence. My point is that without having to change the prevailing approach, the Free Speech Clause can and should be interpreted in ways that limit its scope.

A. *Requiring Communicating About Your Editing*

The criteria I laid out above include that a message is sendable and receivable, and is actually sent. If you attribute your own private meaning to some action and communicate that meaning to no one, I find it hard to say that you have engaged in speech. In some situations the underlying communication is so clear that the speaker does not need to do anything special to alert listeners or viewers. Newspapers generally do not proclaim "This newspaper is the product of our writing and editing," because that is simply understood by the reading public. In other situations, the relevant action is fairly clearly not speech, so alerting the audience will not transmogrify that action into speech. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Supreme Court stated that the fact that conduct would be expressive only if accompanied by speech identifying its expression was itself an indicator that the conduct was not speech.[118]

The question is whether there are situations in which communicating about the underlying activity is necessary for it to be speech. I think the answer is yes. In most situations it will be obvious, but not always; and when it is not obvious, failing to communicate means that the recipient does not know that a message has been sent.

Consider some forms of art, for example. A pile of mud is art, and thus speech, only when it is so presented (e.g., in an art gallery). A pile of candy on the floor becomes artistic communication only when it is identified as the communication of an artist.[119] Maybe, however, all this shows is that art is contextual.

Perhaps a more apt real-world comparison is to a secretly edited bulletin board (virtual or otherwise). Consider a webpage open to comments that

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[118] *See* 547 U.S. 47, 66 (2006) ("The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under [*United States v.*] *O'Brien* [391 U.S. 369 (1968)].").

[119] One of Felix Gonzalez-Torres's "signature works" was "Untitled (Placebo—Landscape—for Roni)," which consisted of hard candy wrapped in cellophane on a concrete floor. *See* Cate McQuaid, *Sweet but Not Sugarcoated*, BOSTON.COM (Dec. 13, 2007) http://www.boston.com/ae/theater_arts/articles/2007/12/13/sweet_but_not_sugarcoated.

Temple American Inn of Court - April 2016 Program - Research and Materials

are, to all appearances, unedited. There is no suggestion on the part of the website that it moderates or edits these comments in any way, and the number and range of tasteless, offensive comments would support the impression that there is no ongoing moderating or editing. Unbeknownst to all but the few commenters who are censored (and whose complaints are then censored), the webpage owners secretly engage in substantive editing of the comments—maybe they remove posts that are too tasteful, or that support the Socialist Workers Party. The commenters are certainly engaged in speech for First Amendment purposes, but does the webpage owners' editing constitute speech? I think the answer is no, because the owners have not indicated to their users that they are engaged in substantive editing. The users' reading experience has been altered by the webpage owners, but the users have not received a recognizable message. The webpage owners are speaking in a language that sounds like meaningless noise to the users, and the owners are not revealing that it is, in fact, a language but are instead keeping it a secret. By keeping their editing secret, they are not sending any messages. Simply stated, the webpage owners would not have communicated to their users.

That said, I acknowledge that the Supreme Court's jurisprudence does not compel this conclusion. The Court's cases do indicate that a substantive message is necessary, but no case similarly clarifies that it is necessary to alert the world to the existence of your substantive message in situations where that message is not obvious. Indeed, *Turner I* highlights that public affirmations of editing often will not be required. In that case, nothing in the Court's opinion indicates that public pronouncements by cable operators were necessary or even relevant. The Court apparently treated the operators' editing—the fact that they chose what channels to put in their lineups—as sufficiently obvious that public statements by the cable operators were not necessary. There is no Supreme Court case in which the activity giving rise to a message was sufficiently nonobvious that speech acknowledging that activity would have been necessary to put the audience on notice. In my view, this is the most coherent understanding of "communication." A concern about First Amendment overexpansion would further support this view.

This question will be purely academic for many algorithm-based decisions, both because the editors' work will be obvious and because they will acknowledge it. Web users understand, for example, that search engines are not simply presenting them with "the Internet" but are instead using algorithms in order to find the most relevant or highest quality sites in response to their queries. And, as I noted above, the search engines themselves so

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state.[120] Similarly, most websites do engage in some screening (algorithm-based, proactive by humans, and/or in response to complaints by humans) of user-submitted material, and communicate that to the world.[121] Conversely, most algorithms that affect our experience of the Internet more broadly (like TCP/IP) are designed not to engage in any substantive editing in the first place and do not send any substantive messages.

But there may be situations in which algorithm-based substantive editing is not obvious and the editor keeps it a secret, or sends mixed messages that create doubt. Internet service providers advertise their services as offering the Internet, as opposed to a substantively edited portion of the Internet. But imagine that an Internet service provider engages in substantive editing that would not be obvious and does not communicate that editing to users (say, blocking some webpages that extol the virtues of Falun Gong). Users would find fewer positive sources about Falun Gong on the Web than actually existed, and this might influence their views about Falun Gong (which presumably would be the reason for editing in the first place), but they would not know that their ISP had engaged in such editing. Their ISP would not have sent them any readily understandable message.

What would be required of the hypothetical ISP? The message must be both sendable and sent, but I do not think it is necessary that the message be received. There is obviously no magic formula. And the articulation could depend on how concerned one was about the breadth of the First Amendment's application in the first place. My own view, based on what I think of as a bare-bones understanding of what communication entails, is that the touchstone would be that the speaker had meaningfully attempted to communicate its message to the world, and in particular to its audience.[122] There are many different forms of communication—formal advertising, news releases, statements by company officials, blog posts, tweets. A memo that was written and then deleted would not suffice, as there would have been no attempt at communication, but a clear public message would seem to suffice, even if the company did not trumpet it. In an earlier era, identifying a clear public message might have been difficult sometimes. Before the Internet, perhaps a single advertisement in a given city would have had no meaningful chance of being disseminated more broadly and thus would

120 *See supra* notes 74-82 and accompanying text.

121 Even seemingly anarchic Internet communities like 4chan have moderators (and junior moderators, known on 4chan as "janitors") whose role is made clear on the website. *FAQ: What Are "Janitors"?*, 4CHAN, http://www.4chan.org/faq#whojan (last visited Apr. 10, 2013).

122 *See* Benjamin, *supra* note 8, at 1701 (explaining that communication requires a substantive message that can be sent and received and has actually been sent).

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not really have been a message sent to the world. But in the Internet era, for better or worse this difficulty largely evaporates: any tweet, blog post, or statement by a company official that presents a company's new position is subject to widespread dissemination via the Web. An entity's public declaration of its policy thus would, in ordinary circumstances, constitute a meaningful attempt to communicate.

The bigger pitfall would involve mixed messages. If one arm of a company proclaims "We edit your experience" and another arm equally loudly proclaims "We don't do any editing," then no meaningful message has been communicated. Such incoherence is more likely if a company changes its position, because articulations of the company's earlier position are likely to remain on the Web. A change in position may impose a greater burden on an entity, because the entity will have to do more in order to communicate its message. The principle is fairly straightforward: in order to engage in speech, one must actually send a substantive message, and the level of action required to send a message may depend on the surrounding circumstances—other statements the entity has made, a contrary reputation that it may have cultivated, etc.

The larger point, though, is that the argument for this requirement could be strengthened, and indeed the nature of the requirement could be toughened, if one wanted to limit the expansiveness of the First Amendment's coverage. Even absent a goal of reining in the application of the First Amendment, in my view the reading outlined above is the most persuasive and coherent understanding of what a communication entails. But such a goal would be furthered by adoption of this requirement.

B. *Regulations of Speakers Not Aimed at Their Speech*

The Supreme Court has consistently held that laws of general applicability, like antitrust laws, can be applied to speakers without implicating the First Amendment.[123] That said, there are a couple of exceptions. Under

[123] *See* Associated Press v. United States, 326 U.S. 1, 19-20 (1945) (applying generally applicable antitrust laws to a company's core First Amendment activities); *id.* at 7 ("The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."); Lorain Journal Co. v. United States, 342 U.S. 143, 156 (1951) ("Injunctive relief under . . . the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others."); *see also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 800 n.18 (1978) ("[A]pplication of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment."). This also extends to remedies. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697-98 (1978) ("In fashioning a

Temple American Inn of Court - April 2016 Program - Research and Materials

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,[124] antitrust enforcement against actions aimed at changing regulations would implicate the First Amendment. And politically motivated boycotts are covered by the First Amendment under *NAACP v. Claiborne Hardware Co.*[125] *Noerr* construed the Sherman Act not to apply to conduct aimed at "influencing the passage or enforcement of laws" in light of the constitutional problems with a contrary construction—that regulation of such conduct would conflict with the First Amendment right to petition the government.[126] *Claiborne Hardware*, meanwhile, emphasized that the challenged action (a boycott of white merchants by the NAACP in Mississippi during the civil rights movement) "sought to bring about political, social, and economic change. Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens."[127]

Both of these categories of First Amendment applicability have been construed fairly narrowly to apply only to coordinated actions aimed

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remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.")

[124] 365 U.S. 127 (1961).

[125] 458 U.S. 886, 907 (1982) ("[B]oycott[s] [are] a form of speech or conduct . . . ordinarily entitled to protection under the First and Fourteenth Amendments.").

[126] *See Noerr*, 365 U.S. at 137-38 ("To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes . . . would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."); *see also id.* at 139 ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."). The Court reiterated this interpretation of the Sherman Act in light of the speech principles at stake in *United Mine Workers of America v. Pennington*. *See* 381 U.S. 657, 670 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972) ("We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors."). In *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, the Court summarized the doctrine by stating flatly that "[c]oncerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr*; *Pennington*; and *California Motor Transport Co.*" 486 U.S. 492, 499 (1988).

[127] 458 U.S. at 911-12.

Temple American Inn of Court - April 2016 Program - Research and Materials

directly at influencing government action.[128] *FTC v. Superior Court Trial Lawyers Ass'n* is instructive.[129] The case involved a group of court-appointed lawyers who objected to the low level of compensation in Washington, DC, criminal cases and organized a boycott aimed at increasing that compensation.[130] After the Federal Trade Commission initiated an antitrust action against the lawyers' group, the Court of Appeals for the D.C. Circuit concluded that the boycott "contain[ed] an element of expression warranting First Amendment protection" and applied heightened scrutiny.[131] The Supreme Court rejected this notion, and further emphasized that *Noerr* had found the First Amendment relevant in an antitrust action against a publicity campaign designed to produce government action, not an antitrust action against a restraint of trade.[132] The Court also stressed the narrowness of *Claiborne Hardware*, holding that First Amendment coverage for political boycotts was "not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'"[133]

One unsettled question is whether the First Amendment encompasses laws that single out speakers (and thus are not generally applicable) but do not regulate their speech. In *Arkansas Writers' Project, Inc. v. Ragland*, the Supreme Court suggested that any law singling out a set of speakers for special treatment was subject to First Amendment scrutiny.[134] By contrast,

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128 *See, e.g.*, *Noerr*, 365 U.S. at 144 ("There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.").

129 493 U.S. 411 (1990).

130 *Id.* at 414-18.

131 856 F.2d 226, 248 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

132 Specifically, the Court stated:

> [I]n the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted.

Superior Court Trial Lawyers Ass'n, 493 U.S. at 424-25.

133 *Id.* at 426-27 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988)). *Allied Tube* similarly distinguished politically motivated from profit-motivated boycotts, and held that only the former trigger First Amendment scrutiny. 486 U.S. at 506-10. The Court distinguished *Claiborne Hardware* by emphasizing that the civil rights boycott in *Claiborne Hardware* "was not motivated by any desire to lessen competition or to reap economic benefits . . . and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market." *Id.* at 508.

134 *See* 481 U.S. 221, 228 (1987) ("[S]elective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse

in *Leathers v. Medlock* the Court held that First Amendment review applies only to differential taxation schemes that threaten to suppress the expression of particular ideas or viewpoints, target a small group of speakers, or discriminate based on the content of speech.[135] *Leathers* stated that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[136]

What about the application of the First Amendment to a regulation whose only connection to speech was that it applied to an entity that engages in speech? The D.C. Circuit has treated all regulations of cable operators as raising First Amendment issues. Some of these regulations directly relate to cable operators' speech.[137] Requiring cable operators to set aside some of their capacity for public, educational, and governmental channels, and for stations subject to leased access, for instance, could reduce the number of channels over which cable operators can exercise editorial control and thus limit their ability to engage in speech under the First Amendment.[138] Other regulations that the D.C. Circuit has subjected to First Amendment scrutiny, however, have no direct connection to cable operators' editing. The best example is the regulation of the rates that cable companies can charge to their customers. The D.C. Circuit, with little discussion, held that such regulation is subject to First Amendment scrutiny.[139] The nexus between rate regulation and cable operators' exercise of editorial discretion is not obvious. One could argue that rate regulation reduces revenues, which limits the ability of a cable operator to produce the content

by the state."); *see also Turner I*, 512 U.S. 622, 640-41 (1994) ("[L]aws that single out the press, or certain elements thereof, for special treatment . . . are always subject to at least some degree of heightened First Amendment scrutiny.").

135 499 U.S. 439, 447 (1991).

136 *Id.* at 453.

137 One example is vertical concentration limits on cable operators, which limit the percentage of channels in which an operator has an ownership interest that it can include in its lineup, thus constraining the operator's choice of which channels to air. *See* 47 U.S.C. § 533(f)(1)(B) (2006) (mandating that the FCC "establish[] reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest"); Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1137-39 (D.C. Cir. 2001) (applying First Amendment scrutiny to rules promulgated under § 533(f)(1)(B)).

138 *See* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973 (D.C. Cir. 1996) (finding that such regulation could present First Amendment problems, but rejecting a facial challenge to the statute at issue).

139 *See* Time Warner Entm't Co. v. FCC, 56 F.3d 151, 181-82 (D.C. Cir. 1995) (addressing the First Amendment's application in a single sentence).

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it wants and to exercise editorial discretion as it sees fit.[140] But this argument would suggest that virtually every regulation that specifically applies to a company engaged in speech will be subject to First Amendment scrutiny, because almost any regulation can have the effect of reducing revenue.

The Supreme Court has not considered cases involving the rate regulation of cable television service or other regulations that have similarly tenuous connections to speech.[141] That is, every regulation to which the Court has applied First Amendment scrutiny has had some additional element connecting it to speech, and thus the Court has never considered the applicability of the First Amendment to a regulation whose only connection to speech was that it was not of general applicability and applied to an entity that engaged in speech.

Whereas excluding algorithm-based decisions (or even just search engines) from the ambit of the First Amendment would entail a significant revamping of First Amendment jurisprudence, rejecting the D.C. Circuit's position would have no such effect. It is about as discrete and separable a question as arises in the First Amendment context. The Supreme Court's jurisprudence permits either answer: the logic of the cases simply does not dictate, or even strongly hint at, an answer to this question. And, for the

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140 *See* Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 687 (2005) (contending that "rate regulation had the unintended consequence of degrading the quality of existing cable offerings and foreclosing the emergence of higher quality channel packages despite viewers' willingness to pay for them").

141 The Supreme Court has invalidated statutes giving local officials authority to permit or ban distribution of newspapers and other forms of speech, but those cases focused on the possibility of content and viewpoint discrimination created by unbridled discretion to permit or ban. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 767-68 (1988) ("[T]his Court has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official."); *see also* Saia v. New York, 334 U.S. 558, 562 (1948) ("When a city allows an official to ban [loud-speakers] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas."); Lovell v. City of Griffin, 303 U.S. 444, 450-51 (1938) (invalidating a regulation prohibiting the distribution of leaflets without the approval of the city manager). Indeed, in *Plain Dealer* the Court stated,

> This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

486 U.S. at 759.

Temple American Inn of Court - April 2016 Program - Research and Materials

reasons I discussed at the outset, textual and historical interpretive tools do not provide an answer.[142]

In other words, with respect to generic regulations of speakers—that is, regulations that are not directly connected to the conduct giving rise to speech and that betray no censorious goals, no preference for content, and no desire to squelch particular speakers—there seem to be no broadly accepted sources or reasoning that push us strongly in one direction or another. As a result, in my view this is an appropriate place for other considerations to play a role. I incline toward consequentialism, and I think there are good consequentialist reasons related to the concerns about heightened scrutiny applying too broadly for rejecting the D.C. Circuit's position. Given the rise of substantive editing (happening all the more frequently via algorithms, but of course not limited to algorithms), applying the First Amendment to all specific regulations of companies engaged in such editing would have a massive impact. One could reject the D.C. Circuit's approach on other bases of course. Under conceptions focusing on autonomy and self-expression, for example, it would be risible for a court to apply the First Amendment to economic regulation of companies engaged in speech. My point is simply that insofar as we are concerned about First Amendment scrutiny applying too broadly, this is an appropriate point of limitation.

CONCLUSION

In this Article I have attempted to take seriously both broadly accepted sources and forms of reasoning and concerns about expansion of the application of the First Amendment. Consistent with that focus, I have considered how those broadly accepted sources (in particular Supreme Court jurisprudence) would apply to First Amendment coverage of algorithm-based decisions, whether we can exclude such decisions from the First Amendment without radically revamping First Amendment jurisprudence, and whether there are attractive interpretations of the First Amendment's scope consistent with current jurisprudence that would limit its feared overexpansion.

Those worried about the Free Speech Clause expanding too far, particularly with respect to algorithm-based decisionmaking (or maybe just Google), might find the proposals in the previous Part unsatisfying. If drawing nonarbitrary lines that do not radically reorient First Amendment

[142] Other than, perhaps, the possible originalist conclusion that our entire First Amendment jurisprudence is misbegotten because the freedom of speech is only a freedom from prior restraints. *See supra* note 27 and accompanying text.

Temple American Inn of Court - April 2016 Program - Research and Materials

jurisprudence provides protections for algorithm-based outputs, then perhaps we should be willing to draw arbitrary lines or radically reorient First Amendment jurisprudence.

There is no way to definitively refute these arguments. Perhaps inclusion of algorithm-based decisions illuminates just how far Free Speech jurisprudence has gone off the rails (to use a technical term), such that we need to remake it. Or perhaps algorithm-based decisions are such unattractive candidates for First Amendment inclusion that we should draw a somewhat arbitrary line excluding them.

In my view, any line between algorithm-based and human-based decisions would be unjustifiably arbitrary, so a radical reorientation is the more attractive of the two options in this context.[143] But that does not answer the

[143] Commerce Clause jurisprudence provides a point of comparison. Even after *United States v. Lopez*, the Supreme Court's interpretation of Congress's interstate commerce power has been so expansive that almost every imaginable piece of federal legislation is authorized by the commerce power. *See* 514 U.S. 549, 567 (1995) (refusing to hold that "the possession of a gun in a local school zone" reflects economic activity that rises to the level of interstate commerce and thus implicates the commerce power); *see also* United States v. Morrison, 529 U.S. 598 (2000) (holding a federal statutory remedy for the victims of gender-motivated violence unconstitutional because it did not comport with the Commerce Clause). *Cf.* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the constitutionality of the Federal Controlled Substances Act as applied to intrastate, noncommercial cultivation and possession of marijuana under the Commerce Clause). Some of those concerned about this development (notably Justice Thomas) have argued for a radical reorientation of the Court's jurisprudence. *See Lopez*, 514 U.S. at 584 (1995) (Thomas, J., concurring) (arguing that the Court "ought to temper [its] Commerce Clause jurisprudence"); *Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (criticizing the Court's "view that the Commerce Clause has virtually no limits" and advocating for a shift to a "standard more consistent with the original understanding"). Others have argued for drawing ad hoc, and arguably arbitrary, lines to limit the expansion of that power. Both of these positions were articulated (minus any concession of possible arbitrariness) in arguments against the constitutionality of the Affordable Care Act. Some advocates argued for a radical revamping of Commerce Clause jurisprudence. *See, e.g.*, Brief for Virginia Delegate Bob Marshall et al. as Amici Curiae in Support of Respondents at 11-14, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 484059 (Feb. 13, 2012) (arguing for a reconsideration of the Court's Commerce Clause cases, particularly *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Darby*, 312 U.S. 100 (1941)). Many more pushed for a distinction between activity and inactivity. They often acknowledged that the distinction was ad hoc, and that they preferred a more fundamental rethinking of Commerce Clause jurisprudence. But they saw the action–inaction distinction as a tenable way of limiting Commerce Clause expansion without entailing a radical reorientation of the jurisprudence. *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 619 (2010) ("Of course, like the distinction between economic and noneconomic activity, the activity–inactivity distinction would not perfectly distinguish between incidental and remote exercises of implied powers. But, however imperfect, some such line must be drawn to preserve Article I's scheme of limited and enumerated powers."). Whatever the merits of that argument in the Commerce Clause context, I think drawing a line between algorithm-based and human-based decisions for purposes of First Amendment coverage is so arbitrary as to be undesirable.

Temple American Inn of Court - April 2016 Program - Research and Materials

question whether a major revamping of First Amendment jurisprudence is in fact desirable, and none of the arguments in this Article squarely addresses that question. The analysis in this Article does, however, highlight the stakes involved (because of the growing importance of algorithms in our lives), and in that way may provide a boost to arguments for a radical reorientation of the existing jurisprudence. That said, it would be a fairly small boost. Encompassing algorithm-based decisions within the ambit of the Free Speech Clause is a natural and modest step. The profusion of computer algorithms designed by humans to do the work other humans once did may alter our economy,[144] but it does not significantly change the First Amendment analysis. So long as humans are making substantive editorial decisions, inserting computers into the process does not eliminate the communication via that editing.[145] Arguments for a radical revamping should stand or fall on other grounds.

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[144] See, e.g., ERIK BRYNJOLFSSON & ANDREW MCAFEE, RACE AGAINST THE MACHINE: HOW THE DIGITAL REVOLUTION IS ACCELERATING INNOVATION, DRIVING PRODUCTIVITY, AND IRREVERSIBLY TRANSFORMING EMPLOYMENT AND THE ECONOMY (2011) (arguing that innovations in information technology will, inter alia, destroy many jobs).

[145] Or so our computer overlords would have us believe. *See Jeopardy!* (ABC television broadcast Feb. 15, 2011) (documenting the reaction of Ken Jennings, the most successful Jeopardy! player of all time, upon realizing that he was going to lose to an IBM computer named Watson). In his final answer, Jennings paraphrased the venerable Simpsons: "I for one welcome our new computer overlords." *Id.*; *see also* Melissa Maerz, *Watson Wins* "Jeopardy!" *Finale; Ken Jennings Welcomes "Our New Computer Overlords,"* L.A. TIMES (Feb. 16, 2011), http://latimesblogs.latimes.com/showtracker/2011/02/watson-jeopardy-finale-man-vs-machineshowdown.html; Ratzule, *Watson the New Computer Overlord*, YOUTUBE (Feb. 16, 2011), http://www.youtube.com/watch?v=Skfw282fJak (video of Jennings's answer and Watson's victory).

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ASHUTOSH BHAGWAT

Associational Speech

ABSTRACT. This Article explores the relationship between the First Amendment right of free speech and the nontextual First Amendment right of freedom of association. The Article provides important and new insights into this area of law, drawing upon recent scholarship to urge a substantial rethinking of the Supreme Court's approach to this subject. The Article proceeds in three parts. Part I explores the doctrinal roots of the right of association and reviews recent scholarship regarding the association right, as well as the provisions of the First Amendment addressing public assembly and petitioning the government for a redress of grievances. Drawing on these materials, I demonstrate that the assembly, petition, and association rights historically were important, independent rights of coequal status to the free speech and press rights of the First Amendment, and therefore that the Supreme Court's modern tendency to treat the association right as subordinate to speech is incorrect. Building upon this conclusion, I then advance the novel argument that the key First Amendment rights of speech, assembly, petition, and association should be perceived as interrelated and mutually reinforcing mechanisms designed to advance democratic self-government. In particular, I argue that one of the key functions of free speech in our system is to facilitate the exercise of other First Amendment rights, including notably the right of association. I describe this as the theory of associational speech. Part II explores the implications of the theory of associational speech for various areas of free speech doctrine, including incitement, hostile audiences, and the public forum doctrine. Finally, Part III explores some broader questions regarding what the theory of associational speech teaches us about the basic nature of free speech and about the interrelationships between the various provisions of the First Amendment. It also notes some limits of the associational speech concept.

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ARTICLE CONTENTS

I. ASSOCIATION AND SPEECH—A CONVOLUTED RELATIONSHIP 982

A. Association and Assembly in the Supreme Court 983

B. Association, Assembly, Petitioning, and Self-Governance 989

C. Associational Speech 995

II. FREE SPEECH DOCTRINE THROUGH AN ASSOCIATIONAL LENS 1002

A. Dissident and Subversive Speech 1003

B. The Government as Manager – Public Forums and Government Employees 1014

C. Charitable Solicitation 1018

D. Campaign Finance Reform and Corporate Speech 1020

III. ASSOCIATION AND SPEECH—BROADER LESSONS 1026

CONCLUSION 1028

In traditional legal thinking, the First Amendment to the U.S. Constitution has been ineluctably, and almost exclusively, tied to freedom of speech. On occasion, mention might also be made of the Press Clause of the First Amendment or of the two Religion Clauses; but free speech has been the central focus of First Amendment law and scholarship. In fact, however, the text of the First Amendment is not limited to, or even particularly focused on, speech. The full text of the Amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1]

Freedom of speech is no doubt mentioned, but it is given no particular prominence and is sandwiched in between other, distinct topics. In particular, the First Amendment mentions not only freedom of speech, of the press, and of religion but also freedom of assembly and the right to petition the government. In addition, the Supreme Court has long interpreted the First Amendment to protect an implicit right of association.[2] These last provisions have traditionally been the poor stepchildren of First Amendment law, neglected and ignored.

In the past several years, that tradition of neglect has ended, and we have witnessed an explosion of scholarship on those other aspects of the First Amendment, notably on the rights of association and assembly.[3] These developments appear to have been triggered in part by the general advance of communitarian and civic republican models of democracy in the academy and in part by the Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*, holding that the First Amendment's right of association protected the Boy Scouts' decision to expel a gay assistant scoutmaster, in violation of state antidiscrimination law.[4] Regardless of its cause, this scholarship has thrown important new light on the significance of these forgotten liberties and their

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1. U.S. CONST. amend. I.

2. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

3. *See, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); MARK E. WARREN, DEMOCRACY AND ASSOCIATION (2001); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) [hereinafter Inazu, *Forgotten Freedom*]; John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) [hereinafter Inazu, *Strange Origins*]; Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

4. *Dale*, 530 U.S. 640; *see, e.g.*, Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000); Symposium, *The Freedom of Expressive Association*, 85 MINN. L. REV. 1475 (2001).

relationship to the better-known provisions of the First Amendment, notably the Free Speech Clause. Most importantly, this scholarship convincingly demonstrates that the textual assembly and petition rights in the First Amendment were historically at least as significant as, and indeed antecedent to, the free speech right. It also strongly suggests that the nontextual association right is best understood as a significant and distinct right, tied to the Assembly Clause and not (as the modern Supreme Court has suggested) derivative of the free speech guarantee.

This Article seeks to take these insights one step further. It proposes that even today, assembly, petition, and association are at least as central to the process of self-governance as is free speech and that assembly and petition were historically viewed as *more* fundamental to a politically functional society than speech. On the assumption that ensuring self-governance is the primary structural purpose of the First Amendment, this argument suggests that the freedom of association (along with assembly and petition) is not merely derivative of the freedom of speech. Instead, the freedom of association deserves at least equal stature in its own right—and in some contexts enjoys primacy over the freedom of speech. Furthermore, this Article argues that one of the most important functions of free speech in our society, and in constitutional law, is to advance and protect the right of association, rather than purely the converse as the Supreme Court has suggested in recent years.[5] I call this form of speech "associational." Associational speech is speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders (including government officials). Such speech lies at the heart of the First Amendment's structural goals and plays a central role in many First Amendment controversies. Understanding the speech at issue in those situations in associational terms provides insight beyond that of traditional theory and doctrine because it helps explain why the courts have singled out certain specific forms of speech for particularly stringent constitutional protection. The purpose of this Article is to explain and defend this thesis and to explore its implications for free speech doctrine in a number of different areas.

The thesis propounded here neither claims to be an originalist account (if that is possible with respect to the First Amendment) nor presents associational speech as a grand theory explaining all facets of free speech law. Not all speech is associational, at least in a meaningful sense. Scientific talks

5. *See infra* notes 24-55 and accompanying text (discussing, among other cases, *NAACP v. Alabama ex rel. Patterson*, *Roberts v. United States Jaycees*, and *Boy Scouts of America v. Dale*).

Temple American Inn of Court - April 2016 Program - Research and Materials

and papers, mass media publications and broadcasts, commercial advertising, and published literature, for example, all have little or no associational element to them, yet are all clearly protected by the First Amendment.[6] Nonetheless, the concept of associational speech is important for several reasons. Most importantly, understanding the associational role of speech leads to a deeper understanding of the broad, structural functions of the First Amendment and, in particular, of how distinct provisions of the First Amendment interact to perform those structural functions. In addition, as the discussion in Part II demonstrates, the associational perspective gives important clarity to some very important areas of First Amendment law, helping to explain distinctions that the Supreme Court has drawn in the area of free speech that are not otherwise easily explicable.

Part I explores the development of the implicit right of association and the evolving relationship of that right with the free speech and assembly rights. It also discusses the relationship of assembly, petition, and association to self-governance and the modern scholarship on the historical roots of these rights. Part I then uses these insights to develop a theory of associational speech. Next, Part II explores the implications of this theory for various areas of free speech law. Finally, Part III explores some broader questions about what the theory of associational speech teaches us about the basic nature of free speech, as well as some of the limits to the concept of the associational speech.

I. ASSOCIATION AND SPEECH—A CONVOLUTED RELATIONSHIP

To understand the relationship among free speech, association, and assembly, some background is necessary. To that end, this Part traces the doctrinal evolution of the First Amendment rights of association and assembly over the past century, as well as the historical roots and functions of those rights and the closely related right of petition. To begin with a clarification, the Supreme Court has over the years used the terms "association" and "assembly" interchangeably (even though assembly is mentioned in the constitutional text and association is not). Generally, however, the scholarship suggests that assembly was understood historically to refer to ad hoc gatherings of citizens, while association was understood to refer to more permanent citizen

6. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) (mass media broadcasts); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (published literature); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (commercial advertising); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (mass media publications).

organizations, whether formally constituted or not.[7] How those rights came to be recognized and enforced in the Supreme Court is a complex tale, to which we now turn.

A. *Association and Assembly in the Supreme Court*

For the first 125 years of its history, the Free Speech Clause was essentially absent from the Supreme Court's jurisprudence. The reasons for this absence are many: first, prior to incorporation, most free speech controversies raised no *federal* constitutional issues, since state governments were the primary regulatory authorities; second, the Alien and Sedition Act controversy never reached the Supreme Court; and third, the Court itself took a notably narrow view of the scope of the Free Speech Clause.[8] Assembly and association cases were similarly absent from the Court prior to the twentieth century. The evolution of the assembly and associational rights in the Court began a few years after the birth of free speech jurisprudence in the 1919 Espionage Act cases,[9] with the Court's famous decision in *Whitney v. California*.[10]

Whitney is generally cited as a free speech case; indeed, it is remembered as one of the classic triumvirate of free speech cases in which Justices Holmes and Brandeis, in separate opinions, formulated their "clear and present danger" test and developed their underlying theories of free speech.[11] Justice Brandeis's concurring opinion in *Whitney* famously expounded his self-governance rationale for protecting speech and has been described as perhaps the most important free speech opinion in the Supreme Court's history.[12] All of this is a bit odd, however, because *Whitney* was not a free speech case at all. It was a case about association and assembly. The case arose from the prosecution for criminal syndicalism of Anita Whitney, a leading California left-wing activist

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7. *See infra* note 61 and accompanying text.

8. *See, e.g.*, Patterson v. Colorado *ex rel.* Att'y Gen., 205 U.S. 454, 462 (1907) (suggesting that the "main purpose" of the First Amendment was to prohibit prior restraints on speech).

9. Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

10. 274 U.S. 357 (1927).

11. The other two cases are *Gitlow v. New York*, 268 U.S. 652 (1925); and *Abrams v. United States*, 250 U.S. 616 (1919).

12. *See generally* Ashutosh A. Bhagwat, *The Story of* Whitney v. California*: The Power of Ideas*, *in* CONSTITUTIONAL LAW STORIES 383 (Michael C. Dorf ed., 2d ed. 2009) (discussing the influence of Justice Brandeis's *Whitney* opinion on subsequent First Amendment case law and scholarship).

(and niece of Supreme Court Justice Stephen Field). The crux of the prosecution, however, was not that Whitney's speech constituted criminal syndicalism (which California law defined as the advocacy of crimes or violence to effect change in industrial ownership) but merely that she belonged to an organization, the Communist Labor Party, that engaged in syndicalism. Speech could not have been a basis for the prosecution because Whitney herself had never advocated violence; to the contrary, she was on the record as supporting peaceful, democratic activism.[13] Furthermore, both the majority opinion (affirming Whitney's conviction) and Justice Brandeis's separate opinion seem to have recognized this point, at least implicitly. While both opinions mentioned free speech, they did not limit themselves to it. The majority described the rights at issue as "rights of free speech, assembly, and association,"[14] while Justice Brandeis repeatedly described the relevant constitutional provisions as the rights of free speech *and* assembly.[15]

There are two important lessons to be learned from *Whitney*: first, that as of 1927, members of the Court were treating the rights of free speech, assembly, and association as distinct but coequal (albeit to dismiss them all, in the case of the majority); and second, that no clear distinctions were being drawn at this time between association and assembly. The majority spoke of both rights in the same breath, without clarifying the distinction between them, while Justice Brandeis spoke exclusively of assembly, apparently without thinking his nomenclature had any significance. In his view, as well as in the majority's view, the textual right of assembly protected membership in political organizations.

In the years following *Whitney*, the Court continued to recognize and enforce rights of assembly and association, without clearly distinguishing between the two. In 1937, the Court held in *De Jonge v. Oregon*[16] that convicting an individual for attending a lawful meeting merely because the meeting was held under the auspices of the Communist Party violated the right of peaceable assembly. The Court described the right of assembly as "cognate to those of free speech and free press and . . . equally fundamental."[17] Similarly, in 1945, the Court in *Thomas v. Collins*[18] reversed the conviction of a union organizer who gave a speech to an assemblage of workers in violation of a state statute

13. *Id.* at 387-88.
14. *Whitney*, 274 U.S. at 371.
15. *Id.* at 372-79 (Brandeis, J., concurring).
16. 299 U.S. 353 (1937).
17. *Id.* at 364.
18. 323 U.S. 516 (1945).

and judicial order requiring him to obtain a permit. The Court held that the statutory scheme constituted an unconstitutional prior restraint on the official's rights of free speech *and* assembly,[19] and the Court again described speech, press, assembly, and (this time) petition as cognate rights that in combination constitute "the indispensable democratic freedoms secured by the First Amendment."[20] In 1950, on the other hand, the Court in *American Communications Ass'n v. Douds* upheld a federal statute that, in effect, required union officials to disclaim membership in or support for the Communist Party.[21] At various points, the Court's opinion described the statute as impinging on rights of free speech and assembly,[22] though at one point it referenced "freedom of association" instead,[23] again without drawing any distinction. Note that *Douds* primarily involved not speech but membership in the Communist Party, demonstrating that the Court continued to view assembly and association as interchangeable and as protecting membership in permanent organizations.

The next step in this area, and the key one from the point of view of modern law, was the Court's 1958 decision in *NAACP v. Alabama ex rel. Patterson*.[24] In that case, the Court held that an Alabama law requiring the National Association for the Advancement of Colored People (NAACP) to disclose its membership lists violated what the NAACP members described as their First Amendment right of "lawful association in support of their common beliefs."[25] In the course of its discussion, the Court freely cited cases involving freedom of assembly, such as *De Jonge* and *Thomas*,[26] and at various points used the terms association and assembly interchangeably, though its emphasis was clearly on association rather than assembly.[27] What is noteworthy, however, is that the *NAACP v. Alabama* Court discussed the rights of association and assembly not as independent, cognate rights, but rather as means to enable free speech. Thus, the Court stated: "Effective advocacy of both public and private points of view, particularly controversial ones, is

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19. *Id.* at 518.
20. *Id.* at 530.
21. 339 U.S. 382 (1950).
22. *See id.* at 399-402.
23. *Id.* at 409.
24. 357 U.S. 449 (1958).
25. *Id.* at 460. The context of the case was the civil rights movement and the efforts of Southern state governments to resist desegregation.
26. *Id.*
27. *E.g.*, *id.* at 462.

undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[28] On this view, membership in organizations was protected no longer as an independent political freedom but as an aspect of free speech. And something had been lost in the translation.

In later cases, the Court largely followed its new approach, emphasizing association, not assembly, as the relevant right and treating association as subsidiary to free speech. In *Shelton v. Tucker*, the Court struck down an Arkansas statute requiring public school teachers to reveal their membership in organizations, finding that the statute burdened teachers' "right of free association, a right closely allied to freedom of speech."[29] In *NAACP v. Button*, the Court struck down a Virginia statute that in effect prohibited organizations such as the NAACP from providing lawyers to represent civil rights plaintiffs when the organization itself was not involved in the litigation.[30] The right at issue, the Court wrote, was the right "to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[31] The Court also, oddly, described NAACP-supported litigation as "a form of political expression,"[32] and it treated the association right as nontextual and independent of assembly.[33] That the Court struggled to apply a free speech lens[34] in *NAACP v. Button*—a case that centered on litigation, a form of activity otherwise considered a form of petitioning[35]—demonstrates the extent to which the Court had lost sight of the vision of the speech, press, assembly, and petition protections as independent and equal forms of political freedom. Later cases from the 1970s—such as *Healy v. James*, involving the registration of student organizations on a state college

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28. *Id.* at 460.
29. 364 U.S. 479, 486 (1960); *see id.* at 480, 490.
30. 371 U.S. 415 (1963).
31. *Id.* at 428.
32. *Id.* at 429.
33. *See id.* at 430.
34. Admittedly, the Court did at one point mention the petition right as well, *id.*, but in a decidedly off-hand fashion.
35. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

campus,[36] and *Kusper v. Pontikes*, involving the rights of individuals to shift political party affiliation between elections[37] – continued to follow this pattern.

The key modern developments in the area of association began with the Court's landmark 1984 decision in *Roberts v. United States Jaycees*.[38] The question in the case was whether the United States Jaycees, a national membership organization dedicated to advancing the interests of young men, had a First Amendment right to restrict its membership to men, in the face of state antidiscrimination laws that required the admission of women. Justice Brennan's majority opinion began its analysis by distinguishing between a right of intimate association, rooted in the Court's privacy jurisprudence,[39] and a First Amendment right of association for the purposes of engaging in activities protected by the First Amendment.[40] The Court then rejected the Jaycees' claims on both fronts. With respect to intimate association, the Court held that the Jaycees, with a national membership of 295,000, simply did not constitute an intimate association.[41] Its analysis of First Amendment association, however, was more complex. The Court acknowledged that requiring the Jaycees to admit members against its will was a clear and direct intrusion into the association's freedom.[42] Ultimately, however, the Court concluded that because of the state's compelling interest in eliminating gender discrimination,[43] and (critically) because admission of women would not significantly interfere with the Jaycees' "freedom of expressive association"[44] – that is, the organization's ability to "engage in . . . protected activities or to

36. 408 U.S. 169, 181 (1972) ("While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.").

37. 414 U.S. 51, 56-57 (1973) ("There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.").

38. 468 U.S. 609 (1984).

39. *Id.* at 617-18. The privacy jurisprudence is a reference to cases protecting nontextual rights, such as the right to marry, *see* Zablocki v. Redhail, 434 U.S. 374 (1978); the right to cohabitate with one's family members, *see* Moore v. City of East Cleveland, 431 U.S. 494 (1977); and the right to control one's children's upbringing, *see* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

40. Note that at this point of its analysis, the Court linked the First Amendment association right not to speech alone but also to such other First Amendment activities as assembly and petitioning. *Roberts*, 468 U.S. at 618.

41. *Id.* at 613, 621-22.

42. *Id.* at 623.

43. *Id.* at 623-26.

44. *Id.* at 626.

disseminate its preferred views"[45]—no constitutional violation had occurred.[46] Justice O'Connor wrote a separate opinion agreeing with the result but arguing that the majority underprotected associational rights. Her view was that the law should distinguish between commercial associations, which enjoy limited constitutional protection, and associations that engage predominantly in "protected expression," to which she would have accorded essentially complete freedom to select their members.[47] Interestingly, however, she defined the phrase "protected expression" very broadly, to include not only "expressive words" and "strident" conduct but also "quiet persuasion, inculcation of traditional values, instruction of the young, and community service."[48]

In the years following *Roberts*, the Court decided two other cases applying the holding of that case. In *Board of Directors of Rotary International v. Rotary Club of Duarte*,[49] the Court upheld a state law requiring local Rotary Clubs to admit women, and in *New York State Club Ass'n v. City of New York*,[50] the Court upheld a local ordinance requiring large eating clubs (with more than four hundred members) to admit women. In the latter case, Justice O'Connor wrote separately to reiterate her view that truly expressive associations possess a First Amendment right to select their members.[51] Following the reasoning of *Roberts* in both cases, the Court relied on the state's strong interest in controlling discrimination and on the fact that the associations involved did not engage in much expressive activity, so that the forced admission of women would not interfere with free expression.[52] These cases demonstrate a critical change to the Court's association jurisprudence in the wake of *Roberts*. In the early association cases, the Court emphasized the link between association and free expression as a means to *strengthen* the right of association, driven in part by the Court's (unwarranted) concerns that the right otherwise lacked constitutional mooring. In *Roberts* and its progeny, however, the Court invoked the connection with free speech to *restrict* the right by rejecting constitutional protection for associations that are not predominantly expressive. With this move, the Court abandoned its original insight that

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45. *Id.* at 627.

46. *Id.* at 628-29.

47. *Id.* at 632-35 (O'Connor, J., concurring in part and concurring in the judgment).

48. *Id.* at 636.

49. 481 U.S. 537 (1987).

50. 487 U.S. 1 (1988).

51. *Id.* at 18-20 (O'Connor, J., concurring).

52. *N.Y. State Club Ass'n*, 487 U.S. at 11-14; *Duarte*, 481 U.S. at 548-49.

association and assembly, while linked to free speech and press, are cognate, independent rights.

The most recent turn in the Court's modern association jurisprudence occurred in the 2000 case of *Boy Scouts of America v. Dale*.[53] The case arose when the Boy Scouts revoked James Dale's adult membership and position as an assistant scoutmaster upon learning that Dale was homosexual and a gay rights activist. The New Jersey Supreme Court held that the Boy Scouts' actions violated New Jersey's law banning discrimination in places of public accommodation, and the question posed to the Court was whether New Jersey's application of its antidiscrimination law in this context violated the First Amendment. The Court began in much the same way as in *Roberts* by confirming that, to come within the right of expressive association, "a group must engage in some form of expression, whether it be public or private," and that the right was infringed if forced inclusion of a member "affects in a significant way the group's ability to advocate public or private viewpoints."[54] Unlike in *Roberts*, however, a majority of the Court in *Dale* found a constitutional violation, in that forcing the Boy Scouts to include Dale as a member would impair the Scouts' ability to express a message of hostility to homosexual conduct. (Interestingly, the Court deferred to the Boy Scouts' assertions that the organization was in fact hostile to homosexuality and that Dale's inclusion would interfere with its ability to convey that message.[55]) Justice Stevens wrote a vigorous dissent, joined by three other Justices, contesting both key assumptions of the majority: that the Boy Scouts in fact did disapprove of homosexuality and that Dale's inclusion would interfere with their expression.[56] *Dale* thus demonstrated that while the *Roberts* Court's reformulation of associational rights did not spell the end of those rights, no member of the Court was inclined to question the reformulation itself.

B. Association, Assembly, Petitioning, and Self-Governance

This description of the evolution of the Court's association jurisprudence indicates that, in the seventy-three years between *Whitney* and *Dale*, something went astray in the Court's understanding of the association right. Recent scholarship tends to confirm this view, as does consideration of more foundational principles.

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53. 530 U.S. 640 (2000).

54. *Id.* at 648.

55. *Id.* at 650-53.

56. *Id.* at 663-700 (Stevens, J., dissenting).

As noted earlier, recent years have seen an explosion in scholarship regarding association and assembly. Leaving aside the extensive scholarship discussing the merits and (usually) demerits of the *Dale* decision, a topic that is not the main subject of this Article, the scholarship has two major components. First, in the fields of political science and philosophy, there has arisen a vibrant scholarship discussing the role that civic associations play in American political and social life, both historically and in modern America. Prominent recent examples of works in this area include Amy Gutmann's edited collection *Freedom of Association*,[57] Nancy Rosenblum's *Membership and Morals*,[58] and Mark Warren's *Democracy and Association*.[59] The second branch of scholarship, on which this Article focuses, constitutes legal scholarship examining the historical origins of the assembly and association rights.[60]

Several points emerge from this scholarship. Most importantly, the scholarship confirms the close, historical links between assembly and association. Both were seen as forums in which citizens could engage in the process of self-governance, with the difference being that assemblies were probably understood as ad hoc groups gathered in public or private while associations constituted more permanent groupings of citizens, meeting either publicly or in private.[61] Thus, the early Supreme Court's tendency to conflate these concepts is understandable, and the modern Court's failure to recognize the relationship between association and assembly is significant. Admittedly, as Jason Mazzone points out, there is some ambiguity about whether the assembly and petition clauses were understood by (some of) the Framing generation to protect permanent associations;[62] but the deep historical roots and significance of associations to American democracy are clear. The scholarship also confirms what the textual juxtaposition suggests: that assembly and petition are closely linked rights, again with deep historical roots. Mazzone goes so far as to argue that the Assembly Clause protects only

57. FREEDOM OF ASSOCIATION, *supra* note 3.

58. NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA (1998).

59. WARREN, *supra* note 3.

60. *See, e.g.*, Abu El-Haj, *supra* note 3; Inazu, *Forgotten Freedom*, *supra* note 3; Inazu, *Strange Origins*, *supra* note 3; Mazzone, *supra* note 3.

61. Inazu, *Strange Origins*, *supra* note 3, at 491 (citing Charles E. Wyzanski, Jr., *The Open Window and the Open Door: An Inquiry into Freedom of Association*, 35 CALIF. L. REV. 336 (1947)); *id.* at 510-11 (citing LEO PFEFFER, THE LIBERTIES OF AN AMERICAN: THE SUPREME COURT SPEAKS 97-123 (1956)).

62. Mazzone, *supra* note 3, at 742-43.

assembly for petitioning purposes.[63] John Inazu has convincingly refuted this narrow reading but confirms the historical link between the two activities.[64] More importantly, Inazu and Mazzone confirm that, historically, assembly and association were essential components of political activism, from the precolonial period through the American Revolution and the nineteenth century.[65]

The tie between the rights of assembly and association on the one hand and of petition on the other also clarifies their deep, historical roots – roots that are much deeper, in fact, than those of free speech. A right to petition the government in England appeared at least as early as the thirteenth century and, unlike free speech and assembly, was explicitly protected by the English Bill of Rights of 1689.[66] Jason Mazzone also points out that in the English tradition, the link between petitioning and association became significant as early as the seventeenth century, as the practice of group or "common" petitioning became linked to the formation of private associations created for the purpose of petitioning.[67] This was during an era when the law of seditious libel and the practice of licensing meant that political speech was restricted and enjoyed far less protection than petitioning (notably because petitions were immune from criminal libel prosecutions).[68]

Finally, the scholarship clearly demonstrates that the Framing generation was fully aware of the importance of assembly and petitioning in a system of democratic government, as opposed to the system from which the Framers had broken. What history we have of the drafting of the Assembly and Petition Clauses indicates that the First Congress, in drafting the Bill of Rights, was fully cognizant of the significance of public assembly and of the close relationship among assembly, free speech, and self-governance.[69] Nor should

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63. *Id.* at 712-13.

64. Inazu, *Forgotten Freedom*, *supra* note 3, at 573-77.

65. *Id.* at 575-88 (recounting numerous historical episodes of association and assembly, from the arrest of William Penn to the Democratic-Republican Societies of the 1790s to the abolitionist and suffrage movements); Mazzone, *supra* note 3, at 642-44, 700-01 (recounting the role of women's clubs during the nineteenth century in engaging women in political participation); *id.* at 730-34 (describing the roles of public assembly and of Revolutionary associations in the American Revolution); *see also* Abu El-Haj, *supra* note 3, at 555-61 (recounting similar historical episodes).

66. Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1299-1300 (2008); Mazzone, *supra* note 3, at 720.

67. Mazzone, *supra* note 3, at 722-23.

68. *Id.* at 721-22.

69. Inazu, *Forgotten Freedom*, *supra* note 3, at 571-77.

Temple American Inn of Court - April 2016 Program - Research and Materials

this awareness be a surprise. The generation that drafted the First Amendment had lived through the Revolutionary era and surely understood the importance of association and assembly in creating a popular revolution. They understood that the rights of speech, press, assembly, association, and petition are all at heart political freedoms that are essential to democratic self-governance. Nor was this awareness limited to the Framing era. In particular, the Reconstruction-era authors of the Fourteenth Amendment were also surely aware of the central importance of these freedoms, especially assembly and association, in the political and economic empowerment of newly emancipated slaves. The Fourteenth Amendment must be understood as a reaction, at least in part, to the evisceration of those liberties by Southern states prior to the Civil War and in the "Black Codes" adopted in the wake of the war.[70]

The passage of time has not reduced the significance of this insight for American democracy. Indeed, despite their English roots, assembly and association have evolved as distinctly American phenomena. In a passage repeatedly quoted by association scholars, Tocqueville commented on the significance of associations to American democracy. "Americans of all ages, all stations of life, and all types of disposition," he said, "are forever forming associations."[71] As Mark Warren points out, Tocqueville saw associations as contributing to democracy in two ways: by permitting organization and resistance to the state and by developing the habits, skills, and values that make collective rule possible.[72] Tabatha Abu El-Haj similarly points out that assembly historically has been a central component of citizen participation in self-government, not only or even primarily to facilitate free speech,[73] and

70. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1280 (1992); Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 991 & n.369 (2008); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 446; Inazu, *Forgotten Freedom*, *supra* note 3, at 582-84.

71. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840). For examples of quotations from this passage, see Amy Gutmann, *Freedom of Association: An Introductory Essay*, *in* FREEDOM OF ASSOCIATION, *supra* note 3, at 3; and Mazzone, *supra* note 3, at 688.

72. WARREN, *supra* note 3, at 29-30. For an insightful discussion of the relationship between association and value-formation, which does not draw a connection to self-governance, see Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840-41, 865-69 (2005).

73. Abu El-Haj, *supra* note 3, at 547, 554-55, 586-89 (discussing the relationship between assembly and political participation, and citing historical and modern examples of assembly).

Mazzone makes similar arguments.[74] Nor has the Supreme Court ignored this relationship. In *Sweezy v. New Hampshire*, the Court pointed out that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association" and that the exercise of "basic freedoms in America has traditionally been through the media of political associations."[75] In *NAACP v. Button*, the Court quoted from this language to support its protection of the NAACP's right to associate for the purposes of litigation, though not for speech.[76]

From a historical perspective, moreover, the long-standing appreciation of the importance of assembly and association to self-governance makes good sense. During the early Republic, large numbers of citizens lacked the franchise – and in any event, voting in occasional elections is a passive and inadequate form of citizen participation in government.[77] Then, as now, the power of individuals to communicate their views widely, or to influence public officials, was very limited (especially in an era of limited communications). Meaningful participation in government aside from voting (which was open only to some) required citizens to act together. Sometimes, that joint action took the form of public assemblies, designed to develop common values and to catch the attention of those in power. Other times, it may have been through associations of the sort discussed by Tocqueville. But either way, group action was and is an essential aspect of *meaningful* self-governance.

Finally, this understanding of assembly and association as critical to self-governance fits well with general First Amendment theories. Over time, three distinct theories of free speech have gained prominence and acceptance.[78] One, based on the writings of John Stuart Mill[79] and on Justice Holmes's famous dissent in *Abrams v. United States*,[80] suggests that the purpose of free speech is to ensure that the truth shall emerge in the marketplace of ideas. Another,

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74. Mazzone, *supra* note 3, at 647, 729-30.

75. 354 U.S. 234, 250 (1957).

76. 371 U.S. 415, 431 (1963).

77. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) (discussing historical limits on the franchise); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/abstract=1670134 (discussing historical forms of political participation aside from voting).

78. For a general discussion, see ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 79-81 (2010).

79. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 20-22 (John Gray ed., Oxford Univ. Press 1998) (1859).

80. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

prominently defended by Edwin Baker and Thomas Emerson, is that free speech's importance lies in its value to individuals as they seek self-fulfillment.[81] It is fair to say, however, that in recent decades the most prominent and widely accepted theory of free speech is the third, which emphasizes its role in self-governance. As noted earlier, this theory was first explicated in the Supreme Court by Justice Brandeis's opinion in *Whitney*.[82] It was later carefully formulated and defended by the philosopher Alexander Meiklejohn[83] and has since been espoused by legal scholars as influential and diverse as Robert Bork[84] and Cass Sunstein.[85] The essence of this theory is that the primary *constitutional* significance of free speech is its contribution to political debate and thus its enablement of democratic self-governance. Without speech, democracy would be impossible because citizens would have no way to discuss and form their views, including their views about the conduct and competence of public officials.

In the literature, self-governance has been advanced as a theory of *free speech*. In fact, however, as the prior discussion indicates, it is better understood as a theory of the First Amendment generally or at least of the provisions of the First Amendment other than the Religion Clauses.[86] Free speech and a free press are undoubtedly essential components of democratic self-governance. But so are the freedoms of assembly, association, and petition. All of these protected activities are distinct, though interrelated, forms of citizen participation in government that work in tandem to make that participation meaningful. Despite the biases of the modern Court and most modern scholarship, free speech should not be given any precedence in this relationship. Assembly, association, and petitioning are older forms of participation, surviving from a predemocratic era, and they are no less foundational to a functioning democracy. The scholarship discussed in this Section has explored and explicated the implications of this insight for the scope of the rights of association and assembly. We now turn to the implications of this thought for the law of free speech.

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81. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-69 (1989); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4-7 (1966).
82. Whitney v. California, 274 U.S. 357, 375-79 (1927) (Brandeis, J., concurring).
83. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.
84. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).
85. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-65 (1993).
86. The relationship between the Religion Clauses and self-governance is beyond the scope of this Article, though I raise some questions about it briefly in the Conclusion.

C. *Associational Speech*

At this point, we have come to recognize that the Speech, Press, Assembly, and Petition Clauses of the First Amendment are independent provisions, protecting distinct human activities but serving the common political and structural goal of enabling meaningful self-governance by the sovereign People. We have also come to realize that the Assembly Clause has been read, and should be read, to protect not only ad hoc public assemblies of citizens but also private assemblies and associations, including long-lasting and permanent ones. Finally, we have seen that the modern tendency to give primacy to the free speech right among these provisions, treating the others as primarily designed to facilitate free speech, is both historically unjustifiable and logically mistaken. If anything, the petition and assembly provisions have at least historical, and to some extent practical, preeminence over the speech and press provisions. But at a minimum they should stand on an equal footing. To complete our understanding of the functioning of the First Amendment, one final step is necessary: to recognize that while the various rights protected by the First Amendment are distinct and independent, they are *not* unrelated. To the contrary, the activities protected by the First Amendment can and generally must be undertaken in tandem for them to be effective. Free speech is central to a functioning system of popular sovereignty, but as the Supreme Court recognized in *NAACP v. Alabama*, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as [the] Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[87] This is the insight underlying all of the Supreme Court's modern association jurisprudence, from *Alabama* through *Dale*.

The modern Court's error has been to fail to recognize that these relationships and dependencies are not limited to the connection between speech and association and do not run in only one direction. For one thing, the historical record clearly establishes that just as association facilitates speech, it also facilitates petitioning the government, and indeed the link between assembly and petitioning is historically much tighter than that between assembly and speech. Underlying this blind spot in the Court's analysis is a bigger problem: an impoverished view of what self-governance means. The Court appears to envision self-governance as voting, pure and simple. Speech enables self-governance by facilitating thoughtful and knowledgeable voting,

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87. 357 U.S. 449, 460 (1958) (citing Thomas v. Collins, 323 U.S. 516, 530 (1945); De Jonge v. Oregon, 299 U.S. 353, 364 (1937)).

and association facilitates speech by permitting voices to be heard. But the ultimate goal, and the core of self-governance, is voting. This perspective can be traced to the seminal writings of Alexander Meiklejohn on free speech and self-governance. Meiklejohn describes a New England town meeting as the model of self-governance. The meeting is organized and moderated. Citizens speak in a respectful, controlled way, addressing the topic at hand. If they are disruptive or do not follow the rules set down, speakers can be silenced or ejected. And, ultimately, those present vote. That, according to Meiklejohn, "is self-government."[88] One important consequence of this model is that from Meiklejohn's perspective, what is critical is that free speech educate listeners, not that speakers be able to express themselves: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[89] As Jack Balkin has recently pointed out, Meiklejohn's vision has had enormous influence on modern free speech theory.[90]

The difficulty with Meiklejohn's vision is that it is incomplete. The role of the People in this vision is passive and therefore vulnerable—a concern that Justice Brandeis certainly recognized, as reflected in his statement that "the greatest menace to freedom is an inert people."[91] Voting and civilized discussion among individuals are of course important elements of democratic government, but they are hardly the sum total of the matter—especially in times, such as the Framing era, when large numbers of citizens were excluded from voting yet surely still were part of the sovereign People. For one thing, Meiklejohn's vision of how democratic debate proceeds is curiously naïve. Actual political debate is not, and has never in this country's history been, so polite. Instead, real political debate is often loud, robust, and nasty. Certainly the most casual glance at cable news demonstrates the truth of that proposition today. But this is not just a modern phenomenon. During the first Adams Administration, harsh personal attacks were a standard part of politics, leading the Administration to imprison, under the Sedition Act, Republican newspaper editors responsible for such attacks.[92] Attacks on Abraham Lincoln were no less

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88. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-25 (2d ed. 1960).

89. *Id.* at 26.

90. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 439-40 & n.50 (2009); *see also* Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 413-16 (2002) (summarizing Meiklejohn's views on the relationship between free speech and self-governance).

91. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

92. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 15-78 (2004).

pointed,[93] and so on. All of which is to say that the modern phenomenon of attack politics has deep historical roots.

Even recognizing that political speech may be disruptive and uncivilized does not go far enough. For one thing, it completely ignores the role of petitioning in real democratic politics. For self-governance to have meaning, citizens must not only be able to speak among themselves; they must also have some access to public officials. In a recent article, Ronald Krotoszynski and Clint Carpenter point out that petitioning historically has been an essential part of citizen activism and that its modern decline has seriously injured our democracy.[94] Effective petitioning, however, is almost inevitably a group activity. In a large republic, it is unlikely that individual citizens can make themselves heard to those in power (except through litigation, which is a special case). It is only when citizens combine around an issue, and make clear that there are numbers on their side, that elected and other public officials take notice. In other words, petitioning requires association. Moreover, while petitioning historically was a carefully circumscribed and private process, akin to modern lobbying, Krotoszynski and Carpenter convincingly argue that in our modern democracy, public demonstrations and protests – that is, public assemblies – must also be seen as a legitimate form of petitioning.[95] In short, association and assembly are essential components of any effective citizen participation in the democratic process through petitioning.

Finally, the democratic value of citizens' associations is not limited to direct participation in a public, political process. Citizens form their underlying values, both political and personal (if it is possible to distinguish the two), in the context of private associations.[96] If popular sovereignty means anything, it surely means that citizens must be able to decide what they believe and to cooperate in that process of deciding, free from state coercion. Especially in an age of widespread public education, however, citizens can do so only in intimate associations, such as families, and in larger democratic associations.[97] Notice that this function of associations has nothing necessarily to do with *public* debate, the traditional concern of free speech, or with petitioning. Rather, it is private conversation and joint activity that create these shared

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93. *See, e.g.*, DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 257-58, 489 (2005); STONE, *supra* note 92, at 93-94, 109-110, 128-32.

94. Krotoszynski & Carpenter, *supra* note 66.

95. *Id.* at 1308-09.

96. *See* WARREN, *supra* note 3, at 34-38; Shiffrin, *supra* note 72, at 840-41, 865-69.

97. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984) (distinguishing between intimate associations, protected by substantive due process principles, and expressive associations, protected by the First Amendment).

values.[98] In addition, as noted earlier, associations permit citizens to develop the skills needed for participation in democratic self-governance.[99] Such skills, again, are best developed independently of public officials, whose incentives on the matter are decidedly mixed.

Public assembly and association free of state control, then, are essential both to popular participation in government—self-governance in its active form—and to underlying concepts of popular sovereignty. Given the significance of assembly and association to the underlying structural purposes of the First Amendment, it makes sense to read the First Amendment to protect the process of forming and maintaining such associations. And finally, the key insight is that free speech and a free press are important parts of that process. In other words, just as association can facilitate speech, an important role of speech is to facilitate assembly and association. It is hard to imagine how assemblies or associations can be created without speech. At the most obvious level, to organize a public assembly requires informing participants of the planned assembly, publicizing it more broadly to attract others, and publicizing the occurrence of the assembly after the fact, in order to influence the political process (secret protests being an oxymoron). Assembly without free speech, in other words, is impossible.

The role of free speech in enabling the formation and maintenance of associations is more subtle but no less fundamental. An association is a coming together of individuals for a common cause or based on common values or goals. Associations do not form spontaneously. Individuals seeking to form an association must be able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values. As Tocqueville points out, "In a democracy an association cannot be powerful unless it is numerous."[100] But numbers cannot be achieved without publicity. Writing in the first part of the nineteenth century, Tocqueville emphasized the role of newspapers in forming and maintaining the common values and goals at the core of associations.[101] Today, the means of communication are broader, including not only the written press but also mass mailings, media advertising, and of course the Internet. But at the heart of the process are free speech and a free press. To achieve the structural purposes of the First Amendment, therefore, one of the primary objects of First Amendment doctrine must be to protect speech, the

98. *See* Shiffrin, *supra* note 72, at 865-66.

99. *See* Mazzone, *supra* note 3, at 697-701; *supra* note 72 and accompanying text.

100. TOCQUEVILLE, *supra* note 71, at 518.

101. *Id.*

function of which is to form and maintain associations and to communicate an association's views to outsiders – what I denote as associational speech.

One last subject that must be considered is the nature of the assemblies and associations that are provided strong First Amendment protection. Not all associations contribute to the First Amendment's democratic goals, and so not all associational speech linked to associations contributes to those goals either. Justice O'Connor's separate opinions in the *Roberts* and *New York State Club Ass'n* cases,[102] in particular, drew a strong distinction between commercial and noncommercial associations, arguing that the former do not deserve First Amendment protections. The difficulty, however, is in defining precisely what that distinction is. Justice O'Connor spoke of a difference between commercial associations, which cannot claim a First Amendment right to control their membership, and expressive associations, which can claim such a right.[103] The latter category, however, seems too narrow. It is rooted in the fallacy, discussed above, that the sole First Amendment function of associations is to facilitate speech. Justice O'Connor herself seemed to recognize this difficulty in *Roberts*, when she defined the possible conduct of expressive associations to include "a broad range of activities."[104] In particular, she wrote that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."[105] She was quite correct to define the protected conduct of noncommercial associations broadly, though she was off the mark in describing that conduct as "expressive." The better

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102. N.Y. State Club Ass'n, Inc. v. New York, 487 U.S. 1, 18-20 (1988) (O'Connor, J., concurring); *Roberts*, 468 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment); *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting) (citing Justice O'Connor's concurring opinion in *Roberts* for the proposition that the First Amendment does not protect commercial association).

103. *N.Y. State Club Ass'n*, 487 U.S. at 19-20 (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the [local] law [at issue]."); *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "there is only minimal constitutional protection of the freedom of *commercial* association" and discussing the "dichotomy between rights of commercial and rights of expressive association").

104. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment).

105. *Id.* There is language in Justice Brennan's majority opinion that similarly blurs the line between expressive associations and other noncommercial associations. *See id.* at 622 (majority opinion) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

distinction is one drawn based on the primary *goals* of the association at issue. Protected associations are those whose primary goals are relevant to the democratic process. These include not only expression but also political organization, value formation, and the cultivation of skills relevant to participation in the democratic process.[106] Associations can contribute to self-governance in any number of ways aside from direct advocacy, and all those contributions deserve First Amendment protection. An environmental organization such as the Sierra Club, for example, might run publicity campaigns, lobby, and litigate, but it might also organize local clean-up days, tree planting, and hikes. The latter activities are not themselves protected by the First Amendment, but the existence and autonomy of an *association* directed at such goals should be protected because of the value-forming function of such activities, regardless of whether that association also engages in expression or in the political process.[107] And speech directed at forming and preserving such associations is similarly entitled to protection.

In contrast to the wide range of broadly democratic associations that deserve First Amendment protection, certain associations whose primary goals are immaterial to democracy do not. The most obvious are commercial associations, including for-profit corporations and other commercial entities such as limited and professional partnerships, whose primary goal is to make money.[108] These associations are not outside the ambit of the First

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106. For a more complete development of the relevance of associations to democratic skill-building, see Mazzone, *supra* note 3, at 697-701.

107. This discussion also demonstrates why, like Justice O'Connor's distinction between commercial and expressive associations, the Court's opinion in *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986), does not fully capture the range of associations protected by the First Amendment. In *MCFL*, the Court held that certain nonprofit corporations may not constitutionally be subject to restrictions on corporate election expenditures. In particular, it identified three necessary features of such an entity: (1) it was "formed for the express purpose of promoting political ideas" and not to engage in business activities; (2) such a corporation has "no shareholders or other persons affiliated so as to have a claim on [its] assets or earnings"; and (3) it was "not established by a business corporation or a labor union" and do not accept contributions from such entities. *Id.* at 264. The difficulty with this definition of protected associations is that the first feature is far too narrow. It limits protection to associations that are formed to promote political ideas, a purely expressive goal. But as discussed in the text accompanying this footnote, democratic associations contribute to self-governance in a plethora of ways aside from "promoting political ideas," and many such associations were clearly not "formed for the express purpose" of engaging in speech. The *MCFL* test would protect none of them. For a discussion of other shortcomings of the *MCFL* standard, *see infra* note 215.

108. For a similar argument, distinguishing protected "social associations" from unprotected commercial ones, see Shiffrin, *supra* note 72, at 865-66, 877. Shiffrin, however, does not draw a link between protected social associations and self-governance.

Amendment, at least from an associational perspective, because their activities are irrelevant to democratic politics—the activities surely *are* relevant. Corporations participate regularly in the political process (excessively, some would say), and the workplace can be an important influence on the values of individuals. Nonetheless, such participation and influence are not the primary goals of commercial associations; they are either instrumental or coincidental. For this reason, such associations are not the types of entities that the First Amendment is intended to protect, even though some of their activities may be entitled to constitutional protection on the basis of First Amendment principles other than the associational perspective.[109]

This understanding of the First Amendment, as protecting democratic associations generally rather than only "expressive" associations, explains the results in the "right to discriminate" association cases—notably *Boy Scouts of America v. Dale*—far better than the convoluted opinions of the Court. The *Dale* majority's reasoning, that the inclusion of Dale as an assistant scoutmaster would interfere with the Boy Scouts' ability to express a message of hostility to homosexuality, is unconvincing for two separate reasons (and is powerfully refuted by Justice Stevens's dissent). First, it is not at all clear why Dale's mere presence as an assistant leader would interfere with the Scouts' ability to communicate a message of hostility to homosexuality, unless Dale himself used his position as a bully pulpit to defend homosexuality, of which there was no evidence in the record.[110] Second, the very idea that the Boy Scouts are a primarily expressive association is a stretch. Of course, the Boy Scouts engage in some expression, including reciting the pledge of allegiance and saying prayers, but that is not the primary function of the organization. Rather, Boy Scouts primarily do things like outdoor activities and community service. These sorts of activities are not expressive as such, but they are still highly relevant to the democratic process because they are driven by the Scouts' broader goal of value formation. (Justice O'Connor's words in *Roberts*, sixteen years before *Dale*, are prophetic in this regard.[111]) The Boy Scouts thus exemplify an association that is democratic, but not primarily expressive. If one

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109. For this reason, the Court's opinion in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), holding that the First Amendment prohibits placing restrictions on the independent electoral expenditures of corporations, including for-profit corporations, is not necessarily incorrect. The breadth of the decision is not defensible on associational grounds, but it might be justified based on other, purely speech-oriented principles. *See infra* notes 215-218 and accompanying text.

110. Boy Scouts of Am. v. Dale, 530 U.S. 640, 688-98 (Stevens, J., dissenting).

111. *See supra* note 105 and accompanying text (quoting Justice O'Connor's description of "the training of outdoor survival skills" as protected, expressive activity).

recognizes that such associations are protected by the First Amendment in their composition and self-definition because they must enjoy autonomy from the state, and thus have a constitutional right to select their own members, then the result in *Dale* follows a fortiori.[112] Of course, this still leaves open the question, raised in Justice Stevens's dissent, whether the Boy Scouts truly were hostile to homosexuality.[113] It seems perilous, however, to grant government officials (including judges) the power to determine the "true" values of democratic associations. Putting such a powerful tool into the hands of the state would threaten the autonomy of such associations.[114] Of course, granting such a high degree of autonomy to these kinds of associations imposes significant costs on society in the form of exclusion and division, but given the importance of associations to the structure of the First Amendment, those are costs that the Constitution requires us to bear.

On the other hand, the distinction set forth above also makes clear that commercial entities have no right to discriminate, either as employers or in their choice of customers and contractual partners. Such associations are not directed toward goals relevant to the democratic process, so their internal organizations are not free from government regulation. There are, of course, difficult intermediate cases, such as those in the Court's 1980s trilogy. The Court's implicit, and Justice O'Connor's explicit, conclusions that Rotary Clubs and eating clubs fall on the commercial side of the line seem correct. The Jaycees, on the other hand, pose a much more difficult problem, given that they undoubtedly engage in substantial civic and political activities but also and probably primarily (as Justice O'Connor points out in her concurring opinion) in commercial activities.[115] On balance, given the lower court's findings regarding the Jaycees' activities, the Court's conclusion is probably defensible, but it is clearly a close case.

II. FREE SPEECH DOCTRINE THROUGH AN ASSOCIATIONAL LENS

The previous Part established the significant, mutually reinforcing relationships between the various protections afforded by the First

112. For a contrary argument that law should encourage internal dissent (of the sort represented by *Dale*) within cultural associations, see Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 555-58 (2001).

113. 530 U.S. at 684-88 (Stevens, J., dissenting).

114. For a similar argument, see Shiffrin, *supra* note 72, at 846-48.

115. Roberts v. U.S. Jaycees, 468 U.S. 609, 639-40 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

Amendment, including the fact that one of the important roles of free speech is to facilitate other types of political freedoms. In particular, it argued that one of the functions of free speech law is to protect associational speech – speech the purpose of which is to create and foster private, democratic associations or to express the views of such associations to the world. Turning now from the abstract to the specific, we will consider several areas of First Amendment doctrine from the perspective of associational speech.

A. *Dissident and Subversive Speech*

In the modern era, free speech issues have been litigated in a huge and varied range of areas, from pornography and nude dancing[116] to tobacco advertising[117] to campaign finance reform.[118] The roots of First Amendment doctrine, however, lie not in these peripheral areas but in efforts by the government to suppress what it considers to be dissident or subversive speech. Most of the important free speech disputes during the first half-century of the Court's free speech jurisprudence (from 1919 to 1969) arose in this area, and most of the Court's important doctrinal innovations were also driven by such cases. The cases encompass a number of distinct doctrinal strands, including incitement, hostile audiences, and compelled speech. What they have in common, though, is that in each of these areas the Court was faced with efforts to suppress the speech of dissident groups. Viewing these cases as involving associational speech therefore clarifies the constitutional values underlying these disputes.

The earliest, most significant, and most contentious line of subversive speech cases concerns incitement, which is speech that poses the risk of encouraging listeners to engage in illegal action. The problem of incitement first came to the Supreme Court in 1919, in a series of cases involving prosecutions (under the Espionage Act of 1917) of opponents of U.S. entry into World War I. In opinions by Justice Holmes, the Court unanimously affirmed these convictions.[119] One of the cases, *Schenck v. United States*, announced the "clear and present danger" test, under which subversive speech could be suppressed if it produced a clear and present danger of social harm – in that

116. *See, e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803 (2000); City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

117. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

118. Citizens United v. FEC, 130 S. Ct. 876 (2010).

119. Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

Temple American Inn of Court - April 2016 Program - Research and Materials

case, resistance to conscription during wartime.[120] In the months and years following these first decisions, the Court upheld several other convictions under the Espionage Act[121] and also upheld convictions of members of the Socialist and Communist parties for crimes such as criminal anarchy and criminal syndicalism.[122] These later cases were not, however, unanimous. Justices Holmes and Brandeis wrote separately in all of them and, in the course of doing so, enunciated a much stronger version of the clear and present danger test than that of the majority, providing robust protection to free speech rights. History has vindicated the Holmes-Brandeis position, and the results in these cases (including Justice Holmes's early opinions) have been almost unanimously condemned.[123] By the 1930s, the Supreme Court began moving toward the Holmes-Brandeis view, stepping up its protection of free speech rights – notably in its 1931 decision in *Stromberg v. California*,[124] striking down a California statute that made it a crime to display a red flag as a symbol of opposition to the government.

The adoption of the Holmes-Brandeis approach, however, did not make the problem of incitement go away. Indeed, the problem returned anew with the McCarthy-era persecution of Communists during the Cold War. Once again, the Court at first stumbled, upholding numerous statutes imposing restrictions on Communists. In 1951, for example, the Court affirmed the convictions under the Smith Act of the leaders of the American Communist Party while purporting to apply the Holmes-Brandeis clear and present danger test.[125] By later in that decade, however, the Court's approach to incitement

120. *Schenck*, 249 U.S. at 52. Given that Holmes did not quote the "clear and present danger" language of *Schenck* in the later *Debs* and *Frohwerk* decisions, it is not entirely clear whether he truly intended to create a new "test" in *Schenck*. As related in the text, however, in later cases Holmes, and eventually the Court, unambiguously adopted "clear and present danger" as the relevant doctrinal test.

121. Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919).

122. Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

123. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (overruling *Whitney*); *id.* at 451-54 (Douglas, J., concurring) (describing the Court's treatment of the majority approach in the Red Scare-era cases); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-116 (1980) (criticizing the early cases); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 508 (1985) (describing the Red Scare era as "pathological" and observing the Court's failure "to stem the tide of intolerance"). *But see* Bork, *supra* note 84, at 29-32 (defending the results in the early incitement cases).

124. 283 U.S. 359 (1931).

125. Dennis v. United States, 341 U.S. 494 (1951).

became more nuanced. Notably, in two important decisions, the Court adopted narrowing interpretations of the Smith Act to avoid First Amendment concerns. First, the Court held in *Yates v. United States* that the Act condemned not abstract advocacy of forcible overthrow of the government but only advocacy directed at promoting unlawful actions.[126] Then, the Court held in *Scales v. United States* that the Smith Act criminalized not "passive" membership in the Communist Party but only "active" membership.[127] The final step in the development of the Court's incitement doctrine occurred in 1969, with *Brandenburg v. Ohio*.[128] The *Brandenburg* Court reversed the conviction of a Ku Klux Klan leader for criminal syndicalism (overruling *Whitney v. California*) and, in the course of doing so, abandoned the clear and present danger test.[129] Henceforth, the Court held, advocacy could be condemned as incitement only if it was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[130] In subsequent cases, the Court has made clear that this rule is speech-protective in the extreme, requiring a high degree of both imminence and likelihood of violence before speech can be punished, either criminally or with civil liability.[131] The *Brandenburg* standard appears to have resolved the incitement problem, largely in favor of protecting speech.

This abbreviated history of the incitement doctrine reveals a Court that struggled for decades with the problem of incitement. That struggle is not surprising. While inciting speech is often political in nature, it threatens substantial social harms, whether interference with the war effort (in the Espionage Act cases), a Communist revolution (during the McCarthy era), or racial violence (in *Brandenburg*). Moreover, one may question why the Constitution should protect speech advocating illegal activities, when the

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126. 354 U.S. 298 (1957).

127. 367 U.S. 203 (1961).

128. 395 U.S. 444.

129. *Id.* To be precise, the *Brandenburg* Court never explicitly abandoned the clear and present danger test; it merely failed to mention that standard. However, this silence, combined with the omission of "clear and present danger" from the Court's discussion of *Dennis*, seemed to telegraph such a purpose. *Id.* at 447 n.2. That is certainly how Justice Black's concurring opinion read the majority. *Id.* at 449-50 (Black, J., concurring); *see also* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., dissenting) (describing the abandonment of the clear and present danger test in *Brandenburg* and other cases).

130. *Brandenburg*, 395 U.S. at 447.

131. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam).

Temple American Inn of Court - April 2016 Program - Research and Materials

activities themselves are surely unprotected.[132] It is no answer to point out that such advocacy is often mixed up with legitimate criticisms of our society because that does not answer why the advocacy aspect of the speech cannot be punished. The Court has never resolved this conundrum.

One plausible answer, I submit, lies in the concept of associational speech. What is notable about these important incitement cases is that *all* of them involved speech in the context of public assemblies or political organizations. Most of the cases involved multiple defendants acting jointly. Even in the case of individual prosecutions (such as *Whitney* and *Brandenburg*), membership in and assembly with disfavored organizations such as the Communist Labor Party or the KKK lay at the core of the cases. The Espionage Act cases, for example, all involved pleas by antiwar groups to join opposition to World War I, and they often involved members of the Socialist Party. One of the early defendants, Eugene Debs, was the national leader of the Socialist Party; his conviction was based on a public speech that he had given.[133] Much of the condemned speech and literature constituted efforts to recruit new members to antiwar groups, including the Socialist Party. As Justice Brandeis commented in one of the Espionage Act dissents, the criminalized act of "'distributing literature' is a means commonly used by the Socialist Party to increase its membership and otherwise to advance the cause it advocates."[134] Other cases, if they did not involve explicit recruitment, involved discussions and activities within a group or on behalf of a group aimed at forming agreements and tightening ideological bonds within the group and disseminating the group's messages to others, necessarily with a view to long-term recruitment. Examples include the flag-waving in *Stromberg*, the pamphlets thrown into the streets in *Abrams*, and the propaganda literature and workshops at issue in the Smith Act cases. In other words, the incitement cases at their heart concern speech and actions directed toward forming, expanding, and strengthening dissident associations. *Brandenburg* itself involved a KKK rally, quintessentially a public assembly, and post-*Brandenburg* incitement cases similarly involved either public demonstrations (an antiwar rally in *Hess*[135]) or intragroup dynamics (the organization of a boycott by a civil rights organization in *Claiborne Hardware*[136]). There is a broad modern consensus, as noted above, that the

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132. Robert Bork famously made this argument in the course of attacking the Holmes-Brandeis approach to incitement. Bork, *supra* note 84, at 29-32.

133. Debs v. United States, 249 U.S. 211 (1919).

134. Pierce v. United States, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting).

135. 414 U.S. 105.

136. 458 U.S. 886.

speech in *all* of the incitement cases leading up to *Brandenburg* should have been protected and that under the *Brandenburg* test it would have been protected.[137] The reason, I would argue, is that even if the message communicated by advocacy of illegality has little value to democratic self-governance in isolation, dissident associations play a central role in a system of genuine popular sovereignty, even when the goals of such associations are abhorred by broader society (as the Communists' were in the 1920s and 1950s and the KKK's are today). Such associations ensure that majoritarian institutions, often with close ties to the state – such as the two main political parties – do not gain a monopoly on the formation and dissemination of political values. Dissident associations are also much more likely to become a source for disruptive political activism such as protests and rallies – that is, for an active citizenry – than are more majoritarian organizations. And, ultimately, dissident associations are more likely to become centers for resistance to tyrannical government actions than are broader, more diffuse organizations. As the cases demonstrate, advocacy even of illegal action, short of incitement (as defined in *Brandenburg*), plays an important role in the formation and strengthening of such associations and so must be tolerated despite its potentially harmful results.

The outcomes in two recent incitement cases in the lower courts bolster the thesis that incitement has been granted such strong constitutional protection because of its associational elements. In the first case, *Rice v. Paladin Enterprises*, the Fourth Circuit concluded that a publisher could be held civilly liable to the survivors of murder victims who were killed by a hired attacker who followed directions set forth in a book, published by the defendant, titled *Hit Man: A Technical Manual for Independent Contractors*.[138] The court rejected a First Amendment argument based on *Brandenburg* on the grounds that the detailed instructions at issue were different from the abstract advocacy in *Brandenburg* and earlier decisions.[139] In the second case, *Planned Parenthood v. American Coalition of Life Activists* (*ACLA*), the Ninth Circuit upheld, over a powerful dissent, a RICO verdict in favor of a group of medical professionals who provided abortion services against an antiabortion group that had posted the names, addresses, and photographs of the plaintiffs on the Internet in the form of "Wanted" posters and then crossed out the pictures of those doctors who were assassinated.[140] Again, the Court rejected a First Amendment

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137. *See* ELY, *supra* note 123, at 115 & 233 n.26.

138. 128 F.3d 233 (4th Cir. 1997).

139. *Id.* at 255-65.

140. 290 F.3d 1058 (9th Cir. 2002) (en banc).

defense, this time on the theory that the speech constituted an unprotected "true threat."[141]

Leaving aside the doctrinal complexities of these two cases (the *ACLA* majority's threat analysis is particularly problematic), on their faces these cases appear to fall within the confines of *Brandenburg*. After all, both involved pure speech advocating illegality, and yet in neither case could one plausibly argue that the illegality was either *imminent* or *likely* when the book was published or the information posted. In *Paladin* ten years passed between the publication of the book and the murders, and in *ACLA* there was no evidence that the website had ever generated actual violence. What, then, explains the results in these cases? While many potential factors are at play, most significant is that neither case involved associational speech. *Hit Man* was not written with the purpose of recruiting others to a movement or organization; it was intended either as a joke (as some think) or simply to assist strangers in committing crimes. Either way, there was no associational element. *ACLA* is a somewhat more difficult case because ACLA itself was a protected association, and most of its website, including its generalized endorsement of violence, surely constituted protected, associational speech designed to strengthen the organization and express its views. The finding of liability in *ACLA*, however, was not based on those aspects of ACLA's website but on the website's inclusion of personal details about the doctors. Those details had no possible relationship to either recruiting new members to the organization or disseminating the organization's views. The sole purpose of that particular aspect of the website seemed to be to encourage strangers to commit crimes; thus, it was not associational speech. This fact clearly distinguishes *ACLA* from *Brandenburg* because the speech at issue in *Brandenburg*, while containing some vague references to violence,[142] was part of an organizational rally designed to deepen associational bonds and had no real link to violence or the threat of violence against others. Threats of violence and other speech closely associated with violence by associations—as with speech associated with violence by individuals—do not constitute protected speech any more than violence itself is protected, because such speech is closely "brigaded with action."[143] In its 2003 decision in *Virginia v. Black*,[144] the Supreme Court confirmed this distinction, holding that burning a cross could be punished when it was done in order to

141. *Id.* at 1085-86.

142. *See* Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) ("'We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.'").

143. *Id.* at 456 (Douglas, J., concurring).

144. 538 U.S. 343 (2003).

convey a threat to a third party but not when it was done as part of a KKK organizational rally—that is, when it was associational speech.

Thus, because the specific speech punished in *Paladin* and *ACLA* did not constitute associational speech, the results in those cases are consistent with *Brandenburg* from an associational perspective. This is not to say that only publications constituting associational speech deserve First Amendment protection; that would radically narrow the scope of free speech. But in the context of incitement, when serious social ills are threatened, such a limitation might be justified because absent the advancement of associational values, advocacy of illegal conduct simply may not be worthy of protection.

Limiting the protection of incitement to associational speech clarifies the law in this area but does not solve all problems. In particular, the problem of dissident or subversive organizations that *do* directly promote illegal activities remains. As discussed above,[145] despite the value of associations to democracy, not all associations can possibly be entitled to constitutional protection. In particular, associations whose primary or direct goal is criminality cannot find shelter under the First Amendment for the same reason that commercial associations are unprotected[146]: criminal activity is not in itself a part of the democratic process. Of course, breaking the law can sometimes be a part of a political movement, but that is a different matter. Civil rights organizations such as Dr. Martin Luther King's Southern Christian Leadership Conference were entitled to First Amendment protection even though they engaged in massive civil disobedience, but that is because the primary goal of such organizations was not to break the law but to effectuate political and social change. The Mafia, on the other hand, is an organization that surely is unprotected, both because it is fundamentally commercial in nature and because its goals are entirely criminal and therefore irrelevant to the democratic process. Even an ideological organization whose primary activities are criminal, such as the Red Brigades or Al Qaeda, deserves no protection; both membership in and recruitment by such groups can be condemned. Unfortunately, however, not all associations are easily classified. Many organizations that are widely or officially labeled as criminal and terrorist, such as the Palestinian group Hamas, the Kurdish PKK, and the (now-defunct) Liberation Tigers of Tamil Eelam, also engage in peaceful, protected activities.[147] Others, such as the Communist Party, have illegal goals but also

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145. *See supra* notes 102-109 and accompanying text.

146. *See supra* notes 108-109 and accompanying text.

147. The latter two were chosen as examples because the Supreme Court recently upheld the constitutionality of criminalizing the provision of "material support" to those groups, even

engage in substantial protected activity, and the precise lines between the two are not always clear (consider the example of a "political" strike pushed by union officials associated with the party). Given these uncertainties, some distinction must be drawn between protected associational speech that nurtures a dissident organization and unprotected speech that supports an association's illegal activities and thus can be suppressed for the same reasons that the illegal activities themselves can be. The modern distinction between abstract and directed advocacy, drawn in *Yates* and *Brandenburg*, appears to try to capture this line. Note that abstract advocacy cannot be protected on the theory that its abstract nature means it risks no social harm. After all, as Holmes pointed out:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.[148]

Abstract advocacy of the sort at issue in cases like *Gitlow*,[149] however, is an essential aspect of recruitment, value formation, and the strengthening of bonds within dissident associations. Criminalizing such advocacy would necessarily lead to the evisceration of many dissident associations, which would be a severe blow to democratic values. Direct advocacy of imminent action, on the other hand, is much less directly connected to these values and is more closely related to such clearly unprotected speech as criminal solicitation and conspiracy, which have action and not association as their main aim and effect. And for that reason, it is unprotected incitement.[150]

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when the "support" consisted of speech in the form of training and coordinated advocacy. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

148. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

149. Gitlow was prosecuted for publishing the manifesto of the Left Wing Section of the Socialist Party. *Id.* at 655 (majority opinion).

150. The recent *Humanitarian Law Project* decision might appear to weaken the line between abstract and direct advocacy by permitting the government to impose criminal liability for the provision of even nonviolent training to foreign terrorist organizations. However, that holding is based on the perceived impossibility of separating support for the peaceful activities of foreign terrorist organizations from support for their terrorist activities. *See* 130 S. Ct. at 2724-30. Furthermore, the Court specifically limited its holding to *foreign* organizations, suggesting that domestic organizations may be entitled to greater protection. *Id.* at 2730. This last limitation in particular reduces the significance of the Court's decision for democratic associations composed of citizens.

In addition to incitement, another line of cases involving dissident speech with a strong associational flavor is the line of "hostile audience" cases. The leading case in this area is *Cantwell v. Connecticut*,[151] in which the Court reversed the conviction for breach of the peace of Jesse Cantwell, a Jehovah's Witness. Cantwell was arrested for playing a record on a street corner espousing the views of his faith; the record attacked all organized religion but singled out Roman Catholicism in particular, eliciting a hostile reaction from listeners. Drawing on the Holmes-Brandeis tradition, the Court held that Cantwell could not be convicted unless a clear and present danger existed of violence or other social harm and that the fact that Cantwell's speech offended others was not a constitutionally permissible ground for punishment. *Cantwell* appeared to establish a strong level of protection for speakers in the face of hostile audiences. Eleven years later, however, the Court backed away from *Cantwell* in *Feiner v. New York*,[152] upholding the conviction of another public-corner speaker, this time addressing civil rights issues, because the speaker was stirring up a crowd and refused to obey police instructions to stop speaking. On those facts, the Court found a clear and present danger, even absent evidence of imminent violence that the police could not control. *Feiner* has never been overruled, but later cases strongly suggest that the more protective stance of *Cantwell* has won the day. In a series of cases involving civil rights protestors, the Court consistently overturned convictions of marchers facing hostile audiences, on the ground that the police could have prevented, and had an obligation to prevent, any violence by the audience.[153] Today, those cases are widely understood to reject *Feiner*'s deferential approach and to impose an effective requirement that law enforcement officers protect unpopular speakers from hostile audiences and silence speakers only if controlling the crowd becomes impossible. The Court has in fact extended this principle to the point of holding that governments may not charge unpopular speakers for the cost of protecting them (though nondiscriminatory charges applicable to all speakers are permitted).[154]

There are many solid reasons for protecting speakers from hostile audiences, including the undesirability of permitting a "heckler's veto" of speech. There is, however, something odd about the way in which these cases are typically described. The image is of a lone, street-corner speaker (to use

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151. 310 U.S. 296 (1940).

152. 340 U.S. 315 (1951).

153. Gregory v. City of Chi., 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

154. Forsyth Cnty., Ga. v. Nationalist Movement, 505 U.S. 123, 137 (1992).

Owen Fiss's memorable phrase[155]) facing a hostile crowd and requiring protection. What is odd, however, is that such a lone speaker, while perhaps brave, is contributing nothing to First Amendment values if no one is listening. Working up an angry mob is hardly conducive to self-governance. This description of the hostile audience cases is, however, deeply incomplete. In fact, *all* of the key cases involved not a truly lone speaker but rather associational speech. In particular, they involved associational speech by dissident organizations, seeking to express their views as a means of both building solidarity and recruiting. In the civil rights cases, most obviously, the speakers were organized marchers assembling in large groups (of thousands, in one case).[156] Such marches are classic forms of public assembly by political associations and are therefore constitutionally protected regardless of any speech element. The recent *Forsyth County* case involved another assembly by a dissident group (in that case, white supremacists),[157] and in *Feiner* itself, the defendant was addressing a mixed-race crowd, some members of which were clearly supportive of his views—again, a classic form of assembly.[158] Finally, even though Cantwell was speaking together with only his two sons, he was recruiting on behalf of a religious association, the Jehovah's Witnesses.[159] Seen in this light, the Court's decisions in this area (excluding *Feiner*) seem coherent. Dissident organizations invariably will face public hostility—that is what makes them dissident—but, as we have discussed earlier, they play a critical role in self-governance by challenging established understandings and the predominance of the state. Without protection, however, such associations often cannot engage in public organizational activities, recruiting, or public assembly because of the threat of violence. In short, the hostile audience cases are best understood as preventing not a heckler's veto against lone, unpopular speakers, but societal vetoes of unpopular associations.

Indeed, the Court's protection of dissident, unpopular associations has gone beyond merely providing protection from violence. On a few occasions, the Court has recognized a constitutional right on the part of such associations to obtain exemptions from generally applicable laws so as to be able to maintain their organizational integrity and coherence. The leading Supreme Court decision establishing a right of association, *NAACP v. Alabama ex rel.*

155. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

156. *See* sources cited *supra* note 153.

157. *Forsyth Cnty.*, 505 U.S. at 137.

158. Feiner v. New York, 340 U.S. 315, 316-17 (1951).

159. Cantwell v. Connecticut, 310 U.S. 296, 300-01 (1940).

Patterson,[160] recognized such an exemption. The holding in the case was that Alabama could not require the NAACP to turn over a list of its in-state members because public exposure would subject those members to harassment and abuse.[161] Notably, however, the Court did not hold that states could never require membership organizations to disclose their membership lists, only that such a requirement could not be imposed on the NAACP in Alabama because of the controversial nature of the NAACP's activities.[162] *Brown v. Socialist Workers '74 Campaign Committee* reached a similar result.[163] The question in *Brown* was whether Ohio could require the Socialist Workers Party to disclose to the public a list of contributors to the Party and recipients of its funds. The Court held that it could not, in a manner consistent with the First Amendment, even though the Court had earlier rejected a facial challenge to a federal statute compelling disclosure of political contributors.[164] Again, the Court made clear that it was not overruling its earlier decision and invalidating disclosure requirements generally; it was only holding that such requirements could not be applied to unpopular, dissident groups such as the Socialist Workers Party.[165]

At their heart, these are cases about dissident groups. This is true in the obvious sense that the need for an exemption arises from membership in a

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160. 357 U.S. 449 (1958).

161. *Id.* at 462-63.

162. *Id.* at 460 (noting that the plaintiff's claims for immunity from disclosure were based on "the facts and circumstances shown in the record"); *id.* at 463 (noting that disclosure may still be required if the state's interest in obtaining the relevant information is strong enough).

163. 459 U.S. 87 (1982).

164. Buckley v. Valeo, 424 U.S. 1, 60-74 (1976).

165. *Brown*, 459 U.S. at 92-93. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), is another decision recognizing a constitutionally mandated exemption for a dissident association, though in that case on the basis of the Free Exercise Clause, not the Free Speech Clause. The question in *Yoder* was whether a member of the Old Order Amish could be criminally punished for refusing to send his children to school past the age of fourteen, in conformity with Amish religious beliefs but in violation of state compulsory school attendance laws. Building on an earlier case protecting the religiously based refusal of a Seventh Day Adventist to work on Saturdays, *see* Sherbert v. Verner, 374 U.S. 398 (1963), the Court reversed the conviction on the ground that the Free Exercise Clause required the state to exempt the Amish from school attendance, while reaffirming that school attendance laws are not generally unconstitutional. Indeed, in *Yoder* the Court went one step further than in *Sherbert* or the cases discussed in the text, clarifying that the exemption was required because Yoder's actions were the result of the religious beliefs of "an organized group," 406 U.S. at 216, and not just the beliefs of an individual. But in more recent cases, notably *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court has failed to follow *Yoder* in protecting the religious practices and beliefs of religious associations, thereby rejecting the parallel between free exercise and free speech.

dissident group. But more broadly, the existence of the group seems a necessary precondition for a claim of exemption. It is very difficult to imagine that an individual would ever succeed in claiming an exemption from neutral, generally applicable, and otherwise constitutional laws based on that individual's unusual ideological beliefs.[166] But when a First Amendment exemption is requested on the basis of membership in an unpopular or unconventional *group*, as the cases discussed here show, the Court has been more responsive. Why the distinction? The answer must lie in the special constitutional value of associations and the protections accorded to them under the First Amendment. Protecting dissident and unconventional associations is a sufficiently strong constitutional value that it trumps the general presumption, present throughout First Amendment law, that neutral and generally applicable regulations of conduct are not subject to serious First Amendment scrutiny.[167] The exemption cases, in other words, rest upon the same underlying principles as the general protection for associational speech.

B. *The Government as Manager—Public Forums and Government Employees*

Another area of free speech law with a strong associational character is the public forum doctrine. The public forum doctrine sets forth the constitutional rules for government regulation of speech on its own property. When the government is regulating speech in either traditional public forums (such as streets and parks) or designated forums (property that the government has intentionally opened up for speech), it may neither ban speech outright nor burden speech based on its content, without showing that the burden "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[168] Even content-neutral "time, place, and manner" regulations of speech in public forums must ensure that alternative avenues for speech exist.[169] In nonpublic forums or limited public forums, however, the government enjoys much broader discretion to regulate speech.[170] The case law in this area is bewildering, in particular on the question of what sorts of

166. *See* United States v. O'Brien, 391 U.S. 367 (1968); *see also Smith*, 494 U.S. 872 (rejecting a Free Exercise claim of exemption from generally applicable regulations of conduct).

167. *See supra* notes 160-165 and accompanying text.

168. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

169. *Id.*

170. *Id.*; *see* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2984 (2010).

property qualify as public forums,[171] but the key underlying principle is that, at least with respect to certain sorts of government property, the government's ability to restrict speech is severely limited.

The difficult question raised by the public forum doctrine is why this should be so. Why, when the government is acting in a proprietary capacity as opposed to a sovereign regulatory capacity, should it not enjoy precisely the same rights as other property owners to ban speech on its property? This was the traditional view,[172] and even today the Court is quite deferential when government employees' speech is restricted by the government in its capacity as an employer.[173] So why not when it acts as an owner? The answer that a plurality of the Supreme Court (speaking through Justice Owen Roberts) gave in the Court's leading case on the public forum doctrine was a historical one: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[174] The difficulty with this explanation is that while Justice Roberts's description of the use of the public forum is accurate, it fails to explain why this tradition creates a constitutional principle, especially in light of the fact that the traditional *legal* view on the question was to the contrary. The answer, I submit, can be found in the concept of associational speech.

The rhetoric of the public forum doctrine, like most of free speech law, focuses on individual speakers and their rights. To quote Owen Fiss: "[T]he Free Speech Tradition can be understood as a protection of the street-corner speaker. An individual mounts a soapbox on a corner in some large city, starts to criticize governmental policy, and then is arrested for breach of the peace."[175] Such a vision, however, is odd. As noted above, such lone speakers contribute little to self-governance or other First Amendment values. Moreover, it is not clear that individual speakers really need the public forum to speak or that the public forum is the most effective way for individuals to reach an audience (especially in the age of the Internet). In fact, however, many if not most public forum cases have not involved individuals seeking access to government properties; they have involved groups wanting to use government property to assemble, to recruit, and to send a collective message to the public or to

171. *See, e.g.*, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

172. Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895) (Holmes, J.), *aff'd*, 167 U.S. 43 (1897).

173. Garcetti v. Ceballos, 547 U.S. 410 (2006).

174. Hague v. CIO, 307 U.S. 496, 515 (1939).

175. Fiss, *supra* note 155, at 1408.

government officials. The leading case, *Hague v. CIO*, involved efforts by labor organizations to assemble and distribute literature on the streets of Atlantic City, New Jersey.[176] Significant modern public forum disputes have involved Nazis marching in a suburb with a large Jewish population,[177] Hare Krishnas seeking to solicit funds and recruit members,[178] political protestors at the 2004 Democratic National Convention,[179] and, most frequently, abortion protestors.[180]

Simply put, this makes sense. While individual speakers may find use of the public forum desirable, access to the public forum is *essential* for associations and public assemblies. After all, where if not in the public forum can public assembly occur? In short, the crucial rights at issue in the public forum cases are not simply speech rights but rights to assembly, association, and associational speech.

Indeed, if one examines the actual use of the public forum for First Amendment purposes, speech as such is almost peripheral. In the typical modern protest or assembly utilizing the public forum, speeches are no doubt made and signs are waved, but they are hardly the main point of the exercise. After all, most of the speeches are inaudible and the signs often illegible. The point, rather, is the assembly itself. The fact of a large public gathering forms a sense of solidarity, helps to influence public opinion, and sends a message to political officials. Assembly, in short, is a form of petition and a form of associational speech, quite aside from what is said *during* the assembly. And it is assembly, not the actions of a street-corner speaker, that is at the heart of the public forum doctrine.

An appreciation of the fact that access to the public forum is primarily a concern of groups rather than individuals has important implications for some aspects of the doctrine. For one thing, it makes clear that a meaningful public forum must be a large, open, and publicly accessible space or else the purposes of the doctrine cannot be fulfilled. Furthermore, given the close ties between public assembly and petitioning the government, alternative spaces must

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176. *Hague*, 307 U.S. at 501-03.

177. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

178. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

179. Bl(a)ck Tea Soc'y v. City of Bos., 378 F.3d 8 (1st Cir. 2004).

180. Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988).

provide access to government officials.[181] On this view, the severely restricted "demonstration zone" approved by the First Circuit as a designated site for protests outside the 2004 Democratic National Convention cannot possibly qualify as a true public forum.[182] Another lesson is that when assessing whether content-neutral restrictions on speech in the public forum do leave open ample alternatives, courts should ask not only whether alternative opportunities to speak exist but also whether alternative opportunities to gather in groups, sometimes large groups, are available. Speech substitutes are not necessarily assembly substitutes. Finally, courts should be highly suspicious of rules that restrict particular groups' access to the public forum. Even if such restrictions are not written expressly in terms of the content of disfavored groups' speech, they pose a grave risk that the government is seeking to suppress disfavored associations and assemblies. Awareness of assembly and associational concerns can convert the public forum doctrine into a much more robust protector of all First Amendment liberties, not just speech.

There is some value in contrasting the public forum doctrine with the Court's treatment of the speech of government employees. The public forum doctrine continues to place substantial limits on the government's power to limit speech on its property. Recently, however, the Supreme Court held in *Garcetti v. Ceballos* that the First Amendment places *no* limits on the government's power to restrict the speech of its employees during the course of their employment.[183] What explains the very different approaches? After all, both situations involve the government acting in a proprietary rather than a sovereign capacity, and surely there is no reason to believe that the speech of government employees is less valuable than the speech of protestors. There are many factors at work here, including in part the government's greater managerial needs as an employer than as an owner, but perhaps part of the answer lies in the fact that when a government employee speaks in the course of her employment, her speech has no associational aspect. The speech is uttered as a part of her job and on behalf of her employer, not as a part of forming, strengthening, or representing a private association.

Even on the rare occasions when a government employee's speech does have associational implications – for example, when the employee is organizing community volunteers or when a whistleblower's revelations trigger political activity by private associations – the employee's speech is not itself truly associational. In the first instance, government-sponsored community groups

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181. For a similar argument, see Krotoszynski & Carpenter, *supra* note 66, at 1311-13.

182. *Bl(a)ck Tea Soc'y*, 378 F.3d at 10.

183. 547 U.S. 410 (2006).

are not the sorts of associations at the heart of the First Amendment's protections and goals. Such groups, which are necessarily under heavy state influence, cannot play the kind of independent role in self-governance—including in forming values free of state interference and in overseeing and petitioning public officials—that the First Amendment envisions. And while whistleblowers' revelations can trigger associational activities and speech—just as the publication of scientific discoveries or the disclosure of financial crimes can—that does not make the revelations themselves associational speech. After all, associational activities can be triggered just as easily by events, such as oil spills or international confrontations, and those events do not implicate the First Amendment. In short, while speech by government employees in the course of their employment might well have social value, particularly in keeping citizens informed about their government's activities, it is not associational speech and does not play the sort of central role in the process of self-governance that private, associational speech does. This fact, combined with the government's strong managerial interest in controlling such speech, appears to explain the holding of *Garcetti*.[184]

C. *Charitable Solicitation*

Another area of First Amendment doctrine in which the theory of associational speech has important implications is the regulation of charitable solicitations. In a series of cases, the modern Court has extended broad, almost unconditional First Amendment protection to the activities of nonprofit organizations in distributing literature and soliciting funds. It has struck down a requirement that door-to-door canvassers obtain permits;[185] a law regulating the fees that professional fundraisers may charge for soliciting on behalf of charities;[186] a law forbidding charities, in connection with fundraising, from paying expenses of more than twenty-five percent of funds raised;[187] and a statute forbidding door-to-door solicitation by charities that do not spend more than seventy-five percent of funds raised for "charitable purposes."[188] On

184. This is not to say that the Court's conclusion in *Garcetti* was necessarily correct. While not associational, government employees' speech, especially whistleblower speech, does have a role to play in self-governance and was therefore arguably undervalued in *Garcetti*. My point is simply that such speech is less central to the structure of the First Amendment than associational speech is.

185. Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150 (2002).

186. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988).

187. Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947 (1984).

188. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

the other hand, the Court has accorded substantially less protection to advertising and solicitation by *commercial* entities.[189] Yet both forms of speech at heart have the same content—a request for money. Why does the Court impart such high First Amendment value to charitable solicitations? The answer must lie in principles of associational speech.

From an individualistic perspective, the extraordinary protection that the Court has accorded charitable solicitation seems a bit odd. It is not at all clear how speech asking for money contributes to democratic discourse.[190] From an associational perspective, however, the value of such speech is clear. The ability to solicit funds and supporters is the lifeblood of associations. Without solicitation, nonprofit associations would be limited to activities that their current members can fund, which would necessarily be limited. Charitable solicitations permit associations to organize themselves, to expand, and to fund political activism and petitioning. Protection of solicitation is thus an essential aspect of the Constitution's general protection for private associations and assemblies. Charitable solicitation is valuable not for its speech aspects but for its associational aspects. Viewed as associational speech, charitable solicitation is quite properly treated not as marginal but as at the core of the protections accorded by the First Amendment. Put differently, the reason why charitable solicitation receives strong constitutional protection is not that the solicitation itself has great value but that it enables charitable associations to engage in *other* activities that are central to self-governance and so to the purposes of the First Amendment.[191]

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189. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980) (holding that commercial speech may be regulated or silenced so long as the relevant law satisfies a reduced, intermediate level of scrutiny); *see also* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477-80 (1989) (confirming that commercial speech receives reduced constitutional protection).

190. I speak here only of charitable *solicitations*. Distribution of literature and other speech is of course highly relevant to democratic discourse and therefore obviously deserving of protection.

191. The associational perspective also helps to explain why *commercial* solicitation receives much more limited First Amendment protection than does charitable solicitation, even though at heart both forms of speech are simply requests for money. *See supra* note 189 and accompanying text. Commercial entities, as discussed earlier, *see supra* notes 108-109 and accompanying text, have far weaker associational rights than do noncommercial entities, because their primary function—profit-making—has no direct connection to self-governance. Just as commercial associations have weaker (or no) associational rights to discriminate in selecting their members, so also the associational speech of commercial entities receives limited constitutional protection. This is because solicitation and advertising of commercial transactions by commercial entities are not directed to other goals, as charitable solicitations are; they are themselves the central profit-making activities

D. Campaign Finance Reform and Corporate Speech

Finally, we will consider what insights the associational speech perspective can provide to an important and recently controversial area of First Amendment law: campaign finance reform. The body of the Supreme Court's case law in this area, from its 1976 decision in *Buckley v. Valeo*[192] to its most recent pronouncement in *Citizens United v. FEC*,[193] is complex and impossible to treat fully in this space. Nonetheless, because of the significance of this area of law and because associational speech issues lie at the heart of many of the disputes here, some discussion is in order. We will focus on two foundational questions: the distinction that the Court has drawn between campaign contributions and expenditures, and the Court's treatment of campaign expenditures by corporations and unions.[194]

We begin with the distinction between contributions and expenditures, a distinction that the Court created in its seminal decision in *Buckley v. Valeo*. The primary issue in *Buckley* was whether statutory restrictions on the amount of money that individuals could contribute to political candidates, and on the amount that individuals could independently spend "relative to a clearly identified candidate" in a federal election, were constitutional.[195] The majority distinguished sharply between contribution limits and expenditure limits, upholding the former and striking down the latter. With respect to contributions, the Court held that while contribution limits do interfere with the rights of individuals to associate with the candidate of their choice, the interference was justified by the government's strong interest in combating corruption and the appearance of corruption.[196] With respect to expenditures,

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toward which such entities are directed. As such, commercial solicitation does not advance principles of self-governance.

192. 424 U.S. 1 (1976).

193. 130 S. Ct. 876 (2010).

194. I do not separately discuss the Court's election law jurisprudence concerning the regulation of political parties, including the early White Primary cases, *e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932), and more recent decisions invalidating various restrictions on how political parties organize their primary elections, *e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000); Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989); Tashjian v. Republican Party, 479 U.S. 208 (1986). These cases raise difficult and interesting questions regarding the tension between political parties' associational rights and the government's legitimate power, or obligation, to regulate elections, but they do not directly raise questions of associational speech and so are not relevant to the subject of this paper.

195. *Buckley*, 424 U.S. at 39 (internal quotation marks omitted).

196. *Id.* at 24-29.

on the other hand, the Court held that the heavy burden placed on freedom of expression by limits on expenditures outweighed any governmental interest in regulating expenditures. Expenditure limits were therefore unconstitutional.[197]

The result reached by the Court in *Buckley v. Valeo* was, and remains, highly controversial. Chief Justice Burger dissented from the Court's decision to uphold contribution limits,[198] while Justice White wrote a sharp dissent criticizing the majority's view that expenditure limits raise serious First Amendment concerns.[199] In recent years, several Justices have similarly questioned *Buckley*'s distinction between contributions and expenditures, generally advocating greater suspicion of contribution limits.[200] How does the theory of associational speech illuminate this debate? First, the associational speech principle strongly confirms (contrary to Justice White's *Buckley* dissent) that contributions to political candidates deserve significant First Amendment protection because they constitute a form of association. Giving money to another person is not, of course, always an act of association. But when individuals pool their financial resources to achieve political ends, doing so is surely a core form of association. In the case of most political contributions, the resultant associations are large and relatively anonymous (in the literature, these are called "tertiary" associations[201]), but they are nonetheless protected associations. Moreover, in the context of local elections, contributions may be an important aspect of close, personal associations at the core of the democratic process. This insight in turn suggests that contribution limits should be subject to fairly stringent constitutional scrutiny and that excessively strict limits should be invalidated, as the Court has recently confirmed.[202]

The question that the associational speech perspective cannot answer, however, is whether the First Amendment permits any contribution limits, if the government interests supporting such limits are strong enough. No constitutional rights are absolute, and the question of how to reconcile the

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197. *Id.* at 44-51.

198. *Id.* at 242-46 (Burger, C.J., concurring in part and dissenting in part).

199. *Id.* at 257-66 (White, J., concurring in part and dissenting in part).

200. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 266-69 (2003) (Thomas, J., concurring in part and dissenting in part, joined by Scalia, J.); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 466-82 (2001) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (criticizing restrictions on expenditures by political parties in coordination with a candidate, which the majority treats as equivalent to contributions).

201. WARREN, *supra* note 3, at 39-40.

202. *See* Randall v. Sorrell, 548 U.S. 230 (2006) (striking down stringent contribution limits imposed by Vermont in its state elections).

government's legitimate need to limit public corruption with the First Amendment's protections for association is beyond the scope of this Article.

With respect to expenditure limits, an associational perspective leads to the surprising conclusion that whatever the legitimacy of governmental restrictions on expenditures by individuals, restrictions on expenditures by groups are highly suspect.[203] When associations express the joint views of their members, they are engaging in conduct that stands at the intersection of the assembly, association, petition, and speech provisions of the First Amendment. Such conduct is at the core of self-governance as seen through an associational lens, and it must presumptively be free of interference by the government. Moreover, the fact that expenditure limits literally restrict not speech but money cannot answer this argument because, in the context of associations, expenditures are intrinsically linked to the joint expressive and other democratic activities of the group. After all, pooling financial resources is one of the core functions of associations. The *Buckley* Court was thus correct to view such restrictions, at least as applied to groups, suspiciously. Justice Stevens's recent argument to the contrary—that limits on expenditures constitute only indirect and therefore permissible limits on First Amendment freedoms[204]—is incorrect because it fails to consider the impact of spending limits on associations. With respect to restrictions on independent expenditures by individuals, however, associational speech theory has little to say. This is not to say that other First Amendment principles may not limit the government's power in this regard, but associational speech concerns are by definition not implicated in the absence of an association.

Once one recognizes and accepts the stringent protections accorded by the First Amendment to expenditures and expression by groups, a critical question arises: which groups are entitled to this protection? This question was at the core of the Supreme Court's recent, highly publicized, and controversial decision in *Citizens United*.[205] Before turning to *Citizens United*, however, a brief discussion of two earlier Supreme Court decisions regarding corporate speech is in order. In *First National Bank of Boston v. Bellotti*, the Court was faced with a challenge to a Massachusetts statute that forbade corporations from making contributions or expenditures in relation to referendum elections, unless the election involved issues that "materially affect[ed] . . . the property, business or

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203. The *Buckley* Court noted the severe impact of expenditure limits on the ability of associations to express themselves. 424 U.S. at 22-23.

204. *Randall*, 548 U.S. at 276-77 (Stevens, J., dissenting).

205. 130 S. Ct. 876 (2010).

assets of the corporation."[206] The Court struck down the statute, holding that it restricted speech at the core of the First Amendment and that the corporate form of the speakers being regulated was irrelevant.[207] Twelve years later, however, the Court in *Austin v. Michigan Chamber of Commerce* veered away from its holding in *Bellotti*.[208] In *Austin*, the Court upheld a Michigan statute that forbade corporations from making independent expenditures in support of, or in opposition to, candidates for election to state offices. (Corporations were permitted to create segregated funds for such purposes.[209]) The Court acknowledged that, under its precedent, such a restriction severely impaired First Amendment liberties and was therefore subject to stringent scrutiny. But it concluded that Michigan's compelling interest in preventing corporate money from dominating the electoral process justified the law.[210]

This takes us to *Citizens United*. In *Citizens United*, the Court faced a challenge to § 203 of the Bipartisan Campaign Reform Act of 2002, a federal law that prohibited corporations and unions from using their general treasury funds to make "electioneering communications" – speech within a brief period before an election that was either express advocacy for or against a specified candidate for federal office or its functional equivalent.[211] In *McConnell v. FEC*, the Court had upheld this provision, relying on *Austin*.[212] In *Citizens United*, a majority of the Court overruled *Austin* and this aspect of *McConnell*, striking down § 203. The Court held that the speech suppressed by § 203 was at the core of the First Amendment's protections and that (following *Bellotti*) the corporate identity of the speaker was irrelevant for First Amendment purposes. Can associational speech theory contribute to this debate?

Yes, it can contribute powerfully. The key question raised by *Citizens United* is one of corporate "rights": whether the corporate identity of a speaker should influence the scope of First Amendment protections. The majority said that it should not, while the dissent argued to the contrary that corporations

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206. 435 U.S. 765, 768 (1978) (internal quotation marks omitted).

207. *Id.* at 776, 784.

208. 494 U.S. 652 (1990).

209. *Id.* at 655.

210. *Id.* at 658-60.

211. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified at 2 U.S.C. § 441b (2006)); Citizens United v. FEC, 130 S. Ct. 876, 889-90 (2010); *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007) (concluding that constitutional considerations precluded the application of § 203 to any speech except express advocacy or speech "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate").

212. 540 U.S. 93, 203-09 (2003).

lack full First Amendment rights. From an associational speech perspective, both sides asked the wrong question and therefore arrived at profoundly incorrect answers. The key issue is not the corporate form of the speaker but what *kind* of collective entity—that is to say, association—the speaker is. If the speaker is a form of association protected by the First Amendment, because it is an association that contributes to self-governance, then the association's speech explicating its views constitutes associational speech, entitled to the highest level of constitutional protection. The corporate form may be relevant to this question, but it cannot be decisive; surely some corporations constitute democratic associations at the core of the First Amendment's protections. Thus, the dissent's assertion that the speech of corporations can be flatly restricted seems clearly incorrect. Indeed, the associational speech perspective suggests that, contrary to the majority's assumption, sometimes such speech is entitled to *more* protection than individual speech because such associational speech contributes more directly to the core self-governance goals of the First Amendment. But a clarification is necessary here. As discussed in detail earlier,[213] not all associations fall within the protection of the First Amendment. Only associations whose primary goals are relevant to self-governance fall within this category. Associations that do not fall within this category, such as those whose primary goals are commercial or criminal, do not enjoy the same level of constitutional solicitude for their speech. From this perspective, the result reached by the Court in *Citizens United* is clearly correct on the facts of the case. Citizens United was a nonprofit corporation whose primary goal was to organize individuals who shared its (conservative) political views and to express those views.[214] It was quintessentially the sort of disruptive, democratic association that is at the heart of the First Amendment's protections for speech, association, and petitioning. The particular speech at issue in the litigation was a film, entitled *Hillary: The Movie*, that was highly critical of then-Senator Hillary Clinton, a candidate for the presidency. This movie was quintessentially associational speech relevant to self-governance. That Citizens United chose to organize itself in a corporate form, and to accept small amounts of contributions from for-profit corporations, cannot change the fact that in its structure, goals, and functions, it was a democratic association whose activities and speech furthered self-governance and thus merited protection.[215]

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213. *See supra* notes 102-109, 145-147 and accompanying text.

214. *See Citizens United*, 130 S. Ct. at 886-87; CITIZENS UNITED, http://www.citizensunited.org/about.aspx (last visited Sept. 5, 2010).

215. It should be noted that despite the obviously democratic character of the Citizens United organization, the Court concluded that the group did not fall within the category of associations granted constitutional protection under the *MCFL* test, *see supra* note 107,

Recognizing that the Court decided *Citizens United* correctly on its facts does not end difficulties here, however, because the majority's holding extended constitutional protection to political speech by *all* corporations, not just those like Citizens United. Indeed, the majority specifically refused to adopt a narrow approach limited to nonprofit corporations.[216] In that respect, the majority's decision is probably unjustified, at least from an associational speech perspective. Most for-profit corporations have the primary goal of making profits, a goal with no relevance to self-governance. These are not the sorts of associations protected by the First Amendment, and their speech is not associational speech for First Amendment purposes. I do not mean to suggest that the line between for-profit and nonprofit corporations (as the Court drew it in *Massachusetts Citizens for Life*[217]) is necessarily decisive here. There may be some technically for-profit corporations that are in practice primarily directed to goals of self-governance, just as there may be nonprofits whose goals are completely tangential to self-governance. The key here is not technical, legal classifications but rather a careful examination of facts. It is fair to say, however, that the vast majority of for-profit corporations – especially large, publicly held corporations – have primarily commercial goals, such that their speech is not associational speech. Given that, the majority in *Citizens United* was wrong to equate the speech of such corporations to the speech of groups like Citizens United itself. This is not to say that there may not be other, nonassociational principles that support extending First Amendment protections to political speech by commercially oriented corporations. That question is beyond the scope of this Article. But from an associational perspective, the holding in *Citizens United* is clearly overbroad because it grants protection to associations whose functions and goals are unrelated to the structural purposes of the First Amendment.[218]

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because Citizens United accepted a small amount of donations from nonprofit corporations. 130 S. Ct. at 891. This suggests another flaw in the *MCFL* test, aside from its excessive focus on expressive associations. *See supra* note 107. After all, why should a legitimately democratic association lose constitutional protection merely because it accepts *some* financial support from unprotected associations? There may well be room to exclude from protection associations that are merely façades for commercial interests, but if that is the goal of the *MCFL* test, then the solution is surely overbroad; it provides a bright-line rule at the expense of the genuine associational rights of such organizations as Citizens United.

216. The Court rejected on statutory grounds the Solicitor General's invitation to limit the holding to nonprofit corporations "funded overwhelmingly by individuals," through a slight modification of the *MCFL* test. 130 S. Ct. at 891-96.

217. *See supra* note 107.

218. The statute at issue in *Citizens United* regulates speech by both corporations and labor unions, though the Court did not discuss labor unions separately. Labor unions are a tough,

In conclusion, analyzing free speech as linked with and sometimes subsidiary to the rights of association and assembly helps to clarify some important areas of First Amendment doctrine. The question to which we now turn is whether the perspective of associational speech sheds light on more basic questions regarding free speech.

III. ASSOCIATION AND SPEECH—BROADER LESSONS

This Article has so far explored the relationship between the First Amendment right of free speech and the other provisions of the First Amendment, including the right of association. It has also explored the implications of that relationship for free speech doctrine. I close with some preliminary thoughts about what this Article's holistic approach to the First Amendment teaches us about more basic questions such as the nature of speech. I also consider some limitations of associational speech as a theory of the First Amendment.

The concept of associational speech is a lens through which the Free Speech, Assembly, and Petition Clauses can be read together, as connected and mutually reinforcing. The theory of associational speech views speech as a fundamentally collective, communal activity. Associational speech is about joining together, whether for a brief exchange of thoughts or for a more sustained period (in the form of associations and assemblies). Associational speech is *not* an atomistic, individual act. Yet because of the liberal, individualistic perspective that contemporary society brings to the Constitution, speech is generally viewed in highly individualistic terms. Such a vision of speech is most obvious in the various "self-fulfillment" theories of free speech,[219] but it is also more pervasive. Generally, theorists focus on the autonomous actions of the speaker, though occasionally the listener takes center stage.[220] But either way, speech is treated as the act of an individual

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in-between case because while arguably their goals are primarily economic, as with for-profit corporations, historically the union movement has had a strong political aspect to it, which suggests that protection is justified. On balance, I am inclined to the view that from an *associational* perspective, the political activities of unions—like those of commercial associations—are not entitled to First Amendment protection because such activities are incidental to unions' economic goals. *See supra* Section II.D. I admit, however, that the question is a close one. In addition, as with commercial associations, I leave open the possibility that there are *nonassociational* reasons why the political activities of unions should receive First Amendment protection.

219. *See supra* note 81 and accompanying text.

220. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (recognizing a First Amendment right of listeners that is "reciprocal" to the right to

acting alone. Of course, some speech today does fit this model – soapbox speakers in London's Hyde Park come to mind – but this perspective ignores the collective nature of most communication by speech. Speech generally involves multiple participants. Put differently, speech is not usually about *self*-expression; it is about bonding, associating, and attempting to find commonality.

Not all speech involves seeking cultural or political commonality of the sort fundamental to self-governance. Negotiating a contract is speech, but it is speech seeking a commercial agreement and therefore receives less constitutional protection. Furthermore, not all speech (as we understand it today) involves immediate, face-to-face association. The written word can join readers separated by vast distances and centuries. Broadcasting similarly involves fairly anonymous interactions, as do most electronic communications via the Internet (though not, significantly, e-mail). Such speech is not associational in the same sense as the speech discussed in this Article. Reconciling such speech to a theory of associational speech raises some complex questions.

One possible path to clarity here may be to distinguish between speech and publication. Speech, in this view, is communication to an audience from whom a response of some sort is expected. Often that response is an associational one. Publication, on the other hand, is one-way communication to an anonymous audience.[221] Telephone conversations, text messages, personal correspondence, and e-mail seem to fall within the category of speech, while large metropolitan newspapers, broadcast and cable television, websites, and blogs fall more in the category of publication. These latter activities do seem less associational than the former.

Nonetheless, an associational element often exists even in communications by publication. After all, even most publications are directed not at completely unknown, perhaps future audiences but at relatively identifiable contemporary

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speak); John Greenman, *On Communication*, 106 MICH. L. REV. 1337 (2008) (defining communication as requiring an act of free will on the part of a listener).

221. This distinction might be traced to the differences between the Speech and Press Clauses of the First Amendment, on the view that, given the technology available in the Framing era, speech was necessarily a face-to-face affair, while the Press Clause protected printing and publication. I do not insist upon this reading, however, and do not wish to embroil myself in the ongoing debate over whether the Press Clause creates special protections for the institutional media. *Compare Citizens United*, 130 S. Ct. at 905-06, *and id.* at 928 n.6 (Scalia, J., concurring) (rejecting the view that the Press Clause provides special protections to the institutional press), *with id.* at 951-52 n.57 (Stevens, J., dissenting) (arguing that the institutional press does enjoy special protections under the Press Clause), *and* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633-34 (1975) (same).

audiences. Such publications in fact do advance important associational interests. When Martin Luther (allegedly) nailed his ninety-five theses to the door of the church in Wittenberg in 1517, he was in a sense "publishing" the theses, but the purpose and effect of his actions were of course to draw adherents to him in religious association – an associational effect that was magnified by the circulation of printed copies of his theses throughout Germany. Similarly, Tocqueville recognized the importance of newspapers in preserving and strengthening associations in early America.[222] And in the modern world, publications such as newsletters, organizational websites, mass e-mails, tweets, and Facebook pages play a central role in the formation and maintenance of associations, especially larger, national associations. Such tertiary associations,[223] while perhaps not as significant to value formation as more personalized associations, have a central role to play in self-governance by mobilizing large numbers of like-minded citizens independently of the government. Examples range from the NRA to the Sierra Club to the Tea Party movement to President Obama's political group, Organizing for America. Such associations could not exist, and certainly could not thrive, without publications, and from Tocqueville's time and before one of the primary roles of publications has been to foster such associations.

This Article does not contend, however, that all publications – or for that matter all speech – can be explained in associational terms. Communications by the mass media seem truly anonymous and do not fit easily within associational theory. Similarly, books directed at distant audiences, scientific publications, and many other types of speech and publication have goals that are distantly or not at all directed at association. Associational speech does not purport to be a universal theory of the First Amendment. It cannot explain all free speech and press doctrine, nor does it encompass all of the purposes and goals of the First Amendment. The more limited purpose of this Article is to highlight some of the relationships and interactions among different provisions of the First Amendment and to consider how an awareness of those relationships can inform certain areas of free speech law.

CONCLUSION

The goal of this Article has been modest. The Article has not tried to present a grand unified theory of the First Amendment or a lens through which all First Amendment doctrine can be analyzed. Instead, it has explored

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222. TOCQUEVILLE, *supra* note 71, at 518-20.

223. *See supra* note 201 and accompanying text.

relationships among the Free Speech, Assembly, and Petition Clauses of the First Amendment, as well as the right of free association recognized by the courts as implicitly protected by the Amendment, and the ways in which these relationships provide *one* perspective from which to understand the role of the First Amendment.

The Article has focused in particular on the relationship between free speech and association. Modern law tends to treat the associational right as subsidiary to free speech and tends to assume that the primary purpose of association is to facilitate speech. I have argued that this approach is ahistorical and incorrect. In fact, the speech and association rights, as well as the assembly and petition rights, have a primary, common goal: to enable self-governance. These rights do not exist in isolation but support and interact with each other. Association derives from assembly, assembly facilitates petitioning, and speech is closely tied to all of these activities. In this sense, then, the First Amendment does not create distinct rights; it protects a complex set of interrelated human activities that are central to the process of self-governance. The special focus of this Article has been the relationship between speech and association. In particular, I have argued that one of the critical roles of free speech is to facilitate association. In other words, speech is often subsidiary to association, rather than the converse. This is the theory of associational speech. The bulk of this Article has explored the role of associational speech and elucidated how understanding the role of free speech in associational terms can clarify many puzzling areas of First Amendment doctrine. Finally, the Article has identified and addressed some of the limits of associational speech as a theory of the First Amendment.

Recognizing the significance of associational principles in interpreting and understanding the First Amendment opens up many important areas of investigation, building upon the start made in this Article. One particularly fruitful avenue of investigation might be to explore the relationship between associational principles and the Religion Clauses of the First Amendment. The First Amendment, after all, begins with the prohibition against "law[s] respecting an establishment of religion, or prohibiting the free exercise thereof,"[224] and the Establishment and Free Exercise Clauses provide special and powerful protection for religious activities. The reasons for providing such protection are manifold, based in history and experience, but perhaps associational principles can provide some insight here. In a recent article, Paul Fricke argues that the Free Exercise Clause should be read to protect primarily the activities of religious groups, not individuals—what he calls the

224. U.S. CONST. amend. I.

"associational thesis."[225] Other scholars have also in recent years been exploring the institutional aspects of the Religion Clauses.[226] This scholarship resonates in obvious ways with the broader thesis of this Article. Future scholarship may wish to explore the ways in which First Amendment protection of religious institutions – that is, religious associations – relates to self-governance.[227] That religious associations play an important role in self-governance seems clear. After all, religious groups contribute critically to value formation and provide a setting for joint deliberation for vast numbers of citizens. They may focus primarily on religious rather than overtly political questions, but no clear line can be drawn between religion and politics in this area. In addition, religious groups have been important participants in the democratic process itself.[228] Indeed, it would be safe to say that American politics would be unrecognizable without the active participation of overtly religious associations. The Religion Clauses, by protecting the autonomy of religious associations,[229] may thus contribute to the First Amendment's overarching goal of protecting and enabling the process of self-governance.

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225. Paul C. Fricke, *The Associational Thesis: A New Logic for Free Exercise Jurisprudence*, 53 HOW. L.J. 133 (2009).

226. *See, e.g.*, Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

227. I have explored this question to some extent in BHAGWAT, *supra* note 78, at 121-24 (discussing the role of religious institutions in self-governance).

228. For example, religious leaders such as Elijah Parsons Lovejoy played an important role in the antebellum Abolitionist movement. *See* Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1997). In the twentieth century, religious leaders and groups were central players in the temperance movement, *see* RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920, at 36-37 (1995); ROBERT A. HOHNER, PROHIBITION AND POLITICS: THE LIFE OF JAMES CANNON, JR. 72-73 (1999); THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933, at 114-15 (1998); the civil rights movement (in which the black church and church leaders such as the Reverend Martin Luther King, Jr., were primary leaders), *see generally* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963 (1988); and the rise of the religious right in the 1980s, *see generally* WILLIAM C. MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA chs. 7-10 (2005). More recently, religious groups such as the Mormon and Catholic Churches have played important roles in the debate over same-sex marriage. *See, e.g.*, Matthai Kuruvila, *To Pass Measure, Catholics and Mormons Allied*, S.F. CHRON., Nov. 10, 2008, at A1.

229. For a summary of judicial decisions protecting church autonomy, see Horwitz, *supra* note 226, at 116-20.

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Constitutional Law in an Age of Proportionality

ABSTRACT. Proportionality, accepted as a general principle of constitutional law by many countries, requires that government intrusions on freedoms be justified, that greater intrusions have stronger justifications, and that punishments reflect the relative severity of the offense. Proportionality as a doctrine developed by courts, as in Canada, has provided a stable methodological framework, promoting structured, transparent decisions even about closely contested constitutional values. Other benefits of proportionality include its potential to bring constitutional law closer to constitutional justice, to provide a common discourse about rights for all branches of government, and to help identify the kinds of failures in democratic process warranting heightened judicial scrutiny. Earlier U.S. debates over "balancing" were not informed by recent comparative experience with structured proportionality doctrine and its benefits.

Many areas of U.S. constitutional law include some elements of what is elsewhere called proportionality analysis. I argue here for greater use of proportionality principles and doctrine; I also argue that proportionality review is not the answer to all constitutional rights questions. Free speech can benefit from categorical presumptions, but in their application and design proportionality may be relevant. The Fourth Amendment, which secures a "right" against "unreasonable searches and seizures," is replete with categorical rules protecting police conduct from judicial review; more case-by-case analysis of the "unreasonableness" or disproportionality of police conduct would better protect rights and the rule of law. "Disparate impact" equality claims might be better addressed through more proportionate review standards; Eighth Amendment review of prison sentences would benefit from more use of proportionality principles. Recognizing proportionality's advantages, and limits, would better enable U.S. constitutional law to at once protect rights and facilitate effective democratic self-governance.

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FEATURE CONTENTS

INTRODUCTION 3096

I. PROPORTIONALITY IN U.S. CONSTITUTIONALISM AND ABROAD 3104
- A. Proportionality Principles Already Recognized in U.S. Constitutional Law 3104
- B. Proportionate Government as a Goal of Constitutional Design 3106
- C. Proportionality Elsewhere: The United States in Comparative Perspective 3110

II. OF OLDER TEXTS, CLAUSE-BOUND INTERPRETATION, AND NEGATIVE PRECEDENTS 3121

III. BENEFITS OF PROPORTIONALITY REVIEW FOR U.S. CONSTITUTIONAL LAW 3130
- A. Regulating Police Behavior Under Constitutional Norms 3130
  1. *Atwater v. City of Lago Vista* and Fourth Amendment Case Law 3130
  2. A Canadian Comparison 3134
- B. "Strict Scrutiny" and the First Amendment 3136
- C. Theoretical Benefits of Proportionality Review in Deciding Rights Claims 3142
  1. Structured and Transparent Reason-Giving with Broad Justificatory Appeal 3142
  2. Bridge Between Courts and Legislatures 3144
  3. Justice, Law, and Judgment 3147
  4. Process Failures Warranting Heightened Scrutiny 3151

IV. OBJECTIONS AND RESPONSES 3153
- A. General Objections to Proportionality as a Standard of Review 3153
- B. Arguments from Lack of Fit with U.S. Constitutionalism 3159

V. DEFINING THE BOUNDARIES FOR PROPORTIONALITY REVIEW 3166
- A. Different Rights, Different Roles, Different Texts 3168
- B. Remedial Constraints 3170
  1. The Exclusionary Rule 3170
  2. Equal Protection 3172
  3. Criminal Sentencing 3184
- C. Fragile Rights, Fragile Regimes 3189

CONCLUSION 3193

INTRODUCTION

"Proportionality" is today accepted as a general principle of law by constitutional courts and international tribunals around the world.[1] "Proportionality review," a structured form of doctrine, now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims.[2] The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law.[3] Yet some areas of U.S. constitutional law embrace proportionality as a principle, as in Eighth Amendment case law,[4] or contain other elements of the structured "proportionality review" widely used in foreign constitutional jurisprudence,[5] including the inquiry into "narrow tailoring" or "less restrictive alternatives" found in U.S. strict scrutiny.[6]

Justice Stephen Breyer has suggested that there are other areas in which the appropriate standard of judicial review would involve examining the proportionality of government regulation.[7] For example, in *United States v. Alvarez*,[8]

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1. In 2004, Canadian scholar David Beatty asserted that proportionality review was the "ultimate" rule of law for resolving constitutional questions about rights; as a positive matter, it was the dominant method of constitutional interpretation in the world, and as a normative matter, it was superior to such other methods as originalism or textualism. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159-88 (2004). In 2005, U.S. legal scholar David Law identified proportionality as a "generic" component of constitutional adjudication around the world. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). On the role of proportionality in international law and administrative law, see, for example, HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel, 58(5) PD 807 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 264. *See also* Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105, 113 (1993).
2. The German Constitutional Court has been particularly influential, as has the Canadian Supreme Court, in developing "proportionality review" in ways that influence other countries. On how seemingly similar approaches may be applied or understood differently in different countries, see JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013) (comparing U.S. and German conceptions of balancing); and Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).
3. *See* Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller*: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009) [hereinafter Cohen-Eliya & Porat, *The Hidden Foreign Law Debate*]; *see also* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 14-16 (2013) [hereinafter COHEN-ELIYA & PORAT, PROPORTIONALITY].
4. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010); *see also* cases cited *infra* notes 43-44.
5. *See generally* Steven Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008).
6. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).
7. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 49 (2006). Justice Breyer's interest in proportionality as an approach to analyzing rights goes

Justice Breyer's concurrence, joined by Justice Kagan, associated proportionality review with intermediate scrutiny and applied this standard to evaluate a First Amendment challenge to the Stolen Valor Act.[9] In his dissent in *District of Columbia v. Heller*,[10] Justice Breyer explicitly invoked the idea of proportionality as a guide to permissible regulation under the Second Amendment.[11] This explicit invocation of proportionality led some scholars to begin to consider, critically, the prospects of proportionality review, as it has developed elsewhere in the world, being more fully embraced in the United States.[12]

Given developments within and outside the United States, the time is ripe to take a fresh look at proportionality, both as a general principle in constitutional analysis and as a structured doctrine of potential benefit to discrete areas of U.S. constitutional law. In 1987, T. Alexander Aleinikoff criticized U.S. constitutional law for its overreliance on balancing in doctrines like strict scrutiny and in cases like *Tennessee v. Garner*[13] or *Mathews v. Eldridge*,[14] where the Court aimed to strike a balance among different interests.[15] Other work soon followed, contrasting more categorical and rule-like approaches, on the one hand, and standards, on the other.[16] The scholarship of the late 1980s may have in-

further back. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 535-41 (2001) (Breyer, J., concurring); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring); United States v. Playboy Entm't Grp., 529 U.S. 803, 835-47 (2000) (Breyer, J., dissenting); *see also* Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 157-66 (describing Justice Breyer's concurrence in *Bartnicki v. Vopper*—in which Justice Breyer analyzed whether the challenged "restrictions on speech . . . are disproportionate"—as demonstrating a more "flexible" approach in recognizing "competing constitutional interests" between privacy and free speech); *cf.* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (arguing that reviewing court should consider "whether there are significantly less restrictive ways to achieve Congress' over-the-air programming objectives, and . . . whether the statute . . . strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences").

8. 132 S. Ct. 2537 (2012).

9. *See id.* at 2551-52 (Breyer, J., concurring in the judgment).

10. 554 U.S. 570 (2008).

11. *Id.* at 682, 690 (Breyer, J., dissenting).

12. *See* Cohen-Eliya & Porat, *The Hidden Foreign Law Debate*, *supra* note 3, at 378-84, 395-408 (discussing "balancing" as "the exception," not "the rule," in the United States); *see also* COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3.

13. 471 U.S. 1 (1985).

14. 424 U.S. 319 (1976).

15. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-48, 968, 982-83, 989-91 (1987).

16. *See generally, e.g.*, Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

fluenced case law in some areas towards more categorical rules.[17] But these earlier U.S. debates could not have been informed by the subsequent course of proportionality review in other countries. Foreign courts' experience with proportionality review casts new light on these enduring questions in ways that suggest that U.S. constitutional law would benefit from a moderate increase in the use of proportionality.

Proportionality can be understood as a legal principle, as a goal of government, and as a particular structured approach to judicial review. As a principle and as a goal of constitutional government, proportionality is a "precept of justice,"[18] embodying the idea that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less severe ones.[19] Proportionality as a principle is embodied in a number of current areas of U.S. constitutional law: for example, in Eighth Amendment "cruel and unusual punishments" and "excessive fines" case law; as a limit imposed by the Due Process Clause on the award of punitive damages; and in Takings Clause cases requiring "rough proportionality" between conditions on zoning variances and the benefits of the variance to the property owner. In each of these areas, the principle of proportionality imposes some limit on otherwise authorized government action, a limit connected to a sense of fairness to individuals or a desire to prevent government abuse of power. Proportionality is centrally concerned with how, in a "democratic society, . . . respect for the dignity of all men is central,"[20] reflected in "our Nation's [longstanding] belief in the 'individuality and the dignity of the human being.'"[21]

Proportionality as a structured legal doctrine is used by some (not all) courts that treat proportionality as a general principle. In countries like Germany, Canada, and Israel, courts use a similar multi-part sequenced set of

17. *See infra* note 307. *Compare, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402-03, 406-07 (1963) (applying a compelling interest standard to review claims for religious accommodation from generally applicable laws), *with* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) (rejecting claims for "accommodation" of religious practices as against generally applicable laws).

18. Weems v. United States, 217 U.S. 349, 367 (1910) (linking "justice" and its requirement that punishments be proportional to the severity of the crime to the Eighth Amendment's cruel and unusual punishment ban).

19. *See id.*; ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102-04 (Julian Rivers trans., 2010) (describing the "Law of Balancing" as follows: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other").

20. McNabb v. United States, 318 U.S. 332, 343 (1943).

21. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 41 (2004) (O'Connor, J., concurring in the judgment) (citation omitted).

questions;[22] elsewhere, such questions are considered but in a less sequenced way.[23] In Canada, for example, structured proportionality review begins with attention to the scope of what a right is intended to protect; if a right has been infringed, the inquiry turns next to the authority for the action, and to the importance and legitimacy of the government purpose. If an infringement on interests protected by a right is shown, and if the challenged action has been "prescribed by law" sufficiently precisely and for a legitimate and sufficiently important purpose, then the constitutionality of the *means* used are examined through a three-fold inquiry into: (a) rationality; (b) minimal impairment; and (c) proportionality as such.[24] Several of these criteria correspond with elements in U.S. "strict," "intermediate," or "rational basis" scrutiny: the need for a sufficiently important or "compelling" government purpose; the rational connection required between the means chosen and the end; and the "minimal impairment" inquiry into whether there are less restrictive means towards the same goal.

Structured proportionality analysis in countries like Canada, Germany, or Israel includes an additional stage – "proportionality as such" – asking whether the intrusion on the challenger's rights can be justified by the benefits towards achieving the important public goal. This step calls for an independent judicial evaluation of whether the reasons offered by the government, relative to the limitation on rights, are sufficient to justify the intrusion. While this step is sometimes referred to as involving "balancing," the "proportionality as such" question in structured proportionality doctrine differs from "balancing" tests

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22. *See* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 179-81, 188-89, 208-10 (2012) (describing proportionality doctrine in Germany, Canada, and Israel); *see also id.* at 181-87, 190-206 (describing proportionality principles or doctrine in the two transnational European courts, Ireland, England, New Zealand, Australia, South Africa, Central and Eastern Europe, Asia, and South America); Susan Kiefel, *Proportionality: A Rule of Reason*, 23 PUB. L. REV. 85, 86 (2012) (describing how proportionality in Australia is not regarded as a general principle, as in many parts of the world, but is used in constitutional law to test the limits of constitutional legislative authority). On proportionality in the European Union, see de Búrca, *supra* note 1.

23. *See* Niels Petersen, *Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court* 2 (NYU Sch. of Law, Pub. Law Research Paper No. 13-07, 2013), http://ssrn.com/abstract=2230454 [http://perma.cc/936Y-HTYG] (describing how South Africa rejected the "structured" sequenced approach to hold that the factors listed in Section 36 of its Constitution must be "considered in an overall assessment" (citation omitted)).

24. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 139 (Can.). Sometimes proportionality is used in less formally structured analyses focusing more broadly on the reasonableness of the means chosen in light of the nature of the right and the government's justification for its actions. *See infra* notes 116, 194-95, 198, 201, and accompanying text.

that tend to focus primarily on quantification of net social good, as in *Dennis v. United States*[25] or *Mathews v. Eldridge*.[26]

Take Canada as an example of structured, sequenced proportionality analysis. First, "proportionality as such" is a part of a doctrine that, as a whole, prioritizes the right, putting the burden of justification on the government.[27] In this respect, structured proportionality analysis differs from "multi-factor" analyses of proportionality, as one sees in some countries, including South Africa,[28] or from some U.S. "striking a balance" case law. Second, Canadian-style proportionality review is a logically sequenced set of inquiries that limits the need to consider whether the government interests justify the intrusion on interests protected by rights. It does so by first examining whether the challenged action is authorized by law, and then whether the government's purpose is sufficiently important to serve as a basis for limiting the right at all. If these first tests are met, Canadian proportionality review examines the rationality and necessity of the means chosen, all before reaching the final "proportionality as such" inquiry. In this way, if the means chosen are not suitable or necessary to advance the government's interest, the case can be resolved at one of these stages: the courts need not reach the "proportionality as such" question unless there is a genuine conflict between the government's interest and the interests protected by the right.[29] Third, "proportionality as such" returns courts to considering both the infringed-on right and the government's purposes, not just in terms of their theoretical gravity, but in terms of the *relative* weight or bearing of the government's reasons in relation to the harm to the challenger's rights, in a particular context and in light of constitutional values.

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25. 341 U.S. 494, 510 (1951) (plurality opinion) (suggesting that whether prosecution violates First Amendment depends on "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger").

26. 424 U.S. 319, 335 (1976) (establishing that resolving procedural due process questions "requires consideration of three . . . factors: First, the private interest . . . affected . . . ; second, the risk of an erroneous deprivation . . . through the procedures used, and the probable value . . . of [other] procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional . . . requirement[s] would entail"). A significant feature of such a formulation is the apparent absence of any prioritization of the underlying right to a fair hearing; the *Mathews* test suggests a kind of quantifiable cost-benefit inquiry, without giving clear weight to the basic procedural values of fair hearings for those singled out for adverse government treatment. *See generally* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (suggesting that the failure of *Mathews* lies in "its focus on questions of technique rather than on questions of values," *id.* at 30).

27. *Oakes*, 1 S.C.R. at 136-37.

28. S. AFR. CONST., 1996, § 36; *S. v. Manamela and Another* 2000 (3) SA 1 (CC) at 29 ¶ 32 (S. Afr.); *see* Petersen, *supra* note 23.

29. *See* KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 193-94 (2012).

In this way, courts are not "substituting" their judgment for that of the legislature.[30] They are playing a valuable judicial role—checking to assure appropriate attention to rights within a framework of constitutional justice.

Part I provides background for considering proportionality in the United States. It notes several areas of U.S. constitutional law in which proportionality already is an element of constitutional analysis and argues that one of the goals of the Constitution was to produce a just government, one likely to avoid arbitrariness and to act proportionately. As further background, Part I goes on to describe in more detail the structured form of proportionality review as it exists in several foreign countries, with special focus on Canada.

Part II explores why proportionality has not been used as a general principle of constitutional law in the United States. It suggests that the aversive impact of *Lochner v. New York*[31] and *Dennis v. United States*,[32] as "negative precedents,"[33] led to a search for categorical approaches to constrain judicial discretion. Moreover, the age of the Constitution and related interpretive practices help account for the absence of any general embrace of proportionality. For example, the Constitution's brevity and, relatedly, the relative dearth of rights that are viewed as in tension with each other, have tended to reinforce a view of rights either as trumps[34] or as prohibited reasons for government ac-

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30. On how much attention legislators can give to constitutional values, a wide range of views exists. *Compare, e.g.*, Jennifer Nedelsky, *Legislative Judgment and the Enlarged Mentality*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 95 (Richard W. Bauman & Tsvi Kahana eds., 2006) (expecting "intermittent conscious reflection" by legislators to constitutional values), *with* Ruth Gavison, *Legislatures and the Phases and Components of Constitutionalism*, *in* THE LEAST EXAMINED BRANCH, *supra*, at 198, 198-99 (treating constitutional interpretation as primarily for courts, not legislators).

31. 198 U.S. 45 (1905).

32. 341 U.S. 494 (1951).

33. *See* Jack Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 76 (2007) (describing negative precedents as illuminating "how judges should *not* decide cases, what the Constitution does *not* mean, and what we as Americans do *not* stand for"); *see also* Richard A. Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (describing negative precedents as "texts that are important but normatively disapproved"); *cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 388-89 (2011) (offering citation analysis of negative precedents that puts *Lochner* and *Dennis* in the six most often negatively cited cases, but arguing that the "anticanon" is actually smaller and depends on historical contingencies more than incorrect or immoral reasoning or result).

34. This is an idea associated with Ronald Dworkin, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi, 90-100, 190-97 (1977), though perhaps contestably so, *see* Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 LAW & ETHICS HUM. RTS. 78, 85 n.29 (2010); *see also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26-53 (1974) (discussing rights as "side constraints").

tion.[35] These conceptions contrast with alternative understandings of rights as presumptive protections of human interests[36] or as values to be optimized,[37] which some leading theorists link with proportionality review. And, unlike European countries, which have incentives to harmonize national constitutional law with international rights regimes that rely on proportionality, the United States has not been comfortable treating its international human rights obligations as judicially enforceable domestically.[38]

Part III makes an affirmative case for greater use of proportionality as a principle and for structured proportionality as a standard of review in the United States. I begin by looking at discrete areas of U.S. constitutional law, starting with Fourth Amendment cases like *Atwater v. City of Lago Vista*,[39] with rigid rules allowing police to detain and search regardless of the severity of the offense – rules that facilitate humiliating and badly intentioned police conduct. Excluding proportionality considerations neither fulfills the purpose of the Fourth Amendment nor promotes respect for the Constitution as law. Canadian case law on analogous rights offers an alternative approach. I then consider a recent First Amendment case, *Holder v. Humanitarian Law Project*,[40] that appears to depart from existing categorical rules. Applying structured proportionality analysis in this case, I suggest, would require more disciplined attention both to free speech and national security interests, in order to clarify which considerations control.

Next, I discuss some general normative arguments in favor of structured proportionality review and proportionality principles. First, Canadian-style proportionality review promotes structured and transparent decisions through

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35. *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that the purpose of the presumption against content-based regulation is the likelihood of illicit government purpose for such regulation).

36. *See* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993) (conceiving of rights as "shields," protecting rights-holders from intrusion unless the government action is sufficiently justified).

37. *See* ALEXY, *supra* note 19, at 47-50 (describing most constitutional rights not as "rules" but as "principles" that require optimization). Alexy's work has been widely influential. *See, e.g.*, Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 93-96 (2008) (discussing Alexy's contributions).

38. *See, e.g.*, Declaration 1, U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) ("[T]he provisions of articles 1 through 27 of the Covenant are not self-executing."); Medellín v. Texas, 552 U.S. 491 (2008); Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006).

39. 532 U.S. 318 (2001); *see also* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012), discussed *infra* note 176.

40. 561 U.S. 1 (2010).

a stable methodological framework. Second, proportionality as a principle helps bring constitutional law closer to constitutional justice. Third, proportionality principles and structured proportionality review provide a better bridge between courts and other branches of government, offering criteria for constitutional behavior that are usable by, and open to input from, legislatures and executives. Fourth, proportionality analysis can reveal process failures, including departures from impartial governance, warranting heightened judicial scrutiny.

Part IV takes up several objections to proportionality review – that it is irrational, insufficiently protective of rights, unduly intrusive on legislatures, or overempowering of courts – and responds to each. I give special attention to the concern that proportionality review might focus too much attention on governmental justifications for its means and not enough on deontological understandings of rights. I suggest that more deontological understandings of rights, and attention to particular constitutional texts and lines of cases, is appropriate both in initially defining whether a right has been infringed and what ends are legitimate, and also in evaluating "proportionality as such." Part IV also considers arguments from American exceptionalism that would preclude greater use of proportionality review. Exceptionalist claims, however, cannot be made or answered in broad brushstrokes; indeed, I argue, U.S. history and experience support greater use of proportionality.

Although some scholars view case-by-case application of proportionality analysis as almost always normatively superior to other approaches to rights adjudication,[41] Part V takes a different view. Text, history, and precedent matter. Not all rights have the same structure nor serve the same purposes; free speech claims, which benefit from a presumptively categorical structure, are different from police behavior or criminal sentences, both of which would benefit from greater attention to proportionality. Even in adjudicating a single claim, different issues may call for different treatment. In equal protection law, paying more attention to disproportionate effects need not imply embrace of all elements of structured proportionality doctrine. Moreover, sometimes the most "proportionate" results will be achieved through categorical rules, especially when remedial frameworks are considered.[42] At least some of these rule-like regimes can be justified in terms of proportionality analysis at the level of the rule. Being proportional about proportionality means recognizing that history

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41. *See* BEATTY, *supra* note 1; *cf.* MÖLLER, *supra* note 29, at 24, 75-90, 180 (describing the purpose of constitutional rights as ensuring that autonomy interests are protected through justifications under proportionality and balancing tests, though noting limited areas not subject to proportionality review or to all its sub-tests).

42. Further, the distinction between case-by-case application and articulation of more general rules is overstated in any legal system committed to consistency. *See infra* note 343.

and text have roles to play, and that proportionality as a principle is not always served by proportionality as a doctrine.

I. PROPORTIONALITY IN U.S. CONSTITUTIONALISM AND ABROAD

Proportionality as an element of constitutional doctrine has already been recognized in several areas of contemporary constitutional law in the United States. This is not surprising, since well-designed constitutions are generally intended to promote proportionate, non-arbitrary government behavior. What the United States does not presently use is the structured "proportionality doctrine" described in Part I.C.

A. *Proportionality Principles Already Recognized in U.S. Constitutional Law*

Americans are already familiar with the legal principle of proportionality in constitutional law. The Eighth Amendment's case law has long recognized that punishments grossly disproportionate to the severity of the offense are prohibited as cruel and unusual punishment,[43] although the Court's willingness actually to scrutinize the proportionality of sentences has varied over time and contexts.[44] The Excessive Fines Clause of the Eighth Amendment has also been

43. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment."); Solem v. Helm, 463 U.S. 277 (1983) (assessing the proportionality of a sentence of life imprisonment); Enmund v. Florida, 458 U.S. 782 (1982) (assessing the proportionality of a death penalty sentence); Weems v. United States, 217 U.S. 349, 367 (1910) (arguing that the Eighth Amendment ban on cruel and unusual punishment embodies the "precept of justice that punishment for crime should be graduated and proportioned to offense"). Although the Justices making up the majority in *Harmelin v. Michigan*, 501 U.S. 957 (1991), were divided on whether proportionality review applies in non-capital cases, *Weems* had applied such review to a punishment of hard labor for a term of years. In so doing, *Weems* was consistent with earlier Supreme Court comments on the meaning of the Eighth Amendment. *See* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 480 (1867) (suggesting that Eighth Amendment clauses as a whole prohibited punishments that were "excessive, or cruel, or unusual"); *cf.* O'Neil v. Vermont, 144 U.S. 323, 331 (1892) (quoting a lower court opinion construing the Eighth Amendment and an analogous state constitutional provision to ban "excessive," "oppressive," or "unreasonably severe" punishments, but for other reasons rejecting an attack on a lengthy sentence imposing cumulative time on multiple counts); *see also infra* notes 425-426.

44. For example, from 1983, when *Solem*, 463 U.S. 277, was decided, until *Graham*, 560 U.S. 48 (2010), the Court did not invalidate any sentence of imprisonment for disproportionality under the Eighth Amendment. But since 1977, the Court has invalidated capital sentences for rape of an adult, Coker v. Georgia, 433 U.S. 584 (1977); for felony murder by one who did not personally kill or intend or attempt to kill, *Enmund*, 458 U.S. 782; for rape of a child, Kennedy v. Louisiana, 554 U.S. 407 (2008); and for persons with mental retardation, Atkins v. Virginia, 536 U.S. 304 (2002), or who were juveniles at the time of the conviction offense, Roper v. Simmons, 543 U.S. 551 (2005). In *Graham* the Court held unconstitutional a life

understood to impose proportionality limits.[45] Since the 1990s the Court has invoked proportionality in several other constitutional contexts. For example, under the Due Process Clause, courts must now ensure that the measure of punitive damages in civil cases "is both *reasonable and proportionate* to the amount of harm to the plaintiff and to the general damages recovered."[46] Under the Takings Clause, conditions for zoning permits must have "*rough proportionality*" to the effects of the proposed use of the property.[47] Furthermore, the "undue burden" standard is now the controlling inquiry in the Court's abortion cases, invoking in its language and application a concern for the reasonableness of regulations affecting women's choices to abort their pregnancies prior to viability.[48] All of these standards invoke proportionality in resolving individual rights questions, as do Justice Breyer's First Amendment opinions.[49] Moreover, the Court has extended proportionality standards to federalism issues: as of 1997, legislation under Section 5 of the Fourteenth Amendment must have "congruence and proportionality" to conduct that Section 1 prohibits.[50]

As these examples suggest, U.S. courts have found the concept of proportionality increasingly attractive in resolving interpretive challenges, prompting scholars to identify the roots of proportionality doctrines in U.S. constitutional law. Richard Fallon, for example, has drawn comparisons between European proportionality doctrine and U.S. strict scrutiny as it emerged in the 1960s (and applied thereafter),[51] while Alec Stone Sweet and Jud Mathews see proportionality review in nineteenth century Dormant Commerce Clause cases.[52] Attraction to proportionality in both the courts and the academy is no surprise,

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without parole sentence for a juvenile convicted of a non-homicide offense; in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court held unconstitutional mandatory life without parole sentences for juveniles convicted of homicide, concluding that imposition of such a sentence required individualized consideration.

45. *See* United States v. Bajakajian, 524 U.S. 321 (1998).

46. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (emphasis added). *See generally* BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (limiting punitive damages under the Due Process Clause).

47. *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591 (2013); Dolan v. City of Tigard, 512 U.S. 374, 391, 398 (1994).

48. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.).

49. *E.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551-52 (2012) (Breyer, J., concurring in the judgment).

50. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

51. *See* Fallon, *supra* note 6, at 1295-96, 1330-34.

52. *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 814-24 (2011); *cf.* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009) (arguing for greater recognition of proportionality as a principle across areas of law).

since an aspiration to proportionate government, as an important aspect of justice, is implicit in the constitutional design.

B. *Proportionate Government as a Goal of Constitutional Design*

The Constitution's Preamble states that one of its goals is to "establish Justice," echoing the defining commitments of leading state constitutional instruments of the time.[53] "Justice" has, at least since the time of Aristotle, been associated with proportionality.[54] Although the Preamble does not contain independently operative grants of power, it nonetheless provides important background for understanding constitutional purposes relevant to the interpretation of the operative provisions that follow.[55] Similarly, there are allusions to proportionality in the Federalist Papers, where the constitutional design is described more generally as aimed to produce "a wise and well-balanced govern-

53. *See* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 454 (1968) ("[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." (quoting VA. DECLARATION OF RIGHTS § 15 (1776))); *id.* at 458 ("Every subject of the commonwealth . . . ought to obtain right and justice freely . . . ." (quoting MASS. DECLARATION OF RIGHTS 1780 § XI)); *id.* at 459 ("A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government." (quoting MASS. DECLARATION OF RIGHTS 1780 § XVIII)).

54. On proportionality in distributive justice, see ARISTOTLE, NICOMACHEAN ETHICS 162-63 (Sarah Broadie ed., Christopher Rowe trans., Oxford University Press 2002) (c. 384 B.C.E.); in corrective justice, *id.* at 163-67; BARAK, *supra* note 22, at 175-78 (identifying the philosophical and historical origins of proportionality as part of justice); *see also* Eric Engle, *The General Principle of Proportionality and Aristotle*, *in* ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 265, 265 n.2 (Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho eds., 2013) ("Aristotle's ideas of justice as ratio and virtue as mean explain the application of . . . proportionality to distributive and commutative justice—respectively, social justice (proportional shares in the constitution of the Polis, i.e. the State) on the one hand and proportional punishment of crimes on the other."). On the Founders' familiarity with proportionality as an element of justice in criminal sentencing, see Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 515 (2005); and John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 927-47 (2011).

55. The Preamble's reference to "Justice" has been invoked by both Justices Stevens and Scalia in Supreme Court opinions. Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (quoting the Preamble's reference to "establish Justice" as a purpose of the Constitution); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 54-55 (1994) (Stevens, J., concurring) ("[I]t is entirely appropriate for a court to give controlling weight to the Founders' purpose to 'establish Justice.'"); *see also* John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993).

ment for a free people"[56] in a way that will help control "abuses"[57] and avoid the exercise of "arbitrary and vexatious powers."[58]

These sorts of commitments to government that is just, and to proportionality in the government's treatment of citizens, have deep roots in antecedents to the U.S. Constitution, including the Magna Carta. The Magna Carta's articles on "Amercements" plainly expressed a demand for proportionality in the imposition of fines;[59] other provisions of the Magna Carta called for "justice" to be provided through the law courts.[60] As Dick Howard has shown, the Magna Carta's influence was felt in the American colonists' demands for recognition of their rights as English citizens in accordance with colonial charters;[61] the influence of the Magna Carta and the English Bill of Rights[62] is further reflected in founding period state constitutions, in requirements that no

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56. THE FEDERALIST NO. 2, at 39 (John Jay) (Clinton Rossiter ed., 1961).

57. THE FEDERALIST NO. 9, at 75 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

58. THE FEDERALIST NO. 12, at 94 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 23 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the "means ought to be proportioned to the end" in the design of government powers); THE FEDERALIST NO. 28 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The means to be employed must be proportioned to the extent of the mischief."); THE FEDERALIST NO. 31 (Alexander Hamilton) (stating that, with respect to taxation, "the means ought to be proportioned to the end").

59. *See* Magna Carta, ch. 20 (1215), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 42 (1998) [hereinafter HOWARD, MAGNA CARTA] ("A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position . . . ."); *id.* ch. 21 ("Earls and barons shall be amerced . . . only in proportion to the measure of the offense."); *id.* ch. 22 (providing for similar limitations on amercements on "a clerk's lay property"). Howard's work reproduces the English translation of the 1215 Magna Carta text found in the British Museum, Cotton MS August II.106, with "emendations aimed mostly at achieving readability without sacrificing authenticity." HOWARD, MAGNA CARTA, *supra*, at 34. For an argument that the Excessive Fines Clause of the Eighth Amendment should be understood more broadly than it currently is, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014).

60. *See* Magna Carta, ch. 40 (1215) *reprinted in* HOWARD, MAGNA CARTA, *supra* note 59, at 45 (providing that justice is to be neither for sale nor denied nor delayed); *see also id.* ch. 39 (stating that a free man is not be prosecuted "except by the lawful judgment of his peers and by the law of the land").

61. HOWARD, *supra* note 53, at 14-132, 170-87; *see also* A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9 (2007).

62. The English Bill of Rights of 1689 is an important source for the text of the Eighth Amendment. *See* An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2, § 10 (Eng.) ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . .").

Temple American Inn of Court - April 2016 Program - Research and Materials

"cruel and unusual" punishments nor "excessive fines" be imposed,[63] as well as in the right to open courts.[64] Both Massachusetts's and Virginia's post-revolutionary constitutions emphasized "justice" and "moderation" as among the first virtues of the governments they sought to establish.[65] Similar requirements are evident in most modern constitutions in constitutional democracies, and even when not explicit, the goal of proportionality is implicit in any constitution that aims to produce justice by limiting as well as empowering government.[66]

Proportionality bears a special relationship to government in a constitutional democracy. For an essential idea of constitutional democracy is that in confrontations between citizens and government, government is restrained and avoids oppressive and arbitrary action.[67] The means to achieve this goal are varied, but requiring proportionality of action is one way in which the idea of

63. *See* HOWARD, *supra* note 53, at 206-11 (discussing Virginia's bill of rights and Massachusetts's constitution). At least nine of the thirteen original states' constitutions included some such prohibition. *See* DEL. DECLARATION OF RIGHTS § 16 (1776); MASS. DECLARATION OF RIGHTS art. XXVI (1780) (forbidding any magistrate or court to "inflict cruel or unusual punishments"); MASS. BODY OF LIBERTIES § 46 (1641); MD. DECLARATION OF RIGHTS art. XXII (1776); N.H. BILL OF RIGHTS art. 33 (1784); N.Y. BILL OF RIGHTS § 8 (1787); N.C. DECLARATION OF RIGHTS art. X (1776); PA. CONST. art. IX, § 13 (1790); PA. CONST. § 38 (1776) (punishments to be made "less sanguinary and in general more proportionate to the crime"); S.C. CONST. art IX, § 4 (1790) (prohibiting "cruel punishments"); VA. DECLARATION OF RIGHTS § 9 (1776) (banning "excessive fines" and "cruel and unusal punishments"). For a discussion of proportionality of punishment requirements in early state constitutions, see Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 793-95 (2008). As Balmer notes, some early constitutions prohibiting disproportionate punishment were revised to prohibit "cruel and unusual" punishments; at least one state court concluded that the change in wording was not intended to abandon a proportionality requirement. *See id.* at 794 n.46 (citing People v. Sharpe, 839 N.E.2d 492, 500 (Ill. 2005)).

64. *See* HOWARD, *supra* note 53, at 284-94; *see also* William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 367 (1997); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1321 (2003). On the contemporary significance of open courts provisions, see Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism*, 56 ST. LOUIS U. L.J. 917, 999-1034 apps. 1 & 2 (2012).

65. HOWARD, *supra* note 53, at 454 (reproducing the VA. DECLARATION OF RIGHTS § 15 (1776)); *id.* at 459 (reproducing the MASS. DECLARATION OF RIGHTS, art. XVIII (1780)).

66. *See* Law, *supra* note 1, at 687-93; *see also* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 284-91 (2005).

67. *See* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* DUE PROCESS: NOMOS XVIII 3, 4, 38 (J. Roland Pennock & John W. Chapman eds., 1977) (arguing that the "idea of due process that lasts" is "of individual freedom from arbitrary government imposition"; tracing this idea from Magna Carta through colonial and contemporary history; and concluding that the "durability of due process over seven and half centuries . . . is a tribute to law-minded people whose . . . aspirations for a just life are . . . finely attuned to the relation between individual fulfillment and social welfare").

limited governnment can be realized.[68] Second, constitutional democracies' legitimacy is based on accountability to the people, including but not limited to majoritarian consent. Elections provide one source of accountability, but ensuring that government has justified reasons for action (whether legislative or executive) helps promote accountability on an onging basis.[69] Third, constitutional democracies are not only limited governments; they are goverments limited by a commitment to fundamental human equality. It is on that commitment to the normative equality of all members of the polity that democratic self-governance rests.[70] Recognizing each person as endowed with a quality of humanity equally deserving of respect arguably calls for reasoned justification for the imposition of special burdens or intrusions.[71]

Recognizing proportionality as a goal of constitutional government does not necessarily imply that judicial review is the best method for achieving proportionate decision making. For example, *McCulloch v. Maryland* concluded that the principal protection against abusive taxation is the link between representation and the taxed constituency.[72] Legislators and executive actors may be understood ordinarily to have obligations to act proportionately, even if those obligations are not justiciable. What, then, is the role of judges in implement-

68. *Cf.* SULLIVAN & FRASE, *supra* note 52, at 169, 175 (arguing that proportionality is an "instrumental method of reviewing excessive government measures" and recommending its use across constitutional law as a "general standard of review"); Ristroph, *supra* note 66, at 265 (conceptualizing proportionality "as a limitation of state power in a constitutional liberal democracy").

69. *Cf.* BARAK, *supra* note 22, at 472-73 (arguing that limitations on rights must be properly justified to be compatible with democracy and that proportionality analysis is a "meaningful" way of doing so).

70. *See, e.g.*, Louis Henkin, *Human Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210, 214-15 (Michael J. Meyer & William A. Parent eds., 1992); Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM FOR SPIROS SIMITIS 249, 250-52, 270 (Dieter Simon & Manfred Weiss eds., 2000).

71. *Cf.* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 1018-19 (2006) (arguing that the "values that underlie" the right to equal democratic participation, including "the ideal of a political community of equals" in which each person deserves "similar respect," support a right to judicial review); Walter F. Murphy, *Consent and Constitutional Change*, *in* HUMAN RIGHTS AND CONSTITUTIONAL LAW 123 (James O'Reilly ed., 1992) (arguing that the moral autonomy of persons that underlies the legitimating force of consent also implies limits on what democratic majorities may do). For an argument that human rights are grounded in a moral right of justification, that is, to explain why "human beings [are only] . . . treated in a way that could . . . be justified to him or her as a person equal to others," see Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 120 ETHICS 711 (2010).

72. 17 U.S. (4 Wheat.) 316, 430 (1819); *see also* United States v. Cnty. of Fresno, 429 U.S. 452, 458-59 (1977) ("A State's constituents can be relied on to vote out of office any legislature that imposes an abusively high tax on them.").

ing the constitutional value of proportionality? I consider this question first outside the United States and then within it.

C. Proportionality Elsewhere: The United States in Comparative Perspective

Having suggested that the principle of proportionality is part of the U.S. Constitution, I turn now to proportionality as a structured doctrine developed in the post-World War II period in Germany, Canada, Israel, and elsewhere.[73] Although there are differences in doctrinal terms and applications among different courts,[74] for purposes of comparison to U.S. approaches, I focus primarily on Canada,[75] drawing from other jurisdictions to illustrate particular points.

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73. The origin of "proportionality doctrine" is often attributed to German administrative and police law of the nineteenth century. *See, e.g.*, COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 24-32. Whether German law inspired Canadian law in this instance is uncertain. *See* ROBERT J. SHARPE & KENT ROACH, BRIAN DICKSON: A JUDGE'S JOURNEY 334 (2003) (suggesting that the *Oakes* test may have come from case law of the European Court of Human Rights); Grimm, *supra* note 2, at 383-84 (raising the possibility that the *Oakes* test was derived from *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980), but alternatively suggesting that it could have come from Germany); Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 620 n.134 (2010) (noting the strong similarities between the German and Canadian tests and the possibility that *Oakes* may have been inspired by German constitutional law, through Justice Dickson's law clerk, Joel Bakan, who had recently studied European human rights law).

74. *See infra* note 84; *supra* notes 23, 28.

75. Canada is an especially apt point of comparison. Canada has long had judicial review of constitutional constraints on government. Its 1867 Constitution Act allocated powers to the central and provincial governments, and conferred a limited number of rights to protect minority religions and languages. *See* Constitution Act, 1867, 30 & 31 Vict., c.3, §§ 91-93, 133 (U.K.), *reprinted in* R.S.C. 1985, app. III, no. 5 (Can.). The Supreme Court of Canada was established in 1875, and, acknowledging the influence of U.S. cases, began resolving constitutional controversies soon thereafter. Canada's early constitutional cases focused primarily on the division of powers between the provincial and federal governments. *See, e.g.*, Citizens & Queen Ins. Co v. Parsons, [1880] 4. S.C.R. 215, 277-82 (Fournier, J.), 287-88 (Henry, J.), 298-301, 304-06 (Taschereau, J.) (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869)); Severn v. The Queen, [1878] 2 S.C.R. 70, 120-29 (Fournier, J.) (discussing *Brown v. Maryland*, 25 U.S. 419 (1827)). Moreover, even before the adoption of its statutory Bill of Rights in 1960, or its constitutional Charter of Rights and Freedoms in 1982, the Canadian Court limited government through statutory interpretation in light of unwritten constitutional principles. *See, e.g.*, John Willis, *Administrative Law and the British North America Act*, 53 HARV. L. REV. 251, 275 (1939) (noting the "spurious interpretation" of statutes to protect due process rights, despite the lack of a constitutional basis); *see also* Roncarelli v. Duplessis, [1959] S.C.R. 121, 142 (Rand, J.) (finding that a duty of good faith, implicit in the rule of law, binds public officials). And, like in the United States (and unlike in Germany), in Canada, judicial review of constitutional issues is "decentralized" – that is, it is not limited to a single specialized constitutional court, so that many courts in the country can address constitutional claims.

In 1982, after a long public process, Canada adopted as part of its constitution the Charter of Rights and Freedoms, which in Section One guaranteed the rights set forth therein "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[76] This provision may be referred to as a "limitations" clause because it recognizes that rights may be limited by strong enough reasons, or as a "savings" clause, because statutes otherwise infringing on rights may be preserved from invalidation by meeting the standards of Section One. Canadian doctrine has developed a proportionality test to determine whether this standard is met.[77] Limitations clauses in other countries have also been understood to invite courts to review the justifications for government action through proportionality analysis.[78]

In Canada, when government action is challenged as violating a Charter right, the challenger bears the burden of showing a rights infringement, and Canadian judges first inquire into the scope of the interests that the right protects. In so doing, the court typically adopts a generous view of the scope of what is protected by the right.[79] The court then considers whether the gov-

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76. Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

77. *See supra* note 24 and accompanying text. Similar tests are used in Germany, Israel, and other jurisdictions; the similarity of these approaches is a testament to the global spread of proportionality analyses in constitutional law. *See supra* note 73. *See generally* Stone Sweet & Mathews, *supra* note 37. On why surface similarities may contain important differences, see BOMHOFF, *supra* note 2 (comparing "balancing" analyses in the United States and Germany).

78. *See, e.g.*, Basic Law: Human Dignity and Liberty, 5752-1992, SH no. 1391 p. 150, § 8 (Isr.) ("There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."); S. AFR. CONST., 1996, § 36(1) ("The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . ."). Rights may also have "internal" limitations embracing principles of proportionality, as in Canada's "qualified rights." *See* 2 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA ch. 38-14 (5th ed. supp. 2007). Such rights include the protections against "unreasonable" search or seizure, "arbitrary" detention, and "cruel and unusual treatment or punishment," each of which is discussed below. *See infra* notes 189-201, 430-431.

79. *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 606 (1999) (noting the tendency in Canada to interpret the scope of the right broadly and to decide cases under the justificatory stage of analysis); *see also* Peter W. Hogg, *Interpreting the Charter of Rights: Generosity and Justification*, 28 OSGOODE HALL L.J. 817, 819-20 (1990) (identifying and critiquing this approach). This difference between the U.S. and Canadian approaches can be illustrated by comparing free speech cases: the Canadian courts interpret "freedom of expression" to include any activity, except for physical violence, that "conveys or attempts to

ernment has shown that it is acting under clear legal authority[80] and for reasons that are "pressing and substantial in a free and democratic society";[81] if not, inquiry is at an end.[82] If the infringement of right is pursuant to govern-

convey a meaning," Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927, 968, 969 (Can.), and do not carve out categories of generally unprotected speech, as does U.S. case law. *Compare, e.g.*, Reference re §§ 193 & 195.1(1)(c) of Criminal Code (the *Prostitution Reference Case*), [1990] 1 S.C.R. 1123, 1125 (Can.) (holding that solicitation of prostitution is within the scope of freedom of expression protected under Charter § 2(b), but that the legislative infringement on speech rights was justified under § 1), *with* United States v. Stevens, 559 U.S. 460, 469-70 (2010) (discussing "historically unprotected categories" of speech), *and* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."). More recently, the Canadian Supreme Court found that certain restrictions on prostitution were violations of Charter § 7's protection of "security of the person" that were *not* saved by § 1, because insofar as they prevented prostitutes from screening prospective clients to protect their own safety, prohibiting communication with respect to prostitution was "grossly disproportionate" to the valid objective of the law. Canada v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, ¶¶ 22-23, 69-72, 108-09, 120-22, 133-34, 159, 161-63 (Can.).

80. A rights limitation can only be justified if it is "prescribed by law." Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). *See* Greater Vancouver Trans. Auth. v. Can. Fed'n of Students, 2009 SCC 31, [2009] 2 S.C.R. 295, ¶¶ 70-73 (Can.) (holding that a policy restricting advertising on the side of public buses was "prescribed by law" since it was binding, properly enacted, precise, and publicly accessible); Little Sisters Book & Art Emporium v. Canada, 2000 SCC 69, [2000] 2 S.C.R. 1120, ¶¶ 85, 141 (Can.) (finding that customs officials' discriminatory treatment of gay and lesbian materials could not be justified since the discrimination arose from internal administrative decisions and was not "prescribed by law"). Rights limitations under the authority of an excessively vague law will not constitute a limit "prescribed by law": "where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law.'" *Irwin Toy*, [1989] 1 S.C.R. at 983.

81. R. v. Oakes, [1986] 1 S.C.R. 103, 138-39 (Can.) (explaining that to justify rights infringements under § 1, the law's objective must be "pressing and substantial," or "of sufficient importance to warrant overriding a constitutionally protected right or freedom"). In practice, the Court has rejected the sufficiency of government objectives only where the objective was found to be either illegitimate or nonexistent. *See infra* note 82. The distinctive Canadian formulation is often compared to the German test, which requires simply a "legitimate purpose." *See, e.g.*, David Bilchitz, *Socio-Economic Rights, Economic Crisis, and Legal Doctrine*, 14 INT'L J. CONST. L. 710, 735 (2014).

82. *See, e.g.*, Vriend v. Alberta, [1998] 1 S.C.R. 493, ¶¶ 113-15 (Can.) (invalidating the omission of sexual orientation as a protected ground in a human rights code, finding the government had no articulated objective served by the omission); R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.) (invalidating a statute requiring most stores to close on Sunday because its purpose—to try to force religious observance—was illegitimate). For a lower court decision, later overruled, that a statute lacked the "pressing and substantial purpose" required under the *Oakes* test, see *Canada (A.G.) v. Somerville*, [1996] 184 A.R. 241 (Can. Alb. C.A.), which found that provisions in the Canada Elections Act imposing advertising blackouts and limiting third party election expenditures had an improper purpose of enhancing the

ment action authorized by law and has a "pressing and substantial" purpose, the Court then considers whether the government has shown that the challenged action is "demonstrably justified."[83]

At this justificatory stage, the courts employ a three-part inquiry, focusing on the *means* used to advance the government's purpose and asking whether (1) the means chosen are rationally related to the legitimate object; (2) the means chosen "minimally impair" protected rights; and (3) the benefits towards achieving the government's objective are sufficient to warrant the harm to interests protected by rights (a step called "proportionality as such").[84] The rationality step is similar to U.S. rational basis review.[85] Although this element

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position of political parties and their candidates and hence violated the Charter. The Alberta court's reasoning on this point was, however, rejected in Libman v. Quebec (A.G.), [1997] 3 S.C.R. 569, ¶¶ 55-56, 79.

83. Canadian jurists emphasize the connection between the protection of rights and the kinds of justifications that can support their limitation. *See, e.g.*, *Oakes*, [1986] 1 S.C.R. at 135; *cf.* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993) (arguing that rights and consequentialist concerns justifying limiting rights are conceptually interdependent).

84. *See, e.g.*, *Oakes*, [1986] 1 S.C.R. at 139 (deciding that there are "three important components of a proportionality test"):

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. . . . Second, the means . . . should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the *effects* of the measure . . . and the objective which has been identified as of "sufficient importance."

Id. (citation omitted). The language used to describe this test is articulated and applied somewhat differently across jurisdictions. *See, e.g.*, HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel, 58(5) PD 807 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 264, 297 (referring to "the 'proportionate measure' test (or proportionality 'in the narrow sense'"); BARAK, *supra* note 22, at 340 (describing the third test as one of "proportionality *stricto sensu*," requiring "a proper relation ('proportional' in the narrow sense of the term) between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose"); *id.* at 350-65 (distinguishing his approach to this final test, which analyzes the marginal importance of the purpose and of the rights limitation in light of other alternatives, from that of German theorist Robert Alexy); MÖLLER, *supra* note 29, at 193-99 (equating "rationality" with "suitability"; "necessity" with "less restrictive but equally effective"; and proportionality "in a narrow sense" with "balancing"); Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 582 (2003) (describing the German proportionality test requiring that "(1) the act must be appropriate (*geeignet*) . . . ; (2) the act must be necessary (*erforderlich, notwendig*), which would not be the case if the ends could be achieved with less restrictive or burdensome means; and (3) the act must be proportionate strictly speaking (*verhältnismässig*), which means that its costs must remain less than the benefits secured by its ends").

85. *See* Mathews & Stone Sweet, *supra* note 52, at 802 (calling the rationality step "broadly akin to what Americans call 'rational basis' review," but noting that "under [proportionality

is normally found to be satisfied, in *Oakes* the Canadian Supreme Court concluded that a rebuttable presumption that one who possessed any amount of a drug was also trafficking in the drug was not rational.[86]

If the statute is found (as most are) to be a "rational" means of advancing the government's purpose, the courts go on to consider whether it impairs the right "as little as reasonably possible in order to achieve the legislative objective."[87] This *minimal impairment* step has sometimes been described as a cognate test to the U.S. "least restrictive alternative" requirement in strict scrutiny; this second step is sometimes described in scholarly literature as a "necessity" test.[88] However, the minimal impairment test does *not* necessarily imply that if any less restrictive approach can be imagined, the law is invalid;[89] the government "is not required to pursue the least drastic means of achieving its objective," so long as it "adopt[s] a measure that falls within a range of reasonable alternatives."[90] The Canadian courts will look to see whether there is an obvious and workable alternative, sometimes drawing on approaches already in use by governments, as in a recent case involving procedures for secret evidence in immigration proceedings.[91] Chief Justice McLachlin has emphasized that the

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analysis], the appraisal of government motives and choice of means is more searching"). For discussion of the rationality ("rational connection," "appropriatness," or "suitability") step by a former President of Israel's Supreme Court, see BARAK, *supra* note 22, at 303-16.

86. *Oakes*, [1986] 1 S.C.R. at 142. *Cf.* Mounted Police Ass'n of Ont. v. Canada (A.G.), 2015 SCC 1, ¶¶ 145-53 (Can.) (McLachlin, C.J. & LeBel, J.) (finding ban on police having labor union was not rationally connected to the goal of promoting a "stable, reliable and neutral police force," but going on also to find that the statute failed the "minimal impairment" test).

87. RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, 342-43 (Can.) (McLachlin, J.) (emphasizing also that "the law must be carefully tailored so that rights are impaired no more than necessary," acknowledging that "a range of reasonable alternatives" may exist, but indicating that "if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail").

88. Stone Sweet & Mathews, *supra* note 37, at 75, 78-79 (describing, generically, the steps of proportionality analysis).

89. *RJR-MacDonald*, [1995] 3 S.C.R. at 342-43.

90. *Mounted Police Ass'n of Ont.*, 2015 SCC ¶ 149.

91. *See, e.g.*, Charkaoui v. Canada, 2007 SCC 9, [2007] 1 S.C.R. 350, ¶¶ 85-87 (Can.) (finding procedures for the judge's considering secret evidence with no access to the respondent or one acting for him failed the minimal impairment test, given the availability of alternatives such as security-cleared special advocates in use under other regimes in Canada and in the U.K.). Other formulations are sometimes given. In *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61, ¶ 439 (Can.) (citations omitted), Chief Justice McLachlin, writing for only herself, stated that in applying the minimal impairment step the courts recognize the government's "margin of appreciation in selecting the means to achieve its objective" and focus on whether the challenged measures "fall within a range of reasonable alternatives," especially "where the impugned measures 'attempt to strike a balance between the claims of legitimate but competing social values.'" *See also* R. v. Keegstra, [1990] 3 S.C.R. 697, 784-85 (Can.) (arguing that minimal impairment does not require laws to be

"important point" is whether proposed alternative (and less rights-impairing) means would be "less effective" in advancing the government's goal.[92]

In cases involving more polycentric interests, "minimal impairment" scrutiny can allow considerable latitude to legislative choices. In *Edwards Books*,[93] the Canadian Supreme Court upheld an Ontario statute establishing Sunday as a common day of recreation in which most retail businesses had to close. The statute had an exception for employers who closed for Sabbath on Saturday and had fewer than seven employees working on Sunday,[94] but several Ontario retailers, including some owned by observant Jews, challenged the statute. They argued that the different approach taken in New Brunswick was less impairing of religious freedom rights; New Brunswick provided an exemption for *any* retailer with a sincere religious belief that it needed to close on a day other than Sunday.[95] The Court was not persuaded that New Brunswick's approach

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the "least intrusive" and stating that in light of different options and objectives "the government may legitimately employ a more restrictive measure . . . if that measure . . . further[s] the objective in ways that alternative responses could not," provided it is otherwise proportionate to a valid objective). Canadian scholars are divided on whether relaxation of the minimal impairment rest "is a good or a bad thing." Jackson, *supra* note 79, at 608.

92. *Quebec (Att'y Gen.) v. A.*, [2013] 1 S.C.R. ¶ 442; *see supra* note 87. *Quebec (Attorney General) v. A.* involved a Charter challenge to Quebec's failure to treat de facto marriages as carrying the full range of property rights and support on termination as did formalized marriages or civil unions. Four justices found no violation of Charter equality rights; five justices found a violation of Section 15 equality rights. However, Chief Justice McLachlin (one of the five) concluded that the statute could nonetheless be salvaged under Section 1. For Chief Justice McLachlin, the goal of the Quebec scheme was "choice and autonomy for all Quebec spouses . . . to structure their relationship outside . . . the mandatory regime applicable to married and civil union spouses," [2013] 1 S.C.R. ¶ 435 (McLachlin, C.J.), supported by considerations of federalism, *id.* ¶¶ 439-49; *see id.* ¶ 447 (describing Quebec as seeking to "maximiz[e]" autonomy and choice). Three other justices who found a Section 15 violation would have upheld all but the support provisions under Section 1. Justice Abella, who alone found none of the equality violations to be justified under Section 1, disagreed with the Chief Justice as to minimal impairment and proportionality as such, *see id.* ¶¶ 358-80 (Abella, J., dissenting) (arguing that an "opt out" approach, with presumptive application of the same rules to de facto as to formal marriage, was less impairing because it would better protect the economically vulnerable partner and would equally advance the purpose). Their disagreement may illustrate the significance of how the government's purpose is articulated. For Justice Abella, the goal was simply "freedom of choice," *id.* ¶ 358, a goal that could be served as well, with less harm to the economically weaker partner, by the opt-out approach, *id.* ¶¶ 377-79. On the risks of accepting "maximization" as part of a government goal, see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, ¶¶ 147, 149 (Abella, J., dissenting); and *id.* ¶ 195 (LeBel, J., dissenting). These disagreements might be understood as about defining the government purpose, or as about what a "reasonable alternative" is for minimal impairment purposes.

93. R. v. Edward Books & Art Ltd., [1986] 2 S.C.R. 713 (Can.).

94. *Id.* at 727.

95. *Id.* at 773.

was less impairing: New Brunswick made the exemption available regardless of the number of employees, but Ontario did not require the employer to claim a sincere religious belief. So a small shopkeeper employing observant Jews could benefit from the exemption regardless of the employer's beliefs.[96] Likewise, the Court found, another proposed alternative—allowing an exemption to be invoked by individual employees—was not necessarily more minimally impairing, because of subtle social pressures on employees not to assert such claims.[97] Given the complexity of the rights-holders' interests—as owners, employees, and consumers—the Court could not conclude that one approach was less impairing of rights than another; the infringement on religious freedoms was found not disproportionate to the legislature's objective; and so Ontario's law stood.[98]

The last stage of analysis is sometimes called "proportionality as such."[99] In this phase, the court asks whether the government's reasons for regulating and the degree to which they are likely to be served can justify the harm to constitutionally protected interests. By going beyond rationality and minimal impairment, the "proportionality as such" test can make the doctrine more rigorous than U.S. strict scrutiny, which ends after the "least restrictive means" test. In *Oakes*, Chief Justice Dickson explained that:

> Some limits on [Charter] rights and freedoms . . . will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. *The more severe the deleterious effects of a*

96. *Id.* at 774.

97. *Id.* at 773 (deciding that "[a] scheme which requires an employee to assert his or her rights before a tribunal in order to obtain a Sunday holiday is an inadequate substitute for the regime selected by the Ontario legislature").

98. *Id.* at 779. The Court added: "[T]he courts must be cautious to ensure that [the Charter] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons." *Id.*

99. This step is also referred to as "proportionality in the narrow sense" or proportionality "*stricto sensu.*" *See* Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS. 131, 135 (2003); Stone Sweet & Mathews, *supra* note 37, at 75; *see also supra* note 84.

> *measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.*[100]

Minimal impairment analysis is defined by the scope of the government's objective; only proportionality as such "takes full account of the 'severity of the deleterious effects of a measure on individuals or groups.'"[101]

Canadian cases rarely turn on this third step, generally finding laws unconstitutional on minimal impairment grounds.[102] Other jurisdictions, however, sometimes find that a statute that passes minimal impairment nonetheless fails "proportionality as such." In Germany, for example, "proportionality as such" has been used more often than in Canada.[103]

While "proportionality review" requires an initial determination of whether the government's purpose is sufficiently important to warrant restricting rights at all, in the final stage the *relative* strength of that interest is evaluated in relation to the specific harm to rights;[104] the greater the intrusion on rights, the

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100. R. v. Oakes, [1986] 1 S.C.R. 103, 139-40 (Can.) (emphasis added).

101. Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, ¶ 76 (Can.) (McLachlin, C.J.). Chief Justice McLachlin goes on to quote Aharon Barak's argument: "'Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right.'" *Id.* ¶ 76 (quoting Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 374 (2007)).

102. *See id.* ¶¶ 75-78 (acknowledging that proportionality as such has not had a strong independent role in Canadian jurisprudence to that point, but suggesting that this should change going forward). Chief Justice McLachlin explained:

    > Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.

    Id. ¶ 76.

103. Grimm, *supra* note 2, at 393-94 (arguing, before *Hutterian Brethren*, that Canadian courts tend to subsume proportionality as such into earlier steps of proportionality analysis). In response to German scholar Bernard Schlink's argument that there should not be proportionality as such in review of legislation, but that analysis should stop with minimal impairment, Grimm has argued that one must be able to assess the third stage in order to have a basis for invalidating, for example, a statute providing an authorization for property owners to kill another person, if there is no other way to protect their property. *Id.* at 395-96.

104. *See, e.g.*, Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1, 7 (2010).

greater must be the need and justification for the challenged measure. Consider an example from Israel, whose case law sometimes adopts a particularly rigorous form of analysis of this last prong. In the *Beit Sourik* case,[105] the Israeli High Court of Justice found that the government had a legitimate purpose in building a fence to protect Israelis from violent attacks from occupied territory.[106] The Court found that the government's choice for the fence location, near the top of a mountain, was a *rational* step towards the goals of surveillance and protecting security forces and travelers on a nearby highway.[107] The line drawn was also *minimally impairing* of the rights of Palestinians fenced off from their lands because no other route could achieve an equivalent level of security.[108] The court explained that a "less restrictive means" referred only to an alternative that equally advances the law's purpose while intruding less on rights.[109] However, the Court held, the fence had to be moved to a less elevated location, allowing Palestinians more access to their lands, because the initial location failed the final, "proportionality as such" test: the marginal improvement to security – and protection of the life of the Israeli civilian – from the line that the military chose, as compared to a line in a lower location, was, in the Court's view, far less than the marginally greater intrusions on Palestinian humanitarian rights.[110]

Not surprisingly, the U.S. case law on "less restrictive means" sometimes obscures the distinction between "less restrictive means" that are as effective and those that are not, in part because of the absence of any separate analysis of "proportionality as such." Differing formulations can elide whether a "less restrictive means" must be one that achieves equivalent progress towards the government's legitimate goal.[111] Indeed, U.S. courts referring to "least restric-

105. HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel, 58(5) PD 807 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 264.

106. For a critique of the court for accepting that this was the only purpose, see Moshe Cohen-Eliya, *The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 262 (2005).

107. *Beit Sourik*, 2004 ISR. L. REP. at 308.

108. *Id.* at 308-10.

109. *Id.* (noting that, in the less restrictive (or "less harm[ful]") means inquiry, "[t]he question . . . is whether this [alternative] route satisfies the security objective underlying the separation fence to the same extent as the route determined by the military commander"); *see also* BARAK, *supra* note 22, at 323.

110. *Beit Sourik*, 2004 ISR. L. REP. at 310-14.

111. At times, the Justices discuss "less restrictive means" in terms focusing on whether the alternatives are equally effective (as the Israeli Court did in *Beit Sourik*); at other times, U.S. Justices place emphasis instead on the lesser degree to which another alternative would intrude on rights. *See infra* note 113; Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003); *see also* Noah Marks, Case Comment, *"Least Restrictive Means":* Burwell v. Hobby Lobby, 9 HARV. L. & POL'Y REV. S15 (2015). *Compare, e.g.*, District of Columbia v. Heller,

tive alternatives" tend not to specify whether this analysis requires that the measures being compared "equally advance" the compelling government interest. In *United States v. Alvarez* (the Stolen Valor Act case), the plurality accepted that an online database against which false claims could be checked was less restrictive than a criminal prohibition on lying about receiving the Medal of Honor.[112] The analysis left unclear whether the plurality had concluded that a database would be *equally effective* in carrying out the government's legitimately relevant interests, or instead that even if the database were less effective, the database would be a sufficient alternative given the relatively greater importance of free speech concerns.[113] Similarly, in *McCullen v. Coakley*,[114] the U.S. Court, in concluding that a thirty-five-foot buffer zone was not sufficiently tailored to achieve the government's legitimate goal of maintaining public safety and preserving access to abortion clinics, left unclear whether there were equally effective alternatives or whether the marginal additional benefit towards the government's goal under the statute, as compared to alternatives, was unjustified in light of the degree of intrusion on rights.[115] By contrast, the relative importance of the rights and values at stake can be distinctly evaluated in structured proportionality analysis at the "proportionality as such" stage.

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554 U.S. 570, 712 (2008) (Breyer, J., dissenting) ("[A]lthough there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban . . . "), *and* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997) (stating that a "less restrictive alternative[]" must be "at least as effective in achieving the legitimate purpose that the statute was enacted to serve"), *with* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."), *and* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 128-30 (1989) (finding that less restrictive alternatives to a complete ban on indecent telephone communications existed, even though they might not prevent all minors from accessing such comunications).

112. *See* United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012).

113. *See id.* (rejecting the government's argument that a database would be "impracticable and insufficiently comprehensive," as lacking adequate explanation). Laurence Tribe has recognized that sometimes a finding that there is a less restrictive alternative represents a hidden weighing of the relative proportionality of the two approaches. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 722-23 (1978) ("Implicit in any such holding . . . is a judgment that the reduced effectiveness entailed by a less restrictive alternative is outweighed by the increment in . . . protection gained by demanding such an alternative."); *cf.* Sykes, *supra* note 111, at 415-16 (arguing that in WTO adjudication, the less restrictive means test operates as a crude form of cost-benefit balancing). Some Canadian cases, perhaps reflecting reluctance to rely on "proportionality as such" as a basis for invalidating a statute, may similarly combine concerns of proportionality with analysis of minimal impairment, *see* Grimm, *supra* note 2, at 394-95, though the Court has recently called for more clarity as between the two, *see supra* notes 102 & 103.

114. 134 S. Ct. 2518 (2014).

115. *See, e.g.*, *id.* at 2540 ("[T]he government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests . . . .").

A striking feature of Canadian jurisprudence has been the stability of the proportionality doctrine and its utility as a method for a structured decisional analysis in which the Justices generally focus on the same questions in the same order.[116] (As we shall see, Canadian concerns for proportionality are found not only in formal Section 1 analyses but also in definitions of the scope of certain rights.[117]) Although the three doctrinal components of proportionality review of means are similarly framed in most jurisdictions that use the doctrine, these elements may be applied somewhat differently by different courts or judges.[118]

116. This is so even where the Canadian Court is sharply divided. *See, e.g.*, R. v. Keegstra, [1990] 3 S.C.R. 697, 734-38, 744-89, 790-96 (Can.) (Dickson, C.J.); *id.* at 844-67 (McLachlin, J., dissenting); Quebec (Att'y Gen.) v. A., [2013] 1 S.C.R. 61, ¶¶ 432-49 (Can.) (McLachlin, C.J.); *id.* ¶¶ 358-80 (Abella, J., dissenting in result). To be sure, there have been divergences in the rigor with which the categories of analysis are applied, and the development of more and less deferential approaches to application of the elements of the proportionality test. *See* Sujit Choudhry, *So What Is the Real Legacy of* Oakes*? Two Decades of Proportionality Analysis Under the Canadian* Charter's *Section 1*, 34 SUP. CT. L. REV. (2d) 501 (2006). Choudhry argues that *Oakes* "created an enormous institutional dilemma for the Court, by setting up a conflict between the demand for definitive proof to support each stage of the section 1 analysis, and the reality of policy making under conditions of factual uncertainty," leading to the development of different standards of deference in areas of factual uncertainty, applied inconsistently. *Id.* at 503. Even if Choudhry's analysis is correct, the *Oakes* test has still considerably narrowed and structured the Canadian Court's analysis of Charter problems.

There are, however, a few cases where the Canadian Court has split on the question of whether *Oakes* should apply at all; in these cases, different frameworks are applied by different justices in the same case. *Compare, e.g.*, Multani v. Comm'n Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (applying Section 1 analysis, rather than administrative review principles), *with* Doré v. Barreau du Quebec, 2012 SCC 12, [2012] 1 S.C.R. 395 (rejecting Section 1 *Oakes* analysis for review of challenged administrative action). Under *Doré*, reviewing courts are to ask whether the administrative "decision reflects a proportionate balancing of the *Charter* protections at play." *Id.* ¶ 57. The inquiry in reviewing specific administrative action is thus itself designed to reflect the Charter values of Section 1: the administrative decision maker is to "ask how the Charter value at issue will best be protected in view of the statutory objectives . . . , [an inquiry] at the core of the proportionality exercise, [which] requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives." *Id.* ¶ 56. More flexible "Charter values" analyses, rather than the formal *Oakes* inquiry, occur in other areas as well. *See, e.g.*, Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 (holding that the Charter does not apply directly to the common law governing private disputes, but that Charter values should inform the balancing process inherent in the development of private common law); *cf.* R. v. Clayton, 2007 SCC 32, [2007] 2 S.C.R. 725 (adopting a common law approach to defining Charter Section 9 limits on non-statutory detention powers, implying that this approach sufficiently takes account of Charter values, over a concurrence arguing for full Section 1 *Oakes* analysis).

117. See *supra* note 116 (describing *Clayton*); *infra* notes 194-195, 198, 201.

118. *See, e.g.*, VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 57-62 (2010) (noting the "margin of appreciation" doctrine of the European Court of Human Rights, which gives states room to maneuver in their adherence to the European Convention, and variations in application of proportionality doctrine); Grimm, *supra* note 2, at 389-

Nonetheless, proportionality doctrine has shown itself capable of providing a stable framework across many controversial issues, in jurisdictions widely recognized as free and democratic constitutional states.

II. OF OLDER TEXTS, CLAUSE-BOUND INTERPRETATION, AND NEGATIVE PRECEDENTS

Despite proportionality's appeal in other countries and its partial presence in some areas of U.S. constitutional law,[119] the Supreme Court treats proportionality in different constitutional arenas as unconnected. Multiple accounts of the relative absence of proportionality from U.S. constitutional law have been offered.[120] As later Parts will argue, this relative absence does not mean that the current situation must remain as it is, nor are the historic reasons for its relative absence reasons against expanding its use today.[121] In this Part, I try to account for why proportionality as a general principle or doctrine has not emerged in the United States.

There are many factors contributing to the relative dearth of proportionality analysis in U.S. jurisprudence, among them a general propensity for what John Hart Ely critically referred to as "clause-bound" interpretation.[122] Unlike

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95 (exploring why Canadian cases are less likely than German cases to rest on "proportionality as such"); Petersen, *supra* note 23, at 2 (noting that the South African Constitutional Court treats the different elements, not as a logically sequenced set of questions as in Canada or Germany, but rather as "part of the overall balancing exercise"); *see also supra* note 84. Likewise, there is considerable debate even among scholars from jurisdictions that invoke proportionality as to its merits. *See infra* Part IV.A; Jackson, *supra* note 79, at 608-09 (noting an early debate among Canadian scholars about the Court's development of the *Oakes* test).

119. *See* Mathews & Stone Sweet, *supra* note 52, at 800 ("American judges chose proportionality in the past and introduced it into our doctrinal DNA."); *see also supra* text accompanying notes 43-52.

120. For two recent accounts comparing U.S. and German development, see BOMHOFF, *supra* note 2; and COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3. Bomhoff is careful to note that his study of German legal culture is focused on balancing in earlier periods, while also noting balancing's connection to proportionality analysis and the arguments of Robert Alexy.

121. *Cf.* Fallon, *supra* note 6, at 1285 (arguing that "strict scrutiny" doctrine "is not a timeless feature of constitutional law, but rather a judicially developed device of relatively recent origin that even now could be abandoned by the Supreme Court at any time"); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1227-28, 1280 (1999) (discussing the possibility of comparison in illuminating falsely felt senses of necessity, while noting the difficulty of distinguishing true from false necessities).

122. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12 (1980); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 29 (1998); BOMHOFF, *supra* note 2, at 196.

some European courts, U.S. constitutional case law has for the most part not aspired to general theoretical connections linking constitutional doctrines in one area to those in another.[123] Moreover, from a comparative perspective, scholars have observed that balancing or proportionality in Germany is associated with rights protection in a frame of constitutional perfectionism, while in the United States balancing is associated with pragmatic ad hocery and limitations on rights.[124]

Several additional reasons relating to the age of the U.S. Constitution also help account for why proportionality has not emerged as an articulated general constitutional principle or doctrine. The Constitution's age affects both the timing of case law development and the contents of constitutional text. Unlike the Canadian Charter of Rights (1982) or the German Basic Law (1949), many of the Constitution's rights provisions date to the late eighteenth and mid-nineteenth centuries. They regularly became the subject of the Court's interpretation in the late nineteenth and early twentieth centuries. An evolving body of U.S. case law had already developed well before the atrocities of World War II and the subsequent explosion of international human rights law. By contrast, in Germany (after 1949) and Canada (after 1982), the highest courts were faced with new rights-protecting instruments, framed by international commitments to human rights, which provided an occasion for affording some degree of coherent interpretation to new constitutional instruments.[125] The U.S. Constitution, moreover, has no general limitations clause, unlike many modern constitutions.[126] Such limitations clauses can provide a textual basis for a gen-

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123. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788 (1999) ("Textual argument as typically practiced today is blinkered ('clause-bound' in Ely's terminology), focusing intently on the words of a given constitutional provision in splendid isolation." (quoting ELY, *supra* note 122, at 12)).

124. *See* BOMHOFF, *supra* note 2, at 191-203; COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 42-43; *see also* text accompanying *infra* notes 139-161.

125. *See, e.g.*, Lorraine Weinrib, *Canada's* Charter*: Rights Protection in the Cultural Mosaic*, 4 CARDOZO J. INT'L & COMP. L. 395, 403-10 (1996) (emphasizing the purposive, coherent initial interpretation of the *Charter*); BOMHOFF, *supra* note 2, at 105-12 (emphasizing the harmonic goals of German Basic Law interpretation).

126. *See generally* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 204-05, 227-37 (2008) (arguing that the limitations clauses of modern constitutions invite the balancing of rights and other interests in ways that detract from the special significance of having a right). On the influence of the limitations clause in the Universal Declaration of Human Rights (to which an American Law Institute committee may have contributed) on new constitutions in the post-World War II period, see JACKSON, *supra* note 118, at 86-87.

eral doctrine of how to justify the infringement of rights, though they are not necessarily the foundation for courts doing so.[127]

As an older constitution, moreover, the U.S. Constitution (as conventionally understood) contains fewer rights and thus gives rise to fewer occasions for conflicts between constitutional principles than many newer constitutions. This is especially true for modern constitutions that enforce both older liberal rights and newer positive rights.[128] Where constitutional rights are many and are viewed as "principles" requiring optimization, as in Germany, approaches that seek to give each principle its proportional due are likely to be of great appeal.[129] In the United States, conflicts between constitutional values—like free press versus fair trial—exist but are perceived to arise less often. This in part reflects the relative terseness of the Constitution and its failure to include positive rights as such. But it also reflects the predominantly negative contemporary view of those rights that do exist.[130] The Court has resisted arguments that would impose positive obligations on the government to enable the realization of rights, except in limited categories, such as the rights to counsel and to appeal in criminal cases. There are accordingly fewer perceived conflicts in rights and thus less felt need to find ways of reconciling such conflicts.[131] The absence of positive obligations also affects other aspects of U.S. doctrine, in ways that

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127. *See* Grimm, *supra* note 2, at 384-86 (noting the significance of Section 1 in Canadian development of proportionality doctrine and also noting the relative insignificance of textual limitations clauses in German courts' development of comparable proportionality doctrine).

128. *See* Adam Liptak, *'We the People' Loses Appeal with People Around the World*, N.Y. TIMES, Feb. 6, 2012, http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html [http://perma.cc/PD8S-LR5F] (identifying the relative paucity of individual rights guarantees as a reason that countries are no longer modeling their constitutions on the U.S. Constitution).

129. *See* Stone Sweet & Mathews, *supra* note 37, at 97-111 (describing the German theory of rights and the historical rise of proportionality analysis in German courts).

130. This "negative-only" view of the rights protected has not always been clearly dominant. *See, e.g.*, Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) (arguing that a theme of recent cases has been the need for affirmative action, in contrast with prior practice, to advance the goal of equality); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that recent decisions should be understood as reflecting a duty to secure minimum levels of welfare).

131. It is perhaps not a coincidence that Justice Breyer, in some cases in which he has argued for some form of proportionality review of statutes, has also seen in those cases First Amendment interests on both sides. *See, e g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("[C]onstitutionally protected interests lie on both sides of the legal equation . . . .").

call for caution in considering methodological shifts that are more than incremental in character.[132]

There are other contributing factors apart from the text and age of the U.S. Constitution. Unlike countries in Europe, the United States is not nested in a tightly woven supranational structure of economic union, nor deeply embedded in an effective regional human rights convention, enforced by a transnational court. Courts in Europe have incentives to draw on, and to anticipate, rulings of the two European courts, each of which relies on forms of proportionality review. Unlike Canada, the United States is not part of the Commonwealth, which has arguably promoted more sharing of jurisprudences across national lines. U.S. courts thus have not experienced to the same degree the flow of cases from national to supranational courts that is common in Europe, nor the regular interchange that occurs among judges of the Commonwealth nations.[133] Its relative isolation from these influences, or those of international tribunals, is reflected both in the hesitation of the political branches to ratify human rights conventions,[134] and in the Supreme Court's recent case law.[135]

Over time, moreover, the U.S. Supreme Court has developed distinctive discourses around rights. U.S. law does not generally discuss rights as being subject to external limitation; when U.S. jurists, lawyers, or scholars say a "right" has been "infringed," this is typically the end of analysis.[136] In Canada,

132. In the United States, even "compelling interests" sufficient to overcome presumptive rights protections are optional, in the sense that governments may choose whether or not to advance them; in Germany, by contrast, the Basic Law is understood to impose some affirmative duties on government. *See* JACKSON, *supra* note 118, at 222-23.

133. *See id.* at 40-41, 55-57, 91-94, 95-97, 99-102, 154, 261 (discussing European integration and the Commonwealth).

134. *See supra* note 38; Louis Henkin, Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

135. *See, e.g.*, cases cited *supra* note 38.

136. This approach is often associated with the idea that rights act like "trumps" over other interests against government action. *See* DWORKIN, *supra* note 34, at xi (calling rights "political trumps held by individuals"); Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 166 (Jeremy Waldron ed., 1984) (describing rights as "trumps over some background justification for political decisions that states a goal for the community as a whole" and arguing that rights are needed "only when some decision that injures some people nevertheless finds prima-facie support in the claim that it will make the community as a whole better off"); *see also* Grégoire Webber, *On the Loss of Rights*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 123 (Grant Huscroft et al. eds., 2014). *But cf.* Fallon, *supra* note 6, at 1316-17 (distinguishing "triggering rights," which prompt strict scrutiny, from "ultimate" rights); Gardbaum, *supra* note 5, at 423-25 (noting instances where the U.S. Supreme Court has identified a "two-step analysis" of rights' infringement and of justifications for limits). Gardbaum suggests that without a textual limitations clause, "[w]here all limits are judicially implied, it is far easier to justify such implication if all limits are thought of as part of the first step, part of the undoubtedly legitimate judicial function of in-

the scope of interests that the right protects is determined first from the perspective of the rights-holder; if the "right" is infringed, analysis does not end, but instead the government's reasons for limitation are then separately considered. Likewise, in Germany, according to a leading scholar of proportionality review, rights that are "principles" are understood to be "optimization" requirements which must be protected to the maximum extent possible but which may be limited if there are strong enough reasons for the government to do so.[137] In the United States, courts often blend the two ideas—which personal interests a right protects, and how the government may legitimately act to limit freedom—and articulate a "right" only after internally accounting for limitations deemed warranted by the government interests.[138]

At the same time, there are distinctively American fears about judging and the role of judges, in part an inheritance of legal realism and critical legal studies (CLS). This kind of skepticism about law, judging, and judges contrasts with German (and European) forms of optimism about the possibility of law as a practice distinct from politics.[139] If legal realism and CLS contribute to a gen-

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terpreting the meaning and scope of a constitutional right, rather than . . . part of the second step of specifying when the right as defined may be overridden." *Id.* at 426.

137. Robert Alexy famously characterized most rights as principles, to be understood as "optimization requirements," whose mandate—to optimally protect those rights—must be evaluated against the government's efforts or obligation to advance and protect against other rights and interests. ALEXY, *supra* note 19, at 47-50.

138. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (asking what the Fourteenth Amendment forbids and finding that "because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment"). In Canada, by contrast, the Court first asks whether the interests advanced by the challenger are protected by the substantive Charter provision relied on before analyzing the government's justifications for its action (although there is debate over the role of particular considerations in the Section 15 equality analysis as compared with the Section 1 justification analysis). *See, e.g.*, Quebec (Attorney General) v. A., 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.); *see also* Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 3, 17 (Vicki C. Jackson & Mark Tushnet eds., 2002) [hereinafter, Weinrib, *Constitutional Comparativism*] (explaining that courts in Canada first examine "the rights themselves" from a purposive perspective, and if there is a finding of a violation, the government then has the opportunity to justify the intrusion on rights); Lorraine E. Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, The Rule of Law and Fundamental Rights Under Canada's Constitution*, 80 CAN. BAR. J. 699, 737 (2001) [hereinafter Weinrib, *Supreme Court of Canada in the Age of Rights*] (asserting that under the Charter, "[p]urposive interpretation is the standard approach" and that "[i]t explicates the normative principles and values that legitimate elevating certain fundamental interests as supreme law and thus as situated beyond the reach of the ordinary political process").

139. *See* BOMHOFF, *supra* note 2, at 54-56; COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 82-93 (contrasting European "epistemological optimism" with U.S. "epistemological skepticism"); *cf.* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971

eral skepticism about the capacity of law to constrain, then fears of judging were also reinforced by what we might call the ghosts of *Lochner*[140] and *Dennis*,[141] two cases that have come to be viewed as "negative precedents," or cautionary notes of what not to repeat.[142]

As Richard Fallon has argued, *Carolene Products* laid the foundation for the Court to develop bifurcated categories of review, including more deferential review of economic regulation and heightened review of laws adversely affecting discrete and insular minorities, the representative process, or the protections of the first eight amendments.[143] The vices of *Lochner* are debated,[144] but *Carolene Products*, and the ensuing bifurcation of standards of review into rational basis and strict scrutiny, responded to two major critiques of *Lochner* by creating a clear hierarchy of rights: it rejected liberty of contract as an object of heightened attention and seemed to limit judicial intrusion on political choices, confining judicial discretion by "committing" the Court to two discrete standards of review,[145] each of which was close to outcome determinative – strict scrutiny almost always fatal; rational basis rarely so.[146]

Yet over time, the persuasive, predictive, and constraining force of this bifurcation diminished. The concept of a rigid division in standards of review was implicitly challenged in Justice Thurgood Marshall's 1970 dissent in *Dan-*

(2004) (contrasting the U.S. commitment to popular will with the European commitment to reason).

140. Lochner v. New York, 198 U.S. 45 (1905). With thanks to the title of Louis Henkin's article, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, *supra* note 134; *see also* Fallon, *supra* note 6, at 1293 ("There can be little doubt that the ghost of *Lochner* overhung constitutional law during the period in which strict scrutiny developed.").

141. Dennis v. United States, 341 U.S. 494 (1951).

142. *See supra* note 33.

143. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

144. "Lochnerism" may refer either to a concern over the judicial role vis-à-vis the legislature, or to a concern with the incorrectness of the *Lochner* Court's substantive economic theory. *See* MORTON J. HORWITZ, THE TRANSFORATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 197, 263 (1992); Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 1-15 (2004) (noting overwhelming though not unanimous condemnation of *Lochner*, and arguing that *Lochner*'s critics had, in addition to the two concerns noted above, concern for Court-created crises of governance, as arguably occurred in the early New Deal). On revisionist understandings of *Lochner* as a principled effort to sustain long-standing legal categories, see Gary D. Rowe, Lochner *Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999) (discussing works by Fiss, Gilman, and Horowitz).

145. *See* Fallon, *supra* note 6, at 1270-71; *see also* David A. Strauss, *Is* Carolene Products *Obsolete?*, 4 U. ILL. L. REV. 1251, 1267-69 (2010) (arguing for the significance and continuing vitality of *Carolene Products*).

146. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

dridge v. Williams,[147] which argued that defining the level of benefits for children in poor families was not the kind of economic regulation of commercial enterprises on which the *Carolene Products* distinction rested.[148] Questioning of the rigid tiers of review has extended to more recent debates about whether sexual orientation is a suspect or quasi-suspect category.[149] With the addition of intermediate scrutiny,[150] as well as hard-to-account-for variations in the application of the various tiers of review,[151] the predictability of these categories has been somewhat diminished.[152] Recent years have also seen some resurgence of enhanced constitutional protection for economic rights, such as in takings jurisprudence[153] and commercial speech cases.[154]

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147. 397 U.S. 471 (1970).

148. *Id.* at 519-25 (Marshall, J., dissenting). A few years later Justice Stevens also criticized the tiered standards of review. *See* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

149. *See, e.g.*, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012) (refusing to apply "rigid categorical rubrics" in invalidating the Defense of Marriage Act); *see also* Recent Case, *Equal Protection – Sexual Orientation – First Circuit Invalidates Statute that Defines Marriage as Legal Union Between One Man and One Woman*, 126 HARV. L. REV. 611, 614 (2012) (arguing that *Massachusetts* should be read as a "contextually sensitive form[] of balancing not subject to" traditional rigidity). The Court was repeatedly ambiguous about the standard of review for discrimination based on sexual orientation, in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), each of which invalidated laws disadvantaging minority sexual orientations and identities.

150. *See Craig*, 429 U.S. 190; *id.* at 218 (Rehnquist, J., dissenting) (using the term "'intermediate' level scrutiny" to describe the Court's approach).

151. *Compare* Plyler v. Doe, 457 U.S. 202 (1982) (applying rational basis scrutiny to strike down a Texas statute imposing a fee to educate unlawful alien children), *with* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979) (applying rational basis scrutiny to uphold ban on employing methadone users); *compare* United States v. Virginia, 518 U.S. 515 (1996) (applying intermediate scrutiny to hold that a ban on admitting women to the Virginia Military Institute, and a remedial order to require that a separate facility be developed for women, were both unconstitutional), *with* Nguyen v. I.N.S., 533 U.S. 53 (2001) (applying intermediate scrutiny to uphold gender-based differences in treatment of children born abroad to American citizen mothers and fathers).

152. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 (2004) (arguing that disputes over the strictness of strict scrutiny and the deference in rational basis review have "shaken the foundations of the Court's three-tiered equal protection framework"); *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (arguing that "strict scrutiny" is applied with varying rigor in different contexts and is often not "fatal").

153. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). The holdings of both cases were seemingly preserved in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546-48 (2005).

154. *See, e.g.*, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

If a reaction to Lochnerism helps explain the initial development of the two-tiered structure of review signaled in *Carolene Products*, the perceived failure of balancing to provide appropriate protection to First Amendment interests in *Dennis*[155] may have contributed to the development of more categorical approaches to restrictions on speech inciting violence, as in *Brandenburg v. Ohio*.[156] Such developments in turn have contributed to the notion that U.S. constitutional law more generally rests or should rest on categorical rules.[157] Concerns for proportionate government action may, however, have informed the development of *Brandenburg*'s categorical rule.[158] Exceptions to free speech rules in recent years, including *Holder v. Humanitarian Law Project*,[159] have cre-

155. Dennis v. United States, 341 U.S. 494, 510 (1951) (plurality opinion) (adopting Learned Hand's balancing formulation, that courts in each case must ask whether the gravity of the "'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"); *id.* at 525 (Frankfurter, J., concurring in the judgment) (suggesting deference to legislative balance, asking "who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts"). *Dennis* has been widely condemned for failing to provide appropriate protection to free speech. *See, e.g.*, Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 117-19, 119 nn.16-17.

156. 395 U.S. 444 (1969) (per curiam). The Court there stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. The test at least appears to focus initially on the nature of the advocacy, rather than on any calculation of benefits and harms as appeared in *Dennis*. *See also* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240-42 (interpreting *Brandenberg* to require express advocacy inciting imminent law violation that is likely to occur). For a categorical approach in the regulation of racist expressions, see *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

157. *See* BOMHOFF, *supra* note 2, at 122-89 (arguing that the U.S. debate over "balancing" as opposed to "categorical" or "definitional approaches" was centered on disputes over the First Amendment arising out of Cold War fears of communism).

158. That is, the *Brandenburg* standard could be understood as having been designed, in part, to help prevent overreactions needlessly restricting speech freedoms. *See* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 930 (2009) ("The *Brandenburg* test . . . could be viewed as defining what regulations are sufficiently narrowly tailored to the government's interest in preventing violence . . . ."); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2454 (1996).

159. 561 U.S. 1 (2010); *see also* Hill v. Colorado, 530 U.S. 703, 719-25 (2000) (treating a law that prohibits approaching persons within one hundred feet of abortion clinics for purposes of education or protest as a content-neutral regulation of speech not subject to strict scrutiny); *cf. R.A.V.*, 505 U.S. 377 (recognizing an exception from the "fighting words" exception to the presumptive ban on content-based regulation of speech).

ated a more complex and less determinate overall structure.[160] Other categorical constitutional rules adopted, for example, in criminal procedure, including Fourth Amendment law, have been followed by arguably even more complex exceptions.[161]

As even our more categorical constitutional rules have become increasingly uncertain and complex,[162] is this a time for some reorientation of U.S. law towards proportionality?

160. *See, e.g.*, Martha A. Field, Holder v. Humanitarian Law Project*: Justice Breyer, Dissenting*, 128 HARV. L. REV. 434, 439 (2014) ("[*Humanitarian Law Project* (*HLP*)] throws wide open our present understanding of First Amendment jurisprudence. What is the dividing line separating cases to be governed by *Brandenburg* and our established First Amendment understandings from cases to be analyzed in accordance with *HLP*?"). On the more general question of the clarity and stability of First Amendment rules protecting speech, see Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011); and Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM L. REV. SIDEBAR 16, 17, 23-26 (2012), http://columbialawreview.org/wp-content/uploads/2012/01/16_Huq.pdf [http://perma.cc/C4E7-6Q8G], which notes "discontinuity" between material support and campaign finance case law and expresses "skepticism" about possible justifications for the variances.

161. The Warren Court period saw a number of prophylactic constitutional rules of criminal procedure develop, including *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), applying the Fourth Amendment exclusionary rule to the states to hold that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible," and *Miranda v. Arizona*, 384 U.S. 436 (1966), providing bright-line rules for the treatment of in-custody suspects before they could be interrogated. *See generally* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (describing the *Miranda* Court's prophylactic approach). Similarly categorical rules to protect criminal defendants' constitutional rights developed in other areas. *See* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1500-01 (2006). These rules, however, became complicated by numerous exceptions (and an increased rhetoric of balancing), *see id.* at 1502-03, notably in exceptions to the Fourth Amendment exclusionary rule, *see* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504-20 (1996). If the Warren Court's criminal procedure decisions migrated from standards to rules that sought to ease administrability and deter police misconduct, more recent cases have developed other bright lines to protect police misconduct from judicial review. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (holding that other circumstances are irrelevant to the validity of an arrest once an officer has probable cause based on what he saw to believe an offense was committed); Whren v. United States, 517 U.S. 806 (1996) (holding that a police officer's subjective intentions are irrelevant to evaluating the constitutionality of a traffic stop, as is a violation of local regulations).

162. *See* Fallon, *supra* note 6, at 1297-1300, 1302-03 (noting inconsistencies in the application of strict scrutiny and the development of intermediate scrutiny tests in several areas, commenting that "the introduction of an intermediate tier of scrutiny signals that the Supreme Court no longer feels the need for the degree of self-discipline that it once developed a mostly two-tiered doctrinal structure to provide," and arguing that there are now three different "strict scrutiny" tests, only one of which is close to categorical); *see also supra* note 152.

III. BENEFITS OF PROPORTIONALITY REVIEW FOR U.S. CONSTITUTIONAL LAW

In this Part, I argue that in at least two areas of constitutional law, greater reliance on proportionality would beneficially enhance the protection of individual rights. Working from the facts to the law in the common law tradition, Part A considers recent Fourth Amendment case law in which the Court rejected arguments that arrests, or searches related to pretrial detention, should be limited by proportionality principles, and it contrasts such decisions with Canadian case law. Part B explores how the absence of a "proportionality as such" inquiry diminishes the force of U.S. rules against content-based regulation under strict scrutiny, using *Humanitarian Law Project* as an example. Finally, Part C advances some more general, theoretical arguments for increased use of structured proportionality review and proportionality as a principle in constitutional adjudication.

A. *Regulating Police Behavior Under Constitutional Norms*

1. Atwater v. City of Lago Vista *and Fourth Amendment Case Law*

In *Atwater v. City of Lago Vista*,[163] the Court found no Fourth Amendment violation in the arrest of a motorist for a non-jailable traffic offense.[164] Atwater was driving her two young children in their neighborhood when she was stopped by a police officer for not wearing her seatbelt and not having her children in seatbelts.[165] Arresting Atwater, the officer denied her request to ask a neighbor to care for the children, indicating that he would bring them to the police station.[166] Atwater's hands were cuffed behind her back; she was placed in the back of the police car—without a seatbelt—and driven to the station.[167]

163. 532 U.S. 318 (2001).

164. *Id.* at 323.

165. *Id.* at 323-24. The officer shouted at Ms. Atwater "We've met before," and "You're going to jail!"; he had previously stopped her in the same neighborhood, mistakenly thinking she had commited a seat belt offense. *Id.* at 324 & n.1; Atwater v. City of Lago Vista, 195 F.3d 242, 252 (5th Cir. 1999) (Dennis, J., dissenting); *see also id.* at 248 (Wiener, J., dissenting) (stating that the facts would have supported a jury verdict that the officer had "a personal crusade or possibly even a vendetta"); *id.* at 246 (Garza, J., dissenting) (asserting that as a Texas lawyer for sixty years and an Article III judge in Texas for thirty-eight years, he knew that ordinarily a traffic stop like this would result in a citation and concluding that the officer acted unreasonably and in violation of the Fourth Amendment).

166. *Atwater*, 532 U.S. at 368-69 (O'Connor, J., dissenting). A neighbor then happened to come by and took charge of the children. *Id.*

167. *Id.* at 369.

She was released about an hour later, paid a $50 fine for the seat belt offense, and discovered her car had been towed.[168] She sued for damages, including distress-related medical costs for herself and one child.[169]

The Court described the police officer's conduct in arresting the motorist as involving "merely gratuitous humiliations" and inflicting "pointless indignity and confinement."[170] Indeed, the Court wrote, her claim "clearly outweighs anything the City can raise against it specific to her case."[171] Acknowledging that "*[i]f we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail*," the Court noted that Atwater was an "established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation."[172]

Yet the Court rejected Atwater's Fourth Amendment challenge: history suggested and functional concerns required that police officers be treated as having lawful discretion to arrest for *any* offense with probable cause.[173] To hold otherwise, according to the Court, would impose unwarranted burdens on police officers of knowing details of criminal codes and anticipating likely charging decisions, thereby creating incentives to under-enforce criminal law by officers making split-second decisions.[174] (A similar structure of analysis is found in *Florence v. Board of Chosen Freeholders*,[175] involving visual strip and cavity searches at pretrial detention facilities.[176])

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168. *Id.* at 324 (majority opinion).

169. Atwater v. City of Lago Vista, 165 F.3d 380, 383 (5th Cir. 1999).

170. *Atwater*, 532 U.S. at 346-47.

171. *Id.* at 347.

172. *Id.* at 346 (emphasis added).

173. *Id.* at 342-45, 347-54.

174. *Id.* at 348-51.

175. 132 S. Ct. 1510 (2012).

176. The *Florence* Court described how, after passing through a metal detector, all arriving detainees

> were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Apparently without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. This policy applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process.

Id. at 1514 (citations omitted). Petitioner argued that the detention facility should sort pretrial detainees accused of more serious offenses from those accused of less serious offenses and graduate the intrusiveness of the searches accordingly, unless there was some particular basis for suspicion that an arrestee might be concealing dangerous substances. In *Florence*, as

If a case like *Atwater* had arisen in Canada, the first question the Canadian Court would likely have addressed is whether the plaintiff had interests protected by the provisions analogous to the Fourth Amendment.[177] The first question in fact addressed by the *Atwater* Court was the scope of common law authority to make an arrest.[178] Had the U.S. Court followed the structured proportionality review approach, it would have considered whether Atwater's interests were within the scope of interests protected by the Fourth Amendment before going on to consider whether the search or seizure was justified, that is, reasonable. The amendment's text plainly suggests that searches and seizures must be reasonable. It provides: "The right of the people to be secure in their persons . . . against *unreasonable* searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[179] The U.S. Supreme Court did not conduct its analysis in this order. Moreover, it did not address potential harm to Atwater's children.[180]

Whether "the people" can feel "secure in their persons" knowing that any traffic infraction can result in their being jailed deserves more attention. Justifications that sound only in authority, based on common law practice, are not so

in *Atwater*, the Court rejected arguments that a more individualized approach was constitutionally required to avoid disproportionately humiliating or intrusive treatment. *See id.* at 1517-18 (citing *Atwater*, 532 U.S. at 347, for the proposition that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need").

177. In resolving the threshold question of Charter Section 8, whether a "search" or "seizure" has occurred, the Canadian Court considers whether the challenger had a "reasonable expectation of privacy," R. v. Edwards, [1996] 1 S.C.R. 128, ¶¶ 30-39 (Can.); for Section 9, in resolving the threshold question whether a challenger was "detained," the Court asks whether a reasonable person in the position of the accused would feel she was free to go or had to comply with police requests, considering both physical and psychological coercion. *See* R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353, ¶¶ 20-21, 24-29 (Can.).

178. 532 U.S. at 326-40.

179. U.S. CONST. amend. IV (emphasis added).

180. Although harm to third parties might seem obviously relevant to determining the reasonableness of a search or seizure, in *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014), the Court held that the presence of a passenger in a car driven by a fleeing felon was irrelevant to whether the felon's Fourth Amendment rights had been violated when police fired fifteen shots into the vehicle. The Court's reasoning was that Fourth Amendment rights are personal, not vicarious. *Id.* Under proportionality analysis, or any substantive analysis of reasonableness, it is hard not to think that the possibility of "collateral" injury bears on the "reasonableness" of the police officers' actions. *See, e.g.*, R. v. Thompson, [1990] S.C.R. 1111, 1143-45 (Can.) (noting that failure to take steps to prevent wiretapping of many members of the public's conversation is a basis for finding "unreasonableness" of a search under Section 8). Subsequent Canadian case law holds that third-party interests are not relevant to whether the claimant was subject to a "search or seizure" but may well be "relevant in the second stage of [Section 8] analysis, namely whether the search was conducted in a reasonable manner." *Edwards*, [1996] 1 S.C.R. ¶¶ 34-38.

persuasive to the modern ear; and proportionality tests do not stop with the question of authorization.[181] The Court's methodology, which defined the rights at stake only in relation to an ambiguous common law history and its analysis of the government's interests, left an essential aspect of the question under-explored.

The *Atwater* Court did engage in some balancing or weighing of government needs in deciding between a case-by-case or rule-based approach, and it chose a categorical rule. The Court treated police officers as needing prophylactic protection, reasoning that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."[182] The Court made empirical judgments—concerning the supposed dearth of abusive arrests and the need to avoid "a systematic disincentive to arrest"—in order to strike "a responsible . . . balance" through its categorical rule.[183]

As the dissenters argued, qualified immunity doctrine already protects officials from monetary liability under unclear legal standards.[184] Some focus on the proportionality of the officer's conduct, examining the reasons for this conduct, would have little potential for interference with law enforcement and would better protect citizens' rights to be secure in their persons.[185] Yet the Court offered little discussion of the scope of the interests protected by Fourth Amendment rights or of why the police officer did not use less restrictive alternatives reasonably available to him; its suggestion that the political process could control abuses,[186] and its reference to a possibly different approach in "extraordinary" circumstances,[187] left the decision only partially justified and partially transparent.

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181. *See* BARAK, *supra* note 22, at 107-24 (discussing the requirement of authority for limiting rights, as an inquiry that precedes proportionality analysis of the means used); *id.* at 243-454 (discussing the elements of proper purpose, rational connection, minimal impairment, and proportionality as such); *cf.* BEATTY, *supra* note 1, at 45-46 (discussing how the German Constitutional Court seeks to "evaluate and reconcile the competing interests" rather than to rely on textual exegesis or case law). In minority communities, the need for adequate justificatory accounts may be particularly acute. *See infra* text accompanying note 249.

182. *Atwater*, 532 U.S. at 347.

183. *Id.* at 347, 351.

184. *Id.* at 367 (O'Connor, J., dissenting).

185. *See id.* ("[Qualified immunity] allays any concerns about liability or disincentives to arrest.").

186. *Id.* at 353 (majority opinion).

187. *Id.* at 353-54.

2. *A Canadian Comparison*

For comparison, let's turn briefly to a recent Canadian decision[188] concerning the Canadian Charter's constitutional protections of the "right to be secure against unreasonable search or seizure"[189] and "the right not to be arbitrarily detained or imprisoned."[190] In *Aucoin*, a Canadian police officer made a traffic stop because of a license plate irregularity; on questioning the nineteen-year-old driver, the officer found that he had consumed alcohol in violation of traffic laws prohibiting new drivers from drinking.[191] Having decided to give the driver a ticket, the officer also decided to place the driver in the back of the police car while he wrote up the citation.[192] For safety reasons, the officer conducted a pat-down search before putting the driver in the back of the patrol car and during that search discovered illegal drugs.[193] The parties and the Court agreed that the initial detention of the driver in the traffic stop was lawful. The question was whether the decision to put the driver in the back seat of the patrol car was a reasonable exercise of the authority to detain.[194]

In the Canadian Court's words, the issue was not whether there was authority to detain, but whether the officer was *justified in exercising the authority as he did.*[195] It was the "shift in the nature and extent of . . . detention" for "two relatively minor motor vehicle infractions" that created the constitutional viola-

188. R. v. Aucoin, 2012 SCC 66, [2012] 3 S.C.R. 408 (Can.).

189. Canadian Charter of Rights and Freedoms § 8, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

190. *Id.* § 9.

191. *Aucoin*, [2012] 3 S.C.R. ¶¶ 2-3, 55.

192. *Id.* ¶ 4.

193. *Id.* ¶¶ 5-7.

194. *See id.* ¶ 30. Aucoin challenged the lawfulness of the pat-down search, which in this factual context, turned on whether under Section 9 of the Canadian Charter, "securing the appellant in the cruiser . . . was reasonably necessary"; the Court found that it was not, and thus there was no authority for the pat-down search. *Id.* ¶¶ 30, 44; *see infra* note 201. The issue in the case was the reasonableness of the officer's actions, not whether a statute found to infringe a Charter right could be "salvaged" by a Section 1 proportionality analysis; the Court's application of the reasonable necessity requirement for detentions under Section 9 incorporates concern for the proportionality of police actions. *See Aucoin*, [2012] 3 S.C.R. ¶ 44; R. v. Clayton, 2007 SCC 32, [2007] 2 S.C.R. 725, ¶ 21 (Can.).

195. *Aucoin*, [2012] 3 S.C.R. ¶ 35 ("I do not see this case as turning on whether Constable Burke had the *authority* to detain the appellant in the rear of his police cruiser, having lawfully stopped him for a regulatory infraction. Rather, the question is whether he was justified in *exercising it* as he did in the circumstances of this case."); *cf.* R. v. Collins, [1987] S.C.R. 265, 278 (Can.) (stating that a search is unreasonable and in violation of Charter Section 8 unless the search "is authorized by law[,] . . . the law itself is reasonable[,] and . . . the manner in which the search was carried out is reasonable").

tion.[196] Placing the driver in the back seat of the police car, especially with the accompanying pat-down, "increased restrictions on the appellant's liberty interests . . . [and] altered the nature and extent of the appellant's detention in a fairly dramatic way—especially when one considers that the infractions for which he was being detained consisted of two relatively minor motor vehicle infractions."[197] Given the minor character of the offense, the decision to detain in the car did not meet the test of being "reasonably necessary" under all the circumstances, and so the detention and accompanying pat-down were not constitutional.[198] The Canadian Court was unanimous in this holding.[199]

Canadian law thus adopts an alternative approach, insisting on a more case-by-case approach to examining whether a police authority has been exercised in a reasonable and proportionate way.[200] A comparison with *Atwater*

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196. *Aucoin*, [2012] 3 S.C.R. ¶ 34.

197. *Id.*

198. *See id.* ¶¶ 36-42 (evaluating reasonable necessity "in the totality of the circumstances" of the particular case). The Court also noted that there were less intrusive alternatives available, including waiting for back-up (which was "close at hand") before writing the ticket. *Id.* ¶ 42. It added that "a different factual matrix may well have supported a finding of reasonable necessity," *id.* ¶ 43, consistent with Canadian case law's emphasis that the question whether a detention is "reasonably necessary" is a highly contextual one. *See Clayton*, [2007] 2 S.C.R. ¶ 31 (explaining the need to consider "the nature of the situation, including the seriousness of the offence, . . . information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances," in order to "balanc[e] the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk").

199. Notably, the Court split on whether the cocaine obtained from the search should be admitted into evidence, with a majority ruling in favor of admissibility. *See infra* Part V.B (discussing Canada's more flexible remedial rule, how it differs from the U.S. exclusionary rule, and possible implications for comparative purposes). Scholarly commentary to date on *Aucoin* has mostly focused on the exclusion from evidence question and criticized the majority for allowing the evidence in. *See* Solomon Friedman & Michael A. Johnston, *A Supreme Court that Is* Granting *Power to the State, Not the* Mann, 60 CRIM. L.Q. 555, 567-70 (2014); W. Vincent Clifford, R. v. Aucoin*: Attenuating Circumstances or a Right Without a Remedy?*, FOR THE DEFENCE (Criminal Lawyers' Assoc., Toronto, Can.), June 2013, at 2; *cf.* Steve Coughlan & Robert J. Currie, *Sections 9, 10 and 11 of the Canadian Charter*, *in* CANADIAN CHARTER OF RIGHTS AND FREEDOMS 801-02 n.28 (Errol Mendes & Stéphane Beaulac eds., 5th ed. 2013) (discussing *Aucoin*'s reining in of common law police powers).

200. Although concern for effective crime control lies behind the U.S. Supreme Court's analysis in many cases, including *Atwater*, it is difficult to determine the relationship of particular legal approaches to effective crime control or levels of criminal activity. For comparative analysis of the U.S. and Canadian criminal justice systems, see, for example, Marc Ouimet, *Crime in Canada and the United States: A Comparative Analysis*, 36 CAN. REV. SOC. 389, 405 (2008) (describing the role of gun ownership and residential patterns as determinants of criminal activity). While property crime rates may be higher in Canada, Ouimet, *supra*, at

suggests that some form of more individualized proportionality analysis may produce decisions that are both better reasoned and more protective of rights than the "categorical approach" employed by the U.S. Court.[201]

B. *"Strict Scrutiny" and the First Amendment*

The First Amendment is an area in which U.S. law is typically described as being based on presumptive or definitional categories.[202] Would U.S. First Amendment law be improved by more attention to proportionality? If, for example, in applying the categorical presumption against content-based regulation, courts used as an additional test the question of "proportionality as such" from structured proportionality doctrine? Or if, in defining exemptions from the categorical presumption against content-based regulation, more attention were given to the principle of proportionality? To begin to answer these questions, consider first the Court's recent decision in *Holder v. Humanitarian Law Project.*[203]

The case involved a challenge to a criminal statute prohibiting material support to designated terrorist groups. The challenge was brought by U.S.-

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405, Canadians are less likely to be the victims of homicide, aggravated assault, or robbery than are residents of the United States, *see* Maire Gannon, Juristat, *Crime Comparisons Between Canada and the United States*, JURISTAT (Can. Centre for Just. Stat., Can.), Dec. 18, 2001, at 2, 4; Ouimet, *supra*, at 405, and have greater trust and confidence in the police than do Americans, *see* Sanja Kutnjak Invkovic, *A Comparative Study of Public Support for the Police*, 18 INT'L CRIM. JUST. REV. 406, 422, 425 (2008); Julian V. Roberts, *Public Confidence in Criminal Justice in Canada: A Comparative and Contextual Analysis*, 49 CAN. J. CRIMINOLOGY & CRIM. JUST. 153, 167–68 (2007). By contrast, U.S. governments were reported to expend more per capita on policing and criminal justice than did Canada. *See* Frans van Dijk & Jaap de Waard, *Key Findings from the Study* Legal Infrastructure of the Netherlands in International Perspective: Crime Control, 8 EUR. J. ON CRIM. POL'Y & RES. 517, 523 (2000).

201. *Aucoin* found infringements of Charter Sections 8 and 9, but it did not go on to ask whether the actions were nonetheless justified under Section 1. The infringement of Section 9 arose because the detention in the car and accompanying patdown were not reasonably necessary; Section 8 was therefore violated because the search was not authorized by law, which also precluded justification under Section 1. The leading Canadian constitutional law treatise states that although the author believes Section 1 may apply to salvage a Section 8 infringement, "there is no illustrative case." PETER HOGG, CONSTITUTIONAL LAW OF CANADA 48-2 (5th ed. 2007). To uphold such an infringement of Section 8 under Section 1, one would have to find that it was "demonstrably justified" to act in a manner determined to have been unreasonable – a logical conundrum.

202. *See, e.g.*, Farber, *supra* note 158; Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5 (1992); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); *cf.* Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727, 774 (1996) (Souter, J., concurring) (discussing the importance of "keep[ing] the starch in" free speech doctrine).

203. 561 U.S. 1 (2010).

based NGOs that sought, inter alia, to provide training to certain designated terrorist groups (such as the Kurdistan Workers' Party (PKK) in Turkey) about how to invoke international law processes to advance their claims. Concluding that the statute involved a content-based regulation of speech, the Court nonetheless upheld the statute in light of the government's interest in combatting terrorism.[204]

The protective power of the categorical approach is called into question by this decision. The Court in *Humanitarian Law* failed even to mention an arguably controlling decision from 1969, *Brandenburg v. Ohio*,[205] which had held that speech believed to incite violence could be banned only when the speech's character was an incitement to imminent action and likely to cause imminent lawlessness. Under *Brandenburg*, it would have been difficult to uphold the material support statute as applied to speech designed only to promote lawful invocations of international procedures, as the speech had neither the purpose of inciting nor a likelihood of causing imminent lawlessness.[206]

As noted, the *Humanitarian Law* Court concluded that the statute regulated speech based on its content; it therefore subjected the statute to strict scrutiny, rejecting the government's argument for intermediate scrutiny.[207] The Court indicated that the correct standard to apply was "the more rigorous scrutiny" found in such cases as *Cohen v. California*,[208] *Texas v. Johnson*,[209] and *R.A.V. v.*

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204. *Id.* at 39-40.

205. 395 U.S. 444 (1969). *Brandenburg* had seemingly brought to a stable end the Court's half-century struggle to reconcile government efforts to suppress speech believed to be dangerous to the government with the First Amendment's protections of freedom of expression. For an account of that struggle, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1070-76 (7th ed. 2013) and sources cited therein.

206. *See Humanitarian Law Project*, 561 U.S. at 44 (Breyer, J., dissenting) ("No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*."); Field, *supra* note 160, at 438. Another line of cases, arising out of anti-Communist laws of the 1950s, suggested that under First Amendment freedom of association, the constitutionality of punishing membership in an organization with some unlawful goals depended on whether the membership was "active," in the sense of intending to aid in the accomplishment of those unlawful goals. Scales v. United States, 367 U.S. 203, 229-30 (1961); *see also* Field, *supra* note 160, at 437. Under this line of cases, it was argued in *Humanitarian Law Project* that plaintiffs could not be sanctioned for providing assistance toward the lawful goals of designated terrorist organizations; the Court, however, did not apply this line of cases either, suggesting that the statute did not bar "membership" or discussion but only the provision of "training" or other "services," 561 U.S. at 18.

207. *Humanitarian Law Project*, 561 U.S. at 26-27 ("*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech, and § 2339B regulates speech on the basis of its content." (citations omitted)).

208. 403 U.S. 15, 26 (1971) (requiring a more "particularized and compelling" justification to suppress speech and reversing conviction for breach of peace for wearing a jacket with a vulgar expression on it in a courthouse); *Humanitarian Law Project*, 561 U.S. at 27-28.

City of St. Paul.[210] Although the Court was less than clear on precisely what that standard was, it appeared to be "strict scrutiny."[211] The parties all agreed that combatting terrorism was a compelling government interest. The Court emphasized that the prohibition was narrow, insofar as it did not prohibit "independent" advocacy, and applied only to "knowing" support.[212] As applied to teaching terrorist groups how to petition international agencies, the Court concluded, the ban was sufficiently connected to combatting terrorism for three reasons: to prevent the freeing up of "fungible" resources that could be directed to unlawful acts; to obstruct terrorist groups from acquiring "legitimacy";[213] and to avoid difficulties in relationships with allies in the fight against terrorism.[214] In responding to plaintiffs' argument that there was no need to prohibit

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209. 491 U.S. 397, 412 (1989) (subjecting content-based prohibitions of expressive conduct—desecrating a venerated object, the American flag—to *Boos v. Barry*'s "most exacting scrutiny," which the state's asserted interest in promoting national unity did not meet); *Humanitarian Law Project*, 561 U.S. at 28. According to *Boos v. Barry*, "most exacting scrutiny," as applied to political speech in a public forum, required meeting the compelling interest/narrow tailoring standard. 485 U.S. 312, 321 (1988). *But cf. Humanitarian Law Project*, 561 U.S. at 26 (denying that the prohibition was a pure regulation of political speech, because it was a prohibition of material support, albeit a content-based regulation of speech).

210. 505 U.S. 377, 395 (1992) (holding that a prohibition of cross-burning and other expressive conduct causing annoyance or offense based on race or color was a form of content-based regulation that could be justified only by a compelling government interest in a narrowly tailored statute, a standard not met there); *Humanitarian Law Project*, 561 U.S. at 27.

211. *See supra* notes 208-210.

212. *Humanitarian Law Project*, 561 U.S. at 26, 30, 39.

213. *Id.* at 30. Moreover, the Court reasoned, teaching international law to terrorist groups could be prohibited because "[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt." *Id.* at 37. The potential for disruptive, manipulative use of legal knowledge is, however, pervasively present.

214. *Id.* at 32-33. As the dissent notes, preventing "legitimacy" is a doubtfully legitimate goal of statutes prohibiting speech; and the other two goals had little empirical support with respect to activities like those of the plaintiffs. *Id.* at 47-52 (Breyer, J., dissenting). It is, moreover, unclear whether Congress intended the statute to apply to the plaintiffs' activities: the statute itself, 18 U.S.C. § 2339B(i) (2012), states that "[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment." The government had argued aggressively that the statute was *not* a content-based regulation of speech, but only a regulation of conduct with incidental effects, reviewable under intermediate scrutiny. *See Humanitarian Law Project*, 561 U.S. at 26. The Court disagreed, concluding that the statute was a content-based regulation of speech. *Id.* at 27. Given the government's argument, however, Congress may not have realized that the statute could be applied as a content-based regulation of speech. It is therefore uncertain whether its provisions were intended to apply to these activities. *Cf.* Weinrib, *Supreme Court of Canada in the Age of Rights*, *supra* note 138, at 740 (arguing that Canadian law's requirement that a challenged act be authorized or "prescribed by law" in a statute or regulation ensures that democratic deliberation has been brought to bear on laws limiting the exercise of rights).

their nonviolent education and training activities, the Court further accepted Congress's finding that "any contribution" to a terrorist organization facilitates its terrorist conduct – a finding the Court found was "justified" in an area where concrete information was often unavailable but serious risks were real.[215] This deference to the government raises echoes of *Dennis* and casts further doubt on the constraining character of the "categorical" approach to free speech.

There is much to debate about the Court's analysis in *Humanitarian Law*; I focus here only on two methodological points relating to structured proportionality analysis.

First, it is possible to understand the Court as saying that the statute was sufficiently narrowly tailored to the government's compelling interest in combatting terrorism.[216] It is not clear, however, how seriously the Court took the idea of narrow tailoring (which is analogous to the minimal impairment step); it did not, for example, explain how the "contribution" of training in international law could be "fungible" with support for terrorist activities, in the way other forms of contribution (such as money) could be. It arguably applied a less stringent means-ends test of whether the prohibition could be said rationally to serve the government's asserted interests at all.[217] What the Court may really have been conveying was the overriding importance of the government interest relative to the free speech interests affected by the specific statutory prohibition. Had the Court followed a more structured analysis[218] it would be

215. *Humanitarian Law Project*, 561 U.S. at 28-30. *But cf. supra* note 214 (questioning whether Congress intended such a reading of the statute).

216. *Id.* at 26 ("[T]he statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.").

217. *See id.* at 28-32 (explaining various reasons why Congress was "justified" in thinking that cutting off all material support would help weaken or delegitimize terrorist groups); *id.* at 33-35 (explaining why the Court accepted the Executive Department's affidavits that it is not "possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities," without requiring the government to show that speech to provide training in international law has the same potential for supporting violent activities as other forms of material support aimed at nonviolent activity, for example, contribution of funds for food).

218. Under *Oakes*, even if a restriction on expression is rationally related to a pressing and important government interest, and even if the restriction minimally impairs the plaintiff's speech rights, the courts must, in order to sustain it, find that the statute is proportionate as such – meaning that the objective advanced was more significant than the harm to the plaintiff's expressive rights. Under U.S. "strict scrutiny," a statute that passed the first two queries would be upheld, regardless of whether the harm to rights were greater or less than the benefit towards compelling interests. *Humanitarian Law Project* might be understood as relaxing the narrow tailoring/least restrictive alternative test in light of its implicit evaluation of "proportionality as such" in matters involving terrorism. *See infra* note 223. Alternatively,

easier to understand whether the Court was modifying (or abandoning) narrow tailoring as a requirement in some class of national security cases. Second, addressing all of these elements might not only clarify the doctrine but also better protect free speech, which is always under particular stress during times of war or perceived security threats. Governments that will be held accountable for failures of security may in good faith believe that broad prohibitions on "support" are needed to provide the greatest assurance against future terrorism, without necessarily considering whether any marginal gain in security by prohibiting peaceful speech, in the form of teaching foreign groups about international law, justifies the harm to free speech values. "Least restrictive alternative" analysis might be understood to accept the government's goals (assuming they are "compelling") without evaluating their relative force vis-à-vis intrusion on rights. The added question of "proportionality as such" enables a court, even as it defers to government expertise on the nature of security risks, to exercise independent judgment on whether the risk reductions justify the harm to free speech rights.[219] Because U.S. courts do not use structured proportionality doctrine in their constitutional jurisprudence, they may not even consider the appropriate relationship of government goals to free speech rights, captured by "proportionality as such," or may do so *sub silentio*, to the detriment of both rights protection and the transparent and consistent development of constitutional law.

Consider, again, *United States v. Alvarez*,[220] the Stolen Valor Act case. A separate evaluation of the "less restrictive means" and "proportionality as such" tests might have clarified the decision. Although both the plurality and Justice Breyer asserted that the criminal statute could not be upheld because the government's interest in protecting the integrity of military medals could be advanced by other means, the plurality opinion, at least, was unclear about

Humanitarian Law Project might be understood as accepting that there was no other way to advance the government's interests in preventing terrorist groups from gaining legitimacy or persuading allies of the seriousness of U.S. anti-terrorism commitments. But under the *Oakes* test, even if there were no less restrictive and equally effective alternative to these ends, courts would in theory still ask whether the relative advancement of the government's goals would justify so severe a limitation on speech and associational activities.

219. *Cf.* BARAK, *supra* note 22, at 414 (arguing that while the government has expertise and competence on security risks, the court has expertise in the protection of rights); *see also* HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel, 58(5) PD 807, 845 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 264, 304 ("The military commander determines whether the separation fence will pass over the hills or in the plain. That is his expertise. We [the judges] examine whether the harm caused by this route to the local inhabitants is proportional. That is our expertise.").

220. 132 S. Ct. 2537 (2012).

whether other mechanisms were or needed to be viewed as equally effective.[221] Arguably, both the plurality opinion and Justice Breyer's combined the "less restrictive means" test with a *sub silentio* evaluation of "proportionality as such."[222] Important as the integrity of military honors may be, it may not have warranted an ex ante effort to suppress even false speech through a broad criminal sanction, if the goal of protecting military honors could have been served through less restrictive measures – even if those alternative measures were not quite as effective as a criminal sanction in deterring false claims. If this captures what the Justices in the majority were thinking, then "proportionality as such" might have better explained what motivated the decision.[223] Even if the outcome were not changed through the adoption of a structured proportionality approach, the Justices' reasoning would have been clarified.

221. *Id.* at 2551 (plurality opinion) (stating that when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives," but not indicating whether the other means must be equally effective) (citation omitted); *see also id.* at 2555 (Breyer, J., concurring in the judgment) (asking "whether it is possible substantially to achieve the Government's objective in less burdensome ways").

222. Justice Breyer's opinion is explicit in applying an "intermediate" form of scrutiny, because government prohibitions on intentional lies are not as harmful as other kinds of content-based distinctions. *Id.* at 2551-52. He concludes that "the statute risks harming protected interests but only in order to achieve a substantial countervailing objective," and thus turns to the question whether less burdensome means are available, and concludes that the government had not met its burden of showing that such alternatives were not available. Whether his standard of "substantially" achieving the government's objective is intended to convey that the alternative is "equally" effective remains unclear. *See id.* at 2556 (stating that "it is likely that [alternatives] will effectively serve Congress' end"). Justice Breyer's opinion can perhaps be best understood through the lens of the burden of persuasion, a burden he found the government did not meet.

223. *Cf.* Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, ¶ 149 (Can.) (Abella, J., dissenting) ("It is possible . . . to have a law, which is not minimally impairing but may, on balance, given the importance of the government objective, be proportional."). Justice Abella's comment, which I do not read to suggest a departure from Canada's structured sequence of questions, is intriguing. Although under conventional applications of structured proportionality doctrine use of a means that is broader than necessary would end analysis, to invalidate a statute on this ground, where the statute is otherwise proportional, might even be considered excessive in light of the problems of legislative inertia. That is, even if a legislature would favor enactment of a more narrowly drawn law to replace one too broadly drawn, this may not occur – especially in a separated powers system – because other matters crowd the legislative agenda, or because of conflicts between legislature and government. A more relaxed approach to "minimal impairment" where the intrusion on rights is relatively small and the benefit to a very important government goal is significant might be, in a sense, more proportionate than invalidating the law, once the risks of legislative inertia are considered.

C. *Theoretical Benefits of Proportionality Review in Deciding Rights Claims*

This Part will now identify at a more general level several benefits to be derived from judges applying proportionality doctrine or principles in evaluating rights claims. First, experience elsewhere suggests that structured proportionality review provides a stable framework for persuasive reason-giving, thereby enhancing the transparency of decisions, unlike more opaque forms of balancing.[224] Second, proportionality analysis helps to bridge the roles of courts and legislatures. It requires legal authorization for infringement of rights; it also identifies criteria—to which legislatures are competent to speak—that form part of the justificatory process. Third, reliance on proportionality principles can help bring law closer to the community's sense of justice, in part by cultivating the art of judgment by judges and lawyers. Fourth, attention to proportionality can help identify, and respond to, process deficiencies in governance.

1. *Structured and Transparent Reason-Giving with Broad Justificatory Appeal*

Proportionality analysis in Canada and some other jurisdictions provides a structured and transparent mode of reason-giving that produces justifications likely to be meaningful, or at least understandable, to the parties and other audiences for constitutional courts' decisions. The sequencing and defined order of proportionality review of constitutional rights claims in Canada has provided a more or less stable doctrinal framework within which disagreements are conducted.[225] It also contributes to the relative accessibility and transparency of the Court's reasoning. The stability of the methodology, and its widespread acceptance, enables the Canadian justices' disagreements to focus on matters that are understandable by the parties as substantively relevant to the contested issue; such opinions also make accessible to readers the nature of the justices' disagreement, and the divergent evaluations they may give to the same factors.[226] The sequencing of analysis may be contrasted with more "free form"

224. *See* Aleinikoff, *supra* note 15, at 976 (discussing the "black box" of balancing).

225. *See, e.g.*, Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 830-32 (2004) (book review); Stone Sweet & Mathews, *supra* note 37, at 90 ("[Proportionality analysis] clearly indicates to litigating parties the type and sequence of arguments that can and must be made, and the path through which the judges will reason to their decision.").

226. *See* Jackson, *supra* note 225, at 831; Stone Sweet & Mathews, *supra* note 37, at 96-97. This structured analysis may also have the beneficial effect of encouraging judges to articulate the actual reasons for their opinions. *See* Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 22-23 (1988) (emphasizing the importance of "real reasons" that "reflect the thought processes of the writer and of those colleagues joining in the opin-

evaluations in well-known U.S. balancing cases.[227] In the United States, however, different Justices may well continue to deploy different methodologies, and so some of the structured transparency and consistency gains of a Canadian-style approach might not be realized.

In addition to its benefits in structuring and making more transparent the reasoning of the different justices, proportionality review—by embracing a wider range of reasons than those that resort to text, precedent, and history alone—may increase the persuasive value of the decisions to both the parties[228] and the broader public. As Cass Sunstein has written, "[i]n American constitutional law, government must always have a reason for what it does."[229] Frank Michelman's work emphasizes the connection between government reason-giving and equality of persons.[230] Authority to act is not the same as a reason to act; authority alone does not meet demands for reasons. Furthermore, varying

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ion"). More speculatively, the sequence of questions in structured proportionality may have a "de-biasing" effect: judges whose instinct is that a challenged law is unconstitutional still have to address its "suitability"—that is, whether it advances the government's objective at all, a question that will typically be answered in the affirmative. Judges whose instinct is that a regulation is justified even if it infringes on an area of rights have to pause to consider, at the minimal impairment step, whether there are less intrusive means that serve government goals equally well. By unpacking the analytical elements more than U.S. strict scrutiny, this approach in theory yields more complete consideration of competing points of view.

227. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Dennis v. United States, 341 U.S. 494 (1951); *see also* Coffin, *supra* note 226, at 29-30 (criticizing cases in which there is no "illuminating responsive discussion" in the majority and dissenting opinions).

228. On the role of judicial judgments in persuading losers that their loss was legitimate, see, for example, *Flannery v. Halifax Estate Agencies Ltd.*, [1999] 1 W.L.R. 377 (Eng.) (linking "duty to give reasons" to "fairness . . . to the parties—especially the losing party," who "should be left in no doubt why they have won or lost"); *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, ¶ 60 (Can.) (explaining that "where hard choices have to be made, [reasons] may provide a modicum of comfort, especially to the losing party, that the process operated fairly" (citation omitted)); *cf.* Vlad Perju, *Proportionality and Freedom—An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334 (2012) (arguing that the multiple, careful steps of proportionality analysis help promote a sense of procedural justice in losers, who can see that their arguments were taken seriously). Indeed, it might even be argued, case-by-case proportionality analysis offers hope to "losers" that, in a different context, their claim might "win."

229. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 17 (1993).

230. *See* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 75-76 (1986) (discussing freedom as "self-direction by norms cognizant of fellowship with equally self-directing others" and stating that "[e]very norm, every time, requires explanation and justification in context . . . [, a task calling] for practical reason, and . . . involv[ing] dialogue"); *see also* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 28-29 (2001) (emphasizing the importance of giving reasons that "respect our humanity . . . [and] attend to the range of reasons . . . we care about"); text accompanying notes 70-71.

reasons may appeal to different audiences.[231] Even in the formulation of categorical rules, as in *Atwater*, the Court typically invokes at least some consequentialist understanding – there, of the need to allow unimpeded law enforcement. Notwithstanding the sometimes-expressed view that proportionality involves only arbitrary evaluations,[232] there is nothing "nonlegal" about efforts to promote the proportionality of government action by considering its effects on relevant constitutional values.[233]

2. *Bridge Between Courts and Legislatures*

A second benefit of structured proportionality analysis is that it can provide a bridge between decision making in courts and decision making by the people, legislatures, and public officials. Proportionality doctrine arguably invites more participatory deliberation over constitutional rights, and it may achieve more compliance by legislatures and other officers with constitutional values by offering a rubric for decision making that is accessible to those other decision makers.[234]

Preliminary inquiries into whether challenged action has been authorized by law and has a proper purpose can be seen not simply as judicial checks on government action but as opportunities for the legislature to reflect on and improve its own legislative product. Insisting on proper purpose and legal authority focuses attention on the central role of legislatures in authorizing, and

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231. *Cf.* Michelman, *supra* note 230, at 30-34 (describing certain balancing tests as a commitment to "a communicative practice of open and intelligble reason-giving").

232. *See, e.g.*, William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 73 (1997).

233. *See also infra* notes 251-258 and accompanying text (discussing "constitutional judgment"). As leading constitutional scholars recognize, legitimate sources in constitutional law include multiple forms of argumentation – including "ethos" and "prudential" forms of argument, concerned with values and consequences. *See* PHILLIP BOBBITT, CONSTITUTIONAL FATE – THEORY OF THE CONSTITUTION (1982); PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (describing and exploring several forms of interpreting the Constitution); *see also* Robert Post, *Theories of Constitutional Interpretation*, *in* LAW AND THE ORDER OF CULTURE 13-41 (Robert Post ed., 1991) (describing doctrinal, historical, and responsive interpretation); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (describing how different modes of interpretation work together).

234. *But cf.* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) ("'[R]ational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee."); H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217 (2011) (criticizing the Court's equating "rational basis" as a standard of review with the substance of the constitutional guarantee).

limiting, government conduct that affects rights.[235] Assuming authority and proper purpose, legislative decision making may also take into account and thereby influence courts' determinations of whether the proportionate means tests have been met. Proportionality doctrine can thus be seen as a reflection of the dual commitments of constitutional democracies – to the protection of rights and to democratic self-governance, which itself can be conceived of as a right.[236]

Moreover, in situations of epistemic or normative uncertainty, legislatures may be more empirically competent and democratically legitimate than courts in making prognostic factual determinations and in making accommodations among competing values.[237] As Robert Alexy put it, when judgments about "suitability" (rationality) or "necessity" (analogous to minimal impairment) are in a zone of "epistemic uncertainty," the fact that the legislature is democratically elected is a reason to accept its determination of these issues.[238] When there is epistemic uncertainty – for example, whether decriminalizing marijuana would be as effective as criminalization in preventing dangers associated with that drug's trade and use – legislative judgments about the necessity of the criminal prohibition prevail.[239] When there is a "normative" stalemate –

235. *See also* Weinrib, *Constitutional Comparativism*, *supra* note 138, at 17 (arguing that the requirement that limitations be "prescribed by law" means that encroachment on rights must be "authorized . . . through the regular channels of law-making, so that it is the product of a representative, accountable, deliberative public process" while acknowledging that the "principled elaboration of the common law also satisfies" the formal standard); *cf.* Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 259, 260-61 (Grant Huscroft et al. eds., 2014) (advancing a "broadly-gauged conception and defense of a proportionality-like test for limiting rights" that "seeks to accommodate and temper enduring and legitimate democratic concerns."). For an argument that legislatures constitute rights by deciding on their limitations, see GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION (2012).

236. Stephen Gardbaum has argued that proportionality review can be understood to enhance, rather than to constrain, democracy. *See generally* Gardbaum, *supra* note 235. Gardbaum's suggestion is that proportionality review is democracy enhancing insofar as it is understood to allow democratic legislatures to limit rights. My argument is slightly different: that proportionality review may be democracy enhancing and rights enhancing at once, insofar as it engages legislatures in understanding and protecting rights in the legislative process.

237. Some courts have, for example, indicated that legislatures have considerable discretion on the rationality of means, contemplating judicial non-accceptance of the legislature's presumed finding of rationality only rarely, as in cases of corruption. *See, e.g.*, BARAK, *supra* note 22, at 311 (discussing the Gaza Coast Regional council case); *see also id.* at 312 ("[T]he legislator's discretion in determining its legislative prognosis is wide.") For Barak, legislators make choices within a "zone of proportionality," while courts police that legislative choices remain within that zone. *Id.* at 397-411.

238. ALEXY, *supra* note 19, at 399-401, 411-18.

239. *Id.* at 399-400. *But cf.* R. v. Oakes, [1986] 1 S.C.R. 103, 136-37 (placing the "onus" of justification on the party seeking to uphold the limitation).

involving, for example, competing principles worthy of optimization as in the protection of workers' rights and those of small employers in lay-off situations – legislatures have normative discretion to make different choices.[240] And, in theory, the sequenced structure of proportionality doctrine allows for judicial deference to legislative resolution of some questions, such as minimal impairment, even if not on all questions.

One of Laurence Tribe's critiques of John Hart Ely's representation-reinforcement theory of judicial review was that Ely's theory offered no guidance on constitutional meaning to legislators or executive branch actors.[241] By contrast, the questions of proportionality analysis resonate with the competences of legislatures, especially in its inquiries about rational relation and minimal impairment, both of which have "predictive" factual components about the connection between the means chosen and the legislative goal.[242] Legislators who understand that statutes will be evaluated under proportionality standards if challenged as infringing on individual constitutional rights will have reason to give attention to the rationality of the means, to whether there are other means less likely to intrude on rights, and to whether the gains to be achieved are weightier and of such a character as to warrant intrusions on protected freedoms.[243] As Mattias Kumm has written, focusing public actors on the elements of proportionality review can have a

> disciplining effect on public authorities and help[] foster an attitude of civilian confidence among citizens. The legal institutionalization of Socratic contestation helps keep alive the idea that acts by public authorities that impose burdens on individuals must be understandable as rea-

240. ALEXY, *supra* note 19, at 415-416. Alexy thus disagrees with the suggestion that German proportionality analysis contemplates a single, perfect, ideal answer to rights questions. *Cf.* BOMHOFF, *supra* note 2, at 103-19 (describing the German theory of constitutional legal perfectionism).

241. *See* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1079-80 (1980).

242. ALEXY, *supra* note 19, at 399 (noting "difficult problems of prognosis" posed by "suitability" and "necessity" inquiries); *cf.* Peter W. Hogg & Allison A. Bushell, *The* Charter *Dialogue Between Courts and Legislatures (Or Perhaps the* Charter of Rights *Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 101-04 (1995) (arguing that "[t]he language of post-*Charter* laws . . . suggests that Canadian legislators are engaging in a self-conscious dialogue with the judiciary").

243. In a rights-valuing legal culture, legislators may have political incentives to be careful of protecting rights, particularly on legislation that is of high public salience. For related discussion, see JEREMY WALDRON, THE DIGNITY OF LEGISLATION 86 (1999) (discussing the legislator's role as "judging" what is just, or in accord with society's conception of natural law); WEBBER, *supra* note 235, at 149-59 (arguing that "[f]or a legislator, the ground for a political decision should always be its justification in a free and democratic society" and that legislators must be guided by standards of public reason).

> sonable collective judgments about what justice and good policy requires to be legitimate.[244]

Proportionality considered in courts and in legislatures may differ: legislatures can focus on finding the best achievable solutions; "proportionality analysis" by courts can serve as a check against serious disproportionalities.[245] For courts, the sequenced structure of proportionality doctrine offers benefits of consistency and transparency in methodology; but for both legislatures and courts, there are benefits from considering proportionality, even in less structured ways, as a principle of justice.

3. *Justice, Law, and Judgment*

Proportionality as principle or doctrine is a way to bring the demands of justice into greater harmony with the law of constitutional rights.[246] Justice is not synonymous with law; it provides a critical platform from which to evaluate law. There is value in a legal system's aspiring to do justice, as understood in its society. Attention to different factual contexts, as well as the need to confront the impact of general rules on particular cases in terms of proportionality, can help hone a juridical and political community's sense of justice.[247]

Legal systems whose decisions do not resonate with widely held conceptions of justice may not be able over the long run to perform their basic functions. Such decisions undermine respect for law and for the legitimacy of courts. In the context of Fourth Amendment law, scholars have observed that

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244. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 141, 163 (2010).

245. *See* SULLIVAN & FRASE, *supra* note 52, at 8 (suggesting that the "balancing" metaphor implies an optimum point, whereas proportionality review focuses on whether action is *dis*proportionate, recognizing legislatures and executive officials as the "primary decisionmakers"). *But cf.* Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 195-206 (2006) (distinguishing "optimizing" from "state-limiting" uses of proportionality and arguing that "optimizing" facilitates "orderly" approaches to deference, which either approach entails).

246. For a defense of proportionality review's ability to bring constitutional rights in line with justice, see Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574 (2004) (reviewing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002)). On the relationship of rights to justice, see also Webber, *supra* note 136, at 126-29.

247. Kumm, *supra* note 244, at 147 (proportionality review is "the means by which values are related to possibilities of the normative and factual world"). One of the intended benefits of the independent Article III courts was to "mitigate[e]" and "moderate" legislation that is "unjust" or "partial." *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that independent courts would serve these functions both in applying laws that are enacted and in providing a check on future inequitable legislation).

the Court has tended to reject categorical rules and apply totality of the circumstances tests where the proposed categorical rule would benefit those who are the subjects of police searches, and to embrace categorical rules where they are permissive of police behavior.[248] This pattern, together with the exclusion of officers' intent (or pretext) and of state or local law in defining what is reasonable,[249] cannot but tend to contribute to the lack of trust in police now prevalent in many minority communities. In this area, moving towards doctrine that permits a fuller range of the factors that people in ordinary life consider reasonable would help re-establish the law's connection to justice. To be sure, constitutional justice will often be contested. Even so, proportionality doctrine helps clarify the grounds for decision and the relative importance of different components of justice, thereby providing a framework of analysis for resolving what is most importantly at stake.[250]

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248. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 242 (1984) ("[M]ost of the Supreme Court's current bright line rules tell police officers, 'Yes, you may search,' rather than 'No, you may not.'"); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 295-98, 308 (contrasting the Court's rejection of a bright-line "first-tell-then-ask" rule, designed to moderate police pressure on suspects to consent to searches, with "a pronounced pattern of ruling in favor of the government" in Fourth Amendment cases).

249. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 168-73 (2008) (treating police officers' violation of a state law authorizing only a citation, and not an arrest, as irrelevant to petitioner's Fourth Amendment challenge to the reasonableness of a search incident to that arrest, and concluding more generally that the Fourth Amendment was not understood to include constraints of subsequently enacted statutes); Whren v. United States, 517 U.S. 806, 815-16 (1996) (rejecting the argument that "insistence upon police adherence to standard practices [is] an objective means of rooting out pretext" and seemingly treating as irrelevant whether officers complied with local practices (there, embodied in a regulation) that vary from place to place, because Fourth Amendment law cannot "be made to turn upon such trivialities").

250. *See* Jackson, *supra* note 79, at 613-19. Because justice, and the relative weight of different constitutional values is contestable, application of proportionality analysis will sometimes yield different conclusions even in the same system, in ways that structured proportionality analysis can help make more transparent. *See infra* notes 449-451 and accompanying text (discussing the majority and dissenting opinions in the Canadian *Keegstra* case concerning hate speech). *Compare* Roe v. Wade, 410 U.S. 113 (1973) (applying "strict scrutiny" to establish a trimester approach to abortion regulation), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (rejecting the trimester approach and establishing an "undue burden" test for the constitutionality of regulations designed to protect fetal life before viability). Looking transnationally at abortion regulation, a range of approaches arguably meets the requirements of proportionality in different national settings. Where a court comes down depends in important part on the substantive constitutional values of its jurisdiction, including whether the jurisdiction recognizes a fetal right to life protected by the constitution, as neither Canada, *see* R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.), nor the United States does. But in any system respecting women's equality, application of proportionality analysis will impose constraints on whether and how aggressively abortions can be prohibited. *See generally* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1-158, 210, 219-21 (3d ed. 2014) (describing decisions in United States, Germa-

A related advantage of proportionality is the opportunities it provides for the development of what we might call constitutional judgment or "situation sense."[251] Mark Tushnet has argued that Justice Breyer's dissent in *Heller* should not be understood as primarily about proportionality or balancing, notwithstanding its use of "proportionality" language; rather, it should be understood as about the application of legal judgment to complex settings.[252] Tushnet has also argued that the Court's First Amendment decisions in such cases as *Snyder v. Phelps*,[253] *United States v. Stevens*,[254] and *Sorrell v. IMS Health Inc.*,[255] represent a form of "judicial pathology," consisting of overestimating the harms that prohibitions on speech would cause and an insensitivity to the distribution of those harms.[256] This pathology, Tushnet suggests, is connected to the "rule-ification" of the area and a related "fear" of making obvious judgment calls on issues of degree.[257] Once a "rule" is announced, its function is to focus judicial attention only on the "rule" (that is, for example, asking whether a regulation is "content-based"), rather than on the purposes of the constitutional provision the rule is intended to implement. The arguments for "rule-ification" are stronger with respect to multiple decision makers, like lower court judges and executive officials, than with respect to the Supreme Court, which can always consider introducing an "exception" to a rule. In recent free speech cases, however, the Court has arguably deprived itself of the opportunity to engage with the purposes behind the presumptive rule against content-

ny, Canada, Colombia, and the European Court of Human Rights, and noting that permissible restrictions under European case law may depend in part on the available social resources for medical and other services, as well as the ease of travel). Proportionality's emphasis on a clear understanding of what rights are at stake and on the *justification* for restrictions enables both proponents and opponents of abortion regulation to make their claims to legislatures in understandable terms and allows courts to consider arguments challenging legislation in terms that connect both to constitutional values and lived experiences.

251. *See* JACKSON, *supra* note 118, at 151-52 (discussing the "acquisition of a sense of legal judgment," Karl Llewellyn's idea of "situation sense," and good judgment, all in the context of constitutional law); *see also* Mark Tushnet, Heller *and the Critique of Judgment*, 2008 SUP. CT. REV. 61 [hereinafter Tushnet, Heller *and the Critique of Judgment*]; Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103 (2012) [hereinafter Tushnet, *The First Amendment*].

252. Tushnet, Heller *and the Critique of Judgment*, *supra* note 251, at 71, 76-84.

253. 562 U.S. 443 (2011).

254. 559 U.S. 460 (2010).

255. 131 S. Ct. 2653 (2011).

256. Tushnet, *The First Amendment*, *supra* note 251, at 105-06.

257. *Id.*; *see also* Sullivan, *supra* note 16, at 68 (discussing some of the pathologies associated with "adjudication-by-rule").

based regulation, reaching results that may well be inconsistent with the long-term constitutional judgments of the people.[258]

The Court in *Stevens*, for example, rejected the government's argument for a "'categorical balancing of the value of the speech against its societal cost,'" denying that the Court has "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[259] Consider instead if the question had been whether the statute met a multi-part proportionality standard like that used in Canada. Presumably the Court would have found that it did not, because the statute was so "overbroad" it would have failed "minimal impairment." But the Court would also have had to address such questions as whether the government's purpose in reducing animal cruelty was legitimate and of sufficient importance to warrant some limitation of expressive activity, and whether prohibiting the commercial development and distribution of videos featuring animal cruelty was a rational means of achieving that purpose.[260] The guidance provided by analysis of these questions might have assisted subsequent legislative efforts to address the problem through more narrowly tailored legislation.[261] Proportionality analysis, in short, could help promote judi-

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258. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732 (2011) (invalidating a state law prohibiting the sale of violent video games to children under eighteen); *Stevens*, 559 U.S. at 469 (rejecting the possibility of a categorical exception from First Amendment protection for at least some depictions of animal cruelty). *But see Entm't Merchs.*, 131 S. Ct. at 2766 (Breyer, J., dissenting) (indicating that in applying strict scrutiny, he "would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying 'compelling interests,' the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, 'the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide'" (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 841 (2000))).

259. *Stevens*, 559 U.S. at 470 (quoting Brief for Petitioner at 8, *Stevens*, 559 U.S. 460 (No. 08-769)); *id.* at 472 (striking down a law prohibiting the commercial creation, sale, or possession of certain depictions of animal cruelty). Concluding that the law did not fall within the "historic and traditional categories" of permissible speech restrictions, *see id.* at 468 (citation omitted), and after rejecting the government's argument for a blunt balancing test to identify new areas of permissible regulation, the Court applied its "existing doctrine," *id.* at 472, and found the statute unconstitutional for overbreadth. It went immediately to overbreadth analysis without considering, for example, the statute's purposes, or the rationality of its means. *See infra* note 260.

260. Only Justice Alito's lone dissent in *Stevens* addressed the law's purpose, its connection to that purpose, and whether the harm suppressed warranted intrusion on speech interests. *See* 559 U.S. at 491-99 (Alito, J., dissenting) (discussing the "compelling governmental interests" served by the law); *cf.* Brief for a Grp. of Am. Law Professors in Support of Neither Party, *Stevens*, 559 U.S. 460 (No. 08-769) (urging the Court to reject the Third Circuit's conclusion that prevention of animal cruelty was not a "compelling government interest").

261. Congress indeed responded to *Stevens* by quickly enacting legislation prohibiting "animal crush videos" with elements of "obscenity," and including explicit exceptions for depictions

cial engagement with basic questions of constitutional justice, reflected in judgments about legitimate or compelling purpose – and its relationship to the harms from limiting expressive activity presumptively protected by the First Amendment.

4. *Process Failures Warranting Heightened Scrutiny*

A different kind of argument arises from considering whether disproportionalities in the effects of government action may be a signal of failures in the legislative process that warrant increased scrutiny by the courts.[262] On John Hart Ely's theory, process failures resulting from conscious prejudice and intentional discrimination against minority groups warrant higher levels of justification and judicial scrutiny.[263] A wider range of process failures might be signaled by disproportionalities in the application of law. Disproportionalities – such as those that occur when a law is more intrusive than necessary to serve the stated purposes – may signal an underlying problem, relating not only to conscious prejudice but also to failures of equal regard. Some may arise from lawmakers' insufficient concern with disproportionate effects on the relatively powerless; some may reflect unconscious or unarticulated prejudices; some may arise from the simple inability to anticipate legislation's effects. Each of these might be understood as a process failure: a failure, in Justice John Paul Stevens's terms, to fulfill the government's duty of impartiality to the peo-

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of hunting and the slaughter of animals for food. *See* Pub. L. No. 111-294, § 3(a), 124 Stat. 3178 (2010). The reference to "obscenity" was an evident effort to come within an established "categorical" exception for obscenity. *See* Miller v. California, 413 U.S. 15 (1973). At least one constitutional challenge to the new statute, accepted by the District Court, was rejected by the Fifth Circuit. *See* United States v. Richards, 940 F. Supp. 2d 548 (S.D. Tex. 2013), *rev'd*, 755 F.3d 269 (5th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3742, 2015 WL 1280267 (Mar. 23 2015).

262. *See* Jackson, *supra* note 225, at 830 n.82 ("[Proportionality] can be used to help screen legislation for purposes that are deemed impermissible on other grounds.").

263. *See* ELY, *supra* note 122, at 102-04. For critique of political process theory as the basis for judicial review as "radically indeterminate and fundamentally incomplete," see Tribe, *supra* note 241, at 1064. Such objections do not, in my view, apply to considering the disproportionate effects of laws as a signal of the kind of possible process failure that may conflict with more substantive constitutional commitments.

ple.[264] Some such process failures may warrant heightened judicial attention or intervention.[265]

In the United States, the tiered structure of review applicable to rights claims under equal protection and due process already embodies to a certain extent the idea of proportionality, because more is required to justify laws in categories deemed likely to be of greater constitutional concern; so, too, does the role of less intrusive alternatives in areas of U.S. doctrine.[266] There can be a large gap between "strict scrutiny" and "rational basis" review, however, seen in the contrasting treatment of overt racial classifications and neutral laws with a disparate impact based on race. The *principle* of proportionality supports Justice Thurgood Marshall's suggestion that whether a classification violates equal protection should depend not on rigid ex ante categories but on a more flexible, more proportionate approach,[267] as will be discussed further in Part V below.

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264. Justice Stevens has articulated a "duty to govern impartially" in several opinions. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 341 (2004) (Stevens, J., dissenting); Harris v. McRae, 448 U.S. 297, 357 (1980) (Stevens, J., dissenting); *see also* Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH, *supra* note 30, at 21 (discussing the importance of impartiality and justice in legislation).

265. As discussed further in Part V, disproportionate applications are a necessary feature of prophylactic rules; but if there is a good enough reason for having such a rule, some disproportionalities must be accepted or its prophylactic goals would be undermined. Interests arguably within the scope of rights may be *underprotected* by prophylactic rules designed, for example, to prevent mistaken judicial interference with legislation in arenas in which past judicial interventions were regarded as erroneous intrusions on democratic decision making based on a mistaken understanding of rights. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (signaling that the Court would henceforth uphold "regulatory legislation affecting ordinary commercial transactions" unless the facts are such "as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"). Other interests only arguably within the scope of rights may be *overprotected* to avoid errors of underprotection; freedom of speech is an area in which prophylactic categorical presumptions may be warranted. *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 474 (1985) (emphasizing the importance of "confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense"); *cf.* Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1264, 1279-87 (2014) (arguing that the doctrine of content-neutrality is most important in preventing petty village tyrants from acting against idiosyncratic voices).

266. *See, e.g.*, SULLIVAN & FRASE, *supra* note 52, at 53-66 (describing "implicit proportionality principles" in the standards of review used in equal protection, substantive due process, First Amendment, and dormant commerce clause cases).

267. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (emphasizing "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification"). Although I hold a Chair presently named af-

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Some of these benefits relate primarily to use of the structured proportionality doctrine of Canada and similar systems. But others – bringing law closer to justice – derive from greater use of proportionality principles even in differently or less structured contexts.[268]

IV. OBJECTIONS AND RESPONSES

Some objections to proportionality as a standard for review would apply, generally, in any constitutional democracy. These objections – including to its indeterminacy, its asserted intrusiveness, its potential for inconsistent applications, its asserted irrationality, and its claimed incompatibility with strong conceptions of rights – are discussed in Part A. Other concerns about proportionality relate to particular aspects of U.S. constitutional law and culture; these are addressed in Part B.

A. General Objections to Proportionality as a Standard of Review

Although structured proportionality review's responsiveness to legitimate government justification could help to protect rights while maintaining effective self-government, some argue that this very flexibility detracts from its quality as law, creating an unacceptable level of indeterminacy.[269] The weight to give the indeterminacy critique depends to an important degree on what proportionality review would replace. It is one thing if it replaces a seemingly determinate categorical test;[270] but if proportionality doctrine replaces a less structured "all things considered" approach, or an exception-riddled set of cat-

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ter Justice Marshall and served as his law clerk in October Term 1977, my appreciation for his views came most fully into focus after I had studied comparative constitutional law.

268. *Cf.* SULLIVAN & FRASE, *supra* note 52, at 6-7 (suggesting that there are three distinct tests of proportionality – "limiting retributive" proportionality that constrains liability and sanctions, "alternative-means" proportionality testing whether less intrusive means exist, and "ends-benefits" proportionality, which "compar[es] a single measure to its expected benefits"). They argue that "every government intrusion into individual autonomy [should] undergo some form of proportionality review unless strict scrutiny or another more restrictive standard applies." *Id.* at 11.

269. *See, e.g.*, WEBBER, *supra* note 235, at 89-115; Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 470-72 (2009).

270. Such a change might still improve the overall quality of decisions; whether a more flexible proportionality standard would be better than a particular categorical rule depends on the quality of decisions produced under each.

egorical rules, it might produce a more disciplined jurisprudence. And structured proportionality can co-exist with understandings of rights as "principles" requiring optimization,[271] or as "shields," requiring legitimate and strong reasons to interfere.[272]

Another argument is that proportionality review is too intrusive on legislatures, establishing a standard that cannot realistically be met.[273] A version of this argument, which Alexy refers to as the "highest point thesis," contemplating single right answers,[274] is inconsistent with the recognition by leading proponents of proportionality of the existence of significant "zones" of legislative "discretion,"[275] in which the legislature's judgment will control. It is moreover inconsistent with widespread recognition that proportionality review, with its sequenced steps, is capable of being applied with "variable intensity."[276] The related claim that "proportionality," like balancing, is more a legislative than a judicial competence[277] ignores the degree to which while legislatures and executives may have particular knowledge and competence about, for example, the scope of national security risks and the best means to minimize those risks, courts have more capacity fairly to decide questions of individual rights.[278]

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271. *See supra* note 37 (noting Robert Alexy's views).

272. *See, e.g.*, Schauer, *supra* note 36, at 429-31.

273. *See, e.g.*, Choudhry, *supra* note 116, at 504 (arguing that the pitfall of proportionality analysis is that it does not respond to the "general problem of how to fashion judicial review in a rights-protecting democracy where governments often legislate with imperfect information").

274. ALEXY, supra note 19, at 396-97. On "one right answer" conceptions of proportionality, see Rivers, *supra* note 245, at 192-93. *See also supra* note 237.

275. *See* ALEXY, *supra* note 19, at 396-415 (discussing the German Federal Constitutional Court's cannabis judgment); MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 114-15 (2012) (discussing the cannabis judgment, in which the degree of interference with individual freedom was clear but there was considerable empirical uncertainty over the health effects of cannabis use, and establishing a zone in which the legislature's decision would not be disturbed); BARAK, *supra* note 22, at 379, 384 (discussing the "zone of proportionality" and legislative "discretion" to choose among proportional alternatives); *see also* Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court, Second Senate] Mar. 9, 1994, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 90, 145 (Ger.), *translated in Decisions of the Federal Constitutional Court*, GERMAN L. ARCHIVE 173 (Michael Jewell trans., 2001) http://www.iuscomp.org/gla/judgments/bverfg/v940309.htm [http://perma.cc/PBJ4-3DKH] (stating that in choosing suitable, and necessary means, "the legislator has a certain degree of discretion").

276. *See* Rivers, *supra* note 245, at 202-06.

277. *See* Aleinikoff, *supra* note 15, at 981-86.

278. On some reasons for special judicial competence on questions of justice, morality and constitutional rights, see, for example, CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3, 52-64 (2001); and LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 72-76, 199-201 (2004). It bears noting that the task of a reviewing court may be conceptualized not

There are, to be sure, institutional concerns with using "standards" like proportionality, rather than "rules." Non-judicial actors, like police, may find it easier to implement a rule than a standard.[279] Rules, however, can lose their ease and clarity as their exceptions proliferate.[280] Even if "categorical" rules would result in fewer errors, moreover, a standard may result in fewer "serious" errors, or departures from a common sense of constitutional justice, than its "categorical" counterpart.[281]

To the extent proportionality analysis allows courts to consider more factors, however, the range of reasonable applications may be broader, which may result in more consistency problems in lower courts in the decentralized system of U.S. judicial review.[282] Recent experience with categorical rules in the United States suggests that neither determinacy nor respect for legislative outcomes is necessarily protected through such rules.[283] Moreover, the U.S. Supreme

as making the primary determination of the proportionality questions, but as reviewing whether a reasonable government could have reached the conclusion it did, possibly with varying degrees of deference depending on the issue. *See, e.g.*, Gardbaum, *supra* note 34, at 102 ("[R]eviewing courts should ask whether a legislature's assessment that the chosen means [meet the suitability, necessity and proportionality as such tests] is a reasonable one. . . . [T]he issues involved tend to be relatively indeterminate in the sense that there is usually no one right answer but (a) a range of reasonable ones and (b) one or more wrong or unreasonable ones. Particularly in this context, the task of judicial review should be limited to weeding out the latter."); *id.* at 89 (arguing for more deference to legislatures than to executive decision makers); *see also* AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 240 (2009) (arguing that courts should not assess proportionality as if they were the primary decision maker but as a "secondary" decision maker, owing some deference to Parliament); de Búrca, *supra* note 1, 147-48 (summarizing approaches to deference); Rivers, *supra* note 245, at 205-06 (suggesting that the intensity of proportionality review should depend on the severity of the rights infringement).

279. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

280. *See* Alschuler, *supra* note 248, at 287 (1984) (arguing that Fourth Amendment law is incomprehensible because there are too many detailed rules).

281. I thank the Harvard Law students in my seminar on Proportionality as a Transnational Principle, Spring 2013, for helping to crystallize this idea.

282. *See* Scalia, *supra* note 16, at 1178-83 (favoring "clear, general principle[s] of decision" to promote "predictability"); Sullivan, *supra* note 16, at 62-66 (discussing why rules may help promote consistency and predictability). While there is an important interest in consistency, whether the results of such uniformity are positive overall depends in part on the quality of the rule articulated and how the results under that rule differ from the results under a differently worded standard. Not every rule is superior.

283. For cases that created new exceptions or produced unexpected results under "categorical" rules, see, for example, *Holder v. Humanitarian Law Project*, 561 U.S 1 (2010), which arguably abandons truly strict scrutiny in evaluating limitations on speech in the national security context; and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which creates an exception to the exception from the ban on content-regulation for "fighting words." For a critique of the claim that categorical rules in the Fourth Amendment context are helpful and constraining guides to the police, see Alschuler, *supra* note 248, at 231, which argues that courts produce

Court's "'shrunken docket'"[284] suggests that it has substantial unused capacity to control errors and promote consistency in the lower courts: the Court's docket remains roughly half of what it was decades ago.[285] The Court may be able to expand its docket and use some of that capacity to minimize inconsistencies in the lower courts' application of proportionality.

The "proportionality as such" element of proportionality review has been most widely subject to critique, as unconstrained "balancing" of often incommensurable values and based only on the preferences of the judges.[286] Indeed, some, including Jürgen Habermas, view the "proportionality as such" test as essentially irrational because it requires the weighing of incommensurables lacking a common metric.[287] Even absent a common metric, however, judg-

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"an unmanageable multiplicity of rules" that cannot be humanly remembered, that present numerous choices regarding which rule is applicable, and whose artificiality begets more rules that "muddy more than they clarify" and depart from both justice and predictability.

284. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996). Hellman suggested that the declining docket of granted cases resulted in part from the views of recent Justices that error correction is not a significant task, reflecting a vision of an "Olympian Court" concerned only with deciding large questions. *Id.* at 432-38. He also noted possible disadvantages from the smaller docket, including the Court's failing to "engage in the process of developing the law through a succession of cases in the common-law tradition," "creating gaps in the law," "impair[ing] the quality of the Court's work in the cases that it does take" by depriving itself of the knowedge of how a particular issue "fits into its larger setting," and fostering "detachment from the work of lower courts," noting, as an example, the decision in *Whren v. United States*, 517 U.S. 806 (1996). *Id.* at 433-36. *Whren* is discussed *supra* notes 161, 249, and *infra* note 325. For a somewhat different perspective on the same phenomenon, see Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 63-96 (1999) (arguing that the Court had engaged in "administrative downsizing," *id.* at 68, by cutting its docket of cases in a way consistent with a "new self-conception" of the Court, *id.* at 82).

285. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1228-29 (2012). A belief in the Court's capacity to decide more cases is evident in various reform proposals. *See, e.g.*, Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1382-85 (2006); *see also* Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010). *See generally* SUSAN LOW BLOCH ET AL., INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES 449-97 (2d ed. 2008) (titling chapter section "The Incredible Shrinking Caseload").

286. Bernard Schlink, a leading German critic of Alexy, has reportedly argued for a "reduced proportionality" test, which would end after the minimal impairment step. *See* Niels Petersen, *How To Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387, 1394-95 (2013). For a response to this argument, see *supra* note 103.

287. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 253-61 (William Rehg trans., MIT Press 1996); Tsakyrakis, *supra* note 269, at 473-75. Justice Scalia once famously declared that balancing rights is like trying to decide "whether a particular line is longer than a particular rock is heavy."

ments about the relative priority of two values can be rational.[288] An example is "large-small trade-offs" involving a small sacrifice of one value for a large gain in another.[289] It is a mistake to understand balancing in mathematical terms: rather, "proportionality as such" balancing should entail a reasoning process about the priority of one constitutional value as it relates to another in a particular setting.[290] It is also worth noting that "proportionality as such" is the last in a sequence of inquiries and therefore is part of a more structured decisional process than "all things considered" balancing.[291]

A final and significant set of concerns is that applying proportionality doctrine is incompatible with the basic concept of a constitutional right,[292] or

Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment); *see also* Aleinikoff, *supra* note 15, at 972-76 (discussing the problem of comparison and the development of a common scale).

288. *See* Aleinikoff, *supra* note 15, at 972 (describing critiques from incommensurability as overstated, as common scales can sometimes be found and "we expect courts to make [such] judgments in crafting common law doctrine"); Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS HUM. RTS. 35, 36-39 (2010) (agreeing with Alexy that balancing in the form of proportionality review "is essentially a rational process").

289. David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 78 (1990). On the difference between an analysis that looks only at the *degree* to which a right is limited and a government purpose advanced, and an analysis that also evaluates the *relative importance* of both the right and the purpose, in the proportionality as such stage, see BARAK, *supra* note 22, at 364-65.

290. For a complex taxonomy of balancing, see MÖLLER, *supra* note 29, at 137-73.

291. *See id.* at 178-200 (emphasizing the importance of the structured sequence of queries in ensuring that only "a genuine conflict . . . of interests which cannot be resolved in a less restrictive but equally effective way" reaches the proportionality-as-such stage); Gertrude Lübbe-Wolff, *The Principle of Proportionality in the Case-law of the German Federal Constitutional Court*, 34 HUM. RTS. L.J. 12, 16 (2014) (discussing the importance of "distinguish[ing] the three levels of the [means] test and applying them in due order"); Lorraine Eisenstat Weinrib, *Canada's Constitutional Revolution: From Legislative to Constitutional State*, 33 ISR. L. REV. 13, 33-34 (1999) (emphasizing the importance of beginning with the "prescribed by law" requirement).

292. Webber, *supra* note 136, at 125 (arguing that proportionality "fails to capture the moral priority of rights"). For a different objection to proportionality review relating to the character of rights, see Grant Huscroft, *Proportionality and the Relevance of Interpretation*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 186, 190-93, 202 (Grant Huscroft et al. eds., 2014) (emphasizing the particular, negotiated quality of those rights originally included in constitutions, writing that "[t]o focus on proportionality at the expense of interpretation" is to "recognize rights . . . not . . . part of the constitutional settlement"). For my response to arguments that sound in originalist or contractarian theories of interpretation, see Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPIAC L. REV. 599 (2008).

might undermine the distinctively principled character of rights.[293] Carol Steiker, for example, has suggested that understanding proportionality to be a *necessary* condition for government action intruding on rights might lead to the idea that proportionality is *sufficient*, thereby "[o]ccupying the justificatory field."[294] But on some accounts, even in jurisdictions applying proportionality analysis, one can recognize "core" aspects of rights that are viewed as entirely non-abrogable and not subject to limitation by arguments from proportionality.[295] Judicial elaborations of human dignity in Germany, for example, striking down a law authorizing the shooting down of hijacked civilian aircraft, or in Israel, prohibiting privatization of prisons, show that deontological analysis can coexist with extensive use of proportionality doctrine.[296] Moreover, structured proportionality analysis itself leaves room for the conclusion that a statute has an impermissible goal, one ruled out by the commitments to maintain-

293. *See* Aleinikoff, *supra* note 15, at 998-99 (arguing that constitutional cases involving competing interests can be "resolved . . . by a principle" not derived from balancing).

294. Carol S. Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 194, 212 (Andrew Ashworth et al. eds., 2013); *see also* Aleinikoff, *supra* note 15, at 987, 991 (arguing that balancing "transform[s] constitutional discourse into a general discussion of the reasonableness of governmental conduct," rather than focusing on interpretation of "peremptory norms").

295. *See* Rivers, *supra* note 245, at 180 (noting that the "state-limiting conception of proportionality sometimes assumes that there is an absolute minimum to each right, a core content, which may not be violated on any account"); *see also* BARAK, *supra* note 22, at 27 (discussing "absolute" rights, such as no slavery), *id.* at 497-98 (discussing the relationship between the "core" of a right and disproportionality); Grimm, *supra* note 2, at 386 (noting the German Basic Law provision that "no limitation may affect the very essence of the fundamental right"); Esin Örücü, *The Core of Rights and Freedoms: The Limit of Limits*, *in* HUMAN RIGHTS: FROM RHETORIC TO REALITY 37, 45-53 (Tom Campbell et al. eds., 1986) (describing the "core" of rights in Germany and Turkey). *But cf.* ALEXY, *supra* note 19, at 192-96 (arguing that there is no "core" other than that constituted through the application of proportionality analysis). For an effort to reconcile these views, see KLATT & MEISTER, *supra* note 275, at 66-68.

296. The German aviation security case signals that despite the limitations clauses in the German constitution and the German Constitutional Court's widespread resort to proportionality analysis, "collective goods may not, under any circumstances, outstrip individual rights." Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 7 GERMAN L.J. 761, 772 (2006). The Israeli prison privatization decision similarly reasons that it is not "the nature of the prison or the concessionaire," but rather the "very principle of privatizing prisons" that "violates the hard core of personal liberty." Avirama Golan, *Beinisch Drops a Bombshell*, HAARETZ, Nov. 20, 2009, http://www.haaretz.com/print-edition/news/beinisch-drops-a-bombshell-1.3776 [http://perma.cc/F3BJ-ZBT6]; *see also* Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision To Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690, 690-91 (2010) (noting that the decision "stipulates that . . . prison privatization is unconstitutional per se").

ing rights in a free and democratic society.[297] Beginning the analysis with an inquiry into purpose and then focusing on the nature of the right and the severity of its infringement can help mitigate important concerns with narrowing of the "justificatory field."[298]

B. Arguments from Lack of Fit with U.S. Constitutionalism

It is sometimes argued that Canadian or European approaches to rights analysis do not fit well with already developed U.S. constitutional law. To be sure, a highly contextualized analysis is necessary in evaluating whether approaches in one legal system can usefully be adapted in another. At the same time, it is important to recognize the multiple strands of possibilities for change within particular legal cultures.[299] U.S. constitutional case law already includes several lines informed by the basic idea, and several of the doctrinal components, of proportionality review. Although the United States is unlikely to adopt proportionality as a general principle applicable to all challenges to government action, there is good reason to think that, in some discrete areas, U.S. constitutional law could benefit from greater use of both the principle and the structured doctrine of proportionality.

While the United States does not have the kind of limitations clause found in post-World War II constitutions, U.S. jurisprudence recognizes that limits

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297. *See, e.g.*, R. v. Big M Drug Mart Ltd., [1985] S.C.R. 295 (Can.) (invalidating a statute found to have an illegitimate purpose (coercing religious observance), with no further Section 1 analysis); *see also* cases cited *supra* note 82.

298. *See* Perju, *supra* note 228, at 352 (arguing that inquiry into government purpose at the outset of proportionality analysis offers a theoretical possibility of deontological constraint). Deontological inquiry may also be required to determine the nature of the right and severity of its infringement. *See* BARAK, *supra* note 22, at 45-51 (describing how the right's scope is determined by interpreting constitutional text, and noting distinction between "core" and "penumbra" of right); *see also supra* notes 295-296; *cf.* Perju, *supra* note 228, at 354 (discussing the "core" and "periphery" of rights). Perju argues that in practice the potential of purpose inquiries to impose constraints has not been realized. *Id.* at 352-53. *But see supra* notes 82, 297 (discussing Canadian cases finding insufficient purpose). Determining what is a sufficient purpose to warrant an infringement on rights is itself connected to a conceptual understanding of the right and its purpose. *Cf.* BARAK, *supra* note 22, at 248 (arguing that purposes sufficient to justify intrusion on rights "may vary . . . from one right to another"). Some critics argue that proportionality review, coupled with limitations clauses that expressly acknowledge that rights may be limited with sufficient justification, will diminish rights protection as a whole. *See, e.g.*, Rao, *supra* note 126, at 227-37. Whether proportionality review would have this effect is likely to be highly context dependent. In the context of categorical rules that, as in *Atwater*, or *Florence*, arguably under-protect rights, proportionality review would likely advance rights protection.

299. *See* Vicki C. Jackson & Jamal Greene, *Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?*, *in* COMPARATIVE CONSTITUTIONAL LAW 599 (Tom Ginsburg & Rosalind Dixon eds., 2011).

on matters ordinarily understood as protected by rights can sometimes be constitutionally justified. Indeed, U.S. constitutional law in many areas contemplates "triggering rights" that generate strict review but that in the end, may not be "final rights" because the "triggering right" may be subject to limitation.[300] Influences on contemporary "limitations" clauses are many, but among them is the provision of Article 29 of the Universal Declaration of Human Rights (UDHR),[301] whose language was influenced by a proposal from an American Law Institute (ALI) committee.[302] The German Constitutional Court's influential proportionality doctrine did not derive primarily from the express limitations clauses of the Basic Law but rather from judicial elaboration of constraints on government regulation in the course of interpreting police law in the nineteenth century.[303] And, as Stephen Gardbaum has argued, notwithstanding the absence of an explicit limitations clause, basic approaches to rights interpretation in the United States have much in common with those in countries explicitly using proportionality review.[304]

Nonetheless, some scholars have suggested that U.S. legal culture is hostile to proportionality review. They argue that balancing in the United States developed as an effort to limit the power of courts (acting on behalf of rights) to

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300. Fallon, *supra* note 6, at 1316-17.

301. The UDHR provides:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 29(2) (Dec. 10, 1948).

302. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 44 (1982) (stating that the reference to "democratic society" in article 29(2) of the UDHR was inserted by the drafters "on the basis of a similar clause in the statement of essential human rights, prepared in 1946 by a committee of the American Law Institute and presented to the United Nations by Panama" (citation omitted)). For the ALI Committee proposal, see Am. Law Inst., *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 26 (1946).

303. On the origins of Germany's constitutional proportionality doctrine in judicially developed nineteenth century law, see COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 24-32. On the relative insignificance of limitations clauses in Germany's constitutional proportionality doctrine, see Grimm, *supra* note 2, at 386.

304. Gardbaum, *supra* note 5, at 419-31 (arguing, with respect to the justification for government actions claimed to infringe rights, that differences between the U.S. approach and "proportionality review" are "both far less and far less significant than generally claimed" because, like U.S. "tiers" of scrutiny, proportionality tests are themselves applied with variable intensity and because many elements of analysis, relating to the degree of fit between government goals and the means used, for example, are similar).

interfere with legislative outcomes, rather than, as in Germany, as a way of formalizing and protecting rights.[305] *Dennis* is sometimes described as "symboliz[ing] to this day the most troubling risk of balancing: the danger of judicial capitulation to the legislature's determination of the balance of interest in times of national security crisis," a case whose "stigma" led the Court thereafter to "dissociate[]" itself from balancing.[306] This adverse reaction to balancing was, in important part, historically contingent,[307] and may now be weakening, at least in national-security inflected First Amendment case law.

Even if we assume that the predominantly categorical conceptual structure of free speech law will survive, there are a number of areas of contemporary constitutional rights law in which the U.S. does use balancing, or even proportionality.[308] Richard Fallon, in describing strict scrutiny, notes that in addition to sometimes functioning as a close-to categorical rule, at other times strict scrutiny is applied as if it were "a weighted balancing test, similar to European proportionality inquiries."[309] Moreover, outside of cases governed by strict scrutiny, balancing tests are alive and well, and not necessarily hostile to rights

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305. *See* COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 43; *see also id.* at 154 (concluding that there has been a "relative marginalization of balancing in . . . American constitutional law, as a pragmatic exception to the construction of rights as categorical limitations on state power"); *cf.* BOMHOFF, *supra* note 2, at 143-89 (noting balancing's development in the U.S. as an alternative in contest with more "absolutist" approaches, still viewed through the lens of debates in the 1950s and 1960s about balancing).

306. COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 42.

307. Aleinikoff's attack on balancing, and Justice Scalia's argument for rule-like approaches, published within two years of each other, may have been important influences on the historical trajectory. *See* Aleinikoff, *supra* note 15; Scalia, *supra* note 16. Justice Scalia's argument—that the rule of law is best understood as a law of rules—ignores the important role of equitable traditions in shaping law to apply justly to concrete facts. Compare Aristotle's discussion of the need for rectification of inequitable applications of general rules:

> [A]ll law is universal and yet there are some things about which it is not possible to make correct universal pronouncements. . . . [W]henever the law makes a universal pronouncement, but things turn out in a particular case contrary to the 'universal' rule, on these occasions it is correct, where there is an omission by the lawgiver, and he has gone wrong by having made an unqualified pronouncement, to rectify the deficiency by reference to what the lawgiver himself would have said if he had been there . . . . And this is the nature of the reasonable: a rectification of law, in so far as law is deficient because of its universal aspect.

ARISTOTLE, *supra* note 54, at 174.

308. *See* text accompanying *supra* notes 43-50.

309. Fallon, *supra* note 6, at 1302-08; *see id.* at 1305 (discussing cases where strict scrutiny has not, in fact, been fatal, such as *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Indeed, Fallon has noted more generally the resonances between strict scrutiny and proportionality analysis. *See id.* at 1295 (discussing the narrow tailoring requirement); *cf., e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (balancing the liberty interests of pregnant women against state interests in health and fetal life to identify permitted regulation at different stages of pregnancy).

protection. In *Hamdi v. Rumsfeld*,[310] the plurality drew on the 1976 decision in *Mathews v. Eldridge*[311] for "[t]he ordinary mechanism that we use for balancing such serious competing interests" to decide what process was due an American citizen detained as an enemy combatant.[312] The invocation of balancing was rights-protecting insofar as the government had argued that "'[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme."[313] The Court rejected this and other arguments.[314] A more accurate way to describe U.S. constitutional law is thus that in important areas the Court relies on balancing tests but does so in a less systematic way than its Canadian or German counterparts.

Some scholars argue further that U.S. constitutional law focuses on the "intent" of government actors, not the "effects" of their actions, in defining constitutional rights, an approach claimed to be incompatible with proportionality's concern both with a challenged act's purpose and its effects.[315] But in some areas, narrowly focused intent tests have only recently – and contestedly – replaced more effects-oriented aproaches.[316] One should not mistake a phenomenon that is no doubt present in some areas for a more general state of affairs.[317] There are other significant swathes of U.S. constitutional law that are or have been effects-oriented. This is so not only in the Dormant Commerce Clause ar-

310. 542 U.S. 507, 528-29 (2004).

311. 424 U.S. 319 (1976).

312. *Hamdi*, 542 U.S. at 528-29 (plurality opinion).

313. *Id.* at 527.

314. *Id.* at 526-27 (also rejecting arguments that because Hamdi was seized in a combat zone, no other process was necessary; that no judicial review is proper in an ongoing conflict; or that "at most" only "some evidence" was required). It could be argued, however, that the "balancing" approach adopted by the Court was also rights-undermining, insofar as it facilitated rejecting the position, argued by Justice Scalia, that for a citizen, detention and trial had to be by ordinary criminal process, with speedy trial rights and the full panoply of criminal procedure rights, *see id.* at 572 (Scalia, J., dissenting), a position the plurality rejected, *id.* at 522-24 (plurality opinion).

315. COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 64-78.

316. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990) (displacing the approach of *Sherbert v. Verner*, 374 U.S. 398 (1963), over the objections of four Justices).

317. Cohen-Eliya and Porat do recognize exceptions to their generalization, in the possibility of exceptions to bans on race discrimination to "avoid drastic outcomes," or in the "clear and present" danger tests for free speech in the early twentieth century, bodies of law they describe as a "consequentialist constraint" on an otherwise intent-based deontological system. *See* COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 71-72.

ea,[318] but is also characteristic of the second (effects) and third (entanglement) prongs of the *Lemon v. Kurtzman* test for Establishment Clause claims.[319] Further, in Takings Clause jurisprudence, one inquiry focuses primarily on the effect of the challenged regulation on the property owner.[320] In the First Amendment context, when "incidental" burdens on free speech result from content neutral regulation, the Court still applies an intermediate form of scrutiny.[321] Although for some purposes the Sixth Amendment right to counsel looks to the intent of state actors,[322] for other purposes the effects of action are the significant factors, as in determinations of ineffective assistance of counsel.[323] Since 1997, *Casey*'s "undue burden" test has asked whether a regulation has the "purpose or effect" of creating a substantial obstacle to a woman's choosing to abort a pre-viable fetus.[324] And in Fourth Amendment law, the Court has determinedly turned away from intent. The Court has insisted that

318. *See, e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Cohen-Eliya and Porat recognize the dormant commerce clause as another exception to their generalization about intent. *See infra* note 395.

319. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (stating that to comply with the Establishment Clause, statutes must have a secular purpose and must have a principal effect that neither advances nor inhibits religion, and must not excessively "entangle" the government with religion); *see also* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 859 (2005) (referring to the "three familiar considerations for evaluating Establishment Clause claims" set forth in *Lemon*); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (noting the three-part *Lemon* standard and concluding that a religious purpose alone can condemn a rule); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 697 (1994) (invoking "entanglement" and effects prongs of *Lemon*).

320. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S 528, 538-39 (2005) (discussing a regulation's economic impact on the claimant, focusing "directly upon the severity of the burden that government imposes upon private property rights"); *id.* at 542 (noting significance of the "*magnitude or character of the burden* a particular regulation imposes upon private property rights"); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.").

321. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-63 (1994). Thus, even when there is no intent to regulate speech on account of its content, some heightened scrutiny still applies.

322. Government conduct that "deliberately" elicits incriminating statements from a suspect in the absence of counsel is forbidden. *See* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986); Massiah v. United States, 377 U.S. 201, 206 (1964).

323. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 374-75 (1986) (applying an "objective reasonableness" plus prejudice test to determine if there was a denial of constitutional right to effective assistance of counsel at trial); Strickland v. Washington, 466 U.S. 668, 687 (1984) (articulating two standards to guide ineffective assistance of counsel claims: factual deficiency in counsel's performance and prejudicial effect).

324. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (opinion of O'Connor, Kennedy & Souter, JJ.).

the actual intent of police officers in making a stop or arrest is irrelevant; what matters is whether there was an objective basis for a "reasonable suspicion" or for probable cause; the fact that the police may actually have been motivated to make a stop because of the suspect's race, or preexisting bias against the suspect, is not relevant under the Fourth Amendment.[325] In this light, it is not accurate to describe U.S. law as having a general propensity only to be concerned with intent and not with effects.

Recent scholarship has also suggested that the United States is more skeptical about the possibilities of law in the hands of judges (and thus of proportionality review) than are Canada or Germany.[326] The United States is, to be sure, more willing to leave to democratic processes decisions that, elsewhere, would be made by more expert, elite decision makers (as in the popular election of judges in many states within the United States). The U.S. Supreme Court is an empowered, activist Court, however, even without proportionality review; it has invalidated a significant number of federal statutory provisions since the early 1980s, in cases that include *INS v. Chadha*,[327] *NFIB v. Sebelius*,[328]

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325. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (stating that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment" and holding that "the constitutional reasonableness of traffic stops" does not "depend[] on the actual motivations of the individual officers involved"); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("[T]he standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.'" (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))); Bond v. United States, 529 U.S. 334, 338 n.2 (2000) (confirming that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment"); Scott v. United States, 436 U.S. 128, 136 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."); United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (finding it irrelevant whether the officer "may have used" a "subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate" if a warrant had been sought); *id.* at 236 ("[I]t is of no moment that [the Officer] . . . did not himself suspect that respondent was armed.").

326. See COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 82-93 (contrasting U.S. epistemological skepticism with German epistemological optimism); BOMHOFF, *supra* note 2, at 242-43; *see also id.* at 190 (observing that balancing in the U.S. is viewed "with suspicion rather than aspiration," in contrast to Germany, where it forms part of a comprehensive constitutional order, an underlying "perfectionism"). Bomhoff as well as Cohen-Eliya and Porat assume, in talking about constitutional law, that the object of discussion is judicial decisions; suspicion of law, in this context, is suspicion of judge-made law. In this sense, their comparison resonates with Jed Rubenfeld's observations that there are "two world orders." Jed Rubenfeld, *The Two World Orders*, 27 WILSON Q. 22, 22-36 (2003). In one, international constitutionalists (many European) are more attached to "reason" than to "popular will"; in the other, democratic constitutionalists (many Americans) are more inclined to respect democratic decision-making than "reason" by politically unaccountable experts. *See* Rubenfeld, *supra* note 139, at 1991-95.

327. 462 U.S. 919 (1983).

Citizens United v. FEC,[329] *City of Boerne v. Flores*,[330] and several other First, Eleventh, and Fourteenth Amendment cases.[331] Meanwhile, public confidence in Congress is at astonishingly low levels;[332] a recent *Harvard Law Review* Foreword commented on the Supreme Court's apparent "disdain" for Congress.[333] Even if people believe their elected representatives are more legitimate decision makers than judges, they surely would not intend for legislators to act without reason, or to act in an abusive way.[334] If judicial doctrine on proportionality can better focus legislators on good reasons for their action and at the same time encourage courts to take more seriously legislators' reasons for acting, it may be a net gain for democratic decision making.[335]

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328. 132 S. Ct. 2566 (2012).

329. 558 U.S. 310 (2010).

330. 521 U.S. 507 (1997).

331. *See, e.g.*, United States v. Stevens, 559 U.S. 460 (2010); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

332. *See Confidence in Institutions*, GALLUP (June 2014), http://www.gallup.com/poll/1597/confidence-institutions.aspx [http://perma.cc/ST7G-ETEK] (showing Congress as the lowest scoring of all institutions the public was asked to rate their confidence in—including the military, small businesses, the Presidency, the Supreme Court, the police, medical system, banks, newspapers, organized labor, and big business—with less than ten percent of those surveyed expressing "a great deal" or "quite a lot" of confidence in Congress).

333. Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12-13 (2012) (suggesting that "the current Court . . . combines a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress's enumerated powers," amounting to "judicial disdain").

334. *See, e.g.*, Waldron, *supra* note 264, at 23 (describing the legislative "duty to take care" that proposed laws are "fair . . . and solicitous of the rights as well as the interests of all whom they affect"); *see also* Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373 (2003) (arguing that transparency, respect for loyal opposition, and openness to dissenting views are part of what gives the legislative process its integrity).

335. Canada's constitution includes another device that could theoretically be viewed as promoting such dialogues: the provisions of Charter Section 33 permitting a provincial or national parliament to "override" certain Charter freedoms for up to five years. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 33 (U.K.). In practice, Section 33 (also known as the "Notwithstanding Clause") has been seldom used outside Quebec and its use has been criticized for not achieving dialogical goals. *See, e.g.*, Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 275-95 (1995); *see also* Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613, 620 n.25 (2014) (reporting that the override has been used a total of seventeen times, only by provincial legislatures, and that its last use was in 2000 (citing Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 43 CANADIAN ADMIN. 255 (2001))).

Other kinds of objections to proportionality review flow from general interpretive approaches in the United States. Originalist claims are a distinctive feature of contemporary U.S. constitutional law; their force owes much to a historically specific reaction to the Warren Court's legacy.[336] Those committed to resolving constitutional controversies only by resort to the "specific meaning" of constitutional provisions at the time of the founding would presumably make less use of proportionality-like analyses. For most Justices, however, original understandings are only the beginning and not the end of analysis,[337] and some questions simply cannot be resolved by resort to specific original understandings.

Some academic proponents of proportionality go too far in suggesting that text and precedents do not matter.[338] In so doing they ignore important foundations of law's legitimacy. Texts and their history and purpose matter: proportionality alone cannot provide a substantive theory of what interests are within the scope of rights. Specificity matters: a constitution requiring payment of "just compensation" for the taking of property imposes constraints that may not be enforced in its absence. Stare decisis emphasizes the role of precedent in constitutional adjudication (except where departures are sufficiently justified), thereby linking past, present, and future in a stable but flexible continuity. The long lines of precedent in many areas of individual rights, the different character of different rights, and other factors discussed below, caution against any massive reconstruction of U.S. constitutional law through the lens of proportionality.

V. DEFINING THE BOUNDARIES FOR PROPORTIONALITY REVIEW

I do not argue that the United States should embrace proportionality across the board. For one thing, the U.S. Constitution does not provide as clear a textual basis as exists in Canada for the adoption of proportionality as a pervasive

336. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659-60, 674-82 (2009).

337. On the range of sources regarded as legitimate in the "eclectic" U.S. approach to constitutional interpretation, see JACKSON, *supra* note 118, at 134-38; Fallon, *A Constructivist Coherence Theory*, *supra* note 233; and Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 7 (Jeffrey Goldsworthy ed., 2006). *See also supra* note 233.

338. *See, e.g.*, BEATTY, *supra* note 1, at 47, 87-89 (praising reliance on "facts" rather than "text" and critiquing reliance on precedent); *cf.* MÖLLER, *supra* note 29, at 57-90, 88 (describing the "comprehensive," "protected interests" conception of autonomy, and concluding that "nothing would be lost in theory by simply acknowledging one comprehensive prima facie right to personal autonomy" instead of listing specific rights, such as freedom of expression).

test.[339] The U.S. Supreme Court is not in the position of the Canadian courts interpreting the 1982 Charter, nor the German Court interpreting the 1949 Basic Law; the United States has no new charter of rights subject to interpretation for the first time. And the United States is a large country, with highly decentralized opportunities for judicial review in multiple court systems; a greater need may exist for categorical rules to achieve acceptable levels of consistency in the law (even if the Supreme Court were to expand its docket). Moreover, where reasonably well-functioning lines of law exist, developed over time, there may be insufficient reason to unsettle the law. Not all rights protected by the Constitution involve the kinds of principles that can best be applied through ideas of proportionality. Some rights may be better understood as concrete rules, requiring particular procedures to legalize the government's use of coercive power.[340] Other rights can be better viewed as normatively nonderogable guarantees.[341]

Finally, even when rights have components concerned with promoting proportionate government conduct, case-by-case application of proportionality standards may not be the best approach; formal application of a categorical rule over the course of cases may result in a better group of decisions overall.[342] Given the draw of consistency in adjudication, moreover, rules are likely to emerge even from case-by-case applications of a proportionality standard;[343] and what some call "definitional balancing" or "categorical balancing" might be reconceptualized to reflect conceptions of proportionality in light of the purposes of the right and its implementation in a decentralized system of justice. The goal of proportionality in government action, in the sense of justice and good governance by actual institutions, may sometimes be better served by more categorical rules.[344] How then should judges determine whether an area calls for a more categorical, or case-by-case application of proportionality standards?

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339. *Cf.* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

340. *See, e.g.*, U.S. CONST. amend. V (grand jury requirement); *id.* amend. VI (trial by jury). On the distinction between constitutional rights as "rules," capable of definitive satisfaction, and as "principles" demanding "optimization," see ALEXY, *supra* note 19, at 44-66.

341. *See* Jackson, *supra* note 225, at 850 (noting that there "may be some individual rights," like rights against torture, "that we would want categorized as nonderogable rights").

342. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 541 (1988).

343. *See* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 318; *see also* Tushnet, *The First Amendment*, *supra* note 251, at 106 (citing Duncan Kennedy on the move from standards to rules); *cf.* ALEXY, *supra* note 19, at 373-77 (discussing the role of precedent, based on concrete rules derived from prior decisions, in German constitutional adjudication).

344. To the extent that proportionality tests are concerned, in part, with the effects of government actions, this possibility corresponds with the concept of "rule-consequentialism," as compared with "act-consequentialism." *See* Brad Hooker, *Rule Consequentialism*, STAN.

A. *Different Rights, Different Roles, Different Texts*

Not all rights have the same conceptual structure.[345] Nor do all rights play the same role within the constitutional system. Some rights, like those associated with the Establishment Clause, have been viewed by some as concerned primarily with "excluded reasons" for government action.[346] Doctrine implementing rights, like those secured by the Fifth Amendment Takings Clause, may on occasion draw on proportionality principles to analyze nonphysical actions of government that are claimed to constitute takings,[347] but at the same time treat even minor permanent physical invasions as per se takings for conceptual or historical reasons.[348] Further, the text of that right specifically provides the remedy for when a taking of property occurs – that is, payment of just compensation.[349]

The First Amendment's protections of freedom of speech and association function as broad guarantors of democracy, securing freedom of political competition; they prohibit government conduct motivated by a desire to suppress dissent; and they secure a host of individual expressive freedoms. The First Amendment is also arguably emblematic of a particular form of constitutional identity for the United States.[350] Application of proportionality analysis in an individual case-by-case way might be considered inconsistent with the symbolic importance of treating the First Amendment as providing strong protections. But there is no conceptual obstacle to providing strong rights protection through proportionality analysis by treating a government purpose to suppress

ENCYCLOPEDIA PHIL. (Jan. 9, 2008), http://plato.stanford.edu/archives/spr2011/entries/consequentialism-rule [http://perma.cc/4QHN-Q5XJ]; Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL. (Sep. 27, 2011), http://plato.stanford.edu/archives/spr2014/entries/consequentialism [http://perma.cc/79CE-6ATH].

345. *See, e.g.*, Fallon, *supra* note 83, at 351-68 (differentiating between categories of rights concerned with well-being and material conditions, autonomy, and dignity and those concerned with maintaining government within law, while arguing that all rights are interdependent on government interests); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637-42 (1991) (describing some constitutional rights as pre-political, natural rights that ought to operate as constraints on any government).

346. *See* Pildes, *supra* note 35, at 725-27. For other rights claimed to be primarily concerned with excluding certain reasons for government action, see *id.* at 731-49.

347. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 386-91 (1994).

348. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

349. *See* U.S. CONST. amend. V; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987).

350. *Cf.* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE xi, 9 (1991) (noting an American "penchant for absolute formulations"); J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 278 (2010) (arguing that the assertion of rights in absolute terms is emblematic of U.S. national identity).

ideas as per se illegitimate and by treating the value of freedom of expression as presumptively stronger than reasons for suppression in the "proportionality as such" stage. Still, categorical statements of presumptive rules might be thought to accomplish this in ways more consistent with symbolic or expressive aspects of this amendment (and its "shall make no law" text). But such categorical rules – including categorical exclusions for regulation for obscenity[351] or fighting words[352] – can themselves be informed by considerations of proportionality. The possibility of identity-reinforcing benefits in framing First Amendment jurisprudence in the form of presumptive categorical rules does not answer what those rules should be or what exceptions to a categorical presumption against content-based regulation should be recognized.

Use of proportionality doctrine to review the reasonableness of a search is a different matter than its use to review free speech claims. The Fourth Amendment's text protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[353] Strong considerations of the rule of law and of popular conceptions of justice would support a proportionality approach to some Fourth Amendment issues now governed by categorical rules. Some years ago a scholar wrote: "When an officer acts reasonably, it would torture the English language to condemn his action as an unreasonable search."[354] Likewise, when an officer acts "unreasonably," as the officer did in *Atwater*, it tortures any popular sense of what the Fourth Amendment means to find no violation. To treat the Fourth Amendment as favoring categorical rules to the same degree as the seemingly more absolute language of the First Amendment is to suggest that the text does not matter.[355] And to assume that the proliferation of categorical rules will help constrain rather than liberate official discretion of police officers may be more heroic than realistic.[356]

351. *See* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 54 n.4, 57-60 (1989); Miller v. California, 413 U.S. 15 (1973).

352. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

353. U.S. CONST. amend. IV.

354. Alschuler, *supra* note 248, at 233.

355. Other scholars have noted the Court's inconsistencies, sometimes within the space of months, on the use of all- things-considered and more context-dependent standards, as compared to rule-like, categorical approaches to Fourth Amendment issues. *See, e.g.*, Sklansky, *supra* note 248, at 277-80, 291-98 (discussing *Whren v. United States*, 517 U.S. 806 (1996), *Ohio v. Robinette*, 519 U.S. 33 (1996), and other cases, and identifying inconsistencies).

356. *See* Altschuler, *supra* note 248, at 287 ("What renders substantive [F]ourth [A]mendment law incomprehensible, however, is not the lack of categorical rules but too many of them."); Note, *The Fourth Amendment's Third Way*, 120 HARV. L. REV. 1627, 1627 (2007) ("Scholars agree on very little concerning the Fourth Amendment, but one of the few propositions that nearly everyone accepts is the almost incomparable incoherence of its doctrine."); *see also* Si-

B. Remedial Constraints

Adjudications of liability are always nested in particular remedial systems. The remedies available or required, and their consequences, may have constraining effects on how courts are willing to define the underlying right.[357]

1. The Exclusionary Rule

In the United States, Fourth Amendment remedial rules requiring exclusion of evidence have been applied, at least for a time, in a seemingly categorical manner.[358] By contrast, in Canada the consequence of finding a violation of Charter rights is not necessarily exclusion of the evidence: under Charter Section 24, courts decide, case by case, whether admitting the evidence would "bring the administration of justice into disrepute."[359] The apparent rigidity of the U.S. exclusionary rule may thus militate against more generous interpretation of the right because of the consequences to criminal justice administration. Yet proportionality approaches might also support modifications in the U.S. approach to the exclusionary rule.[360]

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las J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 22-44 (1988) (discussing "Fourth Amendment Formalism" and the Court's failure to attend to the reasonableness requirement).

357. For insightful analysis of this proposition in the context of immunity rules, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-54 (1998).

358. *See* Mapp v. Ohio, 367 U.S. 643, 655-57 (1961). In the 1990s, Carol Steiker noted increasing exceptions to the exclusionary rule and other cutbacks in the remedial efficacy of constitutional criminal procedural rules. Steiker, *supra* note 161, at 2504-21, 2532-40 (noting the weakening of the exclusionary rule not only by the creation of exceptions to its force, but by virtue of law enforcement officers' awareness of these exceptions). More recently, the extent to which the exclusionary rule applies categorically to evidence obtained in violation of the Fourth Amendment has been under serious debate. *See* Herring v. United States, 555 U.S. 135, 140-46 (2009); *id.* at 148-57 (Ginsburg, J., dissenting); *id.* at 157-59 (Breyer, J., dissenting); *see also* Adam Liptak, *Supreme Court Eases Limits on Evidence*, N.Y. TIMES, Jan. 14, 2009, http://www.nytimes.com/2009/01/15/washington/15scotus.html [http://perma.cc/C2E8-NRT5] (reading *Herring* as a debate over whether judges should use a "sliding scale" to determine the applicability of the exclusionary rule, or take a more "categorical" approach).

359. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, s. 24 (U.K.) (providing that where "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute"); *see also, e.g.*, R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353 (Can.).

360. On the possibility that modifications are already under way, see *supra* note 358.

William Stuntz suggested that the absence of attention to proportionality—including the "blindness to differences among crimes"—is one of the deepest problems in Fourth Amendment law.[361] The trans-substantive doctrine of the Fourth Amendment, he argued, created a "reasonableness" gap in the application of the Fourth Amendment's substantive standard.[362] Stuntz also suggested that while the U.S. version of the exclusionary rule serves many useful purposes, the remedy has adversely affected the crafting of substantive Fourth Amendment doctrine and misdirected resources away from more fundamental questions of guilt or innocence.[363] Given the number of existing exceptions to the exclusionary rule, it is possible that more might be gained than lost by adopting a more proportionate approach both to the substantive standards of the amendment and, possibly, even to the consequences of illegality.[364]

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361. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843 (2001) (criticizing the transsubstantive application of rules of criminal procedure); *see also* Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (distinguishing between a roadblock to find a kidnapper and a roadblock to find a bootlegger in Fourth Amendment analysis); Alschuler, *supra* note 248, at 247 ("Plainly, the concept of probable cause should be sufficiently flexible to recognize . . . critical difference[s] in circumstances [of very serious and less serious crimes]."). For a different conception, also applying proportionality to the reasonableness of a search, see Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 4, 47-55 (1991) (calling for application of a "proportionality principle," that "the level of certainty required to authorize a particular search or seizure should be roughly proportional to the level of its intrusiveness," while generally rejecting differences in the severity of past criminal acts under investigation as relevant).

362. Stuntz, *supra* note 361, at 847 (comparing two searches, one in connection with a possible bomb, the other in connection with a local marijuana crime, in which "[t]he different benefits [of the searches] flow from the different crimes the police were investigating" and those "different benefits make for different balances: one of these searches was a good deal more reasonable than the other").

363. *See id.* at 871 n.94 (noting that the extension of the exclusionary rule to states "not only defined the Fourth Amendment's primary remedy but shaped its content as well, by ensuring that most Fourth Amendment law would be made in the context of motions to suppress incriminating evidence"); Stuntz, *supra* note 232, at 38-39, 50 (arguing that the suppression remedy attracts resources to suppression hearings rather than substantive defenses, and that "[t]he manner in which suspects are arrested—how much force the police use, and whether they tend to use more force on some kinds of suspects than others—is regulated only slightly, because police violence tends not to be tied to police evidence gathering, and only evidence gathering is likely to give rise to exclusionary rule claims").

364. Some Justices argued for modification of the exclusionary rule in the 1970s, invoking foreign experience in doing so. *See* California v. Minjares, 443 U.S. 916, 919 (1979) (Rehnquist, J., dissenting from denial of a stay); Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (quoting scholarly discussion of why the exclusionary rule cannot be necessary for judicial integrity "when no such rule is observed in other common law jurisdictions such as England and Canada, whose courts are otherwise regarded as models of judicial decorum and fairness" (citation omitted)); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (stating that the exclusionary

2. *Equal Protection*

Distinct remedial challenges are posed by successful equal protection claims, as their redress may require changes adversely affecting nonparties. For example, if a benefit is made available on terms found discriminatory, there may be options to equalize down, as well as up.[365] Remedial complications may help explain why courts that apply proportionality principles in equality cases do so more deferentially in evaluating challenges to economic or commercial regulations.[366]

Given respect for democratic decision making, interests in the stablity of law, and concern for the reasonable expectations of third parties, there are reasons for caution in the application of equal protection standards to the great mass of legislation.[367] Indeed, in *Washington v. Davis*,[368] the Court rejected disparate impact based on race as a trigger for strict scrutiny, expressing concern that many statutes could not meet the standards of justification required by strict—then usually fatal—scrutiny. Experience with proportionality review elsewhere suggests that equal protection review could be implemented in a more proportionate way, one that does not automatically invalidate laws with such disparate impacts and that can recognize differences in the severity of impacts, especially on historically disadvantaged groups.[369]

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rule "is unique to American jurisprudence" and not followed in either England or Canada). Reconsidering U.S. law in light of proportionality tees up this issue; resolving it requires more analysis than space here permits.

365. *See* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36-43 (1976) (discussing remedial problems that may arise from disparate impact liability under the Equal Protection Clause). Severability analysis may be important, as courts work to determine whether the legislature would prefer to see a benefit extended or withdrawn. Extended times for legislative compliance might also be called for were equal protection doctrine to become more robust. In Germany, when the Federal Constitutional Court finds a statute incompatible with the equality guarantees of the German Basic Law, the Court may decide not to invalidate the statute but declare only that it is "incompatible" with the Basic Law and allow a set period of time for the legislature to enact new legislation. *See* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 35-37, 426-47 (3d ed. 2012) (noting a 2006 decision that gave the legislature until July 1, 2007 to act).

366. *See infra* note 422; *see also infra* note 369.

367. *See, e.g.*, Brest, *supra* note 365, at 36-43; Jeremy Webber, *Democratic Decisionmaking as the First Principle of Contemporary Constitutionalism*, in THE LEAST EXAMINED BRANCH, *supra* note 30, at 424-25.

368. 426 U.S. 229 (1976). For a description of "strict scrutiny" as "'strict' in theory and fatal in fact," see Gunther, *supra* note 146, at 8.

369. *See, e.g.*, Lübbe-Wolff, *supra* note 291, at 13 n.10 (noting stricter justification requirements for "unequal treatment differentiating between preexisting groups of persons," for "uneqal

Proportionality in equal protection review resonates with Justice Thurgood Marshall's "sliding scale" view of equal protection law.[370] In *Dandridge v. Williams*, the Court used relaxed "rational basis" review to uphold a state welfare law imposing a cap on benefits for families with dependent children that had the effect of giving less per child for children in families above a certain size.[371] For Justice Marshall, who dissented, there were differences of constitutional magnitude between classifications affecting businesses and classifications affecting poor children. These differences could be explained by reference to proportionality and a form of "process" theory that Justice Marshall explicitly invoked.

A case involving "'the most basic economic needs of impoverished human beings,'" Justice Marshall wrote, should not be reviewed under a mere rationality standard.[372] Such a rationality standard accepted "extremes . . . in dreaming up rational bases for state regulation" because of "a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls."[373] Here, Justice Marshall drew an implicit contrast between the interests of businesses, which can "protect themselves in the legislative halls," and the interests of much less powerful, poor human beings, including children.[374] He explained that where "the literally vital interests of a powerless minority[,] poor families without breadwinners," are involved, "the *relative* importance to individuals in the class discriminated against of the governmental benefits that they do not receive" required more careful analysis of the government's asserted reasons for the law.[375] Justice Marshall's emphasis on the *relative* importance of the rights is a plea for more proportionality in reviewing standards and in the justifications governments must proffer for the distinctions that their laws create.[376]

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treatment which the persons affected cannot escape," or for unequal treatment affecting fundamental freedoms); *infra* note 422.

370. *See* Gunther, *supra* note 146, at 17-18 (describing Justice Marshall's dissent in *Dandridge v. Williams*, 397 U.S. 471 (1970), as a "sliding-scale analysis").

371. 397 U.S. 471, 473-75, 485-86 (1970).

372. *Id.* at 508 (quoting *id.* at 485, majority opinion) (Marshall, J., dissenting).

373. *Id.* at 520 (Marshall, J., dissenting).

374. *Id.*

375. *Id.* at 520-21 (emphasis added).

376. For similar reasons, Justice Marshall famously dissented in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 109 (1973), arguing that because "discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved," the Court should have more carefully scrutinized Texas's scheme relying on local property taxes to fund the free public education the State guaranteed its citizens.

Justice Marshall's rejection of "a priori definition[s]"[377] in defining the standard of review reverberates with Justice Stevens's later argument that "[t]here is only one Equal Protection Clause,"[378] with a common standard: whether a legislature acting in good faith rationally could believe that the harm it was imposing was justified in support of a greater good. A single standard can be implemented with varying degrees of seriousness depending on the impact of the classification. An example of this kind of approach may be found in *Plyler v. Doe*.[379] Striking down a Texas statute denying public education to children who reside illegally in the country, the Court wrote:

> In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.[380]

The idea in this passage from *Plyler* is that where the harm is great, a rational legislator would need much more convincing evidence of likely effectiveness towards a "substantial goal" before she could conclude that it was rational to impose the harm.[381] This idea is consistent with both Justice Stevens's and Justice Marshall's approaches, as well as with the central idea of proportionality.

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377. 397 U.S. at 520 (Marshall. J., dissenting); *see also Rodriguez*, 411 U.S. at 109 (Marshall, J., dissenting) (rejecting the majority's suggestion that "a variable standard of review would give this Court the appearance of a 'super-legislature,'" because such an approach is a necessary "part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document").

378. Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). For responses to Justice Stevens's approach, see James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006); and Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

379. 457 U.S. 202 (1982).

380. *Id.* at 223-24.

381. For contemporary treatment of *Plyler*, most generally favorable, see, for instance, Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of* Plyler v. Doe, 44 U. PITT. L. REV. 409, 409 (1983) (calling *Plyler* "a significant advance in constitutional jurisprudence"); and Leading Case, *Right of Illegal-Alien Children to State-Provided Education*, 96 HARV. L. REV. 130, 134 (1982) (rejecting the dissenting position but criticizing the majority for a lack of clarity on whether it was status as undocumented children or the fact that education was involved that led to heightened scrutiny). *See also* Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329 (1983) (describing the case as providing the correct answer to a politcal-moral problem but questioning its theoretical basis in the equal protection clause).

As noted earlier, disproportionality in the effects of laws, especially where laws have particularly adverse impact on traditionally discriminated against groups, may be a signal of process failures tainted by prejudices.[382] It may reflect a "deliberate indifference" that is a close cousin to more active forms of prejudice.[383] Rather than relying on tiers of review as on-off switches indicating when reasons must be more substantial, courts might view disparate impact on historically disadvantaged groups (especially if less harmful alternatives towards the asserted goals exist), as signalling a potential process failure requiring higher levels of justification.[384]

Indeed, the rigidly separated "tiered" standards of review may have led to the narrowed understanding of the substantive scope of the Equal Protection Clause in *Washington v. Davis*.[385] Although some have suggested that U.S. con-

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382. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387-88 (1987) (arguing that "the cultural meaning of governmental actions with racially discriminatory impact is the best way to discover the unconscious racism of governmental actors"); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 587 (1977) (arguing that the burdens of a law falling disproportionality on minorities may be a sign that the government is "not as sensitive to the interests of racial minorities as to majoritarian interests"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

383. "Deliberate indifference" is the standard used to evaluate claims that refusals or failures to protect prisoners against substantial risks of serious harm, or to provide prisoners with appropriate medical treatment for serious illness or injury, violate the Eighth Amendment's ban on "cruel and unusual" punishments. *See* Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97, 104 (1976). For a discussion of "deliberate indifference" in the context of equal protection, see generally Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533 (2006).

384. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); *cf.* Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983) (advocating a less stringent intent requirement in antidiscrimination law). Ely was concerned primarily with identifying invidious motives. He rejected arguments for judicial review of legislation distributing benefits not constitutionally required in the absence of invidious purpose; indeed, he rejected arguments that disparate impact alone could violate the Equal Protection Clause. ELY, *supra* note 122, at 136-45. If one believes that government has an obligation to deal impartially with its citizens, however, a substantially disparate impact on a traditionally disadvantaged group, if insufficiently justified, might itself evince an invidious denial of the impartiality to which the Equal Protection Clause aspires. *See* Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing that legislators may unconsciously rationalize and legislate in a way that results in disproportionate adverse impact on racial minorities).

385. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that a law, "neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another"). "Disproportionate impact[,] . . . [s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny." *Id.* (citation

stitutional law is generally oriented towards the prohibition only of intentionally violative acts,[386] this is not a sufficient explanation for *Washington v. Davis*. At that time, as the Court noted, "there [were] some indications" in the Court's own case law that intent was not the critical factor in making out Fourteenth Amendment violations.[387]As the Court also indicated, various courts of appeals had treated disparate impact alone as triggering heightened scrutiny[388]: such court of appeals decisions, the Court fair-mindedly said, "impressively demonstrate that there is another side to the issue"[389] within the existing interpretive resources of U.S. constitutional law.

An important element in the Court's interpretation of equal protection law was its concern that allowing equal protection claims "based solely on [a] statistically disproportionate racial impact" would have sweeping effects on a wide range of important laws.[390] For example, the Court wrote, such jurisprudence might eliminate "various provisions of the Social Security Act" and "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[391] For the Court, "'acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treat-

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omitted). Disparate impact analyses under statutes like Title VII of the Civil Rights Act of 1964, *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971), have survived. *But see* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (raising the question of whether disparate impact liability under Title VII violates constitutional equality guarantees).

386. See COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 64-78, discussed *infra* note 395 and text accompanying *supra* notes 315-326.

387. Washington v. Davis, 426 U.S. 229, 242-43 (1976); *accord* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. 429 U.S. 252, 265 (1977) (noting "contrary indications . . . from some of our cases" to the rule of *Washington v. Davis* that that "[p]roof of racially discriminatory intent or purpose is required" to make out an Equal Protection Clause violation). The Court also discussed other of its own precedents to support the view that the Equal Protection principle was concerned only with discriminatory purpose. *Davis*, 426 U.S. at 239-41.

388. *Davis*, 426 U.S. at 244 (noting that courts of appeals had "held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications").

389. *Id.* at 245.

390. *Id.* at 240, 248.

391. *Id.* at 240-41, 248. *But cf.* Perry, *supra* note 382, at 566 (arguing that the Court's "parade of horribles" will not necessarily result from giving more weight to disparate impact in equal protection law).

ment might be.'"[392] Thus, it concluded, "[d]isproportionate impact . . . [s]tanding alone" does not trigger strict scrutiny.[393]

It seems clear that the Court did not reach its conclusion because it thought racially disproportionate effect was of no concern; disparate impact was "not irrelevant."[394] Motivating the decision in *Washington v. Davis* in important part were the remedial consequences for a broad range of statutes under the then-usually fatal "strict scrutiny" tier.[395] Given the categorical structure of two-tiered review that existed when *Washington v. Davis* was decided, this concern is understandable: intermediate scrutiny had not yet been identified at this time.[396] With the Court's decision in *Personnel Administrator of Massachusetts v.*

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392. *Davis*, 426 U.S. at 240-41 (quoting Jefferson v. Hackney, 406 U.S. 535, 548 (1972)).

393. *Id.* at 242.

394. *Id.*; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). In *Davis*, for example, the Court expressed its agreement with the district court that the use of the test could not be regarded as a purposeful form of discrimination, given the successful efforts of the government to recruit and hire more African-Americans into the Department. *Davis*, 426 U.S. at 246 ("Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general . . . and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.'" (quoting *Davis v. Washington*, 384 F. Supp. 15 (1972))).

395. *But cf.* COHEN-ELIYA & PORAT, PROPORTIONALITY, *supra* note 3, at 66 (viewing U.S. constitutional law as a whole as "an intent-based [system] . . . [that] construes the Constitution and judiciary as the mechanisms for striking down wrongly motivated actions"). As noted earlier, *supra* note 317, Cohen-Eliya and Porat acknowledge some exceptions, not only for a "'consequentialist constraint' in an otherwise deontologically oriented system," *id.* at 72, but also where there is state "indifference" to effects, as in the dormant commerce clause case law, *id.* at 74-75. The willingness to consider "indifference" in dormant commerce clause but not in race- or gender-based equality claims suggests that more is going on than a supposed aversion to effects-based tests can account for. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (holding that indifference to adverse impacts on historically disadvantaged groups ordinarily does not trigger heightened review for equal protection violations). U.S. constitutional law does not so generally focus on "intent," see text accompanying *supra* notes 316-325, as to make implausible the idea that something more was at the root of the *Washington v. Davis* rule.

396. *See* Note, *supra* note 378, at 1147 (describing how, until 1976, there was only two-tiered review). The Court did not adopt intermediate scrutiny for gender classifications until *Craig v. Boren*, 429 U.S. 190 (1976), decided in December, 1976, six months after *Washington v. Davis*. Many statutes at the time would presumably have had some adverse impact based on race—because of links between race and poverty and, possibly, because of the exclusion of African Americans for most of the prior century from full participation in the elections of lawmaking bodies.

Feeney,[397] the gap between strict scrutiny for facial uses of race (or intermediate scrutiny for gender classifications) and rational basis review for facially neutral laws with known disparate impacts widened.[398]

Some of the Court's recent cases have moved away from reliance on rigid tiers, without clearly indicating what is in its place.[399] A standard focused not only on the nature of the classification but also on the relative nature of the harm complained of and its relationship to the particular government interests at stake would allow courts the flexibility to hold legislatures accountable without invalidating most legislation. Such a change in approach would help answer critiques of the Court's position on disparate impact. Failing to recognize disparate impact obscures some invidiously motivated conduct that does take place, and does not recognize the constitutional harm to equal protection of the law that can result from unconscious bias or from deliberate indifference to the situation of minority groups by members of more privileged groups.[400] A more flexible standard for reviewing equal protection claims could treat disparate impacts differently from overt or intentional uses of race, without suggesting that disparate impact on a racial minority group, or other historically discriminated-against group, creates no greater constitutional concern than distinctions between businesses for tax purposes.

More specifically, the use of neutral criteria, claimed to have a disparate impact on already disadvantaged groups, need not be treated as presumptively unconstitutional in order to require some real scrutiny of the reasons for the practice under a single standard of review. Rather, a substantial "disparate" impact on a minority group long subject to discrimination might be viewed as a signal of a possible process failure, reflecting the operation of unconscious bias or deliberate indifference. Such a finding might be viewed as requiring—not the kind of scrutiny that overt uses of race require—but some degree higher than that applied to challenges to economic legislation that is not claimed to impair fundamental rights or rely on suspect classifications.[401] Indeed, similar

397. 442 U.S. 256 (1979) (holding that a knowing use of a preference for veterans, despite its very substantial adverse effect on women, did not require more than rational basis review; only if such a neutral criteria is used "because of" the adverse effects on gender is heightened scrutiny appropriate).

398. *See, e.g.*, Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11-20 (2013).

399. *See supra* notes 151-152 and accompanying text.

400. *See* Flagg, *supra* note 384; Siegel, *supra* note 384.

401. Where a disparate impact falls on a group whose long history of persecution gave rise to the decision to treat the classification as suspect or quasi-suspect, courts might ask whether the challenged law or practice was adopted because of deliberate indifference to the effects on a racial minority group, or on women. If so, some appropriately deferential form of proportionality review (analogous to some form of intermediate scrutiny, sensitive to the magni-

elements were proposed in the scholarly literature in the decades after *Washington v. Davis* was decided.[402]

Experience elsewhere has demonstrated that the burdens of justification, when significant disparate effects on a group historically the subject of discrimination trigger heightened scrutiny, are not necessarily fatal or even that difficult to meet. In the European Court of Justice (now the Court of Justice of the European Union), violations of an anti-discrimination rule may arise from facially neutral policies which have the "effect" of treating women and men differently.[403] Under this quasi-constitutional standard for "indirect discrimination,"[404] the European Court entertains challenges to neutral employment practices with disproportionate adverse impacts on women, including in evaluating wage scales providing lower hourly wages to part-time workers than to full-time workers,[405] or in requiring minimum periods of full-time work to establish eligibility for pensions.[406] In such cases the European case law took into

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tudes of harmful as well as beneficial effects of the challenged law) could evauate whether the practice was justified notwithstanding its disparate effects. *See infra* notes 417-418.

402. *See, e.g.*, Karlan, *supra* note 384, at 124-30 (arguing for a broader understanding of intent, to include action with knowledge or reckless disregard of the disparate impacts of a law, with a slightly less demanding justification requirement); Perry, *supra* note 382, at 560 (arguing that disparate impact should require analysis of the degree of disproportionate impact, the public and private interests at stake, and the fit of the statute to its legitimate goals, without requiring either a "compelling" government interest or the precision of fit contemplated by the Court's narrow tailoring requirements); *see also* Flagg, *supra* note 384, at 391-96 (proposing a form of disparate impact review that would permit the government to justify policies with disparate impact on showing less than "compelling" interest). A common thread is an effort to afford a level of judicial scrutiny greater than rational basis and less than strict scrutiny to laws that have disparate impacts based on race. *See also* Strauss, *supra* note 382, at 935 (arguing that the discriminatory intent standard is useful but that *Washington v. Davis* erred in making it the exclusive standard for establishing Equal Protection violations).

403. Olivier De Schutter, *Three Models of Equality and European Anti-Discrimination Law*, 57 N. IR. LEGAL Q. 1, 9-13 (2006) (discussing the development of the European Court of Justice's disparate impact doctrine in the context of discrimination on the basis of gender); *see also* SANDRA FREDMAN, DISCRIMINATION LAW 181-82 (2d ed. 2011).

404. On the differences between "direct" and "indirect" disrimination in EU law, see EVELYN ELLIS & PHILIPPA WATSON, EU ANTI-DISCRIMINATION LAW 143-55 (2d ed. 2012). Although it is true that Title VII allows disparate impact litigation, this statutory cause of action is arguably more limited (for example, by requirements that challengers show not only a disparate impact, but also linkages between the specific practice and the alleged disparate effect) than that of the comparable line of cases brought under the quasi-constitutional European Union provisions. *See* Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115, 138-49 (2010).

405. *See, e.g.*, Case 96/80, Jenkins v. Kingsgate (Clothing Prods.) Ltd., 1981 E.C.R. 911; *see also* ELLIS & WATSON, *supra* note 404, at 148-51.

406. Case 170/84, Bilka–Kaufhaus GmbH v. Karin Weber von Hartz, 1986 E.C.R. 1607. In *Bilka*, a challenge was brought by a female part-time employee who argued that the re-

Temple American Inn of Court - April 2016 Program - Research and Materials

account that women are disproportionately part-time workers and required employers to provide specific justifications for the exclusion of part-time workers from higher wages or other benefits; this justification ensured that there was no purpose of discriminating against women and that the discriminatory effects were justified as needed for legitimate economic purposes.[407] Once a disparate impact on women (over-represented as part-time workers) is proven, the employer has the burden of showing that the difference in treatment satisfies the principle of proportionality.[408]

In the *Danfoss* case,[409] the European Court held that a criterion of "mobility . . . to reward the employee's adaptability to variable hours and varying places of work," could "work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly."[410] The mobility-

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quirement amounted to pay discrimination based on gender, since women were more likely to be part-time workers.

407. *See Bilka*, at 1627-28 (finding infringement of EEC Treaty Article 119 by a "company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the [company] shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex . . . [and] that the measures chosen by [the company] correspond to a real need on the part of the [business], are appropriate with a view to achieving the objectives pursued and are necessary to that end"; if such a showing is made, then "the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119").

408. On the burden of justification lying with the employer once a prima facie case of indirect discrimination is shown, see Case C-127/92, Enderby v. Frenchay Health Auth., 1993 E.C.R. I-5535, which, like several other rulings, has since been codified in various Directives. *See* ELLIS & WATSON, *supra* note 404, at 158-63. For reference to the EU approach as one of proportionality, see A.C.L. DAVIS, PERSPECTIVES ON LABOUR LAW 134 (2004); FREDMAN, *supra* note 403, at 180; Evelyn Ellis, *The Concept of Proportionality in the European Community Sex Discrimination Law*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 165, 167 (Evelyn Ellis ed., 1999). The tests articulated for implementing this principle of proportionality differ from those of the Canadian *Oakes* test, requiring a legitimate aim, and focusing primarily on the first two prongs of "means" analysis – rationality (or "appropriate with a view to achieving the objectives pursued") and necessity ("necessary to that end"). *See supra* note 407 (quoting *Bilka*). (Some scholars argue that proportionality *stricto sensu* comes into play implicitly in how the two prongs are applied. IAN SMITH & AARON BAKER, EMPLOYMENT LAW 326 (11th ed. 2013).) My argument here is not that the *Oakes* doctrine should be applied to disparate impact claims in the United States, but rather that some form of review, beyond the most relaxed forms of "rational basis" review (and perhaps drawing in part from existing U.S. doctrine or from proposals made by Justices Marshall and Stevens), should be applied to test the constitutionality of laws with severe disproportionate impacts on historically discriminated against groups.

409. Case 109/88, Handels-og Kontorfunktionaerernes Forbund i Danmark v. DanskArbejdsgiverforening acting on behalf of Danfoss 1989 E.C.R. 3199 [hereinafter *Danfoss*].

410. *Id.* ¶¶ 18-21.

related compensation criterion thus arguably violated the "principle" of EU law "that men and women should receive equal pay for equal work."[411] Employers could seek to "justify the remuneration of such adaptability by showing it is of importance for the performance of specific tasks entrusted to the employee."[412] By contrast, in the *Cadman* case the Court accepted that pay scales based on experience would ordinarily be regarded as justified, rejecting the argument that their disproportionate effect on women would require further justification (absent a showing that duration of experience was not in fact job-related in particular settings).[413] This EU case law suggests that a disparate impact standard, sensitive to the different social and life experiences of women and men, can be applied to existing laws without undue economic disruption.[414]

To the extent that equal protection violations in the United States were defined narrowly to focus on intent because of concerns about the risks of judicial intrusion on the existing legal structure,[415] experience elsewhere with a more proportionate, flexible set of inquiries in equality cases suggests that the risk may have been overstated.[416] *Washington v. Davis* led to a large gap between the

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411. CATHERINE BARNARD, EU EMPLOYMENT LAW 254 (4th ed. 2012); Vicki C. Jackson, *Review of Laws Having a Disparate Impact Based on Gender*, *in* GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 130 (Vikram Amar & Mark Tushnet eds., 2008).

412. *Danfoss* ¶ 22.

413. *See* Case C-17/05, Cadman v. Health & Safety Exec., 2006 E.C.R. I-9585; *Danfoss* ¶ 24.

414. *Cf.* Linos, *supra* note 404, at 144 (arguing that U.S. fears that employers would be forced to adopt quotas without a "specific practice" requirement under Title VII "have not materialized" from EU requirements to justify practices that disproportonately affect women). Recent case law in the European Court of Human Rights has embraced "indirect [effects-based] discrimination" as an appropriate analytic for claims of discrimination against Roma children, under the European Convention on Human Rights. *See* D.H. v. Czech Republic, D.H. and Others, Case 57325/00, 2007-IV Eur. Ct. H.R.; Martha Minow, Brown v. Board *in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge*, 50 SAN DIEGO L. REV. 1 (2013).

415. The fear of large-scale invalidation of laws under strict scrutiny plainly was a factor—though not the only one—in *Washington v. Davis*. But *Feeney*, 442 U.S. 256 (1979), cannot be so easily explained. It was decided after "intermediate scrutiny" for gender classifications had been introduced. Under some form of proportionality review compatible with intermediate scrutiny, it should have been possible to say that the Massachusetts scheme gave too large a benefit to the overwhelmingly male group of "veterans," who were the object of the statutory preference, and imposed too high costs on women, even in light of its important purpose. The "proportionality as such" test enables a court to evaluate the impact of neutral laws with disparate impacts and conclude that the degree of preference is too great, in light of its adverse impact on a historically disadvantaged group, even though a lesser degree of preference would be justified by the goal of recognizing the special sacrifices of vetetrans.

416. In addition to the EU case law discussed earlier, it bears noting that the equality provision of Canada's Charter has been interpreted to prohibit both purposeful discrimination and discrimination in effect, *see, e.g.*, Withler v. Canada (Att'y Gen.), 2011 SCC 12, [2011] 1 S.C.R. 396, ¶ 35 (Can.), against groups defined by specific characteristics, including age, gender,

stringent standard of review of facial or intentional uses of race and the lax "rational basis" standard of review for laws having disparate impacts on minorities – a puzzling feature of U.S. equality law. Many aspects of contemporary equality law might be thought to be implicated by this distinction.[417]

Is it too late for U.S. constitutional equality law to reconsider *Washington v. Davis*, in light of experience elsewhere? Perhaps not.[418] A substantial disparate impact on historically discriminated-against groups could be treated as raising an inference of a prohibited motive (including "deliberate indifference"), which

race, national origin, religion, physical or mental disability, and analogous characteristics like marital status. *See, e.g.*, Quebec (Att'y Gen.) v. A, 2013 SCC 5, [2013] 1 S.C.R. 61 (Can.). Despite this extensive catalogue of constitutionally protected classifications, the case law does not seem to have resulted in unbounded judicial interference with legislative decisions. *See, e.g.*, *Withler*, [2011] 1 S.C.R. 396 (Can.) (upholding age-related reductions in certain pension benefits); Gosselin v. Quebec (Att'y Gen.), 2002 SCC 84, [2002] 4 S.C.R. 429 (Can.) (upholding an age-based distinction in access to welfare benefits, accepting that it was easier for younger people to find employment than for older people); *cf. Quebec (Att'y Gen.) v. A*, [2013] 1 S.C.R. 61 (upholding the constitutionality of Quebec statutes distinguishing between those who are married or in a civil union, on one hand, and those in long term relationships, or "de facto" marriages, with respect to statutory obligations for division of property and support after dissolution of the marital relationship, notwithstanding claims that the scheme disadvantaged the financially weaker (typically female) partner); Newfoundland (Treasury Bd.) v. N.A.P.E. [Nfld. Ass'n of Pub. & Private Emps.], 2004 SCC 66, [2004] 3 S.C.R. 381 (Can.) (finding that a violation of Section 15 equality rights, from a decision to delay implementing a pay equity agreement for female workers, was "demonstrably justified" under Section 1 by a severe financial crisis).

417. The origin of the idea of "suspect" classes was in the historic misuse of race as a tool for prejudice against and subordination of racial minorities; that it was minorities being harmed lent support to "representation reinforcement" arguments for strict scrutiny. It was not until close to twenty years after *Washington v. Davis* that the original idea of "suspect" classes was fully and clearly converted into a principle against "suspect classifications," Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), shifting the principal concern of equality law from harm to members of subordinated racial groups to harm to anyone based on a racial classification. A possible reconciliation of *Adarand* with a change in doctrine allowing consideration of disparate impacts on traditionally disadvantaged groups is discussed *infra* note 418 and text accompanying notes 419-422, but space does not permit discussion of the full range of implications for U.S. equality law of making review standards more proportionate.

418. Disparate effects, identified by attention to serious disproportionalities, may be sufficient to show a bad purpose, but only under a broader version of what counts as an invidious purpose than required by *Feeney*, see *supra* notes 395, 397, 415. Since deciding *Washington v. Davis* and *Feeney*, the U.S. Court has also declared that "consistency" requires that overt uses of race claimed to burden non-minorities be reviewed under the same "strict scrutiny" standard applied to minorities. *See, e.g.*, *Adarand*, 515 U.S. at 224; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion); *id.* at 520 (Scalia, J., concurring in the judgment). Were the constitutional significance of serious disparate impacts reconsidered, the existence of historic discrimination against racial minorities provides some basis to think that disparate impacts on those groups are more likely to reflect bad purpose (if not fully intended, then deliberately indifferent) than similar impacts on other groups.

could be rebutted on a showing less stringent than "strict scrutiny" but more rigorous than "rational basis."[419]Although the Court now treats any overt use of race as subject to the same standard of review (whether challenged by majority or minority group members), there are arguably constitutionally relevant differences between the intentional use of race to classify persons and the use of neutral laws that are "race-consciously" designed toward some legitimate end.[420] Disparate impacts that adversely burden minority groups might be regarded as of greater constitutional concern than "disparate impact" harms to members of a majority—if not on a substantive theory of racial nonsubordination then on an evidentiary theory that such disparate impacts are likely to result from bias, whether conscious or not.[421] A more proportionate approach to equal protection could allow courts to probe laws with substantial disparate impacts on racial minorities or women under the more flexible standards proposed by Justices Marshall and Stevens.[422]

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419. *See* sources cited *supra* note 402. A more proportionate approach to reviewing equality claims might also uphold a wider range of affirmative action programs, designed to respond to disadvantages previously imposed by law on discrete minority groups identified by race. *Cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 359 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part) (arguing that "racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives,'" a standard between rational basis and strict scrutiny (quoting Califano v. Webster, 430 U.S. 313, 317 (1977))). It is, however, possible that some members of the Court would place so much weight on color-blindness as a constitutional value and on potential adverse consequences of affirmative programs that the standard of review would not affect their view on the outcome.

420. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (opinion of Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). For at least one Justice in the narrow majority, Justice Kennedy, it is the public use of racial criteria to classify individual persons, rather than purposive consideration given to race, that is of most concern. *See id.* at 782-83, 787-89 (Kennedy, J., concurring in part and concurring in the judgment) (indicating that classifying individual children by race for purposes of school assignment is prohibited, but that "race conscious" but facially neutral measures relating, for example, to school district lines is permissible).

421. *See supra* notes 417-418.

422. Whether such an approach should extend across equality law cannot be fully addressed here. Allowing disproportionate effects to be considered through more flexible standards in cases involving poor welfare recipients or schoolchildren (as in *Dandridge* or *Rodriguez*) might lead to calls for greater scrutiny of economic regulation of businesses, arguably at the core of "Lochnerism." To some extent, this may already be happening through reliance on other parts of the Constitution (for example, under the Takings Clause with respect to land use regulation); the Supreme Court recently refused to rule out the possibility of a "takings" challenge to permitting taxes. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2602 (2013) (leaving open whether and when a "'tax' [could] become[] 'so arbitrary . . . that it was not the exertion of taxation but a confiscation of property'" (quoting Brushaber v.

3. *Criminal Sentencing*

In contrast to the remedial challenges of equality law and the exclusionary rule, proportionality could play more of a role in criminal sentencing without such complications.[423] Prior to the enactment of the Sentencing Guidelines in

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Union Pac. R.R. Co., 240 U.S. 1, 24-25 (1916))); *see also* Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1475 (2015) (reviewing RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014)) (questioning the stability of the bifurcated approach to review of economic regulation as compared to regulation of noneconomic personal liberties); *cf.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (treating the use of money in political campaigns as equivalent to "speech" subject to regulation only to "prevent corruption," very narrowly defined). The Court's increasingly aggressive protection of campaign spending might be viewed as the Lochnerization of the First Amendment. For early scholarly discussion, see Cass R. Sunstein, *Free Speeech Now*, 59 U. CHI. L. REV. 255, 291 (1992). Moreover, to the extent that the *Lochner* problem involved the Court's basic economic theory of the Constitution, *see, e.g.*, Choudhry, *supra* note 144, at 3, it would not be redressable at the level of a trans-substantive methodological choice between case-by-case proportionality or categorical rules.

Some scholars have argued that proportionality review would be a real improvement over the kind of "rational basis" review, amounting to "abdication" of judicial responsibility, found in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). Mathews & Stone Sweet, *supra* note 52, at 838-44. Justice Marshall's suggestions that courts could distinguish the severity of the harm when the rights of the poor as compared with commercial enterprises are at stake, and could also distinguish the likely need for judicial checks on legislatures on behalf of more and less powerful groups, remain salient. Experience in Germany suggests that a proportionality approach sensitive to the nature of the interests affected might avoid the "*Lochner*-esque" risks of undue judicial intervention in economic regulation. *See* KOMMERS & MILLER, *supra* note 365, at 421, 425-39 (noting the German Constitutional Court's use of "sliding scale" and proportionality-like criteria in resolving equal protection cases but doing so through varying "intensity" of review); Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 256-57 (1999) (noting that in the "field of economic legislation," including "mass administration of welfare law," the court "established a doctrine of area-specific legislative discretion," by which "the Parliament is given much greater discretion than in the fields of criminal law, voting law and the law of qualification tests"); Edward J. Eberle, *Equality in Germany and the United States*, 10 SAN DIEGO INT'L L.J. 63, 110 (2008) (describing more relaxed standard for reviewing the proportionality of equality claims in socioeconomic sphere, except when the socioeconomic regulations have a "disparate treatment of essentially similarly situated groups," for example, blue-collar and white-collar workers with respect to length of notice of termination); *see also supra* note 369. Eberle also notes that although the German Court applies more relaxed review to socioeconomic measures, unlike in the United States the German Court varies the intensity of review even for socioeconomic matters: review can be "quite intensive, mainly when the disparity between groups similarly situated is too large." *Id.* at 118; *see also* KOMMERS & MILLER, *supra* note 365, at 421 (noting that in contrast to U.S. "rational basis" review, which "usually assumes a rational connection between classification and purpose," the German "Constitutional Court places a heavy burden on the legislature to demonstrate such a connection," creating an "*enhanced* rationality review").

423. Federal courts historically did not exercise appellate review over the proportionality of sentences, *see* Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810,

the 1980s, there was very little appellate review of sentences in the federal system. Appellate review for compliance with the Guidelines was authorized on appeal by either the government or the defendant. Since 2005, when the Guidelines ceased to be mandatory, federal appellate courts have been authorized to review sentences for reasonableness.[424]

The Court has repeatedly considered the proportionality of death sentences and held them to be unconstitutional under the Eighth Amendment under various circumstances, as when for example, the crime was not intended to and did not result in death; but its non-capital case law has been parsimonious in reviewing prison sentences under the "gross disproportionality" standard.[425] Indeed, the Court's Eighth Amendment case law on non-capital sentences for adult offenders is sparse. In *Weems v. United States*, the first case in which the Court found a punishment to violate the Eighth Amendment, the Court referred to that Amendment as embodying a "precept of justice that punishment for crime should be graduated and proportioned to offense."[426] Although some

855-56 & nn. 226 & 227 (1975); *see also* Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1251 (1997) (noting that before the Guidelines, sentences were "virtually unreviewable"), and thus perhaps did not develop legal sensibilities for identifying disproportionate sentences. Under the 1984 Sentencing Reform Act's guideline regime and until *United States v. Booker*, 543 U.S. 220 (2005), federal judges' sentencing discretion was highly constrained, *see* Am. Law Inst., Model Penal Code: Sentencing Report 116 (2003) ("[A]ll state guidelines systems locate much greater sentencing discretion with the judiciary [than the Federal Guidelines]."); appellate courts reviewing federal sentences focused on applications of the detailed, complex, administratively developed and generally binding "guidelines," *see* Stith & Cabranes, *supra*, at 1266-70.

424. *See* United States v. Booker, 543 U.S. 220, 245, 260-65 (2005) (holding that the Sentencing Guidelines are only advisory and contemplating appellate review of federal sentences for reasonableness). On the history of federal appellate review of sentences, see Note, *More than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 952-58 (2014).

425. *See supra* note 44. *Compare, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (finding the death penalty disproportionate for the rape of an adult), *and* Kennedy v. Louisiana, 554 U.S. 407 (2008) (finding the death penalty disproportionate for the rape of a child), *with* Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a life sentence for a defendant who was a habitual offender and stole goods worth less than $300), *and* Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (upholding a mandatory life without parole sentence for possession of a substantial amount of cocaine, emphasizing that the Eighth Amendment does not require proportionality, it only forbids gross disproportionality) (Kennedy, J., concurring in part and concurring in the judgment), *and* Ewing v. California, 538 U.S. 11 (2003) (upholding a life sentence for recidivist offenses). Even in capital sentencing, the Court has been reluctant to conclude that appellate review for "proportionality" in the sense of consistency with others convicted of similar crimes is required by the Eighth Amendment. *See* Pulley v. Harris, 465 U.S. 37 (1984) (rejecting the claim that appellate proportionality review for consistency with other sentences is necessary for all death sentences).

426. 217 U.S. 349, 367 (1910); *see supra* note 43; *see also* O'Neil v. Vermont, 144 U.S. 323, 331 (1892) (rejecting a challenge to cumulative sentence for multiple offenses, but stating that

Justices have argued that the Cruel and Unusual Punishments Clause bans only particular methods of punishment and not excessive sentences,[427] majorities since *Weems* have found that it does ban severely excessive sentences. In *Solem v. Helm*,[428] the Court reaffirmed that the Eighth Amendment prohibits not only barbaric punishments, but also punishments that are disproportionate to the offense, holding unconstitutional a life without parole sentence imposed on a petty offense recidivist. In *Harmelin v. Michigan*, a majority of the Court, three of whose members emphasized that the Eighth Amendment encompassed only "a narrow proportionality principle," refused to apply *Solem* to invalidate a mandatory life without parole sentence for possession of more than 650 grams of cocaine.[429] The case law suggests that while the proportionality of death sentences is subject to serious scrutiny, for non-death sentences of imprisonment the standard of "gross disproportionality" will rarely be met. Yet Canada, interpreting a very similarly worded provision in its Charter[430] and applying its own judge-made rule of "gross disproportionality," has taken a harder look at criminal punishments. For example, in *R. v. Smith*,[431] the Canadian Court held

"[i]f the penalty were unreasonably severe for a single offense, the constitutional question might be urged" if the Eighth Amendment had been assigned as error and were applicable to the government involved); *id.* at 339-40 (Field, J., dissenting) ("The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."); *cf.* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 480 (1867) (noting that the Eighth Amendment does not apply to the states, but going on to say in any event that "it appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this").

427. *See* Graham v. Florida, 560 U.S. 48, 99 (2010) (Thomas, J., joined by Scalia, J., dissenting); Weems v. United States, 217 U.S. 349, 382-413 (1910) (White, J., joined by Holmes, J., dissenting).

428. 463 U.S. 277, 284 (1983).

429. 501 U.S. 957, 997 (1991) (Kennedy, J., joined by O'Connor and Souter, J.J., concurring in part and concurring in the judgment). Two other Justices would have rejected *Solem*'s proportionality analysis altogether. *See id.* at 962-87 (Scalia, J., joined by Rehnquist, C.J). Four Justices dissented. *See also* Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding, by a five to four vote, a mandatory life sentence for a property crimes recividist).

430. Section 12 of Canada's Charter of Rights and Freedoms provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." Canadian Charter of Rights and Freedoms, Part I of the Constiution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, § 12 (U.K.).

431. [1987] 1 S.C.R. 1045 (Can.). The Canadian Supreme Court characterized the Canadian approach as more restrictive than the U.S. case law at the time, in that only gross disproportionality, not mere excessiveness, could constitute a Charter Section 12 violation. In other cases, the Canadian Court has upheld mandatory minimum sentences; for serious offenses, see, for example, R. v. Luxton, [1990] 2 S.C.R. 711 (Can.) (life without eligibility for parole

that a mandatory minimum of seven years for all offenses involving the distribution of narcotics was grossly disproportionate because it applied regardless of distinctions in degrees of seriousness of the offense. The sentencing practices of some foreign nations,[432] international tribunals,[433] and some states,[434] suggest that a more just and consistent approach to sentencing would be possible with greater attention to the proportionality of the sentence in light of the offense, the offender, and the treatment of comparable offenses and offenders. Proportionality as an outer limit based on the offense severity, as well as proportionality as a form of comparability with similarly situated offenders, have widespread support in the scholarly literature.[435]

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for twenty-five years for first degree murder); R v. Latimer, 2001 SCC 1, [2001] 1 S.C.R. 3 (Can.) (life without eligibility for parole for ten years for second degree murder, in a case involving the mercy killing of defendant's severely disabled child); R v. Wiles, 2005 SCC 84, [2005] 3 S.C.R. 895 (Can.) (mandatory ten-year minimum prohibition on possessing firearms following a drug conviction, where an exception exists if firearms are essential for the defendant's being employed or for minimal sustenance activities); and R. v. Ferguson, 2008 SCC 6, [2008] 1 S.C.R. 96 (Can.) (four-year minimum for manslaughter with a firearm, in a case involving a police officer in altercation with prisoner). For lesser offenses, see R v. Goltz, [1991] 3 S.C.R. 485 (Can.) (upholding seven days of imprisonment as a mandatory minimum for knowingly driving while prohibited from doing so based on a bad driving record).

432. *See* Note, *supra* note 424, at 967 & n.121 (noting the role of appellate review in constraining sentencing decisions in England and Germany).

433. *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9*, *reprinted in* 37 I.L.M. 999 (1998), art. 81.2 ("A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence . . . ."); *see also* 2 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING 285 (2014) (discussing principles of equality, proportionality, and gradation of punishment in international criminal law).

434. *See, e.g.*, SULLIVAN & FRASE, *supra* note 52, at 154-60 (summarizing state laws and discussing Illinois case law); Conner v. State, 626 N.E.2d 803 (Ind. 1993) (holding that a six-year sentence for distributing fake marijuana was constitutionally excessive compared to the three-year maximum for distributing true marijuana); Best v. State, 566 N.E.2d 1027 (Ind. 1991) (finding a twenty-seven-year habitual offender sentence unconstitutionally excessive under the state constitution in light of the conviction offense and nature of defendant's past record); Mills v. State, 512 N.E.2d 846 (Ind. 1987) (explaining that while proportionality analysis is not required under the federal Constitution, it is required under Indiana's constitution); State v. Johnson, 709 So. 2d 672 (La. 1998) (explaining circumstances in which a statutory mandatory minimum should be found constitutionally "excessive" so that the sentence should be below the minumum). With thanks to a paper by Lise Rahdert, Yale Law School, J.D. expected 2015, for bringing some of these cases to my attention.

435. *See, e.g.*, SULLIVAN & FRASE, *supra* note 52, at 129-68. For an argument that proportionality should play more of a role in limiting punishment, regardless of the penological purposes of punishment, see Ristroph, *supra* note 66.

Judicial resistance to reviewing sentence lengths as purely subjective[436] is puzzling, as the availability of information on sentences for comparable offenses and offenders both within and outside of the jurisdiction provide objective anchors for gross disproportionality determinations based on treatment of others.[437] In two recent cases, the Court has drawn from its death penalty jurisprudence and more closely scrutinized juvenile life sentences. It has held that a life without parole sentence for non-homicide offenses violates the Eighth Amendment as applied to minors, because of their characteristics; it also held that a mandatory life without parole sentence for a homicide crime is impermissible for juveniles, because an individualized sentencing determination, like those required for adults in capital cases, is required before imposition of the most severe lawful penalty.[438] Whether these cases foreshadow a broader willingness to take a harder look at the constitutional proportionality of noncapital sentences is uncertain. Likewise uncertain is whether federal courts' growing familiarity with review of sentences for reasonableness will contribute to further development of constitutional standards of proportionality under the Eighth Amendment. There is reason to think, however, that both law and society would benefit from more real attention to the problem of grossly disproportionate prison sentences than has occurred to date.[439]

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436. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 275-76 (1980); Note, *supra* note 424, at 960-61 (describing the concerns of some federal appellate judges). William Stuntz raised the possibility of "a proportionality rule, requiring that the conduct criminalized be serious enough to justify the punishment attached to it," but concluded that a major difficulty would be the absence of a "nonarbitrary way to arrive at the proper legal rules," whether for reviewing sentences, or distinguishing traffic stops from other crimes for Fourth Amendment purposes. Stuntz, *supra* note 232, at 66, 73. Comparisons with other sentences for similar offenses and offenders is an objective way of ensuring one kind of proportionality; and while some comparative severity judgments may be contested, others are widely accepted: intentional violence, for example, is generally considered more severe than modest property crime. Appellate review of criminal sentences in other jurisdiction rebuts claims of necessary arbitrariness. *See supra* notes 431-434.

437. This point has been noted by members of the Court. *See, e.g.*, Ewing v. California, 538 U.S. 11, 47-52 (2003) (Breyer, J., dissenting); Harmelin v. Michigan, 501 U.S. 957, 1019-20 (1991) (White, J., dissenting).

438. Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012). Interestingly, in *Graham*, Chief Justice Roberts wrote separately, arguing against any categorical rule against sentencing juveniles to life without parole in nonhomicide cases but agreeing that in the particular factual context of the crime, the age of the fourteen year-old defendant, and the severity of the sentence compared to what both the prosecutor and probation officer had recommended, the sentence was unconstitutionally excessive. 560 U.S. at 86-96 (Roberts, C.J., concurring in the judgment). Whether this case may presage a willingness to look more carefully at proportionality challenges to prison sentences for adults remains to be seen.

439. *See* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 34-37, 68 (2014) ("Current incarceration rates [in the United States] are historically and com-

C. Fragile Rights, Fragile Regimes

There may be a distinctive need for prophylactic rules either to protect a right that is particularly fragile or to protect the performance of particularly sensitive government functions.

It is widely believed that some rights are particularly sensitive to threats from the possibilities of enforcement and accordingly require prophylactic protection.[440] In the United States, First Amendment rights of freedom of speech are understood to have this kind of fragility, and various doctrines have developed, including overbreadth, that constitute departures from ordinary adjudicatory practice.[441] *New York Times Co. v. Sullivan*[442] can be understood in this way: perhaps it is not that there is a First Amendment right to be negligent in reporting adverse facts about a public official,[443] but that there is a First Amendment right to engage in robust critical discussion of such public figures. That right might be threatened if reporters' actions were adjudicated under only a negligence standard, and thus plaintiffs must show malice or reckless disregard for the truth – as a prophylactic rule.[444]

In other areas the First Amendment's reach has been narrowed by categorical rules, arguably reflecting some form of proportionality analysis behind the rule, and sometimes qualified by further categorical exceptions to the categorical rule. For example, the First Amendment has been interpreted to allow stat-

paratively unprecedented. The United States has the highest incarceration rates in the world, reaching extraordinary absolute levels in the most recent two decades.")

440. *Cf.* Scalia, *supra* note 16, at 1180 (arguing that a well-formulated rule provides more comfort to lower court judges who rely on it to enforce a correct, but unpopular position, a view having particular salience for speech).

441. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977) (defending the First Amendment overbreadth doctrine on the grounds that "First Amendment interests are fragile interests"); *see also supra* note 265.

442. 376 U.S. 254 (1964).

443. *Cf.* Pierre N. Leval, Commentary, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in Its Proper Place*, 101 HARV. L. REV. 1287 (1988) (characterizing *Sullivan* as concerned primarily with threat of large money awards to press freedoms, not as hostile to judicial actions to vindicate private reputational interests injured by inaccurate reporting). *But cf.* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 211 (arguing that the central significance of the case was its coming close to rejecting the possibility that there could be defamation of public officials concerning their governmental acts and its clear rejection of the constitutionality of the Sedition Act of 1798 by embracing the proposition that "false statements of facts . . . are apparently to be afforded constitutional protection").

444. *New York Times*, 376 U.S. at 298 (Goldberg, J., concurring in the result) ("The prized American right 'to speak one's mind' about public officials and affairs needs 'breathing space to survive.'" (quoting Bridges v. California, 314 U.S. 252, 270 (1941); NAACP v. Button, 371 U.S. 415, 433 (1963))).

utes that ban "fighting words."[445] The Court explained in *R.A.V. v. City of St. Paul* that fighting words do not entirely lack expressive content but could be prohibited based on aspects of the speech unrelated to their content that justify the limited restriction on speech.[446] (On the majority's account, a statute singling out racist forms of fighting words fell within a "content-based" exception to the exception for fighting words.) For the concurring Justices, prohibiting hateful fighting words posed little threat to First Amendment values because the "expressive conduct . . . is evil and worthless in First Amendment terms."[447] On either rationale, one can identify a categorical rule arguably resting on a relative evaluation of the harms from the speech and the harms from its prohibition.

Scholarly literature identifies distinctive U.S. doctrine protecting "hate speech" from punishment as an important aspect of the U.S. constitutional tradition.[448] I do not here address the correct constitutional treatment of hate speech regulations. I contrast the majority's analysis in *R.A.V. v. City of St. Paul*,[449] which rested on a view that even "fighting words" had expressive value

445. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (describing the statute for "punishing verbal acts" that it was upholding as "carefully drawn so as not unduly to impair liberty of expression," and concluding that its application to the facts did not "substantially or unreasonably imping[e] upon the privilege of free speech").

446. 505 U.S. 377, 385-86 (1992).

447. *Id.* at 402 (White, J., joined by Blackmun and O'Connor, JJ., concurring in the judgment); *see also id.* at 416 (Stevens, J., concurring in the judgment) ("Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . ; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.").

448. *See, e.g.*, Roger Errera, *The Freedom of the Press: The United States, France, and Other European Countries*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 63 (Louis Henkin & Albert J. Rosenthal eds., 1990); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 252 (2011).

449. *R.A.V.*, 505 U.S. at 391-92, 399-400 (denying that "fighting words" have at most a "*de minimis*" expressive content, arguing that the hate speech ordinance at issue involved both "content" and "viewpoint" discrimination, and explaining that the "point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content"). The Court distinguished the ordinance from others, like the statute specially protecting the President from threats, *see id.* at 388 (asserting that threats only against the President can be criminalized because "the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President"), but without clarifying why that logic did not uphold the hate-speech ordinance. *See id.* at 408 (White, J., concurring in the judgment) (arguing that this exception "swallows the majority's rule. Certainly, it should apply to the St. Paul ordinance, since 'the reasons why [fighting words] are outside the First Amendment . . . have special force when applied to [groups that have historically been subjected to discrimination]'" (quoting

and that the ordinance was a "content-based" or "viewpoint-based" regulation of speech, with a Canadian case analyzing a similar issue through proportionality analysis. In *R. v. Keegstra*, the Canadian Supreme Court upheld a statute making it a crime willfully to engage in public speech calculated to bring hatred upon a group defined by race, color, ethnicity, or religion.[450] The justices were sharply divided on the outcome, but the majority and dissenting opinions all applied proportionality analysis and addressed the same questions in the same sequence. The dissenting opinion, while agreeing with the majority that the statute had a pressing and substantial objective, argued primarily that it did not minimally impair free speech values (noting the risks of its misapplication and the severity of a criminal sanction), while also questioning the statute's rationality and proportionality as such (noting its potential chilling effects and the possibility that criminal prosecutions would draw more attention and support to the racist views).[451] Both majority and dissent in the Canadian case gave substantial weight to the special harms of hateful speech based on race or religion in ways that went well beyond the U.S. Court's brief mention of the reprehensibility of the cross-burning in *R.A.V.*[452] As the competing opinions in *Keegstra* suggest, the issue is one on which there are powerful arguments on both sides.

As Mark Tushnet has suggested, the U.S. Court may be hesitant to recognize exceptions to the general rule against content-based regulation because of

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R.A.V., 505 U.S. at 388 (majority opinion)). For further discussion of these two cases, see Jackson, *supra* note 79, at 611-16.

450. [1990] 3 S.C.R. 697 (Can.). All of the justices agreed that the statute infringed on Section 2 protections of freedom of expression; they disagreed on whether, under Section 1 of the Charter, the statute was "demonstrably justified" under the *Oakes* proportionality test.

451. *Id.* at 718, 758 (majority opinion); *id.* at 851-63 (McLachlin, J., dissenting). Later Canadian case law distinguishes between exposing groups to hatred and exposing them to ridicule, permitting sanctioning of the former but not the latter. *See* Sask. Human Rights Comm'n v. Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467 (Can.).

452. *See Keegstra*, [1990] 3 S.C.R. at 718, 758; *id.* at 861 (McLachlin, J., dissenting). By contrast to both the majority and the principal dissent in *Keegstra*, *see, e.g.*, [1990] 3 S.C.R. at 746-47 (Dickson, C.J.) ("The derision, hostility and abuse encouraged by hate propaganda . . . have a severely negative impact on the individual's sense of self-worth and acceptance [and] may cause target group members to take drastic measures in reaction . . . ."); *id.* at 812 (McLachlin, J., dissenting) ("The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. . . . [I]t may threaten social stability."), the *R.A.V.* Court failed to discuss the harms at which the municipal law was aimed until late in the opinion, and did so only briefly. *See* 505 U.S. at 395-96 (noting that there are compelling interests in assuring the basic human rights of discriminated-against groups to live in peace and that burning a cross in someone's yard is reprehensible, but asserting that the state has other means to prohibit it); *see also id.* at 392. In so doing, it arguably failed adequately to address the reasonable concerns of those on the losing side. *See supra* note 228.

a "fear" of judgment.[453] Courts cannot, however, escape judgment; they can sometimes obscure the character of their judgments through nonpurposive extensions of rules, as arguably has occurred in several areas of First Amendment law.[454] Structured proportionality analysis can help make more transparent the arguments for and against recognition of further categories of analysis of First Amendment claims. The Canadian opinions suggest that, to the extent the First Amendment is construed to prohibit even narrowly drawn hate speech statutes, it should not be because such expression is somehow viewed as having more value than obscene speech, or fighting words in general, but because of the risks of misapplication that such statutes historically present.[455]

This piece has for the most part focused on constitutional rights. But just as prophylactic rules are sometimes necessary to protect unusually fragile rights, prophylactic rules may also be designed to protect important government functions. Many such rules exist.[456] Immunity for judges from civil liability for their adjudicatory acts, which is an absolute immunity under federal law, is famously justified on the basis that without it the costs of defending nonmeritorious suits would be too high, and fear of lawsuits would threaten judicial independence.[457] Qualified immunity rules have been justified as necessary to

453. Tushnet, *The First Amendment*, *supra* note 251, at 105-06.

454. *See supra* notes 252-258 and accompanying text (noting Tushnet's critique of decisions in *Snyder v. Phelps* and *United States v. Stevens*).

455. Such regulation could be viewed as sufficiently neutral if it applied to the fomenting of hatred directed against any racial or religious group, not designed to favor or protect only one side in racially charged conflicts. *But see R.A.V.*, 505 U.S. at 391-92 (treating a hate speech statute directed at racial and religious groups as viewpoint-based because it did not prohibit hate speech against those who preached tolerance). There may, however, be institutional reasons, not present in Canada, in the more decentralized criminal justice and court systems of the United States to limit exceptions to the presumptive ban on content-based regulation. *See* Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-Ian Freedoms*, 58 U. MIAMI L. REV. 265, 316-17 & n.108 (2003).

456. For example, filing deadlines for appealing from trial court decisions both limit access to judicial review and, in another sense, make judicial review possible by providing for an orderly process of review.

457. *See* Stump v. Sparkman, 435 U.S. 349 (1978); Yaselli v. Goff, 12 F.2d 396, 399 (2d Cir. 1926) ("A defeated party to a litigation may not only think himself wronged, but may attribute wrong motives to the judge whom he holds responsible for his defeat. . . . To allow a judge to be sued in a civil action on a complaint charging the judge's acts were the result of partiality, or malice, or corruption, would deprive the judges of the protection which is regarded as essential to judicial independence."); *see also* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.) ("[A]n official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well-founded until the case has been tried, and that to submit all officials, the innocent as well as the

protect officials' ability to function.[458] Such general categorical rules, designed to protect the government's ability to carry out functions that could be jeopardized by intrusive remedies, might well be upheld through structured proportionality analysis notwithstanding their adverse effects on rights-remediation. Consider these questions from structured proportionality analysis: is the goal of protecting officials from the predictable effects of suits, most of which are nonmeritorious, a substantial one? Most would say yes. Is the provision of a high degree of immunity a rational means towards doing so? Plainly yes. But do the means "minimally impair" the rights of those who claim officials have acted unlawfully? This is a closer question, depending on empirical estimates of the effects of different forms of protection that might shift over time.[459] Finally, application of immunity rules would probably be found proportional in all but the most unusual of cases, because to freely make exceptions would undermine the protective purpose of the rule.

CONCLUSION

Embracing proportionality as a principle does not necessarily support its doctrinal use in all areas of adjudication.[460] Proportionate justice concerns

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guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."). Immunity from all or most civil damage actions is widespread in constitutional systems with independent judiciaries. *See generally* JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed., 2012) (exploring elements of judicial independence in several systems).

458. *See* Scheuer v. Rhodes, 416 U.S. 232, 239 (1974) (stating that qualified immunity rests on "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability"); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (explaining its departure from the "good faith" definition of immunity to an "objective" definition in order to protect officials from burdens of litigation). Absolute immunity is even more rule-like, entirely insulating officials from constitutional tort actions related to certain forms of official conduct, such as criminal adjudication or prosecution. *See supra* note 457. The Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964), explicitly invoked *Barr v. Matteo*, 360 U.S. 564 (1959), a then-recent case extending an immunity to civil servants sued for common law libel.

459. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. at 815-19.

460. Proportionality plays a role, both in the United States and elsewhere, as an element in analyzing constitutional questions of federalism. Although some dormant commerce clause cases can be conceptualized as about the rights of out of state goods, services, businesses, or persons and thus analogous to equality claims, there are dormant commerce clause cases that appear to be less about discrimination and more about burdens. *E.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Proportionality may play a quite different role in these two kinds of cases, and a different role again in measuring contests between central government and subnational government powers. In horizontal structural issues – in the U.S. called "separation of powers" – whether the concept of proportionality has any role at

Temple American Inn of Court - April 2016 Program - Research and Materials

could, in some areas, lead to categorical rules rather than to contextualized case-by-case determinations. Using proportionality to define violations, of course, does not dictate remedies or exclude definitions of rights based on separate deontological or historical questions. However, greater use of proportionality, as a principle and as a structured form of review, has several potential benefits. It could enhance judicial reasoning by clarifying justifications for limitations on freedoms. Proportionality might also improve the outcomes of adjudication by bringing U.S. constitutional law closer to (admittedly varied) U.S. conceptions of justice, in ways consistent with the demands of effective government. Finally, proportionality may be democracy-enhancing, both in providing a shared discourse of justification for action clamed to limit rights and in providing more sensitivity to serious process-deficiencies reflecting entrenched biases agaist particular groups.

Justice Scalia has famously argued that the rule of law is a law of rules.[461] But sometimes the rule of law requires attention to the "reasonableness" of conduct. Sometimes considerations of degree will bear on the formulation of a categorical rule in ways that the questions of proportionality analysis can help answer. If we are proportional in our application of proportionality, we may be able to improve much criticized areas of constitutional law while retaining an important role for presumptive categorical rules. Expanding existing proportionality review of criminal sentences would bring more justice to the criminal justice system. In equality case law, the Court's definition of the constitutional right as excluding injuries to minorities from "disparate impacts" of neutral laws may have resulted from fear of applying the usually fatal "strict scrutiny" test;[462] it might be reconsidered in light of case law from other jurisdictions involving more proportionate approaches to defining the violation. Asking the "proportionality as such" question might clarify and strengthen the "compelling interest" test used in some First Amendment areas. Where the Constitution itself uses "reasonableness" as a criterion, as in the Fourth Amendment, embracing proportionality in place of some of the more categorical existing approaches offers substantial benefits.

Consider *Atwater* again: if there were no less rights-impairing alternative that as effectively advances legitimate law enforcement interests, and if the harm to protected constitutional rights were outweighed by the need to advance those law enforcement interests, then a categorical investigatory rule could be upheld. An opinion following the Canadian approach, though, would

all to play would take considerable reflection. *See* Jackson, *supra* note 225, at 843-47 (discussing proportionality and structural constitutional issues). For these reasons, this paper has focused primarily on proportionality doctrine in the adjudication of individual rights cases.

461. *See supra* notes 16, 307.

462. *See* Washington v. Davis, 426 U.S. 229 (1976).

take fuller account of the individual's constitutional rights claim than did the *Atwater* Court. In so doing, the Canadian approach might well be more convincing than opinions that focus primarily on *authority* for the law enforcement action, rather than the reasons for it. Unlike trial courts' decisions, police officers' decisions made in their daily interactions with citizens are highly unlikely to be redressable through the means of subsequent review. Further, when police officers accustomed to unreviewable exercises of discretion make unnecessary arrests or commit gratuitous violence, the harm to the subjects of police abuse – as well as to respect for the rule of law – can be high.[463]

Perhaps the Court's decision in *Atwater* could be viewed as a form of empirical humility about the presumed expertise of police as compared to courts. Perhaps it could be regarded as manifesting respect for democratic federalism, notwithstanding case law treating authority under state law as irrelevant.[464] At the same time, given very high incarceration rates in the United States and evidence that the criminal justice system falls with greater severity on members of already disadvantaged groups,[465] it is by no means clear that law enforcement officers need more, rather than less, insulation from judicial review of the constitutionality of their actions.

Where the Constitution itself uses "reasonableness" as a criterion, as it does in the Fourth Amendment, the use of categorical rules that treat patently unreasonable conduct as constitutional does a disservice to the rule of law and fails to protect express constitutional values.[466] When the Constitution requires the vindication of such large-scale commitments as "equal protection of the laws," or "due process of law," embracing a more flexible, proportionality-based approach may better protect constitutional justice than will existing categorical approaches, by offering a check on governmental indifference or

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463. From reactions to 1) the Los Angeles Police Department's use of chokeholds in traffic stops, disproportionately killing African-American citizens in the 1970s and 1980s; 2) the Rodney King incident of the early 1990s; 3) the 1999 killing of Amadou Diallo in New York; and 4) the very recent death by police violence of an unarmed man in Ferguson, Missouri, these harms are apparent. *See* Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127, 161-74 & n. 155 (2014) (the Los Angeles Police Department's use of chokeholds and Rodney King); Edwidge Danticat, *Enough Is Enough*, NEW YORKER: CULTURAL COMMENT (Nov. 26, 2014), http://www.newyorker.com/culture/cultural-comment/michael-brown-ferguson-abner-louima-police-brutality [http://perma.cc/TG56-JU83] (Diallo and Ferguson).

464. *See supra* note 249.

465. Members of those groups most severely disadvantaged by race and class may not have the resources that Ms. Atwater found to bring her challenge.

466. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 373 (2001) (O'Connor, J., dissenting) ("The Court neglects the Fourth Amendment's express command in the name of administrative ease.").

blindness to acute harms caused to those less able to protect themselves in political processes. Incorporating concerns for proportionality across larger areas of constitutional law may also allow for more meaningful participation by all branches of government in the ongoing process of working the Constitution to achieve effective and human rights-protecting governance.[467]

467. *Cf.* Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934) (discussing the "working Constitution"); *supra* text accompanying notes 234-245.

HATE SPEECH AND POLITICAL CORRECTNESS

*Cary Nelson**

In a famous 1925 poem called *Incident*,[1] Countee Cullen described in only two stanzas something of the power that hate speech can have over those who are its victims:

Now I was eight and very small,
And he was no whit bigger,
And so I smiled, but he poked out
His tongue, and called me "Nigger."

I saw the whole of Baltimore
From May until December;
Of all the things that happened there
That's all that I remember.[2]

It is not merely that the speaker here is a child, of course, but that he is attacked in a moment when he is offering friendship and thus likely to be especially vulnerable. He spent a full six months in the city, but he recalls only the confrontation with another boy.

Hate speech has the power to effect lasting wounds; it also can channel and symbolize the much more pervasive and sometimes less easily isolatable structural forms of discrimination. In some environments, hate speech may be especially potent. Hearing a racial epithet on Times Square in New York is unlikely to be especially wounding; one is, after all, more likely to be psychologically on guard in that setting. Hearing a racial epithet in a college dormitory, however, might be another matter.

For many people, a college campus is a place to insist on more humane and egalitarian behavior than one might expect on Times Square. We cannot legislate a perfect world, we might argue, but we can regulate destructive and damaging speech in some specific social settings, and a college campus may be one such setting. Enforcing hate speech ordinances consistently in a large city might be impossible; enforcing them with some consistency on a college campus might be entirely possible.

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1. Countee Cullen, *Incident*, *in* CAROLING DUSK—AN ANTHOLOGY OF VERSE BY NEGRO POETS 187 (Countee Cullen ed., 1927).
2. *Id.*

Changing the relatively self-contained campus setting could make a significant difference in the lives of the people who work there.

For these and other reasons a number of campuses have recently passed regulations prohibiting hate speech and sanctioning penalties when it occurs.[3] Many such regulations will be struck down by the courts,[4] but some campuses will work to draft regulations more narrowly as a result.[5] Thus we are likely to continue to see efforts to test the constitutionality of these ordinances in the courts.

I have opened my paper in this way because I want to argue the reverse case—that efforts to regulate hate speech are ultimately more dangerous than their benefits warrant—but I do not want to minimize the potentially destructive effects of hate speech. My position is obviously an awkward one where explicitly racist or sexist hate speech is at issue. A white male is not the most strategic spokesperson for First Amendment rights in this context. Nevertheless, racist hate speech in particular is the example we all must confront because it is so elaborately articulated to other forms of racism in America. Additionally, the history of racist hate speech in our culture is long and deeply constitutive of our national identity. This article will lay out some of the problems with hate speech regulations, drawing on arguments others have made in the last few years.

Perhaps the first point to make about hate speech is to clear the air about some activities that are already either fully or partially prohibited under other laws, laws with more severe penalties than most hate speech regulations. It may be useful to work with some familiar examples:

1. A student enters another student's college room in his or her absence and scrawls racist epithets across the walls. This act may involve breaking and entering and vandalism. It is covered by existing law and regulations. Some instances might be prosecutable, and a college well might want to expel a student for this sort of behavior. We do not need to create hate speech regulations to punish these perpetrators.
2. A group of white male fraternity members follows a black woman across campus at night making remarks that suggest a threat of

3. For a report of early efforts to draft campus speech codes that includes sample rhetoric from several regulations, see Felicity Barringer, *Campus Battle Pits Freedom of Speech Against Racial Slurs*, N.Y. TIMES, Apr. 25, 1989, at A1, A20. For comments on the text of the code adopted at Stanford in 1990, see Nat Hentoff, *Are People of Color Entitled to Extra Freedom of Speech?*, VILLAGE VOICE, Sept. 18, 1990, at 26. Also see Hentoff's series of 1992 *Village Voice* articles on municipal and campus speech codes. Nat Hentoff, *This Is the Hour of Danger for the First Amendment*, VILLAGE VOICE, Jan. 28, 1992, at 20; Nat Hentoff, *Trading in the First Amendment for "Hate Speech" Laws*, VILLAGE VOICE, Feb. 4, 1992, at 22; Nat Hentoff, *The Bitter Politics of the First Amendment*, VILLAGE VOICE, Feb. 11, 1992, at 20; Nat Hentoff, *Mari Matsuda: Star of the Speech Police*, VILLAGE VOICE, Feb. 18, 1992, at 24.

4. *See* Michele Collison, *Hate-speech Code at U. of Wisconsin Voided by Court*, CHRON. OF HIGHER EDUC., Oct. 23, 1991, at A1. Subsequently, an effort was made at Wisconsin to rewrite the hate speech code more narrowly.

5. *Id.*

physical or sexual assault. Once again, this kind of intimidation cannot be tolerated. Threats of bodily harm are punishable forms of speech. However, we do not need new regulations to punish such acts.

3. A town or campus hate group burns a cross on the lawn of a black fraternity. Words are not involved, but the act is indeed communicative and certainly constitutes symbolic speech.[6] Once again, existing law against trespass or attempted arson may provide a sufficient basis for punishment.[7]

I am not a lawyer, and even if I were, I doubt if I could claim expertise in state and municipal law across every state. Therefore, I am not offering to decide whether any given act is legal in a given locality. Rather, my point is that many serious actions that *include* hate speech are already sufficiently—and *narrowly*—regulated by existing law. Moreover, racist, sexist, or homophobic components to violations of existing law can justify both vigorous prosecution of such offenses and increased severity of sentencing for those found guilty. Vandalism at a church or synagogue can be punished more severely than vandalism at a bowling alley. The argument advanced by some—including some lawyers—that hate speech regulations are necessary to reduce danger from acts such as those described above is often inaccurate.

The specificity of hate speech regulations possibly may give them a more focussed deterrence value. On the other hand, a stiff penalty for attempted arson for a cross burner has obvious deterrence potential as well. The latter does lose the educational benefit of debating hate speech regulations. Awareness of the problem increases significantly when the issue is widely discussed. Nevertheless, carefully chosen prosecutions under existing law could supply some—but certainly not all—of the same educational effect.

On the other hand, existing law will not prevent or punish the incident Countee Cullen described,[8] even if the perpetrator is older than eight. Cullen, of course, partly dealt with it himself—by writing and publishing the poem. He thus employed the longstanding civil libertarian remedy for bad speech—more speech. Colleges are obviously uniquely empowered to adopt Cullen's remedy, not only by offering alternative speech, but also by calling for more speech from racists on campus. As Leon Botstein argued recently,[9] colleges have something to gain by urging people to express such views and debate them vigorously.[10]

That would have been my solution to the incident at Brown Univer-

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6. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

7. *Id.*

8. *See supra* notes 1-2 and accompanying text.

9. Leon Botstein, President of Bard College, spoke at a recent special *Firing Line* debate. *Firing Line, Resolved: Freedom of Thought is in Danger on American Campuses* (PBS television broadcast, Sept. 6, 1991).

10. *Id.*

sity in 1990—when a loutish, drunken student yelled racist and homophobic epithets at 2:00 a.m.[11] I would not, however, insist on handling such students gently. If this clown persisted, I would not give him a moment's peace. I would encourage people to discuss and criticize his behavior in every class he attended. At the cafeteria and on the quad, I would encourage people to approach him and let him know what effect he was having on people. I would not, however, expel him for that one incident alone. Additionally, I certainly would not pretend, as Brown did, that he was expelled for conduct rather than speech, a distinction that Nan Hunter has shown to be impossible to maintain.[12]

I also would take one further step on college campuses as a way of mandating speech rather than silence: I would require all students to take courses dealing with racism and with minority cultures. Such courses would be required to have reading lists in which at least fifty percent of the items were written by members of minority groups. Students would have to write papers about race in America. A curriculum that fails to take up race is effectively a racist curriculum, no matter how innocent its designers may be.

Involving people in more diverse and widespread efforts to challenge and eliminate hate speech has some real value. Adopting a regulation as a solution may seem satisfying, but it also may block recognition of how pervasive racism is in our culture. Other forms of discrimination require legal remedies. More varied forms of social pressure may curtail hate speech more persuasively. Once again, of course, there is a counterargument that such regulations do not claim to alter people's attitudes; they merely seek to alter behavior and eliminate its destructive effects. Even the effort to curtail these specific behaviors, however, might benefit from broad, continuing, and complex community involvement. Except for a long-term reporting and policing function, the only broad community involvement in hate speech ordinances comes in the initial period when the ordinance is being debated.

Yet, the prospect of a campus environment free of racist speech is immensely appealing. Those who argue against hate speech regulations need to acknowledge that such regulations well might accomplish considerable good. The possibility that a strong university or municipal policy on hate speech could reduce occurrences of hate speech substantially in a town or on a campus offers a powerful inducement to support such poli-

11. Brown University's decision to expel Douglas Hann was widely reported. *See, e.g.*, *People*, U.S. NEWS & WORLD REP., Feb. 25, 1991, at 25. It also was debated widely, despite the probability that the whole story never was revealed fully. For quotations from a variety of media responses and for the Brown University President's defense of his actions, see *The View from the Press Gallery*, BROWN ALUMNI MONTHLY, May 1991, at 33; *A Statement by the President*, BROWN ALUMNI MONTHLY, May 1991, at 35.

12. Nan Hunter, A Response on Hate Speech (Apr. 10, 1991) (paper presented at Brooklyn College of Law Conference on hate speech) (on permanent file with the *University of Illinois Law Review*).

cies. I share that desire and thus make a case against formal regulation with difficulty.

In order to punish all instances of the behavior Cullen describes—and to cover all such aggressions against women, minorities, religious and ethnic groups, and people of differing sexual orientations—governments must enact broad, vague regulations that make substantial inroads into our constitutional guarantees of free speech. In the end, as in the broad antipornography legislation championed by Catherine MacKinnon and others,[13] the evidence often becomes the effects testified to by victims of hate speech. Someone could claim to be deeply hurt by hearing me read Cullen's poem. Thus, the text of a black poet speaking out against racism could be silenced as well. Again, I am not denying that I would rather have a campus free of racist epithets—I would. I am not willing, however, to stifle freedom of speech to achieve that end.

Political life and public debate require some expressions of anger, perhaps something like hate. When I was part of a small group of people nearly thirty years ago who interrupted a Lyndon Johnson speech by chanting "LBJ, LBJ, how many kids did you kill today?" I think I was partly engaged in hate speech. If I call David Duke racist and Pat Buchanan homophobic and Dan Quayle dumb as a brick, I may, I suppose, hurt their feelings, but I want the freedom to speak anyway.

I use these examples because many Americans are likely to assume the freedom to criticize public figures could never be imperiled. We are always in danger, however, of losing those freedoms. Let us not forget that people largely lost those freedoms in the decade and a half that followed the Second World War. That was a period when subversive public speech—like support for civil rights or democratic governments—was often punished by termination of employment. Additionally, criticism of public figures on those grounds was considered actionable in loyalty boards throughout the country.

In a country with little sense of history, and even less sense of how current actions may impact our future, taking advantage of immediate political opportunities to enact hate speech regulations is very easy. Victims of oppression often are tempted to employ identity politics to demonize advocates of free speech and stifle debate on such issues. That easily could have occurred at the University of Illinois, where I presented an earlier version of this paper. I was, as it happened, the only speaker who came out against hate speech regulation; a number of the other speakers supported such regulations either in their formal papers or in comments during discussion. But everyone was cordial, and there was no effort to block debate. I agreed to participate in part in order to em-

13. For a commentary on the antipornography movement that places it in the broader context of differing feminist positions on sexuality, see Ann Ferguson et al., *Forum: The Feminist Sexuality Debates*, 10 SIGNS 106 (1984). This forum includes citations to contemporary reactions to the antipornography legislation proposed in Minneapolis. *See also* Andrew Ross, *The Popularity of Pornography*, *in* NO RESPECT: INTELLECTUALS AND POPULAR CULTURE 171 (1989).

power and create a credible space for audience members who reject both racism and speech regulation. I was not happy to be the only speaker taking that position, but I was not terrified either; at least for faculty members, there seems to me to be no excuse other than excessive personal cowardice to claim that speaking out against hate speech regulation at events dominated by Left-oriented audiences is impossible. Some students and faculty nonetheless confided to me afterwards that they still were unwilling to speak publicly against hate speech regulations at a Left conference on race in America. That suggests that psychological restraints against taking politically incorrect positions are strong enough that we need to work harder at encouraging debate on difficult issues like this. At the very least, one may point out that an atmosphere of political correctness that demonizes those on the Left who support free speech heralds the very dangers inherent in the future cultural work these regulations may do. In punishing racist speech in Minneapolis or Madison, we give the radical Right the tools they can *and will* use to punish progressive speech everywhere else. I emphasize that this is hardly a matter of speculation. For many of us, the federal judiciary now can be counted on to suppress individual liberties for the rest of our lives. For years, the press has been terrorized successfully and manipulated by the Right. If some of us on the Left now collaborate in the destruction of our basic and vulnerable freedoms, we will pay a price in the end more terrible than the speaker does in Cullen's poem. We will end with a culture that continues to be deeply and institutionally racist. We will have accomplished nothing but our own destruction.

Why, in the light of this terrible risk, were a coalition of civil rights groups and unions—from the NAACP to the Anti-Defamation League of B'nai B'rith—willing to support a law so sweeping in its dangers as St. Paul City Ordinance 292.02,[14] which criminalized any public speech or symbolism "which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."[15] This wording on its own would have made a powerful repressive weapon available to reactionary forces. If it had been judged constitutional, it would have given license to restrictions on speech offensive to any group on any grounds. The only test would then have been the test of a group's political power. If you could get such a law passed, it would be constitutional almost by definition. Can it be that civil rights groups were so benighted as to be unaware that they are hardly the ones likely to be most able to employ legal weapons against speech in the decade to come? Unfortunately, some may be deluded about their relative influence in American culture. Others may have been assuming they would lose the Minnesota case and other similar cases and therefore assumed that the real function of such debates was

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14. ST. PAUL, MINN., LEGIS. CODE § 292.06 (1990).
15. *Id.*

education. More likely, however, many progressive groups, feeling cut out of the action for more than a decade of Reagan-Bush power, simply found it irresistible to go for this opportunity when they saw it. It is one of the few places where some seeming progress could be made by concentrating on local legislation. My argument is that hate speech regulation is exactly that—*seeming progress*—that will be turned against us and set the progressive agenda back decades. I urge people to think seriously about the past and the future and about the price that will be paid if future laws of this sort are found constitutional. On June 22, 1992, the Supreme Court found the Minnesota law unconstitutional.[16] The issue, however, likely is not permanently settled. Like anti-abortion activists, proponents of hate speech regulation no doubt will try again. Other laws will follow.

But what about the conduct of the Right in the debate over hate speech regulations? Here I would like to deploy a little strategic paranoia. One of the things that worries me about the debate over hate speech is that the Right is playing as if it wants to lose the first round. They are treating what should be a major political battle as if it were merely a cultural struggle for our hearts and minds. In other words, in a serious political struggle you do not use cultural spokespersons—a bombastic, hyperbolic figure like William Bennett and a patrician like William Buckley—as your shock troops. These people are fine if what you want to do is keep the Left exercised, but not if you want to send a strong political message to the Supreme Court. I am not suggesting that everyone on the Right has thought this issue through thoroughly enough to realize that they have much to gain by losing a case like this, although some may have. We can be certain, however, that if some college or municipality wins a similar case in the future—using a more narrowly drawn regulation or law—the Right will realize how to turn its supposed failure into a major victory.

I am not, I should emphasize, against legislative and regulative remedies. Mandated affirmative action, for example, has been, and continues to be, immensely helpful and necessary in college hiring. I continue to be in favor of forced desegregation in schooling. I would like to see universal health care mandated by law, and I would like to see the tax laws redistribute income more fully. I am merely against restricting and punishing speech. The solution to bad speech remains more speech, including speech that is "politically incorrect." Of course this is a "solution" without guarantees; it is merely a practice, a means of making acts of witness and sustaining continuing struggle. That, I believe, is the best we can do. We can guarantee many rights and opportunities by law, but we cannot guarantee either ideal speech situations or social environments free of painful and destructive utterances. The effort to suture social life so that it excludes all unacceptable speech always will be frustrated. If

16. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

that frustration is met by increasingly severe or more widely applied penalties, it risks ending in tyranny.

After I presented this paper at the University of Illinois one of the other speakers—also a white male—came up to me to say that he wished people on the Left who held views like mine would remain silent. When I asked why, he made two arguments: first, that at the present time alliances with minority members who favor hate speech regulation are more important than putting our own views forward; second, that the country never has honored the First Amendment in any case. I want to respond to both of these arguments in some detail.

First, alliances based on suppressing our beliefs have increasingly less chance of succeeding. With the country's steadily more diverse range of minority, ethnic, and gender interests and disenfranchisements already in considerable competition with one another, alliances need to be based on careful and difficult negotiations over our similarities and differences. Less honest alliances can work only in moments of desperate crisis. Trying to enforce a single politically correct position on hate speech regulation will only fragment a Left that might reach effective consensus on other pressing political issues. I take Richard Perry's and Patricia Williams's *Freedom of Hate Speech* essay[17] to be moving, therefore, in the wrong direction, because they assume that anyone interested in multiculturalism certainly will be in favor of hate speech regulation. I am thereby left with no subject position in their politics, because I do multicultural research but am against hate speech ordinances. Perry and Williams also thereby reinforce the Right's image of the Left as monolithic, another cultural contribution that is less than beneficial.

Second, being against hate speech regulations does not mean ignoring the often dismal record of the First Amendment's enforcement. Neither under slavery nor in the hundred years after its abolition did African-Americans feel they had meaningful freedom of speech. No one who stood publicly against the First World War in America is likely to have felt sheltered by the First Amendment. Neither the Japanese Americans sent to prison camps during the Second World War nor the thousands of people who lost their jobs during the McCarthy era felt protected by the Bill of Rights. And any claim that Native Americans have been consistent beneficiaries of constitutional rights would be laughable. One could go on, looking at speech restrictions in institutions like public schools and industries. The only question is whether the right to speak freely would have been significantly *worse* without the Bill of Rights and subsequent amendments. I believe it would have been much worse indeed.

Critical legal studies has helped remind us that the law is subject to

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17. Richard Perry & Patricia Williams, *Freedom of Hate Speech*, *in* DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES 225 (Paul Berman ed., 1992).

continual reinterpretation, that its enforcement is often a matter of social struggle and political expediency, and that the meaning of a sentence in the Constitution is always open to change. That is not to say, however, that principles like those articulated in the Constitution are valueless. The First and other amendments to the Constitution are weapons to be used in the constant struggle to maintain a degree of freedom in public speech. Without those discursive resources to appeal to, the country would have been even more repressive than it has been.

Stanley Fish recently spoke out in favor of hate speech regulation,[18] buttressing his argument by claiming that there never has been and never will be any such thing as free speech.[19] On the latter point, Fish is quite correct, although his model of communally arrived at consensual limits to what it is possible and reasonable to say is an excessively rational one. At least since Freud and Marx, we have known that we cannot actually speak freely. Indeed, more powerful psychological and political constraints on speech exist than we are capable of realizing; most of what constrains our speech remains invisible to us. Within the boundaries, however, we can recognize instances of kinds of freedom and repression; those are differences worth struggling over.

Fish concluded that, because it is all a matter of social competition, ideals like those embodied in the First Amendment have no value.[20] This is typical of the kinds of errors critics make who were schooled in the apolitical atmosphere of American literary theory in the 1970s. Deciding that it is all a matter of politics throws Fish into a model of politics that is as hopelessly abstract and nonmaterial as textuality would have been a decade earlier. The point is that ideals and appeals to idealization are important components of political struggle—both for the Left and Right. Appeals to the First Amendment are a significant part of Left political strategy. Pushed further, Fish's argument would lead to declaring the entire Constitution irrelevant. Does he really think he would be as free as he is to speak his views without the First Amendment? This is not something that can be decided wholly in the abstract—by comparing arguments—as Fish believes it is. The issue requires careful study of both national and local material practices throughout American history.

For people on the Left to abandon the struggle to win support for their interpretations of constitutional law is a considerable error. Ceding popular interpretation of the First Amendment and other elements of the Constitution to the Right is also an error. The Right, of course, likes to treat the First Amendment as an untarnished ideal impeccably honored throughout our history; under pressure, a few will concede past errors but insist free speech is guaranteed now. Their aim is simple enough—to

18. Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too*, *in* DEBATING P.C. THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES, *supra* note 17, at 231.

19. *Id.* at 233.

20. *Id.* at 242.

deflect attention from the real and continuing struggles over political freedom and material inequities. There is no reason, however, to credit the bombastic and disingenuous rhetoric that reactionary journalists, politicians, and members of the judiciary use to surround and muffle the First Amendment. The Left can bring historical reality to the foreground while still appealing to values that may be read into democratic ideals. Appealing to political reality does not mean abandoning the role of idealization in social life. Again, the proper tactic is more speech, not silence.

Let me end with another instance of such speech, this time from a white poet writing in the first decade of the century. It is a case of hate speech—in the form of a racist epithet—used against itself; in the process we are forced to see it and ourselves more clearly. These are the last lines of Carl Sandburg's poem *Nigger*,[21] in which, as one critic writes, "[i]t is as if the stereotype suddenly stood up on its own and gestured threateningly toward its maker":[22]

> Sweated and driven for the harvest wage . . .
> Brooding and muttering with memories of shackles:
> I am the nigger.
> Look at me.
> I am the nigger.[23]

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21. CARL SANDBURG, *Nigger*, *in* THE COMPLETE POEMS OF CARL SANDBURG 23 (rev. ed. 1970).

22. ALDON L. NIELSON, READING RACE: WHITE AMERICAN RACIAL DISCOURSE IN THE TWENTIETH CENTURY 36 (1988).

23. SANDBURG, *supra* note 21, at 23-24.

THE INVENTION OF LOW-VALUE SPEECH

Genevieve Lakier

CONTENTS

INTRODUCTION 2168
I. THE PROBLEM OF LOW-VALUE SPEECH 2170
II. FREEDOM OF SPEECH PRIOR TO THE NEW DEAL 2179
A. *Low-Value Speech* 2182
1. *Commercial Advertising* 2182
2. *Libel* 2184
3. *Obscene and Profane Speech* 2186
4. *Fighting Words* 2190
B. *High-Value Speech* 2192
1. *Press* 2192
2. *Religious Speech* 2193
3. *Political Speech* 2194
C. *The Broad but Shallow First Amendment* 2195
III. INVENTING A TRADITION 2197
A. *The New Theory* 2201
B. *Problems with the Theory* 2203
C. *Subsequent Development* 2207
IV. REINVENTING THE DOCTRINE 2212
A. *Problems of Justification* 2214
B. *Costs of the Rule* 2218
C. *The Problem of Principle* 2223
D. *Embracing Purposes* 2225
E. *The Irresolvable Conflict* 2229
CONCLUSION 2232

THE INVENTION OF LOW-VALUE SPEECH

*Genevieve Lakier**

It is widely accepted that the First Amendment does not apply, or applies only weakly, to what are often referred to as "low-value" categories of speech. It is also widely accepted that the existence of these categories extends back to the ratification of the First Amendment: that the punishment of low-value speech has never, since 1791, been thought to raise any constitutional concern.

This Article challenges this second assumption. It argues that early American courts and legislators did not in fact tie constitutional protection for speech to a categorical judgment of its value, nor did the punishment of low-value speech raise no constitutional concern. Instead, all speech — even low-value speech — was protected against prior restraint, and almost all speech — even high-value speech — was subject to criminal punishment when it appeared to pose a threat to the public order of society, broadly defined. It was only after the New Deal Court embraced the modern, more libertarian conception of freedom of speech that courts employ today that it began to treat high- and low-value speech qualitatively differently. By limiting the protection extended to low-value speech, the New Deal Court attempted to reconcile the democratic values that the new conception of freedom of speech was intended to further with the other values (order, civility, public morality) that the regulation of speech had traditionally advanced. Nevertheless, in doing so, the Court found itself in the difficult position of having to judge the value of speech even though this was something that was in principle anathema to the modern jurisprudence. To resolve this tension, the Court asserted — on the basis of almost no evidence — that the low-value categories had always existed beyond the scope of constitutional concern.

By challenging the accuracy of the historical claims that the Court has used to justify the doctrine of low-value speech, this Article forces a reexamination of the basis for granting or denying speech full First Amendment protection. In so doing, it challenges the Court's recent claim that the only content-based regulations of speech that are generally permissible under the First Amendment are those that target speech that was historically unprotected. What the history of the doctrine of low-value speech makes clear is that history has never served as the primary basis for determining when First Amendment protections apply. Nor should it today, given the tremendous changes that have taken place over the past two centuries in how courts have understood what it means to guarantee freedom of speech.

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INTRODUCTION

It is widely accepted today that the First Amendment guarantee of freedom of speech does not apply — or applies only weakly — to "low-value" categories of speech such as obscenity and libel. It is also widely accepted today that the existence of these categories extends back to the ratification of the First Amendment: that, since 1791, low-value speech has been considered unworthy of constitutional protection, or at least of the protection afforded "high-value" speech.

This Article challenges this second assumption. It argues that eighteenth- and nineteenth-century courts did not in fact consider low-value speech to be categorically unworthy of constitutional protection. Nor did they treat low-value speech qualitatively differently than they treated other kinds of speech. It was only in the New Deal period that courts began to link constitutional protection to a judgment of the value of different kinds of speech.

The idea that the low-value categories of speech have always existed, and always existed beyond the scope of constitutional concern, is a historical myth or what we might call an "invented tradition." The term "invented tradition" refers to novel social practices that are justified on the basis of an alleged, but ultimately fictitious, continuity with the past.[1] The historian Eric Hobsbawm, who coined the phrase, noted that the "peculiarity of 'invented' traditions is that . . . they are responses to novel situations which take the form of reference to old situations."[2]

As this Article shows, the distinction between high- and low-value speech emerged, just as Hobsbawm suggests, in response to a novel situation: namely, the changed judicial climate of the New Deal era and, specifically, the new constraints that the Court's embrace of a much more libertarian conception of freedom of speech imposed on the government's ability to enforce basic standards of conduct in public. By identifying certain categories of speech as entirely outside the scope of First Amendment protection, the New Deal Court made it possible for the government to continue to punish speech — at least, certain kinds of speech — not only when it threatened serious violence or disorder, but also when it violated dominant norms of civility, decency, and piety. Nevertheless, in limiting the scope of First Amendment protection in this way, the Court found itself in the difficult position of allowing the government to discriminate against speech on the basis of its content, even though this discrimination was something that the new conception of freedom of speech otherwise disavowed. To resolve

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[1] Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1992).

[2] *Id.* at 2.

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this tension, the Court insisted that the distinction between high- and low-value speech was a traditional feature of free speech jurisprudence in the United States.

By asserting a historical continuity that did not in fact exist, the New Deal Court attempted, in other words, to justify what was actually a new conception of constitutional boundaries. There is evidence that claims of historical tradition are functioning to the same effect today: that the Roberts Court is using history to justify a shift toward a more absolutist conception of First Amendment boundaries than the twentieth-century Court employed.

In calling into question the historical basis of the doctrine of low-value speech, the Article thus not only contributes to our understanding of the First Amendment's past, but also has important implications for the doctrine's present and future. Specifically, it challenges the merits of the Court's holding in *United States v. Stevens*[3] that historical evidence of a "long-settled tradition of subjecting that speech to regulation" is required to establish the existence of a novel category of low-value speech.[4] The *Stevens* Court argued that, by requiring evidence of this sort to identify novel categories of low-value speech, it ensured fidelity to an original understanding of freedom of speech and prevented judges from denying protection to speech merely because they disliked it. What the history detailed in this Article makes clear, however, is that the *Stevens* test accomplishes neither of these goals. What it does do is impose a very steep bar on the government's ability to regulate speech in new ways even when the regulation furthers important ends and does not impede any of the goals traditionally associated with the First Amendment. These problems with the *Stevens* test suggest that the Court should instead recognize the purpose-driven and functionalist, rather than historical, nature of the distinction between high- and low-value speech.

The Article proceeds in four parts. Part I examines the historical and methodological claims the Court has used to justify the doctrine of low-value speech.

Part II explores the eighteenth- and nineteenth-century case law dealing with questions of freedom of speech. It argues that eighteenth- and nineteenth-century courts employed what we might call a broad but shallow conception of freedom of speech and press. That is, they recognized that even indecent or obscene speech was covered by the constitutional guarantees of speech or press freedom insofar as it could not be restrained in advance. But they did not hesitate to impose criminal punishment — and in some cases, civil liability — on these as

[3] 130 S. Ct. 1577 (2010).

[4] *Id.* at 1585.

Temple American Inn of Court - April 2016 Program - Research and Materials

well as many other kinds of speech when they appeared to pose a threat to the public order, understood in moral, social, and political terms. In this respect, there was little qualitative difference in how courts treated what later would be recognized as high- and low-value speech.

Part III examines why the New Deal Court turned to history to justify what was in fact the novel distinction it drew between high- and low-value speech.

Part IV examines the contemporary fate of the doctrine of low-value speech. It argues that, in *Stevens* and subsequent cases, the Court has essentially invented the tradition of low-value speech by insisting — as earlier cases did not — that the *only* content-based regulations that do not infringe freedom of speech are those that target categories of speech that were subject to criminal sanctions in the eighteenth and nineteenth centuries. In so doing, the Court has transformed the distinction between high- and low-value speech from a mechanism for limiting constitutional protection for speech into a mechanism for expanding it. Indeed, if taken seriously, the *Stevens* rule could be used to challenge a wide array of existing speech regulations — regulations whose constitutionality up until now had not been in serious doubt.

Because the *Stevens* rule does not in fact reflect longstanding historical practice, this Part argues, the Court's recent reinvention of the doctrine is both unjustified and undesirable. In fact, it threatens to create a test of low-value status that both overprotects and underprotects constitutionally valuable speech. The significant problems with the *Stevens* test demonstrate the difficulties created by the Court's efforts to link the contemporary boundaries of the First Amendment to the past. These problems suggest that First Amendment doctrine would be better served by a purpose-based test of constitutional boundaries. History can help elucidate what those purposes are. Nevertheless, given the tremendous changes that have taken place in how courts understand the means by which those purposes are to be realized, history does not provide a principled basis for determining the scope of constitutional protection today — or at least, it cannot do so without entailing a massive, and unappealing, reorganization of the First Amendment boundaries as they currently exist.

I. THE PROBLEM OF LOW-VALUE SPEECH

Much of modern First Amendment jurisprudence is organized around a two-tier structure that in practice has devolved into more than two tiers. At least when it comes to the review of content-based

regulations of speech, the degree of constitutional scrutiny afforded the regulation will primarily depend on whether the speech it targets is found to be of high or low value.[5] Content-based regulations of high-value speech are considered presumptively invalid.[6] As a result, they will survive constitutional scrutiny only if they can be shown to be narrowly tailored to a compelling governmental purpose. Regulations that target low-value speech, in contrast, must satisfy a much less demanding standard of review.

The Court has vacillated on precisely how much constitutional scrutiny the content-based regulation of low-value speech should receive. Initially, it suggested that low-value speech was entitled to no constitutional protection whatsoever.[7] It has subsequently held that certain categories of low-value speech, such as commercial advertising, are entitled to an intermediate level of constitutional review.[8] Other low-value categories, such as obscenity, continue to receive in theory no constitutional protection whatsoever, even if a great deal of constitutional labor may be expended determining whether a particular regulation targets obscene speech, or instead merely pornographic or sexually explicit speech.[9] In general, however, what unites the low-value categories is the fact that they can be regulated on the basis of their content without having to satisfy strict scrutiny.

By creating (at least) two tiers of constitutional scrutiny for regulations that target or in some way limit what is recognized to be speech, the Court has attempted to reconcile the constitutional promise of expressive freedom with the practical need for governmental regulation. Indeed, absent the distinction between high- and low-value speech, it would be much more difficult for the government to justify its regulation of the commercial marketplace,[10] its ability to impose criminal

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[5] Although other factors can affect the level of constitutional scrutiny, these factors (such as whether the speech takes place in a school or a prison, or targets a captive audience) only apply in certain circumstances. Nor do they obviate the need to first determine the high- or low-value status of the regulated speech. For purposes of this Article, I thus ignore the complexities these non-subject-matter distinctions create.

[6] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

[7] Roth v. United States, 354 U.S. 476, 483 (1957) (concluding that obscenity is "outside the protection intended for speech and press"); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (concluding that libel is not "within the area of constitutionally protected speech").

[8] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980).

[9] Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 724 (1978) ("Once it is demonstrated that a book or film fits within the definition of obscenity . . . the prosecution's task is complete; there need be no showing of any 'clear and present danger' or imminent lawless activity.").

[10] *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000) (noting that, as a consequence of the lesser First Amendment value of commercial speech, the government may compel commercial speakers to disclose information, and the overbreadth doctrine and the prior restraint doctrine may be suspended).

Temple American Inn of Court - April 2016 Program - Research and Materials

sanctions on speech that facilitates or is otherwise closely connected to criminal behavior,[11] or its efforts to maintain basic standards of public conduct by prohibiting (for example) threatening and defamatory speech.[12] The distinction between high- and low-value speech thus provides an important mechanism by which courts ensure the workability of the First Amendment by cabining, but only in limited circumstances, the libertarian breadth of its command.

This cabining is not unproblematic, however, insofar as it violates a central principle of the modern First Amendment: namely, the principle of content neutrality. Content neutrality is the idea that, as Justice Marshall famously put it in *Police Department of Chicago v. Mosley*,[13] "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[14] The principle is motivated by the belief that allowing the government to restrict speech on the basis of its content threatens both democracy (by allowing the government to repress the speech of those groups it dislikes or who criticize it) and social progress (by allowing the government to remove ideas from competition in the public marketplace).[15] It also, of course, inhibits individual self-expression by telling citizens what they can and cannot say.[16]

By granting less or no protection to low-value speech, the doctrine of low-value speech allows the government to do what it is not supposed to be able to do: that is, to remove ideas it dislikes from public circulation in the marketplace and potentially (though less easily) repress the speech of those who criticize it.[17] The doctrine also, of

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[11] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (recognizing that constitutional protection does not extend to "speech or writing used as an integral part of conduct in violation of a valid criminal statute"); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1283 (2005) (noting the extent to which courts rely upon *Giboney* to justify the sanctioning of crime-facilitating speech).

[12] *See* Virginia v. Black, 538 U.S. 343, 359–60 (2003) (noting that the First Amendment "permits a State to ban a 'true threat'" to "'protect[] individuals from the fear of violence' and 'from the disruption that fear engenders'" (internal citations omitted)); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974) (holding that "the States . . . retain substantial latitude [under the First Amendment] in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual").

[13] 408 U.S. 92 (1972).

[14] *Id.* at 95.

[15] *See id.* at 98–99.

[16] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 n.32 (1983).

[17] In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court made clear that the government could not use low-value speech to enact viewpoint discrimination: that is, it could not use the low-value exceptions to target particular speakers or viewpoints when the targeting of those viewpoints was not the justification for the low-value category as a whole. *See id.* at 384 ("Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression . . . . That would mean that a

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course, allows the government to absolutely prohibit its citizens from expressing themselves in certain ways.

For this reason, the doctrine has been a persistent source of controversy. Indeed, a number of the most prominent First Amendment theorists of the twentieth century have argued quite strenuously that the distinction between high- and low-value speech, as Professor Thomas Emerson put it, "inject[s] the Court into value judgments concerned with the content of expression, a role foreclosed to it by the basic theory of the First Amendment."[18] Instead, these theorists argue, the same degree of constitutional protection should apply to all speech.[19]

The Court has not agreed — although it has in some cases defined the low-value categories of speech extremely narrowly, thereby limiting the range of cases in which the distinction between high- and low-value speech makes a meaningful difference.[20] It has instead attempted to mitigate the conflict between the principle of content neutrality and the doctrine of low-value speech by emphasizing the historical origins of the categories of low-value speech.

The Court's emphasis on the historical origins of the low-value categories can be traced back to *Chaplinsky v. New Hampshire*,[21] the 1942 decision in which the Court first explicitly identified the existence of low-value categories of speech. The case involved a First Amendment challenge to the conviction of a Jehovah's Witness who was prosecuted for using "offensive, derisive, or annoying word[s]" in public after he accused a city marshal of being a "God damned racketeer"[22] and "a damned Fascist."[23] The Court affirmed the conviction without inquiring whether it satisfied the "clear and present danger" test it had recently begun to apply in other cases involving the crimi-

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city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government."). This lessens the possibility that the doctrine enacts forbidden repression although it does not entirely eliminate it. For more discussion, see *infra* notes 277–278 and accompanying text.

[18] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 326 (1970) (discussing the classification of "fighting words" as low-value speech). Professor Kenneth Karst argued similarly that the doctrine was "inconsistent with the principle of equal liberty of expression" that underpinned the First Amendment presumption against "governmental control of the content of speech." Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 31 (1975); *see also* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 19 (noting that the "fundamental difficulty of the two-level theory [of low-value speech]" is that it requires courts to "weigh[] the social utility of speech" and this was something "[t]he First Amendment . . . was designed to preclude" (internal quotation mark omitted in final quote)). *See generally* Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989).

[19] *See, e.g.*, Alexander, *supra* note 18, at 554; Karst, *supra* note 18, at 31.

[20] For a discussion of how the Court has narrowed the scope of the low-value categories of obscenity, libel, profanity, and fighting words, *see infra* notes 188–200 and accompanying text.

[21] 315 U.S. 568 (1942).

[22] *Id.* at 569 (internal quotation mark omitted).

[23] *Id.* (internal quotation mark omitted).

nal prosecution of speech because it found that the defendant's language constituted "'fighting' words"; these were one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[24] The Court went on to explain that the reason that the prosecution of fighting words, and other kinds of low-value speech, such as "the lewd and obscene, the profane, [and] the libelous" raised no constitutional problem was because speech of this sort formed "no essential part of any exposition of ideas," and possessed "such slight social value as a step to truth that any benefit that may be derived from [its expression was] clearly outweighed by the social interest in order and morality."[25] In other words, the opinion suggests a functionalist distinction between high- and low-value speech. The text nevertheless implies that what ultimately distinguishes the low-value categories is the historical fact that their content-based regulation had never been thought to raise constitutional concern.[26]

Subsequent decisions emphasized even further the historical origins of the low-value categories. In *Beauharnais v. Illinois*,[27] for example, the Court held explicitly what the *Chaplinsky* Court only suggested in dicta: namely, that libel was "not . . . within the area of constitutionally protected speech."[28] It justified this conclusion by pointing to the historical evidence that "[l]ibel of an individual was a common-law crime, and thus criminal in the colonies"[29] and that, in the aftermath of the Revolution, "nowhere was there any suggestion that the crime of libel be abolished."[30] Five years later, in *Roth v. United States*,[31] the Court similarly concluded that obscenity "was outside the protection intended for speech and press"[32] because at the time of the adoption of the First Amendment it was prohibited in at least some states, and subsequently recognized as a crime in many others.[33]

Although in the 1970s and 1980s, historical arguments played a very small role in the low-value speech cases, in recent years, the Court has emphasized once again the historical provenance of the categories. Specifically, in *Stevens* in 2010, the Court held that the only content-based regulations of speech that are not presumptively invalid

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[24] *Id.* at 571–72.

[25] *Id.* at 572.

[26] *Id.* (noting that the "prevention and punishment" of these categories "have never been thought to raise any Constitutional problem").

[27] 343 U.S. 250 (1952).

[28] *Id.* at 266.

[29] *Id.* at 254.

[30] *Id.* at 254–55.

[31] 354 U.S. 476 (1957).

[32] *Id.* at 483.

[33] *Id.* at 482–83.

under the First Amendment are those that target speech that either falls into a "previously recognized, long-established category of unprotected speech" or constitutes a "categor[y] of speech that ha[s] been historically unprotected, but ha[s] not yet been specifically identified or discussed as such in [the] case law."[34] In holding as much, the Court acknowledged the possibility that new categories of low-value speech might be added to the list of what it described as the "historic and traditional categories [of low-value exception] long familiar to the bar."[35] Nevertheless, it insisted that in all cases these novel categories be identified on the basis of historical evidence. Specifically, what it required to establish the existence of a historically unprotected but heretofore unrecognized category of low-value speech was evidence of a "long-settled tradition of subjecting that speech to regulation."[36] The next year, the Court clarified that what was required was "persuasive evidence . . . of a long (if heretofore unrecognized) tradition of proscription."[37]

By emphasizing — and in *Stevens*, insisting on — the historical basis of the low-value categories, the Court has attempted to depict the distinction between high- and low-value speech as the product of something other than the perhaps idiosyncratic value judgments and preferences of its individual members. What it instead reflects, *Roth*, *Beauharnais*, and *Stevens* suggest, is a well-established consensus about what kinds of speech are — and more to the point, are not — included in the "speech" and "press" whose freedom is protected against abridgment by the First Amendment. Construed as such, the distinction between high- and low-value speech appears much less threatening to the basic neutrality of First Amendment law than might otherwise be the case because it offers judges little opportunity to read their own preferences and ideological commitments into the Constitution. Instead, history constrains judicial discretion, and in so doing, helps ensure that judges maintain fidelity to the original meaning of freedom of speech.

At least this is what the Court argued in *Stevens* to justify its conclusion that the only content-based regulations of speech that do not trigger a presumption of invalidity are those that target historically unprotected speech. The case involved a dispute over the constitutionality of a federal statute that criminalized the creation, sale, and possession of visual or auditory images of animal cruelty when the

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[34] 130 S. Ct. 1577, 1586 (2010).

[35] *Id.* at 1584 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment)) (internal quotation marks omitted).

[36] *Id.* at 1585.

[37] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011).

Temple American Inn of Court - April 2016 Program - Research and Materials

conduct depicted in those images occurred in violation of federal or state law.[38] The government argued that the statute was constitutional because the speech it regulated was entitled to little or no First Amendment protection when evaluated according to what it called the "*Chaplinsky* balancing test."[39] This test, the government claimed, required courts to balance "the expressive value of the speech with its societal costs."[40] Because depictions of cruelty to animals formed "no essential part of any exposition of ideas" and incurred significant social costs, the government argued that its prohibition did not violate the First Amendment.[41] The *Stevens* majority adamantly rejected this argument, and the interpretation of the *Chaplinsky* doctrine that supported it, as anathema to fundamental constitutional principles. As Chief Justice Roberts put it in his majority opinion:

> The Government contends that "historical evidence" about the reach of the First Amendment is "not a necessary prerequisite for regulation today," and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. . . . The Government thus proposes that . . . "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."
>
> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[42]

Balancing provides an illegitimate mechanism for determining when the ordinary First Amendment rules apply, this passage suggests, because it allows judges to impose their own values onto the Constitution. Implicit in the passage is the suggestion that the historical test the Court instead insisted on poses no such threat to the basic neutrality of the First Amendment because it forces judges to comply with original and fixed understandings of what speech is and is not entitled to constitutional protection. As Professor William Araiza notes of the argument: "Because th[e] historical method [that *Stevens* calls for] implies not a *creation* of new categories but a *discovery* of categories that

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[38] *Stevens*, 130 S. Ct. at 1582 (citing 18 U.S.C. § 48 (2012)).

[39] Brief for the United States at 12, *Stevens*, 130 S. Ct. 1577 (No. 08-769).

[40] *Id.*

[41] *Id.* at 21 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (internal quotation marks omitted).

[42] *Stevens*, 130 S. Ct. at 1585 (internal citations omitted).

have always existed, it is presumably impervious to context-based analysis or the perceived needs of the moment, at least to the extent a court employs it conscientiously . . . ."[43]

History can only constrain judicial discretion in this way, however, if there are in fact categories of low-value speech that "have always existed" or if the historical record is, at the very least, sufficiently clear and consistent in its treatment of different kinds of speech to bind judges when their intuitions or preferences would lead them another way. It is perhaps because the Court recognizes the threat that a murky and inconsistent record poses to the theoretical justification for the doctrine of low-value speech that it has consistently emphasized the well-defined and narrowly limited nature of the low-value categories.

There is little historical evidence, however, to back up the Court's claim that the categories of low-value speech we recognize as such today constituted, in the eighteenth and nineteenth centuries, well-defined and narrowly limited exceptions to the ordinary constitutional rules. Nor is there evidence to suggest, as the *Stevens* Court implied, that the contemporary distinction between high- and low-value speech maps onto an earlier, let alone original, understanding of what counted as speech or press for constitutional purposes.

First Amendment scholars have not paid a great deal of attention to the pre-twentieth-century case law dealing with freedom of speech and press, perhaps on the mistaken assumption that there are too few cases from this period to tell us much.[44] Indeed, if one sticks merely to cases dealing with the First Amendment, the eighteenth- and nineteenth-century case law on questions of speech and press freedom is slim. There is little reason to limit the historical inquiry in this way, however, given the widely shared assumption in the eighteenth and nineteenth centuries that the First Amendment did not create new rights but merely declared — in order to better protect — rights that existed prior to its ratification and that were guaranteed also by the

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[43] William D. Araiza, Citizens United, Stevens, *and* Humanitarian Law Project*: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 829–30 (2011).

[44] *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 911 n.15 (1993) (noting the paucity of scholarship exploring "the idea of freedom of speech and press in the nineteenth century"); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1700 (1991) (critiquing the tendency of the "orthodox academic history [of the First Amendment to] begin[] with the censorship of the World War I seditious libel cases" and citing examples). Notable exceptions to this general trend include the works of Professors David Rabban, Norman Rosenberg, and John Wertheimer. *See generally* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN (1986); John W. Wertheimer, *Free-Speech Fights: The Roots of Modern Free-Expression Litigation in the United States* (Jan. 1992) (unpublished Ph.D. dissertation, Princeton University) (on file with the Harvard Law School Library). What follows builds on the contributions of these scholars.

Temple American Inn of Court - April 2016 Program - Research and Materials

speech and press clauses provided for in all the state constitutions.[45] The dozens upon dozens of state cases that engaged questions of freedom of speech and press thus provide a helpful guide to what courts generally understood the freedom of speech and press guaranteed by *both* the state and federal constitutions to mean. For this reason, the Court itself has frequently turned to these cases to decipher the meaning of the First Amendment guarantees of speech and press freedom.[46]

The next Part examines the state, as well as federal, case law from the eighteenth and nineteenth centuries dealing with questions of freedom of speech and press.[47] What these cases demonstrate is that early

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[45] As the Louisiana Supreme Court put it in 1882:

> The Constitution of the State of Louisiana contains a Bill of Rights. Such Bills are modelled upon the famous English Bill of Rights, and, in the language thereof, are intended as public declarations of the "true, ancient and indubitable rights of the people." They are declaratory of the general principles of republican government, and of the fundamental rights of the citizen, rights usually of so fundamental a character, that, while such express declarations may serve to guard and protect them, they are not essential to the creation of such rights, which exist independent of constitutional provisions.
>
> In our Bill of Rights, side by side with the rights of bearing arms, of religious freedom, of free speech, of assembly and petition, of habeas corpus, is found the declaration that "no law shall be passed abridging the freedom of the press."
>
> A similar provision has existed in every Constitution of this State, exists in the Constitution of the United States and that of every State of this Union. It is a principle of English and American government, and whatever variety may be found in the forms of expression used in different instruments, they all signify the same thing, and convey the general idea which is crystallized in the common phrase, "liberty of the press." This is what the Constitution intends to recognize and to guarantee, and in order to ascertain what meaning and effect to give to the Constitution, we have only to inquire what is meant by "liberty of the press."

State *ex rel.* Liversey v. Judge of Civil Dist. Court, 34 La. Ann. 741, 743 (1882); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 416–17 (1868) (asserting that the state and federal constitutional guarantees of free expression "do not create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed" and that, as a result, we must look to the common law "in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they assure"); Hamburger, *supra* note 44, at 913 ("Late eighteenth-century Americans typically assumed that natural rights, including the freedom of speech and press, were subject to natural law . . . ."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1133–35, 1161–67 (1987) (noting that the rights provisions in both the state and federal constitutions were understood in the eighteenth century as declaratory of inherent and natural rights that preexisted their enactment).

[46] *See, e.g.*, Roth v. United States, 354 U.S. 476, 482 nn.11–13 (1957); Beauharnais v. Illinois, 343 U.S. 250, 254 nn.1–3, 255 n.5 (1952); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 719 n.11 (1931).

[47] Because in the contemporary period the guarantee of freedom of press has been subsumed within the guarantee of freedom of speech, I do not distinguish in my analysis of the eighteenth- and nineteenth-century case law decisions dealing with freedom of press specifically and those dealing with freedom of speech. Both elucidate the traditional understanding of what today we think of as freedom of speech. *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) ("The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause." (footnotes omitted)).

Temple American Inn of Court - April 2016 Program - Research and Materials

American courts did not in fact recognize the existence of a delimited set of well-defined and narrowly limited categories to which the constitutional guarantees of press and speech freedom did not apply. Instead, they applied the same constitutional principles to both what we today would consider to be high-value speech and speech we would consider to be low value. What the eighteenth- and nineteenth-century cases make clear is that, rather than a product of longstanding jurisprudential tradition, the distinction between high- and low-value speech is instead a product of far more recent changes in First Amendment law.

II. FREEDOM OF SPEECH PRIOR TO THE NEW DEAL

To contemporary eyes, one of the most remarkable features of the eighteenth- and nineteenth-century free speech case law is its almost complete inattention to what would emerge in the twentieth century as one of the most pressing and controversial of First Amendment questions: namely, to what kinds of expressions do the guarantees of speech and press freedom apply? Indeed, in only one of the dozens upon dozens of reported cases in which eighteenth- and nineteenth-century courts engaged directly with free speech or press claims did a court conclude that a particular kind of expression was *not* covered by the constitutional guarantees of freedom of speech and of press.[48] For the most part, eighteenth- and nineteenth-century courts either assumed that the constitutional guarantees applied, or ignored the issue altogether.

Courts did little to delimit the boundaries of the constitutional categories of speech and press because they did not need to. For much of this period, it was widely assumed that the state and federal constitutional guarantees of expressive freedom provided to speakers almost-absolute protection against the prior restraint of speech or writing but only limited protection against after-the-fact punishment for what they uttered or wrote. The freedom that the First Amendment and state provisions guaranteed, in other words, was freedom of expression — but not freedom from responsibility for the ill effects of what one ex-

[48] *See, e.g.*, State v. Blair, 60 N.W. 486 (Iowa 1894) (holding that a law that prohibited "itinerant vender[s]" from publicly advertising their ability to treat diseases did not violate the state constitutional guarantees of speech and press freedom on the grounds that the "prohibitive features of the act do not go to the rights intended to be secured by the constitutional provision[s]," *id.* at 486). In one other nineteenth-century case, a court held that a particular kind of expression was within the scope of the constitutional guarantee of freedom of speech and press. *See* Dailey v. Superior Court, 44 P. 458 (Cal. 1896) (concluding that "[t]he production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author" and is therefore protected by the free speech and press provision of the California Constitution, *id.* at 459).

pressed. As Justice Story put it in his influential 1833 treatise on the federal constitution:

> [T]he language of [the first] amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government. . . .
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> . . . .
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> . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[49]

Justice Story's acceptance of the constitutionality of punishing speech that was "improper, mischievous, or illegal" did not mean — as critics of the eighteenth- and nineteenth-century view would later argue — that he and other jurists believed that government could restrain speech post-publication or post-utterance in whatever way it pleased.[50] Although this view of the freedom of speech and press had been propagated by some supporters of the Sedition Act of 1798,[51] by the early nineteenth century it had largely been renounced. Justice Story himself made clear that limits existed on what speech government could punish, even after publication. He noted, for example, that government could not, concordant with the First Amendment guarantee of freedom of press, impose criminal penalties on the publication of true statements made "with good motives and for justifiable ends."[52] Even William Blackstone, the figure primarily associated with the view that the guarantee of press freedom operated exclusively as a bar

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[49] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 732, §1878, at 736 (1833) (footnotes omitted).

[50] Professor Zechariah Chafee, most prominently, argued that a number of early nineteenth-century courts adopted the view that, under the First Amendment, "government cannot interfere by a censorship or injunction *before* the words are spoken or printed, but can punish them as much as it pleases *after* publication, no matter how harmless or essential to the public welfare the discussion may be." Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 938 (1919).

[51] For example, Congressman Harrison Gray Otis argued in 1798 that the Sedition Act was constitutional because the "liberty of the press [guaranteed by the First Amendment] is merely an exemption from all previous restraints." 8 ANNALS OF CONG. 2148 (1798). Most supporters of the Act defended its constitutionality on other grounds, however. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 44 (2004) ("The Sedition Act provided that malicious intent was an essential element of the crime, that truth was a defense, and that the jury should decide whether the speech had a seditious effect. Federalists could therefore boast that the 1798 act had eliminated those aspects of the English common law that had been particularly controversial in the seventeenth and eighteenth centuries.").

[52] STORY, *supra* note 49, § 1874, at 733.

on prior restraints, agreed that government could only criminally punish speech when it constituted what he called a "public vice" — that is, when it posed a public threat of some kind to civil society.[53]

The constitutional guarantees of speech and press freedom thus did impose constraints on the after-the-fact punishment of expression. Nevertheless these constraints were far weaker than they would later be. As a result, expression could be criminally sanctioned whenever it posed even a relatively attenuated threat to public peace and order. In practice, what this meant was that little depended on whether a given mode of expression was recognized as speech or press for constitutional purposes, other than the constitutionality of the expression's prior restraint.

Perhaps for this reason, eighteenth- and nineteenth-century courts tended to employ a relatively expansive conception of the constitutional categories of speech and press. Even when litigants raised novel constitutional claims — when, for example, in the late nineteenth century, unions began to challenge state laws that restricted labor picketing on free speech grounds[54] — courts spent very little energy exploring whether picketing constituted speech for constitutional purposes. Most courts simply assumed that it did. Many nevertheless found that the activity could be prohibited — and even enjoined in some cases — because it was coercive or violent.[55]

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[53] Moral transgressions that impacted only the individual himself, Blackstone argued — what he called "private vices" — were not within the power of the secular state to punish. 4 WILLIAM BLACKSTONE, COMMENTARIES *41 ("[H]uman laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society . . . and, of consequence, private vices . . . cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes."). Hence, the "vice of lying, which consists (abstractedly taken) in a criminal violation of truth" could not be subject to criminal punishment unless and until it caused "some public inconvenience, [such] as spreading false news; or some social injury, [such] as slander and malicious prosecution." *Id.* at *42.

[54] *See* Wertheimer, *supra* note 44, at 61–62.

[55] *See, e.g.*, Local Union No. 313, Hotel & Rest. Employés' Int'l Alliance v. Stathakis, 205 S.W. 450, 452 (Ark. 1918) ("Early cases upholding the right of picketing likened that action to the exercise of the right of free speech. . . . The existence of this right is still generally conceded, and we think such right exists. . . . But as the cases continued to come before the courts and the law on the subject to be molded, it became more and more apparent that picketing was practiced and resorted to, not alone for purposes of publicity and persuasion, but for coercion and intimidation as well; so that, while the tendency of the earlier cases was to uphold picketing as an exercise of the right of free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies, and one which in its practical application tends generally to breaches of the peace and other disorders."). Although some courts did, as *Stathakis* makes clear, construe picketing as inherently coercive, other courts required evidence that the picketing would lead to violence in order to conclude that its prior restraint was constitutional. *See, e.g.*, Richter Bros. v. Journeymen Tailors' Union, 24 Ohio Dec. 45 (Ct. Com. Pl. 1890) (refusing to enjoin a strike absent any evi-

Temple American Inn of Court - April 2016 Program - Research and Materials

Eighteenth- and nineteenth-century courts also tended to treat acts of symbolic expression as the functional equivalent of acts of linguistic expression. As a result, courts extended to "[p]aintings, liberty poles, and other [kinds of] symbolic expression . . . no less and no more protect[ion] than spoken and printed words."[56] For this reason, a number of state supreme courts in the late nineteenth century struck down, as unconstitutional prior restraints, the permit regulations that municipalities began to impose on parades and processions of all kinds.[57]

A. *Low-Value Speech*

Courts also extended protection, at least against prior restraint, to many of the categories of what would later be recognized as low-value expression.

1. Commercial Advertising. — Consider for example the case of commercial advertising. Advertising has been considered a category of low-value speech since the Court rather summarily held, in *Valentine v. Chrestensen*[58] in 1942, that the Constitution's protections did not apply to this kind of speech.[59] *Valentine* was not, however, the first advertising free speech case to come across the Court's docket. In the late nineteenth century, the Court decided two such cases.[60] In both cases, litigants challenged the constitutionality of federal statutes that prohibited the circulation in the mail of lottery advertisements and circulars on the grounds that these statutes violated the freedom of press guaranteed by the First Amendment. In neither case did the Court find the constitutional guarantee inapplicable. It instead found the federal statutes to be reconcilable with the guarantee of freedom of press because they allowed the circulation of lottery advertisements

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dence of likely harm to property and noting the general American rule that equity will not allow the injunction of libels except when harm to property interests is at stake); *see also* Joseph Tanenhaus, *Picketing as Free Speech: Early Stages in the Growth of the New Law of Picketing*, 14 U. PITT. L. REV. 397, 398–402 (1953).

[56] Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1059–60 (2009). Liberty poles were, as Professor Eugene Volokh explains, "tall poles that were crowned with flags or 'liberty caps.' They originated before the Revolution as symbols of hostility to the assertedly oppressive English government, but by the 1790s, they had become symbols of hostility to asserted oppression by the federal government." *Id.* at 1072.

[57] *See* City of Chi. v. Trotter, 26 N.E. 359 (Ill. 1891); Anderson v. City of Wellington, 19 P. 719 (Kan. 1888); *In re* Frazee, 30 N.W. 72 (Mich. 1886); *In re* Garrabad, 54 N.W. 1104 (Wis. 1893). *But see* Commonwealth v. Abrahams, 30 N.E. 79 (Mass. 1892).

[58] 316 U.S. 52 (1942).

[59] *Id.* at 54. In later decisions, the Court recognized that commercial advertising was entitled to at least some degree of constitutional protection, and in recent years, has extended increasingly more protection to such speech. Nevertheless, advertising remains a category of low-value speech insofar as its content-based regulation does not trigger strict scrutiny. *See infra* notes 203–204 and accompanying text.

[60] *In re* Rapier, 143 U.S. 110 (1892); *Ex parte* Jackson, 96 U.S. 727 (1877).

and circulars through means other than the mail.[61] The Court thus upheld the regulation, but noted that Congress had no power to prohibit more broadly the transportation of the prohibited materials because "[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."[62]

The Court interpreted the First Amendment, in other words, to impose a significant but by no means insuperable limit on the federal government's power to restrain the circulation of printed material, including commercial advertisements — even commercial advertisements that the Court clearly recognized as "injurious to the public morals."[63] This interpretation was entirely in keeping with the weak nineteenth-century view of press and speech freedom generally. Certainly, at no point in the opinion did the Court suggest that the principles of freedom of speech or press applied differently to advertisers than to others, such as newspaper publishers, who disseminated printed material to the public at large.

The Court's failure to distinguish between the free press rights of newspaper publishers and commercial advertisers suggests, as Professor Stuart Banner and Judge Alex Kozinski note, that "the *Jackson* Court implicitly considered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other."[64] Or at least, it suggests how little rode on the distinction between regulations targeted at commercial advertising and regulations targeted at other kinds of speech, given the Court's general conclusion that Congress possessed the power to prohibit any printed materials it wished from the mails, just so long as it allowed their circulation via other means.

Nor was the Supreme Court the only court to subject the regulation of advertising to First Amendment scrutiny. In the early twentieth century, at least two lower courts treated advertising in much the same way. That is, they denied the free speech or press claims of the advertisers, but did not deny that the constitutional principle of freedom of press applied.[65]

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[61] *See, e.g.*, *Jackson*, 96 U.S. at 736; *see also Rapier*, 143 U.S. at 134 ("We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people.").

[62] *Jackson*, 96 U.S. at 733.

[63] *Id.* at 736.

[64] Alex Kozinksi & Stuart Banner, Response, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 765 (1993).

[65] *See* Buxbom v. City of Riverside, 29 F. Supp. 3, 4–6 (S.D. Cal. 1939) (applying, without inquiry, the state guarantee of free speech to advertising materials but upholding a municipal ordi-

2. *Libel.* — Advertising was not the only kind of low-value speech to which eighteenth- and nineteenth-century courts applied some degree of constitutional scrutiny. In fact, constitutional concerns constrained to varying degrees the prosecution and punishment of all four of the kinds of speech identified as low value by the *Chaplinsky* Court. These concerns were clearest in the case of libel. Indeed, the prosecution of libel — far from raising no constitutional problem, as the *Chaplinsky* Court asserted — was in many respects at the center of debates about the meaning of freedom of the press in the eighteenth and nineteenth centuries.

Both prior to and after the Revolution, arguments raged among courts, lawyers, and publishers about the extent to which the traditional common law rule that truth was no defense to criminal libel was compatible with the constitutional principle of freedom of the press.[66] Important revolutionary figures, such as Alexander Hamilton, argued that, in order to safeguard press freedom, true statements, at least those published with good motives, should not be considered criminally libelous.[67] Others disagreed, arguing that true statements were just as likely as false ones to cause mischief and disorder.[68]

The Hamiltonian side ultimately won. By the early nineteenth century, most states had altered the common law rules to allow truth as a defense to accusations of libel, although most also required, as Hamilton urged, a showing that the true libel had been published with good motives.[69] In some states, the defense was available only to "papers, investigating the official conduct of officers, or men in a public capaci-

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nance that prohibited their distribution to private residences without the owners' agreement on the grounds that the ordinance left adequate alternative means of communication); Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 73–81 (Ga. 1905) (balancing the right to privacy against the right of free press in a case involving a newspaper advertisement, and affirming the plaintiff's claim of invasion of privacy after his image was used without his permission in an insurance ad).

[66] The classic articulation of the common law rule was provided by William Blackstone in his *Commentaries on the Laws of England*. BLACKSTONE, *supra* note 53, at *150–51. As Blackstone makes clear, what motivated the rule was the belief that the purpose of criminal libel law was to prevent the breaches of the peace that would otherwise occur when those defamed took it upon themselves to exact revenge for the injury. *Id.* at *150. ("[I]n a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law."). Understood as such, there was no reason for the law to prosecute only untrue libels, given that both appeared equally likely to stir up animosity that might result in violence.

[67] *See* ROSENBERG, *supra* note 44, at 110–14.

[68] In 1811, for example, the South Carolina Supreme Court rejected the argument that truth should be allowed as a defense in cases of criminal libel on the grounds that doing so would only encourage strife. Relaxation of the old rule, the Court argued, would allow libelers to expose "the secret infirmities of their neighbors" or "imprudencies, long since committed and repented." State v. Lehre, 4 S.C.L. (2 Brev.) 446, 448 (S.C. 1811), *quoted in* ROSENBERG, *supra* note 44, at 108.

[69] ROSENBERG, *supra* note 44, at 117.

ty, or where the matter published is proper for public information."[70] However, in many states, the privilege extended to defendants in ordinary libel suits as well.[71] In both cases, the rule was motivated by the belief that imposing criminal liability on true speech threatened the expressive freedom that the American Revolution, and the state and federal constitutions enacted in its wake, were intended to protect. As Justice James Kent of the New York Supreme Court of Judicature argued in 1804, to justify his adoption of the Hamiltonian "truth-plus" standard for criminal libel:

> The first American congress, in 1774, in one of their public addresses, enumerated five invaluable rights, without which a people cannot be free and happy . . . . One of these rights was the *freedom of the press* . . . . [T]he Convention of the people of this state, which met in 1788 . . . declared unanimously, that the freedom of the press was a right which could not be abridged or violated. The same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party. . . .
>
> These multiplied acts and declarations are the highest, the most solemn, and commanding authorities, that the state or the nation can produce. . . . And it seems impossible that they could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish anything, true or false, that reflects on the character and administration of public men.[72]

Although Justice Kent was not able to sway the majority of justices on the court to his position, his opinion ultimately persuaded the New York legislature to amend the state constitution to specifically allow parties charged with libel to introduce the Hamiltonian truth-plus defense.[73] Similar motivations led courts in other states to adopt a similar rule, even absent an explicit constitutional provision authorizing them to do so.[74]

Nor was the truth-plus defense the only way in which the prosecution of libel in the eighteenth and nineteenth centuries was constrained

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[70] PENN. CONST. of 1790, art. IX, § 7; *accord* ILL. CONST. of 1818, art. VIII, § 23; TENN. CONST. of 1796, art. XI, § 19.

[71] *See, e.g.*, CAL. CONST. of 1849, art. I, § 9; CONN. CONST. of 1818, art. I, § 7; IND. CONST. of 1851, art. I, § 10; MICH. CONST. of 1835, art. I, § 7; N.J. CONST. of 1844, art. I, § 5; N.Y. CONST. of 1821, art. VII, § 8; R.I. CONST. of 1843, art. I, § 20; W. VA. CONST. of 1863, art. II, § 5; WIS. CONST. of 1848, art. I, § 3.

[72] People v. Croswell, 3 Johns. Cas. 337, 391–92 (N.Y. Sup. Ct. 1804) (opinion of Kent, J.) (citations omitted).

[73] *See* PETER J. GALIE & CHRISTOPHER BOPST, THE NEW YORK STATE CONSTITUTION 76 (2d ed. 2012).

[74] In 1808, the Massachusetts Supreme Judicial Court held, for example, that although truth by itself did not provide a complete defense to the charge of criminal libel, in such a case, the defendant may give evidence of truth in order to show that "the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man," and on those grounds, not libelous. Commonwealth v. Clap, 4 Mass. (3 Tyng) 163, 169 (1808).

Temple American Inn of Court - April 2016 Program - Research and Materials

by constitutional principles. Courts also refused to enjoin allegedly libelous speech on the grounds that doing so constituted a prior restraint on expression. The only exception to this rule was when the party seeking the injunction could demonstrate that he or she enjoyed a property right to the speech in question or when the injunction was necessary to prevent "irreparable injury to, and the destruction of" the complaining party's property rights.[75] In such cases, the right to free expression lost out to the right to property. Otherwise, the rule was absolute. Hence, in 1839, the New York Court of Chancery denied the plaintiff's application for a court order to restrain the publication of an allegedly libelous pamphlet on the grounds that so doing would be to "infring[e] upon the liberty of the press, and attempt[] to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government."[76] In 1876, the St. Louis Court of Appeals made a similar, equally forceful argument to explain its decision to dissolve the injunction a lower court had imposed on the publication of "false, slanderous, malicious, and libelous statements."[77] The plaintiff claimed that because the publishers of the statements were insolvent, injunctive relief was the only meaningful remedy available.[78] The court held that, even if this was so, the injunction could not stand because it would violate the state constitutional guarantees of speech and press freedom.[79]

3. Obscene and Profane Speech. — The prosecution of obscene and profane speech was also constrained by constitutional concerns in the eighteenth and nineteenth centuries. This was the case notwithstanding the disfavor with which late nineteenth-century courts and legislators regarded obscenity in particular, and the breadth of materials they were willing to consider obscene.[80] Because both obscene and profane

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[75] Judson v. Zurhorst, 20 Ohio Cir. Dec. 9, 11 (1907); *see also* Brandreth v. Lance, 8 Paige Ch. 24, 28 (N.Y. Ch. 1839) (concluding that the court has no authority to intervene where the publication of the work "cannot be considered as an invasion of the rights either of literary or medical property"); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 641 (1916) (critiquing the settled rule that courts would not enjoin libels when they threatened only "injury to personality").

[76] *Brandreth*, 8 Paige Ch. at 26.

[77] Life Ass'n of Am. v. Boogher, 3 Mo. App. 173, 174 (Ct. App. 1876).

[78] *See id.* at 175.

[79] *See id.* at 180.

[80] As Professor Donna Dennis has noted in her history of obscenity law in the United States, in the early nineteenth century, "jurists and treatise writers routinely interpreted the common law of nuisance and obscene libel to give local authorities extremely broad powers to punish any form of expression that had a tendency to promote indecency or corrupt morality." Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369, 383 (2002). Although by the end of the century courts had developed a more worked-out definition of the obscene, it was far from narrowly limited. Instead, obscenity was

speech were technically considered to be species of libel,[81] eighteenth-, nineteenth-, and early twentieth-century courts generally agreed that speech of this kind could not be restrained in advance without violating the constitutional guarantees of expressive freedom. As a Texas court explained in 1893:

> The power to prohibit the publication of newspapers is not within the compass of legislative action, in this state, and any law enacted for that purpose would clearly be in derogation of the bill of rights. . . . The power to suppress one concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise. The doctrine of the constitution must prevail in this state, which clothes the citizen with liberty to speak, write, or publish his opinion on any and all subjects, subject alone to responsibility for the abuse of such privilege.[82]

As this passage makes clear, the prohibition against enjoining obscene or profane speech was not granted to such speech for its own sake. Instead, courts refused to grant the government the power to vet speech in advance of publication or utterance because what was in fact obscene, blasphemous, or otherwise indecent could not be determined in the abstract. The rule, on this view, was purely prophylactic.[83] Nevertheless what it meant was that, for all intents and purposes, obscenity was constitutionally protected against prior restraint, if not post-publication sanctions.

Even in the early twentieth century — during a period when both the federal and the state governments were expending significant resources to rout out and prosecute obscenity[84] — courts remained firm

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defined as any speech that had a "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences and into whose hands [the obscene] publication . . . may fall." *Id.* at 383 n.17 (quoting The Queen v. Hicklin, (1868) 3 L.R.Q.B. 360, 371 (Eng.)). This language was interpreted to mean that advertisements promoting contraception and abortion services were obscene, as were contraceptives and abortifacients themselves, as were many works of what today we would consider high literature. *See id.* at 390–91; Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 53–56 (1938).

[81] *See* Colin Manchester, *A History of the Crime of Obscene Libel*, 12 J. LEGAL HIST. 36, 36 (1991). The offense of profane swearing was generally understood to constitute a subspecies of the broader offense of blasphemy, and therefore was governed by libel doctrine as well. *See* FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 75 (1st American ed. 1818).

[82] *Ex parte* Neill, 22 S.W. 923, 923–24 (Tex. Crim. App. 1893); *see also* Corliss v. E.W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893) ("Th[e] constitutional privilege [of freedom of speech and the press] implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or, by its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals.").

[83] In this regard of course it may not be so dissimilar from a great deal of contemporary First Amendment law. *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 198 (1988) ("Not just arguably peripheral doctrines . . . but the most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the 'real' first amendment.").

[84] *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 12–13 (1976).

Temple American Inn of Court - April 2016 Program - Research and Materials

in their refusal to enjoin the publication of indecent or obscene materials. As an Ohio court somewhat regretfully noted in 1907, in response to the plaintiff's request for a court order enjoining the publication of what he claimed were obscene libels about him:

> Article 1, Sec. 11 of the Ohio constitution declares that:
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> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. . . ."
>
> It is clear that the constitution here provides for the fullest liberty of speech, but subject always to the proviso that every citizen must be held responsible for his abuse of the right. . . .
>
> . . . .
>
> Were we empowered to formulate original principles of law and lay down new rules by which courts of equity should be guided, [the plaintiff's] argument would appeal strongly to our consciences and judgment. But we have no such power. . . .
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> . . . .
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> In a proper case instituted by one legally authorized to represent the public, the public exhibition of lewd pictures, immodest statuary, or immoral plays, would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mails. The case presented to us, however, is not of that character and does not authorize the relief sought."[85]

To contemporary eyes, the distinction drawn by the Ohio court — between enjoining the exhibition and sale of "lewd pictures, immodest statuary [and] immoral plays" and enjoining the publication or manufacture of such goods — may seem so formalistic and insubstantial as to make whatever "protection" the freedom of press provided obscene materials essentially meaningless. But in fact the prohibition against prior restraint was not entirely toothless. It meant, for one thing, that the government had to prove, not merely allege, that the materials it wished to enjoin were obscene — and, in most jurisdictions, to do so to the satisfaction of a jury rather than a judge.[86] Requiring juries to define what was obscene *after the fact* took the power away from individual government officials. And making the jury the arbiter of what was obscene ensured that the prosecution of speech obeyed community

[85] Judson v. Zurhorst, 20 Ohio Cir. Dec. 9, 9, 10, 13, 14 (1907) (quoting OHIO CONST. art. I, § 11).

[86] *See* SCHAUER, *supra* note 84, at 22 ("Most of the [nineteenth-century state] cases [dealing with obscenity] held that determination of the issue of obscenity was for the jury . . . ." (citing cases from New York, Alabama, and Georgia and noting contrary authority from Texas)).

Temple American Inn of Court - April 2016 Program - Research and Materials

norms — and resulted in relatively few obscenity convictions, at least in the eighteenth and early- to mid-nineteenth centuries.[87]

That these restraints on the government's power to prevent and punish obscene or otherwise "indecent" speech were felt to be both significant and constitutionally mandated is demonstrated by the opposition that developed when legislators attempted to undermine them. In 1868, for example, Republicans in the New York Senate were forced to remove from a new municipal obscenity bill a provision that authorized magistrates to issue warrants directing police officials to search and destroy materials the magistrate summarily declared to be "obscene and indecent"[88] after the provision generated intense opposition among the Democratic minority and the Democratic-leaning press.[89] Critics argued that the proposed provision would undermine both due process and freedom of the press. An editorial in the *Sunday Mercury*, for example, described the provision, as evidence of "Radical despotism" and noted that the law would empower:

> any magistrate or any policeman . . . [who] finds a paper with an advertisement in it that he thinks is not sufficiently refined for his pure imagination — [to] seize the same and transmit specimens of it to the District-Attorney's office, and forthwith destroy the remainder thereof; in other words, destroy the entire edition of the paper . . . without complaint or process of law.[90]

When the bill was finally enacted into law, it allowed destruction of obscene materials only after trial.[91]

The kerfuffle over the 1868 obscenity bill points to the important, albeit attenuated, role that concerns with press and speech freedom played in the regulation of even obscene or "indecent" speech in the nineteenth century. It calls into question the twentieth-century Court's assertion that obscenity was traditionally considered entirely "outside

[87] Dennis argues, for example, that in mid-nineteenth-century New York, which was throughout the nineteenth century one of the central sites for the production and dissemination of salacious materials, "prosecutions for obscenity . . . were sporadic and often dropped after indictment" and that "[o]nly a few of the defendants were convicted, and none served a prison sentence." Dennis, *supra* note 80, at 388. Dennis further notes that "authorities generally conceded that they could only obtain indictments against the most explicit sexual materials in circulation." *Id.*; *see also* SCHAUER, *supra* note 84, at 12 (noting the relatively few prosecutions for obscenity in the pre–Civil War period). Toward the end of the nineteenth century, as Professor Frederick Schauer notes, there was a significant increase in the amount of material prosecuted as obscenity, largely as a result of the enactment of the federal Comstock Act. SCHAUER, *supra* note 84, at 12–13. But of course, because the Comstock Act limited only the circulation of materials in the mail, under *Ex parte Jackson*, 96 U.S. 727 (1877), it could restrict speech in ways that a law of more general application could not.

[88] DONNA DENNIS, LICENTIOUS GOTHAM 225 (2009).

[89] *See id.* at 225–29.

[90] *Obscene Literature—Its Radical Organ and Propagators*, SUNDAY MERCURY, Apr. 26, 1868, at 4. The newspaper sardonically called the provision "a new illustration of the liberty of the press." *Id.*

[91] DENNIS, *supra* note 88, at 227.

the protection intended for speech and press."[92] Indeed, only in the twentieth century did courts first suggest that the prior injunction of speech of this kind might *not* infringe upon the constitutional rights of speech and press.[93] Only in the twentieth century, in other words, did courts begin to treat obscenity as if it were not in fact "speech at all" for constitutional purposes.[94]

4. Fighting Words. — Even the prosecution of what the *Chaplinsky* Court called "fighting words" was constrained to some degree by constitutional concerns.[95] Insulting or offensive language tended to be prosecuted in the eighteenth and nineteenth centuries as disorderly conduct or as the common law offense of public nuisance.[96] In the second half of the nineteenth century, however, states and municipalities began to pass more specific statutory prohibitions on the public use of offensive or insulting language.[97] In construing these statutes, courts made clear that there were limits on the government's ability to criminally punish speech merely because of its offensive or insulting content. In *Ex parte Kearny*[98] in 1880, for example, the California Supreme Court held that a municipal statute that prohibited any person from "utter[ing] in the presence of another, any words, language, or expression, having a tendency to create a breach of the peace"[99] could only be constitutionally applied when the insulting or offensive language was actually "addressed to, or spoken in the presence of, the

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[92] Roth v. United States, 354 U.S. 476, 483 (1957).

[93] In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the Court laid the groundwork for *Chaplinsky* in some respects by noting that, notwithstanding the general First Amendment prohibition against prior restraint, obscene materials could be enjoined when necessary to enforce what the Court described as the "primary requirements of decency." *Id.* at 716. As a result, after *Near*, obscene materials could be enjoined in advance, as was not possible doctrinally in the nineteenth century. *See* B. Kay Albaugh, Comment, *Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies — The Prior Restraint Dilemma*, 19 WAKE FOREST L. REV. 7 (1983) (describing the use of prior injunctions to abate and censor adult bookstores and obscene films). As Albaugh notes, the use of prior restraints in this area is contested, given the risk that nonobscene material will be suppressed. Nevertheless, a number of state courts have upheld the practice. *See, e.g.*, Chateau X, Inc. v. State *ex rel.* Andrews, 275 S.E.2d 443, 449 (N.C. 1981).

[94] Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.146.

[95] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (internal quotation marks omitted).

[96] *See* Annotation, *Words as Criminal Offense Other than Libel or Slander*, 48 A.L.R. 83 (1927).

[97] In 1891, for example, New Hampshire passed a law that prohibited any person from "address[ing] any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place" or to "call him by any offensive or derisive name" or "make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him." State v. McConnell, 47 A. 267, 267 (N.H. 1900). Chaplinsky was later prosecuted under a revised version of this law. *See Chaplinsky*, 315 U.S. at 569. Similar statutes were passed by Connecticut in 1865, *see* State v. Warner, 34 Conn. 276, 278–79 (1867), and Arkansas in 1868, *see* Hearn v. State, 34 Ark. 550, 550 (1879), among other states.

[98] 55 Cal. 212 (1880).

[99] *Id.* at 219 (internal quotation mark omitted).

Temple American Inn of Court - April 2016 Program - Research and Materials

person whom they have a tendency to incite to a breach of the peace."[100] Any other construction of the statute, the court held, would allow the government to too easily evade the careful constitutional constraints otherwise imposed on the prosecution of insulting or disorderly speech. As the court explained:

> The freedom of the press is surrounded by many constitutional safeguards. . . . Will it be contended that the printer may be deprived of this great constitutional right by providing that he shall be punished, not for libel, but for the publication of words having a tendency to produce a breach of the peace? . . .
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> . . . .
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> . . . To hold that the conversation of intimate friends may be reported, or the privacy of domestic circles invaded, to secure evidence of declarations, which, if subsequently communicated to the person to whom they relate, may, in the opinion of a jury in the Police Court, "have a tendency" to induce him to commit a breach of the peace, would recognize and encourage a system of espionage abhorrent to American ideas, and productive of more evil than the practice condemned. . . .
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> . . . .
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> . . . That such an ordinance would not accord with our governing policy is further evidenced, perhaps, by the circumstance that no like prohibitory legislation has ever been attempted in this or other States.[101]

The court held, in other words, that the mere utterance of words that in the abstract had a tendency to breach the peace was not something the municipality could punish while remaining true to the principles that governed the U.S. constitutional system.

Other courts were rather more generous in what they allowed legislatures. Indeed, in other jurisdictions, courts affirmed the conviction of individuals who engaged in offensive or disruptive speech even when this speech was not directly aimed at any one individual, let alone likely to provoke a fight.[102] Nevertheless, the California Supreme Court appears to have been correct that in no jurisdictions was the mere utterance of insulting or provoking words a crime.[103] As the

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[100] *Id.* at 223.

[101] *Id.* at 222–25.

[102] *See, e.g.*, Commonwealth v. Foley, 99 Mass. 497, 497–99 (1868) (upholding the conviction of a defendant accused of being a "railer and brawler and disturber of the peace," *id.* at 497, after he "used loud and violent language" consisting of "opprobrious epithets and exclamations" inside or "near his dwelling-house, and frequently to his wife when in the house," *id.* at 498); State v. Maggard, 80 Mo. App. 286, 287–92 (Ct. App. 1899) (upholding conviction of defendants found to have "willfully disturb[ed] the peace of [another family] by cursing and swearing and by offensive and indecent conversation," *id.* at 291).

[103] *See* People v. Loveridge, 42 N.W. 997 (Mich. 1889) (concluding that the use of obscene language by a "filthy-minded person whose tongue was loosed by drinking" could not be prosecuted as the common law offense of breach of the peace because "[i]t is laid down, very positively, that insulting and abusive language does not [constitute a breach of the peace without] threats of im-

Tennessee Supreme Court noted in 1856, "[m]ere quarrelsome words [without more] are not a punishable offense."[104] Instead, what was prohibited was the disruption created by the public expression of offensive or insulting language in a context in which such expression was likely to lead to violence or disorder of some sort. The content of the speech alone was not sufficient to justify prosecution, given both constitutional concerns with freedom of expression and common law concerns with the limits of secular state power.

B. High-Value Speech

As *Ex parte Kearny* demonstrates, eighteenth- and nineteenth-century courts extended some degree of constitutional protection to many kinds of low-value speech. Conversely, courts during this period upheld the imposition of criminal sanctions on many kinds of high-value speech that were perceived to be (to use Justice Story's language) "improper, mischievous, or illegal."[105]

1. Press. — For example, courts imposed sometimes-steep penalties on journalists or newspapers that reported on public trials in a manner that appeared to threaten the impartial administration of justice or to demean the judge.[106] Courts did not justify doing so by claiming that newspaper reports about public trials were categorically excluded from constitutional protection. To the contrary: it was widely recognized in the eighteenth and nineteenth centuries that one of the purposes of guaranteeing freedom to the press was to enable the press, as Pennsylvania Supreme Court Chief Justice McKean put it in the 1788 case *Respublica v. Oswald*,[107] to lay "open to the inspection of every citizen . . . the proceedings of the government; of which the judicial authority is certainly to be considered as a branch."[108] The justification was instead that newspaper reports that insulted or demeaned the court represented an abuse of the constitutional right of press freedom, rather than an exercise of it. As the Supreme Court of the Territory of Michigan argued in 1829, just as the Second Amendment vested citizens with the right to keep and bear arms but not the right to use

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mediate violence, or challenges to fight, or incitements to immediate personal violence or mischief," *id.* at 998); State v. Taylor, 35 Tenn. (3 Sneed) 662, 663 (1856) (quashing indictment of defendant accused of inciting another to breach the peace after he publicly called him a liar upon finding insufficient evidence that the words actually threatened to incite the defendant to breach the peace).

[104] *Taylor*, 35 Tenn. (3 Sneed) at 663 (internal quotation marks omitted).

[105] STORY, *supra* note 49, § 1878, at 736.

[106] The offense was generally referred to as "constructive contempt." For a history of the law of constructive contempt in the United States, see generally Raoul Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602 (1942).

[107] 1 Dall. 319 (Pa. 1788).

[108] *Id.* at 322.

these arms to "destroy [their] neighbor[s]," so the First Amendment vested citizens with the right to publish their sentiments on whatever topic they chose but did not give them the right to use this privilege for an "unlawful or unjustifiable purpose."[109]

2. *Religious Speech.* — The same distinction between freedom and its abuse justified the criminal prosecution of many other kinds of high-value speech. In 1824, for example, the Pennsylvania Supreme Court affirmed the conviction of a defendant who asserted, during a debate organized by a local debating club to which he belonged, that the Bible was a "fable, that . . . contained a number of good things, yet . . . a great many lies."[110] The court found that, although serious debate about religious matters could not be prosecuted as blasphemy in light of the constitutional protections provided for speech as well as religion, the type of language used by the defendant — at least when uttered in a public place and "in the presence and hearing of several persons"[111] — constituted a "gross offence against public decency and public order, tending directly to disturb the peace of the commonwealth."[112]

The court recognized that in principle religious speech was protected by the guarantees of both freedom of speech and free expression.[113] Nevertheless, it found the speech at issue in the case to represent a threat to public order and public peace, but not because the speech threatened any actual violence. Indeed, there is no suggestion in the opinion or in counsel's arguments that the audience to the debate was riled up by the defendant's conduct. Instead, the court concluded that the speech represented a threat to public order because, by calling into question the truth of the Scriptures, it threatened to undermine "those religious and moral restraints, without the aid of which mere legislative provisions [aimed at keeping order] would prove ineffectual."[114] The speech threatened the public peace, in other words, by transgressing dominant norms of public piety. This was all the court required to convict.[115]

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109 United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829). The Court therefore concluded that, although the First Amendment "prohibits the passing of any law abridging the liberty of the press, it does not follow, that if the act of which this defendant is charged is a contempt of the authority of the court, that it is any the less a contempt because it is committed through the medium of the press." *Id.* at 346–47.

110 Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 398 (Pa. 1824) (internal quotation mark omitted).

111 *Id.* at 398.

112 *Id.* at 405.

113 *Id.* at 408.

114 *Id.* at 406.

115 A similar justification was invoked by the New York Court for the Correction of Errors to defend the constitutionality of the prosecution of a defendant charged with "wickedly, maliciously, and blasphemously" asserting "in the presence and hearing of divers good and christian people"

Temple American Inn of Court - April 2016 Program - Research and Materials

3. Political Speech. — Eighteenth- and nineteenth-century courts upheld the imposition of sanctions on political speech not only when it threatened to incite immediate violence or disorder, but also when it appeared to more generally encourage subversive and dangerous political behavior. Indeed, as Professor David Yassky notes, the dominant view of freedom of speech in the late eighteenth century was not that "all points of view [had to] have access to public debate."[116] The prevailing view was instead that "[l]arge categories of immoderate public speech were . . . properly subject to censure . . . [and] 'government . . . had a positive responsibility to monitor — and, when necessary, to step in and moderate — political communication.'"[117] This was because it was widely believed that only by punishing what eighteenth- as well as nineteenth-century jurists tended to describe simply as "licentiousness" — namely, speech "inconsistent with the peace and safety of th[e] state" — could the government ensure the long-term stability, and popularity, of the system of free expression itself.[118] Only by routing out licentiousness could government protect genuine liberty "from those who would exploit and degrade it."[119]

This view remained dominant in the nineteenth century as well — as demonstrated by the willingness of nineteenth-century courts to impose sometimes harsh punishment on dangerous or subversive political expression. In *People v. Most*,[120] for example, the New York Court of Appeals affirmed the conviction of an anarchist under a state statute that criminalized the assembly of three or more persons who "being as-

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that "*Jesus Christ* was a bastard, and his mother must be a whore." People v. Ruggles, 8 Johns. 290, 292–93 (N.Y. 1811) (internal quotation marks omitted). The Court held that language of this sort constituted an actionable "offence against the public peace and safety" because, by calling into question the sanctity of the gospels, it "tend[ed] to lessen, in the public mind, [the] religious sanction" of the public oaths that, then as now, individuals took when joining, or contributing to, judicial or administrative proceedings. *Id.* at 297–98. The implication of this, of course, was that, like the language in *Updegraph*, the speech undermined the moral and religious controls that helped preserve the public and political order. As Professor Sarah Barringer Gordon has noted, the *Ruggles* and *Updegraph* opinions enjoyed widespread popular support in the early nineteenth century. Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682, 693–95 (2000).

116 Yassky, *supra* note 44, at 1707.

117 *Id.* (quoting ROSENBERG, *supra* note 44, at 100).

118 Gordon, *supra* note 115, at 685 (quoting *Ruggles*, 8 Johns. at 296) (internal quotation mark omitted).

119 *Id.* A similar sentiment was expressed by Justice Joseph Story in his discussion of freedom of the press. *See* STORY, *supra* note 49, § 1874, at 731–33 (arguing that liberty of press means no more than that "every man shall be at liberty to publish what is true, with good motives and for justifiable ends" because "[w]ithout . . . a limitation [on the right], it might become the scourge of the republic, first denouncing the principles of liberty; and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form," *id.* at 733).

120 27 N.E. 970 (N.Y. 1891).

sembled . . . threaten any act tending towards a breach of peace"[121] after he addressed a crowd of fellow anarchists and warned them that the day of revolution was "not far distant."[122] The court noted that, although to its eyes the anarchist's words were the "ravings of a madman," it was up to the jury to discern whether they posed a real threat of public disorder, given the circumstances in which he spoke.[123] The court also adamantly rejected the defense counsel's argument that because "the threats [uttered in the speech] related to acts not presently to be done, but to be performed at some future time," they did not pose a real threat to peace and safety.[124] "The main purpose of the common law and of the statute relating to unlawful assemblies," the court wrote, "is the protection of the public peace[:]"

> Incendiary speeches under the circumstances disclosed in this case, before a crowd of ignorant, misguided men, are not less dangerous because the advice to arm for the redress of grievances and the threats of murder are accompanied with the suggestion that the time is not quite come for action. . . . No one can foresee the consequences which may result from language such as was used on this occasion, when addressed to a sympathizing and highly excited audience.[125]

Political speech could be criminally punished, in other words, not only when it threatened imminent political disorder but also when it spread "incendiary" ideas to ignorant and misguided men — and thereby threatened in the long run, if not the short, the safety and security of society.

C. *The Broad but Shallow First Amendment*

What these cases demonstrate is that eighteenth- and nineteenth-century courts applied the same constitutional principles to the regulation of high-value speech as they applied to the regulation of low-value speech. The general rule in the eighteenth and nineteenth centuries was that speech — no matter how valuable it might be — could be sanctioned criminally whenever it threatened, as Justice Story put it, to "disturb the public peace, or . . . subvert the government."[126] But almost no speech or writing could be enjoined in advance without violating the constitutional prohibition against prior restraints, except when it posed a threat to person or property.[127]

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[121] *Id.* at 972 (quoting N.Y. PENAL LAW § 451.3 (1882)) (internal quotation mark omitted).
[122] *Id.* at 973.
[123] *Id.* at 972.
[124] *Id.*
[125] *Id.* at 972–73.
[126] STORY, *supra* note 49, § 1874, at 732.
[127] *See* Pound, *supra* note 75, at 652.

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This is not to say that courts and legislators possessed no conception that some categories of speech might be more valuable than others, and therefore entitled to a somewhat greater degree of constitutional protection. As we saw above, in many states, speech that touched on "the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or . . . matter . . . proper for public information" had to be either untrue or malicious in order to be considered libel or slander.[128] In the civil context, many jurisdictions also offered defendants in cases involving what were generally referred to as "matters of public interest" a qualified privilege that required the plaintiff to prove that the libel was malicious as well as false in order to receive damages.[129] Speech that took place during a trial or on the floor of the legislature was protected against accusations of libel because of its great value to the democratic system in the United States.[130]

Nevertheless, the difference in the treatment of this kind of high-value speech and other kinds of speech was for the most part relative, not absolute. Speech about matters of public concern received greater constitutional protection than other kinds of speech but nevertheless was subject to criminal penalties, as well as civil liability, when false or motivated by a malicious intent.[131] And even protected speech given during trial or legislative proceedings remained subject to prosecu-

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[128] ME. CONST. of 1819, art. I, § 4; *see also supra* notes 69–71 and accompanying text.

[129] *See, e.g.*, Gott v. Pulsifer, 122 Mass. 235, 238–39 (1877) ("The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice."); *see also* CLIFTON O. LAWHORNE, DEFAMATION AND PUBLIC OFFICIALS 87–110 (1971) (noting that between the Civil War and 1900, "state after state" adopted a rule granting some sort of privilege to defendants who spoke on public matters of some kind or another, *id.* at 87).

[130] *See* COOLEY, *supra* note 45, at 421–22; *id.* at 446 (noting that the absolute privilege afforded legislators on the floor of the legislature "[is] secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal" (quoting Coffin v. Coffin, 4 Mass. (1 Tyng) 1 (1808))).

[131] *See id.* at 431–34; WILLIAM BLAKE ODGERS, A DIGEST OF THE LAW ON LIBEL AND SLANDER 30 (1st ed. 1881). The requirement that matters of public concern be published with good motives reflected the view that even when it touched on matters of public concern, speech that was motivated by a malicious intent undermined, rather than fostered, the democratic aims of the qualified privilege doctrine because such speech functioned to "unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power." Respublica v. Dennie, 4 Yeates 267, 270 (Pa. 1805). Once again, the ultimate concern motivating the rule appears to have been a concern with the preservation of the public order, and the moral, religious, and political attitudes believed necessary to sustain it.

Temple American Inn of Court - April 2016 Program - Research and Materials

tion for perjury.[132] Meanwhile, even blasphemous and obscene speech was protected against injunction and other kinds of prior restraint.[133]

Courts adopted, in other words, what we could describe as a broad but shallow conception of the constitutional guarantee of expressive freedom: one that imposed few constraints on the government's ability to regulate speech on the basis of its content but extended constitutional protection — at least against prior restraint — to almost all speech, even when it was immoral or improper or otherwise devalued.

What this means is that in declaring fighting words, obscenity, libel, and profanity to be categorically outside the scope of constitutional protection for speech and press because of what it called their lack of "social value," the *Chaplinsky* Court was not, as it claimed, simply rendering explicit a longstanding understanding of the limits of constitutional protection for speech and press. Instead, it was creating something new: namely, the two-tier system that continues to organize the doctrine, more or less, to this day. In the next Part, I explore why and how the Court did so before turning, in Part IV, to the implications of this history for the contemporary doctrine.

III. INVENTING A TRADITION

The 1930s and 1940s marked a new deal for freedom of speech. Although legal histories of the New Deal tend to emphasize the constitutional changes that took place during this period in Commerce Clause and Fourteenth Amendment doctrine,[134] this was also a period of significant change in First Amendment doctrine.[135]

It was during this period that a majority of Justices on the Court adopted for the first time the new understanding of freedom of speech that Justices Holmes and Brandeis had been promoting, largely in dissent, since the teens and twenties, and that free speech activists had been promoting even earlier than that.[136] In contrast to the more interventionist eighteenth- and nineteenth-century view, this new conception of freedom of speech imposed strong constraints on the government's ability to punish speech after the fact. Rather than empowering the government to protect liberty by routing out what eighteenth- and nineteenth-century courts generally described as "licentiousness," proponents of this view instead argued that the guaran-

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[132] COOLEY, *supra* note 45, at 441.

[133] *Id.* at 421.

[134] *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 359–82 (1998); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 108 (1998).

[135] *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 128, 165 (2000).

[136] For a good history of this development, see David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1345–51 (1983).

Temple American Inn of Court - April 2016 Program - Research and Materials

tees of speech and press freedom limited the government's ability to decide what was or was not in fact licentious.

Indeed, the great innovation of the New Deal Court's free speech jurisprudence was its embrace of the idea that in order to achieve the purposes long associated with the First Amendment — purposes such as the promotion of democratic government and the advancement of "truth, science, morality, and arts in general"[137]— the government had to tolerate even harmful speech, except when that speech was so dangerous that it posed an imminent threat to the security of the state or to other vital governmental interests, such as the protection of its citizens against physical harm. Justice Holmes had promoted this idea since at least 1919, when, dissenting in *Abrams v. United States*,[138] he famously insisted that: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'"[139] But the Court was initially resistant to it. In *Gitlow v. New York*[140] and other early twentieth-century cases, it instead continued to articulate a view of freedom of speech very close to the nineteenth-century view described in the previous Part.[141]

By the 1930s, however, significant personnel changes, among other factors, led the Court to change its view of what it meant to guarantee freedom of speech and press against abridgment.[142] The result was a series of decisions that imposed for the first time significant limits on the government's ability to punish speech merely because it believed it to be subversive or immoderate. In *Stromberg v. California*[143] in 1931,

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[137] This quote comes from the portion of the 1774 address that the Continental Congress wrote to the inhabitants of Quebec in order to apprise them of the purposes of the Revolution that dealt with freedom of the press. *See* Address to the Inhabitants of Quebec, 1774, *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221, 223 (Bernard Schwartz ed., 1971).

[138] 250 U.S. 616 (1919).

[139] *Id.* at 630–31 (Holmes, J., dissenting) (omission in original).

[140] 268 U.S. 652 (1925).

[141] *Gitlow* continued to emphasize, for example, the importance of punishing licentious speech in order to protect liberty. *See id.* at 666–67 ("It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, *or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom*." *Id.* at 666 (emphasis added).). The opinion also insisted that a state's power to "punish those who abuse [their] freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." *Id.* at 667.

[142] Between 1930 and 1940, eight new Justices were appointed to the Court, many of whom (Justices Murphy, Black, and Douglas) emerged as strong supporters of the new, expansive conception of the First Amendment that theorists such as Zechariah Chafee had been promoting since the teens and twenties. *See* WHITE, *supra* note 135, at 143, 356 n.18.

[143] 283 U.S. 359 (1931).

Temple American Inn of Court - April 2016 Program - Research and Materials

for example, the Court held that a state statute that prohibited the display of a flag, badge, or banner "as a sign, symbol or emblem of opposition to organized government"[144] violated the First Amendment because it was so "vague and indefinite" in its language as to be construed to allow the punishment of merely "peaceful and orderly opposition to government."[145] In *Herndon v. Lowry*[146] in 1937, the Court held that a Communist Party member who was charged with insurrection for organizing on behalf of the party could not be convicted absent evidence that his activities posed a "'clear and present danger' of the use of force against the state"[147] or posed some other serious "danger to organized government."[148] And in *Thornhill v. Alabama*,[149] in 1940, the Court extended the use of the clear and present danger test to labor picketing. Specifically, it held that the state could not prohibit labor picketing absent a "clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace."[150] This was because "freedom of speech and of the press . . . embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment" and picketing, the Court found, provided an important means by which workers engaged in discussion of this sort.[151]

These cases, insofar as they interpreted the constitutional guarantee of freedom of speech to impose significant constraints on the government's ability to restrict speech ex post as well as ex ante, signaled the Court's decisive break with the nineteenth-century conception. For precisely that reason, however, they also raised difficult questions about what counted as speech for constitutional purposes — questions that eighteenth- and nineteenth-century courts had not needed to confront as directly. Given how much of social life is mediated by language, allowing the government to restrict or sanction speech only when it posed "a clear and present danger" to life, property, privacy, or peace[152] threatened to dramatically impede the government's ability to

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144 *Id.* at 361.
145 *Id.* at 369.
146 301 U.S. 242 (1937).
147 *Id.* at 255.
148 *Id.* at 258.
149 310 U.S. 88 (1940).
150 *Id.* at 105.
151 *Id.* at 101–02. In reaching this conclusion, the Court rejected the argument that what was at stake in a labor picket was merely the private struggle between worker and employer. Instead, the Court found that in the "circumstances of our times . . . labor relations are not matters of *mere local or private concern*," and have a political "importance which is not less than the interests of those in the business or industry directly concerned." *Id.* at 102–03 (emphasis added).
152 *Id.* at 105.

regulate not only political expression but also a great deal else. Yet not even the most zealous advocates of the new, more libertarian understanding of freedom of speech believed it should be interpreted to preclude the government from restricting speech except when it threatened to create a serious and imminent emergency.[153]

Nevertheless, as of the 1930s, there existed few doctrinal rules that could aid courts in determining what counted as speech for constitutional purposes. In his *Abrams* dissent, Justice Holmes noted that, in limiting the government's power to restrict speech only to emergencies, he was speaking "[o]f course . . . only of expressions of opinion and exhortations."[154] Justice Holmes did not explain, however, how courts could determine when speech involved the expression of opinion or exhortation and when it did not. Nor did any other member of the Court subsequently.

And while in two earlier decisions the Court held, for the first time in its history, that certain kinds of expression were categorically not protected by the constitutional guarantees of press or speech freedom, neither opinion provided generalizable principles that courts could use in other contexts to determine when the protections of the First Amendment did and did not apply. In the first decision, the Court held simply that words likely to trigger an unlawful act may be enjoined, notwithstanding the First Amendment, because in such circumstances they constituted "verbal acts," not mere speech.[155] In the second opinion, the Court held that motion pictures are not "part of the press of the country or . . . organs of public opinion" and on that basis sustained an Ohio movie censorship law.[156] Although the opinion represents the first time the Court ruled categorically on the boundary of the constitutional category of the press, it provided little hint of what else besides movies, and perhaps also plays, might be excluded from the category.[157]

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[153] Even Theodore Schroeder, by far the most absolutist of the early advocates of the modern conception of freedom of speech, acknowledged that speech could be punished when it constituted or contributed to a criminal act. *See* Theodore Schroeder, *The Meaning of Unabridged "Freedom of Speech," in* FREE SPEECH FOR RADICALS 37, 40 (1916). Schroeder also acknowledged that the First Amendment provided stronger protection to public speech than to private speech. David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 567 (1981). All of the other important theorists of the modern conception argued explicitly for the necessity of limiting the scope of constitutional protection for speech in some way. Indeed, it is in their work that one sees the first sustained engagement with what would become the modern preoccupation with First Amendment boundary-setting. *See id.* at 564–68.

[154] Abrams v. United States, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

[155] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911) (internal quotation marks omitted).

[156] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915).

[157] Indeed, the *Mutual Film* Court justified its conclusion that movies did not constitute part of "the press of the country" by pointing to the unique features of the medium and specifically its

It was in this context that the Court turned to the work of contemporary theorists of free speech — particularly Professor Zechariah Chafee — to develop a more generalizable theory for when the protections of the First Amendment did and did not apply.

A. *The New Theory*

The Court first suggested such a theory in *Cantwell v. Connecticut*[158] in 1940, when it reversed the conviction of a Jehovah's Witness accused of inciting others to breach the peace after he stopped two Catholic men on a street in New Haven, Connecticut and played for them a phonograph record that attacked all organized religions as "instruments of Satan."[159] The Court found insufficient evidence that the defendant's conduct posed a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order."[160] The Court thus made clear that the clear and present danger standard applied to religious expression just as it did to the political expression in *Herndon* and the labor speech in *Thornhill*. In dicta, however, it suggested that its analysis would have been different had the defendant engaged with his unwilling interlocutors in a less polite fashion — if he had, for example, directed "profane, indecent, or abusive remarks" to his audience, or engaged in other behavior "likely to provoke violence and disturbance of good order."[161] This was because, as Justice Roberts wrote in his majority opinion, "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[162]

Two years later, *Chaplinsky* turned the suggestion in *Cantwell* that certain kinds of personal attacks were not "in any proper sense communication of information or opinion safeguarded by the Constitution"[163] into a more generalizable test of First Amendment boundaries. The Court sustained the defendant Walter Chaplinsky's conviction

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peculiar and dangerous attractiveness to viewers. *Id.* at 244–45 (asserting that movies "are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition" and concluding on that basis that "we cannot regard . . . as beyond the power of government" the authority to require censorship before their exhibition). The Court did suggest, however, that plays and other theatrical spectacles might be similarly excluded from constitutional protection for press. *Id.* at 243–44.

[158] 310 U.S. 296 (1940).

[159] *Id.* at 309; *see id.* at 309–11.

[160] *Id.* at 308; *see id.* at 308–09.

[161] *Id.* at 309.

[162] *Id.* at 309–10.

[163] *Id.* at 310.

under the New Hampshire offensive-words statute because it found that the fighting words for which he was convicted comprised one of a number of "well-defined and narrowly limited" kinds of speech that were not, nor had ever been, protected by the First Amendment guarantee of freedom of speech.[164]

By identifying certain kinds of speech as categorically outside the scope of constitutional protection, the *Chaplinsky* opinion made it possible for the government to continue to regulate speech — at least certain kinds of speech — not only when that speech threatened the kind of material harm to person and property that the clear and present danger test required, but also when it threatened more intangible harms. Indeed, the opinion made clear that speech could be prosecuted as fighting words not only when it threatened an immediate breach of the peace but also when "[its] very utterance inflict[ed] injury" — that is, when it caused harm, in the form of offense, by violating dominant social norms of how individuals were supposed to relate to one another in public.[165] This was not the kind of harm that the clear and present danger test allowed the government to guard against — as the Court made clear in *Cantwell* when it refused to affirm Newton Cantwell's conviction even though it found that the record he played attacked religion in general, and Catholicism specifically, "in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows."[166] Nevertheless, even many of the proponents of the new, more libertarian conception of freedom of speech believed that the regulation of offensive speech served an important function. As Professor Laura Weinrib notes, in the early twentieth century, even members of the ACLU believed that "censorship on the basis of morality . . . facilitate[d] free speech, by enhancing the quality of public discourse."[167] Some vestiges of the nineteenth-century conception that, in order to preserve liberty, the government had to rout out licentiousness, remained very much alive in the New Deal period — even among those most ardently committed to the new conception of freedom of speech.

The Court was clearly sensitive to this problem. In a decision handed down just months after *Chaplinsky*, Justice Reed noted that

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[164] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[165] *Id.* at 572. As Professor Robert Post points out, the harm done by an utterance of this kind is that it is "intrinsically offensive." Robert C. Post, *Blasphemy, the First Amendment and the Concept of Intrinsic Harm*, 8 TEL AVIV U. STUD. L. 293, 294 (1988).

[166] *Cantwell*, 310 U.S. at 309. The Court noted also that the two men Cantwell forced to listen to his record "were in fact highly offended" by the recording. *Id.*

[167] Laura M. Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 385 (2012) (emphasis omitted).

Temple American Inn of Court - April 2016 Program - Research and Materials

the individual right to expressive, as well as religious, freedom could not be interpreted as an absolute, given the necessity of reserving to the government "the sovereign power . . . [required] to ensure orderly living, without which constitutional guarantees of civil liberties would be a mockery."[168] And in *Near v. Minnesota*[169] in 1931, the Court insisted that, just as the government could constitutionally prohibit as well as enjoin clearly dangerous information — such as the location and movement of troops during wartime — without violating the First Amendment, it could also both prohibit and enjoin the publication of obscenity in order to enforce what the Court called "the primary requirements of decency."[170] The opinion in *Near* provided, however, no analytic framework to explain the equivalence it drew between dangerous speech such as the publication of information about troop movements during war and indecent speech such as obscenity. *Chaplinsky* provided this analytic framework.

By declaring that certain categories of offensive but not necessarily dangerous speech were simply outside the scope of constitutional concern, the decision in *Chaplinsky* made it possible for the government to prohibit speech not only when it threatened violence and disorder but also when it violated dominant social norms of civility, piety, and decency — for example, by depicting sex in an obscene manner, or by speaking of others in an uncivil manner, or by addressing another in words calculated to cause offense. Nevertheless, by granting this power with respect to only those categories of speech that possessed so little social value that the benefits of their expression were outweighed by the "social interest in order and morality,"[171] the decision limited the government's ability to use this prohibitory power to punish speech merely because it expressed heterodox or subversive views.

Chaplinsky, and the doctrine it gave birth to, thus achieved what we might call a "reconciliation" between the democratic and libertarian values promoted by the Court's clear and present danger line of cases and the other values (morality, public order, civility) that the regulation of speech had traditionally promoted and that an unconstrained application of the clear and present danger standard appeared to threaten.

B. *Problems with the Theory*

The reconciliation that the new doctrine of low-value speech made possible was not unproblematic, however. For one thing, by allowing

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[168] Jones v. Opelika, 316 U.S. 584, 593 (1942), *rev'd* 319 U.S. 103 (1943).
[169] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).
[170] *Id.* at 716.
[171] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

the government so much more freedom to regulate low-value speech than high-value speech, it made questions of categorical definition incredibly important. As a result, in subsequent years sometimes intense disagreement arose among members of the Court, as well as in the lower courts, about how precisely to define the various classes of low-value speech.[172]

This fighting over how to define the categories only exacerbated what was a deeper problem with *Chaplinsky*: that in linking the constitutional status of different kinds of speech to a judgment of their "social value" or lack thereof, the opinion existed in considerable tension with what was then emerging as a central principle of the modern jurisprudence — namely, the principle of content neutrality.

Although the term "content neutrality" would be coined only significantly after the New Deal period, the idea that government has no right to discriminate against speech because it disagreed with or disliked the message the speech conveyed played an important role in the New Deal cases, just as it would in subsequent decades.[173] Indeed, by proclaiming the neutrality of the First Amendment, the Court was able to distinguish its activism on behalf of free speech from the by-then much reviled activism of the *Lochner* Court.[174] By insisting that

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[172] The difficulties the Court faced when, in the wake of *Chaplinsky*, it attempted to define what constitutes the "well-defined and narrowly limited" category of obscenity are by now almost legendary. *See* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 111–12 (1994). But it was not only with respect to obscenity that the Court proved incapable for many years of coming up with a definition that provided litigants with predictable rules; the Court's fighting words jurisprudence in the 1940s and 1950s was similarly muddled and contentious. See, for example, Justice Jackson's vigorous dissents in *Kunz v. New York*, 340 U.S. 290, 299–300 (1951) (Jackson, J., dissenting) ("This Court's prior decisions, as well as its decisions today, will be searched in vain for clear standards by which it does, or lower courts should, distinguish legitimate speaking from that acknowledged to be outside of constitutional protection. . . . What evidences that a street speech is so provocative, insulting or inciting as to be outside of constitutional immunity from community interference? Is it determined by the actual reaction of the hearers? Or is it a judicial appraisal of the inherent quality of the language used? Or both?"); *Terminiello v. Chicago*, 337 U.S. 1, 13, 26–28 (1949) (Jackson, J., dissenting); and *Douglas v. City of Jeannette*, 319 U.S. 157, 166 (1943) (opinion of Jackson, J.). *See also* Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 53 (1973) (noting the Court's difficulty during this period in reconciling its various fighting words cases).

[173] The term "content-neutral" only first appeared in a Supreme Court opinion in 1976, although it appeared in the scholarly literature earlier than that. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 84–85 (1976) (Stewart, J., dissenting); Nicholas Johnson, *Freedom to Create: The Implications of Anti Trust Policy for Television Programming Content*, 8 OSGOODE HALL L.J. 11, 17 (1970).

[174] *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 314 (1996) ("One feature of the *Lochner* decision that made it notorious for Progressive critics was its embrace of the doctrine of 'liberty of contract[.]' . . . [M]odernist critics concluded that [the doctrine] functioned simply as a tool that judges could employ to invalidate statutes that they felt threatened the idealized domain of unregulated economic activity."); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1407 n.102 (2001) (noting that

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what the First Amendment absolutely prohibited were efforts by the government to repress speech merely because it disliked it, the Court was able to depict the First Amendment as a guardian of democracy, rather than a threat to it.[175] The First Amendment protected democracy, the New Deal cases insist, by preventing the government from unfairly intervening in democratic debates and, more generally, by defending democratic diversity of opinion against governmental efforts to repress it. As the Court put it in *Cantwell*: "The essential characteristic of the[] liberties [guaranteed by the First Amendment] is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed."[176]

Epithets and insults could be prohibited without violating this fundamental First Amendment principle, *Cantwell* suggested, because by "incit[ing] violence and breaches of the peace," those who used speech of this sort attempted "to deprive others of their equal right to the exercise of their liberties."[177] *Chaplinsky* made clear, however, that what was excluded from First Amendment protection was not merely coercive and directly inciting speech but also speech that caused injury merely because it violated dominant social norms. As such, the opinion, to a degree that *Cantwell* did not, appeared to undermine the idea of the First Amendment as a "shield" for democratic diversity and difference.

It was in this context that the Court proclaimed a continuity with the past that did not in fact exist. It is difficult to know whether the Court did so deliberately. Nothing in Justice Murphy's notes from the case says anything about this aspect of the opinion.[178] Nevertheless,

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many contemporary commentators "insisted that judges were pawning off their own views, inevitably conservative ones, as the meaning of the Constitution").

[175] *See* White, *supra* note 174, at 341 ("By openly identifying the basis of special constitutional protection for speech as the indispensable connection between free expression and democratic theory, and at the same time distinguishing between speech and liberties deriving from shifting economic arrangements, the [New Deal] cases sought both to link free speech with the idea of America as a democratic society and to disengage protection for economic liberties from that idea.").

[176] Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). A similar sentiment was articulated by the Court in 1943 in *West Virginia State Board of Education v. Barnette*. 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

[177] *Cantwell*, 310 U.S. at 310.

[178] Regarding the substance of the case, Justice Murphy noted only that he "was convinced that [the statute] was not unconstitutional," and that the ruling from *Cantwell* should control the outcome. Notes by Justice Murphy, Walter Chaplinsky vs. State of New Hampshire (#255), Folder 5, Box 65, microformed on Roll 124, Frank Murphy Papers (on file with the Bentley Historical Library, University of Michigan).

Temple American Inn of Court - April 2016 Program - Research and Materials

the opinion's text suggests that the Justice was, at the very least, uninterested in the historical truth of the matter.

Indeed, as support for the paragraph in which he asserted the historical provenance of the exception for fighting words, obscene and profane speech, and libel, Justice Murphy cited no eighteenth- or nineteenth-century case law or treatises.[179] Instead, he primarily cited two authorities. The first was *Cantwell*.[180] The second was Chafee's recently published *Free Speech in the United States*.[181] Justice Murphy cited a passage in which Chafee explained why, on his view, laws that punished seditious speech were unconstitutional but laws that targeted "obscenity, profanity, and gross libels upon individuals" were not.[182] Chafee argued that the former were unconstitutional because they violated a central purpose of the First Amendment, which was to encourage the spread of political truth. The latter, in contrast, did not. Chafee explained:

> [T]hese verbal peace-time crimes . . . are too well-recognized to question their constitutionality, but I believe that if they are properly limited they fall outside the protection of the free speech clauses as I have defined them. My reason is not that they existed at common law before the constitutions, for a similar argument would apply to the crime of sedition, which was abolished by the First Amendment. . . . The true explanation is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.[183]

Justice Murphy borrowed a great deal from this passage in constructing his opinion in *Chaplinsky*, as is evident from the opinion's text. Nevertheless, there is a crucial difference between Chafee's argument and Justice Murphy's recapitulation of the argument in *Chaplinsky* — namely, that Chafee never claimed that the distinction he drew between what he called the "normal" criminal laws of obscenity, profanity, and libel and the abnormal and unconstitutional sedition statutes was based on historical practice.

To the contrary: Chafee acknowledged on multiple occasions that in the eighteenth and nineteenth centuries, lawmakers prosecuted seditious libel just as they prosecuted obscene or profane speech.[184]

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179 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

180 *Id.* (citing *Cantwell*, 310 U.S. at 309–10).

181 *Id.* (citing ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 149 (1941)).

182 CHAFEE JR., *supra* note 181, at 149.

183 *Id.* at 149–50.

184 *Id.* at 153–55. Chafee noted in particular the tendency of Southern lawmakers to punish abolitionist speech in the decades leading up to the Civil War. *Id.* at 154.

Chafee also noted that much of what was previously prosecuted as obscenity, profanity, and libel did not in fact have such "slight social value as a step toward truth" that the interests promoted by its suppression outweighed, on his view, the free speech interests that were harmed.[185] Chafee, in other words, criticized existing tradition, and deeply so. Nevertheless, he insisted that, *in principle*, a distinction could and should be made between certain kinds of speech-restraining laws and others based on a particular analysis of the value of the speech they restricted.

It was Justice Murphy's opinion in *Chaplinsky* that transformed the theoretical distinction that Chafee drew between the abnormal and normal criminal laws of speech into a claim about historical practice. In doing so, the opinion was able to sidestep, at least in part, the problems created by Chafee's effort to tie the degree of constitutional protection afforded speech to a judgment of its social value. The opinion accomplished this feat by depicting the distinction between high- and low-value speech as a product of longstanding jurisprudential tradition, rather than the perhaps idiosyncratic or politically motivated desires and beliefs of the members of the Court.

C. *Subsequent Development*

In *Roth* and *Beauharnais*, the Court once again turned to history to justify denying protection to obscene and libelous speech.[186] By claiming that the denial of protection to these categories of speech was "implicit in the history of the First Amendment," the Court attempted in these cases to justify what was in fact a very new conception of constitutional boundaries by obscuring what was so new about it.[187]

In practice, however, the Court relied very little on historical precedent to actually define the low-value categories. Rather than simply adopting the often extremely broad definitions of obscenity, profanity, and libel that eighteenth- and nineteenth-century courts employed, the Court instead defined each of these categories much more narrowly. In doing so, the Court avoided classifying as low value any speech ca-

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[185] *Id.* at 150. Chafee asserted for example that "[t]he absurd and unjust holdings in some of these prosecutions for the use of indecent or otherwise objectionable language furnish a sharp warning against any creation of new verbal crimes." *Id.* He noted also that, because the definition of obscenity was "very vague, . . . many decisions have utterly failed to distinguish nasty talk or the sale of unsuitable books to the young from the serious discussion of topics of great social significance." *Id.* at 150–51.

[186] Roth v. United States, 354 U.S. 476, 484 (1957); Beauharnais v. Illinois, 343 U.S. 250, 254–56 (1952).

[187] *Roth*, 354 U.S. at 484 ("All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties[,] . . . [b]ut implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

Temple American Inn of Court - April 2016 Program - Research and Materials

pable of contributing to what *Thornhill* had declared to be of central First Amendment importance: the public and truthful discussion of "matters of public concern."[188]

Hence, in *Roth* the Court rejected the broad definition of obscene speech used by nineteenth-century courts because it defined as obscene any material that meaningfully contributed to discussion about what the Court described as a "vital problem[] of human interest and public concern" — namely, sex.[189] Instead, the Court adopted the significantly narrower definition of obscenity that was developed by lower courts in the 1930s specifically in order to protect medical discourse and works of high art from prosecution.[190]

For similar reasons, the Court narrowed the category of the profane to exclude the kind of serious religious debate that in the nineteenth century was prosecuted as either profanity or blasphemy.[191] In *Cantwell*, and in the subsequent case, *Joseph Burstyn, Inc. v. Wilson*,[192] the Court made clear that speech could not be prosecuted as either profane or blasphemous merely because it violated dominant social norms of piety or expressed an unpopular view of religion or the divine.[193]

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188 Thornhill v. Alabama, 310 U.S. 88, 101 (1940).

189 *Roth*, 354 U.S. at 487.

190 Under the test adopted by the Court in *Roth*, material could not be considered obscene unless the "dominant theme of the material taken as a whole" appeared "to the average person, applying contemporary community standards . . . [to] appeal[] to [a] prurient interest." *Id.* at 489. This distinguished it from the nineteenth-century test, which (as the Court put it in *Roth*) "judg[ed] obscenity by the effect of isolated passages upon the most susceptible persons." *Id.*

191 Nineteenth-century courts did not tend to distinguish the crime of blasphemy from the crime of profanity. Hence, defendants could be prosecuted for profanity both when they called into question the existence of the deity or the sanctity of the Scriptures and when they used offensive or insulting language that happened to include words like "God" or "damn." *See, e.g.*, Holcomb v. Cornish, 8 Conn. 375 (1831) (affirming the conviction of a defendant prosecuted for "profane cursing and swearing" after he hurled "imprecations of future divine vengeance upon [a] magistrate," *id.* at 380); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 398 (Pa. 1824) (affirming the conviction of a defendant prosecuted for "wilfully, premeditatedly, and despitefully blasphem[ing], and speak[ing] loosely and profanely of Almighty God, Christ Jesus, [and] the Holy Spirit" after he called the existence of God into question during a public debate (emphasis omitted)).

192 343 U.S. 495 (1952).

193 *Id.* at 505 ("[F]rom the standpoint of freedom of speech and the press . . . the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . . 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."); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("In the realm of religious faith, and in that of political belief, sharp differences arise. . . . To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").

Temple American Inn of Court - April 2016 Program - Research and Materials

Meanwhile, after first embracing a very broad interpretation of what counted as low-value libelous speech in *Beauharnais*,[194] the Court sharply constricted liability for libel when it held in *New York Times Co. v. Sullivan*[195] that public officials could receive damages for defamatory falsehoods about them only if they could show that the falsehoods were made with actual malice, and not as a result of negligence.[196] In later decisions, the Court extended the rule to cases involving public figures.[197] In so doing, the Court more or less constitutionalized the nineteenth-century doctrine of qualified privilege.[198] The justifications the Court provided for limiting what kind of speech could be subject to liability for defamation absent any significant constitutional concern did not, however, include that doing so was mandated by longstanding tradition.[199] Instead, the Court argued that no other rule would effectively safeguard the "unalienable right" of the individual to disseminate his or her opinion on matters of public interest without fear of persecution.[200]

The Court also did not rely upon history to identify new categories of low-value speech. In *Valentine*, for example, the Court cited no historical precedents to justify its denial of First Amendment protection to commercial advertising.[201] Instead, the Court pointed to the fact that advertising contained information of only private interest.[202] Nor did the Court rely upon history in 1972, when it overruled *Valentine*

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194 Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1952) (construing a state statute that prohibited the distribution or exhibit of "any lithograph, moving picture, play, drama or sketch, which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy" as a kind of group libel to which First Amendment protections did not apply). The *Beauharnais* Court did note that it retained its "authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Id.* at 263–64. Nevertheless, the opinion suggested that even speech that touched overtly on "matters of public concern" — for example, by commenting negatively on contemporary racial relations — could be prohibited when libelous without raising any First Amendment concerns. *See id.* at 272. As Professor Robert Cover noted some years later, *Beauharnais* represented the Court's attempt to "purify . . . our political discourse" — albeit an attempt that was soon abandoned. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1311 (1982).

195 376 U.S. 254 (1964) (plurality opinion).

196 *Id.* at 283, 288.

197 Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

198 *See supra* p. 2196.

199 The Court in fact acknowledged that speech of this sort had been prosecuted in the eighteenth century under the Sedition Act of 1798, but argued that its prosecution reflected a poor understanding of the original meaning of, and was ultimately inconsistent with, the First Amendment. *Sullivan*, 376 U.S. at 276.

200 *Curtis Publ'g Co.*, 388 U.S. at 149 (plurality opinion) (internal quotation marks omitted); *see also id.* at 149–51.

201 *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

202 *Id.* at 55 (finding the advertisement at issue in the case could be prohibited without raising First Amendment concern because it concerned only "what is for private profit" rather than "what is of public interest").

Temple American Inn of Court - April 2016 Program - Research and Materials

and held that even purely commercial advertising was entitled to some degree of constitutional protection.[203] The justifications the Court provided for extending protection to speech of this sort were once again functional, rather than historical. Specifically, the Court pointed to the importance of advertising as a medium for communicating to the public information relevant both to political debates and economic decisionmaking.[204]

Meanwhile, the Court recognized as high value many kinds of speech that in the eighteenth, nineteenth, and early twentieth centuries were regularly sanctioned. It held, for example, that newspaper reports about public trials could be prosecuted for contempt only upon a showing of "clear and present danger," given their obvious public importance.[205] The Court reached this conclusion notwithstanding the fact that, as Justice Frankfurter pointed out in a forceful dissent, in doing so it enacted a "sudden break with the uninterrupted course of constitutional history."[206] The Court also extended full protection to motion pictures, notwithstanding its earlier conclusion that motion pictures were not press for constitutional purposes. The Court did so because it recognized the capacity of motion pictures to "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."[207] The Court extended high-value status to movies, in other words, because it found them capable of contributing, both directly and indirectly, to public debate about public matters.

These cases demonstrate how little the Court actually relied upon history to distinguish low- from high-value speech. Instead it employed what we might describe as a "purpose-based" approach: one that identified low-value speech by looking at whether its content-based regulation threatened to undermine the goals the First Amendment was intended to advance.[208] Chief among these purposes — as

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[203] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976). Advertising remained a category of low-value speech, however, insofar as it could be regulated more strictly than other kinds of high-value speech. *See id.* at 772; Stone, *supra* note 16, at 194 (noting the low-value status of commercial advertising).

[204] *Va. State Bd.*, 425 U.S. at 764 (noting that consumers, as well as "society . . . may have a strong interest in the free flow of commercial information" and that "[e]ven an individual advertisement, though entirely 'commercial,' may be of general public interest").

[205] Bridges v. California, 314 U.S. 252, 257, 269 (1941) (concluding that allowing the prosecution of speech of this sort when it possessed merely an inherent or reasonable tendency of undermining the administration of justice would "remove from the arena of public discussion" the "controversies that command most interest," *id.* at 269).

[206] *Id.* at 279 (Frankfurter, J., dissenting).

[207] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[208] Certainly this is what observers believed at the time. *See* Stone, *supra* note 16, at 194 (noting that "[t]he precise factors that the Court considers" when identifying low-value speech "remain

Temple American Inn of Court - April 2016 Program - Research and Materials

Roth, *Sullivan*, and the other low-value speech cases make clear — was protecting against government interference the public debate on matters of public concern that the Court now identified as of core First Amendment importance.

History nevertheless continued to provide the theoretical justification for denying protection to offensive or otherwise immoral speech. At least, the Court continued to invoke the *Chaplinsky* dicta that low-value speech was speech "the prevention and punishment of which have never been thought to raise any Constitutional problem"[209] when it needed to explain why it was, for example, that child pornography could be entirely prohibited even when it was not obscene, or why the government could prosecute what the Court called "true threats" but not other kinds of speech.[210]

In *Stevens* in 2010, the Court also cited this passage as support for its conclusion that the only content-based regulations of speech that are ordinarily permissible under the First Amendment are those that target what it called simply "historically unprotected categories of speech."[211] In its emphasis on the historical basis of the low-value categories, *Stevens* makes clear the continuing importance of the invented tradition of low-value speech to First Amendment doctrine today. It also, however, illuminates the serious problems created by the Court's continuing reliance on what is essentially a false view of First Amendment history — as the next Part explores.

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somewhat obscure" but that in general the Court focuses "on the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment"); Cass R. Sunstein, Commentary, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 556 (1989) (construing the distinction between high- and low-value speech as a distinction "between categories of speech [based upon] . . . their centrality to the purposes of the free speech guarantee").

[209] New York v. Ferber, 458 U.S. 747, 754 (1982) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

[210] Virginia v. Black, 538 U.S. 343, 359 (2003) (quoting Watts v. United States, 394 U.S. 705, 708 (1969)) (internal quotation marks omitted). True threats are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. The category as such does not include threatening language that operates as political hyperbole, or threats that are not made seriously. However, it includes more than simply language that poses a clear and present danger of harm. As the Court made clear in *Black*, language can be prosecuted as a true threat even when the speaker does "not actually intend to carry out the threat." *Id.* at 360; *see id.* at 359–60. Like many of the other categories of low-value speech, by designating true threats as outside the scope of constitutional protection, the Court has allowed the government to continue to regulate speech when it threatens intangible harm — in this case, the "fear of violence" engendered by the communication of true threats — even when it does not in fact pose an imminent threat of serious danger to person or property. *Id.* at 360 (quoting Watts, 394 U.S. at 708) (internal quotation mark omitted).

[211] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

Temple American Inn of Court - April 2016 Program - Research and Materials

IV. REINVENTING THE DOCTRINE

In *Stevens*, the Court essentially reinvented the doctrine of low-value speech when it held that the only content-based regulations that are not presumptively invalid under the First Amendment are those that target speech that either falls into "a previously recognized, long-established category of unprotected speech" or constitutes a "categor[y] of speech that ha[s] been historically unprotected, but ha[s] not yet been specifically identified or discussed as such in [the] case law."[212] The Court claimed, in holding that novel categories of low-value speech could be identified only on the basis of evidence showing a "long-settled tradition of subjecting that speech to regulation," that it was doing nothing new; it was merely making explicit what was previously implicit in the doctrine.[213] It acknowledged that there was language in the earlier cases to support the government's alternative interpretation of *Chaplinsky* as establishing a balancing test that required courts to weigh the expressive value of speech against its social costs.[214] Nevertheless, it insisted that in practice, it had always "grounded its analysis" of the low-value categories in historical considerations.[215]

In fact, as the previous Part makes clear, the Court had not always grounded its analysis of the low-value categories in history. As the example of commercial speech illustrates, historical considerations played no role in the Court's analysis of at least some categories of low-value speech.

Prior to *Stevens*, the Court had also never held that the only content-based regulations of speech that are generally permissible under the First Amendment are those that targeted historically unprotected categories of low-value speech. To the contrary: the Court had affirmed on multiple occasions the constitutionality of content-based regulations that imposed sometimes significant restrictions on categories of speech that were either explicitly recognized to be high value — such as the labor picketing in *Thornhill* — or that, prior to the twentieth century, were not the target of governmental regulation. For example, in 1978 in *Ohralik v. Ohio State Bar Association*,[216] the Court affirmed the constitutionality of laws that restricted "the exchange of information about securities" and imposed content-based restrictions on "corporate proxy statements."[217] In other decisions, it affirmed the

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[212] *Id.* at 1586.
[213] *Id.* at 1585.
[214] *Id.* at 1585–86.
[215] *See id.* at 1586.
[216] 436 U.S. 447 (1978).
[217] *Id.* at 456.

constitutionality of labor laws that absolutely restricted the right of unions to engage in certain kinds of strikes and boycotts.[218] The Court also upheld the use of Title VII of the Civil Rights Act of 1964 to impose civil liability on the use of language that created a hostile work environment on the basis of race or sex.[219]

In none of these cases were the regulations justified — to the extent that they were justified at all — by recourse to history. Instead, courts pointed to context-specific features of the speech targeted by these laws to explain why its regulation was permissible even absent a showing that it served a compelling government purpose and was narrowly tailored to that end. In most cases, the justifications were pragmatic. Courts justified regulations that restricted the "exchange of information about securities," for example, by pointing to the importance of such regulations to the government's ability to effectively regulate the securities market.[220] The Court justified the ban on secondary boycotts and picketing, meanwhile, by invoking the necessity of maintaining the "delicate balance" established by the labor laws between the rights of workers and the rights of disinterested third parties.[221] In their variability, these cases point to what Professor Steven Shiffrin once described as the "eclectic[ism]" of modern free speech law.[222]

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[218] *See, e.g.*, Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982) (upholding ban on secondary boycotting on the grounds that neither secondary pickets nor boycotts constitute protected activity); NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 616 (1980) (upholding a ban on secondary picketing on the grounds that "[s]uch picketing spreads labor discord by coercing a neutral party to join the fray"). As Professor Julius Getman noted, the Court's approach to the First Amendment issues involved in these cases was markedly different than the much more stringent approach it took to restrictions on picketing and boycotts outside the union context. *See generally* Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984).

[219] In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), for example, the Court upheld the award of damages under Title VII against an employer who used sexually harassing language without once mentioning the possibility that imposition of damages might violate the First Amendment. This was the case notwithstanding the fact that First Amendment issues were extensively argued in the briefs. *See* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 9–10.

[220] *See, e.g.*, SEC v. Wall St. Publ'g Inst., Inc., 851 F.2d 365, 372–73 (D.C. Cir. 1988) ("Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government, and regulation of such communications has been upheld. If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible — and that result has long since been rejected." (citations omitted)); Bangor & Aroostook R.R. Co. v. Interstate Commerce Comm'n, 574 F.2d 1096, 1107 (1st Cir. 1978) (concluding that the "first amendment has not yet been held to limit regulation in areas of extensive economic supervision").

[221] *Retail Store Emps. Union*, 447 U.S. at 617–18 (Blackmun, J., concurring).

[222] Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251 (1983).

Stevens thus signals a marked shift away from this eclectic approach to questions of First Amendment coverage, and toward a much more rigorous application of the two-tier framework for the review of content-based regulations of speech. By taking the historical claims made by the *Chaplinsky* Court much more seriously than the New Deal Court did itself — by insisting, as the New Deal Court did not, that historically unprotected speech is the *only* kind of speech that may be regulated on the basis of its content without triggering grave constitutional concern — the decision makes it significantly more difficult for the government to justify laws burdening speech that was historically *not* unprotected. It also, of course, makes history much more important to the analysis than was previously the case.

That the *Stevens* rule ultimately rests on a false view of history calls into question whether the changes it brings to the doctrine are good ones.

A. *Problems of Justification*

The *Stevens* Court made two arguments to justify its new test of low-value status. It argued that, by requiring evidence of a long-settled tradition of regulation to justify the recognition of any novel low-value categories, it ensured that First Amendment doctrine remained faithful to an original understanding of what speech is and is not worth constitutional protection.[223] It also insisted that, by grounding the analysis in history, it prevented judges from being able to deny protection to speech merely because they disliked it or believed it lacked value.[224] The history detailed in the previous two Parts undermines both of these arguments.

First, it makes clear that the *Stevens* test does not in fact ensure that the doctrine remains faithful to an original understanding of freedom of speech, even assuming that a well-developed understanding of this sort existed at the time and that it can be deciphered via the post-Ratification practice of courts and legislatures.[225] To the contrary. By requiring courts to extend full First Amendment protection to every-

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[223] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

[224] *Id.*

[225] There is good reason to doubt that a well-developed understanding of this sort existed in the late eighteenth century. As Professor Leonard Levy has noted:

> [F]reedom [of speech] had almost no history as a concept or a practice prior to the [ratification of the] First Amendment or even later. It developed as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion — the freedom to speak openly on religious matters. But as an independent concept referring to a citizen's personal right to speak his mind, freedom of speech was a very late development, virtually a new concept without basis in everyday experience and nearly unknown to legal and constitutional history or to libertarian thought on either side of the Atlantic prior to the First Amendment.

LEONARD W. LEVY, LEGACY OF SUPPRESSION 5 (1960).

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thing that we would today consider speech for constitutional purposes *except* when the government can affirmatively point to a long-settled tradition of regulating speech of this sort, the test strictly limits when and how the government can regulate even subversive, immoral, or otherwise plainly dangerous speech. It thus establishes a constitutional regime of speech regulation that looks nothing like that which existed in the eighteenth and nineteenth centuries.

Second, the fact that the distinction between high- and low-value speech is a product of the twentieth century, rather than a longstanding feature of the regulation of speech in the United States, calls into question how effective the *Stevens* test will be in preventing judges from imposing their own values onto the Constitution.

The test might significantly limit judicial discretion were it in fact the case that the historical record discloses "well-defined" and "narrowly limited" categories of low-value speech that eighteenth- and nineteenth-century courts treated qualitatively differently from other kinds of speech. In that case, even if it didn't ensure fidelity to the original meaning of freedom of speech, the rule could nevertheless restrain courts by forcing them to abide by the categorical distinctions that earlier courts employed.

The historical record does not, however, include well-defined and narrowly limited classes of this kind. Instead, it reveals a plethora of what we today would call content-based regulations of speech — many of which applied to high-value speech, not merely to low.[226] The complexity of the historical record means that, even leaving aside the question of original meaning, the task of determining whether a sufficient tradition of prohibition exists to classify a particular kind of speech as of low value will in many cases be a difficult and highly subjective endeavor and one whose outcome will depend in large part on how the Court constructs the relevant categories.

Consider, for example, the most recent opinion in which the Court applied the *Stevens* test, *United States v. Alvarez*.[227] *Alvarez* involved

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[226] To give just a few examples of what I mean, the following is a list of some of the speech-related common law causes of action for nuisance listed in an 1874 treatise: disturbing "public rest on the Lord's day" by conspicuous secular labor; indulging in "gross and scandalous profanity"; indulging in "habitual, open, and notorious lewdness" (which the author noted could include the display of "a picture of a man naked to the waist, and covered with eruptive sores, so as to constitute an exhibition offensive and disgusting" even though "there is nothing immoral or indecent in the picture"); scolding; brawling; eavesdropping; publishing false alarms, or intelligence calculated to disturb the peace of the community. 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES §§ 2384, 2385, 2391 (1874). The task of translating these offenses into a contemporary context, or interpreting what they mean vis-à-vis freedom of speech, is by no means a simple one. It certainly cannot be said that the First Amendment allows the government to prohibit all of these (expressive as well as nonexpressive) acts; nor is it likely that that is what the Court would understand it to mean.

[227] 132 S. Ct. 2537 (2012).

a challenge to the Stolen Valor Act, which made it a crime to knowingly lie about having received a military honor or award.[228] A plurality of the Court found that the speech the Act restricted — namely, false statements of fact — was historically protected because, although courts and legislatures have traditionally imposed sanctions on many kinds of false speech, there is no historical tradition in the United States of prosecuting the act of lying when that lie is unconnected to some other, legally cognizable harm, "such as an invasion of privacy or the costs of vexatious litigation."[229]

The plurality was certainly correct on this point. Indeed, it was widely recognized in the nineteenth century that lying was not by itself an actionable offense under either the common law or the various statutes that governed false representations.[230]

It is far from clear, however, why this undoubtedly true fact about the historical tradition of regulating falsity in the United States led the plurality to conclude that statements like those prohibited by the Stolen Valor Act do not fall within a "historic and traditional" category of exception. As the Court itself acknowledged, the Stolen Valor Act was not intended to criminalize falsity per se. Instead, Congress intended the Act to criminalize lying that resulted, if not necessarily in material harm to the government or the public, then in harm to the morale and efficacy of the Armed Services.[231] This was how it was interpreted in Alvarez's case.[232] There is plenty of evidence to suggest that nineteenth- or at least early twentieth-century courts and legislators saw nothing amiss in punishing false statements of fact that threatened this kind of intangible harm. For example, someone who falsely claimed to be speaking on behalf of the Government could be criminally punished under a federal statute passed in 1909 that prohibited the impersonation of government officers even absent any evidence that the speech caused financial or property loss.[233] This was because his or her speech was understood to cause intrinsic harm to "the general good repute and dignity" of government service.[234] In the nine-

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[228] *Id.* at 2543.

[229] *Id.* at 2545.

[230] *See, e.g.*, Ramey v. Thornberry, 46 Ky. (7 B. Mon.) 475, 475 (1847) ("To charge a person in general terms, with having sworn a lie or having sworn falsely, is certainly not actionable."); Benton v. Pratt, 2 Wend. 385, 389 (N.Y. Sup. Ct. 1829) ("[N]o action could be supported for telling a bare, naked lie; that is, saying a thing which is false, without any intention to injure, cheat or deceive another person . . . .").

[231] Stolen Valor Act of 2005, § 2(1), 120 Stat. 3266 (2006) (identifying the Act's purpose to be the prevention of the dilution of "the reputation and meaning of military decorations and medals").

[232] *Alvarez*, 132 S. Ct. at 2548–49.

[233] United States v. Barnow, 239 U.S. 74, 75, 79–80 (1915).

[234] *Id.* at 80.

teenth century, meanwhile, the "publishing of false alarm" was a common law offense. The cognizable harm it created was, of course, the harm to the public order of the community.[235]

Only by construing the relevant category extremely broadly — to include *all* false statements of fact, even those that do not appear to lead to any "cognizable legal harm" — could the *Alvarez* plurality conclude that false statements of fact like those targeted by the Stolen Valor Act were historically protected. That the Court could construe the relevant category in this way — that it could, in other words, determine the terms of the analysis, and in so doing, determine its result — suggests how manipulable the *Stevens* test can be, given the failure of the historical record to clearly demarcate categories of low-value speech that need not be created, merely discovered. Nor is this the only example of serious ambiguity in the Court's delimitation of the categories.

Stevens itself demonstrates how much can depend upon how the Court construes the relevant categories of analysis. The case, recall, involved a First Amendment challenge to a federal statute that criminalized the creation, sale, and possession of visual or auditory images of animal cruelty when the conduct depicted in those images was illegal under either federal law or the law of the state in which they were created, possessed, or distributed.[236]

The Court concluded that the speech regulated by the statute — a category it described as "depictions of animal cruelty" — was not historically unprotected, given the absence of any evidence demonstrating the existence of a long-settled tradition of regulating speech of this kind.[237] And indeed, as the majority pointed out, there is no evidence that eighteenth- or nineteenth-century courts prosecuted speech that depicted cruelty to animals.[238]

A good argument can be made, however — indeed, Justice Alito made it in his dissent — that even if depictions of cruelty to animals do not constitute a novel category of historically unprotected speech, they nevertheless fit into the established "historic and traditional" category of speech integral to crime.[239] In *New York v. Ferber*,[240] the Court concluded that child pornography was a kind of speech integral to crime because "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Na-

[235] WHARTON, *supra* note 226, at § 2391.
[236] United States v. Stevens, 130 S. Ct. 1577, 1582–83 (2010) (citing 18 U.S.C. § 48 (2012)).
[237] *Id.* at 1585 (emphasis omitted).
[238] *Id.*
[239] *Id.* at 1599–600 (Alito, J., dissenting).
[240] 458 U.S. 747 (1982).

Temple American Inn of Court - April 2016 Program - Research and Materials

tion."[241] Like child pornography, many of the depictions of animal cruelty that the federal statute prohibited — such as the dogfighting video for which the defendant in the case was prosecuted — created a market for, and thereby incentivized, "activity illegal throughout the Nation."[242]

It is hard therefore to reconcile the majority's conclusion regarding the constitutional status of the defendant's speech with the decision in *Ferber*. The *Stevens* majority certainly provided no hint as to how the two decisions might be reconciled. Instead, it entirely ignored the possibility that the speech targeted by the federal statute might constitute speech integral to crime and concentrated all of its attention on the separate question of whether depictions of cruelty to animals constituted a novel category of historically unprotected speech (they do not).

Ultimately, the decision in *Stevens* might be justified on overbreadth grounds.[243] The Court's dismissal of even the possibility that the defendant's speech qualified as low value suggests nevertheless how unpredictable, perhaps even incoherent, the historical test can be, given the difficulty of determining at what level of generality it should be applied. This leaves, obviously, a great deal of room for value judgments to intrude into the analysis, albeit in cloaked form.

B. *Costs of the Rule*

The fact that the *Stevens* rule relies on a false view of history means that it achieves neither of the benefits the Court has claimed for it. Meanwhile, the test imposes serious costs.

For one thing, by requiring courts to justify decisions about low-value speech in historical terms, it forces whatever value judgments may in fact motivate these decisions to remain silent and hidden. It thus undermines the transparency of judicial decisionmaking that, by making courts' reasoning vulnerable to popular critique, helps limit the antimajoritarian power of the courts.

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[241] *Id.* at 761.

[242] The defendant in *Stevens* ran a business and an associated website though which he sold videos of dogfights. *Stevens*, 130 S. Ct. at 1583. He was prosecuted under 18 U.S.C. § 48, which prohibited the sale of "depiction[s] of animal cruelty . . . for commercial gain" when the conduct depicted in the speech violated federal or state law in the jurisdiction in which the sale took place. *Id.* at 1582 (quoting 18 U.S.C. § 48 (1999) (amended 2010)). As Justice Alito noted in dissent, dogfighting is banned in all fifty states, as well as the District of Columbia, just as child pornography is. *Id.* at 1601 (Alito, J., dissenting).

[243] As the majority pointed out, laws regulating hunting vary considerably across jurisdictions. *Id.* at 1589 (majority opinion). Accordingly, depictions of hunting might run afoul of the statute even though they depicted conduct that was illegal only in the jurisdiction in which they were sold, not the jurisdiction in which the depictions occurred. *Id.* at 1588–89. Hence, the statute criminalized many acts of expression that did not in fact depict — and thereby incentivize — activity that was "illegal throughout the Nation" even if they did depict activity that was illegal in at least one jurisdiction.

To the extent judges employ it in good faith, the test also ensures that decisions about the constitutional status of speech depend, ultimately, on factors — such as, for example, how the court defines the relevant categories, and whether eighteenth- and nineteenth-century legislatures happened to regulate a particular kind of speech — that are not only hard to predict in advance, but also, from a constitutional perspective, quite irrelevant. Whether a court construes the relevant categories broadly or narrowly tells us little or nothing about whether the speech in question is "worthy" of constitutional protection or would have been considered so at the time.

Of course, this is in some sense what the Court crafted the rule in order to achieve. The assumption underlying the decision, however, was that by forcing judges to base their decisions about the constitutional status of speech on historical evidence, rather than their own conceptions of the constitutional value of the speech in question, the rule would allow an original, or at least traditional, understanding of constitutional value to control. Absent that kind of animating understanding, the formalism of the *Stevens* rule is very unattractive — particularly since one of its likely consequences will be to make it much more difficult for the government to regulate speech in new ways.

Consider, for example, the vexed question of the First Amendment status of information. In 2011, in *Sorrell v. IMS Health Inc.*,[244] the Court addressed a First Amendment challenge to a Vermont law that prohibited pharmacies from sharing information about doctors' prescribing practices with marketers.[245] Although the Court ultimately struck the law down on other grounds, it noted in passing that there is a "strong argument that prescriber-identifying information is speech for First Amendment purposes."[246] Indeed, in a number of previous cases, the Court had concluded that certain kinds of information — information on beer labels, information in the form of a credit report — counted as speech under the First Amendment, albeit not always high-value speech.[247]

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[244] 131 S. Ct. 2653 (2011).

[245] *Id.* at 2659.

[246] *Id.* at 2667.

[247] *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (plurality opinion). More generally, in its commercial speech cases, the Court has long emphasized the First Amendment importance of the information that advertisements convey. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

In a future case, the Court thus may well find that personal information of the sort at issue in *Sorrell* is speech for First Amendment purposes. This is not inherently problematic.[248] It does however raise the question of what level of protection speech of this sort should receive. The analysis is potentially a complex one, given on the one hand the tremendous value that information of this sort possesses, and on the other hand the serious threat that its circulation and unregulated disclosure might pose to individual privacy.[249]

Under the *Stevens* rule, however, the only inquiry that matters is historical: namely, can courts discern a long-settled tradition of regulating speech of this sort? But why should it matter whether eighteenth- and nineteenth-century legislatures passed rules to restrict the disclosure of speech of this kind? Given how recently the technology to store personal information on a mass scale emerged, the absence of a tradition of regulating speech of this kind tells us very little about whether courts and legislatures would have believed it constitutionally permissible to do so.[250] All it tells us is that the problem of information disclosure had not yet emerged as something legislatures and courts had to concern themselves with. And yet, under *Stevens*, it seems almost certain that, were the Court to recognize personal information as speech (a far from unlikely prospect), it would have to conclude that such speech was high value and could be regulated only in accordance with the demanding standards of strict scrutiny.

In practice, applying *Stevens* to the case of personal information would thus significantly impede the government's ability to restrict the

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[248] As Professor Ashutosh Bhagwat notes, there are entire industries organized around the collection and dissemination of information of this and similar sorts. Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 864 (2012). To say that such information is not speech would be to leave these industries entirely unprotected against government efforts to restrict their expressive activities. *Id.* (arguing that such a result would "create an absurdly large and dangerous hole in the protections granted by the First Amendment"). This seems obviously problematic.

[249] As Bhagwat notes, were the Court to recognize personal information as speech, the ruling could implicate not only data on individual physician prescribing practices but also the following categories:

> [P]ersonal medical information in the possession of health care providers; financial information in the possession of financial institutions; purchasing histories in the possession of retailers, including online retailers such as Amazon.com; search information in the possession of search engines such as Google; viewing information in the possession of firms such as Comcast and Netflix; and any number of other forms of personal data that individuals voluntarily share with private-sector firms.

Id. at 868. For a cogent argument about the threat to privacy that the disclosure of information of this sort poses, see A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000).

[250] *See, e.g.*, Froomkin, *supra* note 249, at 1472–501 (tracing the recent transformations in how and how much personal information is gathered and retained); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 969–70 (2003) (same).

Temple American Inn of Court - April 2016 Program - Research and Materials

disclosure of many kinds of personal information.[251] Although restrictions on the disclosure of personal medical information might survive strict scrutiny, it is much less likely that laws that prohibit the disclosure of other kinds of information would.[252] Certainly in the past the Court has held that the First Amendment prevents the government from limiting or imposing liability on the disclosure of truthful information in order to protect personal privacy.[253] It is hard to believe that the Court will find that laws restricting the disclosure of information about an individual's buying habits, or credit history, or video rental records serve a compelling state interest when it has not found that laws restricting the disclosure of, for example, information about a rape victim, or a juvenile defendant, do. Yet it is difficult to see what First Amendment interests are harmed by such laws. In contrast to the earlier cases, the information targeted by privacy laws of this sort is usually not already in the public domain or likely to end up there. Restricting its circulation does not therefore appear to undermine public debate on matters of public concern.[254] Nor does information of this sort appear sufficiently important to the search for truth or the individual right to autonomy, to preclude any restrictions on its disclosure.[255]

Privacy laws are not the only kinds of laws that the *Stevens* test threatens. It also threatens the various labor, securities, and civil rights laws described above. Eighteenth- and nineteenth-century courts did not, after all, regularly sanction sexually harassing speech or restrict speech about public securities, save for some limited regulation

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[251] *See* Solove, *supra* note 250, at 971–72 (noting the "panoply of federal and state statutes that limit disclosures of personal data [including] . . . information from school records, cable company records, video rental records, motor vehicle records, and health records" (footnotes omitted)).

[252] *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 112–14 (2014) (arguing that under heightened scrutiny, the confidentiality provisions in the Health Insurance Portability and Accountability Act of 1996, the Fair Credit Reporting Act, and other federal laws should be struck down); Bhagwat, *supra* note 248, at 871–72 (noting that "[i]t seems beyond peradventure that individuals' interests in maintaining the secrecy of their financial transactions, or their personal health history, qualify as compelling" but concluding that it is much less likely that the interest in maintaining personal privacy about other kinds of information would similarly qualify).

[253] *See, e.g.*, Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 830, 845–46 (1978) (invalidating a Virginia statute that imposed criminal punishment for publishing truthful information about confidential proceedings); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 309–10 (1977) (per curiam) (striking down a pretrial order that enjoined the news media from publishing the name or picture of a child); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494–95 (1975) (holding that a state may not allow damages for an invasion of privacy caused by the publication of the name of a deceased rape victim).

[254] *See* Solove, *supra* note 250, at 984.

[255] As Daniel Solove points out, laws restricting the disclosure of personal information in fact vindicate an important autonomy interest — that of the individual to control the disclosure of information about him or herself. *Id.* at 990–91.

Temple American Inn of Court - April 2016 Program - Research and Materials

of fraud.[256] And although there is a considerably longer history of regulating strikes and boycotts, this history extends for the most part only to the late nineteenth century.[257] The fact that the Court has not specified how long a history of regulation must be to qualify as "long-settled" means that *Stevens* could be interpreted so as to avoid conflicting with these or any other by-now familiar regulatory schemes. The originalist language in the opinion suggests, however, that by a long-settled tradition of regulation, what the Court means is a tradition extending back to the eighteenth century, or as close to it as seems capable of illuminating original understandings.

Assuming therefore that what a "long-settled" tradition of regulation means is a tradition that extends into the nineteenth and even perhaps eighteenth centuries, *Stevens* calls the constitutionality of all of these laws into serious question. Again, however, it is not clear that it should. Certainly the fact that eighteenth- and nineteenth-century legislatures did not regulate the speech of public companies, or prohibit the use of sexually harassing speech, or prohibit secondary boycotts, does not mean that they would have considered prohibitions of this sort to be unconstitutional. Nor does it mean that we should do so today.

There are, of course, critics of these laws who argue that they violate the First Amendment and should therefore be struck down.[258] The arguments made against these laws do not, however, tend to rely upon history. Instead, critics of these laws argue that they are unconstitutional because they impede important First Amendment inter-

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[256] Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 859 (1993) ("Sexual harassment was [only] recognized as a legitimate cause of action under Title VII in 1976."). For a detailed history of securities regulation in the United States in the mid–nineteenth century, see STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION (1998).

[257] WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59–60 (1991) (noting that "[i]n 1900, strikes to improve wages and working conditions were clearly legal, as they had been virtually throughout the century," *id.* at 59–60, and that "[b]efore the 1890s, courts had barely considered the legal status of many kinds of boycotting activities," *id.* at 60); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEX. L. REV. 919, 922–23 (1988) ("[N]o American case before the 1890s condemned laborers for the simple act of combining in order to increase wages.").

[258] *See, e.g.*, Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997) (arguing that at least some of the speech targeted by Title VII restrictions on harassing language deserves First Amendment protection); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1845–55 (1992) (same); *see also* Getman, *supra* note 218, at 20–22 (arguing that the laws prohibiting unions from engaging in secondary boycotts "resemble[] an intellectual rubble heap," *id.* at 21, and should be overturned, *id.* at 20); Susan B. Heyman, *The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech*, 74 OHIO ST. L.J. 189, 211–17 (2013) (arguing that securities regulations that prohibit the disclosure of truthful information violate the First Amendment when assessed under strict scrutiny or the intermediate scrutiny afforded commercial speech).

ests.[259] What is problematic about the *Stevens* test is that, by making the inquiry an exclusively, or at least primarily, historical one, the test deprives courts of any opportunity to determine whether the critics are right.

C. *The Problem of Principle*

The preceding discussion points to the fundamental problem with the *Stevens* rule: it fails to provide courts with a principled basis for making determinations about the scope and limits of constitutional protection for speech. Nor could a historical-boundary test like it do so, given the tremendous changes that have taken place in how courts understand what it means to guarantee freedom of speech, without entailing a massive reorganization of the constitutional boundaries that currently exist.

Indeed, were the Court to genuinely attempt to craft a test of First Amendment boundaries that resulted in a distribution of constitutional protections for speech that looked anything like that which existed in the eighteenth and nineteenth centuries, it would have to either (1) extend protection to the many categories of low-value speech that were protected, at least against prior restraint, during this period or (2) deny protection to the many kinds of high-value speech that were criminally sanctioned when they posed a threat — even what we would today consider to be an attenuated threat — to the public order of society. Embracing the former view of constitutional boundaries would mean essentially doing away with the doctrine of low-value speech altogether. Embracing the latter view would mean vesting the government with considerably greater power than it now possesses to punish speech merely because it dislikes it or believes it improper or immoral.

Neither conception of constitutional boundaries is normatively attractive. The former threatens to undermine the government's ability to regulate commercial, criminal, or other kinds of low-value speech not only when it poses an imminent danger of serious harm to person or property, but also when it threatens other, more intangible but nevertheless important harms — harms to reputation, civility, public confidence in the marketplace, and so on. The latter conception is undesirable because it undermines the central insight of the modern jurisprudence: namely, that granting government the power to repress speech that it dislikes threatens democracy, the search for truth, and individual self-expression.

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[259] *See* Heyman, *supra* note 258, at 218 (arguing that securities regulations that restrict speech in advance of an initial public offering "raise[] serious First Amendment concerns" because the speech they regulate operates much like traditional advertising and therefore deserves the same protection); Volokh, *supra* note 258, at 1856 (critiquing the antidemocratic implications of hostile workplace laws that allow speech to be restricted because of its political content).

Temple American Inn of Court - April 2016 Program - Research and Materials

The *Stevens* test does not, of course, create either unpalatable scenario. It preserves the existing low-value categories, notwithstanding their historical pedigree or lack thereof. It merely imposes a steep bar to the recognition of novel categories of low-value speech. As a result, what it produces is an ultimately unprincipled distribution of constitutional protection: one that does not clearly reflect either an original *or* a contemporary understanding of freedom of speech.

The test consequently threatens to both underprotect and overprotect speech. Indeed, the *Stevens* Court insisted quite forcefully that a reconsideration of the existing low-value categories was foreclosed by history, just as the recognition of novel categories of low-value speech is.[260] The Court's resistance to reexamining the existing low-value categories is problematic for many of the same reasons that the Court's refusal to recognize novel categories of low-value speech is.

There may be good reasons to believe that some categories of low-value speech pose a greater threat to First Amendment interests and values than others do. The exception carved out for obscene speech, for example, is much harder to square with *Cantwell*'s stirring ode to the importance of diversity than is the exception carved out for commercial advertising because the former appears much more likely to be used to target those who hold a particular set of beliefs or espouse a particular viewpoint.[261] For that reason, the content-based regulation of obscenity appears to pose a greater threat to the democratic values of the First Amendment than the regulation of commercial advertising.[262]

Yet the *Stevens* framework provides no vocabulary or set of standards courts can use to evaluate whether the existing categories of low-value speech pose a threat to democracy, or social progress, or any of

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[260] United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (asserting that the freedom of speech referred to by the First Amendment does not include "a freedom to disregard the[] traditional limitations" on the scope of its application, just as it does not include the freedom to recognize novel categories of low-value speech (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)) (internal quotation mark omitted)).

[261] An alternative way to express this point is to say that prohibitions against obscenity shade much closer to impermissible viewpoint discrimination than do many of the other laws that the doctrine of low-value speech makes possible. *See* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 122–28 (1996) (arguing that the prohibition against obscene speech is viewpoint based); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111–12 (1978) (arguing that the repression of sexually explicit speech is likely to "have a potent viewpoint-differential impact," *id.* at 112, because speech of this sort "will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores," *id.* at 111–12, and that "[t]o treat such restrictions as viewpoint-neutral seems simply to ignore reality," *id.* at 112).

[262] Of course, even prohibitions on commercial advertising might have viewpoint differential effects. Pro-consumption advertising is likely to be much more common than advertising expressing the opposite point of view, for obvious reasons. But the impact is less stark. Ads of the latter persuasion certainly do exist. *See* DOUGLAS J. GOODMAN & MIRELLE COHEN, CONSUMER CULTURE 49–74 (2004).

the other purposes associated with the First Amendment. This might be justifiable were it the case that the rule in fact expressed the principled judgments of the Founders that certain speech simply didn't count as speech for constitutional purposes. But it doesn't. Instead, the rule merely makes immutable the perhaps idiosyncratic, biased, or outdated judgments reached by earlier courts about the harms that the regulation of low-value speech such as obscenity threaten. This fact suggests that even free speech absolutists — those who might otherwise rally around the *Stevens* rule because of the steep bar it imposes on the recognition of novel categories of low-value speech — should be unhappy with the Court's insistence on a historical test of First Amendment boundaries.

D. *Embracing Purposes*

The problems with the *Stevens* rule illustrate the dangers of crafting doctrinal rules that rely, ultimately, upon a false view of the past. By forcing courts to determine the constitutional value of speech by means of a historical test that does not illuminate original understandings of what speech is worth protecting, the rule threatens to create a set of doctrinal distinctions that rest either on hidden value judgments — value judgments that are, as a result, very difficult to understand, engage with, or critique — or are the product of factors that are constitutionally irrelevant. In so doing, it threatens the very reconciliation between freedom and order for which the Court developed the distinction between high- and low-value speech. Certainly, if applied consistently, the rule will make it virtually impossible for the government to regulate speech in new ways. Meanwhile, it forecloses the serious reconsideration of the existing categories of low-value speech and forces whatever revisions to the categories the Court comes to believe to be necessary to occur *sub rosa*, through a narrowing of categorical definitions.

What these problems suggest is that, however important historical claims may have been to the initial justification of the doctrine of low-value speech, the Court's continuing emphasis on the historical basis of the low-value categories only creates more problems for the doctrine than it solves. They suggest that First Amendment doctrine would be better off were the Court to more affirmatively embrace the purposive and functional, rather than historical, nature of the distinction between high- and low-value speech.

Returning to a purpose-based test like the "matters of public concern" test the Court used throughout the twentieth century to determine the constitutional status of movies, commercial advertising, and nonprurient speech about sex would avoid many of the problems created by the *Stevens* test. It would ensure much greater doctrinal transparency by allowing courts to articulate the value judgments that

Temple American Inn of Court - April 2016 Program - Research and Materials

in fact inform their decisionmaking. It would also provide courts the flexibility to recognize novel categories of low-value speech, even when these kinds of speech either did not exist in the eighteenth or nineteenth century or were not, for whatever reason, a subject of legislative or judicial concern at the time. And of course it would provide courts with the tools to critically evaluate the merits of the existing low-value categories.

This is not to say that embracing a purpose-based approach would not pose its own problems. For one thing, asking courts to determine the constitutional status of speech by examining the extent to which it furthers the First Amendment's purposes would still leave courts a great deal of room to determine the outcome of the analysis by construing the relevant speech category broadly or narrowly. Furthermore, the approach would require courts to identify, and agree upon, the purposes of the First Amendment. At least in the scholarly literature, there is considerable debate about what these purposes may be.[263] And while the Supreme Court's jurisprudence has tended to emphasize primarily the democracy- and truth-promoting purposes of the First Amendment,[264] these purposes alone do not easily explain all of the Court's decisions regarding where and to what kinds of speech First Amendment protections apply.[265] What purposes actually inform the case law may therefore be considerably harder to discern than one might initially assume.

Neither of these problems is insurmountable, however. Certainly the Court could, if it wished, articulate much more clearly than it has

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[263] *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–54 (1989) (outlining the various purposes invoked to justify freedom of speech, including the promotion of democracy, the advancement of truth, and the safeguarding of individual autonomy). For a good survey of recent debates about First Amendment purposes, see *Virginia Law Review Symposium on Free Speech*, 97 VA. L. REV. 477 (2011).

[264] *See* Greenawalt, *supra* note 263, at 145 ("Arguments from democracy have been said in a comparative study to be the 'most influential . . . in the development of twentieth-century free speech law.'" (alteration in original) (quoting E. BARENDT, FREEDOM OF SPEECH 23 (1985))); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2 n.2, 3 (noting the influence of the metaphor of the marketplace of ideas and its accompanying search-for-truth rationale on the development of modern First Amendment doctrine); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 488 (2011) (arguing that although "the value of democratic self-governance can[not] explain all First Amendment decisions[,] . . . this value best corresponds to the major outlines and structure of our inherited decisions"); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491 (2011) ("[C]ontemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves. . . . Descriptively, no other theory provides nearly as good an explanation of the actual pattern of the Supreme Court's free speech decisions.").

[265] *See* C. Edwin Baker, Response, *Is Democracy a Sound Basis for a Free Speech Principle?*, 97 VA. L. REV. 515, 527–28 (2011); Post, *supra* note 264, at 488; Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559 (2011).

Temple American Inn of Court - April 2016 Program - Research and Materials

so far a theory of First Amendment purposes. It could also develop rules to govern the task of delimiting the relevant speech categories, similar to those that govern the identification of fundamental rights in the Due Process Clause context.[266] The only thing stopping the Court from doing so, in fact, is the presumption that underlies the *Stevens* test: namely, that the categories of low-value speech have always existed in something roughly like their contemporary form and that the task of categorical definition is a relatively simple and objective one (as it clearly is not).

Embracing more affirmatively than the Court has done up until now the purpose-based nature of the low-value inquiry could therefore do a great deal to make the analysis of constitutional boundaries both more predictable and more transparent than it has been to date. Of course, doing so would require the Court to acknowledge more explicitly that the principle of content neutrality is not in fact as all-encompassing as it has claimed: that both courts and legislatures in fact retain considerable power to discriminate against speech because of the message it communicates.

It would also mean vesting judges with considerable discretion to determine when a particular category of speech does or does not advance the First Amendment's purposes. But in this respect a purpose-based test is not inferior to a historical test like that outlined in *Stevens*. In both cases, the test grants courts considerable leeway to determine the constitutional value of the regulated speech. In the former case, however, this discretion is evident, and the court's reasoning and conclusions are subject to critique. In the latter case, however, the discretion built into the test is hidden, and is therefore much more difficult to understand and respond to.

Furthermore, there are ways to constrain judicial discretion under a purpose-based approach that would limit, even if not entirely eliminate, the threat of what the *Stevens* Court rather derisively called "ad hoc balancing."[267] Certainly for much of the twentieth century, the Court did not simply balance what it perceived to be the expressive value of speech, when considered in light of the First Amendment's purposes, against its social costs. Instead, as Part III discussed, it

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[266] *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (arguing that, to determine whether a liberty interest was "traditionally protected by our society," *id.* at 122, and therefore protected by the Due Process Clause of the Fourteenth Amendment, courts should look to the most specific relevant tradition available). The approach taken by the plurality in this case has earned its share of criticism. *See, e.g.*, Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 33–36 (1992); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). The point is not that the Court should follow the specific approach adopted in the Due Process Clause context, but that rules for determining the level of generality of analysis can be developed, and have been developed in other contexts.

[267] United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

Temple American Inn of Court - April 2016 Program - Research and Materials

asked whether speech of a given category was capable of impacting, directly or indirectly, public debate about "matter[s] of political, social, or other concern to the community."[268] If it was thought to do so, in most cases the speech received full or close to full First Amendment protection — notwithstanding a long-settled tradition of regulating speech of this sort.[269] If it did not, it tended to be relegated to the status of low-value speech and receive little or no constitutional protection.[270]

The matters of public concern test thus did not require courts to make first-order judgments of the value of speech per se. Indeed, the Court extended full First Amendment protection under this test to many kinds of speech that it clearly believed lacked value.[271] This is not to say that judges did not continue to enjoy considerable freedom under the test to define matters of public concern as they desired. The Court itself recently acknowledged as much.[272] And commentators have long criticized the test for its lack of standards.[273] But the Court's failure to develop explicit rules for when speech touches on matters of public concern may be less an inherent problem with the

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[268] Connick v. Myers, 461 U.S. 138, 146, 147–48 (1983) (describing the "matters of public concern" test). The Court developed this test to deal with the rather specific category of employee speech. But the Court has subsequently made clear that the test applies beyond this limited realm. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215–16 (2011) (applying the test to picketing at a funeral); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (plurality opinion) (applying the test to a credit report).

[269] *See supra* p. 2210.

[270] For example, in its libel jurisprudence, the Court has held that defamatory speech that touched on matters of public concern received greater First Amendment protection than speech on merely private issues. *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 8–12 (1990). The Court also has extended First Amendment protection only to government-employee speech that touched on matters of public concern. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). And of course, it has denied protection to obscene speech and other kinds of low-value speech that appeared to contribute little to the "exposition of ideas." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[271] In *Winters v. New York*, 333 U.S. 507 (1948), for example, the Court held that true-crime magazines were entitled to full First Amendment protection because, like any other kind of mass publication, magazines of this sort possessed the capacity to affect public attitudes and beliefs, notwithstanding the fact that the Court itself could "see nothing of any possible value to society in these magazines," *id.* at 510. Another example is *Cohen v. California*, 403 U.S. 15 (1971), where the Court struck down the defendant's conviction under an offensive conduct statute for wearing a jacket that made a "vulgar allusion to the Selective Service System," *id.* at 20.

[272] *See* City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) (noting that "the boundaries of the public concern test are not well defined").

[273] *See, e.g.*, Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 259 (1987) (arguing that the test amounts to "little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it"); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 668 (1990) ("Although the 'public concern' test rests on a clean and superficially attractive rationale, the Court has offered virtually no analysis to develop its logic.").

test than a consequence of the submerged and somewhat implicit way in which the test operated in many areas of the law. In other words, it may be yet another casualty of the Court's reliance on a false view of First Amendment history. Embracing the modernity of the distinction between high- and low-value speech more affirmatively than the Court has been willing to do to date could thus help avoid not only the problems of the *Stevens* test but also at least some of the problems associated with the matters of public concern test itself.

To be sure, the matters of public concern test is not the only purpose-based test that courts can use to distinguish high-value speech from low. Indeed, the test has a major shortcoming: it extends no protection to speech that concerns only private matters. And yet, the fact that speech that touches on matters of public concern clearly advances one or more of the First Amendment's purposes does not mean that speech on private matters does not.[274] One can understand the opinions in *Alvarez* and *Sorrell* to reflect the desire among at least some members of the Court to explicitly extend constitutional protection to private speech of this sort. Certainly, the *Alvarez* plurality expressed concern that the Stolen Valor Act might apply not only to public lies but to "personal, whispered conversations within a home."[275] And personal information of the kind at issue in *Sorrell* is not the kind of publicly oriented expression to which the matters of public concern test has traditionally been applied. There may be good reason therefore to develop an alternative or additional purpose-based test for distinguishing high- from low-value speech.

The point here is not to decide which purpose-based test the Court should use to identify low-value categories of speech. It is only to note that a purpose-based test like the matters of public concern test would provide a principled basis for distinguishing between high- and low-value speech. The history of constitutional boundary-setting in Parts II and III makes clear that a historical test like that developed by the *Stevens* Court does not provide a principled basis for making distinctions of this sort.

E. The Irresolvable Conflict

What the history of the doctrine of low-value speech makes clear, in other words, is that courts cannot avoid the conflict between the doctrine of low-value speech and the principle of content neutrality by turning to history. At least they cannot do so without risking the crea-

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[274] Numerous commentators have made this point. *See, e.g.*, Baker, *supra* note 265, at 526–27; Frederick Schauer, *"Private" Speech and the "Private" Forum:* Givhan v. Western Line School District, 1979 SUP. CT. REV. 217, 235–36; Shiffrin, *supra* note 265, at 561.

[275] United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (plurality opinion).

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tion of a set of doctrinal distinctions unmoored from any conception of the purposes they are supposed to serve — whether those of the Founders, those of nineteenth-century courts, or those of courts today.

This is not to say that courts cannot turn to history to help determine what purposes the First Amendment was intended to further. Eighteenth- and nineteenth-century discourses about freedom of speech and press, in their emphasis on the democracy- and truth-promoting purposes of guaranteeing freedom of expression, suggest that there has been much less change in how we conceive the ends that the First Amendment promotes than in how we conceive the means by which it does so.[276] History may therefore be helpful in uncovering what the important First Amendment interests are, and in coming to consensus about them. Nevertheless, given the tremendous changes in how courts have understood those purposes are to be realized, historical practice provides a very poor basis on which to determine more specifically what kinds of expressive acts are and are not entitled to constitutional protection, and to what degree.

The fact that courts cannot make their own judgments about the constitutional value of speech and cannot rely upon the past to do so for them, however, is not as much of a problem for the democratic legitimacy of the First Amendment as strong versions of the principle of content neutrality suggest, and certainly not as the New Deal Court appeared to believe. Although the New Deal Court asserted initially that low-value speech enjoyed no constitutional protection, the Court has subsequently made clear that the government may not restrict even the lowest-value speech (such as libel) in order to penalize particular viewpoints.[277] Hence, although "the government may proscribe libel[,] . . . it may not make the further content discrimination of proscribing *only* libel critical of the government."[278] Today, as a result, the government cannot easily use the doctrine of low-value speech to repress dissent. It can, of course, use the exception carved out for low-value categories such as obscenity and libel to do what the New Deal Court announced that the First Amendment prevented: namely, "pre-

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[276] In articulating the goals of freedom of the press to the people of Quebec in 1774, for example, the Continental Congress highlighted, much as would many of the twentieth- and twenty-first-century First Amendment cases, the importance of guaranteeing freedom of expression in order to protect good democratic government and advance the search for truth. Address to the Inhabitants of Quebec, 1774, *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221, 223 (Bernard Schwartz ed., 1971) ("[The] importance of [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.").

[277] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992).

[278] *Id.* at 384.

scribe what shall be orthodox,"[279] if not in politics or religion then at least when it comes to matters of personal expression and style.

The doctrine of low-value speech thus clearly continues to pose a problem for the antinormativity impulse of the modern First Amendment at least. However, this fact provides only further reason to believe that the Court's continuing reliance on a mythical view of the First Amendment's past is a problem, insofar as it discourages critical engagement with the question of when and in what ways the existing low-value exceptions pose a threat to First Amendment interests.

Of course, returning to a purpose-based approach to the delimitation of high- and low-value speech inevitably means, as I have suggested, vesting courts with discretion to deny speech protection merely because they dislike it. But the only alternative to granting courts this discretion would be to get rid of the distinction between high- and low-value speech altogether. Doing so, however, would have tremendous costs of its own. It would force courts either to dilute the level of protection afforded high-value speech in order to allow the government to continue to regulate commercial speech, prohibit threats, sanction criminal speech, and so on, or to impose such a stringent burden on the content-based regulation of low-value speech that the regulation would be hard to sustain in practice.[280]

Unless we are willing to return to something like the nineteenth-century model of speech regulation — a model that looks distinctly unpleasant to contemporary eyes, precisely because of the lack of protection it affords high-value speech — courts have no recourse but to engage in the difficult task of judging constitutional value. Certainly, the twentieth-century case law makes clear that, while in principle the Court has long been committed to a conception of the First Amendment that precludes the government from limiting expression except when it poses a serious threat of material harm, in practice the doctrine has long recognized broad exceptions to these rules. As Professor Richard Fallon has noted in another context, although "the principle of content neutrality . . . frequently is identified as the First Amend-

[279] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[280] Professor Cass Sunstein has certainly argued as much. *See* Sunstein, *supra* note 208, at 558 ("It is difficult to maintain that false commercial speech, libel of private figures, conspiracies, or child pornography ought to be immunized from governmental control — as in all likelihood they would be if the stringent burden properly imposed on governmental efforts to regulate political speech were extended to all categories of expression. In these circumstances, the most likely outcome of a doctrinal refusal to look at the 'value' side would be that judgments about value would be made tacitly, and the articulated rationale for decisions would not reflect an assessment of all factors thought relevant by the courts.").

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ment's operative core, [in practice it] is neither so pervasive nor so unyielding as is often thought."[281]

The history detailed in this Article helps explain why, notwithstanding the formal doctrinal commitment to content neutrality, value judgments in fact pervade First Amendment law. Attempting to hide these judgments under the cloak of history does not make them go away; it merely makes them harder to understand, engage with, and critique.

CONCLUSION

This Article has argued that, to justify what was in fact a novel distinction between high- and low-value speech, the New Deal Court invented a tradition, by claiming a continuity with a past that did not exist. Invented traditions of this kind may be quite common in the law, given the tremendous legitimating power that claims of historical continuity possess in a common law legal system such as our own. As Justice Holmes remarked somewhat critically over a hundred years ago: "Everywhere the basis of [legal] principle is tradition."[282] This may be less true in constitutional law than it is in other areas of the law, and less true in recent years than previously.[283] Even in this con-

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[281] Fallon, *supra* note 219, at 2; *see also* Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 205 (1982) ("Despite its repeated invocations of a near-absolute content neutrality rule, the Court has not followed its own precept. . . . In several cases where the principle has seemed relevant, the Court has not considered seriously whether it applied. Throughout, it has failed either to reconcile these results with the absolute rule it enunciated or to describe the dimensions of the more limited rule it actually has applied.").

[282] O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 472 (1897).

[283] The popularity of originalism as a judicial methodology may have led courts in recent years to emphasize Founding-era intentions rather than longstanding jurisprudential tradition when deciphering the meaning of the constitutional text. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5–7 (1998) (criticizing originalists for ignoring post-Ratification developments); Larry Kramer, *Fidelity to History — and Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997) (criticizing originalist methods of constitutional interpretation as "Founding obsessed" and unduly focused on "Founding moments"). But even originalist judges frequently invoke constitutional tradition as a means of getting to the original meaning of the text. *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2503–04 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness." (alteration in original) (quoting Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347–48 (2011)) (internal quotation marks omitted)). And efforts to justify contemporary doctrine via historical claims about legal practice at the time of the Founding or Ratification are susceptible to all of the problems that claims based on longstanding tradition are. *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 125 (critiquing the Court's use of history "as a precedent-breaking instrument, by which the Court could purport to return to the aboriginal meaning of the Constitution" and thus to "declare that in breaking with precedent it was really maintaining constitutional continuity").

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text, however, invocations of tradition possess a great deal of power. By turning to tradition, courts are able to fill in absences in the constitutional text, and thereby justify a particular interpretation of what the Constitution means.[284]

But in fact, history is not always continuous; times change and so do legal understandings and the values that motivate them. Courts may therefore misuse history by asserting a continuity with a past that does not exist in order to justify what is in fact a new doctrinal position or understanding. The irony of the invented tradition is that it marks change, not continuity. As Hobsbawm noted: "Where the old ways are alive, traditions need be neither revived nor invented."[285]

Paying attention to when these invented traditions come into being thus may help illuminate and identify points of significant doctrinal transformation. But, as this Article suggests, it also should lead us to be wary of efforts to cast history as the final arbiter of constitutional meaning. Particularly in bodies of law that have witnessed significant evolution, claims about history may reflect nothing more than an attempt on the part of the court to avoid having to provide a more principled justification for a new rule or interpretation. In this respect, the rhetorical power that claims about history possess in the law can undermine doctrinal development by allowing courts to avoid difficult debates about constitutional meaning.

At least in the context of the First Amendment, what an examination of the history of constitutional boundaries makes clear is that courts cannot avoid the difficult task of judging the constitutional value of novel categories of speech by turning to history. At least they cannot do so without risking the creation of a set of doctrinal distinctions unmoored from any conception of the purposes they are supposed to serve.

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[284] For a recent example of the Court's use of tradition to do just this, see *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) ("[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon [post-Ratification] historical practice . . . [because] '[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." (italicization omitted) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))).

[285] Hobsbawm, *supra* note 1, at 8.

Temple American Inn of Court - April 2016 Program - Research and Materials

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THE ORIGINS AND HISTORICAL UNDERSTANDING OF FREE EXERCISE OF RELIGION

Michael W. McConnell

TABLE OF CONTENTS

PAGE

I. FREE EXERCISE DOCTRINE TODAY 1416

II. FREE EXERCISE BEFORE THE CONSTITUTION 1421
- A. *Four Approaches to Church-State Relations in the Colonies* 1421
- B. *Locke and Theories of Religious Toleration* 1430
- C. *Development of the Expansive Conception of Religious Freedom* 1436
  - 1. *Disestablishment in the States* 1436
  - 2. *The Evangelical Impetus Toward Religious Freedom* 1437
  - 3. *Advances Beyond Locke in the Popular Understanding of Religious Freedom* 1443
    - (a) *Judicial Review* 1444
    - (b) *The Nature and Role of Religion* 1445
  - 4. *The Views of the Framers* 1449
- D. *Legal Protections After Independence* 1455
  - 1. *Scope of the Liberty* 1458
  - 2. *Limits on the Liberty* 1461
- E. *Actual Free Exercise Controversies* 1466
  - 1. *Oaths* 1467
  - 2. *Military Conscription* 1468
  - 3. *Religious Assessments* 1469
  - 4. *Other Religious Exemptions* 1471

III. THE FEDERAL FREE EXERCISE CLAUSE 1473
- A. *The Constitution of 1787* 1473
- B. *Framing and Ratifying the Free Exercise Clause* 1480
  - 1. *Debates in the First Congress* 1480
  - 2. *Ratification* 1485
  - 3. *Two Issues of Interpretation* 1485
    - (a) *The Meaning of "Prohibiting"* 1486
    - (b) *The Substitution of "Free Exercise of Religion" for the "Rights of Conscience"* 1488
  - 4. *The Militia Exemption Clause* 1500
- C. *Early Judicial Interpretation* 1503
- D. *Summary of the Evidence* 1511

IV. CONCLUSION: THE NEW AMERICAN PHILOSOPHY OF RELIGIOUS PLURALISM 1513

Temple American Inn of Court - April 2016 Program - Research and Materials

ARTICLE

THE ORIGINS AND HISTORICAL UNDERSTANDING OF FREE EXERCISE OF RELIGION

*Michael W. McConnell**

The question whether the free exercise clause requires the granting of religious exemptions from generally applicable laws with secular purposes has generated lively debate. Beyond a few narrow circumstances, the Supreme Court and legal commentators have rejected claims to free exercise exemptions. In this Article, Professor McConnell argues that this debate has largely proceeded in an ahistorical fashion and has ignored the unique American conception of religious freedom from which the free exercise clause emerged. Professor McConnell discusses the approaches to church-state relations in the American colonies and traces the development of free exercise provisions in both the colonies and the post-independence states. Contrary to modern perceptions, he argues, the impetus for free exercise provisions came from the evangelical religious movements of the period, movements that espoused the primacy of religious conscience over secular laws and that viewed the constitutional guarantee of free exercise as protecting the right actively to fulfill religious duties without state interference. He contends, moreover, that the framers adopted the terminology "free exercise of religion" in place of the alternative, "rights of conscience," to ensure protection for religiously motivated conduct and to make clear that protection would not extend to secular claims of conscience. After discussing early nineteenth-century judicial interpretations, Professor McConnell concludes that an interpretation of the free exercise clause that mandates religious exemptions was both within the contemplation of the framers and consonant with popular notions of religious liberty and limited government that existed at the time of the framing.

IN the winter of 1812–1813, Daniel Philips entered the confessional of his parish church, St. Peters in New York City, to confess to God that he had knowingly received stolen goods. Under the tenets of his Roman Catholic faith, Philips had to make oral confession of his sins and perform appropriate penance before he could partake of holy communion. Under centuries-old church doctrines, he could be confident that his confession would remain between him and God —

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Temple American Inn of Court - April 2016 Program - Research and Materials

that the priest would not reveal to anyone what he had to say. After Philips confessed his crime, the priest, Father Kohlmann, insisted that he return the goods to their rightful owner. Under cover of confidentiality of the confessional, Philips brought the goods to Father Kohlmann, who delivered them to the owner, James Keating. Keating informed the authorities of these events, who in turn subpoenaed Father Kohlmann to appear before the grand jury to identify those responsible for the crime. The priest appeared before the court but pleaded in these words to be excused from testifying:

> [I]f called upon to testify in quality of a minister of a sacrament, in which my God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not answer any question that has a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question. For, were I to act otherwise, I should become a traitor to my church, to my sacred ministry and to my God. In fine, I should render myself guilty of eternal damnation.[1]

To this, the district attorney responded:

> [T]he constitution has granted religious "profession and worship" to all denominations, "without discrimination or preferance": but it has not granted exemption from previous legal duties. It has expelled the demon of persecution from our land: but it has not weakened the arm of public justice. Its equal and steady impartiality has soothed all the contending sects into the most harmonious equality, but to none of them has it yielded any of the rights of a well organized government.[2]

Thus was posed an issue that continues to divide and trouble the legal system: does the freedom of religious exercise guaranteed by the constitutions of the states and United States require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? Or does this freedom guarantee only that religious believers will be governed by equal laws, without discrimination or preference?

The New York court in *People v. Philips* ruled that an exemption was constitutionally required.[3] Although the government had a legit-

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[1] This speech and all the other details of the case are taken from a report of the trial published as W. SAMPSON, THE CATHOLIC QUESTION IN AMERICA 8–9 (1813 and photo. reprint 1974). The decision of the court is excerpted in *Privileged Communications to Clergymen*, 1 CATH. LAW. 199, 199–209 (1955).

[2] W. SAMPSON, *supra* note 1, at 51 (emphasis omitted and punctuation altered). The internal quotations are from N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1328, 1338 (B. Poore 2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

[3] *See* W. SAMPSON, *supra* note 1, at 112–14.

imate need and the authority to compel testimony, that need did not outweigh the interference with the relationship between priests and penitents in the Roman Catholic Church. This resolution of the conflict between generally applicable law and religious conscience had deep roots in the practices of the American states both before and after independence. But it was not until the full flowering of the Warren Court that the United States Supreme Court so interpreted the free exercise clause of the first amendment. In the meantime, the Court had upheld enforcement of anti-polygamy laws against Mormons,[4] of child labor laws against a minor who wished to distribute religious tracts in the company of her aunt,[5] of a public university's suspension of students who refused on account of their religious convictions against war to participate in ROTC,[6] and of Sunday closing laws against Orthodox Jews who observed the Sabbath on Saturday rather than Sunday.[7]

In *Sherbert v. Verner*,[8] the first and leading case in the Supreme Court's modern free exercise jurisprudence, the Court held that a Seventh-Day Adventist need not agree to work on Saturday in order to be eligible for unemployment compensation. Although a state has a legitimate need and the authority to limit unemployment benefits to those who make themselves available for work, it may not enforce the limitation when it conflicts with sincere religious practices. The state is "constitutionally compelled to *carve out an exception* — and to provide benefits — for those whose unavailability is due to their religious convictions," as Justice Harlan disapprovingly put the point in dissent.[9] The *Sherbert* decision thus created the potential for challenges by religious groups and individual believers to a wide range of laws that conflict with the tenets of their faiths, because such laws impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct. For example, in the same year that the Court decided *Sherbert*, it remanded for reconsideration in light of *Sherbert* the contempt conviction of a religious objector who refused jury service.[10] A decade later, the

[4] *See* Reynolds v. United States, 98 U.S. 145 (1879) (upholding the criminal conviction of a Mormon leader for the crime of polygamy under territorial law); *see also* Cleveland v. United States, 329 U.S. 14 (1946) (upholding the conviction of a "fundamentalist" Mormon polygamist under a federal statute prohibiting the transportation of a woman across state lines for immoral purposes); Davis v. Beason, 133 U.S. 333 (1890) (upholding the requirement that voters take an oath that they are not members of an organization that teaches polygamy); *cf.* The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding a statute revoking the charter of the Mormon Church and confiscating its property).

[5] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

[6] *See* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).

[7] *See* Braunfeld v. Brown, 366 U.S. 599 (1961).

[8] 374 U.S. 398 (1963).

[9] *Id.* at 420 (Harlan, J., dissenting) (emphasis in original).

[10] *See In re* Jenison, 375 U.S. 14 (per curiam), *vacating and remanding In re* Jenison

Court exempted members of the Old Order Amish and the Conservative Amish Mennonite churches from compulsory education of children beyond the age of sixteen.[11] Free exercise litigation since *Sherbert* has consisted almost entirely of requests for exemption rather than for general invalidation of restrictive laws.[12]

The Court made no effort in *Sherbert* or subsequent cases to support its holdings through evidence of the historical understanding of "free exercise of religion" at the time of the framing and ratification of the first amendment. This evident lack of historical support has made the decisions vulnerable to attack. Critics have not hesitated to call the decisions "a palpable and unprecedented misconstruction of the Constitution," at variance with the Lockean liberal principles of the Founding.[13]

While in retrospect the Court's inattention to original meaning may seem characteristic of this period of constitutional jurisprudence, it was anything but characteristic of the Court's treatment of the establishment clause. For example, in the *School Prayer Cases* decided in the same Term as *Sherbert*, the author of the *Sherbert* opinion, Justice Brennan, undertook a lengthy historical analysis of school prayer and public education. He commented that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[14] Interpretations of the establishment clause, then as well as now, are replete with extensive analyses of the historical context and meaning. Indeed, it has been said that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."[15] Yet neither *Sherbert* nor any other Supreme Court opinion — majority, concurring, or dissenting — has ever grounded the interpretation of the free exercise clause in its historical meaning.

Academic commentary has followed a similarly ahistorical approach. While scores of law review articles and a number of scholarly

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Contempt Proceedings, 265 Minn. 96, 120 N.W.2d 515 (1963). On remand, the Supreme Court of Minnesota reversed the conviction. *See In re* Jenison Contempt Proceedings, 267 Minn. 136, 125 N.W.2d 588 (1963).

[11] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[12] The only clear exception among Supreme Court free exercise cases is McDaniel v. Paty, 435 U.S. 618 (1978), which struck down a state law prohibiting ministers from serving as delegates to a constitutional convention. *Cf.* Widmar v. Vincent, 454 U.S. 263 (1981) (striking down under the free speech clause the exclusion of a student religious group from public university facilities).

[13] W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 38, 43–44 (1985).

[14] School Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring).

[15] Everson v. Board of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting); *accord* McGowan v. Maryland, 366 U.S. 420, 437–42 (1961).

books have been devoted to the historical background of the establishment clause,[16] little or no scholarly work has been devoted primarily to the history of the concept of "free exercise of religion."[17] The history of the free exercise principle is usually seen as too meager, or too inconclusive, to be of much help.[18] The few serious efforts to examine the history have concluded that the principle of constitutionally compelled free exercise exemptions from generally applicable laws is historically unsupportable.[19]

This Article analyzes the major philosophical, legal, and historical sources that preceded the free exercise clause of the first amendment to determine the probable understanding of those who drafted and

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[16] *See, e.g.*, C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT (1964); G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); L. LEVY, THE ESTABLISHMENT CLAUSE (1986); Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986); Smith, *Getting Off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569 (1984); Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989) [hereinafter Smith, *Separation and the "Secular"*].

[17] The most comprehensive studies of the history of religious freedom in the United States to the time of the Constitution have been S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902); and T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986). This Article makes liberal use of material from Curry and Cobb. Other useful recent general historical studies include W. MILLER, THE FIRST LIBERTY (1986); Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); and Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986). None of these histories provides a clear doctrinal analysis of the free exercise clause or focuses on free exercise exemptions.

The best historical examination of free exercise exemptions is a little-noticed report to the Attorney General. *See* OFFICE OF LEGAL POLICY, DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1986) [hereinafter REPORT TO THE ATTORNEY GENERAL]. The report relies on a much narrower range of sources than are relied upon in this Article. Moreover, although it reaches conclusions on some issues parallel to those reached here, the report reaches contrary conclusions on other, quite important questions of interpretation. Other significant historical examinations of the exemptions issue include W. BERNS, *supra* note 13; M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); and Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption (1989) (unpublished manuscript) (on file at the Harvard Law Library) (forthcoming in 40 CASE W. RES. L. REV. 357 (1989-1990)). These works reach conclusions at odds with those of this Article and will be discussed throughout at appropriate points.

[18] *See, e.g.*, Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 676 (1980); Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 315; Marshall, *supra* note 17.

[19] *See* W. BERNS, *supra* note 13; M. MALBIN, *supra* note 17; Marshall, *supra* note 17; *see also* REPORT TO THE ATTORNEY GENERAL, *supra* note 17 (arguing that free exercise exemptions are limited to prohibitory law).

ratified it. The focus is on exemptions from generally applicable laws, since this has posed the most important interpretive issue. The conclusions of this analysis are (1) that exemptions were seen as a constitutionally permissible means for protecting religious freedom, (2) that constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause, and (3) that exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God. While the historical evidence may not be unequivocal (it seldom is), it does, on balance, support *Sherbert*'s interpretation of the free exercise clause.[20]

For purposes of this Article, there is no need to presuppose agreement about an "originalist" (or any other) theory of constitutional interpretation. Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive. Much of the criticism of the *Sherbert* doctrine is based on the supposed weakness of its historical roots.[21] Thus, even if the original understanding of the free exercise clause is not considered dispositive, a fresh look at the historical record can correct misconceptions that have arisen from the ahistorical manner in which free exercise exemptions have been created and defended.

After a brief description of the state of modern free exercise doctrine in Part I, the Article proceeds chronologically. Part II canvasses the preconstitutional history of free exercise of religion in the American colonies and states by analyzing protections found in charters, constitutions, and statutes. This Part also discusses the works of the main philosophical, political, and religious figures of the time and examines actual controversies over free exercise exemptions. Part III discusses the framing of the free exercise clause of the first amendment, as well as early interpretations of free exercise clauses in both federal and state constitutions. Part IV, the conclusion, describes the relation between religion and government that best reflects the original conception of free exercise of religion.

While much of the analysis focuses on the specific doctrinal question of free exercise exemptions, this discussion has implications for the broader controversy involving the proper relationship between law

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[20] This does not mean that the principle was necessarily correctly applied to the facts of *Sherbert*. For an analysis of whether there was a burden on free exercise in *Sherbert*, see McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 40–41 (1989).

[21] *See, e.g.*, W. BERNS, *supra* note 13; M. MALBIN, *supra* note 17; Bork, *The Supreme Court and the Religion Clauses*, in "TURNING THE RELIGION CLAUSES ON THEIR HEADS": PROCEEDINGS OF THE NATIONAL RELIGIOUS FREEDOM CONFERENCE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS 83, 85–86 (1988).

Temple American Inn of Court - April 2016 Program - Research and Materials

and religious obligation in a liberal republic.[22] On many levels, the legal recognition of religion as a counter-authority to law is anomalous. Religious freedom claims present paradoxical combinations of duty and liberty, neutrality and special accommodation. The characteristic tendency of the modern legal system has been to assimilate the freedom of religion into the more familiar framework of Lockean liberal individualism. This denies the singularity of religion in life and, more particularly, in political life. Under this view the religion clauses of the first amendment become an instrument of secularism to be interpreted in secular terms.[23] An understanding of the historical roots of free exercise exemptions casts doubt on this interpretation. It suggests instead a peculiarly American conception of the relation between religion and government — one that emphasizes the integrity and diversity of religious life rather than the secularism of the state.

A robust principle of liberty of conscience also conflicts with the alternative, nonliberal understanding of the governmental role, known as republicanism, under which the state has a responsibility to promote civic virtue among its citizens. The principle of free exercise of religion effectively removes government from the development and transmission of virtue at its most fundamental level — thus devolving upon voluntary religious societies (including those of atheists or agnostics) the central function thought by "republicans" to be vested in the state. The free exercise principle therefore suggests that modern attempts to understand the Founding as a clash between "liberal" and "republican" elements are radically incomplete. It points instead toward a social order that is neither strictly individualistic nor statist in its understanding of the good.

I. Free Exercise Doctrine Today

The basic framework of the free exercise exemptions doctrine is easily stated. If the plaintiff can show that a law or governmental practice inhibits the exercise of his religious beliefs,[24] the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or "compelling") secular objective and that it is the least restrictive means of achieving that

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[22] The Article is mostly confined to issues of individual conscience. This is not to disparage the importance of the institutional or corporate aspects of religious exercise — the independence of religious bodies from government control. But the theoretical and historical background for those issues is sufficiently distinct that to combine them would add too much both to pages and to confusion.

[23] *See* Smith, *Separation and the "Secular"*, *supra* note 16, at 975–1015.

[24] For analysis of the requisite "burden" on free exercise, see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); and McConnell & Posner, cited above in note 20, at 38–45.

Temple American Inn of Court - April 2016 Program - Research and Materials

objective.[25] If the plaintiff meets his burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue. In order to be protected, the claimant's beliefs must be "sincere," but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination.[26] "Only beliefs rooted in religion are protected by the Free Exercise Clause";[27] secular beliefs, however sincere and conscientious, do not suffice.[28]

Some twenty-five years after *Sherbert*, the legitimacy of this doctrine has increasingly come under attack, and the survival of the principle of free exercise exemptions is very much in doubt. Since 1972, the Court has rejected every claim for a free exercise exemption to come before it,[29] outside the narrow context of unemployment benefits governed strictly by *Sherbert*.[30] What once appeared to be a jurisprudence highly sympathetic to religious claims now appears virtually closed to them. Chief Justice Rehnquist and Justice Stevens have openly declared their opposition to the doctrine. Chief Justice Rehnquist has contended that when "a State has enacted a general statute, the purpose and effect of which is to advance the State's

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[25] For analysis of the "compelling governmental interest," see Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917 (1988); and McConnell & Posner, cited above in note 20, at 45–54.

[26] *See* Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514, 1517–18 (1989); Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981). For critical appraisals of the sincerity requirement, see Noonan, *How Sincere Do You Have To Be To Be Religious?*, 1988 U. ILL. L. REV. 713; and Marshall, *supra* note 17, at 27–30.

[27] *Frazee*, 109 S. Ct. at 1517 (quoting Thomas v. Review Bd., 450 U.S. at 713); *see also* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972) (exempting Amish children beyond the age of 16 from compulsory public school attendance on account of religious beliefs).

[28] *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981) (upholding a prison's refusal to provide a prisoner with a special diet on the ground that his belief system was not a religion); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (rejecting a free exercise claim for exemption from a prohibition on marijuana use on the ground that the defendant did not demonstrate that her beliefs supporting drug use were religious). The historical basis for this limitation is discussed at pp. 1488–1500 below.

[29] *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (rejecting the claim of Muslim prisoners seeking a change in work schedule to accommodate Friday worship services); Goldman v. Weinberger, 475 U.S. 503 (1986) (rejecting the claim of an Orthodox Jewish Air Force officer forbidden to wear a yarmulke while on duty and in uniform); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (requiring members of a religious organization opposed to receiving cash wages to submit to minimum wage regulation); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding a denial of religious school tax exempt status because of the university's religiously based rule against interracial dating and marriage); United States v. Lee, 455 U.S. 252 (1982) (requiring members of a self-supporting religious group to contribute to Social Security in violation of their religious tenets).

[30] The narrow holding of *Sherbert*, as it applies to unemployment benefits, has been repeatedly reaffirmed, most recently in the unanimous *Frazee* decision. In Hobbie v. Unemployment Compensation Appeals Commission, 480 U.S. 136 (1987), and Thomas v. Review Board, 450 U.S. 707 (1981), then-Justice Rehnquist was the sole dissenter.

Temple American Inn of Court - April 2016 Program - Research and Materials

secular goals, the Free Exercise Clause does not . . . require the State to conform that statute to the dictates of religious conscience of any group."[31] Justice Stevens has stated that there is "virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application."[32] Several leading scholars in the field have espoused a similar position.[33]

The debate over free exercise exemptions hinges on two different conceptions of the threat government poses to religious liberty. Under the no-exemptions view, the free exercise clause exists solely to prevent the government from singling out religious practice for peculiar disability. The evil to be prevented is, in Judge Bork's words, "laws that directly and intentionally penalize religious observance."[34] The remedy is to strike down the offending legislation and to treat religious institutions and practices the same way that comparable nonreligious institutions and practices are treated. Under the exemptions view, on the other hand, the free exercise clause protects religious practices against even the incidental or unintended effects of government action. The evil includes not only active hostility, but also majoritarian presuppositions, ignorance, and indifference. The remedy generally is to leave the government policy in place, but to carve out an exemption when the application of the policy impinges on religious practices without adequate justification.

Under both conceptions, it is unconstitutional for the government to inflict penalties on religious practices as such. For example, zoning ordinances disallowing churches while allowing meeting halls and other uses with comparable effects are unconstitutional,[35] as are "anticult" legislation,[36] laws barring clergy from public office,[37] and charitable solicitation regulations crafted to disadvantage a particular religious sect.[38] Under the no-exemptions view, however, religious believers and institutions cannot challenge facially neutral legislation, no matter what effect it may have on their ability or freedom to practice

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[31] Thomas v. Review Bd., 450 U.S. at 723 (Rehnquist, J., dissenting).

[32] United States v. Lee, 455 U.S. at 263 (Stevens, J., concurring).

[33] In addition to the sources cited in note 17 above, see P. KURLAND, RELIGION AND THE LAW (1962); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978); and Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373.

[34] Bork, *supra* note 21, at 84.

[35] *See* Hollingsworth v. State, 37 Tenn. 518 (1858); *cf.* Catholic Bishop v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939) (holding that a city may not zone out religious schools if it allows public schools).

[36] *See* Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J.L. & SOC. PROBS. 163, 201 n.258 (1982).

[37] *See* McDaniel v. Paty, 435 U.S. 618 (1978).

[38] *See* Larson v. Valente, 456 U.S. 228 (1982) (disallowing solicitation regulations under the establishment clause rather than the free exercise clause).

their religious faith. Thus, a requirement that all witnesses must testify to facts within their knowledge bearing on a criminal prosecution — the requirement at issue in *Philips* — if applied without exception, could abrogate the confidentiality of the confessional. Similarly, a general prohibition of alcohol consumption could make the Christian sacrament of communion illegal, uniform regulation of meat preparation could put kosher slaughterhouses out of business, and prohibitions of discrimination on the basis of sex or marital status could end the male celibate priesthood.

Both the exemption and no-exemption views can be expressed in terms of "neutrality" toward religion, but the way in which the two views define "neutrality" differs.[39] Under the no-exemption position, a law or government practice is "neutral" if it makes no reference to religion and has a secular justification unrelated to the suppression of religion. Under the exemption position, a law or governmental practice is not "neutral" if it embodies the majority's view on a contested question of religious significance to the minority, even if that question is of no religious significance to the majority.[40] For example, from the majority's perspective, a requirement that those seeking unemployment benefits be willing to work on Saturday seems secular and neutral. Only from the perspective of a sabbatarian do Saturday work environments have a religious dimension. Both the exemption and no-exemption views thus insist on neutral, "secular" laws and governmental practices, but the no-exemption view makes that judgment exclusively according to the perspective of the government, while the exemption view takes the perspective of the religious claimant, as well as the countervailing interests of the government, into account.

Likewise, these two interpretations agree that laws and governmental practices must be neutral *among* religions, but they differ about how this is to be accomplished. Under the no-exemption position, the best way to ensure equal treatment of all religions is to deny exemptions to all. The proponents of exemption, by contrast, observe that powerful and influential religions will usually receive adequate protection in the political arena.[41] One rarely sees laws that force main-

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[39] *See* Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DE PAUL L. REV. (forthcoming 1990).

[40] Here the term "majority" is used not in the technical sense of comprising over 50% of the population, but in the sense of prevailing in the political process, and the term "minority," in the sense of losing in the political process. Obviously, "majorities" in the technical sense sometimes lose, and "minorities" sometimes win.

[41] *See, e.g.*, Volstead Act, 41 Stat. 305, 308–39 (1919), *repealed by* U.S. CONST. amend. 21 (1933) (exempting sacramental wine from prohibition); Civil Rights Restoration Act, 20 U.S.C. § 1681(3) (1988) (exempting religious institutions); Nation's Capital Religious Liberty and Academic Freedom Act (Armstrong Amendment), Pub. L. No. 100-462, § 145, 102 Stat. 2269 (1988)

stream Protestants to violate their consciences. Judicially enforceable exemptions under the free exercise clause are therefore needed to ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions by the representative branches.

Opposition to free exercise exemptions arises from two jurisprudentially distinct positions. The first looks to the constitutionally required separation of powers and is grounded in a philosophy of judicial restraint. This objection holds that courts are not the proper institutions to craft exemptions from generally applicable statutes that have a secular purpose and lack an intent to suppress religious freedom. Any exemptions must be made by the legislature or by executive officials acting within their delegated authority. The opinions of Chief Justice Rehnquist exemplify this position on the modern Court. The second objection, most forcefully articulated on the modern Court by Justice Stevens, argues that whether made by courts or legislatures, exemptions directed to religion alone are generally unwarranted because determining the "sincerity" of religious claimants is dangerously intrusive, because granting exemptions for religious beliefs discriminates against secular beliefs, and because "special treatment" may give the appearance of aid to and endorsement of religion. While these two positions lead to virtually identical results in free exercise cases, they lead to opposite results in many cases involving the establishment clause, in which legislative exemptions and accommodations are at issue.[42]

As this Article went to press, a five-Justice majority abandoned the free exercise exemptions doctrine except in cases involving a free exercise claim "in conjunction with other constitutional protections."[43] The historical record casts doubt on this interpretation of the free exercise clause.

(exempting Georgetown University from a Washington D.C. law prohibiting discrimination on the basis of sexual preference).

[42] *See, e.g.*, Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989) (striking down a statute exempting religious magazines from sales tax) (Stevens, J., in the majority and Rehnquist, C.J., dissenting); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (striking down a statute providing Sabbath observers the right not to work on their chosen Sabbath in the private workplace) (Stevens, J., in the majority and Rehnquist, J., dissenting). Even Justice Stevens sometimes votes to uphold a legislative accommodation specifically tailored to religion. *See, e.g.*, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding a statutory exemption for religious organizations from the prohibition of employment discrimination on the basis of religion).

[43] Employment Div. v. Smith, No. 88-1213, slip op. at 8 (U.S. Apr. 17, 1990) (1990 U.S. LEXIS 2021, *16).

II. Free Exercise Before the Constitution

Although the free exercise and establishment clauses were proposed in 1789 and ratified in 1791, the American states had already experienced 150 years of a higher degree of religious diversity than had existed anywhere else in the world. They had, moreover, seen the results of religious conflict in England and of a variety of approaches to church-state relations in the colonies, ranging from near-theocracy to religious pluralism to state domination of the church. If the states can serve as "laboratories of democracy,"[44] the American colonies surely served as laboratories for the exploration of different approaches to religion and government. The free exercise clause cannot be understood or appreciated without knowing what happened before.

A. Four Approaches to Church-State Relations in the Colonies

The English legacy was not a happy one. During the early settlement of the colonies in the seventeenth century, England suffered from chronic religious strife and intolerance.[45] The Church of England was the established church of the realm, and both Roman Catholicism and extreme Protestantism (of which Puritanism was the most prominent element) were suppressed. After the deposition of Charles I in the English Civil War, the Protestant dissenters assumed power, and Parliament took it upon itself to rewrite the prayer book and confession of faith, dissolve the episcopal structure of the Church, and confiscate the property of the bishoprics. Parliament ostensibly guaranteed free exercise of religion to most Protestants but denied religious freedom to "papists, the adherents of prelacy and the advocates of 'blasphemous, licentious or profane' doctrines."[46] Baptist leaders were imprisoned, and ministers who insisted on frequent use of the prayer book were ejected from clerical office.[47]

Upon restoration of the monarchy in 1660, Parliament reconstituted the Church of England. Suspected of conspiring with France or Spain to the detriment of England's Protestant rulers, Catholics continued to be targets for hostile legislation, as much for political as for religious reasons. But Protestant dissenters' rights were limited as well. The Test Act of 1672,[48] for example, restricted public and military office to Anglicans. The Act also required officeholders to

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[44] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[45] For a discussion of religious strife in England during this period, see F. Makower, The Constitutional History and Constitution of the Church of England 68–95 (1895 and photo. reprint 1972).

[46] *Id.* at 86.

[47] *See id.* at 85–86.

[48] 1672, 25 Car. 2, ch. 2.

Temple American Inn of Court - April 2016 Program - Research and Materials

swear an oath in court denying transubstantiation and acknowledging the King's supremacy over the Church and to present proof that they had taken communion within the preceding year in accordance with the rites of the Church of England.[49] The Toleration Act of 1688[50] ended official persecution of Protestant dissenters but left the favored position of Anglicans unchanged. The anti-Catholic elements of the Test Act persisted throughout the eighteenth century.

The English religious policy did not automatically extend to the colonies, where four different approaches to church-state relations developed. The settlers of New England (outside of Rhode Island) were predominantly English Calvinists called "Puritans" or "Congregationalists." They moved to the wilderness of the New World in order to establish a Christian commonwealth where, for the first time in history, society would be directed by the revealed word of God. Both civil and church governance were established in accordance with their "congregational" understanding of church polity, under which each town would constitute a congregation and would select its own minister (within certain standards of education set by the General Court) and would maintain a minister and church through compulsory taxes. Authority in the system was decentralized and genuinely democratic, but the results were foreordained. The local churches were invariably of the Congregationalist persuasion. Nonetheless, ministers in the system were accorded a high degree of autonomy from civil control, and indeed frequently lectured colonial authorities on their civic and spiritual derelictions.[51]

Having carved their communities out of the rocky wilderness of a distant land, the Puritans of New England saw no reason to allow ungodly individuals to spoil their vision of a Christian commonwealth. This vision allowed no room for religious pluralism or even for toleration. "Polipiety [a variety of sects] is the greatest impiety in the world," according to a well-known tract by Nathaniel Ward.[52] The great preacher John Cotton declared that "it was Toleration that made the world anti-Christian."[53] Cotton reasoned:

> Fundamentals are so cleare, that a man cannot but be convinced in Conscience of the Truth of them after two or three Admonitions: and that therefore such a Person as still continues obstinate, is condemned of himselfe: and if he then be punished, He is not punished for his Conscience, but for sinning against his owne Conscience.[54]

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[49] *See id.*

[50] 1 W. & M., ch. 18.

[51] For a general discussion of church-state relations in New England during this period, see 1 W. McLoughlin, New England Dissent: 1630-1833, at 3–110 (1971).

[52] S. Cobb, *supra* note 17, at 68 (quoting N. Ward, The Simple Cobler of Aggawam in America (4th ed. 1647 and photo. reprint 1905)).

[53] *Id.*

[54] J. Cotton, The Bloudy Tenent Washed 9 (London 1647 & photo. reprint 1972).

Temple American Inn of Court - April 2016 Program - Research and Materials

Massachusetts, the most rigorous of the New England Congregationalist establishments, actively persecuted dissenters. Baptists were banished from the colony by statute in 1644,[55] and four Quakers, who insisted on returning after being expelled, were hanged.[56] Other dissenters were horsewhipped or jailed. By the 1680's, these violent measures came to an end, although the established church and the hostility to religious diversity continued in New England well into the nineteenth century.[57]

By contrast, in Virginia the Church of England was established by order of the Crown and maintained, in large part, as an instrument of social control by the governing authorities and the local gentry. The government financed and tightly controlled the Church. Although Virginia and New England both maintained religious establishments, the two systems were in a more profound sense opposites. The New England establishments arose from a grassroots movement born of the conviction that religious truth should control all of society, while the Virginia establishment was imposed from above and dedicated to governmental control over religion.

For the first century of its existence, the Virginia establishment required little overt coercion, for few dissenters ventured into the colony. Even so, ministers sent to serve the small Puritan community in Virginia were expelled, as was the Catholic Lord Baltimore.[58] As in Massachusetts, harsh measures, including banishment, were authorized against Quakers, but there is little evidence that they were put into effect.[59] In the eighteenth century, waves of newcomers, first Presbyterians but later Baptists and a few Quakers, entered the colony. The authorities blocked the Presbyterians' ability to preach at every turn, and the Baptists were "reviled" and "met with violence."[60] Baptists continued to be horsewhipped and jailed for their preaching until the Revolution. In the eighteenth century, Virginia was the most intolerant of the colonies.[61]

Cotton's position had roots in both the Catholic and Reformed traditions and can be traced to St. Augustine. *See, e.g.*, Letter from Augustine to Boniface, *The Correction of the Donatists* (A.D. 417), *excerpted in* J. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 19 (1987) (embracing the use of coercion against heretics and schismatics); *see also* D. RICHARDS, TOLERATION AND THE CONSTITUTION 87–88 (1986) (discussing St. Augustine's views regarding schismatic Christians and heretics).

[55] *See* T. CURRY, *supra* note 17, at 12–13.

[56] *See id.* at 22.

[57] *See id.* at 88.

[58] *See* S. COBB, *supra* note 17, at 82, 84–87.

[59] *See id.* at 89–90. *But cf. id.* at 91 (noting that some Quakers were arraigned and fined under Governor Berkeley).

[60] J. LEWIS, THE PURSUIT OF HAPPINESS: FAMILY AND VALUES IN JEFFERSON'S VIRGINIA 49 (1987). For a discussion of Presbyterian difficulties, see T. CURRY, *supra* note 17, at 99; for a discussion of Virginia's persecution of Baptists, see text accompanying note 152 below.

[61] *See* S. COBB, *supra* note 17, at 93, 111–14; T. CURRY, *supra* note 17, at 134–35; R. ISAAC,

Temple American Inn of Court - April 2016 Program - Research and Materials

In time, the Virginia system spread to Maryland and throughout the South, though with less violence toward dissenters. Georgia, the last colony to be settled, represents an interesting variation. The Trustees of the Georgia colony firmly supported the established Church of England. With the assistance of the Anglican-based Society for the Propagation of the Gospel, they financed and supervised ministers, built churches, and encouraged attendance and support for religion.[62] Unlike the Virginians, the Georgia Trustees demonstrated remarkable tolerance toward Protestant dissenters and even toward Jews. (Savannah contained a substantial Jewish community, which was allowed to worship in peace and participate in public affairs.) Catholics, however, were detested and excluded from the colony.[63]

The third approach to religious liberty might be described as benign neglect. In New York and New Jersey, a policy of de facto religious toleration evolved, largely due to the extraordinary religious diversity of the area. Although the four counties of metropolitan New York had a formally established church, and although there were periodic episodes when the royal governor attempted to enforce conformity to the Anglican Church, for the most part Protestants remained free to live and worship in these colonies as they chose, and Quakers and Jews were generally unmolested.[64]

The fourth approach to religious freedom in seventeenth-century America arose in those colonies that were established explicitly as havens for religious dissenters. There were four such foundings, each with a different religious cast. Maryland, the first haven for dissenters, was founded by a Catholic proprietor, George Calvert (the first Lord Baltimore), and his son, Cecil Calvert, to provide a place for English Catholics to escape the persecution they suffered in the mother country.[65] After 1689, however, the proprietor was removed and the Protestant majority in Maryland established the Church of England and initiated a program of discrimination and intolerance toward dissenters, particularly Roman Catholics. In the eighteenth century, Maryland rivaled Virginia for the narrowness and intolerance of its laws. Roger Williams, an extreme Protestant dissenter, founded Rhode Island as a refuge for those who could not endure the Massa-

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THE TRANSFORMATION OF VIRGINIA 148–54, 162–63, 175–77, 192–94, 198–203 (1982); H. MCILWAINE, THE STRUGGLE OF PROTESTANT DISSENTERS FOR RELIGIOUS TOLERATION IN VIRGINIA (Johns Hopkins Univ. Studies in Hist. and Pol. Sci., 12th Series, No. 4 April, 1894).

[62] *See* R. STRICKLAND, RELIGION AND STATE IN GEORGIA IN THE EIGHTEENTH CENTURY 44–92 (1939).

[63] *See id.* at 79–83.

[64] *See* S. COBB, *supra* note 17, at 301–62, 399–418; T. CURRY, *supra* note 17, at 62–73.

[65] *See* W. RUSSELL, MARYLAND: THE LAND OF SANCTUARY (2d ed. 1908); Lasson, *Free Exercise in the Free State: Maryland's Role in Religious Liberty and the First Amendment*, 31 J. CHURCH & ST. 419 (1989).

Temple American Inn of Court - April 2016 Program - Research and Materials

chusetts establishment.[66] William Penn founded Pennsylvania and Delaware as sanctuaries for Quakers.[67] Although each of these colonies was established for the benefit of a particular religious sect, all extended freedom of religion to groups beyond their own. Finally, Carolina was founded by a group of proprietors, with the assistance of John Locke, who followed Enlightenment principles of toleration.[68] Early in the eighteenth century, North and South Carolina abandoned these principles and instituted a rigid establishment of the Church of England along lines parallel to Virginia's.[69] It was in these colonies — Maryland, Rhode Island, Pennsylvania, Delaware, and Carolina — that the free exercise of religion emerged as an articulated legal principle.

The term "free exercise" first appeared in an American legal document in 1648, when Lord Baltimore required his new Protestant governor and councilors in Maryland to promise not to disturb Christians ("and in particular no Roman Catholic") in the "free exercise" of their religion.[70] The proprietor had previously attempted to attract settlers from Boston by a promise of "free liberty of religion," to which offer Massachusetts Governor John Winthrop responded that none "of our people . . . [had a] temptation that way."[71] In 1649, the Maryland Assembly passed a statute containing the first "free exercise" clause on the continent: "noe person . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled . . . for . . . his or her religion nor in the free exercise thereof . . . nor any way [be] compelled to the beliefe or exercise of any other Religion against his or her consent."[72]

Rhode Island's Charter of 1663[73] was the first to use the formulation "liberty of conscience." The founder, Roger Williams, was a man of extreme and idiosyncratic religious views who was banished from Puritan Massachusetts. Williams wrote frequently, eloquently, and vituperatively in defense of freedom of conscience.[74] With a few glaring exceptions (Rhode Island barred Jews from citizenship, a provision that was not abandoned until 1842,[75] and barred Catholics

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[66] *See* S. COBB, *supra* note 17, at 422–23.

[67] *See id.* at 440–41.

[68] *See id.* at 115–19.

[69] *See id.* at 124–26.

[70] W. RUSSELL, *supra* note 65, at 130.

[71] 2 J. WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630–1649, at 149 (1825 and photo. reprint 1972).

[72] Act Concerning Religion of 1649, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 49, 50 (P. Kurland & R. Lerner eds. 1987).

[73] R.I. CHARTER of 1663, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1595, 1596.

[74] His most prominent work, written in 1644, was R. WILLIAMS,THE BLOODY TENENT OF PERSECUTION, in 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1 (S. Caldwell ed. 1963).

[75] *See* M. BORDEN, JEWS, TURKS, AND INFIDELS 13 (1984).

Temple American Inn of Court - April 2016 Program - Research and Materials

from public office[76]), the colony lived up to its royal Charter of 1663 as a "livelie experiment . . . with a full libertie in religious concernements."[77] In 1641, the legislature ordered that "none be accounted a delinquent for doctrine, provided that it be not directly repugnant to the government or laws established."[78] This tends to support historian Thomas Curry's statement that "[t]he Rhode Island towns carefully reiterated that liberty of conscience did not exempt one from the civil law."[79] Later, the royal Charter of 1663 protected residents of the colony from being "in any wise molested, punished, disquieted, or called into question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony,"[80] and stated that they may "freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceblie and quietlie and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others."[81] In comparison with the earlier language, this provision implies that believers were not required to obey *all* "laws established," but only those directed to maintaining the "civill peace" and preventing licentiousness and profaneness, or the injury of others.

It is tempting to assume that other American colonies observed and eventually imitated the vision of Roger Williams and the Rhode Island "experiment," for the depth and breadth of the Rhode Island commitment to religious freedom were unparalleled until after the American Revolution.[82] The truth, however, is that Williams' writings were lost and forgotten until Massachusetts Baptist apologist and historian Isaac Backus rediscovered them in 1773.[83] In fact, far from being a positive example, Rhode Island was the pariah among the colonies, with a reputation for disorder and instability: "During and after the colonial period, Rhode Island, 'the licentious Republic' and

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[76] *See* T. CURRY, *supra* note 17, at 90.

[77] R.I. CHARTER of 1663, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1595, 1596.

[78] S. COBB, *supra* note 17, at 430.

[79] T. CURRY, *supra* note 17, at 20.

[80] R.I. CHARTER of 1663, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1595, 1596.

[81] *Id.*, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1597.

[82] For scholarly works taking this approach, see M. HOWE, THE GARDEN AND THE WILDERNESS (1965); P. MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION (1953); W. MILLER, cited above in note 17; and L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158–59 (2d ed. 1988).

[83] *See* T. CURRY, *supra* note 17, at 91; *see also* 1 W. MCLOUGHLIN, *supra* note 51, at 8 ("[A]lmost no one in colonial New England ever praised his experiment, sought his advice, quoted his books, or tried to imitate his practices.").

Temple American Inn of Court - April 2016 Program - Research and Materials

'sinke hole of New England,' was an example to be shunned."[84] It is unlikely that the Rhode Island provisions had much direct influence on subsequent developments of the free exercise principle.

The language of the Rhode Island Charter of 1663, however, had a second and third life elsewhere in the colonies. In 1664, the proprietors of Carolina issued an "Agreement" with prospective settlers, using words almost identical to the Rhode Island charter of the previous year,[85] and two of the Carolina proprietors also obtained the grant of New Jersey, where they promulgated an almost identical provision.[86] The language of the Rhode Island, Carolina, and New Jersey provisions represented the most common form of protection for religious freedom in the early colonies, although the provisions in other colonies were less expansive. The language did not survive in North Carolina, South Carolina, or New Jersey, as it was superseded by later (and more limited) religious freedom provisions. But the substance of these early provisions later re-emerged as the most common pattern in the constitutions adopted by the states after the Revolution.[87]

Three features of these early provisions warrant attention. First, the free exercise provisions expressly overrode any "Law, Statute or clause, usage or custom of this realm of England to the contrary."[88] Second, they extended to all "judgments and contiences in matters of religion";[89] they were not limited to opinion, speech and profession, or acts of worship. Third, they limited the free exercise of religion only as necessary for the prevention of "Lycentiousnesse" or the injury or "outward disturbance of others,"[90] rather than by reference to all generally applicable laws. As discussed more fully below, these fea-

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[84] 1 W. McLOUGHLIN, *supra* note 51, at 8. This illuminates the irony in the remark by Benjamin Huntington, Representative from Connecticut, during the debate over the religion clauses of the first amendment that "[b]y the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it." 1 ANNALS OF CONG. 758 (J. Gales ed. 1834) (Aug. 15, 1789). Huntington opposed the amendment.

Two printings exist of the first two volumes of the *Annals of Congress*. They contain different pagination, running heads, and back titles. The printing with the running head "History of Congress" conforms to the remaining volumes of the series, while the printing with the running head "Gales & Seaton's history of debates in Congress" is unique. *See* CHECKLIST OF UNITED STATES PUBLIC DOCUMENTS 1789–1909, at 1463 (3d ed. 1911). All page citations herein are to the latter printing. Readers with the "History of Congress" printing can most easily find parallel citations by referring to the date.

[85] *See* S. COBB, *supra* note 17, at 117.

[86] *See id.* at 400.

[87] For a discussion of the later constitutions, see pp. 1456–57 & note 242 below.

[88] S. COBB, *supra* note 17, at 117.

[89] *Id.*

[90] *Id.*

tures are consistent with the idea of free exercise exemptions and indicate the lengthy pedigree of modern exemptions under the free exercise clause of the United States Constitution.[91]

Under the second Charter of Carolina, issued in 1665,[92] the availability of free exercise exemptions was made yet more explicit. Recognizing that "it may happen that some of the people and inhabitants of the said province cannot, in their private opinions, conform" to the Church of England,[93] the charter authorized the proprietors "to give and grant unto such person and persons . . . such indulgences and dispensations, in that behalf" as they "shall, in their discretion, think fit and reasonable."[94] "Indulgences" and "dispensations" are technical legal terms, referring to the King's asserted power to exempt citizens from the enforcement of a law enacted by Parliament. Charles II and James II used these powers frequently to exempt Roman Catholics (and sometimes Protestant dissenters) from oppressive laws.[95] The proprietors used this authority, among other things, to exempt Quakers from the colony's oath requirements and to allow settlements made up of non-Anglicans to choose their own ministers.[96]

In 1669, the proprietors issued the Fundamental Constitutions,[97] though it was never fully put into effect.[98] The Fundamental Constitutions is of particular interest because John Locke, as principal adviser and assistant to Lord Ashley, the most active and influential of the Carolina colony proprietors, helped to draft it. Indeed, the published text was first printed from a copy in Locke's own handwriting and bears an obvious resemblance to Locke's theories of religious toleration.[99] The Fundamental Constitutions established the Church of England as "the only true and orthodox" church.[100] Nonetheless, persons of "different opinions concerning matters of religion," other than atheists, were welcomed into the colony.[101] In a remark-

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[91] *See infra* pp. 1461–64.

[92] *See* CAROLINA CHARTER of 1665, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1390.

[93] *Id.*, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1397.

[94] *Id.*, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1397.

[95] *See* J. KENYON, THE STUART CONSTITUTION: DOCUMENTS AND COMMENTARY 401–13 (1966); F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 302–06 (1968); 2 W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 581–84 (3d ed. 1887 & photo. reprint 1987). The English Bill of Rights of 1689 curtailed the royal power of dispensation. *See* Bill of Rights, 1689, 1 W. & M., ch. 2, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 1.

[96] *See* T. CURRY, *supra* note 17, at 56.

[97] *See* FUNDAMENTAL CONSTITUTIONS of 1669, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1397.

[98] *See* H. BOURNE, THE LIFE OF JOHN LOCKE 243–44 (1876 and photo. reprint 1969).

[99] *See id.* at 239 & n.1.

[100] FUNDAMENTAL CONSTITUTIONS of 1669, § 96, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1397, 1406.

[101] *Id.* § 97, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1406.

Temple American Inn of Court - April 2016 Program - Research and Materials

able display of broadmindedness for its day, the document specifically extended protection to "Jews, heathens, and other dissenters from the purity of Christian religion," as well as to the "natives of that place."[102] Even slaves were free to select "what church or profession any of them shall think best, and, therefore, be as fully members as any freeman."[103]

While the Fundamental Constitutions provided exceptionally broad freedom to choose among religions, there was no freedom of non-religion or of individualistic, non-institutionalized belief. Atheists were banned from the colony, and every person was required to be enrolled as a member of one (and only one) church. "[A]ny seven or more persons agreeing in any religion, shall constitute a church or profession"[104] and could worship without molestation, provided they adhered to three tenets:

> Ist. "That there is a God."
> II. "That God is publicly to be worshipped."
> III. "That it is lawful and the duty of every man, being thereunto called by those that govern, to bear witness to truth; and that every church or profession shall, in their terms of communion, set down the external way whereby they witness a truth as in the presence of God . . . ."[105]

Under this system, churches were required to register their membership with the authorities, and any religious assemblies that did not register would "not be esteemed as churches, but unlawful meetings, and be punished as other riots."[106] This system suggested a respect for the role of religion in supporting social stability, coupled with an indifference to the choice of religion that is made and a fear of secret religion and private faith. It had the strange effect of simultaneously denying ultimate authority over religious matters to the state, the church, and the individual. This corresponds to no popular conception of church-state relations and perhaps accounts for the system's failure of implementation.

In actual practice, the most influential examples of religious pluralism were the middle colonies, where no church was established (except in the four counties of metropolitan New York) and the widest

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[102] *Id.* § 97, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1406–07.

[103] *Id.* § 107, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1407.

[104] *Id.* § 97, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1406–07.

[105] *Id.* § 100, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1407.

[106] *Id.* § 108, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1407.

Temple American Inn of Court - April 2016 Program - Research and Materials

range of religious persuasions lived in relative harmony. William Penn's colonies were particularly associated with religious freedom and harmony because of Penn's widely read work, *The Great Case of Liberty of Conscience*, published in 1670.[107] Under his 1701 Charters of Privileges,[108] Pennsylvania and Delaware protected the religious profession of all theists (but confined public office to Christians). This example caught the eye of statesmen in other colonies, for Pennsylvania's promise of toleration contributed to the highest level of immigration of any of the colonies, and with immigration, prosperity. Madison later contrasted the religious repression of Virginia, which turned away useful settlers, with "[t]he allurements presented by other situations,"[109] probably referring to Pennsylvania.

B. *Locke and Theories of Religious Toleration*

These variations in the scope of free exercise in pre-revolutionary America paralleled an intense and controversial theoretical debate on the other side of the Atlantic regarding the proper relation between religion and the state. Most of the great political thinkers of the period — among them Hobbes, Bodin, Spinoza, Locke, Hume, Bayle, Voltaire, Montesquieu, Montaigne, Smith, and Burke — contributed to the subject and in some manner, however indirect, influenced the American solution to the problem.

This section concentrates on the thought of John Locke, both because his discussion of the religion question was most extensive and because his influence on the Americans and the first amendment was most direct. Jefferson carefully read and made notes on Locke's *The Reasonableness of Christianity*[110] and his *Letters on Religious Toleration*.[111] Major portions of Jefferson's Bill for Establishing Religious

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[107] *See* W. PENN, *The Great Case of Liberty of Conscience*, in 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 443 (London 1726 and photo. reprint 1974).

[108] *See* DEL. CHARTER of 1701, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 270; PA. CHARTER OF PRIVILEGES of 1701, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1536; *see also* S. COBB, *supra* note 17, at 440–53 (discussing the religious histories of colonial Pennsylvania and Delaware); T. CURRY, *supra* note 17, at 72–77, 159–62 (same); Gaustad, *Colonial Religion and Liberty of Conscience*, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY 35 (M. Peterson & R. Vaughan eds. 1988) [hereinafter VIRGINIA STATUTE FOR RELIGIOUS FREEDOM] (same).

[109] J. MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 188 (G. Hunt ed. 1901) [hereinafter J. MADISON, *Memorial and Remonstrance*]. *Memorial and Remonstrance* is also reprinted as an appendix to Justice Rutledge's dissenting opinion in Everson v. Board of Education, 330 U.S. 1, 28 app. at 63 (1947) (Rutledge, J., dissenting).

[110] J. LOCKE, THE REASONABLENESS OF CHRISTIANITY (I. Ramsey ed. 1958) (1st ed. 1695).

[111] The *Letters* are reprinted in 6 J. LOCKE, THE WORKS OF JOHN LOCKE (London 1823 and 1963 photo. reprint) [hereinafter WORKS OF LOCKE]. Jefferson's notes appear in T. JEFFERSON, *Notes on Locke and Shaftesbury*, in 1 THE PAPERS OF THOMAS JEFFERSON 544, 544–48, 549–51 (J. Boyd ed. 1950) [hereinafter PAPERS OF JEFFERSON].

Temple American Inn of Court - April 2016 Program - Research and Materials

Freedom[112] derived from passages in Locke's first *Letter Concerning Toleration.*[113] Jefferson's bill, in turn, was one of the major precursors of the religion clauses of the first amendment.[114] Four of the five states used language from Jefferson's bill in their proposals for a religion amendment.[115] Moreover, James Madison served as floor leader in the Virginia assembly in support of Jefferson's bill; only three years later, he would serve as draftsman and floor leader in the House of Representatives in support of the Bill of Rights. Locke's ideas also entered the American debate (though more selectively) through the writings of Massachusetts Baptist apologist Isaac Backus.[116] Locke's ideas, then, are an indispensable part of the intellectual backdrop for the framing of the free exercise clause.[117] The ways in which American advocates of religious freedom departed from Locke, however, are as significant as the ways in which they followed him.

John Locke was one of the earliest, and certainly one of the most influential, advocates of religious freedom on a theoretical ground. Writing in the aftermath of religious turmoil in England and throughout Europe, he viewed religious rivalry and intolerance as among the most important of political problems. Religious intolerance was inconsistent both with public peace and with good government. Locke's resolution of the problem involved two elements: a modification of the nature and claims of religion and an abandonment of the government's role in upholding religious truth. His teachings on religion, most prominently in *The Reasonableness of Christianity*, urged that Christianity be made more rational and tolerant but less engaged in questions of earthly significance. Thus, the dissension among Christian

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[112] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 77.

[113] *See* J. LOCKE, *A Letter Concerning Toleration*, in 6 WORKS OF LOCKE, *supra* note 111, at 1 [hereinafter J. LOCKE, *A Letter Concerning Toleration*]; Sandler, *Lockean Ideas in Thomas Jefferson's* Bill for Establishing Religious Freedom, 21 J. HIST. IDEAS 100 (1960); *see also* W. BERNS, *supra* note 13, at 18–24 (tracing the Lockean roots of Jefferson's insistence that principles of consent and free opinion require religious freedom); M. MALBIN, *supra* note 17, at 29 (noting and summarizing Jefferson's reliance upon the first *Letter Concerning Toleration* in drafting the Bill for Establishing Religious Freedom); Kessler, *Locke's Influence on Jefferson's "Bill for Establishing Religious Freedom,"* 25 J. CHURCH & ST. 231 (1983) (cataloging the similarities between Locke's *Letters* and Jefferson's bill).

[114] *See* Marty, *The Virginia Statute Two Hundred Years Later*, in VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, *supra* note 108, at 1, 10–11. *But cf.* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 16 (explaining the varieties of religious establishment and toleration in the colonies and illustrating the wide range of opinion and practice that lies behind the adoption of the religion clauses); P. KAUPER, RELIGION AND THE CONSTITUTION 48–50 (1964) (warning against too heavy a reliance on the views of Madison and Jefferson for interpretation of the first amendment).

[115] *See infra* TAN 359–362.

[116] *See* McLoughlin, *Introduction*, in I. BACKUS, ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 1, 40–44 (W. McLoughlin ed. 1968) [hereinafter CHURCH, STATE, AND CALVINISM].

[117] *See* D. RICHARDS, *supra* note 54, at 105–10.

Temple American Inn of Court - April 2016 Program - Research and Materials

denominations would be softened and would be less likely to create political problems.

Although his little-known earlier works, *Two Tracts on Government*,[118] advocated that government reduce religious turmoil by enforcing religious unity,[119] by 1689 Locke had concluded that such attempts were the source of the problem: "It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion."[120] Accordingly, Locke became an advocate of a sweeping toleration toward religious dissenters, with the exceptions of Catholics (because of their allegiance to a foreign prince), atheists (because they cannot be trusted to carry out their promises and oaths), and those who refuse to support tolerance for others.[121] "Nobody . . . [has] any just title to invade the civil rights and worldly goods of [another], upon pretence of religion," Locke stated. "Those that are of another opinion, would do well to consider with themselves how pernicious a seed of discord and war, how powerful a provocation to endless hatreds, rapines, and slaughters, they thereby furnish unto mankind."[122]

In Locke's view, religious strife stems from the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others' province: "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other."[123] The proper division between the realms of government and religion comes down to this: "all the power of civil government relates only to men's civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come,"[124] while "churches have [no] jurisdiction in worldly mat-

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[118] J. LOCKE, TWO TRACTS ON GOVERNMENT (P. Abrams ed. 1967). Not to be confused with his TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d ed. 1698), these essays were written by Locke in 1660, at the age of 30, but he did not publish them. Both *Tracts* are devoted to defending the power of the magistrate over religion.

[119] Locke's *Two Tracts on Government* resembled Thomas Hobbes' teaching that civil government should have complete authority over religion, extending not just to conduct but to religious profession and worship as well. *See* T. HOBBES, LEVIATHAN, pt. III, ch. 43, at 355 (M. Oakeshott ed. 1957) (1st ed. 1651). Hobbes denied any right to exemption from civil law on account of religious scruple, both because it would engender "confusion and civil war," *id.*, and because true Christianity required only two "virtues" for salvation: "*faith in Christ*, and *obedience to Laws*." *Id.* at 385 (emphasis in original).

[120] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 53.

[121] *See id.* at 46–47.

[122] *Id.* at 20.

[123] *Id.* at 9.

[124] *Id.* at 12–13.

ters."[125] Thus, Locke was concerned not only with limiting the powers of government, but also with limiting the purview of religion. "The end of a religious society," he wrote, "is the public worship of God, and by means thereof the acquisition of eternal life. All discipline ought therefore to tend to that end, and all ecclesiastical laws to be thereunto confined."[126]

To be sure, Locke's ideal of separation was less than complete, for he was willing to countenance governmental encouragement of the state religion. "[T]he magistrate may make use of arguments," wrote Locke, "and thereby draw the heterodox into the way of truth, and procure their salvation . . . . But it is one thing to persuade, another to command; one thing to press with arguments, another with penalties."[127] He also accepted government financial support of state religion and never condemned the English system of supporting the church with taxes; indeed, he served as secretary to the Lord Chancellor for the presentation of benefices — that is, the dispensing of religious patronage.[128] While Locke opposed what would be called interference with free exercise, he thus approved of what would be called an establishment under modern constitutional doctrine.

For the purposes of this Article, two aspects of Locke's teaching are particularly significant: his advocacy of legislative supremacy with respect to conflicts between public power and individual conscience and his rejection of religious exemptions. Although Locke's prescription for religious harmony depends upon the division between the religious and the secular jurisdictions, he anticipated that some matters, such as "[m]oral actions," belong "to the jurisdiction both of the . . . magistrate and conscience."[129] He recognized that this creates "great danger, lest one of these jurisdictions intrench upon the other."[130] As a practical matter, the possible overlap in jurisdiction did not greatly concern Locke, for "if government be faithfully administered, and the counsels of the magistrate be indeed directed to

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[125] *Id.* at 19.

[126] *Id.* at 15–16. This understanding has its modern echo in the claim that religion is a strictly "private" matter, which ought not be allowed to influence public decisions. An example of this position, though not using precisely the words in text, is Justice Stevens' opinion in Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), in which he argues that religiously based premises about the value of life form an illegitimate basis for legislation. *See id.* at 3082–85 (Stevens, J., concurring in part and dissenting in part). For a critique of this position, see K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 12 (1988), which concludes that it is appropriate for citizens and legislators to rely upon their religious convictions when "shared premises of justice and criteria for determining truth cannot resolve critical questions of fact"; and *Religion and the State*, 27 WM. & MARY L. REV. 833, 1011–1109 (1986).

[127] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 11.

[128] *See* 1 P. KING, THE LIFE OF JOHN LOCKE 62 (London 1830).

[129] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 41.

[130] *Id.*

Temple American Inn of Court - April 2016 Program - Research and Materials

the public good," it will "seldom happen" that the magistrate enjoins "'any thing by his authority, that appears unlawful to the conscience of a private person.'"[131] In theory, however, such clashes might occur; Locke proposed that under these circumstances the individual should disobey the law and accept punishment from the state. "[T]he private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."[132]

Locke gave a modicum of rhetorical support to the individual, exempting from this requirement of obedience those laws "not within the verge of the magistrate's authority."[133] But when the magistrate believes that a law is within his authority, and the individual believes the contrary, the magistrate prevails: "Who shall be judge between them? I answer, God alone; for there is no judge upon earth between the supreme magistrate and the people. . . . You will say then the magistrate being the stronger will have his will, and carry his point. Without doubt."[134] In other words, the *government's perception* of public need defines the boundaries of freedom of conscience. As Professor Walter Berns puts the point: "according to liberalism — one renders unto Caesar whatever Caesar demands and to God whatever

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[131] *Id.* at 43.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 44–45. This passage is similar to Locke's treatment of the wider theme of constitutional limits on government in *The Second Treatise of Government.* There, he posited that "the body of the people" are the "proper umpire" in cases of controversy over the powers of the government. *See* J. LOCKE, *The Second Treatise of Government* § 242, in TWO TREATISES OF GOVERNMENT, *supra* note 118, at 307, 476–77. But there is no lawful institution for vindication of the people's judgment. If the government does not honor the determination of the people on a contested point, "the appeal then lies nowhere but to heaven." *Id.* By this Locke meant revolution — a "state of war" between government and the people. The "supreme power" reverts to the people, who then have authority to "continue the legislative in themselves, or erect a new form, or under the old form place it in new hands, as they think good." *Id.* § 243, at 139. At a verbal level this "appeal to heaven" is the same remedy prescribed in *A Letter Concerning Toleration* for a violation of religious freedom, but with an important difference. In the case of religious freedom, Locke did not claim that the "body of the people" — or anyone else on earth — can serve as judge between the believer and the government. Perhaps this is because duties to God (unlike other constitutional limits) are not defined or governed by the social contract. Perhaps it is also because, as Madison perceived, the "body of the people" are as likely to violate the conscience of a religious minority as is the government. For this reason, the "appeal to heaven" is unlikely to take the form of revolution unless the believers whose rights are violated constitute a majority, or at least a powerful minority. In the context of religious freedom, therefore, Locke pointed to the otherworldly consequences of the appeal to heaven: "God, I say, is the only judge in this case, who will retribute unto every one at the last day according to his deserts . . . ." J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 44. No political institution, nor even the remedy of revolution available under Locke's political theories, can be expected to vindicate these rights if the magistrate chooses not to do so. Locke's language thus subtly suggests that religious freedom is fundamentally more vulnerable than other rights.

Caesar permits."[135] When individual conscience conflicts with the governmental policy, the government will always prevail and the individual will always be forced to submit or suffer the punishment.

This understanding of religious toleration expressly precludes free exercise exemptions. The rights of religious exercise, according to Locke, are simply rights of nondiscrimination. "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church. Whatsoever is permitted unto any of his subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses."[136] Locke gave the example of a sect that wishes to sacrifice a calf. "I deny that that ought to be prohibited by a law," he said.[137] Since individuals can lawfully kill a calf at home, and burn any part they see fit, they may do the same thing in a religious meeting.[138] They are not entitled, however, to dispensations or exceptions:

> [T]hose things that are prejudicial to the commonweal of a people in their ordinary use, and are therefore forbidden by laws, those things ought not to be permitted to churches in their sacred rites. Only the magistrate ought always to be very careful that he do not misuse his authority, to the oppression of any church, under pretence of public good.[139]

Accordingly, if the "interest of the commonwealth required all slaughter of beasts should be forborn for some while," the ritual slaughter of a calf for religious purposes may be forbidden as well.[140]

Locke's assertion of legislative supremacy and his opposition to special religious exemptions from generally applicable laws are consonant with arguments against free exercise exemptions. Unless there is reason to believe that the understanding of the free exercise clause held by the framers and ratifiers differed markedly from that of their intellectual forebear, Locke, *Sherbert* is historically unsupportable.[141] As the next section demonstrates, however, the movement towards a more expansive notion of religious liberty would gain momentum in the wake of the American Revolution and shape the framing of both state and federal constitutions.

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[135] W. BERNS, *supra* note 13, at 44.

[136] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 34.

[137] *Id.*

[138] *See id.*

[139] *Id.* at 34–35.

[140] *Id.* at 34.

[141] The arguments against free exercise exemptions offered by Berns and Michael Malbin are based almost exclusively on Locke and his Enlightenment counterparts in America. *See* W. BERNS, *supra* note 13; M. MALBIN, *supra* note 17.

C. Development of the Expansive Conception of Religious Freedom

1. Disestablishment in the States. — The American Revolution immediately disrupted the relationship between religion and government in those states with an Anglican establishment. The Church of England was discredited during the Revolution by its connection to the Crown and the loyalist sympathies of most of its clergy. Accordingly, the Georgia Constitution of 1777, the South Carolina Constitution of 1778, the North Carolina Constitution of 1776, and the New York Constitution of 1777 (with reference to the four metropolitan counties that had an Anglican establishment) eliminated the special preferences and state support that had been given to the Church of England. South Carolina "established" the Protestant religion but gave it no governmental support, while Georgia authorized the imposition of a tax for the support of the taxpayer's "own profession." New York and North Carolina joined the ranks of states (Pennsylvania, New Jersey, Delaware, and Rhode Island) with no establishment.[142]

Virginia and Maryland were slower to adjust. Virginia adopted a free exercise provision in its Bill of Rights of 1776[143] and exempted dissenters from payment of tithes to the Anglican Church; shortly thereafter, it temporarily suspended mandatory tithes for everyone. The Church was formally disestablished in 1785, after a major popular and legislative battle in which James Madison played the leading role.[144] The Maryland Declaration of Rights of 1776 authorized the legislature to "lay a general and equal tax, for the support of the Christian religion,"[145] but during a protracted dispute in the Assembly in the 1780's, supporters of an assessment were never able to prevail.[146] Nonetheless, the Maryland legislature exercised continuing control over church affairs. So subservient was the established Church that in 1783 its clergy asked the legislature for permission to make changes in the prayer book.[147] Accordingly, the Episcopal

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[142] *See* GA. CONST. of 1777, art. LVI, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 377, 383; N.Y. CONST of 1777, art. XXXV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1328, 1338; N.C. CONST. of 1776, art. XXXIV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1409, 1413–14; S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1620, 1626–27.

[143] *See* Va. Bill of Rights of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1908.

[144] *See* T. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787, at 155–64 (1977).

[145] Md. Declaration of Rights of 1776, art. XXXIII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 817, 819.

[146] *See* T. CURRY, *supra* note 17, at 154.

[147] *See id.* at 154–55.

Church of Maryland got the bitter of state meddling in church affairs without the sweet of regular state financial support.

The Congregational establishments of Connecticut, Massachusetts, New Hampshire, and Vermont were more firmly entrenched and emerged from the Revolution strengthened by their association with the patriot cause. In reference to the Massachusetts Congregationalists, John Adams observed that "[w]e might as soon expect a change in the solar system, as to expect that they would give up their establishment."[148] And indeed, by 1789 only these states maintained actual legal and financial support for the church. Outside of New England, only Maryland, South Carolina, and Georgia retained constitutional provisions permitting some form of establishment, and in none of these states did actual financial or other material support go into effect.

By 1834, no state in the Union would have an established church, and the tradition of separation between church and state would seem an ingrained and vital part of our constitutional system. But as the delegates gathered at the Constitutional Convention in Philadelphia in 1787 and at the meeting of the First Congress in New York in 1789, some form of establishment still held sway in most of New England, and the resolution of disestablishment controversies elsewhere could not be seen as assured.

2. *The Evangelical Impetus Toward Religious Freedom.* — The movement for freedom of religion in the 1780's was part of a broad reaction against the dominant but uninspired religious cultures represented by the Congregationalists of New England and the Anglicans of the South. It is a mistake to read the religion clauses under the now prevalent assumption that "the governing intellectual climate of the late eighteenth century was that of deism (or natural law)."[149] America was in the wake of a great religious revival. Historian Henry May has commented that the Enlightenment world view "excludes many, probably most, people who lived in America in the eighteenth and nineteenth centuries."[150] To determine the meaning of the religion clauses, it is necessary to see them through the eyes of their proponents, most of whom were members of the most fervent and evangelical denominations in the nation.[151]

One historian's portrait of Madison's neighbors, the Virginia Baptists, in the 1760's may help recreate the actual intellectual — more

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[148] 1 W. McLoughlin, *supra* note 51, at 560 (quoting Isaac Backus' account of his confrontation with the Massachusetts delegation).

[149] Marshall, *supra* note 17, at 18; *see also* W. Berns, *supra* note 13, at 1–2, 15–32 (same).

[150] H. May, The Enlightenment in America at xiv (1976).

[151] This point was first brought to the attention of legal scholars by M. Howe, cited above in note 82.

precisely, spiritual — climate among the proponents of religious freedom:

> Perhaps because they were at first largely lower class; perhaps because their worship sometimes caused their members to cry, bark like dogs, tremble, jerk, and fall to the ground; perhaps because they openly disdained the established religion and gentry mores; and perhaps because, as one Virginian charged, "they cannot meet a man on the road but they must ram a text of Scripture down his throat," the Baptists were reviled. They were seen as troublesome, and they were met with violence.[152]

It must have been particularly irksome to the gentry that the Baptists converted slaves in large numbers[153] and included them "as 'brothers' and 'sisters' in their close communities."[154] Even the Presbyterians, now pillars of mainstream Protestantism, were considered dangerously "enthusiastic" (meaning fanatical) by the authorities. Itinerant Presbyterian preachers in Virginia were said to "screw up the People to the greatest heights of religious Phrenzy, and then leave them in that wild state."[155]

The drive for religious freedom was part of this evangelistic movement. It is anachronistic to assume, based on modern patterns, that governmental aid to religion and suppression of heterodoxy were opposed by the more rationalistic and supported by the more intense religious believers of that era. The most intense religious sects opposed establishment on the ground that it injured religion and subjected it to the control of civil authorities. Guaranteed state support was thought to stifle religious enthusiasm and initiative. As Madison noted, the use of compulsory state taxes to support ministers would produce "pride and indolence in the Clergy; ignorance and servility in the laity."[156] Moreover, establishment served as an instrument for state control over religion. This was particularly true in the states of the Anglican establishment, including Virginia, where the governor, legislature, and gentry exercised direct authority over the established church and the power of licensing over preachers of dissenting denominations.[157] The establishment was localized and more democratic in

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[152] J. LEWIS, *supra* note 60, at 49. A similar, though more sympathetic, portrayal is found in R. ISAAC, cited above in note 61, at 164–68.

[153] *See* R. ISAAC, *supra* note 61, at 165–66.

[154] *Id.* at 171–72.

[155] *Id.* at 150; *see also* D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 135–36 (1958) (providing an unflattering portrayal of the "Enthusiastick Preachers" of New Light Presbyterianism).

[156] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 187. This argument is elaborated by Adam Smith in A. SMITH, THE WEALTH OF NATIONS, bk. 5, ch. 1, pt. 3, art. 3, at 740–66 (E. Cannan ed. 1937) (5th ed. 1789).

[157] *See, e.g.*, D. BOORSTIN, *supra* note 155, at 126–27, 129 (describing how, in the absence

New England, but even there, the government set standards for licensing ministers and regulated ministerial tenure (hence ministerial independence) and itinerancy.[158]

State financial support was inevitably linked to control. The Baptists' declaration against the Virginia assessment proposal observed:

> If, therefore, the State provide a Support for Preachers of the Gospel, and they receive it in Consideration of their Services, they must certainly when they Preach act as Officers of the State, and ought to be Accountable thereto for their Conduct, not only as Members of civil Society, but also *as Preachers*. The Consequence of this is, that those whom the State employs in its Service, it has a Right to *regulate* and *dictate to*; it may judge and determine *who* shall preach; *when* and *where* they shall preach; and *what* they must preach.[159]

The newer, more enthusiastic sects had the most to gain from breaking the monopoly of the old established church. This would allow new, often uneducated and itinerant preachers to conduct worship services and revival meetings and would make the financial support of a preacher dependent on the enthusiasm he generated among his adherents. The greatest support for disestablishment and free exercise therefore came from evangelical Protestant denominations, especially Baptists and Quakers, but also Presbyterians, Lutherans, and others.[160] The decisive political event in the Virginia disestablishment struggle was the decision of the Presbyterians to

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of a bishop in Virginia, the Anglican church was governed in temporal matters by the House of Burgesses and in other respects by the local gentry); S. COBB, *supra* note 17, at 97–98, 351–53 (giving examples of restrictive licensing of ministers in Virginia and New York); *id.* at 107 (recounting instances of investiture and defrocking of ministers by Virginia's governor); *id.* at 126 (discussing governmental control over ministers under North Carolina law); *id.* at 393–94 (illustrating control by the proprietor over investiture in Maryland); T. CURRY, *supra* note 17, at 99 (describing Virginia's prohibition of itinerant preaching); R. ISAAC, *supra* note 61, at 148–54 (recounting the struggle by Presbyterians in Virginia for permission to hold religious meetings); R. STRICKLAND, *supra* note 62, at 70, 83–87 (describing control by trustees over both the Church of England and Presbyterian ministries in Georgia).

[158] *See, e.g.*, S. COBB, *supra* note 17, at 174, 202–03 (providing examples of the Massachusetts General Court's power to regulate doctrinal purity and the qualifications of preachers); *id.* at 272–73 (recounting the adoption of laws against itinerant preaching in Connecticut); T. CURRY, *supra* note 17, at 99, 118 (discussing Connecticut laws against itinerant preaching); *id.* at 171 (discussing a Massachusetts law requiring ministers to possess degrees).

[159] Declaration of the Virginia Association of Baptists (Dec. 25, 1776), in 1 PAPERS OF JEFFERSON, *supra* note 111, at 660, 661 (emphasis in original).

[160] The small Jewish population of Philadelphia made its contribution to the struggle for free exercise with petitions against religious tests for office in Pennsylvania and at the federal level. *See, e.g.*, Petition of the Philadelphia Synagogue to Council of Censors of Pennsylvania (Dec. 23, 1783), *reprinted in* 4 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 635; Letter from Jonas Phillips to the President and Members of the Convention (Sept. 7, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78, 78–79 (M. Farrand ed. 1911 and photo. reprint 1966) [hereinafter FARRAND RECORDS].

Temple American Inn of Court - April 2016 Program - Research and Materials

desert the assessment cause and join the opposition.[161] Madison's *Memorial and Remonstrance Against Religious Assessments*, with its mixed religious and secular arguments against the relatively liberal form of establishment proposed for Virginia in 1785, garnered thousands of supportive signatures. Over twice as many Virginians, however, subscribed to petitions arguing against the assessment in frankly religious terms — stating, among other things, that the bill violated "the Spirit of the Gospel."[162]

Religious rationalists, who are often credited with the leading intellectual role in the movement for religious freedom, were far more likely than the enthusiastic believers to side with the established church (with notable exceptions such as Jefferson).[163] Ironically, it was the Unitarian wing of the Standing Order, Jefferson's favored theological position, that led the fight against disestablishment in Massachusetts,[164] while the "enthusiastic" Baptists sought to cast down all vestiges of the establishment. The established religions — the Congregational churches of New England and the Anglican churches of the South — tended to be far more intellectual, uninspired, and agreeable to rationalist sensibilities, in contrast to the disturbing enthusiasm of the upstart denominations.

The religious supporters of disestablishment and free exercise in the various states also supported adoption of constitutional protections at the federal level, for essentially the same reasons. They were joined in the latter cause by a heterogeneous coalition called the Antifederalists, who used the absence of a bill of rights as an argument against ratification of the Constitution. This was little more than a marriage

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[161] As the established church of Scotland, the Presbyterians had no doctrinal tradition of opposition to establishment. Their principal concern with the proposed assessment bill was that its provision for support of the clergy would undermine the control of the elders over the minister and the church. *See* T. BUCKLEY, *supra* note 144, at 92–96, 137–139. Shortly after the assessment controversy, the Presbyterians in the United States formally amended their Confession of Faith to renounce their prior support for establishment. *See* PRESBYTERIAN CHURCH (U.S.A.), "GOD ALONE IS LORD OF THE CONSCIENCE": POLICY STATEMENT AND RECOMMENDATIONS REGARDING RELIGIOUS LIBERTY 7, 69–70 (1988) [hereinafter PRESBYTERIAN POLICY STATEMENT].

[162] *See* T. BUCKLEY, *supra* note 144, at 148–50; T. CURRY, *supra* note 17, at 143–44.

[163] *See* T. CURRY, *supra* note 17, at 171 ("Religious rationalists in Massachusetts, such as Samuel West, Charles Chauncey, and other ministers who benefited from the state-supported religious system, remained its devoted upholders and insisted on its fairness."); *see also* D. BOORSTIN, *supra* note 155, at 132–39 (describing the undogmatic character of the Anglican Church of Virginia); R. ISAAC, *supra* note 61, at 120–21 (same); *id.* at 153 (reporting a sermon by an Anglican minister to the Virginia House of Burgesses that advocated "rational" religion and denounced the New Light evangelical movement); R. STRICKLAND, *supra* note 62, at 65 (describing a "typical eighteenth century Church of England man" in Georgia as "decrying Calvinism, 'enthusiasm' and the doctrines of regeneration").

[164] *See* McLoughlin, *Editor's Introduction* to I. BACKUS, *Government and Liberty Described*, in CHURCH, STATE, AND CALVINISM, *supra* note 116, at 345, 346.

Temple American Inn of Court - April 2016 Program - Research and Materials

of political convenience, for the advocates of religious freedom had little in common with the political principles of most Antifederalists. The Baptists of Virginia must have found it awkward to join forces with Patrick Henry, Virginia's leading Antifederalist, who had so recently championed the movement for religious assessments. Yet in the ratification convention in Virginia it was Henry who took up the issue of religious freedom and the absence of a Bill of Rights,[165] while Madison, the erstwhile supporter of religious freedom, urged ratification of the Constitution without amendment.[166]

The political theory of the advocates of free exercise sharply conflicted with the "republican" ideology that prevailed among most Antifederalists (as well as many Federalists).[167] The central preoccupation of republican political theory was the necessity of public "virtue." In its religious manifestation, this meant that government should support and encourage religion in order to promote public morality.[168] The Massachusetts Constitution of 1780, for example, justified its ministerial taxes on the ground that "the happiness of a people and the good order and preservation of civil government essentially depend on piety, religion, and morality."[169] The Virginia assessment proposal was defended on the same ground. A petition by citizens of Isle of Wight County, for example, stated: "being thoroughly convinced that the prosperity and happiness of this country essentially depends on the progress of religion, they . . . [pray] that an act may pass to compel every one to contribute something, in proportion to his property, to the support of religion."[170] The most famous statement of this sort was Washington's farewell address, in which he stated that "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion."[171]

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[165] *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 317–18 (J. Elliott 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (June 12, 1788).

[166] *See id.* at 330.

[167] For recent analyses of republican ideology, see M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 4–14 (1988); Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1986); and Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988).

[168] *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 426–29 (1969).

[169] Mass. Declaration of Rights of 1780, art. III, in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 957.

[170] Petition for General Assessment (Nov. 4, 1784), *reprinted in* C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 125, 125 (1900 and photo. reprint 1971).

[171] Washington, *Farewell Address* (Sept. 17, 1796), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 169, 173 (H. Commager 9th ed. 1973).

These arguments ran directly contrary to the position of the evangelical advocates of the religion clauses. To be sure, these advocates did not deny that religion is necessary to civil society. Isaac Backus, for example, affirmed that "religion is as necessary for the well-being of human society as salt is to preserve from putrefaction or as light is to direct our way and to guard against enemies, confusion, and misery."[172] But they did deny that governmental support is necessary, or even useful, to religion.[173] According to Elder John Leland, leader of the Virginia Baptists, "[i]t is error alone, that stands in need of government to support it; truth can and will do better without . . . it."[174] Moreover, the evangelicals found this very mode of argument objectionable, because it implied that religion was to be used as an instrument of statecraft, thus implicitly subordinating religion to the goal of "political prosperity." As Backus caustically observed of the Massachusetts establishment, "a little while ago" the establishment was "for religion," but now it is said to be "for the good of *civil society*."[175]

The paradox of the religious freedom debates of the late eighteenth century is that one side employed essentially secular arguments based on the needs of civil society for the support of religion, while the other side employed essentially religious arguments based on the primacy of duties to God over duties to the state in support of disestablishment and free exercise. It was Baptist preacher John Leland who first stated that "[t]he notion of a Christian commonwealth, should be exploded forever."[176]

Although the secular strain of republicanism was less an object of the evangelicals' polemics, it was no less inconsistent with their understanding of the proper role of the state. Civic republicanism sought to inculcate public virtue through various devices, including sumptuary laws, education, and participatory politics. To the evangelical advocates of religious freedom, this too was a vain extension of the governmental sphere; virtue is either impossible or incoherent when divorced from duty to God. Their position places the state in the precarious posture of depending upon autonomous institutions to preserve the moral conditions necessary to the survival of republican government.

Thus, the evangelical position ultimately coalesced with the secular liberal position, as against the dying tradition of civic republicanism.

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[172] I. BACKUS, *Policy, as Well as Honesty, Forbids the Use of Secular Force in Religious Affairs*, in CHURCH, STATE, AND CALVINISM, *supra* note 116, at 367, 371.

[173] *See supra* pp. 1438–40.

[174] J. LELAND, *The Virginia Chronicle*, in THE WRITINGS OF THE LATE ELDER JOHN LELAND 91, 118 (L. Greene ed. 1845) [hereinafter LELAND WRITINGS].

[175] I. BACKUS, *An Appeal to the Public for Religious Liberty*, in CHURCH, STATE, AND CALVINISM, *supra* note 116, at 303, 324 (emphasis in original).

[176] J. LELAND, *supra* note 174, at 107.

This explains why the more fervent evangelicals, including the Baptists, tended to become Jeffersonians, notwithstanding the deism of Jefferson and the piety of his opponents. Religion, the evangelicals believed, is vital to civic harmony. But voluntary religious societies — not the state — are the best and only legitimate institutions for the transmission of religious faith and, with it, virtue. The only support that churches can legitimately expect from the government, apart from equal participation in the benefits of civil society, is protection and noninterference.[177]

3. Advances Beyond Locke in the Popular Understanding of Religious Freedom. — The same evangelical forces converged in support of protections for religious liberty through free exercise provisions in state constitutions. It is no accident that Locke's vocabulary ("toleration of religion") was rejected in favor of more sweeping terms — not just the "exercise," but the "free exercise" of religion, or "full and equal rights of conscience." When George Mason proposed the term "toleration" for the religious liberty clause of the Virginia Bill of Rights,[178] Madison objected on the ground that the word "toleration" implies an act of legislative grace, which in Locke's understanding it was. Madison proposed, and the Virginia assembly adopted, the broader phrase: "the full and free exercise of [religion]."[179]

Madison was far from alone in his rejection of the concept of "toleration." Tench Coxe, a prominent essayist, stated that "[m]ere toleration is a doctrine exploded by our general constitution."[180] He said that the Americans had "substituted an unqualified admission and assertion, that their own modes of worship and of faith equally belong to all the worshippers of God, of whatever church, sect, or denomination."[181] George Washington, in his famous address to the Hebrew

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[177] *See* J. LELAND, *The Rights of Conscience Inalienable*, in LELAND WRITINGS, *supra* note 174, at 179, 184. Leland wrote:

> Let every man speak freely without fear, maintain the principles that he believes, worship according to his own faith, either one God, three Gods, no God, or twenty Gods; and let government protect him in so doing, i.e., see that he meets with no personal abuse, or loss of property, for his religious opinions.

Id. The Presbyterian Church formally adopted a similar position at its first General Assembly in 1788: "'We do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, at the same time be equal and common to all others.'" PRESBYTERIAN POLICY STATEMENT, *supra* note 161, at 7 (quoting the Presbyterian Principles of Church Order).

[178] *See* Hunt, *James Madison and Religious Liberty*, 1 ANN. REP. AM. HIST. A. 163, 166 (1901). Mason's proposal read in relevant part: "'that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society.'" *Id.*

[179] *Id.*

[180] Kurland, *supra* note 17, at 857 (quoting T. COXE, A VIEW OF THE UNITED STATES OF AMERICA 103–04 (Philadelphia 1794)).

[181] *Id.*

Temple American Inn of Court - April 2016 Program - Research and Materials

Congregation of Newport, Rhode Island, stated: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."[182] More pungently, Thomas Paine commented: "Toleration is not the *opposite* of intolerance, but is the *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it."[183] The United States, several millions of dissenters and a century of pluralism ahead of Locke's England, had advanced beyond mere toleration of religion.

There are two primary reasons to believe that the popular conception of free exercise on this side of the Atlantic was more expansive than Locke's doctrine of religious toleration: the advent of judicial review, and a difference in conception of the nature and role of religion.

(a) Judicial Review. — One reason that Locke's doctrines may have seemed so limited from an American perspective is that he did not envision an authority within the law that was capable of limiting the sovereign power of the "magistrate" (by which he meant the government, the King, and Parliament). "[T]here is no judge upon earth between the supreme magistrate and the people."[184] While Locke recognized the moral imperative to obey God instead of civil rulers,[185] his conception of political institutions did not include a mediator who could transform this moral, prepolitical right into positive law. In the absence of such a mediator, individual conscience could be compelled to yield to government in the event of a conflict. For Locke, the field left to untrammeled conscience could only extend to that in which the civil magistrate had no particular interest — principally, to things pertaining to the world to come. Religious liberty could only be defined negatively; any broader definition would be pointless, since the magistrate would be judge of his own powers.

Locke's key assumption of legislative supremacy no longer holds under a written constitution with judicial review. The revolutionary American contribution to political theory was that the people themselves are sovereign and therefore possess inherent power to limit the power of the magistrate, through a written constitution enforced by judges independent of the legislature and executive. As Madison would predict during deliberation over the Bill of Rights:

> If [the provisions of the Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves

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[182] 31 G. WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 93 n.65 (J. Fitzpatrick ed. 1939).

[183] T. PAINE, *The Rights of Man*, pt. 1, in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 243, 291 (P. Foner ed. 1945) (emphasis in original).

[184] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 44.

[185] *See id.* at 43–45.

> in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[186]

Once the courts are vested with the power to determine the proper boundary between individual conscience and the magistrate's authority, based on the words of a written charter derived from the people, fuller protection for conscience becomes conceivable. An independent judiciary could define religious liberty affirmatively, in terms of what religious liberty requires, and not merely what the legislature concedes. The modern "judicial restraint" position, that legislatures are entitled to make free exercise exemptions but courts are not, is a relic of Lockean legislative supremacy. Once the people empowered the courts to enforce the boundary between individual rights and the magistrate's power, they entrusted the courts with a responsibility that prior to 1789 had been exercised only by the legislature.

(b) The Nature and Role of Religion. — Those most engaged in the struggle for religious freedom guarantees in the United States also departed from Locke's understanding of the role of religion and the utility of religious liberty. While they put Locke's arguments to good effect in legitimating their position, the free exercise apologists used Locke opportunistically, ignoring implications of his argument that were inconvenient to their case. To Locke, religious divisions and discord presented a political problem; the solution was to keep the peace by making religion irrelevant to the things of this world — other than a reasonable, uncontroversial advocacy of good morals, which would be fully consistent with the public good, publicly defined.

This was not the religious enthusiasts' idea of religion and not their idea of religious liberty. To them, the church-state problem was principally a religious problem: the state too frequently used its power to prevent the practice and spread of the gospel. The Baptists languishing in the Culpepper jail and the Presbyterians fighting legislative interference with their form of church governance were not fearful of religion. They were fearful of government. To the evangelical spirit of the minority Protestant sects in America, Locke's conception of the separation between the secular and the religious would have seemed absurd. Does not the will of God govern all of life? Is He not sovereign over all? To the preachers who only recently had been among the leading advocates of revolution against the King, Locke's

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[186] 1 ANNALS OF CONG. 457 (J. Gales ed. 1834) (June 8, 1789). The evidence is overwhelming that the framers and ratifiers understood and intended the courts to engage in constitutional judicial review. For a brief summary, see D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 69–70 (1985).

Temple American Inn of Court - April 2016 Program - Research and Materials

claim that they should be "forbidden meddling with making or executing laws in their preaching"[187] must have seemed quaint, as well as presumptuous. If Locke and Jefferson wished to promote a peaceable, rational religion that minds its own business, is tolerant of others, and does not meddle in affairs of state,[188] their aspirations were diametrically opposed to those whose political efforts produced the first amendment.

These differing conceptions of the purposes of religious freedom have clear implications for the question of free exercise exemptions. From the religious perspective, the scope of free exercise cannot be defined, in the first instance, by asking what matters the public is rightly concerned about. Religion involves itself in many matters of importance to the public. Free exercise must be defined, in the first instance, by what matters God is concerned about, according to the conscientious belief of the individual.

In this respect, Madison's argument in the *Memorial and Remonstrance* echoed evangelical convictions about the roles of religion and civil government. His position that duty to God precedes the claims of civil society[189] strongly resembles the teachings of John Witherspoon, the nation's leading Presbyterian clergyman and President of the College of New Jersey (Princeton) while Madison was a student. In an address that Madison might have heard, Witherspoon observed:

> Another reason why the servants of God are represented as troublesome is, because they will not, and dare not comply with the sinful commandments of men. In matters merely civil, good men are the most regular citizens and the most obedient subjects. But, as they have a Master in heaven, no earthly power can constrain them to deny his name or desert his cause.[190]

The demands of civil society must be judged against the demands of God. That is why the "servants of God" seem "troublesome" and why a society that determines to respect the claims of conscience must recognize exemptions from its laws.

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[187] J. LOCKE, ESSAYS ON THE LAW OF NATURE 275 (W. von Leyden ed. 1954) (ca. 1660).

[188] Compare Jefferson's praise for the Virginia Methodists with his criticism of the Presbyterian clergy: "The Methodists are republican mostly, satisfied with their governmt. [,] medling with nothing but the concerns of their own calling and opposing nothing"; the Presbyterian clergy "are violent, ambitious of power, and intolerant in politics as in religion and want nothing but license from the laws to kindle again the fires of their leader John Knox, and to give us a 2d blast from his trumpet." Letter from Thomas Jefferson to Dr. Thomas Cooper (March 13, 1820), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 697, 697 (A. Koch & W. Peden eds. 1944) [hereinafter SELECTED WRITINGS OF JEFFERSON].

[189] See *infra* text accompanying notes 229–230.

[190] J. WITHERSPOON, *The Charge of Sedition and Faction Against Good Men, Especially Faithful Ministers, Considered and Accounted for*, in 2 THE WORKS OF THE REV. JOHN WITHERSPOON 415, 427 (Philadelphia 1802).

Temple American Inn of Court - April 2016 Program - Research and Materials

While the argument for exemptions tended to be oblique and by implication, opponents of free exercise automatically assumed that liberty of conscience must entail exemptions, and thus claimed that free exercise was tantamount to anarchy. Proponents of exemptions could have responded by denying any claim to exemptions and confining their opposition to discriminatory treatment. But this was not their approach. Proponents did attempt to minimize the practical consequences of the exemptions position by stoutly declaring their fealty to almost all of the laws. But they cleverly used ambiguous language to leave open the theoretical possibility that conscience would prevail over wrongful legislation.

The question of exemptions arose for the first time in the disputation between John Cotton and Roger Williams in the 1640's and 1650's.[191] Williams argued that the government has no authority to enforce the so-called "First Table" (the first four commandments, which deal with religious worship).[192] Cotton responded that this undermined the government's authority to enforce the "Second Table" (murder, theft, perjury, etc.), as well.[193] As Thomas Curry, author of the of the leading history of church-state conflicts in preconstitutional America, observes:

> This rebuttal to Williams derived its strength from its solid foundation in a very real problem, which Williams was unable to tackle and which still has not been solved: how to distinguish between those areas that belong only to religion or conscience and those that belong to the law. In other words, to what extent does a claim to the free exercise of religion exempt one from the laws of the land?[194]

If conscience must be respected, and if conscience can be defined in no way other than by the individual believer, then doesn't liberty of conscience give believers a license to violate laws vital to social order?

Williams never provided a direct response to this question. William Penn did. In *The Great Case of Liberty of Conscience*, Penn posed and answered a number of "objections" made by opponents of religious freedom. To objection number three, "[b]ut at this Rate ye may pretend to Cut our Throats, and do all Manner of Savage Acts,"[195] Penn responded:

> Though the Objection be frequent, yet it is as foully ridiculous[.] We are pleading only for such a *Liberty of Conscience*, as preserves the Nation in Peace, Trade, and Commerce; and would not exempt any

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[191] The exchange is summarized in T. CURRY, cited above in note 17, at 18.

[192] *See id.*

[193] *See id.*

[194] *Id.*

[195] W. PENN, *supra* note 107, at 457.

Temple American Inn of Court - April 2016 Program - Research and Materials

> Man, or Party of Men, from not keeping those excellent Laws, that tend to Sober, Just, and Industrious Living.[196]

This endorsement of certain "excellent laws" falls conspicuously short of a denial of exemption from *any* laws. Penn went on to deny that the Quakers had violated any laws, properly so called, even though "[i]f the enacting *any Thing* can make it lawful," it was true that the Quakers had violated the "law" against unlawful assemblies.[197] His position was that "law" in the true sense was confined to limited purposes, which could not conflict with Quaker practices. He argued that "the Words *Lawful* or *Unlawful*" must "bear their Signification from the Nature of the Things they stand for" rather than from mere enactment into statutes.[198]

A century later, John Leland, the leader of the Baptists in Virginia during the assessment controversy and the enactment of the first amendment, addressed the same question. Like Penn, he condemned in the strongest language the notion that liberty of conscience would justify crimes such as murder or tax evasion:

> Should a man refuse to pay his tribute for the support of government, or any wise disturb the peace and good order of the civil police, he should be punished according to his crime, let his religion be what it will; but when a man is a peacable subject of state, he should be protected in worshipping the Deity according to the dictates of his own conscience.[199]

But also like Penn, Leland made clear that this did not mean that believers could be required to obey *all* laws. "It is often the case," he wrote, "that laws are made which prevent the liberty of conscience; and because men cannot stretch their consciences like a nose of wax, these non-conformists are punished as vagrants that disturb the peace."[200] Unfortunately, Leland supplied no clear basis for distinguishing between the cases. "Let any man read the laws," he said, "and see who were the aggressors."[201] Instead, he seems to have assumed that the distinction would be readily apparent. When a believer's "practice is opposed to good law, he is to be punished,"[202] but when the law has invaded the province of conscience, punishment would be an aggression.

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[196] *Id.*

[197] *Id.* at 458.

[198] *Id.*

[199] J. LELAND, *The Yankee Spy*, in LELAND WRITINGS, *supra* note 174, at 213, 228.

[200] *Id.*

[201] *Id.*

[202] *Id.*; *see also* I. BACKUS, *supra* note 175, at 317 ("We view it to be our incumbent duty to render unto Caesar the things that are his but also that it is of as much importance not to render unto him anything that belongs only to God, who is to be obeyed rather than any man.").

Temple American Inn of Court - April 2016 Program - Research and Materials

Locke's position of no exemptions would have been an easier one to maintain, especially for the Baptists, whose religious practices did not conflict with any generally applicable secular laws. But the Baptists and other proponents of religious freedom in America did not adopt Locke's position, presumably because they insisted on defining liberty of conscience as adherence to the demands of God. This, then, is the key difference between the Lockean view and the popular American view: the former takes the perspective of government and the latter the perspective of the believer. It remains to be seen which of these perspectives dominated the legal arrangements for religious liberty in the years leading up to 1789.

4. The Views of the Framers. — The growing popular support for broad religious freedom within the newly formed American states helped to shape the views of the framers of the Constitution and the free exercise clause. Of particular interest are the contrasting positions of Jefferson and Madison regarding the religion issue, not only because they played the key roles in formulating the free exercise clauses of Virginia and the federal Constitution, but also because their differences illuminate the American evolution away from the narrower conception of religious liberty championed by Locke.

Like Locke, Jefferson favored a mild, tolerant, and rationalistic brand of religion.[203] Professor Sanford Kessler points out that "Jefferson's debt to Locke in theological matters was so great that in some instances he accepted Locke's interpretation of the gospels over what he believed to be the doctrines of Jesus himself."[204] As Locke advocated a watered-down and de-politicized Christianity in his *Reasonableness of Christianity*, so Jefferson took the more radical step of composing his own version of the gospels, excluding everything at variance with his understanding of science and natural morality.[205] Jefferson far surpassed Locke in his hostility to orthodox Christianity. Jefferson called Athanasius and Calvin — the pillars of Catholic and Reformed theology — "impious dogmatists" and "mere usurpers of the Christian name, teaching a counter-religion made up of the *deliria* of crazy imaginations."[206] He denied the divinity of Christ and the

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[203] *See* Kessler, *Jefferson's Rational Religion*, in THE CONSTITUTIONAL POLITY: ESSAYS ON THE FOUNDING PRINCIPLES OF AMERICAN POLITICS 58 (S. Pearson ed. 1983); Kessler, *supra* note 113; Little, *Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment*, 26 CATH. U.L. REV. 57, 58–64 (1976).

[204] Kessler, *supra* note 113, at 247–48 (footnotes omitted).

[205] *See* T. JEFFERSON, THE LIFE AND MORALS OF JESUS OF NAZARETH (Philadelphia 1804 and photo. reprint 1904). For example, Jefferson deleted from his narrative all of the miracles of Jesus reported in the New Testament.

[206] Letter from Thomas Jefferson to Dr. Benjamin Waterhouse (June 26, 1822), in 12 THE WORKS OF THOMAS JEFFERSON 241, 242 (P. Ford ed. 1905) [hereinafter WORKS OF JEFFERSON] (emphasis in original); *see also* Letter from Thomas Jefferson to John Adams (April 11, 1823), in SELECTED WRITINGS OF JEFFERSON, *supra* note 188, at 705–06 (calling Calvin "an atheist, . . . or rather his religion was daemonism").

authority of scripture,[207] condemned the Protestant doctrine that forgiveness of sins is achieved through repentance as opposed to good works,[208] and ridiculed Presbyterians, among others, for "fanaticism" in matters of religion.[209] He was equally contemptuous of Judaism, whose theology he called "degrading and injurious" and whose ethics he called "repulsive."[210]

Jefferson advocated religious freedom, in large part, as a means of combatting religious enthusiasm and advancing the day when all would become adherents of Unitarianism, his idea of a rational and sensible religion:

> I rejoice that in this blessed country of free inquiry and belief, which has surrendered its creed and conscience to neither kings nor priests, the genuine doctrine of one only God is reviving, and I trust that there is not a *young man* now living in the United States who will not die an Unitarian.[211]

This Lockean-Jeffersonian preference for rational over traditional religion continues to characterize one strain, perhaps the dominant strain, of American liberalism.[212]

In many respects, Jefferson advocated a fuller freedom of religion than Locke. Whereas Locke favored a single established church, Jefferson opposed any form of state-established church, even the broad multiple establishment proposed for Virginia. Unlike Locke, Jefferson

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[207] *See* Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in SELECTED WRITINGS OF JEFFERSON, *supra* note 188, at 429, 431–33; Letter from Thomas Jefferson to William Short (Aug. 4, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON 257, 261–62 (A. Lipscomb ed. 1903) [hereinafter WRITINGS OF JEFFERSON].

[208] *See* Letter from Thomas Jefferson to William Short (April 13, 1820), in 15 WRITINGS OF JEFFERSON, *supra* note 207, at 243, 244.

[209] Letter from Thomas Jefferson to Dr. Thomas Cooper (Nov. 2, 1822), in THOMAS JEFFERSON: WRITINGS 1463, 1464 (M. Peterson ed. 1984). Jefferson once wrote to John Adams: "If, by *religion*, we are to understand *Sectarian dogmas*, in which no two of them agree, then your exclamation on that hypothesis is just, 'that this would be the best of all possible worlds, if there were no religion in it.'" Letter from Thomas Jefferson to John Adams (May 5, 1817), in 2 THE ADAMS-JEFFERSON LETTERS 512, 512 (L. Cappon ed. 1959) (emphasis in original).

[210] *See* Letter from Thomas Jefferson to Dr. Benjamin Rush (April 21, 1803), in SELECTED WRITINGS OF JEFFERSON, *supra* note 188, at 566, 569 (enclosing Jefferson's Syllabus of an Estimate of the Merit of the Doctrines of Jesus, Compared with Those of Others); *see also* Letter from Thomas Jefferson to John Adams (Oct. 12, 1813), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 209, at 383, 383–84 (commenting on the "wretched depravity of sentiment and manners" which prevailed among the Jews, and which Jesus undertook to reform).

[211] Letter from Thomas Jefferson to Dr. Benjamin Waterhouse (June 26, 1822), *supra* note 206, at 243 (emphasis in original). To similar effect, see Letter from Thomas Jefferson to James Smith (Dec. 8, 1822), in SELECTED WRITINGS OF JEFFERSON, cited above in note 188, at 703; *cf.* Letter from Thomas Jefferson to John Adams (April 11, 1823), in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 209, at 591, 593–94 (rejecting the doctrine of a Holy Spirit separate from God).

[212] *See, e.g.*, J. DEWEY, A COMMON FAITH (1934).

would extend toleration to atheists and Catholics, though he appeared to agree that toleration should be denied those who would not tolerate others.[213] Unlike Locke, Jefferson would deny all power to the government to provide financial support for religious teaching, arguing that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[214] Finally, Jefferson departed from Locke's views by denying the authority of governmental officials to promote or encourage religion, even through persuasion.[215]

Jefferson's understanding of the scope and rationale of free exercise rights, however, was more limited even than Locke's. Like Locke, he based his advocacy of freedom of religion on the judgment that religion, properly confined, can do no harm: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[216] On this rationale, Jefferson espoused a strict distinction between belief, which should be protected from governmental control, and conduct, which should not. As he wrote in his famous "wall of separation" letter to the Danbury Baptist Association, "the legislative powers of government reach actions only, and not opinions . . . . [M]an . . . has no natural right in opposition to his social duties."[217] It was in reliance on Jefferson that the Supreme Court later held that there can be no free exercise right to exemption from a generally applicable law when such laws are directed at actions and not opinions.[218]

Jefferson's advocacy of a belief-action distinction placed him at least a century behind the argument for full freedom of religious exercise in America. William Penn wrote in 1670 that "by *Liberty of Conscience*, we understand not only a meer *Liberty of the Mind*, in believing or disbelieving . . . *but the exercise of ourselves in a visible way of worship*."[219] Historian Thomas Curry recounts the 1651 flogging of Obediah Holmes, a Baptist, for holding a religious meeting in Lynn, Massachusetts: "To the familiar argument that he was sentenced not for conscience but for practice, Clark replied that there could be

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[213] *See* T. JEFFERSON, *supra* note 111, at 550 n.2.

[214] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 77, 77.

[215] *See* Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808), in 11 WORKS OF JEFFERSON, *supra* note 206, at 7 (explaining his refusal to issue a presidential proclamation of a day of fasting and prayer).

[216] T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (W. Peden ed. 1955) (1st ed. 1787).

[217] Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1820), in 16 WRITINGS OF JEFFERSON, *supra* note 207, at 281, 281–82.

[218] *See* Reynolds v. United States, 98 U.S. 145, 164 (1878).

[219] W. PENN, *supra* note 107, at 447 (emphasis in original).

no such thing as freedom of conscience without freedom to act."[220] It is unlikely that many Americans would have disputed that position by 1789. St. George Tucker, no radical, wrote in 1803 that "[l]iberty of conscience in matters of religion consists in the absolute and unrestrained exercise of our religious opinions, *and duties*, in that mode which our own reason and conviction dictate."[221] Thus, while Jefferson was one of the most advanced advocates of disestablishment, his position on free exercise was extraordinarily restrictive for his day.[222]

Although often linked with Jefferson's "Enlightenment-deist-rationalist" stance toward religious freedom,[223] Madison's views on the religion-state question should be distinguished from those of his fellow Virginian, and hence from Locke.[224] To begin with, Madison possessed a far more sympathetic attitude toward religion than did Jefferson.[225] While Madison's religious convictions as an adult are unknown, as a young man he attended a Presbyterian college in New Jersey (Princeton) instead of pursuing the more natural course of study at the Anglican college, William and Mary, in his own state. Madison's correspondence with his close friend, William Bradford, suggests that the more evangelical Presbyterian teachings took hold, at least for a time; he urged Bradford to become a "fervent Advocate[] in the cause of Christ."[226] None of Madison's writings displayed the disdain Jefferson expressed for the more intense manifestations of religious spirit. Indeed, the sight of "5 or 6 well meaning men" — Baptist preachers imprisoned in Culpepper, Virginia "for publishing their religious Sentiments which in the main are very orthodox" — sparked his concern for religious freedom. The usually soft-spoken Madison described such persecution as a "diabolical Hell conceived principle,"

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[220] T. CURRY, *supra* note 17, at 15.

[221] ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 96, 97 (emphasis added).

[222] For this reason, Michael Malbin's argument against free exercise exemptions must be rejected. After noting that Jefferson opposed free exercise exemptions, Malbin contends that "whatever protection the free exercise clause might have meant to give to religion, it was not likely to have been greater than the protection Jefferson thought religion should be given." M. MALBIN, *supra* note 17, at 36.

[223] *See* D. RICHARDS, *supra* note 54, at 111–21, 147–48; Pepper, *supra* note 18, at 314. The Supreme Court has repeatedly linked Jefferson and Madison as if their thought were identical. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 214 (1963); McGowan v. Maryland, 366 U.S. 420, 465 (1961) (Frankfurter, J. concurring); Everson v. Board of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J. dissenting); Reynolds v. United States, 98 U.S. 145, 163–64 (1878).

[224] *See* Pepper, *supra* note 18, at 320–21. For a discussion of differences between Madison and Jefferson in other areas, see A. KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 43–46 (1950).

[225] *See* Ketcham, *James Madison and Religion: A New Hypothesis*, in JAMES MADISON ON RELIGIOUS LIBERTY 175 (R. Alley ed. 1985).

[226] Letter from James Madison to William Bradford (Sept. 25, 1773), in 1 THE PAPERS OF JAMES MADISON 95, 96 (R. Rutland & C. Hobson eds. 1977) [hereinafter MADISON PAPERS].

and stated that it "vexes me the most of any thing whatsoever."[227] He recounted that he had "squabbled and scolded abused and ridiculed so long about it, [to so lit]tle purpose that I am without common patience."[228] This formative experience exemplifies the marked difference between Madison and Jefferson in their attitudes towards religious liberty. In all Jefferson's writings about liberty of conscience, he never once showed concern for those who wish to practice an active faith; to Jefferson, unlike Madison, liberty of conscience meant largely freedom from sectarian religion, rather than freedom to practice religion in whatever form one chooses.

Consistent with this more affirmative stance toward religion, Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of society. In his *Memorial and Remonstrance*, he wrote:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.[229]

Moreover, Madison claimed that this duty to the Creator is "precedent both in order of time and degree of obligation, to the claims of Civil Society," and "therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society."[230]

This striking passage illuminates the radical foundations of Madison's writings on religious liberty. While it does not prove that Madison supported free exercise exemptions, it suggests an approach toward religious liberty consonant with them. If the scope of religious liberty is defined by religious duty (man must render to God "such homage . . . as he believes to be acceptable to him"), and if the claims of civil society are subordinate to the claims of religious freedom, it would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable. This is the central point on which Madison differs from Locke, Jefferson, and other Enlightenment advocates of religious freedom.[231]

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[227] Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 MADISON PAPERS, *supra* note 226, at 104, 106.

[228] *Id.*

[229] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 183, 184.

[230] *Id.* at 184–85.

[231] Walter Berns, an astute scholar of Locke and the liberal Enlightenment, argues against free exercise exemptions on Lockean grounds: "Congress does not have to grant an exemption to someone who follows the command of God rather than the command of the law because the Congress established by the Constitution denies . . . *that God issues any such commands.*" W. BERNS, *supra* note 13, at 48 (emphasis in original). "Liberalism," Professor Berns goes on to

Temple American Inn of Court - April 2016 Program - Research and Materials

Additional evidence supports the conclusion that Madison believed freedom of religion to include exemption from generally applicable laws in some circumstances. As discussed more fully below,[232] Madison supported a formulation of the Virginia Bill of Rights that allowed generous scope for free exercise exemptions and proposed an express religious exemption from military conscription for inclusion in the Bill of Rights.[233] These positions tend to confirm the "pro-exemptions" reading of the *Memorial and Remonstrance*.

Another passage in the *Memorial and Remonstrance* arguably contradicts such a reading. Virginia's proposed assessment bill made special provision for "Quakers and Menonists," who could use the funds appropriated from their members "in a manner which they shall think best calculated to promote their particular mode of worship," rather than being required, like other denominations, to use the money exclusively "for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship."[234] In response to this special provision, Madison commented:

> As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarantable? Can their piety alone be intrusted with the care of public worship? Ought their Religions to be endowed above all others, with extraordinary privileges, by which proselytes may be enticed from all others?[235]

This passage provides some support for the no-exemptions view, since it describes the "peculiar exemptions" in the bill as "extraordinary privileges" that violate the principle of religious equality. However, the meaning of the passage is ambiguous and must be weighed against evidence that Madison departed from the Lockean objection to exemptions. Instead of indicating a general objection to exemptions, the passage can be read as objecting only to the fact that the bill singled out two sects by name, giving them a preference over others that might have similar scruples. Alternatively, the quoted passage may

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say, "began in the effort to subordinate religious opinion to the law." *Id.* at 50. Professor Berns has no doubt correctly summarized Locke's position — and Jefferson's as well — but this position is at odds with Madison's. According to Madison, it is precisely because God *does* issue commands (though there will be disagreement over what they are) that the state must respect religious liberty, as a subordinate must respect the commands of a superior power.

[232] *See infra* pp. 1462–63.

[233] *See infra* text accompanying note 466.

[234] Va. House of Delegates, A Bill Establishing a Provision for Teachers of the Christian Religion (December 24, 1784), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 28 app. at 72 (1947) (Rutledge, J., dissenting).

[235] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 186.

mean no more than that one reason to reject establishments is that they generate a need for otherwise unnecessary exemptions. The passage therefore does not tell us whether Madison would oppose exemptions from legitimate secular legislation that create unavoidable conflicts with conscience.

No other political figure played so large a role in the enactment of the religion clauses as Jefferson and Madison.[236] To a large extent, Jefferson reflected the rationalist premises of Locke, and it is these premises that the modern courts and commentators have relied upon in arguing for a no-exemption interpretation of the free exercise clause. The evidence indicates, however, that Madison, with his more generous vision of religious liberty, more faithfully reflected the popular understanding of the free exercise provision that was to emerge both in state constitutions and the Bill of Rights.

D. Legal Protections After Independence

The Revolution inspired a wave of constitution-writing in the new states. Eleven of the thirteen states (plus Vermont) adopted new constitutions between 1776 and 1780. Of those eleven, six (plus Vermont) included an explicit bill of rights; three more states adopted a bill of rights between 1781 and 1790. With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789, although two states confined their protections to Christians and five other states confined their protections to theists.[237] There was no discernible difference between the free exercise provisions adopted by the states with an establishment and those without. The free exercise clauses of Massachusetts and New Hampshire were almost identical to those of

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[236] Fisher Ames of Massachusetts drafted the last version of the amendment to pass the House; his version was quite similar to the amendment that was ultimately ratified. His views, therefore, could be relevant. But Ames, who wrote numerous letters and essays on various issues of public importance, never made any reference in them to free exercise or to religious freedom. *See* F. AMES, WORKS OF FISHER AMES (S. Ames ed. 1854). His biographer does not even mention his authorship of the free exercise clause. *See* W. BERNHARD, FISHER AMES: FEDERALIST AND STATESMAN: 1758–1808 (1965). Nor do his opinions regarding religion seem noteworthy. He was a member of the majority denomination in his state, the Congregational Church, and left late in life to join the Episcopal Church, apparently because of political differences with the pastor. *See* W. BERNHARD, *supra*, at 330–31. Evidently, his role in drafting the free exercise clause was one of political peacemaker, rather than exponent of a particular vision of religious freedom.

[237] Maryland and Delaware explicitly limited their free exercise protections to Christians, although a related provision of the Delaware Declaration of Rights contains language that is not so confined. New Hampshire, Massachusetts, New Jersey, North Carolina, and Pennsylvania limited their free exercise protections to believers in God. New York, Georgia, Rhode Island, and South Carolina extended their protections to all religions. Virginia's Bill of Rights is ambiguous; it contains a theistic definition of religion but also contains language that may be broader in application. *See infra* pp. 1456–57 & note 242.

New Jersey, Pennsylvania, and Delaware. Freedom of religion was universally said to be an unalienable right; the status of other rights commonly found in state bills of rights, such as property or trial by jury, was more disputed and often considered derivative of civil society.[238]

These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term "free exercise of religion" meant what it had meant in their states. The wording of the state provisions thus casts light on the meaning of the first amendment.

New York's 1777 Constitution was typical:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[239]

Likewise, New Hampshire's provision stated:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace, or disturb others, in their religious worship.[240]

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[238] The New Hampshire Constitution of 1784 declared: "Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE." N.H. CONST. of 1784, pt. I, art. IV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1280, 1280–81. The Pennsylvania Constitution of 1790 listed both liberty of conscience and the rights of property and reputation as among the "inherent and indefeasible rights." PA. CONST. of 1790, art. IX, §§ 1, 3, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1548, 1554; *see also* 1 ANNALS OF CONG. 454 (J. Gales ed. 1834) (speech by James Madison, June 8, 1789) ("Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."); Madison, *Property*, National Gazette, Mar. 29, 1792, *reprinted in* 6 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 101, 101–03 (treating property as a right "dependent on positive law"). *See generally* M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 195–228 (1978) (discussing the distinction between unalienable and alienable rights, placing "the right to worship" in the former category, and recounting Jefferson's view that "property," an example from the latter category, should not be enumerated in the Declaration of Independence).

[239] N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1328, 1338.

[240] N.H. CONST. of 1784, pt. I, art. V, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1280, 1281.

As a final example, Georgia's religious liberty clause read: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State."[241] Other state provisions were similar.[242] In addition to these state provisions, article

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[241] GA. CONST. of 1777, art. LVI, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 377, 383.

[242] Together with the provisions quoted in the text, the following is a complete collection of state free exercise provisions at the time of the adoption of the first amendment.

The Delaware Declaration of Rights and Fundamental Rules of 1776 provided:

> 2. That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understandings; that no 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, and that no Authority can or ought to be vested in, or assumed by any Power whatever that shall in any Case interfere with, or in any Manner controul the Right of Conscience in the Free Exercise of Religious Worship.
>
> 3. That all Persons professing the Christian Religion ought forever to enjoy equal Rights and Privileges in this State, unless, under Colour of Religion, any Man disturb the Peace, the Happiness or Safety of Society.

Del. Declaration of Rights and Fundamental Rules of 1776, §§ 2, 3, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 70.

The Maryland Declaration of Rights of 1776 provided:

> That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights . . . .

Md. Declaration of Rights of 1776, art. XXXIII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 817, 819.

The Massachusetts Constitution of 1780 provided:

> It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.

MASS. CONST. of 1780, art. II, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 956, 957.

The New Jersey Constitution of 1776 provided: "That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor, under any pretence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment . . . ." N.J. CONST. of 1776, art. XVIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1310, 1313.

The North Carolina Constitution of 1776 provided: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." N.C. CONST. of 1776, art. XIX, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1409, 1410.

The Pennsylvania Constitution of 1776 provided:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that 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 ministry, contrary to, or against, his own free will and

I of the Northwest Ordinance of 1787, enacted contemporaneously with the drafting of the Constitution and re-enacted by the First Congress, provided: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory."[243]

While differing in their particulars, these constitutional provisions followed the model set by the early Rhode Island, Carolina, and New Jersey charters, both in the scope of the liberty and in its limitations. Each of these elements warrants attention.

1. Scope of the Liberty. — Each of the state constitutions first defined the scope of the free exercise right in terms of the conscience

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> consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

PA. CONST. of 1776, art. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1540, 1541.

The Charter of Rhode Island and Providence Plantations of 1663 provided:

> [N]oe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceblie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others; any lawe, statute, or clause, therein contayned, or to bee contayned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding.

R.I. CHARTER of 1663, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1595, 1596–97.

The South Carolina Constitution of 1790 provided:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind: *Provided*, That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

S.C. CONST. of 1790, art. VIII, § 1, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1628, 1632–33 (emphasis in original). The South Carolina Constitution of 1778 contained a much more limited religious freedom clause, similar to the Fundamental Constitutions of 1669. *See* S.C. CONST. of 1778, art. XXXVIII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1620, 1626–27. References in text are to the 1790 constitution unless otherwise specified.

The Virginia Bill of Rights of 1776 provided:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

Va. Bill of Rights of 1776, § 16, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1908, 1909.

[243] Northwest Territorial Ordinance of 1787, art. I, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 429, 431.

Temple American Inn of Court - April 2016 Program - Research and Materials

of the individual believer and the actions that flow from that conscience. None of the provisions confined the protection to beliefs and opinions, as did Jefferson, nor to expression of beliefs and opinions, as some recent scholars have suggested.[244] Indeed, the language appears to have been drafted precisely to refute those interpretations. Maryland, for example, prohibited punishment of any person "on account of his religious persuasion *or* profession, *or* for his religious practice."[245] Opinion, expression of opinion, and practice were all expressly protected. The key word "exercise," found in six of the constitutions, was defined in dictionaries of the day to mean "action."[246] Two of the other constitutions used terms as broad or broader — Maryland referred to religious "practice," Rhode Island to matters of "religious concernment."[247]

Nor did these constitutions follow Locke in defining the scope of free exercise negatively, as a sphere of otherworldly concern that does not affect the public interest. The free exercise provisions defined the free exercise right affirmatively, based on the scope of duties to God perceived by the believer. The New Hampshire formulation defined the believer's right by "the dictates of *his own* conscience, and reason";[248] it extended to all "matters of religious concernment," according to Rhode Island. These could, and often would, include matters of concern to the public. This is consistent with the proposition, reflected in Madison's *Memorial and Remonstrance*, that the right of free exercise precedes and is superior to the social contract.[249]

Although the free exercise right plainly extends to some forms of conduct, the scope of protected conduct in these clauses is less clear. The provisions fall into two categories. Four states — Virginia, Georgia, Maryland, and Rhode Island — protected all actions stemming from religious conviction, subject to certain limitations.[250] The Virginia Bill of Rights, the model for three of the state proposals for the first amendment and presumably the greatest influence on Madison, is especially clear on this point. It provides that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience" and defines "religion" as "the duty which we owe to our

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[244] *See* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

[245] Md. Declaration of Rights of 1776, art. XXXIII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 817, 819 (emphasis added).

[246] *See infra* text accompanying notes 407–409.

[247] *See* Md. Declaration of Rights of 1776, art. XXXIII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 817, 819; R.I. CHARTER of 1663, in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1595, 1596.

[248] N.H. CONST. of 1784, art. V, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1280, 1281 (emphasis added).

[249] *See supra* text accompanying notes 229–230.

[250] *See supra* text accompanying note 241 & note 242.

Creator, and the manner of discharging it."[251] In the biblical tradition, "duties" to God included actions, perhaps all of life, and not just speech and opinion. So according to Virginia, the right of free exercise extended to all of a believer's duties to God and included a choice of means as well as ends.

By contrast, eight states — New York, New Hampshire, Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, and South Carolina — plus the Northwest Ordinance, confined their protection of conduct to acts of "worship." The word "worship" usually signifies the rituals or ceremonial acts of religion, such as the administration of sacraments or the singing of hymns, and thus would indicate a more restrictive scope for the free exercise provisions.[252]

The limitation to "worship" was not carried over into the federal free exercise clause, which in this respect most closely resembles the Georgia provision.[253] No direct evidence suggests whether the adoption of the broader formulation was deliberate, but this seems consistent with the general theological currents of Protestant America, which were "low church" and anti-ritualistic. One of the main elements of the Great Awakening was the insistence that duties to God extend beyond the four walls of the church and the partaking of the sacraments. From the evangelical Protestant perspective, "worship" would not have been sharply distinguished from "the duty we owe to our Creator."[254] The ready availability of narrow models in the recently enacted Northwest Ordinance and the constitution of final drafter Fisher Ames' home state of Massachusetts makes it likely that the choice of broader language was deliberate. The federal free exercise

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[251] Va. Bill of Rights of 1776, § 16, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1908, 1909. The definition of "religion" resembles the one provided by James Buchanan in 1757: "Piety, godliness, the worship of God, and the practice of any duty in obedience to his commands." J. BUCHANAN, LINGUAE BRITANNICAE VERA PRONUNCIATIO (R. Alston ed. 1967) (London 1757). Under this definition, the exercise of "religion" would include both "worship" and "the practice of any duty" to God.

[252] Samuel Johnson's A DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia 1805) defines the verb "worship" as "[t]o adore; to honour or venerate with religious rites." *Id.* Other dictionaries of the day are less specific in the connection to religious ritual. *See* J. BUCHANAN, *supra* note 251 (defining "worship" as "[t]o adore or praise the Almighty"); N. WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 301 (New Haven 1807) (defining "worship" as "to adore, perform adoration"). The latter two definitions make no direct reference to religious ceremonials. Modern definitions, like Johnson's, are more specific. *Webster's Third New International Dictionary* defines "worship" as "the reverence or veneration tendered a divine being or supernatural power; *also*: an act, process, or instance of expressing such veneration by performing or taking part in religious exercises or ritual." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2637 (P. Gove ed. 1986) (emphasis in original).

[253] *See supra* text accompanying note 241.

[254] R. MEHL, THE SOCIOLOGY OF PROTESTANTISM 107–08 (J. Farley trans. 1970) (explaining that "worship" is understood as "[a]ll that one calls 'the Christian life,' with all its ethical components").

clause seems in every respect to have followed the most expansive models among the states.

Indeed, even in the states that apparently limited free exercise to acts of "worship," it is not clear that the limitation had any actual effect. In none of the state free exercise cases in the early years of the Republic did the lawyers argue or the courts hold that religiously motivated conduct was unprotected because it was not "worship." Since the scope and nature of religious duty was itself a contested issue among religions, it seems unlikely that the state provisions intended to interject a judicial discrimination among forms of religious practice, and especially unlikely that this interjection would favor ritual over pious conduct. Interestingly, Pennsylvania (a state whose substantial Quaker population had an interest in exemptions) revised its constitutional protection for liberty of conscience in 1790, removing the language that had limited it to acts of worship.[255] Kentucky borrowed this broader language for its first constitution in 1792.[256] This may suggest a movement toward broader protections, simultaneous with the ratification of the first amendment.

In any event, it would be difficult on this evidence to conclude that the framers of the free exercise clause intended it to be confined to acts of "worship." That would require the assumption that Fisher Ames and the First Congress accidentally failed to use familiar language that would have precisely expressed their meaning and adopted instead new language that went beyond their intentions. Either the broader meaning was intended, or no thought was given to the matter at all.

2. *Limits on the Liberty.* — The second common element in state free exercise provisions is that the provisions limit the right by particular, defined state interests. Nine of the states limited the free exercise right to actions that were "peaceable" or that would not disturb the "peace" or "safety" of the state.[257] Four of these also expressly disallowed acts of licentiousness or immorality;[258] two for-

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[255] The 1776 Declaration of Rights of the Inhabitants of the State of Pennsylvania states that "no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship." A Declaration of Rights of the Inhabitants of the State of Pennsylvania of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1541, 1541. The 1790 Pennsylvania Constitution states that "no human authority can, in any case whatever, control or interfere with the rights of conscience." PA. CONST. of 1790, art. IX, § 3, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1548, 1554.

[256] *See* KY. CONST. of 1792, art. XII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 647, 654.

[257] The nine states are New York, New Hampshire, Georgia, Delaware, Maryland, Massachusetts, New Jersey, Rhode Island, and South Carolina. *See supra* p. 1456 & note 242.

[258] The four states are New York, Maryland, Rhode Island, and South Carolina. *See supra* text accompanying note 239 & note 242.

bade acts that would interfere with the religious practices of others;[259] one forbade the "civil injury or outward disturbance of others";[260] one added acts contrary to "good order";[261] and one disallowed acts contrary to the "happiness," as well as the peace and safety, of society.[262]

These provisos are the most revealing and important feature of the state constitutions. They further confirm that the free exercise right was not understood to be confined to beliefs. Beliefs without more do not have the capacity to disturb the public peace and safety. As Virginia's Bill for Establishing Religious Freedom, drafted by Jefferson, stated, "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[263] If the basic right did not extend to "overt acts," the provisos would be unnecessary.

Moreover, the state provisions make sense only if free exercise envisions religiously compelled exemptions from at least some generally applicable laws. Since even according to the Lockean no-exemptions view, religious persons cannot be prohibited from engaging in otherwise legal activities, the provisos would only have effect if religiously motivated conduct violated the general laws in some way. The "peace and safety" clauses identify a narrower subcategory of the general laws; the free exercise provisions would exempt religiously motivated conduct from these laws up to the point that such conduct breached public peace or safety.

The language of these provisos cannot be dismissed as boilerplate, synonymous with "an assertion of interest on the part of the public." The debates surrounding the drafting of these provisos suggest that they served as independent criteria for evaluating assertions of legislative power. The debate over the free exercise provision of the Virginia Bill of Rights of 1776 most clearly demonstrates the understanding of the states that passed these provisos. George Mason, chief architect of the religious liberty clause of the Declaration, proposed "that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society."[264] Madison objected to the proposal on two grounds. First, he criticized the use of the word "toleration" for reasons already discussed.[265] He offered

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[259] The two states are New Hampshire and Massachusetts. *See supra* text accompanying note 240 & note 242.

[260] The state is Rhode Island. *See supra* note 242.

[261] The state is Maryland. *See id.*

[262] The state is Delaware. *See id.*

[263] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 77.

[264] S. COBB, *supra* note 17, at 491.

[265] *See id.* at 492.

a substitute that read that "all men are equally entitled to the full and free exercise of religion according to the dictates of conscience."[266] This change was accepted, with minor alteration. Second, Madison criticized the breadth of Mason's proposed state interest limitation. Madison proposed instead that free exercise be protected "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."[267] This is obviously a much narrower state interest exception than Mason's. While "peace" and "safety" refer to the fundamental peacekeeping functions of government, "happiness" is a term as compendious as all of public policy.[268] The "peace, happiness, or safety of society" is therefore a standard that would encompass virtually all legitimate forms of legislation. The "preservation of equal liberty" and "manifest endangerment of the existence of the State," on the other hand, is a standard that only the most critical acts of government can satisfy.

The Virginia legislature ultimately passed a religious liberty guarantee that did not spell out the nature of the state interest that could outweigh a free exercise claim. Apparently, the legislature could not decide between the Mason and Madison formulations and compromised through silence. It is fair to assume, however, that the state's interest must fall somewhere between "the peace, the happiness, or safety of society" — Mason's broad formulation — and "manifest danger" to the "preservation of equal liberty, and existence of the State" — Madison's more limited formulation. If so, Virginia was typical of its sister states. While none adopted a proviso as restrictive as Madison's, only one (Delaware) adopted a proviso as broad as Mason's. Almost all opted for the terms "peace" or "safety," presumably on the ground that "happiness" was too broad. In any event, the dispute between Madison and Mason would not have mattered if the proviso were of no legal significance, and the proviso would have been of no legal significance if the "full and free exercise of religion" did not include the right of exemption from generally applicable laws that conflict with religious conscience.

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[266] *Id.*

[267] *Id.* In a private letter many years later, Madison endorsed a different formulation under which religion is immune from governmental authority "in every case where it does not trespass on private rights or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 98, 100.

[268] Samuel Johnson's two-volume A DICTIONARY OF THE ENGLISH LANGUAGE (London 1755), chooses two of five exemplars of the use of the word "happiness" from political sources. It quotes Richard Hooker to the effect that: "*Happiness* is that estate whereby we attain, so far as possibly may be attained, the full possession of that which simply for itself is to be desired, and containeth in it after an eminent sort, the contentation of our desires, the highest degree of all our perfection." *Id.* It also quotes John Locke: "The various and contrary choices that men make in the world, argue that the same thing is not good to every man alike: this variety of pursuits shews, that every one does not place his *happiness* in the same thing." *Id.* (emphasis in original).

Temple American Inn of Court - April 2016 Program - Research and Materials

The wording of the state constitutions also provides some guidance regarding when the government's interest is sufficiently strong to override an admitted free exercise claim. The modern Supreme Court has stated only that the government's interest must be "compelling," "of the highest order," "overriding," or "unusually important."[269] These formulations are unnecessarily open-ended, leading to grudging and inconsistent results. The historical sources suggest that the government's interest can be more precisely delimited in a few specific areas, although other cases will remain difficult to resolve.[270]

The most common feature of the state provisions was the government's right to protect public peace and safety. As Madison expressed it late in life, the free exercise right should prevail "in every case where it does not trespass on private rights or the public peace."[271] This indicates that a believer has no license to invade the private rights of others or to disturb public peace and order, no matter how conscientious the belief or how trivial the private right on the other side. There is no free exercise right to kidnap another person for the purposes of proselytizing, or to trespass on private property — whether it be an abortion clinic or a defense contracting plant — to protest immoral activity. Conduct on public property must be peaceable and orderly, so that the rights of others are not disturbed.

Where the rights of others are not involved, however, the free exercise right prevails. The state constitutional provisions give no warrant to paternalistic legislation touching on religious concerns. They protect the "public" peace and safety but respect the right of the believer to weigh spiritual costs without governmental interference. Thus, some modern free exercise controversies, such as the refusal by Jehovah's Witnesses to receive blood transfusions[272] or the enforcement of minimum wage laws in a religious community,[273] should be easy to resolve and require no subjective judicial judgments about the importance of public policy. Moreover, the early free exercise clauses seem to allow churches and other religious institutions to define their own doctrine, membership, organization, and internal requirements

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[269] Goldman v. Weinberger, 475 U.S. 503, 529–30 (1986) (O'Connor, J., dissenting) (summarizing free exercise tests from earlier cases).

[270] For another discussion of governmental interest in light of the early state constitutions, see REPORT TO THE ATTORNEY GENERAL, cited above in note 17, at 61–68.

[271] Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 98, 100.

[272] *But see In re* President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

[273] *But see* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985). The author of this Article was the principal author of the Secretary's brief in that case but believes the position was wrong.

without state interference. As Jefferson wrote to the Reverend Samuel Miller, "the government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises."[274] That their internal practices may seem unjust or repugnant to the majority should be of no moment.[275] Only a handful of states allowed laws against "licentiousness" or immorality to override free exercise claims, and those provisions may well have referred to public displays of immoral behavior.

Obvious connections exist between the scope of the free exercise right defined by these provisions and the wider liberal political theory of which they are an expression. The central conception of liberalism, as summarized in the Declaration of Independence, is that government is instituted by the people in order to secure their rights to life, liberty, and the pursuit of happiness. Governmental powers are limited to those needed to secure these legitimate ends. In contrast to both ancient and modern non-liberal regimes, government is not charged with promotion of the good life for its citizens. Except as needed for mutual protection and a limited class of common interests, government must leave the definition of the good life to private institutions, of which family and church are the most conspicuous. Even in the absence of a free exercise clause, liberal theory would find the assertion of governmental power over religion illegitimate, except to the extent necessary for the protection of others.

To eighteenth-century evangelicals, this issue was posed in theological terms but the answer was much the same. God instituted government for the punishment of wrongdoing,[276] which they interpreted to mean injury to others.[277] While the evangelicals could not accede to the Lockean proposition that the reach of governmental authority is defined by the judgments of civil authorities, they found the liberal theory of government a way to reconcile their insistence on the primacy of conscience with their equal insistence on the divinely ordained authority of government. Thus, when describing the legiti-

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[274] Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808), in 11 WORKS OF JEFFERSON, *supra* note 206, at 7, 7.

[275] *But cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (finding no violation of the free exercise clause when the IRS refused to grant charitable status to a religious school due to its proscription of interracial dating).

[276] "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation." *Romans* 13:1–2.

[277] *See, e.g.*, J. LELAND, *supra* note 174, at 118 ("The legitimate powers of government extend only to punish men for working ill to their neighbors . . . ."); I. BACKUS, *supra* note 175, at 313–14 (interpreting *Romans* 13:1–10 as "clearly show[ing] that the crimes which fall within magistrates' jurisdiction to punish are only such as work ill to our neighbors," while "church government respects our behavior toward God as well as man").

mate reach of government, the evangelical writers sounded little different from the American followers of Locke.[278]

The "peace and safety" limitations of the state constitutions are therefore neither simple restatements of unbridled governmental supremacy in a clash with religious precepts, nor mere expedient exceptions to what would otherwise be unlimited rights of religiously motivated conduct. Both the affirmative free exercise protections and the peace and safety limitations follow logically from the liberal and evangelical theories of government, which reached similar conclusions from different premises about the origin and scope of legitimate government.

E. Actual Free Exercise Controversies

An examination of actual free exercise controversies in the preconstitutional period bears out these conclusions. To be sure, the issue of exemptions did not often arise.[279] The American colonies were peopled almost entirely by adherents of various strains of Protestant Christianity.[280] The Protestant moral code and mode of worship was, for the most part, harmonious with the mores of the larger society. Even denominations like the Quakers, whose theology and religious practice differed sharply from the others, entertained similar beliefs about public decorum.[281] Moreover, the governments of that era were far less intrusive than the governments of today. Thus, the occasions when religious conscience came into conflict with generally applicable secular legislation were few.

Nonetheless, the issue of exemptions did arise, primarily centered around three issues: oath requirements, military conscription, and religious assessments. The resolution of these conflicts suggests that exemptions were seen as a natural and legitimate response to the tension between law and religious convictions.

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[278] For example, compare the passages quoted in note 277 above with Jefferson's statement that "[t]he legitimate powers of government extend to such acts only as are injurious to others." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA, *supra* note 216, at 159.

[279] Professor Marshall relies heavily on this point in his attack on free exercise exemptions. *See* Marshall, *supra* note 17, at 19–20. But of course, few instances are not the same as no instances.

[280] For a discussion of the number of churches of each denomination at the end of the colonial period, see 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 273 & n.50 (1950). The largest groups, in order, were Congregationalists, Presbyterians, Baptists, and Anglicans. Out of 3,005 congregations, only 50 were Roman Catholic. *See id.* There were fewer than 2,000 Jews, concentrated in five cities — New York, Philadelphia, Newport, Charleston, and Savannah. *See* M. BORDEN, *supra* note 75, at 6.

[281] *See* T. CURRY, *supra* note 17, at 81. In the early days of the American colonies, the Quakers' behavior had been more unconventional. *See* W. RUSSELL, *supra* note 65, at 3 n.1 (describing offensive Quaker practices, including interrupting others' worship services and going naked in public in protest against cruelty and sinfulness).

1. Oaths. — By far the most common source of friction was the issue of oaths. The oath requirement was the principal means of ensuring honest testimony and of solemnizing obligations. At a time when perjury prosecutions were unusual, extratemporal sanctions for telling falsehoods or reneging on commitments were thought indispensable to civil society. Quakers and certain other Protestant sects, however, conscientiously refused to take oaths,[282] producing more serious consequences than it might at first seem. A regime requiring oaths prior to court testimony effectively precluded these groups from using the court system to protect themselves and left them vulnerable to their adversaries, "who could sue them for property and never doubt the result."[283] There are three possible responses. First, the government could eliminate the oath-taking requirement for everyone, making oath-taking purely voluntary. Second, the government could continue to insist on the oath requirement, making it impossible for dissenters to give evidence in court or participate in any civic activity involving an oath. Third, the government could continue the oath requirement for the majority, allowing those with religious scruples to comply by an alternative procedure. According to the no-exemption view, only the first two possibilities are available. But the first possibility is disruptive of the entire judicial system and the second is unnecessarily harsh to the dissenters.

The third alternative — to create a religious exception to the oath requirement — was in fact adopted in most of the colonies. As early as the seventeenth century the proprietors of the Carolina colony permitted Quakers to enter pledges in a book in lieu of swearing an oath. Similarly, New York passed a law in 1691 permitting Quakers to testify by affirmation in civil cases,[284] and in 1734 passed a law permitting Quakers to qualify for the vote by affirmation instead of oath.[285] Jews in Georgia received dispensation to omit the words "on the faith of a Christian" from the naturalization oath required in 1740.[286] In 1743, Massachusetts, one of the states with a strong established church tradition, substituted an affirmation requirement for "'Quakers [who] profess to be in their consciences scrupulous of

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[282] Their refusal to take oaths was based on *Matthew* 5:33–37:

> Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil.

Id.

[283] R. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 30 (1988).

[284] *See* T. CURRY, *supra* note 17, at 64.

[285] *See id.* at 71.

[286] *See* R. STRICKLAND, *supra* note 62, at 29.

taking oaths.'"[287] By 1789, virtually all of the states had enacted oath exemptions.[288]

2. *Military Conscription.* — The exemption issue also arose in connection with military conscription. Exemption from conscription provides a particularly telling example due to the entirely secular nature of conscription, its importance to preservation of the state in times of war, and the high costs the granting of exemptions imposes on others. Several denominations in colonial America, most prominently the Quakers and Mennonites, refused on religious grounds to bear arms. As early as 1670–80, Quakers in several states asserted that liberty of conscience exempted them from bearing arms. Rhode Island,[289] North Carolina,[290] and Maryland[291] granted the exemptions; New York refused.[292] It is presumably not coincidental that Rhode Island, North Carolina, and Maryland had explicit free exercise or liberty of conscience clauses in the seventeenth century, while New York did not.

In Georgia, the Moravians claimed a right to be exempt from military service during the troubles with Spanish Florida, and when they were denied, the entire Moravian community departed Georgia between 1737 and 1740 and moved to Pennsylvania.[293] Pennsylvania, where Quakers were most numerous and influential, went without a militia until 1755, when one was organized on a voluntary basis.[294] The issue arose in New York again in 1734, and again the Quakers were denied exemption from penalties imposed for refusal to train for military service.[295] The colony finally relented in 1755, provided the objector would pay a commutation fee or send a substitute.[296] Massachusetts and Virginia soon adopted similar policies.[297] New Hampshire exempted Quakers from conscription in 1759.[298] Later, the Continental Congress was to grant exemptions in these words:

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[287] T. CURRY, *supra* note 17, at 90 (citing 1 MASSACHUSETTS ACTS AND RESOLVES 305; and 2 *id.* at 494–95).

[288] *See* Adams & Emmerich, *supra* note 17, at 1631–32.

[289] *See* Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412–13 (1952). Roger Williams opposed militia exemptions. *See* Adams & Emmerich, *supra* note 17, at 1624, 1630.

[290] *See* T. CURRY, *supra* note 17, at 56.

[291] S. COBB, *supra* note 17, at 380 & n.2.

[292] *See* T. CURRY, *supra* note 17, at 63.

[293] *See* R. STRICKLAND, *supra* note 62, at 76–78.

[294] *See* Russell, *supra* note 289, at 413.

[295] *See* S. COBB, *supra* note 17, at 356.

[296] *See* Act of Feb. 19, 1755, *reprinted in* U.S. SELECTIVE SERVICE SYSTEM, 2 BACKGROUNDS OF SELECTIVE SERVICE: MILITARY OBLIGATION pt. 9, at 186, 203–04 (A. Vollmer ed. 1947) [hereinafter SELECTIVE SERVICE].

[297] *See* Act of Nov. 31, 1757, *reprinted in* SELECTIVE SERVICE, *supra* note 296, pt. 6, at 195, 195–97 (Massachusetts); Act of Nov. 1776, *reprinted in* SELECTIVE SERVICE, *supra* note 296, pt. 14, at 249, 249–53 (Virginia).

[298] An Act for the More Speedy Levying One Thousand or at Least Eight Hundred Men

Temple American Inn of Court - April 2016 Program - Research and Materials

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[299]

The language as well as the substance of this policy is particularly significant, since it recognizes the superior claim of religious "conscience" over civil obligation, even at a time of "universal calamity," and leaves the appropriate accommodation to the judgment of the religious objectors.

3. Religious Assessments. — A third example of a religious exception recognized under the preconstitutional free exercise provisions is found only in states with established churches. Such states often required the citizens to make payments for the support of ministers either of the established church or of their own denomination. Not uncommonly, however, these states accommodated the objection of members of sects conscientiously opposed to compelled tithes. For example, from 1727 on, Massachusetts and Connecticut exempted Baptists and Quakers from ministerial taxes. This exception was expressly, if grudgingly, made in recognition of the "alleged scruple of conscience" of these sects.[300] From 1692 on, New Hampshire exempted anyone who could prove in a contested proceeding that he was "conscientiously" of "a different persuasion," attended services of his own faith regularly ("constantly," in the words of the statute), and made financial contributions toward its support.[301] New Hampshire also exempted Quakers who served as constables from the duty of collecting the assessments from others.[302] Virginia exempted Huguenots in 1700, German Lutherans in 1730, and all dissenters from the Anglican Church in 1776.[303]

Inclusive of Officers to be Employd in His Majestys Service in the Current Year, 32 Geo. 2. Orig. Acts, vol. 4, p. 55; recorded Acts, vol. 2, p. 412; N.H. Province Laws 196, 198 (enacted Mar. 9, 1759).

[299] *See* Resolution of July 18, 1775, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 187, 189 (W. Ford ed. 1905 & photo. reprint 1968).

[300] *See* T. CURRY, *supra* note 17, at 89–90 (quoting 1 MASSACHUSETTS ACTS AND RESOLVES 305; 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, *supra* note 299, at 494–95). Cobb's account is slightly different from Curry's. *See* S. COBB, *supra* note 17, at 234–35. Cobb reports that in 1727, Massachusetts passed a law similar to one already existing in Connecticut, allowing Episcopalians to pay tithes to their own churches (instead of to the prevailing Congregational churches) and that Massachusetts extended this treatment to Quakers and Baptists in 1728. Massachusetts exempted Quakers from any religious assessment whatsoever in 1731, and "Anabaptists" in 1734. *See id.*

[301] *See* S. COBB, *supra* note 17, at 298–99.

[302] *See* An Act to Exempt Those People Called Quakers From Gathering the Rates for the Ministers of Other Perswations Within the Province of New Hampshire, 4 Geo. 2. Orig. Acts, vol. 2, p. 50; recorded Acts, vol. 1, p. 329; N.H. Province Laws 530 (enacted May 10, 1731).

[303] *See* S. COBB, *supra* note 17, at 98, 492.

Exemptions were a far from perfect solution to the assessment problem. Having obtained inclusion in the certificate system, the Baptists of Massachusetts eventually concluded that the system would not work. In 1773, the association of Baptist churches voted to urge their members to refuse to provide the certificates required for legal exemption.[304] Through civil disobedience, the Baptists resolved to pressure the legislature to abolish mandatory tithes altogether.

The Baptists' objections arose from both practice and principle. Administration of the certificate system was in the hands of local officials and local courts, who gave vent to the general hostility against the Baptists. Certificates were sometimes ignored[305] and more often rejected on technicalities.[306] In addition, popular opposition (amounting in some instances to violence) made the certificate system unworkable.[307] It became evident that exemptions would not be administered evenhandedly. Moreover, the Baptists objected to the requirement of certifying which "members" (itself a theologically loaded term) were "conscientiously" of the Baptist persuasion, a judgment they believed could only be made by God.[308] These objections foreshadow two critiques of modern free exercise exemptions: that their administration is implicitly biased in favor of familiar religions,[309] and that the "sincerity" requirement is an inappropriate governmental inquiry.[310] But in the case of religious assessments, these problems could be resolved by abolishing the system of ministerial taxes — a solution not always available for secular interferences with conscience.

It might be objected that the example of exemptions from religious assessments is inapt, because the generally applicable law is itself religious, not secular, and would be unconstitutional under the establishment clause today. This is a valid point, even though the assessment laws were most frequently defended in terms of the secular need to promote morality.[311] The decisive question, however, is whether the people at the time of adoption of the first amendment would likely have considered exemptions, whether legislative or judicial, an appropriate remedy when law and conscience conflict. Those states with

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[304] *See* 1 W. McLOUGHLIN, *supra* note 51, at 550–54.

[305] *See id.* at 548.

[306] *See id.* at 549 (describing a certificate deemed invalid because it was signed by two persons plus the Elder, rather than three); *id.* at 549–50 (discussing a certificate rejected because it did not state that the persons listed "belonged to" the church); *id.* at 547–48 (discussing a certificate rejected because "it did not state that the persons listed were 'conscientiously' of the Baptist persuasion").

[307] *See id.* at 550 (describing instances of mob action).

[308] *See* I. BACKUS, *supra* note 175, at 333.

[309] *See, e.g.*, Tushnet, *supra* note 33, at 381–83. The greater the variance between religious practices and the prevailing social norm, the greater will be the difficulty of accommodation.

[310] *See, e.g.*, Noonan, *supra* note 26, at 718–20.

[311] *See* T. CURRY, *supra* note 17, at 139–41.

Temple American Inn of Court - April 2016 Program - Research and Materials

established churches had free exercise provisions which were almost identical to the provisions in states without establishment; and the establishment states understood the principle of free exercise to entail exemption from religious assessments, solely for the benefit of those with religious scruples. If exemptions were a recognized form of free exercise protection in establishment states, they likely would also have been recognized in the others (although the occasions for exemptions would be less frequent). The fact that exemptions were also made available from military conscription laws (plainly secular) and from oath requirements (largely secular), as well as from other secular laws, supports the broader principle.

4. Other Religious Exemptions. — Other colonies and states responded to particular conflicts between religious convictions and generally applicable laws by exempting those faced with the conflict. The Trustees of Georgia, for example, allowed certain groups of Protestant refugees from the European Continent virtual rights of self-government, a form of wholesale exemption that enabled these dissenters from the Church of England to organize themselves in accordance with their own faith.[312] A group from Salzburg formed the town of Ebenezer, described by one historian as "a state within a state, a sort of theocracy under the direction of their ministers with daily conferences of the entire congregation in which God's guidance was invoked at the beginning and end."[313] In 1764, the colonial legislature of Rhode Island passed a statute waiving the laws governing marriage ceremonies for "any persons possessing [professing] the Jewish religion who may be joined in marriage, according to their own usages and rites."[314] In 1798, the state legislature exempted Jewish residents from the operation of state incest law, "within the degrees of affinity or consanguinity allowed by their religion."[315] This was important because Jewish law was understood to encourage the marriage between uncle and niece, a relationship illegal under Rhode Island law.

Similarly, both North Carolina[316] and Maryland[317] exempted Quakers from the requirement of removing their hats in court, which

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[312] *See* R. STRICKLAND, *supra* note 62, at 21–22, 71–76, 87. These groups were required to obey the colonial laws regarding military service, "property, place and good government," but were otherwise free to govern themselves. *Id.* at 72.

[313] *Id.*

[314] Hartogensis, *Rhode Island and Consanguineous Jewish Marriages*, 20 PUBLICATION AM. JEWISH HIST. SOC'Y 137, 144 (1911).

[315] An Act Regulating Marriage and Divorce, 1798 R.I. Pub. Laws § 7; *see also* Hartogensis, *supra* note 314, at 139–40 (discussing the Rhode Island law as an early example of religious exemptions in family law); Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 744 n.6 (1988) (same).

[316] *See* An Act to prescribe the affirmation of allegiance and fidelity to this state to be taken by the people called quakers, and for granting them certain indulgences therein mentioned, 1784 N.C. Laws ch. 209, at 488.

[317] *See* R. BRUGGER, *supra* note 283, at 29–30.

they considered a form of obeisance to secular authority forbidden by their religion. This exemption may seem trivial today,[318] but it was an issue of historical and emotional importance to the Quakers of that day. One of the most notorious courtroom cases of religious intolerance in England involved William Penn's refusal to remove his hat when he appeared in court to face an indictment for speaking to an unlawful assembly. Penn came to court bareheaded, but knowing his religious scruple, the judge ordered a court official to place a hat on his head. Penn then refused to remove the hat in respect to the court. Although acquitted on the charge on which he was tried, Penn was held in contempt and imprisoned for refusing to doff his hat.[319] This case became a *cause célèbre* in America, and the North Carolina and Maryland exemptions were no doubt passed as a result.[320]

The history of oath requirements, military conscription, religious assessments, and other sources of conflict between religious convictions and general legislation demonstrates that religion-specific exemptions were familiar and accepted means of accommodating these conflicts. Rather than make oaths, military service, and tithes voluntary for everyone, which would undercut important public programs and objectives, and rather than coerce the consciences of otherwise loyal and law-abiding citizens who were bound by religious duty not to comply, the colonies and states wrote special exemptions into their laws. Lest the exemptions be extended too broadly, they confined the exemptions to denominations or categories known or proven to be "conscientiously" opposed. This aspect of the historical practice parallels in its purposes the requirement of "sincerity" under current law,[321] although

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[318] Interestingly, the right to wear a hat has featured prominently in modern free exercise litigation. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (denying an Orthodox Jewish officer the right to wear a yarmulke with his military uniform); Cooper v. Eugene School Dist., 301 Or. 358, 723 P.2d 298 (1986) (upholding a revocation of tenure and teaching certificate when a Sikh teacher violated the dress statute by wearing a turban while teaching), *appeal dismissed*, 480 U.S. 942 (1987) (Brennan, Marshall, and O'Connor, JJ., dissenting).

[319] An excellent summary of the case may be found in I. BRANT, THE BILL OF RIGHTS 62–67 (1965).

[320] It is interesting that this subject came up for oblique discussion in the First Congress, during the debate over the Bill of Rights. Theodore Sedgwick of Massachusetts had ridiculed the Select Committee's list of freedoms to be protected, saying that "they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights." 1 ANNALS OF CONG. 759–60 (J. Gales ed. 1834) (Aug. 15, 1789). John Page of Virginia responded:

> The gentleman from Massachusetts . . . objects to the clause, because the right is of so trivial a nature. He supposes it no more essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions.

Id. at 760. This was an evident reference to Penn's case. *See* I. BRANT, *supra* note 319, at 53–55.

[321] *See supra* text accompanying notes 26–28.

the tendency to recognize only those beliefs that are a formal part of the religious dogma of the claimant's denomination has been superseded by a more individualistic view of religious conscience.[322]

An obvious objection to all these examples would be that they were initiated by the legislature. While these examples may refute the absolute no-exemption position, they are not inconsistent with the "judicial restraint" position. If, however, as seems to be the case, the exemptions were granted because legislatures believed the free exercise principle required them, it is reasonable to suppose that framers of constitutional free exercise provisions understood that similar applications of the principle would be made by the courts, once courts were entrusted with the responsibility of enforcing the mandates of free exercise.

III. The Federal Free Exercise Clause

A. The Constitution of 1787

The original Constitution drafted by the Convention in 1787 and ratified by the states in 1788 contained no provision protecting the general freedom of religion. It was not, however, entirely silent about religion. Two provisions of the Constitution reflect a spirit and purpose similar to that of the free exercise clause: the prohibition on religious tests for office in article VI,[323] and the allowance of affirmations in lieu of oaths in articles I, II, and VI.[324] Both provisions

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[322] *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514 (1989).

[323] Article VI provides: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, § 3. This provision was first proposed by Charles Pinckney of South Carolina as a freestanding amendment, *see* 2 1787: DRAFTING THE U.S. CONSTITUTION 1487 (W. Benton ed. 1986) [hereinafter DRAFTING THE CONSTITUTION], and 10 days later, as an amendment to the article on the oath of office, *see id.* at 1488. Debate was brief. Roger Sherman of Connecticut "thought it unnecessary, the prevailing liberality being a sufficient security against such tests," but Gouverneur Morris of Pennsylvania and Pinckney's second cousin, General Charles Cotesworth Pinckney, supported the motion, which passed unanimously. *See id.* at 1488–89; 2 FARRAND RECORDS, *supra* note 160, at 457, 460–61 (Journal, Aug. 30, 1787); *id.* at 461, 468 (Madison's notes, Aug. 30, 1787). Later, during the ratification debates, the provision generated some opposition from those who believed that atheists, "heathens," non-Christians, "Papists," or "Mahometans" should be excluded from office. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 165, at 119 (noting Col. Jones' opposition to the provision during the Massachusetts convention); 4 *id.* at 199 (noting Caldwell's argument against the provision during the North Carolina convention); *id.* at 215 (noting W. Lancaster's opposition during the North Carolina convention). On the importance of this provision, see C. ANTIEAU, A. DOWNEY & E. ROBERTS, cited above in note 16, at 92–110; and Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

[324] Article I requires that the Senate "shall be on Oath or Affirmation" when sitting for the trial of impeachments. U.S. CONST. art. I, § 3, cl. 6. As originally proposed by Gouverneur Morris and as reported by the Committee on Style, this provision required an oath. *See* 1

Temple American Inn of Court - April 2016 Program - Research and Materials

were designed to prevent restrictions hostile to particular religions and thus to make the government of the United States more religiously inclusive. Neither provision, however, used the device of a religion-specific exemption.

The framers' decision to ban religious tests was a dramatic departure from the prevailing practice in the states, eleven of which then banned non-Christians and at least four of which banned non-Protestants from office.[325] While innovative in practice, however, the provision was unexceptional in theory. From the outset, the prevention of persecution, penalties, or incapacities on account of religion has served as a common ground among all the various interpretations of religious liberty. Religious tests for office are classic examples of laws that single out particular religious beliefs for peculiar disability, and they would be unconstitutional under any intelligible construction of the religion clauses.[326] As Oliver Ellsworth of Connecticut, later Chief Justice of the United States, wrote during the ratification campaign:

> [T]he sole purpose and effect of [the ban on religious tests for office] is to exclude persecution, and to secure to you the important right of religious liberty . . . . In our country every man has a right to worship God in that way which is most agreeable to his own conscience. If he be a good and peaceable citizen, he is liable to no penalties or incapacities on account of his religious sentiments; or in other words, he is not subject to persecution.[327]

DRAFTING THE CONSTITUTION, *supra* note 323, at 640, 641. The words "or affirmation" were added on September 14, 1787, by unanimous vote of the Convention. *See id.* at 641.

Article II provides:

> Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

U.S. CONST. art. II, § 1, cl. 8. The allowance of an affirmation in lieu of an oath was part of the original provision as drafted by the Committee of Detail. *See* 2 DRAFTING THE CONSTITUTION, *supra* note 323, at 1488.

Article VI provides: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3. As originally proposed by the Committee of Detail, this provision required an oath. This appears to have been an oversight; the words "or affirmation" were added, apparently on the floor of the Convention, without separate vote. *See* 2 DRAFTING THE CONSTITUTION, *supra* note 323, at 1488.

[325] *See* Bradley, *supra* note 323, at 681–83. By this time, Virginia had eliminated religious tests. New York allowed Jews but banned Catholics; Maryland banned Jews but allowed Catholics. *See* M. BORDEN, *supra* note 75, at 13–14.

[326] *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (striking down Maryland's religious test under the first amendment). *But cf.* Davis v. Beason, 133 U.S. 333 (1890) (upholding an anti-Mormon oath requirement for voting).

[327] Ellsworth, *A Landholder VII*, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 448, 449 (J. Kaminski & G. Saladino eds. 1983) (originally published

Temple American Inn of Court - April 2016 Program - Research and Materials

The significance of the "oath or affirmation" provisions is more subtle. Oaths of office were serious matters, so serious that the President's oath of office is spelled out in the otherwise spare text of article II. Moreover, the 1787 Constitution requires that *state* as well as federal officers be "bound by Oath or Affirmation, to support this Constitution" — one of the few provisions of the Constitution directed at state officers. Yet the framers of the Constitution realized that several small religious sects, including the influential Quakers, refused to swear oaths, on authority of *Matthew* 5:33–37. Lest members of these sects be excluded from office, it was necessary to provide alternatives.

As has already been noted, this problem had arisen in most of the states in connection with the oaths required of witnesses in court, as well as with oaths of office.[328] The usual solution was to create an exemption only for those with the religious objection and to require all others to take the oath. The framers of the federal Constitution, however, did not follow this model; they allowed any person, whether "conscientiously scrupulous" or not, to promise by affirmation instead of oath. Perhaps this was an act of verbal economy. Perhaps it reflected a principled objection to exemptions limited to those of particular beliefs. In any event, the framers solved the oath problem without the need for a free exercise exemption.

The new Constitution made no other provision for religious differences. Indeed, it appears the subject did not come up, though Luther Martin (not always the most reliable of sources) stated that he was "positive" that "[a]n honorable member from South Carolina" made an "attempt to have a stipulation in favour of liberty of conscience, but in vain."[329] The prevailing view among the Federalists, the supporters of the new Constitution, was that additional guarantees of individual liberty were unnecessary. Explicit guarantees might even be counterproductive, since the express mention of some liberties might be taken to disparage the existence of other rights, which were

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in the *Connecticut Courant*, Dec. 17, 1787). Oddly, Ellsworth supported a strict religious test for office in his own state. *See* M. BORDEN, *supra* note 75, at 18.

[328] *See supra* pp. 1467–68.

[329] Martin, *Reply to The Landholder* (Mar. 19, 1788), *reprinted in* 3 FARRAND RECORDS, *supra* note 160, at 286, 290. Martin was probably recalling Charles Pinckney's several efforts to ban religious tests for office. A less likely possibility is that Martin recalled Pinckney's original draft of a constitution, which may have provided: "The Legislature of the United States shall pass no Law on the subject of Religion." *The Pinckney Plan*, *reprinted in* 3 FARRAND RECORDS, *supra* note 160, at 595, 599. This draft (if it existed) was never debated, and the Committee of Detail included no such provision in the drafts it presented to the Convention. *See* 3 FARRAND RECORDS, *supra* note 160, at 595. According to Farrand, "it is established beyond all doubt" that the draft containing this language was not at all similar to the original Pinckney plan. *See id.* at 603; Jameson, *Studies in the History of the Federal Convention of 1787*, 1 ANN. REP. AM. HIST. A. 89, 111–32 (1902).

adequately secured through the careful enumeration and delimitation of federal powers.[330]

Other participants in the debate were less trustful of the novel and distant federal government. Patrick Henry complained that a too-powerful federal government could override religious freedoms that had been hard won at the state level.[331] "Philadelphiensis," a Pennsylvania pamphleteer, objected to the transfer of control over military service to the federal government for fear that the Quakers would lose the exemptions from compulsory service they had won at the state level: "Their influence in the state of Pennsylvania is fully sufficient to save them from suffering very materially on this account; but in the great vortex of the whole continent it can have no weight."[332] The leader of the Virginia Baptists, John Leland, opposed ratification on the ground that religious freedom was "not sufficiently secured."[333] "[I]f Oppression dose not ensue," he wrote, "it will be owing to the Mildness of administration & not to any Constitutional defence."[334] In the Rhode Island town meetings of 1788–89, citizens spoke out against the lack of protection for liberty of conscience "and other fundamental liberties," and the state refused to ratify the Constitution until after the Bill of Rights had been proposed.[335] Others, perhaps more numerous, supported ratification but demanded amendments incorporating a bill of rights. These advocates were sufficiently persuasive (or sufficiently numerous) to extract the promise of a Bill of Rights as the price for ratification of the rest of the Constitution.

Perhaps the most significant political battleground for future development of a strong protection for religious freedom was in the foothills of Virginia, where the young James Madison, recently returned from the Constitutional Convention, was seeking a seat in the first House of Representatives. Like other proponents of the Consti-

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[330] *See, e.g.*, 1 ANNALS OF CONG. 456 (J. Gales ed. 1834) (statement of James Madison, June 8, 1789); THE FEDERALIST No. 84, at 510 (A. Hamilton) (C. Rossiter ed. 1961).

[331] *See* 3 ELLIOT'S DEBATES, *supra* note 165, at 317–18 (June 12, 1788).

[332] 3 THE COMPLETE ANTI-FEDERALIST § 3.9.12, at 107 (H. Storing ed. 1981). A similar argument was made by another pamphleteer nicknamed "An Old Whig." *See id.* § 3.3.29, at 36.

[333] 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 528 (U.S. Dep't of State ed. 1905) [hereinafter DOCUMENTARY HISTORY OF THE CONSTITUTION]. The Virginia Baptist Association voted unanimously to oppose ratification, a fact that several men quickly communicated to Madison, with the request that he take steps to mollify them. *See* R. SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 99 (Richmond 1810); Letter from James Madison, Sr., to James Madison (Jan. 30, 1788), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 105 n.1; Letter from Joseph Spencer to James Madison (Feb. 28, 1788), in 4 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra*, at 525.

[334] 4 DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 333, at 528.

[335] *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 16, at 152–53; F. BATES, RHODE ISLAND AND THE FORMATION OF THE UNION 165–76 (1898).

tution of 1787, Madison initially lacked enthusiasm for adding a Bill of Rights, though he came to recognize the need for one to assuage the demands of the Antifederalist opposition. In a letter to Washington, he called "several of" Virginia's proposed amendments "highly objectionable."[336] But when he initiated his candidacy for Congress, he discovered that his Baptist constituents were prepared to throw their support to his opponent, James Monroe. On advice of his political adviser, George Nicholas,[337] Madison contacted Baptist leaders and proclaimed his support for "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude."[338] He then championed a constitutional provision for religious liberty as a campaign issue.[339] The Baptist leaders responded by giving him their electoral support, which contributed to his narrow margin of victory. A letter to Madison contains an interesting eyewitness account of a gathering at the Blue Run Baptist Church, at which the minister, the Reverend George Eve, "took a very Spirited and decided Part in your favour" and "Spoke Long" on the subject of Madison's contributions to religious freedom.[340]

There were two strands to the Federalist argument against a free exercise amendment. First, under the Constitution, the new federal government was not given any powers to pass laws affecting religion. As Madison told the Virginia ratifying convention, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."[341] Proponents of a free exercise amendment understandably

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336 *See* Letter from James Madison to George Washington (June 27, 1788), in 11 MADISON PAPERS, *supra* note 226, at 182; *see also* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 271 (stating that Madison had never viewed the Bill of Rights "in an important light").

337 *See* Letter from George Nicholas to James Madison (Jan. 2, 1789), in 11 MADISON PAPERS, *supra* note 226, at 406.

338 Letter from James Madison to the Rev. George Eve (Jan. 2, 1789), in 11 MADISON PAPERS, *supra* note 226, at 404, 405; *see also* Letter from James Madison to Thomas M. Randolph (Jan. 13, 1789), in 11 MADISON PAPERS, *supra* note 226, at 415, 416.

339 *See* Letter from James Madison published in the Fredricksburg (Va.) Herald (Jan. 29, 1789), in 11 MADISON PAPERS, *supra* note 226, at 428 (promising to sponsor a constitutional amendment); Letter from James Madison to George Washington (Jan. 14, 1789), in 11 MADISON PAPERS, *supra* note 226, at 417 (describing his speeches and newspaper campaign to dispel a report that he opposed constitutional amendments); *see also* Letter from David Jameson, Jr., to James Madison, in 11 MADISON PAPERS, *supra* note 226, at 419 (Jan. 14, 1789) (thanking Madison for making an address in Culpepper County on the issue of amendments).

340 Letter from Benjamin Johnson to James Madison (Jan. 19, 1789), in 11 MADISON PAPERS, *supra* note 226, at 423, 424.

341 3 ELLIOT'S DEBATES, *supra* note 165, at 330 (June 12, 1788). James Iredell made a similar argument in the North Carolina ratifying convention. *See* 4 *id.* at 194 (July 30, 1788). Roger Sherman of Connecticut continued to make the argument in the First Congress in

rejected this argument. The federal government would exercise plenary regulatory authority in the territories,[342] the District of Columbia,[343] and the military.[344] Its powers of taxation,[345] spending,[346] immigration and naturalization,[347] copyright,[348] international trade,[349] bankruptcy,[350] and relations with Indian tribes[351] and foreign governments[352] could, with little imagination, be expected to affect the exercise of religion. The potential of the necessary and proper clause might be viewed — and was viewed, according to Madison — as the most threatening of all.[353] Thus, a federal government bent

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opposition to enactment of the religion clauses. *See* 1 ANNALS OF CONG. 757 (J. Gales ed. 1834) (statement of Roger Sherman, Aug. 15, 1789).

[342] *See* Reynolds v. United States, 98 U.S. 145 (1878) (upholding the petitioner's conviction under territorial legislation outlawing the Mormon practice of polygamy).

[343] *See* H. Rep., Returned Bill 21 (Feb. 23, 1811), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 99 (recording President Madison's veto of "An Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia," on the ground that Congress' authority over the District of Columbia should not be used to define the functions and governance of a church).

[344] *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an Air Force uniform regulation prohibiting the wearing of a yarmulke).

[345] *See* Hernandez v. Commissioner, 109 S. Ct. 2136 (1989) (rejecting a claim that disallowance of claimed charitable contributions violated the religion clauses).

[346] *See* Flast v. Cohen, 392 U.S. 83 (1968) (holding that federal taxpayers who alleged that the appropriation of federal funds to religious schools violated the establishment and free exercise clauses had standing to sue).

[347] *See* Girouard v. United States, 328 U.S. 61 (1946) (holding that the Nationality Act did not require Seventh-day Adventist aliens to swear to bear arms in defense of the country); United States v. Aguilar, 871 F.2d 1436 (9th Cir. 1989) (sustaining the conviction of defendants engaged in a sanctuary movement who challenged enforcement of immigration laws as violative of their free exercise rights).

[348] *See* United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152 (D.C. Cir. 1987) (holding that congressional extension of the Christian Science Church's copyright on all Christian Science scripture unconstitutionally contravened the first amendment rights of a dissident group that wished to publish a variant).

[349] *See* 19 U.S.C. § 1202, sch. 8, pt. 4, ¶ 850 (1988) (exempting certain religious artifacts from import duties).

[350] *See In re* Reynolds, 83 Bankr. 684 (W.D. Mo. 1988) (regulating the religious contributions of a debtor in bankruptcy).

[351] *See* Quick Bear v. Leupp, 210 U.S. 50 (1908) (maintaining that prohibiting the exercise of Indian treaty power to appropriate tribal and trust funds for sectarian education would deny an Indian's free exercise of religion).

[352] *See* Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir.) (upholding denial of standing to a group raising an establishment clause challenge to the appointment of an ambassador to the Vatican), *cert. denied*, 479 U.S. 914 (1986).

[353] *See* 1 ANNALS OF CONG. 758 (J. Gales ed. 1834) (speech by James Madison, Aug. 15, 1789). Madison observed:

> [S]ome of the State Conventions . . . seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion.

Id.

on religious oppression could accomplish such oppression under pretext of one of the enumerated powers. Moreover, the argument that the lack of enumerated power could serve as a sufficient assurance of religious liberty offered no comfort to those who understood free exercise of religion to entail exemption from otherwise legitimate general legislation. Such legislation is by definition within the enumerated powers of the federal government.

The second strand of the Federalist argument was more persuasive. The Federalists argued that the structure of government, combined with the multiplicity of religious sects, would provide an effective guarantee against religious oppression. Madison's defense of the Constitution in the Virginia convention typified this position:

> Religion is not guarded; there is no bill of rights declaring that religion should be secure . . . . Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.[354]

This argument exactly parallels Madison's famous defense of the Constitutional structure in *Federalist* No. 51. There he says that the "security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[355] The best cure for factional oppression is a large republic with many conflicting factions and a representative government with checks and balances.[356]

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[354] 3 ELLIOT'S DEBATES, *supra* note 165, at 330 (June 12, 1788).

[355] THE FEDERALIST No. 51, at 324 (J. Madison) (C. Rossiter ed. 1961). *See also id.* No. 10, at 79 (J. Madison) (citing "[a] zeal for different opinions concerning religion" as his first example of a "faction").

[356] Madison's theory of religious faction was no doubt a product of his experiences during the assessment controversy in Virginia, where the two largest denominations — Anglican and Presbyterian — were played off against one another. It also had roots in European thought. Madison was fond of quoting Voltaire that "'[i]f one religion only were allowed in England, . . . the government would possibly become arbitrary; if there were but two, the people would cut each other's throats; but, as there are such a multitude, they all live happy and in peace.'" W. RIVES, 2 HISTORY OF THE LIFE AND TIMES OF JAMES MADISON 220 n.1 (1866) (quoting F. VOLTAIRE, LETTRES SUR LES ANGLAIS). Similarly, Adam Smith, in *The Wealth of Nations*, observed:

> The interested and active zeal of religious teachers can be dangerous and troublesome only where there is, either but one sect tolerated in the society, or where the whole of a large society is divided into two or three great sects; the teachers of each acting by concert, and under a regular discipline and subordination. But that zeal must be altogether innocent where the society is divided into two or three hundred, or perhaps into as many thousand small sects, of which no one could be considerable enough to disturb the public tranquillity.

A. SMITH, *supra* note 156, bk. 5, ch. 1, pt. 3, art. 3, at 745.

If the principal danger to religious liberty was the deliberate oppression of religious minorities by the majority, then the Madisonian vision offered a more powerful answer to those demanding a free exercise clause. In a nation of many different religious groups, each jealous of the others, it would be difficult if not impossible for any group to impose its beliefs on the others. Yet Madison's argument did not carry the day. Perhaps the reason is that his argument did not satisfy the concerns of those, like the Quakers addressed by "Philadelphiensis," who feared not deliberate oppression, but the unintended effects of legislation passed without regard to the religious scruples of small minorities. The multiplicity of sects provides no protection against ignorance or indifference. Indeed, the position of religious minorities might be made much worse. Because settlements of minorities tend to be concentrated in particular regions, most sects had greater influence at the state level than in "the great vortex of the whole continent."[357] The same extended Union that protected minority faiths against oppression would make them more vulnerable to thoughtless general legislation.

Federalist assurances thus failed to assuage the concerns of America's religious sects, including many of Madison's own constituents. Only a bill of rights would do.

B. Framing and Ratifying the Free Exercise Clause

1. Debates in the First Congress. — Madison admitted that the lack of a provision protecting the rights of conscience had "alarmed many respectable Citizens," and he pledged to work for "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c."[358] Lawmakers in other states responded to the same popular pressure. Seven states drafted proposals for amendments, and five of them (plus the minority report in Pennsylvania) urged protection for religious freedom. New York, for example, ratified the Constitution but proposed a bill of rights including the following provision: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience . . . ."[359] Virginia proposed a similar provision, using the phrase "free exercise of reli-

[357] 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 332, § 3.9.12, at 107.

[358] Letter from James Madison to the Rev. George Eve (Jan. 2, 1789), in 11 MADISON PAPERS, *supra* note 226, at 404, 404–05. Madison subsequently published this promise in the Fredericksburg Herald. *See* Letter from James Madison published in the Fredericksburg (Va.) Herald (Jan. 29, 1789), in 11 MADISON PAPERS, *supra* note 226, at 428.

[359] 1 ELLIOT'S DEBATES, *supra* note 165, at 327 (July 26, 1788).

gion";[360] Rhode Island[361] and North Carolina[362] made proposals virtually identical to Virginia's.

Only New Hampshire, of the states that proposed a federal bill of rights, used a markedly different formulation: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[363] The wording of this proposal tends to support the exemptions view, since the second clause would have little, if any, application unless secular, generally applicable laws (laws not "touching religion") could violate the rights of conscience. This proposal was considered on the floor of the House of Representatives, briefly adopted, and then rejected in favor of a formulation similar to today's free exercise clause.[364]

The recorded debates in the House over these proposals cast little light on the meaning of the free exercise clause. Indeed, the main controversy during these debates centered on establishment. The key changes in free exercise language ("free exercise of religion" in place of "equal rights of conscience," and "prohibiting" in place of "infring[ing]") took place after the recorded debate. Thus, we must rely primarily on the successive drafts of the clause during its passage through the First Congress.

Madison undertook an initial draft of the Bill of Rights, to be proposed to the House of Representatives. His draft free exercise clause did not follow the language of the state proposals. Rather, he suggested the following formulation: "The civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed."[365] Three aspects of the Madison proposal are suggestive. First, the formulation "full and equal rights of conscience" implies that the liberty has both a substantive and an equality component: the rights must be both "full" and "equal." Hence, the liberty of conscience is entitled not only to equal protection, but also to some absolute measure of protection apart from mere governmental neutrality.

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[360] The Virginia proposal read:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience . . . .

3 *id.* at 659 (June 27, 1788). The Virginia proposal was taken almost verbatim from the Virginia Bill of Rights of 1776. *See supra* text accompanying note 251.

[361] *See* 1 ELLIOT'S DEBATES, *supra* note 165, at 334 (May 29, 1790).

[362] *See* 4 *id.* at 244 (Aug. 1, 1788).

[363] 1 *id.* at 326 (June 21, 1788).

[364] *See* 1 ANNALS OF CONG. 757–59 (J. Gales ed. 1834) (Aug. 15, 1789), 796 (Aug. 20, 1789).

[365] *Id.* at 451 (proposal of James Madison, June 8, 1789).

Temple American Inn of Court - April 2016 Program - Research and Materials

Second, the formulation that the rights in question shall not "in any manner nor on any pretext" be infringed suggests protection from infringements in any form, even those not expressly directed at religious practice. This proposal recognized that infringements on rights of conscience could result from Congress' exercise of its enumerated powers even when the legislation made no direct reference to religion. For the most part these infringements would be indirect — secular laws that invaded religious freedom as applied, rather than acts directed toward religious practice or belief as such.

Third, Madison favored the formulation "rights of conscience" over the formulation "free exercise of religion," which was found both in his own state's laws and in three of the five state proposals. This choice of language was ultimately reversed after deliberation by the House and the Senate; its meaning is considered below.[366]

Rather than debating Madison's proposal, the Select Committee proposed a much shorter version: "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[367] The Committee deleted Madison's reference to "Civil Rights," probably because it was redundant, and shortened his "full and equal rights of conscience" to "equal rights of conscience." If this change was more than stylistic, which seems doubtful, it might suggest a move toward a no-exemptions view of free exercise, since it emphasizes equal treatment rather than full substantive protection.

The Select Committee language ran into trouble in the House, largely because of concerns that its establishment provision might interfere with the ability of the states to support religion — an issue especially important to those states with established churches. After a brief flirtation with the New Hampshire language, previously discussed,[368] the House adopted a formulation proposed by Fisher Ames of Massachusetts: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[369] This version omitted the modifiers "full" and "equal" from the phrase "rights of conscience." This suggests that the deletion of "full" by the Committee was no more than stylistic and that the word "equal" was deleted so as not to create a negative inference.

More strikingly, the Ames version introduced a new term into the debate: "free exercise of religion." "Free exercise" had been part of most of the state proposals but had not appeared in the Madison, Select Committee, or New Hampshire proposals previously debated in the House, all of which had used the alternative formulation "rights of conscience." In many contexts, the phrases "rights of conscience"

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[366] *See infra* pp. 1488–1500.

[367] 1 ANNALS OF CONG. 757 (J. Gales ed. 1834) (Aug. 15, 1789).

[368] *See supra* text accompanying notes 363–364.

[369] 1 ANNALS OF CONG. 796 (J. Gales ed. 1834) (proposal of Fisher Ames, Aug. 20, 1789).

and "free exercise of religion" seem to have been used interchangeably. But here, Ames, a notoriously careful draftsman and meticulous lawyer, thought it necessary to use both terms. The significance of this change will be considered below.[370]

The House of Representatives approved the amendment as proposed by Ames without recorded debate or discussion. Both the House and the Senate journals record that the House passed and sent to the Senate a proposed amendment slightly different from the Ames proposal: "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[371] The difference between these two versions is a shift in verbs from "prevent" to "prohibit" and a shift in grammatical form from infinitives to gerunds. Whether these changes result from an unrecorded amendment or from mistranscription in either the *Annals* or the final copy of the engrossed bill is unknown.[372]

Whatever the precise chain of events, the language considered by the Senate and ultimately employed in the first amendment was "prohibiting the free exercise [of religion]." This wording has proven significant to the Supreme Court's interpretation of the free exercise clause and is discussed in detail below.[373]

In the Senate, the debate was not recorded, but various versions of the religion clauses were adopted and rejected in succession. The versions adopted, in order, were as follows:

> (1) "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[374]
>
> (2) "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."[375]

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[370] *See infra* pp. 1488–1500.

[371] 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 136 (L. De Pauw ed. 1972) (Senate Journal); 3 *id.* at 159 (House Journal) [hereinafter DOCUMENTARY HISTORY].

[372] *See* Laycock, *supra* note 16, at 879 n.27. The *Annals* is not entirely reliable. *See id.* at 885. For a glaring example, see 1 ANNALS OF CONG. 948 (J. Gales ed. 1834) (Sept. 24, 1789) (transcribing the final version of the free exercise clause adopted by both Houses as ". . . or prohibiting *a* free exercise thereof" (emphasis added)). Madison wrote that the reporter's notes, later printed in the *Annals*, showed "'the strongest evidences of mutilation & perversion, and of the illiteracy of the Editor.'" Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 532–33 (3d ser. 1961) (quoting PAPERS OF JAMES MADISON XI, No. 58, Lib. Congress). *See generally* Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986) (arguing that most records of the drafting and ratification of the Constitution may be seriously unreliable).

[373] *See infra* pp. 1486–88.

[374] 1 DOCUMENTARY HISTORY, *supra* note 371, at 151 (Senate Journal).

[375] *Id.*

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(3) "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion . . . ."[376]

Note that each of these versions used either the phrase "rights of conscience" or the phrase "free exercise of religion." No version used the phrases in conjunction, as had the Ames proposal.

The third version passed the Senate and was transmitted to the House, which rejected it, presumably because of its narrow provision on establishment. A Conference Committee, on which Madison served, proposed the version of the religion clauses that was ultimately ratified.[377] The free exercise clause itself was unchanged from the final Senate bill.

One final point about the debate in the First Congress deserves mention. In addition to the provision already discussed, which applied only to the federal government, Madison proposed an amendment that would have been applicable to the states. It read: "[N]o State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."[378] Madison said that he conceived this to be "the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."[379] Significantly, Madison did not propose that the establishment clause be made applicable to the states; this reflects the prevailing view at the time that states should be permitted to set their own course with respect to establishment, but that liberty of conscience was an unalienable right. With minor editorial change, the House adopted Madison's proposal.[380] Later the Senate rejected the proposal, presumably in deference to states' rights.[381] This left the provisions of the Bill of Rights solely as limitations against the federal government,[382] as they were to remain

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[376] *Id.* at 166 (Senate Journal).

[377] *See* 3 *id.* at 228 (House Journal).

[378] 1 ANNALS OF CONG. 783 (J. Gales 1834) (Aug. 17, 1789).

[379] *Id.*

[380] *See id.* at 784.

[381] No less a Federalist than James Iredell had commented in his state's ratifying convention:

> It has been asked . . . why a *guaranty* of religious freedom was not included. . . . Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the [republican form of government clause] does not interfere, must be left to the operation of its own principles.

4 ELLIOT'S DEBATES, *supra* note 165, at 194–95 (July 30, 1788) (emphasis in original).

[382] *See* Permoli v. Municipality No. 1, 44 U.S. (3 How.) 588, 609 (1845) ("The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws.").

Temple American Inn of Court - April 2016 Program - Research and Materials

until the Supreme Court held that they had been selectively "incorporated" pursuant to the fourteenth amendment.[383]

Any interpretation of the religion clauses as applying to the states is thus somewhat anachronistic. Because the free exercise clause at the federal level was itself modeled on free exercise provisions in the various state constitutions, however, no structural distortions arise from assuming that, for modern purposes (after "incorporation"), the free exercise clause means the same thing for states that it has always meant for the federal government.[384]

2. Ratification. — The ratification debates in the state legislatures were unilluminating. Most states ratified the proposed amendments quickly, with little debate or controversy. Three states — Georgia, Massachusetts, and Connecticut — failed to ratify, but the refusal seems to have been unrelated to questions of religious freedom. Only in Virginia is there record of opposition to the religion clauses as proposed by Congress. In Virginia, the Senate delayed ratification of the first amendment, partly on the ground that it "does not prohibit the rights of conscience from being violated or infringed."[385] The reasons for this are difficult to fathom, since neither Virginia's own Bill of Rights nor the amendment on religious freedom the state proposed to the Congress contained a separate "rights of conscience" clause, and in the only legal document in which the "rights of conscience" and the "exercise of religion" were differentiated — the Georgia Charter of 1732[386] — free exercise was broader than the rights of conscience.[387] Historian Leonard Levy attributes the delay to Antifederalist political maneuvering rather than to serious substantive opposition to the language of the first amendment.[388] After two years, the first amendment was ratified without additional comment.

3. Two Issues of Interpretation. — As has been noted,[389] two key modifications in the language that ultimately became the free exercise clause were made after the close of recorded debate. In the House, the verb "prohibit" was substituted for the broader term "infringe."

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[383] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the free exercise clause to the states for the first time through the fourteenth amendment).

[384] Incorporation of the establishment clause presents far more serious interpretive difficulties, since there existed no national consensus on the question of governmental aid to religion, other than to leave the question to the states; in addition, the ramifications of establishment are different for small than for large units of government.

[385] C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 16, at 145 (quoting JOURNAL OF THE SENATE OF VIRGINIA FOR 1789, at 51 (available at Virginia State Library, Richmond)).

[386] *See* GA. CHARTER of 1732, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 369.

[387] *See infra* pp. 1489–90.

[388] *See* L. LEVY, *supra* note 16, at 86–89.

[389] *See supra* p. 1481.

In the Senate, the term "free exercise of religion" was adopted and the term "rights of conscience" was deleted. Both changes could have important implications for the meaning of the free exercise clause. But since there was no recorded debate or discussion of these later versions, we can only rely on context, contemporary diction, and other indirect evidence of meaning.

(a) The Meaning of "Prohibiting." — The prior drafts considered by the House used the verbs "infringing" or "preventing" to describe the forbidden effect on the rights of conscience. Moreover, in parallel clauses of the first amendment, the framers used the verb "abridging" to protect the freedoms of speech, assembly, and petition. The Supreme Court later relied on this choice of words to support a restrictive reading of the free exercise clause. In *Lyng v. Northwest Indian Cemetery Protective Association*,[390] the Court reasoned: "The crucial word in the constitutional text is 'prohibit'"; therefore, the free exercise clause does not require the government "to bring forward a compelling justification" for actions "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs."[391] This textual argument is further developed in the Department of Justice study of the origins of the free exercise clause: "'[P]rohibiting' and 'abridging' are denotatively and connotatively distinct. 'Prohibiting' means to forbid or prevent, while 'abridging' means to reduce or limit. Thus, 'prohibiting' connotes a finality, certitude, or damning not present in 'abridging,' which connotes limitations falling short of the finality of prohibition or prevention."[392] On the strength of this textual evidence alone, the report concludes that laws that discourage or inhibit religious exercise by denying government benefits (even those enacted in "purposeful discrimination" against a religion) do not violate the free exercise clause.[393] Only laws that make a religious practice unlawful or impossible are forbidden.

While contemporaneous definitions of "prohibit" indicate that it was a stronger and narrower term than "abridge" or "infringe," the distinction is probably overdrawn in the context of the free exercise debate in 1789. Among the synonyms for "prohibit" listed in Samuel Johnson's 1755 edition is "to hinder,"[394] which seems weaker and broader than "abridge" or "infringe." Since the verb form used for the establishment clause ("respecting") was different from the verb form used for the free speech clause ("abridging"), it seems more likely

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[390] 485 U.S. 439 (1988).

[391] *Id.* at 451.

[392] REPORT TO THE ATTORNEY GENERAL, *supra* note 17, at 17 (citing various dictionaries, including a 1755 edition of Samuel Johnson's and an 1828 edition of Noah Webster's).

[393] *See id.* at 47 n.84.

[394] 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 268.

Temple American Inn of Court - April 2016 Program - Research and Materials

that the drafters found it less awkward or more euphonious to use yet a third verb form ("prohibiting") for the free exercise clause.[395] No one in the debate, in or out of Congress, expressed the view that infringements that are not final, certain, or "damning"[396] should be allowed. Madison had promised to support "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude,"[397] and Daniel Carroll, a Roman Catholic from Maryland, had stated that the "rights of conscience . . . will little bear the gentlest touch of governmental hand" and that "many sects have concurred in opinion that they are not well secured under the present constitution."[398] If the final version had been understood to allow infringements short of outright prohibition, one of these gentlemen would surely have spoken up. But both seemed satisfied with the bill's language, as did their constituents. A Baptist leader wrote Madison to tell him "that the amendments had entirely satisfied the disaffected of his Sect."[399]

Ten years after the House debate, Madison commented on the difference in verbs in the three portions of the first amendment (laws *respecting* Establishment, laws *prohibiting* free exercise, and laws *abridging* the freedom of speech, press, or assembly). The argument had been made (by no less a figure than John Marshall) that Congress had greater power over the press than over the establishment of religion, because the term "abridging" was less encompassing than the term "respecting."[400] Madison, in response, stated that "the liberty of conscience and the freedom of the press were *equally* and *completely*

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[395] The word choice may therefore reflect what is called "elegant variation," disapproved of by modern authorities. *See* H. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 130–33 (1927).

[396] *See* REPORT TO THE ATTORNEY GENERAL, *supra* 17, at 17.

[397] Letter from James Madison to the Rev. George Eve (Jan. 2, 1789), in 11 MADISON PAPERS, *supra* note 226, at 404, 405.

[398] 1 ANNALS OF CONG. 757–58 (J. Gales ed. 1834) (Aug. 15, 1789).

[399] Letter from James Madison to George Washington (Nov. 20, 1789), in 5 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 429.

[400] *See* Marshall, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 136, 138. Marshall's argument, in full, was as follows:

> In a solemn instrument, as is a constitution, words are well weighed and considered before they are adopted. A remarkable diversity of expression is not used, unless it be designed to manifest a difference of intention. Congress is prohibited from making any law RESPECTING a religious establishment, but not from making any law RESPECTING the press. When the power of Congress relative to the press is to be limited, the word RESPECTING is dropt, and Congress is only restrained from the passing any law ABRIDGING its liberty. This difference of expression with respect to religion and the press, manifests a difference of intention with respect to the power of the national legislature over those subjects, both in the person who drew, and in those who adopted this amendment.

Id.

Temple American Inn of Court - April 2016 Program - Research and Materials

exempted from all authority whatever of the United States."[401] He went on to argue:

> [I]f Congress may regulate the freedom of the press, provided they do not abridge it, because it is said only "they shall not abridge it," and is not said "they shall make no law respecting it," the analogy of reasoning is conclusive that Congress may *regulate* and even *abridge* the free exercise of religion, provided they do not *prohibit* it; because it is said only "they shall not prohibit it," and is *not* said "they shall make no law *respecting*, or no law *abridging* it."[402]

Madison found this interpretation of the free exercise clause so absurd that to state it was to refute it. Despite its plausibility as a textual matter, the narrow interpretation of "prohibiting" should therefore be rejected, and the term should be read as meaning approximately the same as "infringing" or "abridging."

(b) The Substitution of "Free Exercise of Religion" for the "Rights of Conscience." — As noted above,[403] the states requesting constitutional protection for religious freedom, with one exception, employed the language free "exercise" of "religion," borrowing from the Virginia Bill of Rights. Madison, for reasons that remain mysterious, did not follow this lead in his draft, using instead the term "rights of conscience," a term also used by the Select Committee and New Hampshire drafts debated on the floor of the House of Representatives. The term "free exercise of religion" reappeared after the close of recorded debate, in the Ames version, which protected *both* "free exercise of religion" *and* the "rights of conscience," and which passed the House. The Senate first voted to protect "rights of conscience" and then settled upon protecting the "free exercise of religion" alone, a formulation that ultimately carried the day. It is possible that these changes in language were without substantive meaning, for in many of the debates in the preconstitutional period, the concepts of "liberty of conscience" and "free exercise of religion" were used interchangeably. There are, nonetheless, three principal differences between the terms that may have significance for interpretation.

The least ambiguous difference is that the term "free exercise" makes clear that the clause protects religiously motivated conduct as well as belief. This point merits emphasis, because in 1879 the Supreme Court, relying on Jefferson, explicitly rejected this reading.[404] Only in 1940 did the Court begin to include religiously motivated conduct within the ambit of the free exercise clause, and even then,

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[401] Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 141, 146 (emphasis in original).

[402] *Id.*

[403] *See supra* pp. 1481–82.

[404] *See* Reynolds v. United States, 98 U.S. 145, 164 (1879).

only to a limited degree.[405] The belief-action distinction is often used to suggest that protection for religiously motivated conduct is far weaker than that accorded to free speech or other, seemingly "absolute" freedoms.[406]

The choice of the words "free exercise of religion" in lieu of "rights of conscience" is therefore of utmost importance. As defined by dictionaries at the time of the framing, the word "exercise" strongly connoted action. The American edition of Samuel Johnson's *Dictionary of the English Language*, published in Philadelphia in 1805, used the following terms to define "exercise": "Labour of the body," "Use; actual application of any thing," "Task; that which one is appointed to perform," and "Act of divine worship, whether public or private."[407] Noah Webster's American dictionary defined "exercise" as "employment."[408] James Buchanan's 1757 dictionary defined "exercise" as "[t]o use or practice."[409] "Conscience" was more likely to have been understood as opinion or belief. Johnson equated "conscience" with the terms "knowledge," "Real sentiment; veracity; private thoughts," "Scruple; difficulty," and "reason; reasonableness."[410] Webster defined it as "natural knowledge, or the faculty that decides on the right or wrong of actions."[411] Buchanan defined it as the "testimony of one's own mind."[412]

The Georgia Charter of 1732 is the only legal document of the period to make a distinction between the two phrases. It provided "that there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have a free exercise of religion."[413] Since Roman Catholics were

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[405] *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[406] *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 626–27 (1978) (plurality opinion); Braunfeld v. Brown, 366 U.S. 599, 603–07 (1961); Walker v. Superior Court, 47 Cal. 3d 112, 139, 763 P.2d 852, 869, 253 Cal. Rptr. 1, 18 (1988) (holding that the prosecution for manslaughter of a mother who refused any medical treatment except prayer for her son was not prohibited by the free exercise clause); Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 1112, 762 P.2d 46, 56, 252 Cal. Rptr. 122, 132 (1988) (holding that the free exercise clause does not bar an action for fraud against a religious organization when that action implicates conduct, not belief); Madsen v. Erwin, 395 Mass. 715, 727–27, 481 N.E.2d 1160, 1167 (1985) (holding that the free exercise clause would not prevent the consideration of tort claims arising out of the termination of a Christian Science Monitor employee who refused to seek healing through the church for her sexual preference).

[407] S. JOHNSON, *supra* note 252.

[408] N. WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE (New Haven 1806).

[409] J. BUCHANAN, *supra* note 251.

[410] S. JOHNSON, *supra* note 252.

[411] N. WEBSTER, *supra* note 252.

[412] J. BUCHANAN, *supra* note 251.

[413] GA. CHARTER of 1732, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 369, 375.

Temple American Inn of Court - April 2016 Program - Research and Materials

guaranteed liberty of conscience but not the free exercise of religion, this suggests that the former was understood to be narrower than the latter.[414] The most plausible reading of the provision is that it permitted Catholics to believe what they wished (and possibly to worship as they liked, though that is more doubtful), but did not permit them to put their faith into action. Such a policy would be consistent with the fears of the papacy that existed at the time.

By using the term "free exercise," the first amendment extended the broader freedom of action to all believers. As noted, the freedom of religion was almost universally understood (with Jefferson being the prominent exception) to include conduct as well as belief.[415] Accordingly, free exercise is more likely than mere liberty of conscience to generate conflicts with, and claims for exemption from, general laws and social mores.

A second important difference between the terms "conscience" and "religion" is that "conscience" emphasizes individual judgment,[416] while "religion" also encompasses the corporate or institutional aspects of religious belief. In the great battle cry of the Protestant Reformation — "God alone is Lord of the conscience"[417] — the individual conscience was used in contradistinction to the teaching of the institutional church. "Religion," by contrast, connotes a community of believers. The most widely accepted derivation of the word "religion" is from the Latin "religare" — to bind.[418] Religion binds believers together; conscience refers to the inner faculty of judgment. Thus, the "free exercise of religion" suggests that the government may not interfere with the activities of religious bodies, even when the interference has no direct relation to a claim of conscience.[419] This inter-

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[414] It is not apparent what "liberty of conscience" included as applied to Catholics, or if the charter provision was enforced at all. During this period, Catholics were excluded from the colony, and those who entered were not permitted to receive land grants, inherit property, or hold public office. *See* R. STRICKLAND, *supra* note 62, at 80–81. Later, when governance of the colony was transfered from the Trustees to the Crown, the instructions to the royal governor denied even the liberty of conscience to Catholics and omitted any reference to "free exercise." *See id.* at 120.

[415] For a discussion of the belief-action distinction prior to the framing, see pp. 1451–52 above.

[416] *See supra* p. 1489 (quoting contemporaneous dictionary definitions of "conscience").

[417] This statement was formally adopted as part of their creed by the Calvinists of Great Britain in 1647. *See The Westminster Confession of Faith*, in 3 THE CREEDS OF CHRISTENDOM 600 (P. Schaft 4th ed. 1919). It presumably derived from John Calvin's *Reply to Cardinal Sadolet*, published in 1539, which stated: "There is nothing of Christ, then, in him who does not hold the elementary principle, that it is God alone who enlightens our minds to perceive his truth, who by his Spirit seals it on our hearts, and by his sure attestation to it confirms our conscience." J. CALVIN, *Reply to Letter by Cardinal Sadolet to the Senate and People of Geneva*, in JOHN CALVIN: SELECTIONS FROM HIS WRITINGS 81, 105 (J. Dillenberger ed. 1971).

[418] *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1628 (2d ed. 1987).

[419] An example would be the application of a nondiscrimination law to the employment of

pretation is also consistent with the distinction drawn in the Georgia Charter, since the private devotions of individual Catholics would be of less concern to the state than the operations of an institutional Church with supposed connections to foreign powers.

The third, and most controversial, difference between the "free exercise of religion" and the "rights of conscience" is that the latter might seem to extend to claims of conscience based on something other than religion — to belief systems based on science, history, economics, political ideology, or secular moral philosophy. By deleting references to "conscience," the final version of the first amendment singles out religion for special treatment. And so the Supreme Court has held: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[420]

This distinction between religion and other belief systems has come under substantial attack in academic circles.[421] Religion is understood

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a minister. *See, e.g.*, Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Under the view of free exercise espoused in the text, such a law would be an unconstitutional interference in a religious function even if the religious group in question had no doctrinal tenet requiring or allowing discrimination.

[420] Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972). This position was unanimously reaffirmed in Frazee v. Illinois Dep't of Employment Sec., 109 S. Ct. 1514, 1517 (1989); *see also* Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 901 n.8 (1989) (plurality opinion) (Brennan, J.) (noting that exemptions conferred exclusively on religious groups or individuals on account of their religious convictions do not violate the establishment clause if they are "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause"); Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("[I]n one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not." (emphasis in original)) .

The draft cases of the Vietnam War era marked the only instance in the Court's history that it extended religious exemptions to persons with essentially secular claims of conscience. *See* Welsh v. United States, 398 U.S. 333 (1970). Four members of the Court in *Welsh* rested their decision on (not very persuasive) statutory construction grounds. One member of the Court — Justice Harlan — joined the majority on the ground that a distinction between religious and secular claims of conscience would be unconstitutional. *See id.* at 356 (Harlan, J., concurring).

Although the Supreme Court has consistently confined the constitutional protections of the free exercise clause to religion, it sometimes takes the opposite position with regard to accommodations not required under the free exercise clause. *Compare* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (finding a statute unconstitutional because it "singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs and practices of other private employees") *and Caldor*, 472 U.S. at 710 n. 9 (same) *with* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) ("Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.").

[421] *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 200–01 (1977); M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 73–106 (1968); D. RICHARDS, *supra* note 54, at 136–46; Gamwell, *Religion and Reason in American Politics*, 2 J.L. & RELIGION 325, 325–27 (1984).

to be a product of individual choice, and protected as such. It is said to be arbitrary (and even unconstitutional) to differentiate between belief systems, all of which are the product of individual judgment, on the ground that some are "religious" and some are not.

David A.J. Richards has presented the most sustained and thoughtful exposition of this position.[422] Professor Richards' conception of free exercise is rooted in liberal individualism. He views religious freedom as an aspect of the "equal respect" that must be shown "for the capacity to exercise our twin moral powers of rationality and reasonableness."[423] It is ultimately based on "respect for the person as an independent source of value."[424] A definition of "conscience" sufficiently broad to encompass all that "neutrality requires" would "include[] everything and anything, including purely scientific beliefs about the causal structure of the world integrated into some larger rational and reasonable conception of one's ends."[425] If the science of the origin and structure of the universe is included, so presumably must be the soft sciences of economics, politics, history, psychology, and the like. Richards thus contends that "the motivation for universal toleration must encompass all belief systems, religious and nonreligious, expressive of our moral powers of rationality and reasonableness."[426]

Under this view, religious claims have no higher status than nonreligious claims — and maybe even lower status, to the extent that modern moral philosophy elevates "rationality and reasonableness" over the characteristic religious claims of revelation, tradition, and spirit-filled inspiration. And if the distinction between religious and nonreligious conscience is arbitrary, then it amounts to an indefensible preference — an establishment of religion — to accommodate religious and not nonreligious claims of comparable magnitude.

The question is therefore whether the principle of free exercise, as enacted by the framers and ratifiers of the first amendment, was a specific instantiation of a wider liberty of conscience encompassing individual moral judgments rooted in nonreligious as well as religious sources, or whether religious conscience is different in some fundamental respect from other forms of individual judgment, in which case the free exercise clause would provide no warrant for protecting a broader class of claims.[427] The question is all the more significant

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[422] *See* D. RICHARDS, *supra* note 54, at 136–46.

[423] *Id.* at 136.

[424] *Id.* at 142.

[425] *Id.* at 141–42.

[426] *Id.* at 138.

[427] Professor Richards agrees that this issue must be resolved by reference to the "history and practice of religion clause jurisprudence," *id.* at 141, but he devotes no attention to the actual history of the free exercise clause bearing on the specific point (nor to its "practice"). *See*

for the practical reason that if the exercise of religion extends to "everything and anything,"[428] the interference with ordinary operations of government would be so extreme that the free exercise clause would fall of its own weight. To protect everything is to protect nothing.

The historical materials uniformly equate "religion" with belief in God or in gods,[429] though this can be extended without distortion to transcendent extrapersonal authorities not envisioned in traditionally theistic terms.[430] By contrast, Noah Webster's *Dictionary of the English Language*, the first comprehensive American dictionary (published in 1807), defined "conscience" as: "natural knowledge, or the faculty that decides on the right or wrong of actions in regard to one's self."[431] Similarly, James' Buchanan's 1757 dictionary, *Linguae Britannicae Vera Pronunciatio*, defined "conscience" as "[t]he testimony of one's own mind."[432] And Samuel Johnson's great *Dictionary of the English Language* gave as the first definition: "The knowledge or faculty by which we judge of the goodness or wickedness of ourselves."[433] In none of these definitions was there specific reference to religion, although about half of the literary examples Johnson gave in the four volume edition had a religious context.[434]

On the other hand, outside of dictionaries, the vast preponderance of references to "liberty of conscience" in America were either expressly or impliedly limited to religious conscience.[435] A few examples suffice to make the point; dozens of others would do as well. St. George

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id. Significantly, Richards uses a vocabulary that was deliberately rejected by the framers. He talks of "toleration," although the framers condemned the concept of toleration. *See supra* pp. 1443–49. And he speaks of "conscience," when the framers considered drafts employing the term and chose to use the term "religion" instead.

[428] D. RICHARDS, *supra* note 54, at 141.

[429] *See* Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1520 (1983). For example, the Virginia Bill of Rights defined "religion" as "the duty which we owe to our Creator, and the manner of discharging it." Virginia Bill of Rights of 1776, § 16, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 1908, 1909.

[430] Madison, for example, deliberately chose terms other than "God" to refer to the object of religious homage, including "Creator," "Governor of the Universe," and "Universal Sovereign." J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 184–85. This suggests an attempt at a definition more compendious than the familiar Judeo-Christian God, but it retains the distinction between transcendent authority and personal judgment. *See* Freeman *supra* note 429, at 1521–23; Ingber, *supra* note 429, at 251. The literature on the meaning of "religion" under the first amendment is vast. *See id.* at 233 n.3.

[431] N. WEBSTER, *supra* note 252.

[432] J. BUCHANAN, *supra* note 251.

[433] S. JOHNSON, *supra* note 252.

[434] *See id.*

[435] *See* 1 A. STOKES, *supra* note 280, at 16–17; Adams & Emmerich, *supra* note 17, at 1599 n. 174.

Tucker's 1803 commentary on American constitutional law divided "[t]he right of personal opinion" into two subcategories: "liberty of conscience in all matters relative to religion" and "liberty of speech and of discussion in all speculative matters, whether religious, philosophical, or political."[436] Madison himself used the terms "free exercise of religion" and "liberty of conscience" interchangeably when explaining the meaning of the first amendment.[437] The laws of at least ten of the states expressly linked "liberty of conscience" to religion. The Massachusetts Charter of 1691 provided that "a liberty of Conscience [be] allowed in the Worshipp of God to all Christians (Except Papists),"[438] and the Connecticut legislature passed a similar measure in 1784, entitled "An Act for securing the Rights of Conscience in Matters of Religion, to Christians of every Denomination."[439] The Carolina proprietors' Agreement with proposed settlers granted "liberty of conscience in all religious and spiritual things."[440] Maryland's Toleration Act of 1649 declared "the enforcing of the conscience in matters of Religion . . . to be of dangerous consequence."[441]

Religious and popular writings also linked conscience and religion. Elisha Williams, sometime president of Yale, wrote a pamphlet in 1744 called *The essential Rights and Liberties of Protestants. A seasonable Plea for the Liberty of Conscience, and The Right of private Judgment in Matters of Religion without any Control from Human Authority.*[442] Virginia Baptist leader John Leland's pamphlet, *The Rights of Conscience Inalienable*, focused on attacking religious establishments and state-supported religion.[443] There was no recorded controversy in preconstitutional America in which the right of "conscience" was invoked on behalf of beliefs of a political, social, philosophical, economic, or secular moral origin.

In any event, the final version of the amendment adopted by Congress and ratified by the states omitted any reference to "rights of conscience" and protected the "free exercise of religion" instead. There

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[436] ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 72, at 96–97.

[437] *See e.g.*, Madison, *Report on the Virginia Resolutions* (Jan. 18, 1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION *supra* note 72, at 141.

[438] MASS. BAY CHARTER of 1691, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 2, at 942, 950.

[439] T. CURRY, *supra* note 17, at 180 (quoting ACTS AND LAWS OF THE STATE OF CONNECTICUT 21–22).

[440] S. COBB, *supra* note 17, at 116.

[441] *Id.* at 376; *see also id.* at 293–94 (New Hampshire); *id.* at 303–04, 308, 323–54 (New York); *id.* at 401–02 (New Jersey); *id.* at 419 (Georgia); *id.* at 431 (Rhode Island).

[442] *See* T. CURRY, *supra* note 17, at 97–98 & n.59 (citing E. WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS (Boston 1744)).

[443] *See* J. LELAND, *supra* note 174, at 179–92.

Temple American Inn of Court - April 2016 Program - Research and Materials

are two possible explanations for this. The reference to conscience could have been dropped because it was redundant, or it could have been dropped because the framers chose to confine the protections of the free exercise clause to religion.

The "redundancy" explanation can be supported by the absence of any recorded speech or discussion of differences between the terms.[444] The drafters alternated between the two formulations without apparent pattern,[445] and participants in the debate later referred to the free exercise clause as a "liberty of conscience" provision without apparent awareness of the difference in denotation.

Still, the theory that the phrase "free exercise of religion" was deliberately used in order to exclude nonreligious conscience seems more likely, since the different drafts called attention to the question. If no distinction was intended, it would have been more natural to stick with a single formulation and to concentrate on the wording of the contested establishment clause. This theory also derives support from Samuel Huntington's comment that he hoped "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[446]

It derives further support from the debate over a proposed constitutional exception for those "religiously scrupulous of bearing arms."[447] Representative Thomas Scott of Pennsylvania opposed the clause, stating:

> There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.[448]

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[444] The sole exception is the objection posed by the Virginia State Senate to the first amendment, discussed above at text accompanying note 385, which can be read as distinguishing between the terms.

[445] The Senate adopted three different versions of the religion clauses in turn, which included three different formulations of the establishment provision, each of which was coupled with either a "free exercise of religion" clause or a "rights of conscience" clause. See *supra* pp. 1483–84. There is no apparent pattern that might connect the free exercise/liberty of conscience terminology with the establishment formulations. The term "free exercise" seems to be associated with both the broadest and the narrowest conceptions of disestablishment, and "rights of conscience" associated with the intermediate establishment provision. It is difficult to harmonize this with an understanding of religious liberty.

[446] 1 ANNALS OF CONG. 758 (J. Gales ed. 1834) (Aug. 15, 1789).

[447] *See infra* pp. 1500–03.

[448] 1 ANNALS OF CONG. 796 (J. Gales ed. 1834) (Aug. 20, 1789).

Temple American Inn of Court - April 2016 Program - Research and Materials

Why the proposed language ("religiously scrupulous") was not adequate for Scott's purposes is hard to say, but his underlying view of the proper scope of free exercise exemptions is clear: they should be reserved for cases of conflict with actual religious beliefs. Elbridge Gerry expressed a similar view.[449]

In any event, it does not matter which explanation — redundancy or intentionality — is correct, for under either explanation, nonreligious "conscience" is not included within the free exercise clause. If "the rights of conscience" were dropped because they were redundant, "conscience" must have been used in its narrow, religious, sense. If the omission was a substantive change, then the framers deliberately confined the clause to religious claims. Neither explanation supports the view that free exercise exemptions must be extended to secular moral conflicts.

The textual insistence on the special status of "religion" is, moreover, rooted in the prevailing understandings, both religious and philosophical, of the difference between religious faith and other forms of human judgment. Not until the second third of the nineteenth century did the notion that the opinions of individuals have precedence over the decisions of civil society gain currency in American thought. In 1789, most would have agreed with Locke that "the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation."[450]

Religious convictions were of a different order. Conflicts arising from religious convictions were conceived not as a clash between the judgment of the individual and of the state, but as a conflict between earthly and spiritual sovereigns. The believer was not seen as the instigator of the conflict; the believer was simply caught between the inconsistent demands of two rightful authorities, through no fault of his own. This understanding was grounded in the Protestant doctrine of "two kingdoms," taught by both Calvin and Luther,[451] and had still older roots in Augustinian thought.[452]

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[449] 1 ANNALS OF CONG. 779 (J. Gales ed. 1834) (Aug. 17, 1789) (reporting that Gerry "wished the words to be altered so as to be confined to persons belonging to a religious sect scrupulous of bearing arms").

[450] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 43. Locke wrote:

> [E]very man, by consenting with others to make one Body Politic under one Government, puts himself under an Obligation to every one of that Society to submit to the determination of the *majority*, and to be concluded by it; or else this *original Compact* . . . would signifie nothing, and be no Compact . . . .

J. LOCKE, *The Second Treatise of Government*, *supra* note 134, § 97, at 376 (emphasis in original).

[451] *See* 2 J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 1485 (J. McNeill ed. 1960); M. LUTHER, *Temporal Authority: To What Extent It Should Be Obeyed*, in 45 LUTHER'S WORKS 81, 89–129 (W. Brandt ed. 1962).

[452] *See* ST. AUGUSTINE, THE CITY OF GOD 376–77 (M. Dods ed. 1950). For a brief discussion of "two kingdoms" doctrine and its relation to religious liberty, see Adams & Em-

Not only were the spiritual and earthly authorities envisioned as independent, but in the nature of things the spiritual authorities had a superior claim. "[O]bedience is due in the first place to God, and afterwards to the laws," according to Locke.[453] The American conception of religious liberty was accordingly defended in those terms. The key passage in Madison's *Memorial and Remonstrance* reads as follows:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.[454]

Far from being based on the "respect for the person as an independent source of value,"[455] the free exercise of religion is set apart from mere exercise of human judgment by the fact that the "source of value" is prior and superior to both the individual and the civil society. The freedom of religion is unalienable because it is a duty to God and not a privilege of the individual. The free exercise clause accords a special, protected status to religious conscience not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control.

It is important to remember that the framers and ratifiers of the first amendment found it conceivable that a God — that is, a universal and transcendent authority beyond human judgment — might exist. If God might exist, then it is not arbitrary to hold that His will is superior to the judgments of individuals or of civil society. Much of the criticism of a special deference to sincere religious convictions arises from the assumption that such convictions are *necessarily* mere subcategories of personal moral judgments.[456] This amounts to a denial of the possibility of a God (or at least of a God whose will is made manifest to humans). But while this skeptical position is tenable

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merich, cited above in note 17, at 1623–24; *see also* Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987) (contrasting the Jewish jurisprudence of obligation with the liberal jurisprudence of rights); Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 798–801 (1986) (drawing an analogy between religion and insanity to assert that "religious claimants [are] different from other people, and therefore deserving of special constitutional protection"); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980) (advocating a "model of competing authorities" to replace current exemption doctrine).

[453] J. LOCKE, *A Letter Concerning Toleration*, *supra* note 113, at 43.

[454] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 185.

[455] D. RICHARDS, *supra* note 54, at 142.

[456] *See, e.g.*, R. DWORKIN, *supra* note 421, at 200–01.

Temple American Inn of Court - April 2016 Program - Research and Materials

as a theoretical or philosophical proposition, it is a peculiar belief to project upon the framers and ratifiers of the first amendment, for whom belief in the existence of God was natural and nearly universal. It is an anachronism, therefore, to view the free exercise clause as a product of modern secular individualism. From the perspective of the advocates of religious freedom in 1789, the protection of private judgment (secular "conscience") fundamentally differs from the protection of free exercise of religion.

The religious distinction between the City of God and the City of Man had its counterpart in secular Enlightenment thought. Religious belief, as Locke argued in his *Third Letter for Toleration*, "is not capable of demonstration"; it is not, therefore, "capable to produce knowledge, how well grounded and great soever the assurance of faith may be wherewith it is received; but faith it is still, and not knowledge; persuasion, and not certainty."[457] Natural law and morality, on the other hand, are subjects for rational inquiry and knowledge. That is the epistemological premise of Locke's scientific investigations into psychology and politics.

The "magistrates of the world" thus have no authority to coerce individuals on account of religious opinion, for in this sphere they can have no basis for action other than "their own belief, their own persuasion,"[458] which is as likely to support the false as the true religion. As Madison observed, "that the Civil Magistrate is a competent Judge of Religious truth . . . is an arrogant pretension."[459] By contrast, the very purpose of civil society is to grant the magistrate authority to coerce all members of society to comply with the rational principles that order human affairs.[460] When individuals err (however conscientiously) in their judgments about earthly things — politics, economics, natural morals — the magistrate is, and must be, empowered to correct them. It is no usurpation of authority for the government to use its power in these cases. Only when the individual's judgment is grounded in beliefs outside the ken of government is the government required to defer.

A distinction between religious and secular conscience is, therefore, consistent both with the religious and the Enlightenment perspective on free exercise. From the religious point of view, the difference

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[457] J. LOCKE, *A Third Letter for Toleration*, in 6 WORKS OF LOCKE, *supra* note 111, at 139, 144 [hereinafter J. LOCKE, *Third Letter for Toleration*]; *cf.* T. HOBBES, *supra* note 119, at 242 (contrasting the "principles of nature," which our "experience has found true," with matters that depend on the "supernatural revelations of the will of God"). This casts doubt on Professor Richards' assumption that religious judgment is an exercise of Kantian practical reason. *See* D. RICHARDS, *supra* note 54, at 136.

[458] J. LOCKE, *Third Letter for Toleration*, *supra* note 457, at 143.

[459] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 187.

[460] *See* J. LOCKE, *The Second Treatise of Government*, *supra* note 134, §§ 87–89, at 366–69.

between religious and secular forms of conscience is that the former represent an obligation to an authority higher than the individual, while the latter are manifestations of mere individual will or judgment. From the Enlightenment point of view, the difference is that the government has no basis for evaluating the truth of religious claims, while it inevitably must evaluate claims based on rational inquiry and knowledge. The religious view emphasizes the importance of the individual; the Enlightenment, the incapacity of the government. Madison combined these points in his *Memorial and Remonstrance*.[461] Both perspectives lead to the same conclusion: it is sensible to restrict the power of government to influence or coerce religious conscience, even when government has the power to influence or coerce judgments based on science, history, political ideology, economics, moral philosophy, or other secular sources.

This raises the question whether the free exercise clause protects atheists or other unbelievers. As previously noted, Locke excluded atheists from his proposed system of religious toleration, while Jefferson departed from Locke in this respect.[462] Six of the state constitutions as of 1789 confined free exercise protections to theists, two (Virginia and Delaware) were ambiguous, and four extended protection to all religious beliefs without limitation. Since the free exercise clause of the federal Constitution contained no limitation, it is most plausible to assume that, in this as in other respects, it was imitating the more expansive of the state provisions. But this begs the question of what free exercise protection might mean for a person who does not recognize any form of transcendent, extrapersonal authority — to a person who does not "exercise" a "religion."

For the most part, the prohibition on an establishment of religion should suffice to protect unbelievers from discrimination, ill-treatment, or coercion (from test oaths, for example).[463] There should be no doubt that government action that abridges the unbeliever's right not to engage in or support a religious practice is unconstitutional. By 1789, it was generally agreed that compelled homage is of no value to God or to man. In Madison's words, "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[464]

As a practical matter, the question whether the free exercise clause protects atheists arises only with reference to claims for exemption.

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[461] *See* J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 184–85.

[462] *See supra* text accompanying notes 121 & 213.

[463] *See* Torcaso v. Watkins, 367 U.S. 488 (1961). In *Torcaso*, the Court did not specify which of the two religion clauses the test oath violated. Under the analysis here, a test oath is an establishment of religion under any circumstances, since it coerces an affirmation of a religious belief. However, a test oath is a violation of the free exercise rights only of those whose religions forbids taking the oath.

[464] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 184.

If it is true that the right to exemption from generally applicable laws on ground of conflict with religious doctrine is confined to those who have duties arising from their religious beliefs, then it has no application to unbelievers. Unbelievers undoubtedly make judgments of right and wrong that sometimes conflict with generally applicable law. But if these do not stem from obedience to a transcendent authority prior to and beyond the authority of civil government, they do not receive exemption under the free exercise clause. To subject an atheist to civil disabilities would be a violation of free exercise; but to require an atheist who objects to war on secular grounds to go to war would not, since his conduct is not (and by definition could not be) motivated by his religious belief.

4. The Militia Exemption Clause. — Although the debates in the First Congress over the free exercise clause itself did not explicitly raise the question of exemptions, the question arose during the debate over what would become the second amendment, in connection with service in the state militias. Three states (North Carolina, Virginia, and Rhode Island) had proposed that "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."[465] Madison's draft bill of rights contained a similar proposal, appended to what is now the second amendment, although Madison left the requirement of a substitute to legislative discretion.[466] The Select Committee proposed and the House of Representatives debated a more generous exemption: "no person religiously scrupulous shall be compelled to bear arms."[467] The proposal was quite controversial; it passed the House by a mere 24–22 vote and was rejected by the Senate. Since this is the only discussion in the First Congress specifically bearing on religious exemptions from generally applicable legal duties, it warrants detailed consideration.

The most eloquent defender of the proposal, Representative Elias Boudinot of New Jersey, Presbyterian and later President of the American Bible Society, hoped "that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person."[468] He argued that it would be both pointless and unjust to compel "men who are conscientious in this respect . . . to bear arms, when, according to their religious principles, they would rather die than use them."[469]

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[465] 1 ELLIOT'S DEBATES, *supra* note 165, at 335 (quoting from the Rhode Island ratification of the Constitution, May 29, 1790).

[466] "[N]o person religiously scrupulous of bearing arms shall be compelled to render military service in person." 1 ANNALS OF CONG. 451 (J. Gales ed. 1834) (June 8, 1789).

[467] *Id.* at 778 (Aug. 17, 1789).

[468] *Id.* at 796 (Aug. 20, 1789).

[469] *Id.*

One may wonder why, if this is so, objectors were not protected under the free exercise clause without need for a separate provision.[470] There are at least three possible answers. First, the militias are arms of the state governments except when in actual service; thus, the free exercise clause probably did not apply to them. Second, it does not necessarily follow from the fact of free exercise exemptions that the particular case of military service will be held protected. That determination will depend, in part, on the judiciary's assessment of the governmental interest in conscription. Thus, even if Boudinot expected conscientious objection from military service to be protected under the free exercise clause, it was prudent to spell it out. Third, as Boudinot pointed out, if Congress struck out the militia exemption clause, this would create an inference that there is an intention in the general government to compel all its citizens to bear arms. Indeed, some scholars have cited Congress' rejection of the militia exemption clause as conclusive evidence that there is no constitutional right to conscientious objection from military service.[471]

The significance of Boudinot's position for present purposes is that he, with a majority of the House, considered exemption from a generally applicable legal duty to be "necessary" to protect religious freedom. Whether or not the particular application of this principle to bearing arms would be accepted by the Senate (it was not)[472] or the courts (it was not),[473] it strongly suggests that the general idea of free exercise exemptions was part of the legal culture.

Opposition to the militia exemption clause arose on two grounds. First, James Jackson, Revolutionary War hero and representative from Georgia, commented that it would be "unjust" to require "one part" of the nation "to defend the other in case of invasion."[474] If he had left it at that, this argument would resemble the modern anti-exemptions view that to exempt some citizens from legal obligations on religious grounds constitutes an unconstitutional preference for religion.[475] Jackson went on to propose, however, that the militia exemption clause be amended by inserting at the end of it, "upon paying an equivalent, to be established by law."[476] This demonstrates that Jackson's objection was not to the *principle* of exemption, but to the extent of the accommodation in this particular case. Taken as a

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[470] *See* Marshall, *supra* note 17, at 76 ("[T]he fact that a conscientious objection amendment was proposed suggests that the free exercise clause was not thought, by itself, to provide for religious exemptions from neutral laws.").

[471] *See* W. BERNS, *supra* note 13, at 54–55; M. MALBIN, *supra* note 17, at 39–40 & n.4.

[472] *See* 1 ANNALS OF CONG. 779 (J. Gales ed. 1834) (remark of Rep. Jackson, Aug. 17, 1789).

[473] *See, e.g.*, United States v. MacIntosh, 283 U.S. 605, 623–25 (1931).

[474] 1 ANNALS OF CONG. 779 (J. Gales ed. 1834) (remark of Rep. Jackson, Aug. 17, 1789).

[475] *See* Marshall, *supra* note 17, at 30–35.

[476] 1 ANNALS OF CONG. 779 (J. Gales ed. 1834) (remark of Rep. Jackson, Aug. 17, 1789).

whole, Jackson's position must be counted as favoring exemptions for religious conscience, but balancing the interests of believers and nonbelievers somewhat differently.

The most cogent argument against the militia exemption clause came from Egbert Benson of New York. Benson argued that "[n]o man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government."[477] Benson did not oppose religious exemptions in principle, however. On the contrary, he had "no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion."[478] Though he considered religious exemption from military service "humane" and "benevolent," he did not think it fell within the class of natural rights. Accordingly, he could not support its inclusion in the Bill of Rights.

Benson's position is a sophisticated version of the "judicial restraint" or "separation of powers" argument against recognizing exemptions under the free exercise clause. He distinguished between the functions of the legislature and the judiciary, confining the latter to enforcing natural law positively enacted in the Constitution. There is no doubt that Benson, like the other participants in the debate, understood that by constitutionalizing the principle of militia exemptions they were transferring decisionmaking authority from the legislature to the courts. Benson felt that "[i]f it stands part of the constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia."[479] No one challenged this assumption. *Marbury v. Madison*[480] was thirteen years in the future, but Benson and the others clearly anticipated that governmental action would be judicially reviewable under the Bill of Rights.

Nonetheless, Benson's position was ambiguous on the key question of interest here. Did he believe there is no natural right to exemption from militia service because there is no natural right to exemption from any generally applicable law? Or did he believe there is no natural right to exemption from militia service because the government's interest is potentially compelling, and the degree of necessity for universal military service must be left to legislative discretion? The latter seems slightly more probable. Benson stated he "would

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[477] *Id.* at 780 (motion of Rep. Benson, Aug. 17, 1789).

[478] *Id.* This point was echoed by Thomas Scott of Pennsylvania, who said that he conceived exemption from militia service "to be a legislative right altogether." *Id.* at 796 (objection of Rep. Scott, Aug. 20, 1789). His main "design," though, was to ensure that exemptions were not extended to the nonreligious. *See id.*

[479] 1 ANNALS OF CONG. 780 (J. Gales ed. 1834) (Aug. 17, 1789).

[480] 5 U.S. (1 Cranch) 137 (1803).

Temple American Inn of Court - April 2016 Program - Research and Materials

always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity."[481] Although this statement is far from conclusive, it suggests that Benson's opposition to the exemptions was based on the impossibility of capturing in language the great variety of circumstances that would influence the grant or denial of exemptions in any particular case in the future. If so, it does not necessarily imply that he would disagree with the modern construction of the free exercise clause.

C. Early Judicial Interpretation

The religion clauses of the federal and state constitutions did not engender many lawsuits in the early years of the Republic, and fewer still raised the question of free exercise exemptions. The largest volume of litigation was over the competency to testify in court of those, like Universalists, who did not believe in a future state of rewards and punishments. There were also a number of blasphemy prosecutions that raised issues under the religion clauses. Since both of these categories of cases involved laws specifically directed at religion, they did not raise the exemption question.

The free exercise clause of the federal Constitution generated no reported decisions at all until 1845. *Permoli v. Municipality No. 1*,[482] the Supreme Court's first free exercise case, involved a municipal ordinance prohibiting open-casket funerals by Catholic priests except when performed at a single city-approved obituary chapel. In substance (though not in form), this was a generally applicable regulation, since the Protestants conducted services for the dead at graveside, leaving Catholics the only denomination performing open-casket funerals in the area to which the prohibition applied. Justice Catron's opinion for a unanimous Court is uninformative about the meaning of the free exercise clause. It holds only that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws."[483] But it is suggestive that counsel for the city felt it necessary to defend the ordinance under the "law of necessity" in light of its purpose to prevent the spread of yellow fever.[484] This may indicate that the legal profession believed that interference with religious activities required compelling justification.

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[481] 1 ANNALS OF CONG. 779–80 (J. Gales ed. 1834) (statement of Rep. Benson, Aug. 17, 1789).

[482] 44 U.S. (3 How.) 588 (1845).

[483] *Id.* at 609.

[484] *See id.* at 601 (argument of counsel).

In the state courts, there was only one reported case involving a religious exemption claim during the twenty years following ratification of the first amendment. Unfortunately, it is nothing more than a cryptic paragraph in Dallas' reports from the Supreme Court of Pennsylvania.[485] The reporter's summary of the case states the holding as follows: "A Jew refusing to be sworn as a witness, because it was Saturday, his Sabbath, the Court fined him £ 10."[486]

The earliest state court decision expressly addressing the exemption question was the case with which this Article began, *People v. Philips*.[487] It involved the exemption of a Catholic priest from compliance with a subpoena requiring him to testify to matters he heard in the confessional. Noting that "this is a great constitutional question, which must not be solely decided by the maxims of the common law, but by the principles of our government,"[488] the court (through the Honorable DeWitt Clinton, then mayor, later governor, and candidate for President against Madison in 1812) construed the New York Constitution to hold that the priest must be exempted from the subpoena requirement. "It is essential to the free exercise of a religion, that its ordinances should be administered — that its ceremonies as well as its essentials should be protected," the court noted. "To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated."[489] The court thought it so obvious that "[e]very man who hears me will answer in the affirmative" that a law of the state that prevented administration of one of the Protestant sacraments would be unconstitutional. The same right belongs to the Catholics.[490]

The court's argument bears on the issue of neutrality among religious beliefs. The court did not believe it was granting Catholics a benefit to which persons of other beliefs are not entitled. Rather, it saw the exemption as necessary to ensure that Catholics are treated no worse than Protestants would be treated under comparable circumstances. Since it was inconceivable that the Protestant majority of New York would so seriously interfere with the administration of

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[485] *See* Stansbury v. Marks, 2 Dall. 213 (Pa. 1793).

[486] 2 Dall. at xv. The full case description suggests, however, that the actual outcome was less repressive than the holding. It recounts that the witness was fined for his refusal to testify, but that the defendant waived the benefit of his testimony, whereupon the fine was discharged. *See* Stansbury v. Marks, 2 Dall. at 213.

[487] Court of General Sessions, City of New York (June 14, 1813). This case was not officially reported, but a full record of the arguments and opinion are found in W. SAMPSON, *supra* note 1, at 9, *excerpted in Privileged Communications to Clergymen*, *supra* note 1, at 199.

[488] *Privileged Communications to Clergymen*, *supra* note 1, at 206.

[489] *Id.* at 207.

[490] *Id.*

Temple American Inn of Court - April 2016 Program - Research and Materials

Protestant sacraments, the court had the responsibility of extending the same right to the Roman Catholic minority.

The court responded in two ways to the prosecutor's argument that "the peace or safety of the state"[491] requires enforcement of the subpoena. First, it noted that as a functional matter priest-penitent confidentiality often served as an "instrument of great good":[492] "The sinner may be admonished and converted from the evil of his ways: Whereas if his offence was locked up in his own bosom, there would be no friendly voice to recall him from his sins . . . ."[493] The question is not whether concealment of information is a public injury in any particular case, but whether "the natural tendency of it is to produce practices inconsistent with the public safety or tranquility."[494] Second, the court argued that the proviso applies to "acts committed, not to acts omitted."[495] The state may override free exercise claims when the claimant's actions would injure the public, but it may not do so to compel affirmative public benefits.

The very fact that the court evaluated the strength of the government's interest in enforcing a subpoena under the "peace or safety" standard confirms that such state provisos were understood to limit legislative authority from encroaching on religious liberty even through generally applicable laws. The court concluded as follows:

> Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.[496]

Four years after this decision, another New York municipal court distinguished the *Philips* decision and denied the motion of a defendant in a murder trial to bar testimony of a Protestant clergyman to whom he had confessed while in prison.[497] The clergyman informed the court that he had no objection to testifying, whereupon the court ruled "that the testimony was admissible, and took distinction between auricular confessions made to a priest in the course of discipline, according to the canons of the Church, and those made to a minister

[491] *Id.* at 207–08.
[492] *Id.* at 208.
[493] *Id.*
[494] *Id.*
[495] *Id.*
[496] *Id.* at 209. By "country," the court presumably meant New York.
[497] *See* People v. Smith, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), *reprinted in Privileged Communications to Clergymen*, *supra* note 1, at 209.

of the gospel in confidence, merely as a friend or adviser."[498] The logic appears to be that no violation of religious tenets was involved. In response to this decision, the New York legislature passed a statute forbidding any minister or priest "of any denomination whatsoever" from disclosing "any confessions made to him in his professional character."[499]

Similarly, the Supreme Judicial Court of Massachusetts refused, without explanation, to overturn a criminal conviction based on a confession made by a man to the members of his church.[500] The defendant had contended that it would be "in some shape an infringement of the rights of conscience, to make use of confessions, made under these circumstances . . . [where] in a theological view, he is obliged in conscience to perform it."[501] Counsel for the prosecution argued that the defendant's confession was "purely voluntary" and was not "required by any known ecclesiastical rule"[502] but did not contest the validity of the defendant's interpretation of freedom of conscience.[503] It is, of course, impossible to tell whether the Supreme Judicial Court accepted the defendant's legal theory, since it stated no reasons for its decision. But it is noteworthy that the prosecution confined its argument to the facts and did not contest the defendant's interpretation of constitutional principles.

The most interesting line of cases arose in the Supreme Court of Pennsylvania. The first, *Commonwealth v. Wolf*,[504] involved a challenge by a Jewish merchant, Abraham Wolf, to Pennsylvania's Sunday closing law, on the ground that as applied to one who observed Saturday as his day of rest and worship, it conflicted with the commonwealth's constitutional protection of the rights of conscience. The challenge was rejected, but on grounds that would admit the principle of free exercise exemptions. The dispositive question as the court posed the case was not whether the state constitution required exemptions, but whether the law conflicted with Wolf's religious conscience. Wolf's attorney conceded that Jewish doctrine does not "immediately" require work on Sunday; it is possible for a Jewish merchant to comply with the Sunday closing law without violating religious duty. But the attorney attempted an ingenious argument that enforcement of the Sunday closing laws, in conjunction with the

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[498] *Privileged Communications to Clergymen*, *supra* note 1, at 211.

[499] N.Y. REV. STAT. 1828, pt. 3, ch. 7, tit. 3, § 72.

[500] Commonwealth v. Drake, 15 Mass. 161 (1818).

[501] *Id.* at 161.

[502] *Id.* at 161–62.

[503] There was no doubt that the defendant's claim was understood to be based in part on the Massachusetts Constitution. Counsel for the prosecution referred to the claim as a "legal or constitutional principle." *Id.* at 161.

[504] 3 Serg. & Rawle 48 (Pa. 1817).

Jewish law forbidding work on Saturday, would force the plaintiff to violate the fourth commandment: "six days shalt thou labour, and do all that thou hast to do."[505] The court rejected this argument not in theory, but on the facts: "the Jewish Talmud, containing the traditions of that people, and the Rabbinical constitutions and explications of their law, asserts no such doctrine."[506] If there were no such doctrine, there would be no burden on Wolf's liberty of conscience and hence no ground for granting an exemption. The unstated assumption was that if the law had required Wolf to violate his conscience, he might have had a claim.[507]

The next two Pennsylvania cases, *Commonwealth v. Lesher*[508] and *Simon's Executors v. Gratz*,[509] both contain opinions by Chief Justice John Bannister Gibson, a highly regarded jurist who is best known today for his dissenting opinion in *Eakin v. Raub*,[510] in which he rebutted Chief Justice Marshall's position in *Marbury* that the judiciary has authority to declare void unconstitutional acts of the legislature.[511] Gibson also was the foremost judicial opponent of free exercise exemptions in the nineteenth century. His decision in *Simon's Executors* was the leading precedent in the thirteen original states prior to the Civil War for the proposition that free exercise does not include the right of exemption from generally applicable law. An examination of Gibson's opinions in *Lesher* and *Simon's Executors* shows that his rejection of constitutional judicial review and his position on free exercise exemptions were closely related.

In *Lesher*, a prospective juror had been excluded for cause from jury service in a capital case, on the basis of his religious objection to capital punishment.[512] The defendant was convicted and appealed on the ground that the juror's exclusion had been unlawful.[513] On appeal, the majority affirmed the conviction on the basis of the state's interest in obtaining a trial in which the jurors complied with the law, without finding it necessary to address the religion clauses of the state constitution.[514] Gibson dissented on the ground that religious scruples

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[505] *Id.* at 50.

[506] *Id.*

[507] The case was a precursor to Braunfeld v. Brown, 366 U.S. 599 (1961), in which the United States Supreme Court rejected a similar challenge to a Sunday closing law by a Jewish merchant. Whether such a challenge should succeed under the modern doctrine of free exercise exemptions is a close question. *See* McConnell & Posner, *supra* note 20, at 41–42.

[508] 17 Serg. & Rawle 155 (Pa. 1828).

[509] 2 Pen. & W. 412 (Pa. 1831).

[510] 12 Serg. & Rawle 330 (Pa. 1825).

[511] *See id.* at 356 (Gibson, C.J., dissenting). Gibson added one caveat: the judiciary could declare state laws that violate the federal Constitution void, there being an express grant of such power under the supremacy clause. *See id.* at 356–57.

[512] *See Lesher*, 17 Serg. & Rawle at 155.

[513] *See id.*

[514] *See id.* at 156–60.

cannot be a basis for exemption from a civic duty, such as jury service.[515]

Gibson's *Lesher* dissent formed the basis for a majority holding in *Simon's Executors*. In that case, a contract action had been set for trial on a Saturday and the plaintiff, Levi Philips, who was Jewish, moved for a continuance on the ground that "he had scruples of conscience against appearing in court to-day, and attending to any secular business; and that he believes his presence and aid will be material in the progress of the cause."[516] The motion was denied; Philips' counsel took a nonsuit and appealed on the basis of the liberty of conscience clause of the Pennsylvania Constitution.[517] The decision was affirmed, in another opinion by Gibson.[518]

In his *Simon's Executors* opinion, Gibson expressly disapproved the New York precedent of *People v. Philips*,[519] which had been cited by counsel for the defendant:

> No one is more sensible than I, of the benefit derived by society from the offices of the Catholic clergy, or of the policy of protecting the secrets of auricular confession. But considerations of policy address themselves with propriety to the legislature, and not to a magistrate whose course is prescribed not by discretion, but rules already established.[520]

In his *Lesher* dissent, Gibson defined the "rights of conscience" as follows:

> Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act for conscience sake, the doing or forbearing of which, *is not prejudicial to the public weal.*[521]

Relying on the authority of Jefferson (about whom he said "a more resolute champion of toleration perhaps never lived"[522]), Gibson argued that "were the laws dispensed with, wherever they happen to be in collision with some supposed religious obligation, government would be perpetually falling short of the exigence."[523] Since jury

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[515] *See id.* at 160–61 (Gibson, C.J., dissenting).

[516] Simon's Executors v. Gratz, 2 Pen. & W. 412, 412 (Pa. 1831) (quoting the deposition of Levi Philips). Presumably, this was an attempt to relitigate Stansbury v. Marks, 2 Dall. 213 (Pa. 1793), *see supra* p. 1504, by a relative of the original party.

[517] *See Simon's Executors*, 2 Pen. & W. at 414.

[518] *See id.* at 416–18.

[519] *See supra* pp. 1504–05.

[520] *See Simon's Executors*, 2 Pen. & W. at 414.

[521] Commonwealth v. Lesher, 17 Serg. & Rawle 155, 160 (Pa. 1828) (Gibson C.J., dissenting) (emphasis in original).

[522] *Id.*

[523] *Id.* at 161.

Temple American Inn of Court - April 2016 Program - Research and Materials

service is a general obligation on all citizens, and the legislature had enacted no exemption, there was no legal basis for excusing the juror. Gibson did not engage in any analysis of whether an exemption in the case would in fact be "prejudicial to the public weal,"[524] apparently considering existence of the law conclusive as to its necessity. Indeed, he went out of his way to opine that the effect of refusing to exclude a juror with religious scruples against capital punishment was to grant the accused an "unreasonable advantage[]."[525] "No one," he said, "is more thoroughly convinced of the . . . abstract propriety of the objection to the juror here,"[526] but for Gibson the remedy lay with the legislature.[527]

In *Simon's Executors*, Gibson explained the theoretical basis for his position. "Rightly considered," he said, "there are no duties half so sacred as those which the citizen owes to the laws."[528] "That every other obligation shall yield to that of the laws, as to a superior moral force," he wrote, "is a tacit condition of membership in every society, whether lay or secular, temporal or spiritual, because no citizen can lawfully hold communion with those who have associated on any other terms."[529] Gibson's statement may be contrasted with Madison's position in the *Memorial and Remonstrance*. Madison contended that religious duty "is precedent both in order of time and degree of obligation, to the claims of Civil Society."[530] Gibson held that a person entering into civil society must assume the obligation of yielding to all the laws, because no other form of association is possible. Madison held that "every man" who becomes a member of a civil society "*must* always do it with a reservation . . . of his allegiance to the Universal Sovereign."[531] What Gibson said is impossible, Madison said is necessary. Gibson's view of the nature of religious freedom thus conflicts directly with that of one of the leading framers of the federal free exercise clause.

Gibson's rejection of the principle of judicial review, as explained in *Eakin v. Raub*,[532] provides further reason to doubt that he represented the prevailing view on the interpretation of free exercise. Like Locke, Gibson believed in legislative supremacy. In *Lesher*, he attributed his conclusion to his "horror of judicial legislation"[533] and said

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[524] *Id.* at 160 (emphasis omitted).
[525] *Id.* at 164.
[526] *Id.*
[527] *See id.*
[528] Simon's Executors v. Graz, 2 Pen. & W. 412, 417 (Pa. 1831).
[529] *Id.*
[530] J. MADISON, *Memorial and Remonstrance*, *supra* note 109, at 184–85.
[531] *Id.* (emphasis added).
[532] *See* Eakin v. Raub, 12 Serg. & Rawle 330, 344–58 (Pa. 1825) (Gibson, J., dissenting).
[533] Commonwealth v. Lesher, 17 Serg. & Rawle 155, 164 (Pa. 1828) (Gibson, C.J., dissenting).

that he "would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court."[534] As discussed above, the advent of judicial review had transformed a principle of free exercise previously enforced solely through legislative action into one enforceable through the courts.[535] Since virtually all of the framers and ratifiers of the first amendment expected and intended their work to be judicially enforceable, Gibson's contrary position was almost surely idiosyncratic.

Seventeen years after *Simon's Executors*, the Pennsylvania Supreme Court had its next free exercise exemptions case, *Specht v. Commonwealth*.[536] Like *Wolf*, it involved a challenge to enforcement of the Sunday closing law by a sabbatarian, in this case a member of the Seventh Day Baptist Congregation. Also as in *Wolf*, the challenge was rejected. Toward the beginning of the opinion, the court stated that "conscientious doctrines and practices can claim no immunity from the operation of general laws made for the government and to promote the welfare of the whole people,"[537] citing Gibson's opinions in *Lesher* and *Simon's Executors*. Toward the end of the opinion, however, the court appeared to reject the claim on the facts, much as it had in *Wolf*. The court described the effect of the Sunday closing law on sabbatarians as "an incidental worldly disadvantage, temporarily injurious"[538] and stated that if a person were under a religious duty both to observe Saturday as a sabbath and to work six days out of the week, "the law which compels him to inaction upon one of the six, might well be regarded as an invasion of his conscientious conviction."[539] Thus, having restated the no-exemptions precedent, the court narrowed its holding to the facts of the case, leaving open the possibility that an exemption might be granted when an actual conflict arose.

The only other religious exemption decision located from this period is *State v. Willson*,[540] an 1823 decision by the Constitutional Court of South Carolina. In that case, a member of "the sect of christians usually called Covenanters" refused on ground of religious conscience to serve as a grand juror and prosecuted an appeal as a test case.[541] The court unanimously rejected the claim that "a fixed & scrupulous moral objection to the discharge of a duty required by law, which springs conscientiously from the religious tenets of a man,

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[534] *Id.*

[535] *See supra* pp. 1444–45.

[536] 8 Pa. 312 (1848).

[537] *Id.* at 322.

[538] *Id.* at 325.

[539] *Id.* at 326.

[540] 13 S.C.L. (2 McCord) 393 (1823).

[541] *Id.* at 394.

Temple American Inn of Court - April 2016 Program - Research and Materials

amounts to a justification for refusing to perform the duty so required."[542] The court observed that all religions required "a ready obedience to the laws of the country" and urged the Covenanter to "'obey the powers that be.'"[543] In addition, the court expressed concern that if the sincere objections of believers were indulged, it would open the gates to the "hipocritical" and the "deceitful."[544] Oddly, the court neither quoted nor cited the free exercise provision of the South Carolina Constitution.

The court's first argument in *Willson* proves either too much or too little. On the one hand, it suggests that there can be no religious limitation on the powers of the government, since obedience to all laws is a sacred obligation of the citizen. On the other hand, it disregards the possibility that free exercise limitations are themselves a part of the law, and that to rely on constitutional protections does not constitute disobedience to the law. The court's second argument resembles criticism of the "sincerity" requirement under modern free exercise doctrine[545] and contains an implicit bias in favor of familiar religious practices and against religious practices that are not widely held and hence suspect.

It is surprising that cases involving jury service did not arise more often, since Quakers as well as Covenanters refused jury service and were not shy about pressing their claims in court. The explanation is probably that trial judges were vested with broad discretion to excuse jurors and usually did so in cases of religious objection. Indeed, such a de facto exemption had occurred in *Lesher*, and the court in *Willson* noted that it often occurred in South Carolina, as well.[546] The *Willson* case itself was taken to the constitutional court simply to "settle a principle."[547] This strongly suggests that the actual practice favored exemptions, even though the appellate decisions went the other way.

D. Summary of the Evidence

While the historical evidence is limited and on some points mixed, the record shows that exemptions on account of religious scruple should have been familiar to the framers and ratifiers of the free exercise clause. There is no substantial evidence that such exemptions were considered constitutionally questionable, whether as a form of establishment or as an invasion of liberty of conscience. Even opponents of exemptions did not make that claim. The modern argument

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[542] *Id.*

[543] *Id.* at 396.

[544] *Id.* at 394.

[545] *See* Marshall, *supra* note 17, at 27–30.

[546] *See Willson*, 13 S.C.L. (2 McCord) at 395–96.

[547] *Id.* at 394.

Temple American Inn of Court - April 2016 Program - Research and Materials

against religious exemptions, based on the establishment clause, is thus historically unsupportable. Likewise unsupportable are suggestions that free exercise of religion is limited to opinions or to profession of religious opinions, as opposed to conduct.

It is more difficult to claim, on this evidence, that the framers and ratifiers specifically understood or expected that the free exercise clause would vest the courts with authority to create exceptions from generally applicable laws on account of religious conscience. Exemptions were not common enough to compel the inference that the term "free exercise of religion" necessarily included an enforceable right to exemption, and there was little direct discussion of the issue. Without overstating the force of the evidence, however, it is possible to say that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation.

Indeed, the evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison's writings, is that the claims of the "universal sovereign" precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty. A religious duty does not cease to be a religious duty merely because the legislature has passed a generally applicable law making compliance difficult or impossible.

The language of the free exercise and liberty of conscience clauses of the state constitutions, from the early Rhode Island, Carolina, and New Jersey charters to the new constitutions passed after 1776, strongly supports this hypothesis. These constitutions curtailed free exercise rights when they would conflict with the peace and safety of society. These "peace and safety" provisos would not be necessary if the concept of free exercise had been understood as nothing more than a requirement of nondiscrimination against religion.

Moreover, in the actual free exercise controversies in the colonies and states prior to passage of the first amendment, the rights of conscience were invoked in favor of exemptions from such generally applicable laws as oath requirements, military conscription, and ministerial support. Many of the framers, including Madison, a majority of the House of Representatives in the First Congress, and the members of the Continental Congress of 1775, believed that a failure to exempt Quakers and others from conscription would violate freedom of conscience. These experiences, while not so frequent or notorious as to warrant firm conclusions, nonetheless suggest that exemptions were part of the legal landscape. They are sufficient to shift the

burden of persuasion to those who contend that the free exercise clause precludes exemptions.

The history subsequent to adoption of the first amendment is inconclusive but tends to point against exemptions. One lower court in New York squarely adopted the exemptions interpretation, and the supreme courts of Pennsylvania and South Carolina rejected it. None of these decisions was handed down within twenty years of the first amendment, and they are therefore weak indicators of the original understanding. The Pennsylvania holding is entitled to especially little weight since it was connected to a rejection of constitutional judicial review in general. Indeed, the contrast between the rationale of Chief Justice Gibson for the Pennsylvania court and the rationales offered by Madison for religious liberty tends, if anything, to reinforce the conclusion that Madison's position requires exemptions.

IV. Conclusion: The New American Philosophy of Religious Pluralism

The free exercise clause may well be the most philosophically interesting and distinctive feature of the American Constitution. Viewed in its true historical light, as the product of religious pluralism and intense religious sectarianism in the American states and colonies, with limited influence from the rationalistic Enlightenment, the free exercise clause represents a new and unprecedented conception of government and its relation to claims of higher truth and authority.

Until the Protestant Reformation, the separation of church and state was the product not of theory or design but of geopolitical reality. It was graphically illustrated by the throne of St. Peter in Rome and the throne of the king in each of the nation-states of Christendom. At times, the church was under the domination of the state; at times, though more rarely, the state was under the domination of the church. More often, the church and the state were independent powers, supported by different claims of authority, acting in varying degrees antagonistically or cooperatively one with the other. This separation, a product of a "catholic" church in a post-imperial world, was instrumental in staving off incipient despotism. Mankind's two great loyalties, to God and to country, were of necessity divided; claims of ultimate right were pitted against the power of the state. "'To that conflict of four hundred years,'" according to Lord Acton, "'we owe the rise of civil liberty.'"[548]

The Reformation introduced religious factions to Western Europe, and with them, two novel dangers to public peace and freedom. First,

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[548] B. Tierney, *Medieval Canon Law and Western Constitutionalism*, in Church Law and Constitutional Thought in the Middle Ages, pt. XV, at 8 (1979).

Temple American Inn of Court - April 2016 Program - Research and Materials

the rivalry among religious sects broke out into bloody warfare, both between countries, as in the Thirty Years War, and within countries, as in the English Civil War and the Huguenot wars in France. Second, as the universal church was sundered, it became possible to form national churches, such as the Church of England, which could be more easily dominated by the government.[549] Thus, a complete and enduring fusion of earthly and spiritual authority became a serious possibility for the first time since the fall of Rome.

The Enlightenment writers on the subject tended to concentrate on the danger of religious rivalry. Sectarian intolerance and struggle for hegemony was a major cause of unrest, violence, rebellion, and persecution. There were two promising ways to ameliorate and, if possible, eliminate such violence and persecution, and both had proponents among the thinkers of the Enlightenment. One solution was to suppress religious differences by establishing a national church and supporting it with public funds. This solution was proposed by Hobbes,[550] the youthful Locke,[551] and Hume,[552] among others. It would have two advantages: by unifying religion, it would reduce religious factionalism, and by guaranteeing financial support to the clergy, it would cause them to become indolent and subservient. The difficulty with this solution was that it would enrage dissenters from the established church (or at least the most intense among them) and might well exacerbate religious unrest. For this reason, the mature Locke proposed the second approach: to extend toleration to all (except Catholics and atheists), on condition that each religion adopt toleration as one of the tenets of its faith. Toleration, it was hoped, would calm the fevers of religious dissension. To the Enlightenment skeptic, convinced of the absurdity of the more intense varieties of religious expression and likewise convinced of the power of reason, this approach seemed to offer the additional advantage that reason, and with it rational religion, would prevail over the sectarians. Hence Jeffer-

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[549] *See* F. MAKOWER, *supra* note 45, at 97 ("In the sixteenth century the reformation robbed the church almost wholly of its independence.").

[550] *See* T. HOBBES, *supra* note 119, pt. III, ch. 42, at 293–95; *see id.* at 293 ("[T]he Right of Judging what Doctrines are fit for Peace, and to be taught the Subjects, is in all Commonwealths inseparably annexed . . . to the Soveraign Power Civill.").

[551] *See* J. LOCKE, TWO TRACTS ON GOVERNMENT, *supra* note 118, at 124–27.

[552] Hume wrote:

> [E]cclesiatical establishments, though commonly they arose at first from religious view, prove in the end advantageous to the political interests of society . . . . [T]he civil magistrate [should] bribe their [the clergy's] indolence, by assigning stated salaries to their profession, and rendering it superfluous for them to be farther active, than merely to prevent their flock from straying in quest of new pastures.

1 D. HUME, HISTORY OF ENGLAND, ch. 29, at 552–553 (1851); *see also* D. HUME, *Idea of a Perfect Commonwealth*, in ESSAYS: MORAL, POLITICAL, AND LITERARY 512, 520 (E. Miller ed. 1985).

son's hope that with religious freedom in America, all would become Unitarians.[553]

An aggressive interpretation of the free exercise clause would be incompatible with the Enlightenment theory of toleration. Free exercise exemptions are likely to encourage dissident sects to maintain practices at variance with the mores of society, and thus perpetuate the very religious factionalism that is the root of the problem. While deliberate oppression of minority religious groups is counterproductive, indirect measures that increase the cost and inconvenience of exotic religious practices likely will dampen the enthusiasm for religious differentiation and thereby reduce religious strife.

As with the establishment solution, however, the toleration solution seemed less than realistic from the American side of the Atlantic. Too many Americans had come to these shores precisely because they could not practice their faith in the controlled environs of Europe. Too many sectarians were spreading their views, and religious factionalism was already too deeply ingrained. Dissenters were a vexatious minority in Britain; in America they were (in the aggregate) a large majority, divided into many sects. And experience had shown that Americans were attracted — not repulsed — by the "irrational" surges of enthusiastic religion that peaked in the Great Awakening.

Madison, for one, grasped that the United States was not amenable to the Enlightenment solutions.[554] In a letter to Jefferson, he stated that "[h]owever erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman or the benevolent philosopher, the bulk of mankind, who are neither Statesman nor philosophers, will continue to view them in a different light."[555] Religious sectarianism will not go away. Universal Unitarianism, even if desirable, is not going to come about. The Madisonian contribution, familiar to us from *The Federalist* Nos. 10 and 51, is to understand factions, including religious factions, as a source of peace and stability. If there are enough factions, they will check and balance one another and frustrate attempts to monopolize or oppress, no matter how intolerant or fanatical any particular sect may be.

This point of view is consistent with an aggressive interpretation of the free exercise clause, which protects the interests of religious minorities in conflict with the wider society and thereby encourages the proliferation of religious factions. To increase the number of religious sects and the vigor of the small ones will not, as Locke

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[553] *See supra* text accompanying note 211.

[554] On the difference between American styles of thinking and the ideas of the European Enlightenment in other contexts, see D. BOORSTIN, cited above in note 155, at 149–52.

[555] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 5 THE WRITINGS OF JAMES MADISON, *supra* note 109, at 17, 29.

appeared to believe, exacerbate the problem of religious turmoil. More likely, it will make religious oppression all the more impossible and therefore all the more unprofitable to attempt. Rather than try to foster an ecumenical spirit, the state allows each sect to promote its own cause with zeal. The Madisonian perspective points toward pluralism, rather than assimilation, ecumenism, or secularism, as the organizing principle of church-state relations. Under this view, the Supreme Court errs if it attempts to calm or suppress religious fervor by confining it to the margins of public life. It should welcome religious participation in all its diversity and dissension. The Court should not ask, "Will this advance religion?," but rather, "Will this advance religious pluralism?" The Court should not ask, "Will this be religiously divisive?," but rather, "Will this tend to suppress expression of religious differences?" Most of all, the Court should extend its protection to religious groups that, because of their inability to win accommodation in the political process, are in danger of forced assimilation into our secularized Protestant culture. The happy result of the Madisonian solution is to achieve *both* the unrestrained practice of religion in accordance with conscience (the desire of the religious "sects") *and* the control of religious warfare and oppression (the goal of the Enlightenment).

So understood, the free exercise clause also makes an important statement about the limited nature of governmental authority. While the government is powerless and incompetent to determine what particular conception of the divine is authoritative, the free exercise clause stands as a recognition that such divine authority may exist and, if it exists, has a rightful claim on the allegiance of believers who happen to be American citizens. The actual occasions for free exercise exemptions may be rare now, as in our early history; but the importance of the principle outstrips its practical consequences. If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.

Dissenting in *West Virginia Board of Education v. Barnette*,[556] Justice Felix Frankfurter wrote:

> The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious

[556] 319 U.S. 624 (1943).

PUNISHMENT FOR PREJUDICE: A COMMENTARY ON THE CONSTITUTIONALITY AND UTILITY OF STATE STATUTORY RESPONSES TO THE PROBLEM OF HATE CRIMES

CRAIG PEYTON GAUMER†

I. INTRODUCTION

> "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[1]

> "Under our Constitution men are punished for what they do or fail to do and not for what they think and believe. Freedom to think, to believe, and to worship, has too exalted a position in our country to be penalized on such an illusory basis."[2]

> "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[3]

The quotations cited above suggest that freedom of thought has long been recognized as a fundamental constitutional right by the United States Supreme Court.[4] In the past thirteen years, however, many state legislatures have enacted into law a variety of statutes designed to punish racist, sexist, and other bigoted beliefs. The similarity between the statutory

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This article is dedicated to Irving Dilliard. Mr. Dilliard's friendship and career have been inspirational to the author. I also wish to acknowledge the efforts of the men and women of the Anti-Defamation League of B'nai B'rith (ADL), whose laudable efforts to curb antisemitism and racism and other forms of bigotry have drawn public attention to the growing problem of hate crimes. Though the author disagrees with some of the means by which the ADL seeks to end prejudice, the author wholeheartedly supports its goal.

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1. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).
2. *In re* Summers, 325 U.S. 561, 578 (1945) (Black, J., dissenting). *See also* Irving Dilliard, *Justice Black and the Language of Freedom,* 38 ALA. L. REV. 307, 319 (1987).
3. Stanley v. Georgia, 394 U.S. 557, 565 (1969).
4. The U.S. Supreme Court has recognized on numerous occasions, at least in dicta, that freedom of thought enjoys constitutional protection under the First Amendment. *See* Schneiderman v. United States, 320 U.S. 118, 144 (1943) ("If any [provision] of the Constitution can be singled out as requiring unqualified attachment . . . [it is the] freedom of thought contained in the First Amendment."); Thomas v. Collins, 323 U.S. 516, 531 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience."); Black v. Cutter Lab., 351 U.S. 292, 304 (1956) ("Belief cannot be penalized consistently with the First Amendment."). For a discussion of the Supreme Court's freedom of thought jurisprudence, see *infra* notes 160-224.

schemes used throughout the states is attributable to their common point of origin: a lobbying movement launched by the Anti-Defamation League of B'nai B'rith (ADL) in 1981. These assorted statutes are commonly referred to as "hate crime statutes"[5] because they are directed at defendants who engage in misconduct out of hatred[6] for the gender, creed, color or sexual orientation of their victims.[7]

Two distinct types of hate crime statutes exist: one type of statute

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5. *See, e.g.*, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (Gregory M. Herek & Kevin T. Berrill eds., 1992); JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED (1993); THE UNITED STATES CONFERENCE OF MAYORS & THE ANTI-DEFAMATION LEAGUE, ADDRESSING RACIAL AND ETHNIC TENSIONS: COMBATTING HATE CRIMES IN AMERICA'S CITIES (1992); ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: 1991 STATUS REPORT (1991). The topic of hate crimes has received considerable attention in academic literature. *See also* Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875 (1992); Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts On Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979; Joseph M. Fernandez, *Bringing Hate Crime Into Focus—The Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261 (1991); Peter Finn, *Bias Crime: Difficult To Define, Difficult To Prosecute*, CRIM. JUST., Summer 1988, at 19; Tom Foley, *Hate Crimes: An Analysis of the View From Above*, 18 WM. MITCHELL L. REV. 903 (1992); Victoria L. Handler, *Legislating Social Tolerance: Hate Crimes and the First Amendment*, 13 HAMLINE J. PUB. L. & POL'Y 137 (1992); Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993); Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165 (1992); Virginia N. Lee & Joseph M. Fernandez, *Developing New Approaches to Civil Rights for the 1990's: Legislative Responses to Hate-Motivated Violence: The Massachusetts Experience and Beyond*, 25 HARV. C.R.-C.L. L. REV. 287 (1990); Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178 (1993); Note, *Hate is Not Speech: A Constitutional Defense Of Penalty Enhancement For Hate Crimes*, 106 HARV. L. REV. 1314 (1993); Michael Sandberg, *Responding to Bias Crimes In America*, 18 WM. MITCHELL L. REV. 961 (1992); Sandra D. Scott & Timothy S. Wynes, *Should Missouri Retain Its "Ethnic Intimidation" Law?*, 49 J. MO. BAR. 445 (1993).

6. To an extent this label is a misnomer. The plain language of many hate crime laws would bring a defendant within their scope regardless of whether his criminal conduct was motivated by hatred, affection, or another motive. A heterosexual defendant who rapes a woman out of a perverted sense of attraction has committed the crime, at least in part, because of the victim's gender. This act would fall within the scope of most hate crime statutes.

7. Hate crime statutes are not necessarily limited to punishing the few examples of hatred cited above. Any law designed to punish a defendant for acting out of hatred for a class of which his victim is a member can be considered a hate crime law. For example, some states have expanded the scope of their hate crime laws to punish acts directed against physically or mentally disabled persons. *Compare* the Illinois Hate Crime Statute, which provides:

> (a) A person commits hate crime when, by reason of the race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct . . . or harassment by telephone as defined in Section 1-1 of the Obscene Phone Call Act.

ILL. COMP. STAT. ANN. ch. 720, para. 5/12-7.1(a) (Smith-Hurd 1993 & Supp. 1993) *with* the Illinois Factors-In-Aggravation Statute, which reads in pertinent part as follows:

> (a) The following factors shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence under Section 5-8-1:
>
> . . . .
>
> (10) the defendant committed the offense against a person or a person's property because of such person's race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin . . . .

ILL. COMP. STAT. ANN. ch. 730, para. 5/5-5-3.2(a)(10) (Smith-Hurd 1993 & Supp. 1993).

makes it a discrete crime to be motivated by bigotry to commit an act already made illegal (hate crime law); the other type of statute applies after conviction at sentencing to enhance a defendant's punishment when he was motivated to act by a reason the state considers inappropriate (hate crime penalty enhancement). Notwithstanding other rationales that have been advanced to justify hate crime statutes, it seems likely that the genuine goal of both types of statutes is to advance the cause of civil rights by punishing more harshly those persons who commit crimes for reasons of prejudice. While the reduction and elimination of hate crimes are noble goals, the statutory schemes currently being used to combat hate crimes arguably exact too high a price in exchange for any benefits they may confer. Most hate crime laws facilitate the cause of civil rights by bestowing on the government the power to punish a person for the thoughts that he holds. If a state can punish a defendant for being motivated by bigotry, then no constitutional barrier would appear to limit the state's ability to enhance the punishment of any act committed for a reason with which the majority of the electorate disagrees.

Many hate crime statutes have recently been the subject of constitutional conflicts waged in court across the nation.[8] The question of whether one hate crime penalty enhancement statute violates a right to free thought inherent in the First Amendment was recently answered by the United States Supreme Court in *Wisconsin v. Mitchell.*[9] In *Mitchell,* the Court

8. *Compare* State v. Wyant, 597 N.E.2d 450 (Ohio 1992) (holding hate crime law unconstitutional for violating freedom of thought) (*Wyant I*) *with* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (concluding that Wisconsin hate crime penalty enhancement statute is aimed at conduct unprotected by the First Amendment).

In *Wyant I,* the Supreme Court of Ohio originally concluded that Ohio hate crime laws conflicted with the state constitutional right of free thought, as well as the First Amendment. 597 N.E.2d at 459. The case was appealed to the U.S. Supreme Court on the First Amendment issue. Ohio v. Wyant, 113 S. Ct. 2954, 2955 (1993). The judgment was vacated by the U.S. Supreme Court and remanded for reconsideration in light of the decision rendered in *Wisconsin v. Mitchell. Id.* Insofar as the Ohio Supreme Court's interpretation of its own constitution is not a federal question within the review power of the U.S. Supreme Court, it seemed unlikely that the result reached by the *Wyant I* Court would be disturbed. On remand, however, the state court vacated its prior decision and upheld the statute in a three paragraph decision based totally on *Mitchell.* State v. Wyant, 624 N.E.2d 722, 724 (Ohio 1994) (*Wyant II*). In dissent, Justice Wright of the Ohio Supreme Court noted that *Mitchell* should not have been binding on the state of Ohio because "the two statutes are completely different in both wording and scope of application, as are the free speech provisions of the United States Constitution and the Ohio Constitution." *Id.* at 724-25 (Wright, J., dissenting). Justice Wright was especially troubled by the ruling on remand because it failed to interpret the Ohio Constitution as "an independent source of protection of civil liberties." *Id.* at 726 n.2. The court stated:

> "The Ohio Constitution is a document of independent force. In areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups."

Id. (quoting Arnold v. Cleveland, 616 N.E.2d 163, 164 (Ohio 1993)). While the majority of the Ohio Supreme Court felt obligated in *Wyant II* to decide the case in "lockstep" with *Mitchell* in a three paragraph decision, the analysis used in *Wyant I* provides much sounder analysis for courts to consider when examining the issue.

9. 113 S. Ct. 2194 (1993).

found no First Amendment problem with a sentencing statute that increased the range of imprisonment in cases when a defendant committed his crime for reasons of bigotry.[10] The *Mitchell* decision did not, however, expressly address whether states may constitutionally craft laws that go beyond enhancing the sentence of a convicted defendant and instead make having a bigoted motive for engaging in an act of misconduct already sanctioned under criminal law a distinct crime in and of itself. Consequently, *Mitchell* failed to offer much guidance on whether such statutory schemes run afoul of a constitutionally protected right of free thought or the Equal Protection Clause of the Fourteenth Amendment.

In addition to raising constitutional concerns, the current statutory approach to the problem of hate crimes raises penological concerns. Does the practice of increasing a defendant's sentence when he commits an act of violence for reasons of bigotry correspond with any of the acknowledged goals of the American criminal justice system? Will augmenting a hate-motivated criminal's time behind bars rid him of the prejudices that inspired his conduct? Is the ADL approach the only penological tool the states have available to wage the war against hate crime? The utility of hate crime statutes has been virtually ignored in the midst of the constitutional debate and merits further exploration.[11] If the current approach is ineffective—or if another approach is theoretically at least as effective—then it would appear that the states have little need to use the controversial methods presently employed in the fight against hate crimes.

This article discusses the constitutionality and utility of the ADL model response to hate crimes and similar statutes currently in effect throughout the United States. Part Two of this commentary discusses the historical origins of the anti-hate crimes movement in America and frames the current constitutional controversy. Specifically, this article reviews the role of the ADL as a leader in the anti-hate crimes effort. The First Amendment problems that many members of the bench and bar have with the current statutory techniques of combatting hate crimes are examined as well. The United States Supreme Court's response to these First Amendment issues, delivered just last term in *Wisconsin v. Mitchell,* is critically analyzed in Part Three. Additional constitutional questions left unanswered by the *Mitchell* Court are discussed in Part Four. Specifically, Part Four addresses whether the current statutory response to hate crimes violates a right of free thought protected by the First, Ninth or Fourteenth Amendments. Finally, the utility of hate crime laws is briefly deliberated. Alternative methods of punishing the hate-motivated criminal for the repercussion of his misdeeds are investigated. This commentary concludes

10. *Id.* at 2201-02.

11. This work does not contain a comprehensive review of sociological, psychological or penological materials on the etiology and amelioration of criminal behavior. The discussion of these topics contained herein is intended to illustrate the need for the social sciences to specifically assess the utility of hate crime statutes.

that *Wisconsin v. Mitchell* should be the beginning, and not the end, of the debate over whether the ADL model approach is a constitutional and effective means of trying to ameliorate the problem of hate crimes.

II. THE ANTI-HATE CRIMES MOVEMENT

The prevalence of hate crimes is undoubtedly rising. For example, incidents of anti-gay violence reported to the National Gay & Lesbian Task Force increased from 2,042 in 1985 to 7,031 in 1989.[12] During 1991, reported anti-gay violence increased substantially in five major metropolitan areas. Anti-gay violence increased by 6% in Chicago, by 11% in San Francisco, by 17% in New York City, by 42% in Boston, and by 202% in Minneapolis/St. Paul.[13] The 1685 antisemitic incidents reported to the ADL in 1990 was the highest total ever reported in the twelve-year history of the ADL's Audit of Anti-Semitic Incidents.[14]

The increase in hate crimes inspired the United States Congress to enact the Hate Crime Statistic Act of 1990[15] to establish a national data collection system of bias-motivated crimes.[16] The first wave of data accumulated by the Federal Bureau of Investigation under the Hate Crime Statistics Act indicated that "[a] total of 4,558 hate crime indictments involving 4,755 offenses were reported in 1991."[17] Of the hate crimes reported,[18] 60% were allegedly motivated by racial bias, 20% were motivated by religious bias, and ethnic bias and sexual orientation each motivated 10% of the hate crimes reported.[19] The FBI suspects that 1,679 of the persons who committed the hate crimes were white, 769 were black, and the race of

12. HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 5, at 36.

13. *Id.* at 37. A total of 1,822 anti-gay acts of violence were documented in 1991 in these cities, which represented a 31% increase from 1990 and a 161% increase since 1988. *Id.*

14. State v. Mitchell, 485 N.W.2d 807, 810 (Wis. 1992) (citing ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1990 AUDIT OF ANTI-SEMITIC INCIDENTS 1 (1990)).

15. Pub. L. No. 101-275, 104 Stat. 140.

16. For an in-depth discussion of the act, see Fernandez, *supra* note 5, at 268.

17. UNITED STATES DEP'T OF JUSTICE, FBI'S 1991 PRELIMINARY REPORT ON HATE CRIME 1 (1991). Of the 4,558 hate crimes reported, intimidation accounted for 33% of all offenses, destruction/damage/vandalism of property accounted for 27%, simple assault accounted for 17%, aggravated assault accounted for 16%, and robbery constituted 3% of all reported hate crimes. *Id.* Murder, forcible rape, burglary, larceny-theft, motor vehicle theft and arson each made up 1% or less of the total. *Id.*

18. *Id.* at 1, 4. Of the 2,771 agencies that participated in the 1991 survey, 27% reported at least one hate crime. *Id.*

19. *Id.* at 3. Specific data on motivation breaks down as follows:

1,974 offenders is unknown.[20] The prevalence of hate crimes shown in the statistical data indicates that the trend must be curtailed and reversed.

The prime force behind the anti-hate crimes movement has been the Anti-Defamation League of B'nai B'rith (ADL). The ADL's history is that of a strong advocate against racial and ethnic intolerance. The ADL's charter explains that it was established to end, "by appeals to reason and conscience, and if necessary, by appeals to law," the vilification of the Jewish people.[21] The ADL's stated mission is "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens."[22]

The ADL's commitment to curtailing the problem of hate crimes is exhibited by its leadership role in lobbying the states to pass hate crime legislation. The ADL's devotion to the cause is perhaps the product of its

Hate Crime Bias-Motivations Reported, 1991
(Percentages do not add up due to rounding)

Bias-Motivation	Number	Percent
Race	2,963	62.3
Anti-White	888	18.7
Anti-Black	1,689	35.5
Anti-American Indian Anti-Alaskan Native	11	0.2
Anti-Asian/Pacific Islander	287	6.0
Anti-Multi-Racial Group	88	1.9
Ethnicity	450	9.5
Anti-Hispanic	242	5.1
Anti-Other Ethnicity Anti-National Origin	208	4.4
Religion	917	19.3
Anti-Jewish	792	16.7
Anti-Catholic	23	0.5
Anti-Protestant	26	0.5
Anti-Islamic (Moslem)	10	0.2
Anti-Other Religion	51	1.1
Anti-Multi-Religious Group	11	0.2
Anti-Atheism/Agnosticism/Etc.	4	0.1
Sexual Orientation	425	8.9
Anti-Homosexual	421	8.9
Anti-Heterosexual	3	0.1
Anti-Bisexual	1	0.0
Total	4,755	100.0 *

Id. at 2.

20. *Id.*

21. JILL D. SNYDER & ERIK K. GOODMAN, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, FRIEND OF THE COURT (1947-1982): TO SECURE JUSTICE AND FAIR TREATMENT FOR ALL 10 (1983).

22. *Id.* The ADL pledged to use three means to accomplish its goals: education, vigilance work and legislation. *Id.*

origins. The ADL was founded in 1913 to counteract increased hostility directed at American Jews in the early 1900's.[23] At least one of the ADL's founders theorized that the escalation of belligerence by non-Jews was related to the increased Jewish immigration from Eastern Europe near the turn of the century.[24] One of the most infamous and nefarious antisemitic hate crimes on record helped spark various Jewish leaders to consolidate their efforts into a single organization committed to fighting discrimination. The despicable deed which inspired such solidarity was the lynching of a young Jewish man named Leo Frank.[25]

Frank, a native of New York who had relocated to Georgia, was charged in 1913 with the rape and murder of a young girl whose body was found in the pencil factory he managed.[26] Once arrested, Frank soon discovered that he had to defend himself from the prosecution, a timid judge, and a militant public.[27] Herman Binder, who attended Frank's trial, described the scene in the courtroom:

> Mobs choked the area around the courthouse. Men with rifles stood at the open windows, some aimed at the jury, some aimed at the judge. Over and over, louder and louder the men repeated the chant "Hang the Jew, Hang the Jew."
>
> The trial was a farce.... The mobs kept up their chant. I can still hear the screaming . . . through those open windows. And inside the courtroom, spectators were allowed to give free vent to their Anti-Semitism. The jury was threatened with death unless it brought in a verdict of guilty. The judge was threatened with death if he didn't pass a sentence of hanging. No deputies tried to clear the windows or the courtroom. And there, looking so small and forlorn was . . . Leo.[28]

Frank was convicted by the jury and sentenced to death by the trial judge.[29] On appeal, the United States Supreme Court left the conviction intact by holding that it did not involve a federal issue, though Associate Justices Oliver Wendell Holmes, Jr., and Charles Evans Hughes, Jr., issued an im-

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23. *Id.* at 9.

24. *Id.*

25. Frank v. Mangum, 237 U.S. 309 (1915).

26. NATHAN C. BELTH, A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM 59 (1979).

27. *Id.* Tom Watson, a newspaper publisher described by one commentator as "a demagogue, a racist, full of frustrations that fed his hatreds," corrupted the criminal justice system in which Frank was forced to fight for his life by fanning the flames of antisemites throughout the region. *Id.* Watson's "principal product was sensationalized bigotry, largely anti-Catholic." *Id.* at 60. He is also attributed with engaging in "a long career of organizing hate campaigns against Negroes." *Id.* at 59. During the trial, Watson's newspaper, THE JEFFERSONIAN, whipped the community into a frenzy with antisemitic attacks on Frank and Frank's defenders. *Id.* at 64. For example, Watson's paper declared that "'[o]ur little girl—ours by the eternal God . . . has been pursued to a hideous death by this filthy perverted Jew of New York.'" *Id.* "THE JEFFERSONIAN dwelled constantly on the case recounting over and over again that 'Jew money' was 'out to free the convicted libertine,' weeping that the girl Mary Phagan 'had no millionaire uncle to raise money for her.'" *Id.*

28. *Id.* at 62-63.

29. *Frank*, 237 U.S. at 312.

passioned dissent.[30] Then Governor of Georgia, John M. Slaton, subsequently commuted Frank's sentence to life imprisonment.[31] Not content with seeing Frank live out the rest of his days behind bars, twenty-five men took Frank from a prison sickbed on August 16, 1915, and hanged him from an oak tree in Marietta, Georgia.[32] The execution has been described as "the only lynching of a Jew in the nation's history."[33]

Though created to oppose antisemitism, the ADL has been an ardent advocate for the civil rights of all minority groups since the dark decade in which it was born.[34] Notwithstanding its labors in support of the civil rights cause, the ADL did not begin tracking vandalism committed out of antisemitism until 1960.[35] The ADL noticed a dramatic increase in such incidents between 1979 and 1981.[36] In 1981, the ADL's Legal Affairs Department responded to this increase by drafting a model hate crime statute that it proposed to the states.[37]

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30. *Id.* at 347 (Holmes, J., dissenting). Holmes argues:

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted.

Id. Holmes stated that the Court had a duty "to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death." *Id.* at 350.

31. JOHN P. ROCHE, THE QUEST FOR THE DREAM: THE DEVELOPMENT OF CIVIL RIGHTS AND HUMAN RELATIONS IN MODERN AMERICA 90 (1964). Governor Slaton's act of courage cost him his political career—and almost his life. *Id.* "Only the intervention of troops prevented a frenzied mob from hanging the Governor and dynamiting his home, and when Slaton left office and Georgia three days later, his once promising political career was over." *Id.* Before he departed the state, Slaton left the crowd some final words:

> Two thousand years ago another governor washed his hands of a mob and turned a Jew over to a mob. For two thousand years that governor's name has been a curse. If today another Jew were lying in his grave because I failed to do my duty, I would all through life find his blood on my hands, and must consider myself an assassin through cowardice.

Id.

32. *Id.* Frank was in the prison infirmary recovering from an attack by a fellow inmate who had sliced Frank's throat with a razor. *Id.*

33. BELTH, *supra* note 26, at 59.

34. The ADL has played a prominent role in the civil rights arena since the 1940's. It filed several significant amicus curiae briefs before the U.S. Supreme Court in a variety of discrimination cases. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (arguing state courts cannot enforce racially restrictive real estate covenants); Brown v. Board of Educ., 347 U.S. 483 (1954) (supporting abolishment of separate-but-equal doctrine); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (supporting the right of free association); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (claiming racial discrimination in private subdivision violated federal law); Lemon v. Kurtzman, 403 U.S. 602 (1971) (urging strict separation between church and state). The foregoing list is not exclusive: the ADL has frequently been permitted to voice its concerns to the U.S. Supreme Court in a variety of cases. For a listing of the significant cases in which the ADL has been involved, see SNYDER & GOODMAN, *supra* note 21, at 93-103.

35. Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 339 (1991).

36. *Id.* at n.27 (citing CIVIL RIGHTS DIVISION, ADL LEGAL AFFAIRS DEPARTMENT, ADL LAW REPORT: HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM, AND VIOLENT BIGOTRY 1 (1988 & Supp. 1990)).

37. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, *supra* note 5, at 2.

A. Overview of State Statutory Response to the Problem of Hate Crimes

The original ADL model hate crime law proposed two statutes: 1) the Institutional Vandalism Statute, prohibiting a person from vandalizing places of worship, cemeteries, schools or community centers; and 2) the Intimidation Statute, providing enhanced penalties for specific already defined crimes when they are carried out because of the victim's actual or perceived race, sex, color, religion, sexual orientation or national origin.[38] The ADL estimates that twenty-nine states passed hate crime statutes between 1981 and 1991 based on, or similar to, the ADL Model.[39] The ADL's 1981 Model Hate Crime Law was essentially a sentence enhancement statute.

In 1991, the ADL began promoting a model hate crime law that goes a significant step beyond penalty enhancement. The 1991 update recommends that states actually make it a crime for a defendant to have the wrong reason for violating another section of the state criminal code. The ADL suggests that this offense be labelled "intimidation." The ADL's 1991 Model Hate Crime Law (Intimidation Statute) reads as follows:

> A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals, he violates Section ___ of the Penal Code (insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or other appropriate statutorily proscribed conduct.)
> B. Intimidation is a ___ misdemeanor/felony (the degree of the criminal liability should be at least one degree more serious than that imposed for commission of the offense.)[40]

The ADL's 1991 Model Hate Crime Law essentially makes it a distinct crime to commit another criminal act for a reason the state does not like.

The states that have enacted hate crime statutes similar to either of the ADL models have not uniformly ratified the language used in the ADL's 1981 or 1991 Model Hate Crime Laws.[41] Notwithstanding the differences in language used in the various state statutes, and the different "labels" attached to the statutes, the ADL's enhanced punishment approach has received wide acceptance. For example, the state of California has enacted a statute that enhances the penalty to a defendant if he chooses his victim

38. *Id.*

39. *Id.* at 21. These states include: Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, Washington, and Wisconsin. *Id.*

40. *Id.* at 4.

41. *See, e.g.,* State v. Plowman, 838 P.2d 558 (Or. 1992) (discussing Oregon hate crime law); *Mitchell,* 485 N.W.2d at 807 (discussing Wisconsin hate crime law); People v. Grupe, 141 Misc. 2d 6, 532 N.Y.S.2d 815 (N.Y. Crim. Ct. 1988) (discussing New York hate crime law). *See also* Mich. Stat. Ann. § 28.344(2) (Callaghan 1990 & Supp. 1993) (Michigan hate crime law).

from a "protected class."[42] In part, the California statute reads that:

> (a) [A] person who commits a felony or attempts to commit a felony *because of the victim's race, color, religion, nationality, country of origin, ancestry, disability, or sexual orientation* shall receive an additional term of one, two, or three years in the state prison, at the court's discretion.
>
> (b) Except in the case of a person punished under . . . subdivision (a) of this section, any person who commits a felony or attempts to commit a felony because *of the victim's race, color, religion, nationality, country of origin, ancestry, disability, or sexual orientation* and who voluntarily acted in concert with another person either personally or by aiding and abetting another person shall receive an additional two, three, or four years in the state prison, at the court's discretion.
>
> . . . .
>
> (f) The additional term in subdivision (a), (b), and (d) shall be in addition to any other punishment provided by law.
>
> (g) Notwithstanding any other law, the court may strike the additional term in subdivisions (a), (b), and (d) if the court determines that there are mitigating circumstances and states on the record the reasons for striking the additional punishment.[43]

South Dakota, on the other hand, has created the crime of "harassment," which transforms select criminal acts into the more heavily punished offense of harassment if the defendant intentionally selected his victim for a prohibited reason.[44] The newly-enacted South Dakota harassment statute reads in full as follows:

> No person may maliciously and with the specific intent to intimidate or harass another person *because of that person's race, color, religion, ancestry or national origin*:
>
> (1) Cause physical injury to anther person; or
>
> (2) Deface any real or personal property of another person; or
>
> (3) Damage or destroy any real or personal property of another person; or
>
> (4) Threaten, by word or act, to do the acts prohibited if there is reasonable cause to believe that any of the acts prohibited in subdivisions (1), (2) or (3) of this section will occur.
>
> A violation of subdivision (1) is a Class 6 felony. A violation of subdivision (2) is a Class 1 misdemeanor if the damage is less than two hundred dollars, and is a Class 6 felony if the damage is two hundred dollars but less than five hundred dollars, and is a Class 4 felony if the damage is five hundred dollars or greater. A violation of subdivision

42. CAL. PENAL CODE § 422.75 (West Supp. 1994) (defining protected classes and the penalty enhancements). California has enacted several statutes that enhance the penalty to be assessed against a defendant when his motive for committing the crime is a type of prejudice the state scorns. *See, e.g.*, CAL. PENAL CODE § 190.2 (West 1988 & Supp. 1994) (enhancing penalty for murder in the first degree); CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1994) (delineating the state's hate crime law); CAL. PENAL CODE § 422.7 (West 1988 & Supp. 1994) (enhancing penalty for interference with exercise of civil rights).

43. CAL. PENAL CODE § 422.75 (Supp. 1994) (emphasis added).

44. S.D.C.L. § 22-19B-1 (Supp. 1993) (describing the protected classes and penalties for hate crimes).

(4) is a Class 1 misdemeanor.[45]

The California law is apparently patterned after the ADL's 1981 Model Hate Crime Law—it is simply a sentencing enhancement statute that applies after the defendant has already been convicted of an act already proscribed by another part of the criminal code. The South Dakota law is apparently patterned after the ADL's 1991 Model Hate Crime Law—it creates a distinct offense that only requires the prosecution to prove that the defendant has an ill-favored motive for committing a crime already punished by state law. Note, however, that the specific terms of both laws target the reason why the defendant committed the crime, the "because of" aspect of the offense.

The state of Florida has passed what can perhaps be described as the most candid hate crime law. Florida's hate crime law reclassifies any felony or misdemeanor if the offense involves "prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or nation origin of the victim . . . ."[46] The Florida legislature should be given high marks for its candor, for it is the only political body that has the honesty to admit that hate crime statutes are designed to curb certain attributes of the mind that the legislature deems unsuitable. These attributes are, indeed, known as prejudice. In sociological terms, prejudice is "a pattern of hostility in interpersonal relations which is directed against an entire group, or against its individual members."[47] In essence, all hate crime laws are designed to curb prejudice. Specifically, they punish the defendant's motive for committing a crime.

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45. *Id.* (emphasis added).

46. FLA. STAT. ANN. § 775.085 (West 1992). The statute contains both criminal and civil remedies:

> (1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim:
>
> > (a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.
> >
> > (b) A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.
> >
> > (c) A felony of the third degree shall be punishable as if it were a felony of the second degree.
> >
> > (d) A felony of the second degree shall be punishable as if it were a felony of the first degree.
>
> (2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.
>
> (3) It shall be an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated herein.

Id.

47. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 12 (1993).

B. Principles of American Criminal Law

Hate crime laws are contrary to the proper place a defendant's motive has traditionally taken in the common law of crimes. Among the more definitive sources of authority discussing the common law underpinnings of American criminal law is Holmes' *The Common Law,* written in 1881, some twenty-one years before he was appointed to the United States Supreme Court. Holmes explained that "[f]or the most part, the purpose of the criminal law is only to induce external conformity to rule."[48] Further, Holmes indicated that the common law of crimes has little interest in a person's thoughts.[49] He made this point in no uncertain terms: "[W]hen we are dealing with that part of the law which aims . . . at establishing standards of conduct, we should expect . . . to find that the *tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions.*"[50] Holmes recognized that the criminal law is generally concerned with a defendant's mental state only to the extent that it tells whether the defendant has engaged in deliberate conduct which the state can rightfully regulate.[51]

Law professors Rollin Perkins and Ronald Boyce provide a clear and

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48. Oliver Wendell Holmes, Jr., The Common Law 49 (1881). Holmes illustrated this point through the use of example:

> All law is directed to conditions of things manifest to the senses. And whether it brings those conditions to pass immediately by the use of force, as when it protects a house from a mob by soldiers, or appropriates private property to public use, or hangs a man in pursuance of a judicial sentence, or whether it brings them about mediately through men's fears, its object is equally an external result.

Id. To a large extent, English common law remained the law in the various United States after the War for Independence. *Cf.* Herbert Pope, *The English Common Law in the United States,* 24 Harv. L. Rev. 6 (1910).

49. Holmes, *supra* note 48, at 49. Holmes explained that:

> In directing itself against robbery or murder . . . [the purpose of the law] . . . is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men. *If those things are not done, the law forbidding them is equally satisfied, whatever the motive.*

Id. (emphasis added).

50. *Id.* at 50 (emphasis added).

51. *Id.* at 65. Noting that the law is without the power to punish a mental state, such as intent, by itself, Holmes stated, "Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after [tomorrow]. The law only deals with conduct." *Id.* (discussing the distinction between attempt and intent). According to Holmes, the use of intent in the common law of crimes is to limit punishment to "cases where circumstances making the conduct dangerous were known." *Id.* at 55. Thus, the "importance of the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences." *Id.* at 68. At the end of his lecture on "The Criminal Law," Holmes summed up the general theory of criminal liability as he understood it:

> All acts are indifferent *per se.* In the characteristic type of substantive crime acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent. The test of criminality in such cases is the degree of danger shown by experience to attend that act under those circumstances. In such cases the *mens rea,* or actual wickedness of the party, is wholly unnecessary, and all reference to the state of his consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him. Even the requirement of knowledge is subject to certain limitations. A man must find out at his peril things which a reasonable and prudent man would have inferred from the things actually known.

Id. at 75 (emphasis added).

concise definition of motive: "Motive has been said to be *that something in the mind, or that condition of the mind, which incites to the action,* or the *moving power which impels to action.*"[52] As a general rule, motive has never been considered an element of a crime that must be proved at trial. This general rule is consistent with the mission of criminal law to control the intentional conduct of the populace: Intent and conduct are proper elements of a crime because the state has an interest in regulating the deliberate behavior of the populace. Motive is generally not considered an essential element of criminal law.[53]

Professors Perkins and Boyce give an excellent illustration of the distinction between "intent" and "motive," which can be paraphrased as follows: If one person shoots another, his intent could have been to (a) kill the deceased; (b) to frighten the deceased; (c) to intimidate the deceased; (d) to shoot a target; or (e) to merely test the trigger of the gun. Suppose, however, that the triggerman intended to kill the deceased. His motive for doing so, his reason for acting, could also have been a variety of factors—(a) hatred; (b) revenge; (c) jealousy; (d) avarice; (e) fear; or (f) love.[54] In light of the foregoing conceptualization, the term motive can perhaps be best described as simply the "why" behind a defendant's conduct, as opposed to the mental states of intent or purpose, which relate to "what" the defendant meant to accomplish. In contrast to traditional criminal statutes, the current crop of hate crime statutes target the reason why a defendant acted.

The primary objection to hate crime statutes has been the argument that they violate an individual's right of freedom of thought.[55] Hate crime statutes "supercriminalize" conduct already punished under state law when the motive that compelled a defendant to commit a criminal act is a type of bigotry that the majority of a legislature finds offensive. For example, a rich defendant who commits an assault against a homeless person because he hates the poor will be punished for simple assault in most states, while a defendant who commits the same crime against a black person because he hates African Americans may well be convicted of both assault and intimidation, which carries a stiffer penalty under the ADL approach. The only difference between the two acts committed is the fact that the type of hatred one defendant held in his heart is considered more morally objectionable by the legislature than the hatred held by the other defendant. The acts are not different and the effects of the acts are not distinct—the only variable between the two crimes are the contents of the thoughts that led the

52. Rollin M. Perkins & Ronald N. Boyce, Criminal Law § 9, at 926 (3d ed. 1982) (citations omitted).

53. *See* United States v. Hirschberg, 988 F.2d 1509, 1515 (7th Cir. 1993).

54. Perkins & Boyce, *supra* note 52, at 926-27. There is a specific differentiation between motive and intent. "Intent and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Black's Law Dictionary 810 (6th ed. 1990).

55. *See, e.g., Mitchell,* 485 N.W.2d at 807; *Wyant I,* 597 N.E.2d at 450.

defendants to engage in a course of criminal conduct. Under the circumstances, it seems as if such laws conflict with a constitutional right to free thought.

The right of free thought would logically seem to be a corollary to the right of free speech. The First Amendment embraces a neutrality principle that prevents the government from outlawing ideas with which it disagrees.[56] As constitutional law scholar Cass R. Sunstein has noted, impartiality is the most fundamental tenet of American constitutional law: "Under the American Constitution, government should not single out particular people, or particular groups, for special treatment. Neutrality is its first obligation."[57] As summarized by Professor Sunstein, state and federal laws that regulate free speech can be classified in one of three ways, based on the extent to which they conform to the neutrality principle: 1) speech laws can be content-neutral restrictions; 2) speech laws can be viewpoint-based restrictions; or 3) speech laws can be content-based restrictions.[58] The labels assigned to these classes illustrates the fact that the government does not always meet its duty to remain impartial.

If the content of the expression is irrelevant to whether the speech is restricted, the regulation is considered content-neutral.[59] One example of content-neutral regulation would be a law that bans all speech on billboards next to interstate highways. Because the prohibition applies to all speech, regardless of the message any person may wish to display on any such billboard, the law is content-neutral.

If a particular viewpoint is the primary reason the government imposes—or decides not to impose—a limitation on, or penalty for, a person's expression, then the law can be considered a viewpoint-based restriction.[60] Professor Sunstein notes that "[h]ere the government is trying to protect a

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56. "The principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984)). *Cf.* Texas v. Johnson, 491 U.S. 397, 414 (1989). The Court stated, "If 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." *Id.*

57. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 2 (1993). Though adhering to the neutrality principle, Professor Sunstein challenges whether the manner in which the U.S. Supreme Court has interpreted constitutional law principles is truly neutral. *Id.* Sunstein posits that the Court has applied a brand of neutrality that reinforces the status quo instead of being truly impartial. *Id.*

58. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 11 (1993) [hereinafter SUNSTEIN, DEMOCRACY].

59. *Id.*

60. *Id.* at 11-12. Professor Sunstein, explaining the difference between content-based and viewpoint-based restriction on speech, observed:

> Viewpoint-based restrictions are a subset of the category of content-based restrictions. All viewpoint-based restrictions are, by definition, content-based; government cannot silence one side to a debate without making content crucial. But not all content-based restrictions are viewpoint-based. The key difference between a content-based and a viewpoint-based restriction is that the former need not make the restriction depend on the speaker's point of view.

Id. at 12.

preferred side in a debate and to ban the side that it dislikes."[61] An example of a viewpoint-based regulation is a law prohibiting one from criticizing government participation in a war but permitting one to praise government participation in the battle.

Finally, some restrictions on speech can be viewpoint neutral but content-based.[62] Professor Sunstein notes that "[h]ere the content of speech is indeed critical: we . . . have to know what the speech is in order to know whether it is regulated. But the viewpoint of the speaker is not crucial, or even relevant, to the restriction."[63] An example of a content-based, viewpoint-neutral restriction on speech would be a ban on distributing political literature in a government workplace. If the ADL approach to hate crimes is assessed by categories identified by Professor Sunstein, it becomes clear that these laws are not content-neutral or viewpoint-neutral. In fact, hate crime laws are based on the viewpoint of criminal defendants, namely on the particular prejudices that motivate certain defendants to commit illegal acts. Legislatures that enact hate crime laws weigh in against prejudiced thoughts by treating defendants motivated to misbehave for specific reasons of bigotry more severely than defendants who commit the same crime for other reasons.

C. *R.A.V. v. St. Paul*: The First Amendment Ban on Viewpoint Discrimination

The United States Supreme Court has recently declared that a state's interest in combatting hate speech does not permit it to engage in viewpoint discrimination. The Court's decision in *R.A.V. v. St. Paul*[64] established limits on how the states may punish bias-motivated symbolic expression. *R.A.V.* involved whether a St. Paul ordinance that prohibited anyone from placing on public or private property any symbol likely to upset others on the basis of race, creed, color or gender conflicted with the First Amendment.[65] Defendant R.A.V. was charged under the ordinance with placing a burning cross inside the fenced yard of a black family living in his neighborhood.[66] Arguing that the ordinance was facially invalid under the First Amendment because its viewpoint regulation was unconstitutionally broad, R.A.V. moved to dismiss the charges against him.[67] "In

61. *Id.* at 12. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).
62. Sunstein, Democracy, *supra* note 58, at 12.
63. *Id.*
64. 112 S. Ct. 2538 (1992).
65. *Id.* at 2541. In full, the ordinance involved read as follows:

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

Id. (quoting Minn. Stat. § 292.02 (1990)). The defendant was also charged with violating Minn. Stat. § 609.2231(4) which concerns racially motivated assaults. *Id.* at n.2.
66. *Id.* at 2541.
67. *Id.*

essence, R.A.V. contend[ed] that the St. Paul bias-motivated disorderly conduct ordinance potentially censors so many constitutionally protected activities on its face that it must be completely invalidated."[68]

While the trial court granted R.A.V.'s motion to dismiss, the Minnesota Supreme Court reversed.[69] The state supreme court determined that the ordinance was limited to conduct not protected by the First Amendment, namely "fighting words."[70] The court concluded that the ordinance was not overbroad because its scope was limited in this manner.[71] R.A.V. appealed to the United States Supreme Court, renewing his First Amendment claim.[72] Though agreeing that the ordinance was aimed at fighting words, the United States Supreme Court nevertheless held that the ordinance was unconstitutional.[73] The Court held that the law's "viewpoint discrimination" violated the neutrality principle of the First Amendment.[74]

The Court noted that the "ordinance applie[d] only to those 'fighting words' that . . . provoke violence, 'on the basis of race, color, creed, religion or gender.'"[75] The ordinance did not, however, relate to those persons who use fighting words in association with other ideas, such as to voice enmity against "political affiliation, union membership, or homosexuality . . . ."[76] The Court counseled that the First Amendment does not permit the government to impose distinct prohibitions on people who express unaccepted or unpopular convictions.[77] According to the Court, the ordinance was nothing more than an effort to prohibit "fighting words that contain . . . messages of 'bias-motivated' hatred and . . . messages 'based on virulent notions of racial supremacy.'"[78] The Court concluded that the United States Constitution does not permit the states to engage in this type of viewpoint discrimination.[79]

St. Paul argued that the ordinance was constitutional because it was narrowly tailored to foster a compelling state interest.[80] The city essentially contended that the ordinance was needed to combat discrimination and racism. The Court disagreed, concluding that the content discrimination was not reasonably necessary to achieve St. Paul's compelling interest in ensuring "the basic human rights of . . . groups that have historically been subjected to discrimination . . . ."[81] St. Paul could have constitution-

68. *In re* R.A.V., 464 N.W.2d 507, 509 (Minn. 1991).
69. *Id.* at 508, 511.
70. *Id.* at 509.
71. *Id.*
72. *R.A.V.*, 112 S. Ct. at 2541.
73. *Id.* at 2550.
74. *Id.* at 2547.
75. *Id.*
76. *Id.*
77. *Id.* *See, e.g.*, Simon & Schuster, Inc. v. New York State Crime Victims Board, 112 S. Ct. 501 (1991).
78. *R.A.V.*, 112 S. Ct. at 2548.
79. *Id.* at 2550.
80. *Id.* at 2549.
81. *Id.*

ally protected the human rights of those within its borders by generally prohibiting the use of any form of speech intended to incite anger in others.[82] The city could not, explained the Court, narrowly focus its ban only on symbolic speech related to bigotry.[83]

R.A.V. is consistent with traditional First Amendment analysis. The Court forcefully sustained the proposition that fighting words remain outside the scope of First Amendment protection.[84] The Court further advised that government regulation of fighting words must be viewpoint-neutral and cannot be aimed solely at racist speech.[85] The government must either ban all fighting words as a measure to prevent unlawful confrontations or not ban fighting words at all.[86]

The *R.A.V.* neutrality principle can be applied to hate crime laws just as easily as it is applied to hate speech laws. Under the *R.A.V.* principle, states would be permitted to pass laws permitting the sentencing authority to consider whether the defendant's motive, whatever it was, makes him sufficiently villainous or dangerous to merit a term of imprisonment at the high end of a given sentencing range. States would not be permitted, however, to single out for special punishment only a narrow class of motives with which it takes issue. Just one term after *R.A.V.* was decided, the United States Supreme Court was given the opportunity to apply the neutrality principle to a state hate crime law. In *Wisconsin v. Mitchell,* however, the Court declined to do so.

III. THE CURIOUS CASE OF *WISCONSIN v. MITCHELL*

The United States Supreme Court ruled in *Mitchell* that the penalty enhancement practice advocated by the ADL does not conflict with the First Amendment.[87] In doing so, however, the Court failed to apply any First Amendment analysis. According to Chief Justice Rehnquist, the First Amendment was not even implicated by hate crime penalty enhancement laws—or at least not by Wisconsin's hate crime law.[88] Insofar as the result reached in *Mitchell* seems to directly conflict with the law laid down in *R.A.V.,* the decision is at best poorly reasoned—and perhaps result oriented.

The defendant in the case, Todd Mitchell, was among a member of the older group of two cliques of young black men gathered at a Kenosha,

82. *Id.* at 2550. The Court made clear that it was not condoning cross burning by stating, "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.*

83. *Id.*

84. *Id.* at 2545. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *Chaplinsky* established that "fighting words" are not entitled to First Amendment protection because they do not contribute to the expression of ideas and do not possess any social value. *Id.* at 571-72.

85. *R.A.V.,* 112 S. Ct. at 2547.

86. *Id.*

87. 113 S. Ct. at 2200.

88. *Id.* at 2200-01.

Wisconsin apartment.[89] One part of the group started discussing a scene in the movie "Mississippi Burning" where a white man assaulted a young black child who was praying.[90] After they left the apartment a short time later, Mitchell turned to the group of younger men and asked, "Do you all feel hyped up to move on some white people?"[91] When a fourteen-year-old white boy appeared on the sidewalk across the street a short time later,[92] it became apparent that the answer to this question was "yes." Mitchell challenged the group to take action, "There goes a white boy; go get him."[93] Mitchell counted to three and directed the unleashed force in the boy's direction.[94]

The boy was severely beaten and rendered unconscious.[95] Mitchell was caught and convicted of aggravated battery.[96] Though the crime routinely carries a maximum sentence of two years in prison, the sentencing range was statutorily enhanced to a seven-year maximum after the jury found that Mitchell had intentionally selected his victim because of the boy's race.[97] For his part in the assault, Mitchell was sentenced to four

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89. *Mitchell,* 485 N.W.2d at 809.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* It is interesting to note that Mitchell's attorney maintains that the foregoing comments were not intended to inspire the group to take action, but were merely rhetorical comments of a sarcastic nature. This allegation brings to light another problem with hate crime statutes, namely that a person's words do not necessarily indicate the true nature of his motives. Barnard Goldstein, Remarks at Open Forum, Hate Speech and Bias Crimes: Constitutional Issues Raised By Penalty Enhancement Statutes, 1993 Annual Meeting of the Illinois State Bar Association (June 26, 1993) (Panel Discussion, Penalty Enhancement: The Prosecution and Defense Perspective).
94. *Mitchell,* 485 N.W.2d at 809.
95. *Id.* The group stole Gregory Reddick's "British Knights" tennis shoes and inflicted enough damage that Reddick remained in a coma for four days. *Id.* He suffered extensive injuries and may have received brain damage. *Id.*
96. *Id.* Mitchell was convicted under WIS. STAT. § 939.05 and 940.19(1m). *Id.*
97. *Id.* Wisconsin law enhances the penalty for certain criminal acts when the victim is selected because of his race, religion, color, disability, sexual orientation, national origin or ancestry. *Id.* At the time of Mitchell's trial, the Wisconsin penalty-enhancement statute provided:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> > (a) Commits a crime under chs. 939 to 948.
> >
> > (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> > (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
> >
> > (c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.
>
> (3) This section provides for the enhancement of penalties applicable for the underlying

years in prison.[98] Mitchell challenged the conviction and sentence on First Amendment grounds.[99] Specifically, he argued that the penalty enhancement provision unconstitutionally punished him for his bigoted thoughts.[100]

The Wisconsin Supreme Court agreed with Mitchell.[101] Relying on the United States Supreme Court's decision in *R.A.V.*, which prohibits the government from criminalizing viewpoints with which it disagrees,[102] the Wisconsin Supreme Court concluded that the statute unconstitutionally punished Mitchell based on the reason he committed the crime, "the *motive* behind the selection."[103] The court concluded that "[t]he statute is directed solely at the subjective motivation of the actor—his or her prejudice."[104] The state court concluded that punishment of one's thoughts, however repugnant the thoughts may be, violated the First Amendment.[105]

On appeal, the United States Supreme Court reversed.[106] The Court expressed an assortment of justifications to support its conclusion that the sentence enhancement did not violate the First Amendment: 1) motive allegedly plays the same role in the penalty-enhancement statute as it does in antidiscrimination laws;[107] 2) the statute is aimed at the state's interest in redressing individual and social harm caused by bias-motivated crimes;[108] 3) the defendant's motive for acting has been used throughout history as a consideration at sentencing;[109] and 4) the statute was aimed at conduct, which is generally unprotected by the First Amendment.[110]

In support of the Wisconsin hate crime penalty enhancement statute, Chief Justice Rehnquist first claimed that "motive plays the same role" in hate crime laws as it does in antidiscrimination laws.[111] The language employed in antidiscrimination statutes is, indeed, frequently comparable to the language employed in hate crime statutes.[112] Antidiscrimination laws

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crime. The Court shall direct the trier of fact to find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

Id. at n.1 (citing WIS. STAT. § 939.645 (1989-90)). The statute has been amended since Mitchell was convicted. *See* WIS. STAT. § 939.645 (West Supp. 1993).

98. *Mitchell*, 485 N.W.2d at 809. The Wisconsin Court of Appeals affirmed the conviction and the enhancement. *Id.* at 810 (citing State v. Mitchell, 473 N.W.2d 1, 6 (Wis. Ct. App. 1991)).

99. *Id.* at 811.

100. *Id.* at 812.

101. *Id.* at 816-17.

102. *Id.* at 814.

103. *Id.* at 812.

104. *Id.* at 814.

105. *Id.*

106. *Mitchell*, 113 S. Ct. at 2202.

107. *Id.* at 2200.

108. *Id.* at 2201.

109. *Id.* at 2200.

110. *Id.* at 2201. Conduct intended to express an idea can, in some cases, fall within the scope of the First Amendment.

111. *Id.* at 2200.

112. *See, e.g.*, 18 U.S.C. § 242 (1988) (prohibiting deprivation of rights under color of law); 42 U.S.C. § 2000e-2 (1988) (prohibiting unlawful employment practices). Chief Justice Rehnquist

can, however, be distinguished from hate crime laws. Antidiscrimination laws involve both thought and non-thought elements; hate crime laws punish thought alone. The difference may be subtle, but it may well be important in terms of First Amendment analysis if freedom of speech principles apply to freedom of thought cases.[113]

In *United States v. O'Brien*,[114] for example, the United States Supreme Court set a bright-line standard for measuring whether state regulation of activities that involve both speech and non-speech elements conflict with the First Amendment.[115] When both elements are combined in the same course of conduct, only a significant government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedom.[116] This test is easily adaptable to evaluate laws that involve regulation of thought instead of speech. The four-pronged *O'Brien* analysis can be satisfied only in rare situations:

> 1) the regulation must be within the government's constitutional power;
> 2) the regulation must further a substantial government interest;
> 3) the government interest must be unrelated to the suppression of free thought; and
> 4) the incidental restriction on alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest.[117]

Antidiscrimination laws would pass this modified *O'Brien* standard—hate crime penalty enhancement laws would not.[118]

Antidiscrimination laws pass the first prong of the *O'Brien* test: they are within the government's power. The state and federal governments have the authority under the Thirteenth Amendment[119] and the Fourteenth Amendment[120] of the United States Constitution to combat certain forms of discrimination.[121] Putting an end to acts of discrimination satisfies the

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seemed to be adopting a "two wrongs make a right" approach when he noted that both hate crime laws and antidiscrimination laws punish motive. If we assume, for the sake of argument, that both types of statutes directly punish a defendant's motive, this should not lead to the endorsement of punishing prejudiced thoughts. Instead, antidiscrimination laws should be rewritten to ensure that they relate to discriminatory effects and not to bigoted thoughts. Two wrongs do not make a right.

113. For a discussion of freedom of thought cases, see *infra* notes 160-224.

114. 391 U.S. 367 (1968).

115. *Id.* at 376-77.

116. *Id.* at 376.

117. *Id.* at 377.

118. The *O'Brien* "incidental regulation" standard was followed by the Court in *Procunier v. Martinez*. 416 U.S. 396, 410-14 (1974). For further discussion of the *O'Brien* test, see David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491 (1988).

119. U.S. CONST. amend. XIII. *See Jones*, 392 U.S. at 438 (stating that Congress has power under the Thirteenth Amendment to eliminate any badges of slavery).

120. U.S. CONST. amend. XIV, § 1, cl. 4; U.S. CONST. amend. XIV, § 5. *See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966) (sustaining Congressional power to enforce the Equal Protection Clause through legislation).

121. In addition, the federal government has the authority to prohibit discriminatory business practices. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce among the several states). *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)

second and third prongs of the *O'Brien* test because it furthers an important government interest unrelated to the suppression of free thought, namely ending acts of exclusion. Finally, antidiscrimination laws pass the fourth part of the *O'Brien* test because they impose only an incidental restriction on freedom of thought, a restriction no greater than that essential to further the state interest in ending unlawful discrimination.[122] The defendant's motive can, in some cases, be seen as a necessary element of antidiscrimination statutes because it assists the trier of fact in ascertaining the nature of the act involved. It is difficult to conceive a viewpoint-neutral means of combatting acts of discrimination and exclusion.

On the other hand, hate crime penalty enhancement statutes do not survive scrutiny under the *O'Brien* test. First, *O'Brien* asks whether the regulation is within the constitutional power of government. The primary purpose of hate crime laws and hate crime penalty enhancement statutes is to punish biased thoughts. If hate crime statutes are properly construed as state efforts to punish a person for his prejudices, they would fail the first prong of the test as creating unconstitutional restraints on thought. Second, *O'Brien* asks whether the regulation furthers an important or substantial government interest. Here, again, if hate crime statutes are accurately understood as a government effort to eliminate bigotry, they would fail the second prong because the government has no interest in controlling the passions and prejudices of the populace. Third, *O'Brien* commands us to assess whether the government interest is unrelated to the suppression of free expression or free thought. Though other justification for hate crime statutes can be argued, it is absurd to argue that hate crime statutes are totally unrelated to suppression of thought because they are intended to curb prejudice.

Finally, *O'Brien* instructs that the incidental restriction on constitutional freedoms involved must be no greater than is necessary. Hate crime penalty enhancements are not necessary to punish the defendant for his criminal conduct because the underlying sentencing schemes to which they apply already accomplish this purpose. By their terms, hate crime penalty enhancement statutes are not a means of punishing a defendant for the severe harm he inflicted on his victim. Hate crime statutes are only necessary to send a message to the defendant, to those holding similar beliefs, and to the public, that the majority does not approve of the specific prejudices that inspired an act already made illegal by another law. Hate crime laws go beyond punishing a defendant for his behavior and instead punish a defendant for his unpopular beliefs. Because this is not within the power of the state, hate crime statutes, as written, are not constitutional.

(permitting Congress to prohibit discrimination in enjoyment of public services and facilities); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding federal authority to forbid discrimination in restaurants).

122. The Supreme Court has determined that employment practices which have a discriminatory effect can violate 42 U.S.C. § 2000e-2 even without proof of discriminatory intent or motive. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

Application of the *O'Brien* standard to Chief Justice Rehnquist's argument shows that his comparison of hate crime laws to antidiscrimination statutes is simply a false analogy, albeit a very emphatic false analogy.

The *Mitchell* Court next claimed that the Wisconsin hate crime penalty enhancement statute punished the defendant for the effect his acts have on his victim or society.[123] If the Wisconsin hate crime penalty enhancement did, indeed, target the effect a defendant's acts have on the victim, it would not violate the First Amendment. The Wisconsin hate crime penalty enhancement statute does not punish the defendant for the effect of his misdeeds.[124]

While the United States Supreme Court recently made it quite clear in *Payne v. Tennessee*[125] that states can even consider victim impact evidence at sentencing in capital punishment cases,[126] the plain language of the Wisconsin hate crime law indicates that it bears no relation to victim impact.[127] The Wisconsin penalty enhancement law, as worded, punishes the reason a defendant "selected" the person against whom the crime was committed.[128] It cannot legitimately be categorized as a victim impact statute. It relates to the defendant's reasoning and not the effect of his acts.

If the state truly wished to enhance a defendant's punishment in proportion to the mental or psychological impact his crime has on the victim, it could certainly do so. The state could also pass laws that enhance the penalty when the victim is a member of a specific class of persons that needs special protection, such as small children, the elderly, and the physically and developmentally disabled. A number of viewpoint-neutral alternatives exist that would allow the state to punish particularly violent criminals—and protect vulnerable victims—without punishing a defendant for his prejudices.

The Chief Justice further justified the Wisconsin penalty enhancement statute on the grounds that United States Supreme Court precedent permits the practice.[129] The Court here rests its holding on the authority of *Dawson v. Delaware*[130] and *Barclay v. Florida.*[131] Neither of these cases relate to the freedom of thought issues involved in the hate crime penalty enhancement statute challenged in *Mitchell.* While these cases involved whether a sentencing authority could consider a defendant's motives at sentencing, neither case considered whether a specific viewpoint could be

123. 113 S. Ct. at 2199.
124. For the text of the Wisconsin enhancement statute, see *supra* note 97.
125. 111 S. Ct. 2597 (1991).
126. *Id.* at 2608. "[F]or the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." *Id.*
127. Indeed, a review of the plain language of most hate crime laws would, in all likelihood, reveal that they simply do not relate to victim impact.
128. For the text of the Wisconsin enhancement statute, see *supra* note 97.
129. *Mitchell,* 113 S. Ct. at 2200.
130. 112 S. Ct. 1093 (1992).
131. 463 U.S. 939 (1983).

statutorily singled out for harsher punishment because it reflected a value system which the legislature opposed. *Barclay* involved a constitutional challenge to a death sentence rendered against a black man who helped viciously murder an eighteen-year-old white hitchhiker as part of a "racial revolution" he intended to wage against white people.[132] Defendant Barclay alleged that the sentencing court improperly considered his racist motives when determining whether the death penalty was an appropriate punishment.[133] He argued that his sentence violated the Eighth Amendment.[134] The United States Supreme Court rejected this argument without much analysis, holding that the "United States Constitution does not prohibit a trial judge from taking into account . . . racial hatred . . . ."[135]

Barclay holds that a judge may take a defendant's motives into consideration when weighing factors appropriate to sentencing.[136] The sentencing court considered the defendant's racial hatred as evidence that he presented a great risk of death to many persons, that he intended to disrupt or hinder the lawful exercise of a governmental function or the enforcement of the laws, and that his criminal act was especially heinous, atrocious, and cruel.[137] The sentencing court in *Barclay* was not ordered by law to punish more severely a viewpoint with which the legislature disagreed. It was permitted to consider the defendant's motives, whatever those motives might have been, for valid penological purposes.[138] The Court's Eighth Amendment opinion in *Barclay* provides no First Amendment authority for the *Mitchell* decision.

The other case relied on by the *Mitchell* Court, *Dawson v. Delaware,* is equally inapplicable. In *Dawson,* the question before the United States Supreme Court was whether the First Amendment prohibited evidence of Dawson's membership in a racist organization from being used against him at sentencing.[139] Dawson, a white man facing the death penalty for killing a white woman, claimed that introduction of this evidence violated the First Amendment.[140] Dawson specifically claimed that use of the evidence

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132. *Id.* at 942-44.

133. *Id.* at 948-49.

134. *Id.* at 939. Justice Rehnquist's opinion never mentions the constitutional basis for Barclay's claims. However there exists some Eighth Amendment authority cited in the opinion. *Id.* at 956 (citing Zant v. Stephens, 462 U.S. 862 (1983)). *Zant* in turn, principally bases its analysis of a defendant's challenge to his death penalty on *Furman v. Georgia.* 462 U.S. at 874-77. *Furman* was a landmark Eighth Amendment case discussing the constitutionality of the death penalty. 408 U.S. 238 (1972). The *Barclay* opinion never mentions the First Amendment.

135. *Barclay,* 463 U.S. at 949.

136. *Id.*

137. *Id.* at 944.

138. Full discussion of the purposes of the American criminal justice system is prohibited by the limits of this article. Three works that provide succinct discussion of the topic include: MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE (1992); HENRY N. PONTELL, A CAPACITY TO PUNISH: THE ECOLOGY OF CRIME AND PUNISHMENT (1984); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

139. 112 S. Ct. at 1095-96. Among other things, the prosecution advised that it intended to introduce statements from witnesses attesting to Dawson's association with a white supremacist group and revealing that he sported a number of swastika tattoos. *Id.*

140. *Id.* at 1096.

breached his constitutionally protected right to associate with others.[141] Over Dawson's objections, the evidence was presented to the jury which later recommended that he be sentenced to death.[142]

On appeal, the United States Supreme Court vacated the sentence.[143] The Court's ruling was, however, narrowly tailored to the facts of the case. The Court explained that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs are protected by the First Amendment."[144] Indeed, the Court reaffirmed the principle that trial courts are free, in appropriate circumstances, to consider a wide range of material at sentencing, including a defendant's racist beliefs.[145] The Court advised, however, that such evidence may only be used if it is relevant.[146] Because both Dawson and his victim were white, the Court concluded that elements of racial hatred were not involved in the murder.[147] Consequently, Dawson's membership in the racist group was not relevant at sentencing, and prosecutorial use of the information provided just cause to void the sentence.[148] *Dawson* stands for the proposition that a defendant's racist beliefs cannot automatically be used against him at sentencing.

Dawson, like *Barclay,* did not address whether it is constitutional for a legislature to command that a defendant's sentence be enhanced because he was driven to act by an ideology that lawmakers abhor. While both cases addressed the propriety of permitting evidence of a defendant's motives to be used at sentencing, neither case discussed whether the state can single out and punish the ideological content of a person's thoughts. If these cases are, indeed, the primary foundation supporting *Mitchell,* the decision is woefully unstable.

Finally, the *Mitchell* Court claimed that the Wisconsin hate crime penalty enhancement statute punishes conduct.[149] The Court did state that while "the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment."[150] The Court apparently forgot that *R.A.V.* involved expression that was unprotected by the First Amendment, namely fighting

141. *Id.* In *Dawson,* Chief Justice Rehnquist cited *Patterson* for the Court's holding that the U.S. Constitution protects an individual's right to join groups and associate with others holding similar beliefs, even though this right is not specifically mentioned in the First Amendment. *Id.* (citing *Patterson,* 357 U.S. at 460).

142. *Id.*

143. *Id.* at 1099.

144. *Id.* at 1097. Of course, evidence may be excluded from trial under the Federal Rules of Evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . ." FED. R. EVID. 403.

145. *Dawson,* 112 S. Ct. at 1097 (citing *Payne,* 111 S. Ct. at 2606; United States v. Tucker, 404 U.S. 443, 446 (1972)).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Mitchell,* 113 S. Ct. at 2199.

150. *Id.* at 2201 (citations omitted).

words.[151]

Of even more importance, however, is the *Mitchell* Court's inconsistent position on whether the hate crime penalty enhancement was directed at the defendant's conduct or his point of view. Early in its opinion, the *Mitchell* Court acknowledged that the statute at issue was viewpoint-related: "[The statute] enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all."[152] The latter part of the decision ignored the earlier conclusion that the penalty enhancement statute punished the defendant's motives and not his conduct.

The Court's mischaracterization of the statute as conduct-related enabled it to virtually ignore the First Amendment neutrality principle it established in *R.A.V.* Todd Mitchell selected his companions' victim without making a move.[153] No conduct was involved. He simply said to his companions, "There goes a white boy; go get him."[154] Mitchell's sentence was enhanced because of the viewpoint expressed in his words and thoughts and not for any overt act he performed. By characterizing the statute as a conduct regulation, however, the Court sidestepped the question of how the viewpoint discrimination enforced by the statute could be justified after *R.A.V.*

Mitchell's incompatibility with *R.A.V.* is vividly illuminated by simply comparing the practice permitted in *Mitchell* to the practice outlawed in *R.A.V.* Recall that *R.A.V.* counseled that the government can statutorily punish fighting words that have no First Amendment protection, but cannot single out for punishment fighting words that express a particular viewpoint that lawmakers loathe.[155] In comparison, *Mitchell* allowed the government to statutorily single out for punishment motives that reflect a point of view that lawmakers detest. If *Mitchell* stands for the proposition that a defendant can be sentenced more harshly because of his motives, the St. Paul city council is free to draft a law that bans all fighting words, but enhances a defendant's penalty if he was motivated to utter the fighting words because of a person's race, creed or color. *Mitchell,* therefore, allows lawmakers to engage in the very viewpoint discrimination prohibited by *R.A.V.*

The foregoing critical assessment of the arguments used by Chief Justice Rehnquist shows that none of the reasons relied on by the *Mitchell* Court carry much weight. The decision's deficiencies call into question

151. The *R.A.V.* decision explains that even if words, deeds or thoughts do not enjoy full First Amendment protection, the state cannot regulate the content of a person's expression or thoughts. 112 S. Ct. at 2543-44.
152. 113 S. Ct. at 2199.
153. *Mitchell,* 485 N.W.2d at 809.
154. *Id.*
155. 112 S. Ct. at 2545. For discussion of *R.A.V.,* see *supra* notes 64-84 and accompanying text.

whether any convincing legal argument can be made to support the constitutionality of hate crime laws or hate crime penalty enhancements, as most such laws are currently configured. The *Mitchell* Court could have applied either *R.A.V.* or *O'Brien* to test the constitutionality of the Wisconsin hate crime statute. In the alternative, the Court could have fashioned a new standard to assess the limits on government power to punish prejudice. In its effort to support the sentencing enhancement, the Court avoided the opportunity to confront the complex freedom of thought issue before it.

Mitchell resolved (for now) whether penalty enhancements based on the defendant's reason for committing the crime conflict with the Free Speech Clause of the First Amendment. The nonchalant demeanor with which the Court dispatched the case signifies that it is likely to reach a similar result if called on to decide whether the states can, consistent with the concept of freedom of thought, constitutionally consider a defendant's bigotry, prior to sentencing, as the grounds for criminal liability. If the Court does not revisit the freedom of thought issues involved, few avenues for redress will remain. It is theoretically possible that the courts could distinguish some hate crime laws from the Wisconsin statute by their terms—and then subject the laws to a freedom of thought analysis. In addition, *Mitchell* does not answer whether the ADL approach to hate crimes conflicts with other parts of the federal constitution. If all else fails, defendants punished under state hate crime laws can possibly turn to their state constitutions for protection. The United States Constitution does not prevent state courts from interpreting their own constitutions to prevent encroachment on the right of free thought.[156]

IV. UNANSWERED CONSTITUTIONAL CONCERNS

Mitchell does not specifically address whether the ADL approach to hate crimes conflicts with a constitutionally protected right of free thought. In addition, the question of whether hate crime statutes violate the Equal

156. 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, 548 (1986). Such an exercise of state independence is not uncommon. Between 1970 and 1984, state courts issued over 250 published opinions holding that constitutional minimums set by the U.S. Supreme Court were not sufficient to fulfill the more rigorous requirements of their state constitutional law. *Id.* at 548. *See also* William J. Brennan, Jr., *State Constitutions and The Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). Justice Brennan encouraged this practice as the conservative Burger Court in the 1970's narrowed many of the civil rights recognized by the more libertarian Warren Court. *Id.* The "lockstep doctrine" under which some states require that their state constitutions be interpreted in "lockstep" with similarly worded provisions of the federal constitution is discussed in the following articles: Craig Peyton Gaumer, *Incommunicado Interrogation Under the Federal and Illinois Constitutions,* 81 ILL. B.J. 74 (1993); Thomas B. McAffee, *The Illinois Bill of Rights And Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine,* 12 S. ILL. U. L.J. 1 (1987); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873, 898 (1976); Thomas V. LaPrade, Note, *People ex rel. Daley v. Joyce: Death Knell for the Lockstep Doctrine?,* 21 LOY. U. CHI. L.J. 693 (1990); Roger Kangas, Note, *Interpreting the Illinois Constitution: Illinois Supreme Court Plays Follow the Leader,* 18 LOY. U. CHI. L.J. 1271 (1987).

Protection Clause of the Fourteenth Amendment was not resolved by the *Mitchell* Court. These issues are discussed below.

A. Freedom of Thought

Some opponents of hate crime statutes argue that the ADL Model Hate Crime Statutes conflict with a defendant's free speech rights. While this premise has some merit, it seems the most flagrant foul committed by hate crime statutes is the effect they have on a defendant's right of free thought. As one commentator has noted, most hate crime statutes do "not address effects, state of mind, or a change in the character of the offense, but only the thoughts and ideas that propelled the actor to act."[157]

Neither the United States Constitution nor the Bill of Rights expressly provides that American citizens enjoy a right to be free from government attempts to control their inner thoughts.[158] A long line of United States Supreme Court cases have, at least partially in dicta, recognized such a right.[159] A review of constitutional history and constitutional case law supports the tenet that freedom of thought, even freedom for thoughts with which the majority disagrees, is a fundamental right protected from government encroachment.

B. Freedom of Thought and the First Amendment

The First Amendment to the United States Constitution protects certain civil liberties regarded as fundamental. As ratified by the states, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[160]

The First Amendment applies as a limitation on state power by way of the Fourteenth Amendment.[161] The First Amendment received little attention from the United States Supreme Court during the first hundred years of its existence.[162] The Court's decisions in its second century corroborate the conviction that neither the state nor federal government can punish a

157. Gellman, *supra* note 35, at 363.
158. For a discussion of how freedom of thought relates to the practice of punishing hate crimes, see *Symposium: Penalty Enhancement for Hate Crimes,* 11 Crim. Just. Ethics 3 (1992).
159. For a discussion of several of these cases, see *infra* notes 160-224 and accompanying text.
160. U.S. Const. amend. I.
161. *See* Schneider v. State, 308 U.S. 147 (1939); De Jonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931).
162. *See* David P. Currie, The Constitution in the Supreme Court: The First Hundred Years (1789-1888) (1985). Currie states, "[V]ery few federal actions were challenged in the Supreme Court as offending provisions of the first eight amendments during the first hundred years." *Id.* at 439. For discussion of the brief history of United States Supreme Court cases related to free expression decided prior to World War I, see David P. Currie, The Constitution in the Supreme Court: The Second Century (1888-1986) (1990) [hereinafter Currie, The Second Century].

defendant's thoughts.[163]

The first Freedom of Religion case decided by the United States Supreme Court, *Reynolds v. United States,*[164] strongly supports the proposition that freedom of thought is inherent in all First Amendment freedoms.[165] Decided in 1878, *Reynolds* involved a First Amendment challenge to the defendant's conviction of violating the federal bigamy statute while living in the Utah territory.[166] Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, claimed that the bigamy statute contradicted his right to freely exercise his religious beliefs because it punished him for fulfilling his religious duty to have more than one wife.[167] Specifically, the Court was asked to decide whether the bigamy law conflicted with the Free Exercise Clause.[168]

In affirming Reynolds' conviction, Chief Justice Waite relied heavily on the history of the Free Exercise Clause.[169] According to Chief Justice Waite, the Virginia Bill of Religious Freedom, drafted by Thomas Jefferson in 1779,[170] provided the "true distinction" between what the Free Exercise

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163. *See generally* CURRIE, THE SECOND CENTURY, *supra* note 162.

164. 98 U.S. 145 (1878).

165. During the ratification debates, at least one commentator articulated the idea that liberty conscience extended to more than religious matters. In arguing that the new constitution needed a Bill of Rights to protect the right of conscience from government invasion, "An Old Whig" noted that uniformity "of opinion in science, morality, politics or religion is undoubtedly a very great happiness to mankind; and there have not been wanting zealous champions in every age, to promote the means of securing so invaluable a blessing." 3 THE COMPLETE ANTI-FEDERALIST 35 (Herbert J. Storing ed., 1981). Yet, the Old Whig was nevertheless convinced that the government is, and should expressly declare that it is, without the power to shape or punish a person's opinions. *Id.* at 34-36.

166. 98 U.S. at 146. The challenged statute provided that:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.

Id.

167. *Id.* at 161. The Court described the circumstances surrounding Reynolds' act of bigamy in somewhat greater detail:

> [At trial] . . . the accused, proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practice polygamy . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practice polygamy by such male members of such church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come."

Id. Reynolds "also proved 'that he had received permission from the recognized authorities in said church to enter into polygamous marriage . . . .'" *Id.*

168. *Id.* at 162. The Court noted, "The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong." *Id.*

169. *Id.* at 162-67.

170. For the complete text of the *Bill for Establishing Religious Freedom,* see PHILIP S. FONER, BASIC WRITINGS OF THOMAS JEFFERSON 48-49 (1950). The language of Jefferson's bill left no doubt about his devotion to the concept of free thought:

Clause permits the state to regulate and what is left for the Church.[171] The preamble to the Virginia law cautioned that the civil government was not to intrude "into the field of opinion," but that it was appropriate for the government "to interfere when principles break out into overt acts against peace and good order."[172] The Court noted that Jefferson, along with his protege James Madison, played an important role in the movement that led to ratification of the Bill of Rights.[173] The *Reynolds* Court thus considered Jefferson's interpretation of religious freedom to be weighty precedent:[174]

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. *Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.*[175]

The *Reynolds* decision validated the notion that the free exercise clause prevents the government from meddling in matters of "mere . . . belief and opinions."[176]

> Section I. Well aware that *the opinions and belief of men depend on their own free will,* but follow involuntarily the evidence proposed to their minds; that *Almighty God hath created the mind free, and manifested his supreme will that free it shall remain* by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitions, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion . . . the impious presumption of *legislature and ruler,* civil as well as ecclesiastical, *who,* being themselves but fallible and uninspired men, have *assumed dominion over the faith of others,* setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others . . . *[are depriving others] injudiciously of those privileges and advantages to which . . . [every man] . . . has a natural right* . . . .

Id. at 48 (emphasis added). Though the legislature originally rejected Jefferson's proposed bill, it passed, with some alterations, years later in 1785. *See* DUMAS MALONE, JEFFERSON THE VIRGINIAN (1948). Jefferson considered this bill one of his major accomplishments. *Id.* at 274-85. At his request, the tombstone over his grave makes no mention of the fact that he was our nation's first secretary of state and its third president. *Id.* Jefferson's tombstone only mentions what he considered his three greatest contributions: the American Declaration of Independence, the Virginia Bill for Establishing Religious Freedom, and the University of Virginia, which he helped create. *Id.*

171. *Reynolds,* 98 U.S. at 163.

172. *Id.*

173. *Id.* at 163-64. *See also* DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN (1951). Though he was America's ambassador to France during the ratification debates, Jefferson strongly supported the view that the proposed constitution was in dire need of a Bill of Rights. *Id.* at 168. He stated, "A [Bill of Rights] is what the people are entitled to against every government on Earth, general or particular [that is, Federal or state], and what no just government should refuse, or rest on inferences." *Id.*

174. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3 (2d ed. 1988) (discussing framers' intent, pre-adoption history, and post-adoption history as aids to understanding). According to Professor Tribe, at least three distinct schools of thought motivated the drafters of the Free Exercise Clause: 1) the evangelical view that worldly corruptions might destroy the churches if they were not protected from such dangers; 2) the Jeffersonian view that a barrier should be erected between the church and the state to protect secular interests from church control (and vice-versa); and 3) the Madisonian view that religious and secular interests would both be better advanced "by diffusing and decentralizing power" to assure diversity rather than dominance. *Id.* at 1158-59.

175. *Reynolds,* 98 U.S. at 164 (emphasis added).

176. *Id.* at 166. In one case, the U.S. Supreme Court buttressed the contention that freedom

Theorists who adhere to the constitutional interpretation doctrine of original intent[177] may well scoff at the notion that the First Amendment protects a right to freedom of thought. The *Reynolds* decision makes it quite clear, however, that the concept of freedom of thought was held in high regard during the era of the founding fathers. Though the text of the First Amendment does not contain the words "freedom of thought," the authors and supporters of the Declaration of Independence, the United States Constitution, and the Bill of Rights would in all likelihood be astounded to discover that any government claims the power to control or punish a person's thoughts.

The United States Supreme Court has suggested that freedom of belief—or freedom of thought—is as integral a part of the free speech right protected by the First Amendment as it is a part of the free exercise right. The first Justice to recognize a relationship between a right to free thought

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of thought is part of the Free Exercise Clause. Cantwell v. Connecticut, 310 U.S. 296 (1940). In *Cantwell,* the Court was asked to decide whether a state may constitutionally forbid a person to solicit money or valuables for any religious cause not considered legitimate by the state. *Id.* at 301. In deciding that this practice was an unconstitutional prior restraint on the free exercise of religion, the *Cantwell* decision reaffirmed the principle that no government can engage in thought control. *Id.* at 303. The Court stated:

> *[The First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute* but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. at 303-04 (citations omitted) (emphasis added). Justice Stone voiced his support of a child's right to refuse, on religious grounds, to pledge allegiance to the flag and acknowledged the concept of freedom of thought. Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting). He stated, "*The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them.*" *Id.* (emphasis added). Justice Jackson, writing for the Court that reversed *Gobitis,* instructed that the right to free intellect is protected in our constitutional form of government. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). He stated, "*We think the action of the local authorities* in compelling the flag salute and pledge transcends constitutional limitations on their power and *invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.*" *Id.* at 642 (emphasis added).

177. *See generally* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, BIBLIOGRAPHY OF ORIGINAL MEANING OF THE UNITED STATES CONSTITUTION (1988). Members of the bench and bar who believe that the meaning of the U.S. Constitution should be limited to the meaning its expressed terms had to the founding fathers have been labelled "originalists" or "interpretivists." *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). Perhaps the most famous (or infamous) originalist is former U.S. Court of Appeals Judge Robert H. Bork. Bork's constitutional philosophy was the focal point in the controversial hearings that led the U.S. Senate to vote against confirming his nomination to the U.S. Supreme Court. "[W]hat the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean." *Id.* at 144. Scholars of federal constitutional law debate the validity of a jurisprudence of original intent. *See, e.g.,* Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis,* 50 U. PITT. L. REV. 349 (1989); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record,* 65 TEX. L. REV. 1 (1986); Philip B. Kurland, *History and the Constitution: All or Nothing at All?,* 75 ILL. B.J. 262 (1987); Charles McC. Mathias, Jr., *Ordered Liberty: The Original Intent of the Constitution,* 47 MD. L. REV. 174 (1987); Thomas B. McAffee, *Constitutional Interpretation—The Uses and Limitations of Original Intent,* 75 ILL. B.J. 263 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers,* 41 VAND. L. REV. 507 (1988). The main problem with original intent is determining whose intent should control and what that intent was.

and the free speech clause of the First Amendment was Oliver Wendell Holmes, Jr., in *United States v. Schwimmer.*[178] In *Schwimmer,* the Court sustained the district court's denial of a fifty-year-old Hungarian woman's petition for naturalization due to her pacifist views.[179] In response, Justice Holmes, joined by Justice Brandeis, issued a succinct and stinging dissent.[180] Holmes, a battle-scarred veteran who suffered three wounds during the Civil War while fighting in defense of the Union, was certainly no pacifist.[181] He nevertheless supported Schwimmer's argument that she could be a loyal American and a pacifist.[182] Holmes reprimanded his brethren on the bench for scorning Schwimmer's freedom of thought. "[T]he principle of free thought . . . [even] freedom for the thought that we hate,"[183] was, for Holmes, a principle that "imperatively calls for attach-

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178. 279 U.S. 644 (1929).

179. *Id.* at 653. Schwimmer, who was born in Hungary in 1877, came to the United States in 1921. *Id.* at 646. She filed a petition for naturalization in the U.S. District Court for the Northern District of Illinois in September 1926. *Id.* During a preliminary interview that was part of the naturalization process, she declared that she "understood the principles of and fully believed in [the American] form of government and that she had read, and in becoming a citizen was willing to take, the oath of allegiance." *Id.* at 646-47. She was asked whether she would be willing to take up arms in defense of the country, if necessary. *Id.* at 647. As an acknowledged "uncompromising pacifist," she explained that she, personally, would not take up arms. *Id.* In her own words, Schwimmer pledged that she was "willing to do everything that an American citizen has to do except fighting." *Id.* at 648. In fact, she supported the government's right, if it changed policy and compelled women to take up arms in defense of the nation, to deal with her in the same manner it treated males who declined to bear arms for reasons of conscience. *Id.* at 647-48. Schwimmer proclaimed that she had "always served democratic ideals and fought—though not with arms—against undemocratic institutions." *Id.* at 647. Based on her unwillingness to bear arms, the district court denied her application for citizenship. *Id.* at 646. On appeal, the U.S. Supreme Court affirmed. *Id.* at 653. The Court announced that "the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution." *Id.* at 650. It was certainly appropriate, noted the Court, for the government to inquire into whether the beliefs and opinions of a person seeking naturalization would hinder her performance of this duty to protect the country. *Id.* at 651. In summary, the Court concluded that persons who could not fulfill the duty to defend the nation through force because of their pacifist beliefs "are liable to be incapable of the attachment for and devotion to the principles of our Constitution . . . required of aliens seeking naturalization." *Id.* at 652.

180. *Id.* at 653-55 (Holmes, J., dissenting).

181. *See generally* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989). Holmes was shot through the chest during the Battle of Ball's Bluff, Virginia on October 21, 1861. *Id.* at 48-51. He received a serious neck wound that barely missed piercing his windpipe at the Battle of Antietam Creek, Maryland on September 17, 1862. *Id.* at 66-67. He received an injury in the heel inflicted by a bullet and shrapnel at the Battle of Chancellorsville, Virginia on May 3, 1862. *Id.* at 77-78. Holmes' Civil War exploits are also chronicled in the following biographies: SILAS BENT, JUSTICE OLIVER WENDELL HOLMES (1932); LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (1991); CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY (1944).

182. *Schwimmer,* 279 U.S. at 654 (Holmes, J., dissenting). Holmes here practiced what he preached, for he acknowledged Schwimmer's right to hold pacifist beliefs notwithstanding the fact that he, himself, disagreed with them. He stated:

> She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace.

Id.

183. *Id.* at 654-55.

ment" in our system of government.[184] Because he believed Schwimmer had unquestionably demonstrated the requisite commitment to the principles of American government, he would have granted her application despite her pacifist views.[185]

In the midst of World War II, the Court's majority opinion in *Thomas v. Collins*[186] paid tribute to the free thought principles espoused by Holmes. In *Thomas,* the Court upheld a labor leader's right to engage in prolabor activities, even though the state of Texas had held him in contempt for violating its order not to address a rally.[187] Justice Rutledge, writing for the majority, stated that the case implicated the Court's "duty . . . to say where the individual's freedom ends and the State's power begins."[188] Justice Rutledge's decision recognized freedom of thought as First Amendment freedom:

> *The First Amendment gives freedom of mind the same security as freedom of conscience.* Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.[189]

Insofar as neither the union leader's words nor the caucus of union supporters presented any discernable danger to public safety, the Court failed to find any cogent state interest significant enough to permit a prior re-

184. *Id.* at 654.

185. It is important for this discussion to note when *Schwimmer* was decided. The case was a by-product of the patriotic fervor that gripped the nation before, during, and after World War I. The Red Scare of the era compelled certain legislators to enact laws designed to restrict unpatriotic views. *See generally* ZACHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1942) (discussing the conflict that waged between the government's war effort and an individual's interest in voicing his disagreement with the war effort). In a sense, the hate crime statutes can be seen as a result of a similar social phenomena. The frequency of hate crime has undoubtedly increased in the past decade and a half. Legislators feel compelled to act, as indeed they should. Yet the legislators have failed to learn the lesson Holmes explained in *Schwimmer,* namely that the political state must be mindful to tolerate thoughts that it hates. Instead of enhancing a defendant's penalty in proportion to the actual harm he causes or the actual violence he incites, or instead of countering prejudice through educational and cultural awareness programs, legislatures have simply criminalized a defendant's thoughts. Proponents of hate crime statutes have proven to be poor pupils of the message dispensed by Holmes in 1929.

186. 323 U.S. 516 (1945).

187. *Id.* at 518. Thomas, a labor leader of two organizations, travelled throughout the nation to help organize union activities and to solicit union members. *Id.* at 520. During the Fall of 1943, he was asked to travel from his home in Detroit to address a recruiting meeting being put on by a struggling union in Pelly, Texas. *Id.* at 520-21. Before Thomas arrived in the Longhorn State, a local court issued an ex parte order instructing him not to address the meeting. *Id.* at 521. After discussing the order with his attorneys, Thomas concluded that the order violated his rights of free speech and free assembly protected by the First Amendment. *Id.* at 522. Thomas spoke, was arrested and sanctioned for violating the court order. *Id.* at 522-23. The Texas Supreme Court affirmed, and Thomas appealed to the U.S. Supreme Court, renewing his constitutional claims. *Id.* at 518, 524.

188. *Id.* at 529. Justice Rutledge believed that the democratic freedoms secured by the First Amendment warranted "a sanctity and a sanction not permitting dubious intrusions." *Id.* at 530.

189. *Id.* at 531 (citations omitted) (emphasis added). Even Justice Roberts' dissent considered it settled that the Constitution protected the "right to think one's thoughts and to express them . . . ." *Id.* at 549.

straint on Thomas' free speech and assembly rights.[190]

Justice Rutledge seemed exceptionally concerned with the idea that the states might try to rationalize restraints on the free flow of ideas by arguing that some state-imposed restrictions are permissible when they are slight in nature. He warned that constraints on civil liberties are never negligible:

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. *There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede.* If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. . . . Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.[191]

Though Justice Rutledge proclaimed that some measure of the freedom of thought was absolute, he failed to identify the threshold past which states are powerless to travel.[192]

Reading a right of free thought into the First Amendment requires no larger leap of logic now than it did to infer the existence of a First Amendment right to freedom of association, which was not fully accepted by the United States Supreme Court until 1958.[193] Writing for the Court in *Patterson,* Justice Harlan explained that "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an insepa-

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190. *Id.* at 536-37. The Warren Court issued similar support for the suggestion that freedom of thought is related to the freedom of association in *Abood v. Detroit Board of Education.* 431 U.S. 209 (1977). "[A]t the heart of the First Amendment is the notion that *an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.*" *Id.* at 234-35 (emphasis added).

191. *Thomas,* 323 U.S. at 543 (emphasis added).

192. *See* Martin Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory,* 11 CRIM. JUST. ETHICS 29 (1992). Justice Rutledge's view that an individual's intellect should be afforded some sphere of protection that the government can never cross deserves closer attention. Two hypotheticals posed by Professor Redish provide excellent illustrations of the boundary of free thought that the state should not be able to cross:

> [A]ssume that a person accidently drops his diary, and it is found by a police officer. Assume further that the officer reads in the diary its owner's distaste for the policies of those currently in power. Could anyone even imagine that the government could, consistent with the First Amendment, punish the diary's owner for holding such views?

Id. at 30. Consider the following hypothetical as well: "Imagine that the government currently in power decides to bolster support for its policies by 'requiring that all citizens attend an "ideological purification" class, even though such a requirement does not by itself restrict anyone's right to speak.'" *Id.* at 31. Though neither of these practices involve speech, most people would intuitively maintain that the First Amendment prohibits the government from punishing a person for the beliefs he has written and from forcing the populace to submit to brainwashing. If the state cannot punish a person for the content of his writings, and cannot directly coerce a person to change his ideologies, how can it enhance a penalty because a person was motivated by an ideology the state condemns? As Professor Redish notes, state efforts at thought control threaten "the fundamental ground rules concerning the relationship between individual and government that inhere in the American political theory of which the protection of free expression is a central element." *Id.* at 30.

193. *See, e.g., Patterson,* 357 U.S. at 449. For a discussion of the right of free association, see Thomas S. Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1 (1964).

rable aspect of the 'liberty' . . . which embraces freedom of speech."[194] Not only did the Court here recognize the inherent right of freedom of association, the Court also afforded it the same degree of protection enjoyed by the rights expressly set forth in the First Amendment. Justice Harlan noted that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[195]

C. Freedom of Thought and the Ninth Amendment

The foregoing analysis primarily asserts that the right to free thought is an intrinsic part of the protections guaranteed by the First Amendment. The First Amendment is not the only fount of freedom in the United States Constitution. Though it has largely been ignored by the courts, the Ninth Amendment could, theoretically, be interpreted to support the recognition of a right to intellectual freedom.[196] The Ninth Amendment provides that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[197] To date, the only United States Supreme Court opinion acknowledging Ninth Amendment support for the proposition that "there are additional fundamental rights, protected from government infringement, which exist alongside

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194. 357 U.S. at 460 (citations omitted).

195. *Id.* at 460-61.

196. James Madison explained the theory underlying the Ninth Amendment when he presented it to Congress:

> "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration. . . . This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]."

Griswold v. Connecticut, 381 U.S. 479, 489-90 (1964) (quoting I ANNALS OF CONGRESS 439 (Gales & Seaton eds., 1834)).

197. U.S. CONST. amend. IX. The potential scope of the Ninth Amendment has received more academic consideration than judicial consideration. *See, e.g.,* Steven J. Heyman, *Natural Rights, Positivism and the Ninth Amendment: A Response To McAffee,* 16 S. ILL. U. L.J. 327 (1992); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment,* 61 U. CIN. L. REV. 49 (1992); Sol Wachtler, *Judging the Ninth Amendment,* 59 FORDHAM L. REV. 597 (1991); Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications For State Constitutional Law,* 1990 WIS. L. REV. 1229; Thomas B. McAffee, *The Original Meaning of the Ninth Amendment,* 90 COLUM. L. REV. 1215 (1990); Randy E. Barnett, *Reconceiving the Ninth Amendment,* 74 CORNELL L. REV. 1 (1988); Geoffrey G. Slaughter, Note, *the Ninth Amendment's Role in the Evolution of Fundamental Rights Jurisprudence: The Enumeration in the Constitution, Of Certain Rights, Shall Not Be Construed to Deny or Disparage Others Retained by the People,* 64 IND. L.J. 97 (1988); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What On Earth Can You Do With the Ninth Amendment?,* 64 CHI.-KENT L. REV. 239 (1988); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons,* 4 J.L. & POL. 63 (1987); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment,* 38 HASTINGS L.J. 305 (1987); Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention,"* 74 GEO. L.J. 1719 (1986); Russell L. Caplan, *The History and Meaning of the Ninth Amendment,* 69 VA. L. REV. 223 (1983); James F. Kelley, *The Uncertain Renaissance of the Ninth Amendment,* 33 U. CHI. L. REV. 814 (1966).

those fundamental rights specifically mentioned in the first eight constitutional amendments" is Justice Goldberg's concurrence in *Griswold v. Connecticut.*[198] *Griswold* recognized for the first time that the United States Constitution protects various zones of individual privacy.[199] Justice Douglas' majority opinion reasoned that the right to privacy is inherent in the "penumbras" of certain expressed constitutional guarantees.[200] The better textual approach to the problem is Justice Goldberg's argument that a right to privacy is supported by the Ninth Amendment.

Justice Goldberg's opinion in *Griswold* dismissed the notion that all fundamental rights worthy of protection had to be contained between the four corners of the United States Constitution. Such a holding would, he argued, "ignore the Ninth Amendment and . . . give it no effect whatsoever."[201] "The Ninth Amendment," he instructed, "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments . . . ."[202] Though conceding that the Ninth Amendment was not a source of rights, Justice Goldberg submitted his views about where judges should look to determine which rights not expressly contained in the United States Constitution merit protection:

> [Judges] must look to the "traditions and [collective] conscience of our people" to determine whether a principal is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[203]

Justice Goldberg apparently understood the concept of privacy to be so rooted in the collective conscience and traditions of the people that it rose to the level of a constitutional right. He accordingly concurred with the majority's decision that a state cannot bar a married couple from using contraceptives without infringing the right to privacy.

The line of United States Supreme Court cases discussing the right of

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198. 381 U.S. 479, 488 (1965).
199. *Id.* at 484.
200. *Id.* Justice Douglas listed in some detail the various parts of the Constitution that he believed, when considered together, supported the existence of a privacy right:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. According to Justice Douglas, these provisions, and case law related to them, "bear witness that the right of privacy which" pressed for recognition in *Griswold* was "a legitimate one." *Id.* at 485.
201. *Id.* at 491.
202. *Id.* at 492.
203. *Id.* at 493 (citations omitted).

free thought or freedom of belief begins in 1878.[204] Through the years, the Court has tied the right of free thought to such firmly established constitutional concepts as the right to freely exercise religious beliefs, the right to speak freely, and the right of free association. The right to freedom of thought does, indeed, appear to be so rooted in our fundamental rights that it rates elevation to constitutional status under Justice Goldberg's Ninth Amendment test.[205]

Though Justice Goldberg's interpretation of the Ninth Amendment has not been adopted by a majority of the United States Supreme Court, the Court has nevertheless acknowledged a connection between the right to privacy,[206] the right to freedom of thought, and the First Amendment. Justice Thurgood Marshall, who was perhaps the Court's greatest champion of civil rights,[207] suggested in *Stanley v. Georgia*,[208] that freedom of

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204. *Reynolds*, 98 U.S. at 145. For a discussion of *Reynolds*, see *supra* notes 164-76 and accompanying text.

205. It should be noted that express language of the Tenth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment can all easily be interpreted to support a right to free thought. The Tenth Amendment states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The Privileges and Immunities Clause pronounces that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV. The U.S. Supreme Court has never had the judicial courage to recognize the plain meaning of these amendments. *Cf.* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (rejecting broad interpretation of Privileges and Immunities Clause). Members of the Court have undoubtedly feared that acknowledging this plain meaning interpretation would open a proverbial Pandora's Box, unleashing a host of jurisprudential horrors on the judicial system as hordes of citizens rush to the courthouse to seek court approval of a wide variety of heretofore unrecognized civil liberties. It nevertheless appears from the plain language of these amendments that the delegation of sovereignty to the federal and state governments was not meant to include certain unnamed individual powers, individual rights or individual privileges and immunities. It takes little or no stretch of the imagination, or of the language in these parts of the Constitution, to support the contention that neither the state nor federal governments were given the direct authority to punish a person for holding beliefs contrary to the prevalent sentiments of the majority. It seems equally unlikely that the state or federal governments were conveyed permission to pass laws intended to force the majority's egalitarian views over the intolerant prejudices of a minority.

206. Samuel Warren and Louis Brandeis can perhaps be considered the "fathers of the right to privacy," insofar as their 1890 law review article, *The Right to Privacy*, appears to be the first documented discussion in the legal literature advocating recognition of such a right. *Griswold*, 381 U.S. at 510 n.1. For a more recent discussion of the topic presented in detail, see Jeb H. Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

207. Justice Marshall, the great-grandson of a slave, spent the first 28 years of his legal career as an advocate in the civil rights battles being fought by the National Association for Colored People (NAACP) and the NAACP Legal Defense and Education Fund. While in private practice, Marshall won 29 cases before the U.S. Supreme Court. These cases include: Smith v. Allwright, 321 U.S. 649 (1944) (prohibiting racial discrimination in primary elections); *Shelley*, 334 U.S. 1 (1948) (holding that state enforcement of racially restrictive covenants violates the equal protection clause); *Brown*, 347 U.S. 483 (1954) (holding that the doctrine of separate but equal is inherently unequal and, therefore, unconstitutional). *See generally* HALL, THE OXFORD COMPANION TO THE SUPREME COURT 526-28 (1992) (containing biographies of all Supreme Court Justices nominated between 1789 and 1992). For a complete discussion of Justice Marshall's endeavors on behalf of civil rights, see MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL (1992); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL (1993).

208. 394 U.S. 557 (1969).

thought may be part and parcel of the right to privacy. *Stanley* involved the question of whether a person could be held criminally liable for possessing pornographic materials at his home for personal use, in violation of a state statute.[209] The police discovered the materials during an unsuccessful warrant search for booking records in Stanley's home.[210] Stanley argued that his conviction was contrary to the First Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[211] The Supreme Court reversed the conviction, adopting Stanley's argument that "the mere private possession of obscene matter cannot constitutionally be made a crime."[212]

While conceding that precedent permitted the states to regulate public distribution of obscene material,[213] the Court reasoned that the practice of prohibiting private enjoyment of such materials conflicted with the right to privacy:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the most valued by civilized man."[214]

The Court considered a person's right to read or possess materials in the solitude of his home a privacy right protected by the Constitution.[215]

The state claimed the power to "protect the individual's mind from the effects of obscenity."[216] Justice Marshall translated this pronouncement to mean that the state claimed "the right to control the moral content of a

209. *Id.* at 558-59. The statute under which Stanley was originally convicted provided:

> "Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature . . . thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years. . . . As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

Id. at n.1 (quoting GA. CODE ANN. § 26-6301 (Supp. 1968)).

210. *Id.* at 558.

211. *Id.* at 559.

212. *Id.*

213. *Id.* at 560 (citing Roth v. United States, 354 U.S. 476, 485 (1957); Alberts v. California, 354 U.S. 476 (1957)). *See id.* at 561 n.6 for further discussion of the cases the Court relied on in support of its conclusion that precedent only allowed the state to regulate the sale or distribution of obscene material.

214. *Stanley,* 394 U.S. at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). *See also Griswold,* 381 U.S. at 479. *Cf. Patterson,* 357 U.S. at 462.

215. *Stanley,* 394 U.S. at 568.

216. *Id.* at 565.

person's thoughts."[217] While confessing that some might well consider this a "noble purpose,"[218] Marshall nevertheless derailed any line of reasoning that could support a state's right to engage in thought control. Marshall pronounced the practice of "idea management" beyond the authority of government: "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[219] The deterrents available among free men to prevent crime, instructed the Court, "'are education and punishment for violations of law. . . .'"[220] Marshall here seemed to acknowledge that the state can punish public conduct, and society can make efforts to dissuade the prejudices of a hostile minority, but the government cannot punish private thoughts deemed to conflict with widespread social norms.

The cases discussed above share a common theme. The Bill of Rights does not permit the state or federal government to pass criminal laws directed at condemning unpopular perspectives. If a person has the autonomy to exercise his religious beliefs, he is free to have beliefs. If a person is at liberty to voice or print his views, however unpalatable they may be to the general masses, he is free to have views. If the government has no power to regulate what a person reads in the privacy of his home, it has no prerogative to restrict the beliefs and biases a person holds in the privacy of his thoughts. The existence of the right to free thought is a reasonable corollary to the rights to free speech, free exercise of religion, freedom of association and the right to privacy.

The line of cases discussed above, and the principles for which they stand, amply indicate that the right to freedom of thought deserves the protection of the Constitution of the United States from political control.[221] However, since all of the cases discussing this right have related to other constitutional guarantees as well, the United States Supreme Court has had little opportunity to separately define the scope of the right to free thought.[222] The freedom of thought cases decided by the Court have been

217. *Id.*

218. *Id.* at 566.

219. *Id.*

220. *Id.* at 567 (quoting Whitley v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)). *See* Thomas S. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 938 (1963).

221. The cases discussed in the text are not the only examples where the members of the U.S. Supreme Court voiced their approval of a right to free thought. Approval has been articulated several times over the past half century. *See Black,* 351 U.S. at 304 (Douglas, J., dissenting) ("Belief cannot be penalized consistently with the First Amendment."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); Wallace v. Jaffree, 472 U.S. 38, 52 (1985) ("Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.").

222. *See generally* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992). Professor Smolla may have uncovered the reason the U.S. Supreme Court has not yet considered a controversy it regards as a pure freedom of thought case. Professor Smolla states:

within the parameters of established First Amendment analysis because they have involved government efforts to restrict speech, limit the free exercise of religion, or invade a person's privacy. Freedom of thought is, nevertheless, capable of analysis under traditional First Amendment standards.

If freedom of thought is properly viewed as a First Amendment right capable of traditional analysis, the *Mitchell* Court could have applied the *R.A.V.* neutrality principle to test whether the Wisconsin hate crime penalty enhancement statute conflicts with a defendant's right to free thought.[223] The *Mitchell* Court could also have applied the four-pronged *O'Brien* test to assess the constitutionality of the state's efforts to combat hate crimes.[224] The *Mitchell* Court failed to apply either test. As a result, it appears that defendants will have to turn to their state constitutions—or wait for the emergence of a United States Supreme Court that has greater respect for the individual right of free thought—in order to protect their right to hold beliefs with which the majority disagrees.

D. Equal Protection

Hate crime laws can be interpreted to raise equal protection problems as well. The *Mitchell* Court declined to address the defendant's equal protection argument because it had been waived in lower court proceedings.[225] The question of whether hate crime laws conflict with the Equal Protection Clause nevertheless merits some discussion.

In pertinent part, the Fourteenth Amendment to the United States Constitution, which contains the Equal Protection Clause, provides: "No State shall . . . *deny to any person within its jurisdiction the Equal Protection of the laws.*"[226] The Fourteenth Amendment is one of three "Civil War Amendments" ratified at the end of the war to eliminate the racial barriers erected by the southern state governments.[227] Though the Equal Protection Clause was crafted to cure racial injustice,[228] it has been extended to

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> The precincts of the mind are not sacred but merely inaccessible; men have been able to get away with free thinking in those precincts because up to now no state has devised a means of patrolling them. Men enjoy perfect freedom of thought because the state lacks the technological devices to read minds and control thinking.

Id. at 10.

223. For a discussion of the *R.A.V.* neutrality principle, see *supra* notes 74-86 and accompanying text.

224. For a discussion of the *O'Brien* test, see *supra* notes 114-22 and accompanying text.

225. 113 S. Ct. at 2197 n.2.

226. U.S. Const. amend. XIV (emphasis added).

227. Bernard Schwartz, Statutory History of the United States: Civil Rights, Part I, 179-364 (1970).

228. *Id.* at 222-23. Congressmen Thaddeus Stevens (R-Pa.), who reported the proposed amendment to the House from the Joint Committee on Reconstruction, explained the intended effect of the Equal Protection Clause:

> This amendment . . . allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.

remedy discrimination based on national origin, age, gender, religion and other impermissible categories.[229] Federal courts have applied the Equal Protection Clause to prevent the states from arbitrarily denying classes of citizens the ability to exercise fundamental rights.[230]

The United States Supreme Court has crafted three tests to assess whether a law denies a class of persons the equal protection of the laws:

> 1) Rational Relationship Test—If a law that classifies persons is a general social or economic regulation, or does not involve a fundamental right or suspect class, the courts are only permitted to ask whether it is conceivable that the classification bears a rational relationship to an end of the government that is not prohibited by the U.S. Constitution.[231] If the law bears a plausible relationship to a legitimate state interest, it will not be held in violation of the Equal Protection Clause under the rational relation test;[232]
> 2) Strict Scrutiny Test—If a law classifies people in terms of their ability to exercise a fundamental right,[233] or if a law relates to a suspect classification such as race or national origin, the courts must apply the strict scrutiny test to the law. Under the strict scrutiny test, the court can only uphold a classification if it can conclude that the law in question is narrowly tailored to advance a compelling state interest;[234]
> 3) Intermediate Test—In cases where the classification being challenged is a gender-based classification or involves a legitimacy-based classification, the court will not uphold the statute unless it finds that the classification has a substantial relationship to an important governmental interest.[235]

Id.

229. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 18.1 to 18.46 (2d ed. 1992) (discussing Equal Protection).

230. Though the U.S. Constitution does not expressly contain an equal protection clause that applies to limit the federal government's power to draw distinctions between how it treats certain persons, the courts have nevertheless read an equal protection component into the due process clause of the Fifth Amendment.

231. Hodel v. Indiana, 452 U.S. 314, 331 (1981).

> Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear show of arbitrariness and irrationality.

Id. at 331-32 (citations omitted).

232. ROTUNDA & NOWAK, *supra* note 229, at 14. *See also* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985); *Hodel,* 452 U.S. at 314; City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

233. The U.S. Supreme Court has held that certain rights are fundamental in nature, and laws that attempt to alter, amend or eliminate the exercise of these rights accordingly warrant analysis under the strict scrutiny test. For cases discussing the right to vote, see Reynolds v. Simms, 377 U.S. 533 (1964); Williams v. Rhodes, 393 U.S. 23 (1968); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969). For a case discussing the right to travel in interstate commerce, see Shapiro v. Thompson, 394 U.S. 618 (1969). For cases analyzing the right to privacy, see *Griswold,* 381 U.S. at 1; Roe v. Wade, 410 U.S. 113 (1973). For cases discussing the rights of marriage and procreation, see Skinner v. Oklahoma, 316 U.S. 535 (1942); Loving v. Virginia, 381 U.S. 1 (1967); Meyer v. Nebraska, 262 U.S. 390 (1923); Zablocki v. Redhail, 434 U.S. 374 (1978). For a case analyzing First Amendment rights, see Carey v. Brown, 447 U.S. 455 (1980).

234. *See* ROTUNDA & NOWAK, *supra* note 229, § 18.3 at 15-16.

235. *Id.* at 17.

The right of free thought, like other rights emanating from the Bill of Rights, appears to be sufficiently fundamental to warrant consideration under the strict scrutiny test.

Under the strict scrutiny test, the first question that must be asked is what compelling state interest hate crime statutes are designed to effectuate. The states do have a compelling interest in controlling how a person's prejudices are physically manifested—states have the power to punish a person for his misdeeds. Hate crime statutes, however, relate to a person's misguided beliefs and not to his misdeeds. The state has no compelling state interest in eradicating a person's prejudices. The fact remains that hate crime laws punish certain bigoted defendants more harshly than other bigoted defendants—or non-bigoted defendants—who commit the exact same criminal act.[236]

Hate crime statutes would suffer the same fate under the rational relationship test. If hate crime statutes are interpreted to reprimand a defendant for his thoughts, the state must explain how it has a legitimate interest in engaging in an overt attempt at thought control. Equal protection analysis helps put into focus the illegitimate objective of thought management attempted by hate crime statutes.

It can be argued that drawing a penal classification based on the defendant's prejudiced motive not only denies the criminal equal protection by punishing his right to free thought, but it also denies the victims of identical crimes committed for other reasons equal protection from the person who harmed them. If a person who severely beats up a victim for racial reasons deserves five years in jail, a victim who suffers the same injuries from an identical act committed for a different reason should be owed the same protection from his assailant and should get the same measure of retribution.[237]

Because the *Mitchell* Court did not have the opportunity to address the issue, any predictions of how equal protection challenges to hate crime laws will fare before the United States Supreme Court would be nothing more than pure conjecture. However, the foregoing discussion illustrates that hate crime laws do raise valid equal protection concerns.

V. UTILITY OF HATE CRIME STATUTES AND HATE CRIME PENALTY ENHANCEMENT STATUTES

The constitutionality of hate crime laws has been debated by the

236. The state does not even have a compelling interest in eliminating all acts of prejudice. The state has no concern for whether an African-American woman chooses not to date white men because of her prejudices. The state has no concern with whether a devout Mormon chooses not to send her children to a Catholic high school. The state has no business regulating whether a Mexican-American only votes for candidates of his race. While the state can punish acts of violence motivated by prejudice, thought control is clearly not a government affair.

237. *See* State v. Beebe, 680 P.2d 11, *appeal denied,* 683 P.2d 1372 (1984). This argument was rejected by an Oregon state court called on to assess the constitutionality of one of its hate crime laws.

courts and other commentators and will undoubtedly be the subject of further discussion. As a consequence of *Mitchell,* the advocates of hate crime statutes are currently winning the contest. The patrons of the ADL hate crime approach have failed to explain what use hate crime laws will have in the war against hate crimes.

The following penological and social science discussion is by no means exhaustive. It is presented as fuel for further discussion. A review of the social science theories discussed below suggests that the ADL approach to hate crime does not serve any valid penological purpose and does not seem to be a highly probable means of curing a defendant's prejudices. If sending biased defendants to prison for extended periods of time does not correct their bigotry, then hate crime penalty enhancements cannot fairly be classified as rationally related to a legitimate state purpose.

A. Penological Theory

How does the ADL hate crime penalty enhancement approach relate to any of the traditional Anglo-American objectives of our criminal justice system? Criminal law "declares what conduct is criminal and prescribes the punishment to be imposed for such conduct."[238] Over the course of time, several theories concerning the objective of punishment for violating criminal law have emerged:[239] (1) specific deterrence; (2) restraint; (3) gen-

238. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.2 at 6 (2d ed. 1986). *See* Herbert L. Packer, The Limits of the Criminal Sanction (1968). Professor Packer notes:

> What we mean by a *crime* or an *offense* is simply conduct that is forbidden by law and to which certain consequences, called punishment, will apply on the occurrence of stated conditions and following a stated process. A crime . . . is forbidden conduct for which punishment is prescribed and which is formally described as a crime by an agency of the government having the power to do so.

Id. at 18. The main purpose of criminal law is to "make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable." LaFave & Scott § 1.5 at 22.

239. LaFave & Scott, *supra* note 238, § 1.5(a) at 24. Though rehabilitation is a goal of the criminal justice system, it is not a form of punishment. Rehabilitation or treatment theory is more properly considered a form of correction. Rehabilitation theory supports the view that the behavior of criminals can be changed through appropriate treatment so that they can be returned to society without the desire or need to commit more crime. *Id.* Rehabilitation focuses on the offender, not on the offense. *Id.* *See* Packer, *supra* note 238, at 26. Professor Packer explains the difference between punishment and treatment as follows:

> [O]ne feature that always distinguishes a case of Punishment from one of Treatment is the nature of the relationship between the offending conduct and what we do to the person who has engaged in it. For example, by saying that we may deal with a youth who seems likely to fall into a life of crime by locking him up or by providing him with an education, we have not described the essential difference between Punishment and Treatment. If we send him to a school pursuant to a judgment that he has engaged in offending conduct, we are subjecting him to Punishment; if we think that he will be better off in jail than on the street and proceed to lock him up without a determination that he has engaged in offending conduct, we are subjecting him to Treatment.

Id. Professor Packer notes that punishment deals with a person because he has engaged in offending conduct. *Id.* In treatment, he is dealt with in the manner he is because it will help him. *Id.* *See also* Henry N. Pontell, A Capacity to Punish: The Ecology of Crime and Punishment (1984). Some scholars question whether rehabilitation is still a goal of the American criminal justice system: "The original goal of penal institutions in this country, which was the

eral deterrence; (4) education; and (5) retribution. The sentence enhancement approach is unrelated to any of these penological models.

1. Specific Deterrence

Under the specific deterrence theory, which is also known as prevention theory, the objective of punishment is to deter the criminal from committing any additional crimes by giving him such an unpleasant experience that he will not want to risk repeat punishment by breaking the law again.[240] Neither the penalty enhancement nor the hate crime statute are related to specific deterrence of the defendant's conduct. The penalty for the offenses incorporated into most hate crime laws should sufficiently deter a defendant from committing the same act again, regardless of the motive the defendant had for committing the offense. If the punishment for the predicate offense plays the appropriate role, what purpose does it serve to enhance the penalty because of the defendant's motive? The answer, of course, is none.

2. Restraint

The purpose of punishment under the restraint theory, otherwise known as incapacitation, isolation, or disablement, is to protect society from persons considered dangerous due to their past criminal conduct by segregating them from society.[241] The restraint model may be slightly concerned with why the defendant committed the crime or selected the victim. Motive is relevant here for what it tells the sentencing authority about the danger the defendant presents to society. However, this calls for a case-by-case determination. Not all racists present a danger to society; a person motivated by different forces may present a greater danger to the masses than a racist. For example, Charles Manson's total disregard for established societal norms makes him considerably more dangerous than a teenager who starts a fight because he is prejudiced against a particular group with which his victim can be identified.

Every person has some sort of prejudice. The fact that a person permits his prejudice to manifest itself into inappropriate conduct once does not transform him into a grave threat from which society must be protected. Penalty enhancements do not catalog defendants into dangerous and nondangerous classifications. Accordingly, the penalty enhancements can easily be applied to defendants who present no greater danger to society than defendants who do not fall within the scope of the statute. This being the case, the laws cannot be justified under the restraint model.

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reformation of the criminal, has not been met in practice.... We have witnessed displacement of this original penological goal in favor of other goals . . . ." *Id.* at 3.

240. LAFAVE & SCOTT, *supra* note 238, § 1.5(a)(1) at 23.

241. *Id.* § 1.5(a)(2) at 23-24.

3. *General Deterrence and Education*

Under the general deterrence model, frequently referred to as general prevention, the punishment of a criminal is meant to discourage others from committing crimes.[242] Under the education theory, the publicity of a criminal trial, conviction, and punishment serves to educate the public about the differences between good conduct and bad conduct.[243] The general deterrence and education models, like the specific deterrence model, do not relate to the penalty enhancement or the hate crime statute. If the punishment for the predicate offense is sufficient to plausibly discourage the public from committing the crime, and to educate the masses about the differences between good conduct and bad conduct, the penalty enhancement must be aimed at something other than general deterrence of conduct. If hate crime laws serve any deterrent or education functions at all, they send the message that bigotry and other forms of statutorily defined prejudices are inappropriate values.

4. *Retribution*

Retribution theory is the oldest doctrine of punishment;[244] retribution is simply revenge or retaliation. Acts of violence motivated by racism, sexism, homophobia, and other modes of prejudice may well arouse a desire for revenge. Retribution is not aimed at making the defendant change his behavior; retribution endeavors to make the victim feel better. Again, the penalty for the underlying offense exacts a pound of flesh from the defendant for the criminal act he has committed. The hate crime penalty enhancement approach comes closest to the retribution model, but the retribution model is "no longer [a] dominant objective of criminal law."[245]

B. The Social-Psychological Origins of Prejudice

If one accepts that hate crime laws are aimed at punishing a defendant for his prejudices, it is important to consider whether enhancing a defendant's time in prison will have any effect on his prejudiced views—or whether the signal the enhanced punishment will send to the public will have any deterrent effect. A person's prejudices can manifest themselves in different forms and different frequencies: there are those "who *sometimes* . . . act out their prejudices; those who *frequently* [act out their prejudices] . . . and those who *usually do both*.[246] To date, no panacea for

242. *Id.* § 1.5(a)(4) at 24-25.
243. *Id.* § 1.5(a)(5) at 25.
244. This proposition is amply supported by reference to the Bible. "He that smiteth a man, so that he die, shall be surely put to death." 2 *Exodus* 21:12 (King James). "Eye for eye, tooth for tooth, hand for hand, foot for foot." *Id.* at 21:24.
245. Williams v. New York, 337 U.S. 241, 248 (1949).
246. Philip Perlmutter, Divided We Fall: A History of Ethnic, Religious, and Racial Prejudice in America 15 (1992). According to Perlmutter, variations in the type and intensity of prejudice show that it:

- can be stronger and more tenacious than reason and truth;

prejudice has been discovered. It seems unlikely that hate crime statutes will eradicate this very human attribute.[247] Social psychologist Elliot Aronson has reviewed a variety of works on the subject of prejudice and concludes that the behavior can be caused by one of four non-exclusive factors: "(1) economic and political competition or conflict; (2) displaced aggression; (3) personality needs; and (4) conformity to existing social norms."[248]

According to the economic and political competition model, "the dominant group might attempt to exploit or derogate a minority group in order to gain some material advantage [when resources are limited]. Prejudiced attitudes tend to increase when times are tense and there is conflict over mutually exclusive goals."[249] Occupational barriers to women and members of ethnic minorities are classic examples of prejudice derived from competition. Discrimination and prejudice have been shown to increase as competition for scant employment opportunities increases.[250] For example, a study conducted in the 1970's showed that most anti-black prejudice existed in groups just one step above the socioeconomic level on

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- can be limited to one group or generalized to many—locally, regionally and/or nationally;
- can be practiced simultaneously by different groups, including victimized ones;
- can be held by people who do not believe they are prejudiced, and who even decry it in others;
- can be applied selectively or intermittently to members of a particular group or to entire groups;
- can be motivated by and exploited for economic, political, social, or psychological gain;
- can be enacted by victims of prejudice against members of their own group as well as those of other groups;
- can be found among the educated and uneducated, as well as the liberal and the conservative;
- can be implemented and nurtured by ethnocentricism, stereotyping, and public and religious education;
- can develop or intensify during good or bad economic times, feeding off economic or status rivalries;
- can result from familiarity or unfamiliarity with groups;
- can be directed against people not seen or known;
- can be generated, institutionalized, and sanctioned by one's group, family, faith, community, and country, each believing it is somehow culturally, intellectually, morally, racially, and/or technologically superior to others;
- can be adopted as a norm of behavior, with people and institutions doing or wanting to do as others do or want to do;
- can vary in intensity and duration according to the race, religion, or ethnicity of both the victims and the victimizer;
- can enhance the self-esteem and pleasure of practitioners through inflicting pain, put-downs, pranks, or physical attacks;
- can be suppressed, represented, reduced, intensified, or redirected to others;
- can be historically and culturally inherited, transmitted, or transplanted to other people and lands;
- can be symptomatic of a deeper and more complex condition of human aggressiveness.

Id. at 17.

247. For a discussion on the world-wide prevalence of prejudice, see DANIELA GIOSEFFI, ON PREJUDICE: A GLOBAL PERSPECTIVE (1993).

248. ELLIOT ARONSON, THE SOCIAL ANIMAL 313 (6th ed. 1992). Personality needs, which Aronson has identified as the third factor that contributes to the development of prejudice, is not discussed herein. For a discussion of the origins of prejudice, see ALLPORT, *supra* note 47.

249. ARONSON, *supra* note 248, at 313.

250. *Id.* at 314.

which most blacks were classified.[251] It seems unlikely that hate crime laws will have any effect on eradicating prejudices created by socioeconomic forces.

The displaced aggression theory is also known as the "scapegoat theory of prejudice."[252] In essence, this theory hypothesizes that a person in an unpleasant or adverse situation has "a strong tendency . . . to lash out at the cause of his or her frustration."[253] Frequently, however, it is too difficult for a person to directly retaliate against the source of his frustration. Instead, he projects his frustrations onto another person or group of persons. This phenomena is perhaps best exemplified by the atrocities committed against the Jewish people and other minorities by the German Nazi party during the 1930's and 1940's. The general view of scapegoating indicates that individuals displace their aggression onto groups that are "disliked, that are visible, and that are relatively powerless."[254] The ADL approach to hate crime does not seem to be a likely cure for prejudice caused by scapegoating. In addition, an extended prison term is unlikely to have any effect on a person who has a prejudiced personality.

The final theoretical cause of prejudice is simple conformity to the norms that exist in society.[255] People who live in societies, cultures or subcultures that have prejudiced norms tend to be more prejudiced themselves.[256] It is plausible that removing a person from a bigoted culture and placing him in a culture that holds more egalitarian norms might reduce or eliminate the prejudices he had previously learned to consider an appropriate norm. However, it seems highly unlikely that prison life contains the type of norms that will easily transform a prejudiced defendant into a non-prejudiced defendant.

VI. CONCLUSION

In essence, hate crime statutes endeavor to punish persons who commit crimes because of the hatred they hold for a group with which their victims can be identified. Hate crime statutes are intended to send a message to the general populace that certain types of hatred are less socially acceptable than others. Hate crime statutes seek to accomplish through the force of law the exact objective they punish a defendant for trying to achieve through the force of violence—they attempt to eliminate a certain class of persons from society, namely persons with bigoted beliefs. Legislators who enact such laws are attempting to instill their views of social relations into the consciousness of those with whom they disagree. By the same act which allegedly shows a commitment to civil rights, state legis-

251. *Id.* at 315.
252. *Id.* at 316.
253. *Id.*
254. *Id.* at 319.
255. *Id.* at 322.
256. *Id.* at 322-24.

lators who enact hate crime penalty enhancements deprive a minority with which they disagree the right to hold unpopular beliefs. The right to free thought enshrined in the United States Constitution—and the constitutions of the several states—should protect those persons convicted of illegal acts from having their punishment increased because they were motivated by a hatred deemed unenlightened, wrong-minded or ignorant by those in power.[257]

If the majority-controlled government can, without limitation, enhance a defendant's penalty because it was motivated by biases the state opposes, the government is free to consider any personal or political motive just cause for stiffer punishment. For example, the state may be able to punish as hate criminals "right to life" activists who, motivated by their anti-abortion beliefs, assault persons entering medical clinics. The state may be able to convict as hate offenders animal rights activists who, motivated by their beliefs, assault persons who wear fur coats. The state has no more legitimate interest in punishing more severely those persons who commit crime out of racial bigotry than it does in enhancing the penalties for persons who commit crime for other ideological motives. Because their reach potentially extends this far, hate crime statutes do not just raise questions of civil rights, they raise serious questions concerning the limits of government power.

After the United States Supreme Court's decision in *Wisconsin v. Mitchell,* only time will tell the answer to two questions raised by the hate crime debate: whether malicious prejudices can ever be eliminated; and whether constitutional limits restrain the majority's ability to impose its social values on the rest of society. While racism, sexism, homophobia and other forms of prejudice are admittedly severe ills that afflict the soul of society, the constitutional cure for the malady of prejudice is not to punish a person for his bigoted beliefs, but to teach him why he is wrong.[258] Hopefully the ADL and the United States Supreme Court will recognize that the power being unleashed through hate crime statutes against persons with unpopular prejudices essentially sanctions a practice of thought control inconsistent with our constitutional system of government. "*Thought-*

257. At the advent of the Constitutional Era, James Madison warned that the greatest dangers to liberty would not come directly from the government itself, but rather from the will of the majority. 2 DEBATE ON THE CONSTITUTION 612 (1993) (Madison's June 6, 1788, reply to Patrick Henry at the Virginia Ratifying Convention). He stated, "[T]urbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism." *Id.* The type of thought control attempted by the current crop of hate crime laws borders on just the type of totalitarianism condemned by Madison.

258. Indeed, fidelity to the values of free expression and equal protection dictates that the only weapon constitutionally fit to counter intolerant thought is an exchange of ideas, attempted through education, through leadership by example, and through other less-intrusive, noncoercive means. Over seventy years ago, in *Abrams v. United States,* Justice Holmes explained, "[T]he ultimate good . . . is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

crime does not entail death; thoughtcrime IS death."[259]

259. George Orwell, 1984 27 (1989) (emphasis added).

Restraining the Heartless: Racist Speech and Minority Rights

JEANNINE BELL*

"It may be true that morality cannot be legislated, but behavior can be regulated. The law may not change the heart, but it can restrain the heartless."[1]

INTRODUCTION

> In Spain on November 17, 2004, during a friendly soccer match between Spain and England, two Black players for the English team were subjected to monkey noises and racist slogans chanted by thousands of fans in the 55,000-seat stadium.[2]
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> In 2002, a Black woman purchased a house in an all-White neighborhood in Mobile County, Alabama. Upon arriving at the house to prepare it for occupancy, she found the back door of the house had been kicked in. The intruders had sprayed "KKK" and "Nigga" in red letters across the living room walls of her new home.[3]
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> In New York City, an anti-Semitic smear was found in a bathroom on a college campus building. The images discovered were a swastika and a caricature of a man wearing a yarmulke, which had been drawn in black ink on a stall door.[4]

Racially offensive slogans like those directed at the English soccer players in the anecdote above—slurs, epithets, and symbols—are all forms of racist speech. In the United States, racist speech, along with anti-gay and anti-religious speech, falls into the category called "hate speech."[5] Though there is no commonly agreed upon definition of hate speech, the international advocacy organization Human Rights Watch defines

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1. MARTIN LUTHER KING, JR., An Address Before the National Press Club, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 99, 100 (James Melvin Washington ed., 1986).

2. Keith B. Richburg, *Fans' Racist Taunts Rattle European Soccer: Governing Federations Debate New Rules, Sanctions to Curb Abusive Behavior in Stands*, WASH. POST, Dec. 13, 2004, at A12.

3. Rhoda A. Pickett, *Mobile-Area Families Grapple with Race-Driven Vandalism*, MOBILE PRESS-REG. (Mobile, Ala.), July 22, 2002, at 1A.

4. Elissa Gootman, *Noose Case Puts Focus on a Scholar of Race*, N.Y. TIMES, October 12, 2007, at B1.

5. *See* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 8 (1994).

Temple American Inn of Court - April 2016 Program - Research and Materials

hate speech expansively as "any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women."[6] While people who are targeted by such an expression because of their race or ethnicity can be victims of racist hate speech, the broad nature of this definition reaches out to those who are frequently targeted by any form of hate speech. At least when reports are analyzed, the majority of victims of hate speech all too often lack social power, and are frequently discrete or insular minorities. In addition, the victims are likely to belong to groups that have been historically discriminated against.

In this Article, I limit my focus to racist speech, which I define as speech that is offensive to individuals or groups on the basis of their actual or perceived race, color, ethnicity, or nation of origin. Part I dissects and examines racist expression by providing contemporary manifestations of racist speech and briefly describing the attendant difficulties that such expression creates for those at whom it is targeted. Part II examines how such expression has been regulated in the United States. Part III argues for regulation due to the connection between racist speech and extremist violence.

I. THE CIRCUMSTANCES OF CONTEMPORARY RACIST EXPRESSION IN THE UNITED STATES

A. The Locale: The Home, the Workplace, and Public Spaces

The complicated racial history of the United States has led to significant racial tension in this country over the last several hundred years. Perhaps unsurprisingly, vestiges of the United States' tumultuous racial history remain as racial, ethnic, and religious minorities in areas across the country have been frequently targeted by racist expression in both public and private spaces. One of the most disturbing places in which individuals have faced racist speech and behavior has been in their living spaces—their homes.[7] Such behavior is still prevalent in the United States. Even in the past twenty years, minorities moving to all-White neighborhoods in cities across the country have faced slurs, epithets, and other expressions of racism directed at them by White neighbors who wish to drive them out of the community.[8] One prominent example of racist expression occurring in and around individuals' homes is when a cross is burned on someone's lawn. In the United States, a burning cross is a powerful symbol. Cross burning is strongly associated with the violence that was perpetrated by the Ku Klux Klan and others. Cross burning was accompanied by other sorts of violence, or served as its precursor.[9] Given this history, it is perhaps unsurprising that in the majority of cases, cross burnings are directed at Black Americans, or those

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6. *Id.*

7. *See, e.g.*, Pickett, *supra* note 3 (describing three families who discovered racist graffiti on their homes).

8. *See, e.g.*, STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS (2000); Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. LAW 47 (2007); Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2002).

9. *See* Rubinowitz & Perry, *supra* note 8, at 355–56.

associated with them—for example, a member of an interracial couple.[10] Not all racist expression targeted at individuals in their homes involves an action, such as cross burning. In some cases, racist expression directed at individuals in their homes may simply consist of harassment in the form of racial and ethnic slurs.[11]

Federal and state cases alleging workplace discrimination suggest that racist speech is also common in U.S. workplaces. The legal tolerance for such expression varies based on the severity of the expression. Courts have allowed the infrequent use of slurs and epithets in the workplace.[12] If the use of racist speech in the workplace meets the legal standard for harassment, however, it may violate federal and state laws providing for equal opportunity in employment.[13] Despite such sanctions under federal and state law, research has found racial harassment in the form of racist expression to be quite prevalent.[14] A few of the more graphic examples of speech used by co-workers and supervisors of minority employees include slurs and epithets, for example, referring to a Black employee as "that stupid nigger,"[15] racist jokes, and cartoons or symbols left in the employees' work area.[16] The different venues in which workplace speech may be experienced depends on the circumstances of one's employment. As the soccer anecdote at the beginning of this Article suggests, racial minorities who are athletes

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10. *See* United States v. May, 359 F.3d 683, 685 (4th Cir. 2004) (cross burning near property of interracial couple); United States v. Hartbarger, 148 F.3d 777, 780 (7th Cir. 1998) (cross burning in front of interracial couple's trailer); United States v. Sheldon, No. 96-4375, 1997 U.S. App. LEXIS 3435, at *1 (4th Cir. Feb. 26, 1997) (convicting defendant for burning a cross on the front lawn of an interracial couple's house).

11. *E.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 328 (7th Cir. 2004) (ethnic slur written on the Jewish plaintiffs' property); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 239 (E.D.N.Y. 1998) (slurs directed at Jewish residents by their neighbors).

12. *See. e.g.*, Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985).

13. Title VII prohibits discrimination by an employer "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000). In order for the employer to be held liable, however, behavior must be "sufficiently severe or pervasive." Jerome R. Watson & Richard W. Warren, *"I Heard it Through the Grapevine": Evidentiary Challenges in Racially Hostile Work Environment Litigation*, 19 LAB. LAW. 381, 401 (2004). Courts have interpreted this language to mean that the occasional ethnic slur does not rise to the level of racial harassment under Title VII. *See id.*

14. *See* Vincent J. Roscigno, Lisette M. Garcia & Donna Bobbitt-Zehzer, *Social Closure and Processes of Race/Sex Employment Discrimination*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 28–34 (2007).

15. Armstrong v. Lance, Inc., No. 93-1298, 1994 WL 173192, at *2 (4th Cir. May 9, 1994); *see also* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1408 (10th Cir. 1987) (Blacks referred to as niggers and coons); Gilbert v. City of Little Rock, 799 F.2d 1210, 1213 n.7 (8th Cir. 1986) (use of slurs, anti-Black graffiti against workers); Snell v. Suffolk County, 782 F.2d 1094, 1098 (2d Cir. 1986) (use of slurs and racially offensive cartoons and photographs); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981) (referring to employees as niggers); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 87 (8th Cir. 1977) (referring to employee as a "dago" and to other Italian-American employees as the "Mafia").

16. EEOC v. Nw. Airlines, Inc., 188 F.3d 695, 697–98 (6th Cir. 1999) (Ku Klux Klan symbols and racial graffiti in the work area).

Temple American Inn of Court - April 2016 Program - Research and Materials

may be confronted with racist speech "backstage" in the locker room and also while performing, as fans hurl slurs and epithets from the stands.[17]

B. The Impact of Racist Speech on Individuals

Those who argue for restrictions on racist speech base many of their arguments on its negative impact on its intended targets. An early examination of racist speech focused on the psychological effects on the victims and the devastating impact hate propaganda has been found to have on the self-esteem of its victims.[18] Mari Matsuda writes that racist hate messages, threats, slurs, and epithets convey messages of inferiority that hit the gut of those in the target groups.[19] Victims who attempt to avoid such negative messages may be restricted in their personal freedom as they "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."[20]

Researchers have attempted to evaluate in a more concrete way how hate speech affects its victims. One national study of 2000 people investigated whether individuals have physical or psychological symptoms when they are targeted by others' prejudice.[21] The researchers were surprised to find abuse to be so prevalent; roughly thirty percent of the sample indicated that they had experienced at least one incident of prejudice-motivated violence or abuse during the preceding twelve months.[22] Though the study asked about violence broadly, including physical violence, verbal attacks were the most frequent type of violence reported. Of the individuals surveyed, roughly one-third had experienced verbal attacks—abusive language, harassing telephone calls, or hate mail.[23] Most individuals who indicated that they had experienced "group defamation" identified their skin color or race as the reason.[24]

Examining racist and other types of prejudice-motivated speech, the researchers identified distinctive psychological effects on individuals at whom this type of

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17. For a discussion of the usage of slurs and epithets by players and fans, see Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287, 295–99 (1995).

18. *See* Martin Kazu Hiraga, *Anti-Gay and -Lesbian Violence, Victimization, and Defamation: Trends, Victimization Studies, and Incident Descriptions*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 109, 109–10 (Laura J. Lederer & Richard Delgado eds., 1995); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND 53, 53–55 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, & Kimberlè Williams Crenshaw eds., 1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND, *supra*, at 17, 20–22.

19. Matsuda, *supra* note 18, at 23–24.

20. *Id.* at 24.

21. Howard J. Ehrlich, Barbara E. K. Larcom & Robert D. Purvis, *The Traumatic Impact of Ethnoviolence*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 62, 63–64.

22. *Id.* at 64.

23. *Id.*

24. *Id.* at 65. "Group defamation" consists of statements, verbal or otherwise, that are directed at the group to which an individual belongs or with which she identifies rather than at the individual herself. *Id.*

expression is targeted. After the attack, individuals targeted because of their skin color or race tend to have significantly greater negative psychological symptoms than victims of non-prejudiced attacks. Some of these symptoms include fear, stress, and depression. A follow-up study conducted by the same researchers focused on workers' experiences with incidents involving prejudice in a large corporation.[25] Again a large percentage of the events—twenty-one percent—consisted of race-based name-calling, ethnic jokes, and comments.[26] The second study found similar degrees of stress and also that few victims reported the behavior of coworkers or supervisors to higher-ups.[27]

Research on racist speech has revealed much concerning its prevalence, context, and circumstances. This research reveals that, at least in the United States, such expression may leave racial and ethnic minorities at risk of verbal attacks in a variety of locales ranging from their homes and workplaces to other public spaces. The research also shows that racist expression can be more than just mildly distressing to its victims. Race-based name-calling can make its victims fearful, leading to stress and depression.[28] These harmful effects have raised the specter of state regulation. United States federal regulations on racist speech are considered in the next Part.

II. AMERICAN JURISPRUDENCE ON HATE SPEECH

A. The Relatively New Freedom of Protected Speech and Its Gradual Minimization

In the United States the biggest obstacle to state regulation of racist speech is the First Amendment of the U.S. Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."[29]

The First Amendment places the United States in a somewhat distinctive position with respect to hate speech.[30] Though the United States has an established reputation

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25. *Id.* at 69.

26. *Id.* at 71.

27. *Id.* at 71–74.

28. *See* Howard J. Ehrlich, Barbara E. K. Larcom & Robert D. Purvis, *The Traumatic Impact of Ethnoviolence in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 62, 62–79.

29. U.S. CONST. amend. I.

30. The U.S. position—one that is strongly opposed to regulations on hate speech—was stated clearly in the revised draft it submitted of Article 4, Section (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1964. The United States favored a weaker position, one of only disallowing direct incitement to racist violence rather than incitement to discrimination and violence. The U.S. position was rejected in the final version of Article 4. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195, *available at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm. The United States did not immediately ratify the Convention, *see* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INT'L HUMAN RIGHTS TREATIES 12 (2004) (stating that the United States ratified the CERD in 1994), but rather signed it with a short reservation that does not bind the United States to any action that would violate the First Amendment. *See* United Nations, United Nations Treaty Collection: Declarations and Reservations, http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

for opposing governmental regulation of racist expression, it is important to remember that the meaningful protection of all individual rights in the United States, including freedom of expression, has emerged relatively recently. In the 1920s, free speech was considered a dangerous idea.[31] It was not until the 1930s that the U.S. Supreme Court issued the first opinions protecting freedom of speech.[32]

The Supreme Court first confronted the issue of racist speech with challenges made by an extremist White power group, the Ku Klux Klan, to state restrictions on expression.[33] In these early cases, the Supreme Court found that states could restrict activities involving racist speech and other types of hate speech. In 1928, in *Bryant v. Zimmerman*,[34] the Supreme Court upheld a New York law that required certain groups to register with the state. Some groups, but not the Klan, who challenged the law, were exempted—labor unions, the Masonic order, and others—based on the idea that they were legitimate.[35] The Supreme Court found it constitutional to require the Klan to register with the Secretary of State and turn over its membership lists.[36]

Roughly a decade later, in *Chaplinsky v. New Hampshire*,[37] the Court again considered the issue of extremist speech in a case involving a Jehovah's Witness who became involved in a confrontation with police. Chaplinsky was arrested and convicted for calling a police officer a "God damned racketeer" and "a damned Fascist" under a state law criminalizing the address of any "offensive, derisive or annoying word to any other person" in public.[38] According to the Supreme Court, the restrictions against Chaplinsky were deemed appropriate since Chaplinsky's words were considered "fighting words," a new category of speech which the Court found not to deserve constitutional protection.[39]

In the early 1950s, the Supreme Court again turned to the issue of racist speech, this time by tackling the issue of group libel. The case of *Beauharnais v. Illinois*[40] involved the prosecution of Joseph Beauharnais, president of the White Circle League of America, an organization created by Beauharnais to resist housing integration. The City of Chicago was in the middle of a fractured battle over housing integration and Beauharnais was convicted for distributing literature that stated: "If persuasion and the need to prevent the White race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[41]

Beauharnais was charged with publishing lithographs portraying "depravity, criminality, unchastity or lack of virtue of citizens of [the] Negro race" and exposing them to "contempt, derision, or obloquy."[42] Beauharnais's actions violated an Illinois

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31. WALKER, *supra* note 5, at 12.
32. *Id.*
33. *See id.* at 25–26.
34. 278 U.S. 63 (1928).
35. *Id.* at 73.
36. *Id.* at 77.
37. 315 U.S. 568 (1942).
38. *Id.* at 569.
39. *See id.* at 571–72.
40. 343 U.S. 250 (1952).
41. *Id.* at 252 (omission in original).
42. *Id.*

statute that proscribed publications or other expressive works targeting "citizens of any race, color, creed, or religion."[43] Though several state statutes of this type were proposed in the 1930s and 1940s, the Illinois statute was one of very few "race hate" or group libel statutes to actually get enacted.[44] Beauharnais challenged the Illinois statute, which had been passed in 1917, as unconstitutionally vague and violative of the First Amendment.[45] Citing Illinois's difficult racial history, and relying in part on its decision in *Chaplinsky*, the Supreme Court upheld Beauharnais's conviction. The Court decided that Beauharnais's conduct fell outside the scope of First Amendment protection and that the legislature had the authority to take reasonable measures to mitigate racial conflict, which was deemed a serious social evil.[46]

B. Limits on Regulation: Marches, Speech Codes, and Cross Burning

Though *Beauharnais* seems to suggest that the First Amendment provides the government with significant leeway allowing the State to restrict racist speech that constitutes group libel, the five decades since that decision have been marked by a tightening of the doctrine which heavily constricts the government's ability to regulate racist speech. Even before the Supreme Court weighed in on the issue of hate speech in the early 1990s, *Collin v. Smith*[47] and *Doe v. University of Michigan*,[48] two lower court cases, were important bellwethers of limited state regulation of racist speech. In both of these cases the courts chose to privilege the value of freedom of expression over the equality interests of those who might be harmed by hate speech.

Collin concerned a challenge to three ordinances passed by the Village of Skokie, Illinois, in response to a planned demonstration by Nazi leader Frank Collin, who had previously led demonstrations that resulted in violence.[49] Collin's proposed demonstration in front of the village hall involved fifty of his followers wearing Nazi uniforms. In response to Collin's proposal, the village passed the three ordinances. The first ordinance at issue required those applying to demonstrate in public to have significant liability and property insurance; the second ordinance at issue banned demonstration by those in uniform; and the third ordinance prohibited the distribution

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43. *Id.* at 251.

44. New Jersey's race hate statute was declared unconstitutional in 1934. WALKER, *supra* note 5, at 82. Rhode Island's proposed statute was vetoed by its governor in 1944. *Id.* at 83. In the few cases that states had passed such laws, in New Jersey and Massachusetts, for example, the laws were rarely enforced. *Id.* at 82. In 1943, a federal law, H.R. 2328, was proposed that would have allowed the postmaster general to prohibit the mailing of material containing "defamatory and false statements" based on "race or religion." *Id.* at 83. The American Civil Liberties Union, which had opposed other such legislation, mounted a campaign against H.R. 2328 and it was defeated. *Id.* at 83–84.

45. *Beauharnais*, 343 U.S. at 251 (challenging statute under Fourteenth Amendment for state's violation of First Amendment rights).

46. *Id.* at 261–67.

47. 578 F.2d 1197 (7th Cir. 1978).

48. 721 F. Supp. 852 (E.D. Mich. 1989).

49. Immediately preceding the Skokie incident, Collin had been involved in stirring up controversy over racial integration on the west side of Chicago. WALKER, *supra* note 5, at 120–21. White neighborhood Marquette Park was quite resistant to Blacks moving in and Collin found an audience sympathetic to his racist views. *Id.*

of literature that promotes and incites hatred against persons by reason of race, national origin, or religion.[50] These ordinances were enacted because over half of the town's residents were Jewish, several thousand of whom were survivors of the Nazi Holocaust. Collin challenged the ordinances. In responding to the challenge, the village relied on *Beauharnais*, but the Seventh Circuit rejected this argument, contending that *Beauharnais* had been significantly weakened.[51] The court declared the uniform and literature bans unconstitutional on the grounds that the ordinances attempted to regulate the content of the message being communicated by the demonstrators.[52]

Doe evaluated hate speech in an entirely different context than *Collin*.[53] This case from the Eastern District of Michigan challenged the University of Michigan's campus hate speech code. Campus speech codes prohibiting the use of racist and other offensive speech on campus were passed by several colleges and universities in the 1980s and early 1990s in the wake of several high-profile racial incidents on college campuses.[54] *Doe* was the most well-known case, though several other cases challenged similar codes.[55] Michigan's code "prohibited individuals, under the penalty of sanctions, from 'stigmatizing or victimizing' individuals or groups on the basis of their race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."[56] According to the case, the policy had been enacted in the wake of a number of racially offensive incidents. The policy was challenged by Doe, a biopsychology graduate student. Doe, who had never been sanctioned under the policy, mounted a facial challenge to it, arguing the code had a chilling effect on classroom discussion.[57] He maintained that controversial theories, for instance, those positing biologically based differences between sexes and races, might be perceived as "sexist" and "racist" by some students.[58] "[H]e feared that discussion of such theories might be sanctionable under the [p]olicy."[59] His challenge asserted that "his right to freely and openly discuss such theories was impermissibly chilled, and he requested that the policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth."[60]

The court agreed with the plaintiff that the policy was vague and overbroad, insisting that the terms of the Michigan policy "were so vague that its enforcement

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50. *See Collin*, 578 F.2d at 1199–1200.

51. *See id.* at 1204.

52. *See id.* at 1200–08.

53. *Compare Collin*, 578 F.2d 1197 (challenging city ordinances on the basis that they unconstitutionally restricted freedom of expression), *with Doe*, 721 F. Supp. 852 (challenging university hate speech on grounds that it unconstitutionally restricted freedom of expression in the classroom).

54. WALKER, *supra* note 5, at 129. One of these incidents occurred at the University of Massachusetts after the 1986 World Series and involved White Boston Red Sox fans chasing and beating Black New York Mets fans. *Id.*

55. *See, e.g.*, UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (striking down Wisconsin's code on the grounds that it violated the First Amendment).

56. *Doe*, 721 F. Supp. at 853.

57. *See id.* at 858.

58. *Id.*

59. *Id.*

60. *Id.*

would violate the due process clause."[61] Although the district court was sympathetic to the university's obligation to ensure equal educational opportunities for all of its students, it issued an injunction preventing the policy from being enforced. The court found that the university had not "seriously attempted to reconcile [its] efforts to combat discrimination with the requirements of the First Amendment."[62] In failing to strike this balance, the court indicated that the university's actions were taken "at the expense of free speech."[63]

Doe and *Collin* were quickly followed by a very significant limitation on any state's ability to regulate racist speech, this time from the U.S. Supreme Court. *R.A.V. v. City of St. Paul*[64] involved a challenge to a conviction for having burned a cross on a Black family's lawn. The defendant was charged under St. Paul's Bias-Motivated Crime Ordinance. This particular ordinance restricted the placement on public or private property of an object or symbol, such as a burning cross or Nazi swastika, that one has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[65] R.A.V., along with three other individuals, was charged and convicted under the ordinance after having burned several crosses on the lawn and in the vicinity of the Joneses' home. The Joneses were Black and had recently moved to a White neighborhood.

R.A.V. challenged his conviction on First Amendment grounds, alleging that the ordinance under which he was convicted was substantially overbroad.[66] He also maintained that the statute was impermissibly content based. On appeal to the Minnesota Supreme Court, this challenge was rejected. The Minnesota Supreme Court interpreted the ordinance to simply regulate "fighting words," a permissible form of regulation for speech according to the Supreme Court's decision in *Chaplinsky v. New Hampshire*.[67] With respect to the issue of whether the ordinance ran afoul of the First Amendment because it constituted content-based regulation, the Minnesota court held that the ordinance was narrowly tailored to address the compelling government interest of protecting the community against possible violence and disorder.[68]

On appeal, the Supreme Court reversed the defendant's conviction. The Court firmly rejected the argument that the First Amendment allows a city to use the fighting words doctrine to regulate racist speech. According to the Court, the city's mistake was regulating fighting words that provoke violence on the basis of race, color, creed, religion, or gender. By regulating only this particular subset of fighting words and not other forms of fighting words as well, the city had engaged in impermissible content-based regulation. This particular statute, according to the Court, signaled that the city was trying to suppress messages inherent in particular symbols. In doing so, the city had unconstitutionally "impose[d] special prohibitions on those speakers who express

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61. *Id.* at 867.
62. *Id.* at 868.
63. *Id.*
64. 505 U.S. 377 (1992).
65. *Id.* at 380.
66. *Id.*
67. *In re* Welfare of R.A.V., 464 N.W.2d 507, 509–10 (Minn. 1991) (citing Chaplinksy v. New Hampshire, 315 U.S. 568 (1942)), *rev'd*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
68. *Id.* at 511.

views on disfavored subjects."[69] The Court also rejected the city's argument that it could use this particular form of legislation to prevent violence and disorder. As a content-based regulation, this particular ordinance was not aimed at the secondary effects of the speech, but rather at its primary effects—the listener's negative reaction.[70]

Perhaps because it was a speech case that involved conduct, *R.A.V.* had a far-reaching effect on the state regulation of bias-motivated speech and behavior. After the decision, state courts in Washington, South Carolina, Maryland, Virginia, and New Jersey held their cross-burning statutes unconstitutional.[71] In each of these cases, the courts justified their decisions by relying on the *R.A.V.* opinion.

C. A Slight Expansion of States' Right to Regulate

The most recent Supreme Court cases addressing hate speech suggest that the Court may have retreated from the hard-line, anti-regulation approach it took in *R.A.V.* The first of these cases to signal a slight rejection of the Court's earlier approach was *Wisconsin v. Mitchell.*[72] *Mitchell* involved a First Amendment challenge to Wisconsin's hate crime statute. Hate crimes, which may or may not involve "hate speech," are a fairly new category in American criminal law. Hate crimes are criminal acts motivated by prejudice on the basis of race, religion, ethnicity, or any other protected category.[73] Wisconsin's hate crime statute was a penalty enhancement statute.[74] If the defendant was found guilty of committing a hate crime, then the penalty associated with the underlying crime increased.[75]

Wisconsin v. Mitchell involved a challenge by Todd Mitchell, a Black man who had urged the attack of Gregory Reddick, a fourteen-year-old White youth.[76] For his role in the attack, Mitchell was charged and convicted under Wisconsin's hate crime penalty enhancement statute, which allowed increased penalties for crimes against victims or property intentionally selected because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of the individual or property owner. Because the jury found that the crime had been committed as a result of Reddick's race, Mitchell's sentence was increased from two to four years. In his challenge, Mitchell

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69. *R.A.V.*, 505 U.S. at 391.

70. *See id.* at 393–96.

71. *See* State v. Sheldon, 629 A.2d 753 (Md. 1993); State v. Vawter, 642 A.2d 349, 354–55 (N.J. 1994); State v. Ramsey, 430 S.E.2d 511 (S.C. 1993); Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001), *aff'd in part and vacated in part by* Virginia v. Black, 538 U.S. 343 (2003); State v. Talley, 858 P.2d 217 (Wash. 1993).

72. 508 U.S. 476 (1993).

73. *See* BLACK'S LAW DICTIONARY 399 (8th ed. 2004).

74. *Mitchell*, 508 U.S. at 480 & n.1.

75. *See id.*

76. State v. Mitchell, 485 N.W.2d 807 (Wis. 1992). According to the court, before the attack the men had been discussing the film *Mississippi Burning*, which depicts the investigation of the 1964 murder of three civil rights workers by White supremacists. After watching the film, Mitchell is reported to have asked the group, "Do you all feel hyped up to move on some White people?" When he spotted Reddick, Mitchell said, "There goes a White boy, go get him." Mitchell counted to three and then the group attacked Reddick. *Id.* at 813–14.

contended that the Wisconsin statute was overbroad. According to Mitchell, by regulating both protected and unprotected speech, the statute violated the First Amendment.[77] Relying primarily on *R.A.V.*, the Wisconsin Supreme Court found the statute facially invalid because it directly punished a defendant's constitutionally protected thought. The statute was struck down.[78]

At the U.S. Supreme Court, however, the Justices took a different approach and found that the Wisconsin hate crime statute was constitutional. The Court closely examined the issue of motivation and whether the use of evidence of racial motivation, such as slurs or epithets, impermissibly violated the First Amendment.[79] The Court chose to rely on an earlier case, *Barclay v. Florida*,[80] which involved a group trying to start a race war. In that case, the Court approved the use of the defendant's racial motivation as an aggravating factor in deciding whether or not he would be eligible for the death penalty.[81] By allowing Wisconsin and other jurisdictions to use hate crime statutes, the Court was in effect ruling that Mitchell's racist speech, when indicative of why he committed a crime, was not expression protected by the First Amendment.[82] The Court rejected the argument, made by several scholars critical of hate crime legislation, that using racist speech as evidence of motivation constitutes punishment for bigoted sentiments and violates the First Amendment by creating "thought" crimes.[83] The decision in *Mitchell* affirmed that punishing a criminal because he selected a victim based on that individual's race will not violate the First Amendment.[84]

The Supreme Court's most recent decision evaluating racist speech also dealt with speech bundled with racist violence. In *Virginia v. Black*,[85] the Supreme Court once again examined the First Amendment protection for cross burning. *Black* involved an appeal by the Commonwealth of Virginia from a Virginia Supreme Court decision that struck down the Commonwealth's cross-burning statute on First Amendment grounds. Virginia's statute provided:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, or highway or other public place. Any person who shall violate any provision of this section shall be guilty of a class 6 felony.[86]

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77. *Id.* at 809.
78. *Id.* at 814–17.
79. *Mitchell*, 508 U.S. at 485–87.
80. 463 U.S. 939 (1983) (plurality opinion); *see also Mitchell*, 508 U.S. at 486.
81. *Barclay*, 463 U.S. at 949.
82. *See Mitchell*, 508 U.S. at 489.
83. *See generally* Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 29. For a discussion of the arguments made by scholars critical of hate crime legislation, see Bell, *supra* note 8, at 74–76.
84. *Mitchell*, 508 U.S. at 487–90.
85. 538 U.S. 343 (2003).
86. VA. CODE ANN. § 18.2-423 (1996).

Temple American Inn of Court - April 2016 Program - Research and Materials

Similar to the statute in *R.A.V.*, which had been passed in the 1970s when many of St. Paul's synagogues were under attack,[87] Virginia's statute was a response to actual racial violence. It passed its cross-burning statute in 1952, after a spate of cross burning by the Ku Klux Klan.[88] The First Amendment arguments directed at the statute in *Black* involved two fairly different fact scenarios. One of the defendants, Barry Elton Black, was convicted of violating the statute after supervising the burning of a cross at a Ku Klux Klan rally. The cross, which was between twenty-five and thirty feet tall, was located on a piece of property near the highway. The second set of defendants, Richard J. Elliott and Jonathan O'Mara, were charged with having violated Virginia's cross-burning statute when they burned a cross in the yard of James Jubilee, Elliott's Black next-door neighbor. According to the defendants, the cross burning was in response to Jubilee's complaint about Elliott firing shots in the backyard. Like Black, both Elliott and O'Mara were convicted of having violated the Virginia statute.

The three defendants' cases were consolidated at the Virginia Supreme Court. On appeal, Black, Elliott, and O'Mara argued that Virginia's statute was unconstitutional because it engaged in viewpoint and content discrimination.[89] In evaluating the petitioners' arguments, the Virginia Supreme Court considered *R.A.V.*, in which the Supreme Court had invalidated a conviction for cross burning. The Virginia Supreme Court insisted that the statute at issue in *Black* was "analytically indistinguishable" from the statute at issue in *R.A.V.* and, therefore, constituted content-based regulation of speech.[90] According to the court, even though the Virginia statute did not mention race or gender, its specific prohibition of cross burning—which occurs in a distinct contemporary context—indicated that the Commonwealth's interest was focused on the content of the expression.[91] Though content-based legislation is sometimes acceptable on First Amendment grounds, in this case, despite the Commonwealth's insistence that the statute had been passed "[i]n an atmosphere of racial, ethnic, and religious intolerance," the court found that the statute was not aimed at the negative "secondary effects" of cross burning.[92] Because the statute was aimed at regulating content, and it was overbroad, it was struck down.

When *Black* was argued before the Supreme Court, the Commonwealth maintained that the cross-burning statute merely signaled its wish to prevent an especially pernicious form of intimidation.[93] In support of its contention that the statute was content neutral, the Commonwealth highlighted both the statute's content-neutral language and the existence of several racially discriminatory laws at the time the cross-burning statute was passed as evidence that it was not interested in proscribing the message in cross burning. Rather, according to this argument, the fact that the Commonwealth had not eliminated the racially discriminatory laws at the time the

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87. Laura J. Lederer, *The Prosecutor's Dilemma: An Interview with Tom Foley*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 194, 196.

88. Black v. Commonwealth, 553 S.E.2d 738, 742 (Va. 2001), *aff'd in part and vacated in part by* Virginia v. Black, 538 U.S. 343 (2003).

89. *Id.* at 740–41.

90. *Id.* at 742–43.

91. *Id.* at 743–44.

92. *Id.* at 745.

93. Brief of Petitioner at 17–19, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107).

cross-burning statute was passed indicated that the statute was not directed at White supremacists' views.

In its decision upholding the ability of jurisdictions to regulate cross burning in particular circumstances, though mindful of the cross burners' right to freedom of expression, the Supreme Court gave far more deference than it had in *R.A.V.* to the way cross burning has been used historically to terrorize Black Americans. The opinion began with a long description of the historical use of cross burning. The Court maintained that "[t]he person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan."[94]

After condemning the historical use of cross burning by the Klan, the Court divided cross burnings into two categories: (1) cross burnings in which the perpetrator had intended to intimidate, and (2) those in which the perpetrator had no wish to intimidate listeners. The second category consists of cross burning that occurs in several different contexts, for instance, when cross burning is used as a statement of ideology, as a sign of group solidarity, or, finally, purely for artistic expression.[95] The Court's decision allows states to regulate the first category, cross burnings undertaken with the intent to intimidate. Justice O'Connor located the rationale for this allowance in one of the exceptions to the general prohibition on content-based regulation created by the Court in the *R.A.V.* case. Under this exception, when the State is attempting to regulate a subset of a category that may be excluded, the entire category may be prohibited.[96] The second category, referred to by Justice Thomas in his dissent as "innocent" cross burnings,[97] is identified by the Court as core political speech, and the decision prohibits states from regulating it.[98]

The U.S. approach to regulation of racist speech is one of broad protection, with the exception of situations in which such speech is coupled with violence. Attempts to regulate racist speech on college campuses has largely failed, with hate speech codes challenged at the University of Michigan[99] and the University of Wisconsin.[100] Interestingly enough, research in this area reveals that, though the universities whose codes were held unconstitutional complied by removing their codes, twenty-five percent of schools nationwide failed to comply with court decisions and left their codes intact.[101] In the public arena, after *R.A.V.*, racist speech is subject to little regulation and may not be prohibited simply because the State disfavors the viewpoint it offers. *Wisconsin v. Mitchell* and *Virginia v. Black*, the cross-burning cases that left *R.A.V.* intact, are the Court's two most recent statements on racist speech, and they permit regulation of racist speech. Taken together, these final two cases suggest that the safest path to the regulation of racist speech, from a First Amendment perspective, is to regulate racist speech only when it is coupled with violence.

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94. Virginia v. Black, 538 U.S. 343, 357 (2003).
95. *Id.* at 372 (Scalia, J., concurring).
96. *Id.* at 361–63.
97. *Id.* at 398 (Thomas, J., dissenting).
98. *Id.* at 365–67.
99. Doe v. Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).
100. UMW Post v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); *see supra* text accompanying notes 53–63.
101. JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 159 (2005).

III. COMPARATIVE APPROACHES TO DEALING WITH RACIST SPEECH

A. Approaches to Racist Speech

The U.S. approach, in which racist speech is protected except when it constitutes a threat, contrasts quite strongly with the treatment of racist speech worldwide. For instance, more than thirty European countries place restrictions on racist speech. Countries with restrictions on the use of racist speech include both common law countries (like Great Britain, Canada, India, Australia, and Nigeria) and countries that follow a civil law tradition (including, but not limited to, France, Germany, the Netherlands, Sweden, and Israel). Commentators have divided these regulations into two types: those designed to safeguard public order, and those aimed at protecting human dignity. Criminal laws in the area of hate speech in Great Britain, Northern Ireland, Israel, and Australia are of the former variety. They are based on the idea that hate speech that vilifies a group poses a more serious threat to the public order than insults directed at a person for his or her personal characteristics.[102] Unfortunately, the existence of these laws by themselves is no guarantee that the rights of minorities will be protected. According to Sandra Coliver, this type of hate speech law has not been effectively enforced, in part because the laws are not used as often as they should be. For example, as of 1992, Northern Ireland had only one prosecution for incitement to religious hatred in the twenty-one years that the law had been in force.[103]

Canada, Denmark, France, Germany, and the Netherlands have fairly similar hate speech laws, which commentators say are actively enforced. Hate speech laws in these countries have both criminal and civil penalties and are premised on the need to protect human dignity "quite apart from any interest in safeguarding public order."[104] A conviction under the criminal incitement laws of Canada requires proof of either intent to incite hatred or, in the alternative, the likelihood of breaching the peace. By contrast, one can be convicted under the hate speech laws of France, Denmark, Germany, and the Netherlands without intending to incite hatred and without having breached the peace.[105]

The approach taken by countries around the world to place restrictions on racist speech is also reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. These human rights instruments, though they explicitly protect freedom of expression, also recognize the link between hate speech and discrimination and allow significant restrictions on hate speech.[106] Article 20(2) of the International Covenant on Civil and Political Rights states that "any advocacy of national, racial or

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102. Sandra Coliver, *Hate Speech Laws: Do They Work?*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 366 (Sandra Coliver ed., 1992).

103. *Id.*

104. *Id.* at 363.

105. *Id.* at 364.

106. For an interesting discussion of the debates over the hate speech articles in these treaties, see Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996).

religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[107] Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires governments to outlaw all dissemination of ideas based on racial superiority or hatred. It also requires them to prohibit all organizations which promote and incite racial discrimination.[108]

B. Comparative Race Theory and Racist Speech

The approach taken by countries around the world, which divorces states' abilities to regulate racist speech from the threat of violence, has much in common with the arguments made by scholars in the American Critical Race Theory movement. Critical Race Theory consists of writings by leftist scholars that challenge the ways in which race and racial power are constructed and represented in American legal culture and society.[109] The work of critical race theorists has two aims. The first is to understand how a White supremacist regime that oppresses people of color is maintained in America. The second is to break the bond that currently exists between law and racial power.[110] The writings of critical race theorists present arguments weighted in favor of equality in a way that might allow American courts to strike a better balance between freedom of expression and the rights of states to safeguard equality and prevent violence.

Critical race theorists support restrictions on hate speech because they believe that its use results in the subordination of people of color in society. One example of subordination caused by the use of hate speech is the inequality in the exchange of ideas between those who use it and those against whom it is used. In direct contrast to those who believe that all ideas are traded freely in the "marketplace of ideas," critical race theorists argue that bigoted ideas have more influence than other views. Charles Lawrence argues that the experience of Black Americans and other people of color has shown the tenacity of racism in the supposedly ideologically neutral free market. He writes that the "idea of the racial inferiority of non-Whites infects, skews, and disables the . . . market . . . ."[111] In addition, the menacing historical legacy of threats and violence means that racist words become inextricably linked to racial violence. Thus, the very real fear of provoking violence silences people of color. Critical race theorists argue that if all people are allowed to exchange ideas freely, then racist speech, which does not allow the normal social intercourse necessary for the free exchange of ideas, should be restricted.[112]

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107. International Covenant on Civil and Political Rights art. 20, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

108. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

109. *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (1995).

110. *Id.*

111. Lawrence, *supra* note 18, at 53, 77.

112. *See, e.g.*, *id.* at 77 (describing how racist speech distorts the marketplace of ideas).

Aside from the harm that hate speech causes, critical race theorists argue that hate speech should be regulated because the implications of violent racist ideas conflict with democratic ideals of a diverse society.[113] Richard Delgado maintains:

> Racism is a breach of the ideal of egalitarianism, that "all men are created equal" and each person is an equal moral agent, an ideal that is a cornerstone of the American moral and legal system. A society in which some members regularly are subjected to degradation because of their race hardly exemplifies this ideal.[114]

The most compelling argument in support of equality made by critical race theorists and others to justify hate speech regulations is the link between racist and other hate speech and an incitement to violence. One commentator, Loretta Ross, finds a link between the use of hate speech by hate groups and the occurrence of hate crimes—crimes motivated by prejudice on the basis of race, religion, sexual orientation, or color.[115] She asserts that hate speech is a powerful weapon of hate groups. Public rallies and demonstrations help such groups gain visibility and attract recruits.[116] Hate speech encourages even those who are not members to commit hate crimes.[117] Klan marches in the United States, Ross points out, often polarize residents and may provoke violence after the events.[118] The resulting violence in this instance is discriminatory and linked directly to speech. This connection between hate speech and the intentional selection of victims should create a burden on the government to restrict the speech that leads to violence.

In a similar vein to the work of Ross, Alexander Tsesis uses several historical examples to illustrate the connection between racist ideology and extreme forms of racialized violence.[119] In his book illustrating the historical lessons and dangers of hate speech, Tsesis examines anti-Jewish rhetoric in Germany, White supremacist rhetoric in the United States, and images depicting indigenous Americans as inferior.[120] Racist expression in these contexts is far from harmless. Such expression, according to Tsesis, is characteristic of "misethnicity" group hatred and intends not just to demean individual members of particular groups, but also to characterize entire groups as morally corrupt and inferior.[121] "Dehumanizing the targeted outgroup legitimizes efforts to harm them."[122]

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113. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, *in* WORDS THAT WOUND, *supra* note 18, at 89, 108 (insisting racial insults do not further the goal of permitting individuals to voice their opinions).

114. *Id.* at 92–93.

115. Loretta J. Ross, *Hate Groups, African Americans, and the First Amendment*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 151, 153.

116. *Id.*

117. *Id.* at 154.

118. *Id.*

119. *See* ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 9–79 (2002).

120. *Id.* at 11–65.

121. *Id.* at 81–82.

122. *Id.* at 105.

Temple American Inn of Court - April 2016 Program - Research and Materials

Tsesis maintains that racist hate speech is far from a harmless release for those who do not like particular groups. Rather, it can be a tool for those intent on spreading group hatred. Tsesis describes the work of "hate propagandists" who have used racist and other forms of hate speech to spread group hatred at various points in European and American history. Members of outgroups are labeled as problems, are objectified, and are considered an infestation corrupting the body politic. The cures for this "infestation," manufactured through the spreading of group hatred, are all too often violent—genocide, unfair and inequitable subordination, and separation.[123]

CONCLUSION

The structure of First Amendment doctrine in the United States has led to a regime that is ill prepared to deal with important negative consequences of racist speech. As a primary matter, this is true because, at least after *R.A.V.*, racist speech is explicitly protected under the First Amendment. The U.S. approach also is characterized by an unwise and artificial separation between hate speech, which is protected expression unless it advocates violence, and hate crime, which may be punished.

This wall of separation between nonviolent hate speech and hate crime fails to recognize the critical interaction between the two entities, as demonstrated by the following example. In 1996, Matthew Hale assumed leadership of the World Church of the Creator (WTC), an organization dedicated to the supremacy of the White race. Among other things, Hale preached that racial and ethnic minorities are inferior to Whites. In 1999, one of his followers, Benjamin Smith, took his gospel dehumanizing minorities seriously. Smith embarked on a shooting spree targeting Jews, Blacks, and Asian Americans that left two people dead and twelve people injured.[124]

Because Hale had not explicitly preached violence, his speech was protected. The U.S. approach, which protects racist speech that does not threaten or incite violence, fails to acknowledge that White supremacists' racist ideology blames racial and ethnic minorities for all of society's ills. When demagogues and leaders of hate groups use racist and hate propaganda, they are seeking followers whose attachment to the organization is premised on seeing members of outgroups as less than human. Once minorities are assumed to be subhuman, there is no longer any reason not to eliminate them by attacking them physically. At least some followers of the WTC seem to share the view that minorities should be eliminated through attack. Smith was one of several members of the WTC engaged in violence against minorities.[125] Contrary to the views of critics of hate speech legislation who dismiss arguments suggesting a connection between racist rhetoric and violence, the actions of Smith and others like him suggest that racist speech urging listeners to disregard the humanity of particular citizens may have violent and not unforeseeable consequences.

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123. *See id.* at 117.

124. Pam Belluck, *Hate Groups Seeking Broader Reach*, N.Y. TIMES, July 7, 1999, at A16; Bill Dedman, *Suspect Sought in Attacks Said to Kill Himself*, N.Y. TIMES, July 5, 1999, at A1.

125. Belluck, *supra* note 124 (describing the killing of a number of minorities by individuals affiliated with the World Church of the Creator).

State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis

I.	INTRODUCTION	473
II.	VIOLENCE STATUTES	474
III.	REGULATION OF OBSCENE SPEECH	479
IV.	THE SUPREME COURT'S FREEDOM OF SPEECH JURISPRUDENCE	483
	A. First Amendment Analysis	484
	B. Fourteenth Amendment Analysis	488
V.	STATE INTERESTS IN PROMULGATING VIOLENCE STATUTES	490
	A. Regulating Morality	490
	B. Preventing Incitement	491
	C. Protecting Children	494
VI.	THE LACK OF PROCEDURAL SAFEGUARDS	498
VII.	CONCLUSION	499

I. INTRODUCTION

A group of minors allegedly attacked a nine-year-old girl at a San Francisco beach and "artificially raped" her with a bottle. The minors attacked the girl after watching and discussing a television network movie that portrayed a similar rape. The victim sued the network, claiming that it was negligent in airing the program.[1]

In Miami Beach, a teenage boy shot and killed his eighty-three-year-old neighbor. Following his conviction, the minor sued three television networks for damages, alleging that a decade of viewing extensive television violence had incited him to imitate the acts that he had seen.[2]

Nineteen-year-old John McCollum was listening to Ozzy Osbourne's "Speak of the Devil" album on his headphones when he shot himself in the head. The album included a song entitled "Suicide Solution." John's parents sued Osbourne and the record producer, alleging that Osbourne's music proximately caused John's death by preaching that life is filled with despair and suicide is the only way out.[3]

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1. *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).
2. *Zamora v. Columbia Broadcasting System, Inc.*, 480 F. Supp. 199 (S.D. Fla. 1979).
3. *McCollum v. Columbia Broadcasting System, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

Temple American Inn of Court - April 2016 Program - Research and Materials

Public reaction to these unsuccessful lawsuits has sparked a new movement. Some state legislatures are passing statutes that restrict minors' access to violent video cassettes, books, and other forms of expression. Vendors of expressive material have challenged Missouri[4] and Tennessee[5] violence statutes. Colorado recently has passed similar restrictions on the dissemination of such material despite the uncertain constitutional status of these regulations.[6]

The emergence of violence statutes raises questions concerning the future of freedom of speech in the United States. This Note explores the implications of the Supreme Court's First Amendment jurisprudence for validating or invalidating violence statutes. Part II discusses the recent passage of violence acts and the reasoning two courts have applied in declaring the regulations unconstitutional. Part III examines the Supreme Court's approach to obscenity regulations, which served as the impetus for the development of Court-imposed restrictions on freedom of speech. Part IV compares and contrasts regulations on obscene speech and violent speech by first examining a proper First Amendment inquiry, and then applying Fourteenth Amendment Due Process analysis to restrictions on speech. Part V discusses the states' purported interests in upholding morality, preventing the incitement of their citizens toward crime, and protecting children, as they apply to regulations on violent speech. Part VI addresses the problem of providing adequate procedural safeguards in statutes that restrict expression. This Note concludes that even though states may have a stronger constitutional basis for regulating violent material than they have for restricting obscene expression, current violence statutes violate the First and Fourteenth Amendments.

II. Violence Statutes

Missouri's violence act regulates the sale and rental of violent video cassettes to minors.[7] The Act requires video dealers to keep videos in a

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4. See Mo. Rev. Stat. § 573.090 (Supp. 1992).
5. See Tenn. Code Ann. §§ 39-17-901 to 39-17-914 (1991).
6. See 1992 Colo. Rev. Stat. § 18-7-601.
7. The statute provides:

1. Video cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area . . . if:
(1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and
(2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen; and
(3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.

separate area if the dealers determine that their content or their cover is violent expression as defined by the statute's three-part test.[8] Further, the Act strictly forbids dealers from selling or renting these videos to minors.[9] In enacting the three-pronged analysis for triggering the statutory requirements, the Missouri legislature essentially applied the Supreme Court's obscenity test, enunciated in *Miller v. California*,[10] to violent expression.[11]

A violation of this statute is an "infraction,"[12] which under Missouri law is not a crime[13] but may result in a fine.[14] Video dealers[15] initiated a pre-enforcement challenge to the Act, claiming it unconstitutionally restricts the sale and rental of violent videos.[16]

In *Video Software Dealers Association v. Webster*[17] the district court enjoined state authorities from enforcing the Act, declaring the statute's provisions unconstitutional on their face.[18] Recently, the Eighth Circuit affirmed,[19] holding the Act unconstitutional on three

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2. Any video cassettes or other video reproduction devices meeting the description in subsection 1 of this section shall not be rented or sold to a person under the age of seventeen years.
3. Any violation of the provisions of subsection 1 or 2 of this section shall be punishable as an infraction . . .

Mo. Rev. Stat. § 573.090 (Supp. 1992).

8. Id. § 573.090.1. The statutory three-part test is set forth in note 7.
9. Id. § 573.090.2.
10. 413 U.S. 15 (1973). The Court stated:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

11. See note 7 and accompanying text.
12. Mo. Rev. Stat. § 573.090.3 (Supp. 1992).
13. According to Missouri law:

> 1. An offense defined by this code or by any other statute of this state constitutes an "infraction" if it is so designated or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction.
> 2. *An infraction does not constitute a crime* and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime.

Id. § 556.021 (1979) (empbasis added). However, the fact that this statute falls within the Chapter entitled "Crimes and Punishment" persuaded the Eighth Circuit to find the statute "quasi-criminal." See *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992), and notes 32 to 34 and accompanying text.

14. The fine may not exceed $200. Mo. Rev. Stat. § 560.016.1(4) (1979).
15. Three groups actually initiated the challenge: (i) video dealer associations; (ii) the Motion Picture Association of America, Inc. (including movie producers and distributors); and (iii) the owners of two Missouri video retail stores. *Webster*, 968 F.2d at 687. This Note collectively refers to these challengers as "video dealers."
16. Id. at 687.
17. 773 F. Supp. 1275 (W.D. Mo. 1991), aff'd, 968 F.2d 684 (8th Cir. 1992).
18. Id. at 1277-80.
19. 968 F.2d 684 (8th Cir. 1992).

Temple American Inn of Court - April 2016 Program - Research and Materials

grounds. First, the court applied strict scrutiny analysis and held that the Act is not narrowly drawn to promote a compelling state interest.[20] The statute's proponents (hereinafter "Missouri") argued that violent videos are "obscene" for a child audience, and therefore the court should apply a lower level of scrutiny to the statute.[21] The court rejected Missouri's characterization of the videos as obscene, and declared that expression is obscene only if it depicts sexual conduct.[22] The court explained that since the statute discriminated against expression based on its content,[23] it was subject to strict scrutiny.[24] The Missouri statute did not identify clearly the material that would be subject to the regulations, and thus it was unconstitutional on its face for not being narrowly drawn.[25]

Second, the court found the Act unconstitutionally vague,[26] since it does not clearly identify which expression triggers its requirements. While the Missouri legislature attempted to avoid such a challenge by adopting *Miller*'s obscenity test,[27] *Miller* still requires that either the statute specifically define the proscribed expression or the state courts develop a definition.[28] In this instance the Missouri courts would not be able to delineate a proper definition because the legislature failed to enunciate a purpose behind the statute and no legislative history is available.[29] Furthermore, courts should not require video dealers to defend prosecutions so that the courts may develop the statute's meaning.[30]

Finally, the Eighth Circuit held that the Act unconstitutionally imposes strict liability on video dealers.[31] The court found that the statute

20. Id. at 688-89.

21. Id. at 688. See Part III for a discussion of the regulation of obscene speech.

22. 968 F.2d at 688 (citing *Miller*, 413 U.S. at 24).

23. Id. at 689. See also notes 93 to 98 and accompanying text.

24. 968 F.2d at 689. See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 48 (1987) (noting that the standard applied to content based regulations is some formulation of "compelling governmental interest," "absolute protection," or "clear and present danger").

25. 968 F.2d at 689. The statute has no legislative history, nor did the legislature articulate a purpose behind the Act's provisions. Id. at 687. While one commentator concluded that the statute was designed to regulate "slasher" movies, see Kenneth D. Rozell, Comment, *Missouri Statute Attacks "Violent" Videos: Are First Amendment Rights in Danger?*, 10 Loy. Ent. L. J. 655, 655 (1990), the court stated that tbe statute's language showed no such intent. 968 F.2d at 689.

26. 968 F.2d at 689-90.

27. See note 10 and accompanying text.

28. 968 F.2d at 690.

29. Id. See note 25 and accompanying text.

30. The court declared:

> We believe the Missouri courts could only define the prohibited expression on a video-by-video basis. Video dealers "are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal."

968 F.2d at 690 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965)).

31. Id. at 690-91.

Temple American Inn of Court - April 2016 Program - Research and Materials

is "quasi-criminal,"[32] and that a court may impose a criminal penalty for disseminating speech only when the statute requires that the video dealer have knowledge of the video's contents.[33] This Act creates too great a danger that video dealers will engage in self-censorship.[34]

The Tennessee legislature passed a statute[35] similar to the one at

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32. Id. at 690. A violation of the statute is technically not a crime, but the statute is located in the "Crimes and Punishment" chapter of the Missouri Code. See also note 13.

33. 968 F.2d at 690.

34. The court stated:

> By penalizing video dealers regardless of their knowledge of a video's contents, the statute presents a hazard of self-censorship. To comply with the statute, all video dealers would have to view the contents of every video in their stores. Dealers would limit videos available to the public to videos the dealers have viewed. This would impede rental and sale of all videos, including those that the statute does not purport to regulate and that the First Amendment fully protects. Because the statute's strict liability feature would make video dealers more reluctant to exercise their freedom of speech and ultimately restrict the public's access to constitutionally protected videos, the statute violates the First Amendment.

Id. at 690-91.

35. See Tenn. Code Ann. §§ 39-17-901 to 39-17-920 (1991). The statute provides:

> *Sale, loan or exhibition of material to minors.*—(a) It is unlawful for any person to knowingly sell or loan for monetary consideration or otherwise exhibit or make available to a minor:
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors; or
>
> (2) Any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in subdivision (a)(1), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.
>
> (b) It is unlawful for any person to knowingly exhibit to a minor for monetary consideration, or to knowingly sell to a minor an admission ticket or pass or otherwise admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.
>
> (c) A violation of this section is a Class A misdemeanor.

Id. § 39-17-911. The statute also covers display for sale or rental:

> *Display for sale or rental of material harmful to minors.*—(a) It is unlawful for a person to display for sale or rental a visual depiction, including a videocassette tape or film, or a written representation, including a book, magazine or pamphlet, which contains material harmful to minors anywhere minors are lawfully admitted.
>
> (b) The state has the burden of proving that the material is displayed. Material is not considered displayed under this section if:
>
> (1) The material is:
>
> (A) Placed in 'binder racks' that cover the lower two thirds (⅔) of the material and the viewable one third (⅓) is not harmful to minors;
>
> (B) Located at a height of not less than five and one half feet (5.5') from the floor; and
>
> (C) Reasonable steps are taken to prevent minors from perusing the material;
>
> (2) The material is sealed, and, if it contains material on its cover which is harmful to minors, it must also be opaquely wrapped;
>
> (3) The material is placed out of sight underneath the counter; or
>
> (4) The material is located so that the material is not open to view by minors and is located in an area restricted to adults;

Temple American Inn of Court - April 2016 Program - Research and Materials

issue in *Webster*. Among other prohibited material,[36] Tennessee's Act prohibits the knowing[37] display, sale, or rental of videos, books, or any other printed matter or visual representations that depict "excess violence"[38] and are "harmful to minors."[39] A violation of the Tennessee Act is a misdemeanor.[40]

In *Davis-Kidd Booksellers, Inc. v. McWherter*,[41] retail booksellers[42] initiated a First Amendment challenge to the statute, claiming it is unconstitutionally overbroad.[43] The booksellers argued that the statute would prevent constitutionally protected material from reaching the public since the only alternatives left open to booksellers would be to remove all "harmful to minors" works from display, construct "adults only" sections, or prohibit minors from entering their stores altogether.[44] The booksellers claimed that they would have to determine

---

> . . . .
>
> (c) A violation of this section is a Class C misdemeanor for each day the person is in violation of this section.

Id. § 39-17-914.

36. The Act prohibits the sale, loan, or exhibition of material depicting nudity, sexual conduct, or sado-masochistic abuse if the material is harmful to minors. Id. § 39-17-911(a).

37. Unlike the Missouri statute, a person must knowingly sell, loan, or exhibit such material to a minor. Id. § 39-17-911. This avoids the strict liability problem present in *Webster*. See notes 31 to 34 and accompanying text.

38. The Tennessee statute defines "excess violence" as the "depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake." Tenn. Code Ann. § 39-17-901(4) (1991).

39. The Tennessee statute defines the term "harmful to minors" to mean:

> that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sado-masochistic abuse when the matter or performance:
>
> (A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;
>
> (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
>
> (C) Taken as a whole lacks serious literary, artistic, political or scientific values for minors.

Id. § 39-17-901(6).

"Minor" is defined as "any person who has not reached eighteen (18) years of age and is not emancipated." Id. § 39-17-901(8).

40. A violation of the display provisions is a Class C misdemeanor, id. § 39-17-914(c), punishable by no more than 30 days imprisonment, a $50 fine, or both, id. § 40-35-111(e)(3). A violation of the knowing sale, loan, or exhibition provision is a Class A misdemeanor, id. § 39-17-911(c), punishable by no more than a year's imprisonment, $2500, or both, id. § 40-35-111(e)(1). Unlike the Missouri court, the Tennessee court did not find an issue as to whether a violation constitutes a crime. Compare notes 32-34 and accompanying text.

41. No. 90-1893-III (I) (Tenn. Chanc. Feb. 14, 1992). Appeal is pending.

42. The plaintiffs are owners of retail book stores, book distributors, and publishing trade associations. Id.; slip op. at 1. This Note collectively refers to these plaintiffs as "booksellers."

43. Brief of Plaintiffs-Appellants at 20; *Davis-Kidd* (No. 90-1893-III(1)).

44. Id. at 25.

Temple American Inn of Court - April 2016 Program - Research and Materials

which material should not be available to the general public, under fear of criminal prosecution for making a mistake.[45]

The Tennessee Chancery Court partially invalidated the statute.[46] The court struck down the Act's application to material depicting excess violence.[47] The court did not hold that violent expression can never be regulated, but rather found the Act's definition of excess violence unconstitutionally vague.[48] The Act would require each bookseller to exercise his or her subjective judgment as to which materially is excessively violent, without any guidance from the statute itself.[49] However, the court upheld the requirement that those selling expressive material maintain separate displays[50] for any material fitting the Act's definition of "harmful to minors," once the excess violence provision is deleted.[51] The court held that requiring restrictions on the displays is a proper exercise of Tennessee's police power and is not an unconstitutional prior restraint on speech.[52] The Tennessee Supreme Court will hear the booksellers' argument on appeal.[53]

III. Regulation of Obscene Speech

In the United States, freedom of speech does not mean freedom to say anything at any time and in any place.[54] The Supreme Court has defined certain classes of speech for which the First Amendment provides no protection. These include speech that is obscene, libelous, profane, or which incites a breach of the peace.[55] The rationales behind the Supreme Court's obscenity jurisprudence demonstrate the shaky foundation on which First Amendment freedoms rest. The obscenity cases

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45. Id.

46. *Davis-Kidd*, slip op. at 12.

47. Id. at 8-9.

48. Id. at 9.

49. Id. at 8-9.

50. See Tenn. Code Ann. § 39-17-914.

51. *Davis-Kidd*, slip op. at 9-10, 12.

52. Id. at 10.

53. When this Note went to press, the Tennessee Supreme Court had not yet decided the case. See note 41.

54. See *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (declaring that there is no constitutional right to mail erotic material to an unwilling recipient); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding sanction on a radio station that broadcast indecent speech in the afternoon); *Sable Communications of Cal. v. FCC*, 492 U.S. 115 (1989) (holding that the FCC may regulate obscene interstate commercial telephone messages).

55. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and tbe insulting or 'fighting' words—those which by their very utterance infiict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

Temple American Inn of Court - April 2016 Program - Research and Materials

also provide a basis for determining the constitutionality of the violence acts.

In the 1940s New York enacted a statute purporting to regulate "obscene prints and articles."[56] The New York legislature passed this Act in order to prevent the incitement of violent crimes.[57] In *Winters v. New York*,[58] a bookseller challenged the constitutionality of the statute after he was convicted of selling magazines that allegedly would incite readers to commit criminal acts. The Supreme Court recognized that a state has an interest in reducing the incitement of its citizens to commit criminal acts, and that it may exercise its police powers to achieve this end. However, the Court struck down the statute, stating that publications of no value to society warrant as much First Amendment protection as those considered classics.[59]

The *Winters* Court seemed to give broad meaning to the right to freedom of speech. The Court, however, indicated that states may justifiably regulate acts injurious to the public morals[60] as long as they do not violate the Constitution in the process. In later cases, this aspect of the opinion actually undermined a broad interpretation of freedom of speech.[61]

In *Roth v. United States*[62] the Supreme Court reversed its stance regarding the role of expressive material's "value." At issue in *Roth* were a federal statute that made it a crime to mail obscene material,

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56. See N.Y. Penal Law § 1141 (Consol. 1941). The statute provided:

> 1. A person . . . who,
>
> 2. Prints, utters, publishes, sells, lends, gives away, distrihutes, or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of *deeds of bloodshed, lust or crime*; . . . [i]s guilty of a misdemeanor.

Id. (emphasis added), quoted in *Winters v. New York*, 333 U.S. 507, 508 (1948). Note that the only reference to obscenity is in the title of the Act: "Obscene Prints and Articles."

57. See *Winters*, 333 U.S. at 511-14.

58. 333 U.S. 507 (1948).

59. Id. at 510.

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are *as much entitled* to the protection of free speech as the best of literature.

Id. (emphasis added).

60. Id. at 515.

61. See notes 160-69 and accompanying text for a discussion of the regulation of "immoral" speech and the role this alleged governmental interest is playing in the passage of the violence acts.

62. 354 U.S. 476 (1957).

Temple American Inn of Court - April 2016 Program - Research and Materials

and a Massachusetts statute that made selling obscene material a criminal offense.[63] The Court declared these regulations constitutional. While the Court began by stating that the First Amendment, as written, is an unconditional grant of free speech, it claimed that this was not the actual intent of the Framers in drafting the amendment.[64] The *Roth* Court, in direct contradiction to the *Winters* Court,[65] declared that the First Amendment has a purpose, which is to allow the free exchange of ideas so that people can bring about desired political and social changes.[66]

Once the Court defines a purpose behind the constitutional grant of free speech, it may limit any speech that does not thereby comport with the articulated intent. By declaring the purpose behind the First Amendment, the *Roth* Court paved the way for courts to carve out exceptions to both the freedom to speak and the corresponding freedom to receive information.[67] The constitutional propriety of developing such a list of exceptions is questionable.[68]

The *Roth* Court's test for determining when expression is protected under the First Amendment asks whether the speech at issue has any social importance.[69] If any such importance exists, the expression is protected.[70] *Roth* holds that obscenity has absolutely no social importance and, therefore, states may regulate it without any constitutional infirmity. While in one breath the Court stated that the Constitution fully protects unorthodox ideas, controversial ideas, and even ideas generally hateful to prevailing community opinion,[71] in the next breath it declared that obscenity is socially unimportant because many nations and most of the American states traditionally have enacted laws prohibiting obscene publications.[72] The Court contradicted itself by claiming that a majority determination of which expression is constitu-

63. Id.

64. Id. at 483.

65. It is interesting to note that Justice Brennan wrote the opinions of the Court in both *Winters* and *Roth*.

66. 354 U.S. at 484. Compare this declaration to the Court's statement in *Winters*: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas." 333 U.S. 507, 510 (1948).

67. See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976) (holding that the First Amendment's protection extends to a communication, its source, and to its recipients). See also *McCollum*, 202 Cal. App. 3d at 989.

68. See notes 110-14 and accompanying text.

69. 354 U.S. at 484.

70. Id.

71. Id.

72. Id. The Court stated:

> But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of

tionally protected is inconsistent with the First Amendment, yet allowing a majority's determination of what is "socially important" speech accomplish the same objective.[73] This defective constitutional analysis of free expression is what the Framers specifically sought to avoid,[74] and becomes a recurrent problem with the passage of violence acts.[75]

After *Roth*, Supreme Court opinions no longer questioned the idea that the First Amendment does not protect obscene speech. The Court instead turned its focus to refining the definition of obscene. In *Miller v. California*,[76] the Çourt set forth the obscenity test that is still in effect today.[77] The Court specifically rejected its previous conclusion that speech is protected unless it is utterly without redeeming social value.[78] Instead, the Court determined that the First Amendment only protects expression that has serious literary, artistic, political or scientific value.[79]

The Court's decision in *Barnes v. Glen Theatre, Inc.*[80] continued the erosion of First Amendment protection into the 1990s. In *Barnes*, an Indiana indecency law required that barroom dancers at least wear pasties and a G-string. Two establishments sued to enjoin enforcement of the law so that they could provide completely nude dancing as entertainment. While the Supreme Court recognized that nude dancing is a form of expression, it declared that it was symbolic speech and therefore not entitled to the full protection of the First Amendment.[81]

The *Barnes* case represents the erosion of established First Amendment freedoms in two ways. First, the Court has continued to assert that the government has a valid interest in achieving "morality" through legislation.[82] While morality may be a proper basis for the state

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over 50 nations, in the obscenity laws of the 48 States, and in the 20 ohscenity laws enacted by the Congress from 1842 to 1956.

Id. at 484-85 (footnotes omitted).

73. Id. at 485-86.

74. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 79 (1981) (Blackmun concurring) (invalidating convictions for offering live nude dancing as a form of entertainment).

75. See Part V.A.

76. 413 U.S. 15 (1973).

77. Id. at 24. The *Miller* test is cited in note 10. Compare Missouri's violence statute cited in note 7 and accompanying text.

78. See *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966).

79. 413 U.S. at 23.

80. 111 S. Ct. 2456 (1991). See Zachary T. Fardon, Recent Development, Barnes v. Glen Theatre, Inc.: *Nude Dancing and the First Amendment Question*, 45 Vand. L. Rev. 237 (1992), for a critique of the *Barnes* decision.

81. 111 S. Ct. at 2460-61. The *Barnes* Court determined that its opinion in *United States v. O'Brien*, 391 U.S. 367 (1968), held that symbolic speech is less protected than purely expressive speech.

82. See 111 S. Ct. at 2461-63.

Temple American Inn of Court - April 2016 Program - Research and Materials

to define certain conduct as illegal, such as murder, it is an insufficient rationale to suppress expression.[83] If a state or court is permitted to define whether speech has "value" based on prevailing notions of morality, the view of the majority determines what others may express, whether through speech, writing, or body language.[84]

Second, the *Barnes* Court makes a distinction between expression and expressive conduct,[85] and declares that incidental restrictions on expression are permissible if the regulation of the conduct furthers substantial governmental interests.[86] Such a distinction is constitutionally sound,[87] but only if the definition of conduct is approached carefully in order to prevent actual expression from becoming unprotected and subject to extensive regulation.[88]

IV. The Supreme Court's Freedom of Speech Jurisprudence

An examination of the Supreme Court's jurisprudence shows that the Court applies a two-tiered analysis in determining whether a state has restricted expression unconstitutionally. The first tier requires an examination of the First Amendment itself. This examination involves a consideration of the alleged expression involved and the alleged unconstitutional violation of the freedom to disseminate or receive a particular message. The second tier requires the Court to inquire into the

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83. See Part V.A.

84. Id.

85. 111 S. Ct. at 2460.

86. Id. at 2461. The Court quoted *United States v. O'Brien*:

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. (quoting 391 U.S. 367, 376-77 (1968) (footnotes omitted)).

87. Compare *United States v. Eichman*, 110 S. Ct. 2404 (1990) (holding that flag burning as a mode of expression enjoys full First Amendment protection) with *Adderley v. Florida*, 385 U.S. 39 (1966) (holding that demonstrations on premises of city jail are not speech but conduct, and do not deserve full First Amendment protection). The expression versus conduct debate is beyond the scope of this Note. For a discussion concerning drawing the line between conduct and expression, see Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 Colum. L. Rev. 467 (1984).

88. Note that the *Barnes* Court does find nude dancing to be expressive conduct, albeit "only marginally so." 111 S. Ct. at 2461.

Temple American Inn of Court - April 2016 Program - Research and Materials

procedures the state used in the deprivation of expression and ask whether the procedures are inadequate under the due process clause of the Fourteenth Amendment.

A. First Amendment Analysis

The First Amendment[89] grants freedom of speech and of the press. An ongoing debate[90] exists as to whether courts ever may permit states to limit the freedom of speech constitutionally. Textualists argue that the Amendment's mandate that "no law" shall abridge the freedom of speech means what it says.[91] In contrast, those attempting to divine the framers' intent believe that the only expression that states may not abridge constitutionally is that which implicates the First Amendment's purposes.[92]

The proposition that the government may not discriminate against expression based on its content is relatively uncontroversial.[93] Content-based restrictions on speech are direct censorship[94] because they prohibit the public from receiving communications based on the state's reaction to the message's content. Whether a regulation is content-based depends on whether the limitation on expressive material targets a communication because of the message it conveys.[95]

The violence acts are clearly content-based. The Missouri act regulates video cassettes, while the Tennessee act regulates video cassettes, tapes, films, or any written representations.[96] It is beyond question that these are forms of expression that the First Amendment protects.[97]

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89. According to the First Amendment, "Congress shall make no law respecting an establisbment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." U.S. Const., Amend. I.

90. Compare Douglas N. Husak, *What is so Special About [Free] Speech?*, 4 Law & Phil. 1 (1985) (arguing that freedom of speech is not a special right, and that states are warranted in limiting it) with Sol Wachtler, *Right to Free Speech as a Cherished Heritage*, 201 N.Y. L. J. 37 (Jan. 18, 1989) (arguing that the right to freedom of speech is unique).

91. For a discussion of textualist theory, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1195-98 (1987).

92. The purposes that are the most often articulated as those the Framers intended tbe First Amendment to serve are truth and political participation. See Eric Hoffman, *Feminism, Pornography, and Law*, 133 U. Pa. L. Rev. 497, 499-500 (1985); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 20 (1971). For a more expansive view of the purpose of the First Amendment, see Thomas Irwin Emerson, *The System of Freedom of Expression* 6-7 (Random House, 1970); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 990-91 (1978).

93. See Stone, 54 U. Chi. L. Rev. at 55 (cited in note 24).

94. See id. at 54-57.

95. Id. at 47.

96. See notes 7 and 35 and accompanying text.

97. "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . ." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-65 n.6. This is true whether the expressive activity is noncommercially motivated or commercially motivated.

Temple American Inn of Court - April 2016 Program - Research and Materials

Since the regulations only apply to expression that meets the statutory definition of violent,[98] the two Acts regulate the content of these forms of expression.

The violence statutes apply a "variable" definition[99] of violence—they divide the country into two worlds according to age.[100] Thus, courts must explore two possible ways in which the states may be censoring protected material. First, the violence acts may directly censor statutorily-defined violent expressions as applied to minors. Second, they may censor the same material as applied to adults.

The purpose behind the violence acts is apparent on the face of the legislation—preventing minors' access to these expressions. Therefore, Missouri and Tennessee have directly censored minors' access to violent material. The Supreme Court has declared that not all forms of censorship are unconstitutional,[101] but the Court has established a rebuttable presumption that prior restraints violate the First Amendment.[102] Since the violence acts implicate minors' First Amendment rights, the Court must turn to the second tier of its analysis. Under this tier, the regula-

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Smith v. California, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

98. In *Video Software Dealers Ass'n v. Webster*, the district court stated:

> Plaintiffs argue that the challenged provisions are a form of unconstitutional censorship because restrictions are placed on the dissemination of video cassettes based solely on their content. The kind of expression recorded on a particular video cassette determines whether it must be kept in a "separate area" and whether it can be rented or sold to a person under 17 years of age. . . .
>
> Defendants do not dispute that the Act restricts the dissemination of certain video cassettes based on their content.

773 F. Supp. at 1277.

99. Similarly, in *Ginsberg v. New York* the Supreme Court upheld a statute that applied a more stringent definition of obscenity to minors than that applied to adults. 390 U.S. 629, 635-37 (1968). The Court adopted a lower court's declaration that a variable definition of obscenity was useful in analyzing regulations aimed at limiting the availability of expressive material for minors but not adults. Id.

100. The Missouri statute used age 17 as the cut-off, Mo. Rev. Stat. § 573.090(2) (Supp. 1992), while Tennessee placed it at age 18, Tenn. Code Ann. § 39-17-901(8) (1991).

101. See, for example, *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (holding that prior submission of movies to a censorship board is not necessarily unconstitutional); *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (stating that "[l]iberty of speech, and of the press, is also not an absolute right").

102. See *Bantam Books*, 372 U.S. at 70. The Court stated that: "[a]ny system of prior restraints of expression comes to this Court hearing a heavy presumption against its constitutional validity." Id. The Court also noted:

> Nothing in the Court's opinion in *Times Film Corp. v. Chicago*, 365 U.S. 43, is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances*. In declining to hold prior restraints unconstitutional *per se*, the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures.

Id. at 70 n.10. See also *Near*, 283 U.S. at 716; *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

Temple American Inn of Court - April 2016 Program - Research and Materials

tions can only survive Fourteenth Amendment scrutiny if they are appropriately tailored.[103]

The censorship of expression with respect to adults is less apparent in the passage of the violence statutes, but is present nonetheless. Courts have referred to this form of restraint as informal censorship or self-censorship,[104] but regardless of the label, the effect is the same. Despite the legislators' intentions, regulations that implement prior restraints as to youths may also result in a reduction in the quantity and quality of the regulated material that is available to adults. In *Smith v. California*[105] the Supreme Court declared unconstitutional a Los Angeles statute that imposed strict criminal liability on booksellers who possessed obscene material. The Court declared that such a statute would have the unconstitutional effect of inhibiting constitutionally protected expression.[106] Such informal censorship may have even more constitutional infirmities than direct censorship due to the fewer procedural safeguards generally present.[107]

Informal censorship deprives adult readers, viewers, and listeners of the opportunity to purchase expression that they have a constitutional right to receive.[108] States, therefore, must consider carefully the Supreme Court's warning that such legislation impermissibly may "reduce the adult population . . . to reading only what is fit for children"[109] before they enact statutes restricting expression.

The Court has declared that, with certain exceptions, all speech is constitutionally protected.[110] The Court defines these unprotected ex-

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103. See Part IV.B.

104. See *Bantam Books*, 372 U.S. at 67 (involving informal censorship); *Smith*, 361 U.S. at 151, 154 (involving "self-imposed restriction of free expression" and "self-censorship"); *Freedman*, 380 U.S. at 59 (involving discouraging effect on the exhibitor).

105. 361 U.S. 147 (1959).

106. According to the Court:

> Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would he altogether unreasonable to demand so near an approach to omniscience. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material that the owner had inspected, these shops and stands may very well become depleted. The physical limitations on the bookseller's ability to become familiar with every item for sale coupled with his timidity in tbe face of absolute criminal liability would tend to restrict indirectly the public's access to reading material which the State could not constitutionally restrict directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, bardly less offensive for being privately administered. Through this indirect restriction, the distribution of all books, both obscene and not obscene, would be impeded.

Id. at 143-54. See also *Freedman*, 380 U.S. at 59.

107. See *Bantam Books*, 372 U.S. at 66.

108. Id. at 71.

109. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

110. See note 18 and accompanying text.

ceptions on a case-by-case basis. Since the Court has not yet found that violent speech is unprotected,[111] courts considering the constitutionality of violence acts must reason that they regulate protected expression.[112] The Supreme Court creates exceptions to the First Amendment by classifying certain speech as "low value"[113] expression, thereby making it either completely unprotected by the Constitution or deserving of less protection. By placing values on speech, the Court makes itself the final arbiter as to which speech has a high value and is thus permissible for American society. While not all speech may deserve constitutional protection, classifying the content of such expression as "obscene" or "violent" is unconstitutional content-based discrimination, and is dependent upon the subjective values of nine unelected justices.[114] The result is that only the Supreme Court can determine whether particular expression has value; any such moralizing by the state or federal governments is unconstitutional censorship.

In *Zamora v. Columbia Broadcasting System*,[115] the district court recognized the proper limitations on the ability of courts to make First Amendment value judgments. The plaintiff, a minor, sued the television networks after he killed his eighty-three-year-old neighbor, claiming that he had become desensitized and addicted to violence after a ten-year period of watching network programming.[116] The court warned that both the courts and the legislatures have a limited ability to set the standards for determining depictions of violence.[117]

In *Zamora*, the plaintiff did not seek an injunction against violent programming, but rather sought damages for any harm such program-

111. See *Webster*, 773 F. Supp. at 1278.

112. Id.

113. See Stone, 54 U. Chi. L. Rev. at 47 (cited in note 24).

114. In analyzing *Miller*'s obscenity test, one commentator notes that the court's determinations are:

> aesthetic because their resolution requires analysis and judgment of the content of images and its effect on an audience. Liberal Justices and commentators tend to place aesthetic judgments beyond the scope of the judiciary's proper role in the determination of first amendment issues. Yet, there is little doubt that judges consciously make such judgments in the realm of obscenity law.

Hoffman, 133 U. Pa. L. Rev. at 502-03 (foonotes omitted) (cited in note 92).

115. 480 F. Supp. 199 (S.D. Fla. 1979).

116. The court noted that two rights are involved in such a case: the right of the broadcaster to disseminate messages, and the right of the public to receive them. Id. at 205.

117. The Court declared:

> [T]his Court lacks the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items containing 'violence' in one form or the other. . . . The point here, of course, is that improper judicial limitation of first amendment rights is as offensive as unwarranted legislative incursion into that area.

Id. at 203-04 (footnotes omitted).

Temple American Inn of Court - April 2016 Program - Research and Materials

ming allegedly caused. Plaintiffs have brought several cases along similar lines,[118] but only one such plaintiff has ever been successful.[119] This low success rate is due to the courts' focus on the effect that damage claims would have on the disseminators of such expression. The courts have generally found that self-censorship would result and the First Amendment would effectively die.[120] Broadcasters would err on the side of releasing less expression to the public for fear of incurring liability in close cases. In the cases involving violence statutes, booksellers and video dealers presumably would do the same.

In the obscenity cases, one overriding question is what is obscenity, and who defines it.[121] With obscenity, the issue becomes a moral decision based on a majority-imposed system of values or a judge-made system of values[122] that inhibit the minority's freedom of speech. Similarly, unless a Fourteenth Amendment ends-means analysis is applied to the violence statutes, a moral issue will also exist regarding what a majority of the population considers to be violent expression and what material the state should suppress for the general welfare.

B. *Fourteenth Amendment Analysis*

After concluding that the First Amendment is implicated, the court must determine whether and under what conditions a state may limit protected expression. The conclusion the court reaches will depend first and foremost upon the court's view of the First Amendment's role in American society. Some commentators and courts[123] argue that the

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118. See *Shannon v. Walt Disney Prod., Inc.*, 275 S.E.2d 121 (Ga. Ct. App. 1980), rev'd, 276 S.E.2d 580 (Ga. 1981) (involving an 11-year-old who placed a large piece of lead into a balloon, after watching a sound effect demonstration on the "Mickey Mouse Club" on television and was partially blinded when the balloon burst); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (involving a boy who hanged himself after watching a hanging stunt on "The Tonight Show"); *Olivia N.*, 178 Cal. Rptr. 888 (1981) (involving a 9-year-old girl who was sexually assaulted by a group of minors after the group viewed a similar scene on a made-for-television movie); *Zamora*, 480 F. Supp. 199 (S.D. Fla. 1979) (involving a 15-year-old who, after he shot and killed his elderly neighbor, then sued the networks on the basis that he had become desensitized to violence after ten years of watching television).

119. *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975).

120. See cases cited in note 118.

121. Recall Justice Stewart's infamous statement in *Jacobellis v. Ohio*: "I could never succeed in intelligibly [defining obscenity]. But I know it when I see it." 378 U.S. 184, 197 (1963) (Stewart concurring).

122. Richard Quaresima, Comment, *Protection of First Amendment Freedom of Speech and Expression Does Not Extend to Music Lyrics Judicially Determined to be Obscene*, 22 Rutgers L. J. 505, 523 (1991).

123. For example, one lower court describes the value of the First Amendment as follows:

> The importance of the First Amendment to our freedoms as a whole cannot be overemphasized. It is the lens through which the operations of government are viewed and the support and protection for the commentary which may result. Thus any action, legislative or other-

Temple American Inn of Court - April 2016 Program - Research and Materials

First Amendment only protects political speech; thus, the notion of freedom of all types of expression is a fallacy.[124] Other commentators argue that the First Amendment is an absolute guarantee of the right to say anything, at any time, and in any place.[125] Under this view, the First Amendment is unqualified; the text itself states that government shall make "no law." Therefore, no Fourteenth Amendment analysis is necessary—states may not limit expression regardless of the procedural safeguards or limited circumstances. The Supreme Court appears to value free speech as a fundamental right[126] included within the concept of liberty,[127] which the Fourteenth Amendment protects.[128]

The Constitution, however, is filled with competing interests and rights,[129] some of which conflict at times. Thus, it is unrealistic and impractical to declare that states may never limit free speech. At the same time, free speech is a right fundamental to American society and states must be careful in applying restrictions. Courts try to balance these competing concerns by applying a Fourteenth Amendment analysis to state restrictions on speech.[130]

In order to determine how much process is due before a state abridges freedom of expression, the Supreme Court applies an ends-means analysis.[131] The level of scrutiny it applies varies according to the importance of the interests at stake.[132] When a fundamental right such as freedom of expression is at issue, the state must show that it has a compelling interest for the regulation, and that it has narrowly

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wise [sic] which has as its purpose placing limitations upon freedom of expression must he viewed with suspicion.

Zamora, 480 F. Supp. at 203.

124. See note 55 and accompanying text.

125. See Thomas I. Emerson, *The System of Freedom of Expression* 6-7 (Random House, 1970). See also note 91 and accompanying text.

126. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Tinker v. Des Moines Comm. Sch. Dist.*, 393 U.S. 503 (1969); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

127. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 (1952).

128. The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV.

129. See Mark Schadrack, *Privacy and the Press: A Necessary Tension*, 18 Loyola L.A. L. Rev. 949 (1985).

130. The Fourteenth Amendment analysis is appropriate because freedom of speech and of the press is implicit in the concept of liberty, which may not be deprived without due process of law. *Joseph Burstyn*, 343 U.S. at 500.

131. See, for example, Stone, 54 U. Chi. L. Rev. at 50-54 (cited in note 24); Kent D. Lollis, *Strict or Benign Scrutiny Under the Equal Protection Clause: Troublesome Areas Remain*, 35 S.L.U. L. J. 93 (1990); Stephen T. Parascandola, *There's Trouble in Paradise . . . The Supreme Court Weakens Strict Scrutiny Analysis*, 17 Stetson L. Rev. 549 (1988).

132. Lollis, 35 S.L.U. L. J. at 110.

tailored the limitation to fit the interest.[133] The Court should apply close scrutiny to any law that attempts to regulate speech.[134]

V. State Interests in Promulgating Violence Statutes

In determining the constitutionality of restrictions on expression, the Court must determine what constitutes a "compelling interest" for legislation and whether the restrictions' means of attaining this interest have a sufficiently close fit with the ends. With respect to the violence acts, the states allegedly have three compelling interests at stake.

A. Regulating Morality

Legal theorists maintain an ongoing debate concerning the proper role of morality in governmental regulations.[135] This debate is even stronger when a fundamental right is at stake. Whenever a government makes a law it is defining societal morality. For example, in some societies cannibalism is not illegal.[136] Perhaps a nation ought to limit legislating morality to instances where laws are necessary to effect societal order and to prevent physical harm to its members.

When the Supreme Court declared that the First Amendment does not protect obscene publications, it was engaging in judicial moralizing.[137] Arguably, allowing the Court to define American morals is even worse than legislative moralizing, since the Court is not necessarily representative of American society. However, both judicial and legislative moralizing violate the text and the intent of the Bill of Rights, which values the viewpoint of every individual, not just those of the majority.[138]

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133. Id. at 113.

134. See Stone, 54 U. Chi. L. Rev. at 46. The Supreme Court's list of exceptions to the First Amendment, see note 55 and accompanying text, which it classifies as "low value" speech, does not comport with the Due Process analysis it applies to what it deems "protected" speech. Rather than developing exceptions to the forms of speech that are protected by the First Amendment by deeming such forms of slight social value, such value to be determined by the nine unelected justices sitting on the Court, the Court should use a Fourteenth Amendment analysis for all forms of speech. Under such a system, the Court would find that certain statutes regulating forms of speech, such as obscenity, serve a compelling government interest, with the means to effectuate such interest narrowly tailored to that end.

135. See John F. Murphy, *Clandestine Warfare: Morality and Practical Problems Confounded*, 39 Wash. & Lee L. Rev. 377 (1982).

136. See Gerald Scott, *Romancing the Stone Age; Papua New Guinea is Paradise for Ocean View Assistant Coach Randy Karcher*, L.A. Times 3-17 (Mar. 8, 1986).

137. For a discussion of the propriety of judicial moralizing, see John B. McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 Tul. L. Rev. 280, 291 (1984).

138. In *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court struck down a state statute's prohibition of the exhibition of obscene, indecent, or immoral films as it was applied to censor a film that favorably portrayed adultery:

Temple American Inn of Court - April 2016 Program - Research and Materials

If legislating morality is not a compelling governmental interest, then any statute seeking to regulate violent speech because of its slight social value is unconstitutional since it deprives a person of a fundamental right without due process of law.

B. Preventing Incitement

One crucial difference exists between statutes that regulate obscene speech and those which limit violent speech. The government's objective in enacting obscenity laws is the achievement of a legislatively-defined level of societal morality.[139] States may have this same goal when regulating violent speech, in which case such regulations should not withstand constitutional scrutiny.[140] However, states may have another legitimate and compelling interest in regulating violent speech. If so, such regulations may withstand constitutional scrutiny, whereas obscenity regulations should not. This compelling governmental interest is the state's desire to protect its citizens from violent acts.[141]

Feminist theorists argue that states must regulate obscenity not due to abstract notions of morality, but rather because such forms of expression lead to the commission of violent acts against women.[142] Thus, the compelling interest such statutes seek to achieve is not legislating morality, but rather curtailing criminal violence. State legislatures and the Supreme Court, however, have not determined that the purpose behind obscenity statutes is the prevention of violence. Additionally, feminist theorists have not produced sufficiently persuasive data to substantiate their claim that obscenity leads to violence against women.[143]

> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the *moral* standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Id. at 688-89 (emphasis added).

139. Feminist theorists, however, argue that obscene speech, and pornography in general, is properly subjected to governmental regulation because such expression sanctions and condones violence against women. See Hoffman, 133 U. Pa. L. Rev. at 498 (cited in note 92); Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women's L. J. 5, 9-23 (1984). See also notes 141-42 and accompanying text.

140. See Part V.A.

141. See generally Hoffman, 133 U. Pa. L. Rev. at 497.

142. See note 139.

143. Some commentators argue that the legislature does not need data to support its decisions. See Hoffman, 133 U. Pa. L. Rev. at 501 n.25. Without such a requirement, however, when a fundamental interest such as freedom of expression is involved close scrutiny of the restrictions would become impossible.

The violence statutes more clearly involve the less controversial governmental interest in preventing the occurrence of violent crimes. States enacting these statutes do so based on the theory that violent speech tends to incite the occurrence of violent crimes. In *Brandenburg v. Ohio*,[144] the Supreme Court held that the First Amendment does not protect speech that incites violent crimes if two conditions are met: the speech advocating violence is directed toward incitement, and it is likely to produce such action.[145] In *Tinker v. Des Moines Community School District*,[146] the Court invalidated a school district policy that prevented students from wearing black armbands in protest against the Vietnam War. The school district claimed that wearing the armbands would cause disturbances among the students. The Court declared that something more than a fear of a disturbance is needed before the school district may curtail expression constitutionally.[147]

Commentators debate the effects of violent expression on the audience, especially violence portrayed on television.[148] Some claim that such expression causes desensitivity to violence and the occurrence of criminal acts of violence.[149] Courts thus far have not found a direct line of causation between violent expression and criminal acts.[150] One of the problems in finding causation is statistical: thousands of people may have watched a particular program, but only one viewer reacted violently.[151] The grant of free speech encompasses the idea that states can-

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144. 395 U.S. 444 (1969).

145. The Court stated:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action *and is likely* to incite or produce such action. . . . [T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action.

Id. at 447-48 (citations omitted) (emphasis added).

146. 393 U.S. 503 (1969).

147. Id. at 508. "The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Id.

148. Compare Thomas G. Krattenmaker and L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123 (1978) (condemning regulation of television violence) with James A. Albert, *Constitutional Regulation of Televised Violence*, 64 Va. L. Rev. 1299 (1978) (favoring regulation of television violence).

149. See, for example, *Zamora*, 480 F. Supp. at 200-01.

150. See note 118 and accompanying text.

151. "There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." *Zamora*, 480 F. Supp. at 205 (citations omitted).

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not punish the act of expressing, but only the one whose conduct, separated from expression, violates the law.[152]

The regulation of violent speech serves a more compelling interest than do limitations on obscene speech. The ends in regulating obscenity are intangible, moral goals,[153] while the end in regulating violence is the prevention of physical harm. However, because First Amendment freedoms are so vulnerable to disintegration when the Court begins to carve out exceptions to protected speech, the Court should not declare that violent expression is not subject to constitutional protections because of its "low value."[154] Rather, all speech is constitutionally protected; states may deprive its citizens of this liberty interest only through strict conformity with procedures consonant with the Fourteenth Amendment.[155] This requires an ends-means analysis under the courts' close scrutiny.

Preventing violent criminal acts is a compelling governmental interest. Without clear empirical evidence[156] showing that violent expression in fact causes the occurrence of violent acts, however, states cannot narrowly tailor the means contained in statutory restrictions on violent speech. Thus, violence statutes will fail constitutional muster under close scrutiny.[157] The First Amendment is too fundamental to allow any

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152. See *Whitney v. California*, 274 U.S. 357, 376, 378 (1927) (stating that "advocacy of violence, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on," and that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly"); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (stating that "since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the state on the ground that they had 'a tendency to lead to violence' ") (citation omitted). See also *Olivia N.*, 178 Cal. Rptr. at 892-93; *Zamora*, 480 F. Supp. at 206.

153. But see Hoffman, 133 U. Pa. L. Rev. at 497-98 (cited in note 114).

154. See note 113 and accompanying text.

155. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). The court stated that "yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." Id.

156. Considerable disagreement surrounds the role of statistical data in examining a legislative enactment. For arguments favoring the need for such an examination, see Suzanne Rosencrans, *Fighting Films: A First Amendment Analysis of Censorship of Violent Motion Pictures*, 14 Columbia-VLA J. of L. & Arts 451, 452 (1990) (stating that "without empirical data to substantiate the alleged causal connection between violence witnessed on screen and imminent violence perpetrated in society at large, the task of formulating a constitutionally workable test is nearly impossible"); Hoffman, 133 U. Pa. L. Rev. at 501 n.25 (claiming that the Supreme Court will at times use empirical evidence in constitutional analysis, although in obscenity cases it avoids doing so).

157. In *Zamora* the district court recoguized the possibility of scientific causation data being produced: "One day, medical or other sciences with or without the cooperation of programmers may convince the F.C.C. or the Courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming." 480 F. Supp. at 206-07.

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less stringent examination of governmental restrictions on expression. One of the philosophies that separates American society from others is a citizen's absolute right to propagate opinions that the government finds wrong, or even hateful.[158] The evidence that violent expression may lead to violent behavior[159] is thus insufficient to justify limitations on a right as fundamental to American society and values as is the freedom of speech.[160]

C. Protecting Children

While children have a right to freedom of speech, this right is in tension with the States' interest in protecting children's health, welfare, and safety.[161] States must also carefully limit any regulation that restricts expressive material available to children so as not to violate the rights of the adult public. For instance, in *Butler v. Michigan*[162] the Court considered a Michigan statute that made it a misdemeanor to sell any book to the general public which contained obscene language tending to corrupt youths' morals. The Court did not deny that protecting the general welfare of children is a compelling governmental interest. However, the Court held that the statute in question was not narrowly tailored to achieve this interest,[163] and was thus unconstitutional under the Due Process Clause.

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158. *Hudnut*, 771 F.2d at 327-28.

159. See Krattenmaker and Powe, 64 Va. L. Rev. at 1134 (cited in note 148).

160. See *Bill v. Superior Court*, 187 Cal. Rptr. 625 (1982), in which a minor sued a film producer for injuries received outside a theater after a showing of the defendant's film. The plaintiff claimed that the defendant should have known his film would attract people with violent proclivities. In rejecting the plaintiff's claims, the court stated:

> It is an unfortunate fact that in our society there are people who will react violently to movies, or other forms of expression, which offend them, whether the subject matter be gangs, race relations, or the Vietnam war. It may, in fact, be difficult to predict what particular expression will cause such a reaction, and under what circumstances. To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land.

137 Cal. App. 3d at 1008-09.

161. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968). The *Ginsberg* Court also declared that the state has an interest in protecting children's morals. Id. This Note rejects this proposition. See Part V.A.

162. 352 U.S. 380 (1957).

163. The *Butler* Court declared: "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." Id. at 383. See also *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (finding that limitation of speech is the exception and must be closely confined to preclude licensing or censorship).

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In order to balance the right to free speech with the varying degrees of governmental interests at stake, the Supreme Court has allowed states to apply a variable definition of obscenity—one definition that is applicable to adults and a second that is applicable to minors.[164] In *Ginsberg v. New York*,[165] the Court proclaimed that the Constitution does not forbid a state from placing more restrictions on children's rights to read or view sexually explicit publications than it places on adults' rights.[166] The Court's conclusion rested on two grounds: (1) the legislature was not usurping the role of parents in rearing their children, but rather it was merely providing a law to support and respect the role of parental guidance, and (2) the State itself has an interest in promoting the general welfare of its children and their progression into citizenship.[167]

The Supreme Court thus allows a state's legitimate interest in the well-being of its children to override the children's constitutional guarantees with seemingly little scrutiny.[168] This lack of adequate judicial examination violates children's constitutional rights to due process of law. When an individual's fundamental interest is at stake, the government must show that any restrictive regulation serves a compelling interest and that the regulation's means are narrowly tailored to fit these ends—all subject to the Supreme Court's strict scrutiny. When a fundamental right requiring close scrutiny is at stake, the legislature must produce sufficient data to show that the governmental interest is in fact

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164. See 352 U.S. at 380.

165. 390 U.S. 629 (1968). At issue was the constitutionality of a New York statute barring sales of "girlie" magazines to minors. Id. at 631.

166. Id. at 636-37.

> It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.

Id. See also *Prince v. Massachusetts*, 321 U.S. 158 (1944).

167. *Ginsberg*, 390 U.S. at 639-41.

168. According to the *Ginsberg* Court:

> [T]he law states a legislative finding that the material condemned by [it] is 'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.' It is very doubtful that this finding expresses an accepted scientific fact. . . . To sustain state power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was *not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors. . . . But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.

390 U.S. at 641-42 (footnotes omitted) (emphasis added).

compelling, that the means will accomplish the objective and that the means are the least restrictive manner of achieving the end.[169]

The Court corrected the deficiencies in the *Ginsberg* rationale with its reasoning in *Sable Communications, Inc. v. FCC*.[170] In *Sable*, the contested federal statute regulated telephone services such as "Dial-A-Porn."[171] The Court divided its analysis into two parts: one upheld the ban on *obscene* commercial telephone messages and the other struck down the same prohibition as applied to *indecent* messages.

The *Sable* Court's analysis made apparent the precedental dangers inherent in decisions relating to fundamental rights such as freedom of speech. When examining the constitutionality of the regulation as applied to obscene speech, the Court simply noted that the First Amendment does not protect such expression.[172] When it began its analysis of indecent telephone messages, the Court was quick to note that it had not previously stated that the Constitution does not protect indecent speech.[173] The Court recognized that states have a compelling and legitimate interest in protecting minors from indecent speech, but held that the means employed were not narrowly tailored to fit the ends.

Obscene speech does not even receive the limited protection this balancing test provides—it is completely excluded from First Amendment protections.[174] This result is not due to any constitutional text or any congressional amendment; nor is it because each obscenity statute has passed a test in which a court has found a compelling governmental interest and a narrowly tailored regulation designed to meet this interest. The Constitution does not protect obscene speech simply because the Supreme Court and most of society considers it to be without value.

In holding the statute's ban of indecent telephone messages unconstitutional, the Court distinguished its holding in *FCC v. Pacifica Foundation*.[175] The *Pacifica* Court upheld a time regulation on indecent broadcasts. The *Sable* Court emphasized that courts must construe *Pacifica* narrowly, and found *Pacifica* distinguishable on two grounds: (1) broadcasting is unique since it can enter one's home without prior

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169. The *Ginsberg* Court disagreed with this proposition: "[W]e do not demand of legislatures 'scientifically certain criteria of legislation.'" Id. at 642-43 (citation omitted).

170. 492 U.S. 115 (1989).

171. Section 223(b) of the Communications Act of 1934 was amended as of November 1989 to initiate a complete ban of indecent and obscene interstate commercial telephone messages. 47 U.S.C. § 223(b) (Supp. 1990).

172. *Sable*, 492 U.S. at 124.

173. Id.

174. See id.

175. 438 U.S. 726 (1978).

warning as to its content;[176] and (2) it is uniquely accessible to children, even those too young to read.[177]

Thus, the factors the Court looks at in determining whether a regulation of children's speech is constitutionally sound are: minors' accessibility to the expressive material,[178] whether minors are a captive audience,[179] whether the regulation incidentally restricts expression protected as to adults,[180] whether the government is infringing on the role of parents in rearing their children,[181] whether it is a reasonable time, place or manner restriction,[182] whether other solutions less intrusive on First Amendment freedoms are plausible,[183] and arguably whether appropriate legislative findings have been made.[184]

In *Video Software Dealers Association v. Webster*,[185] the Eighth Circuit struck down the Missouri violence act despite the state's alleged purpose of protecting the welfare of minors. The court reasoned that while the state has more control over the content of speech aimed at children than speech aimed at adults, children still have the right to freedom of speech under the First Amendment.[186] The court noted that since the Supreme Court has not held that violent speech is unprotected by the Constitution, the state must narrowly tailor any legislation regulating violent expression directed toward young people to further the state's interest in the welfare of minors without unnecessarily interfering with First Amendment freedoms.[187] The court concluded that because the statute did not narrowly define the type of violent expression being proscribed, the legislation was unconstitutionally overbroad.[188]

Protecting children is a compelling governmental interest, and under a sufficiently narrow statute, censorship of expression available to children may be constitutionally permissible.[189] Empirical data shows

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176. *Sable*, 492 U.S. at 127.
177. Id. See also *Pacifica*, 438 U.S. at 748-49.
178. *Pacifica*, 438 U.S. at 750.
179. Id. at 748-49.
180. *Sable*, 492 U.S. at 128.
181. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Pacifica*, 438 U.S. at 749-50.
182. *Pacifica*, 438 U.S. at 750.
183. *Sable*, 492 U.S. at 128. See also *Pacifica*, 438 U.S. at 748-50.
184. But see *Sable*, 492 U.S. at 129 (stating that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake") (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).
185. 968 F.2d 684 (8th Cir. 1992).
186. Id. at 688-89.
187. Id. at 689.
188. Id. at 690.
189. Compare *Olivia N.*, 126 Cal. App. 3d 488 (1981).

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that children sometimes mimic violence portrayed on television.[190] However, these studies show that only certain groups of children tend to experience increased aggression after viewing televised violence.[191] Furthermore, imitative behavior varies according to a child's age. For example, violent programs are less likely to affect teenagers.[192] Therefore, under close scrutiny, the violence statutes are overbroad for failure to take these factors into account.

Violence statutes may be constitutional if state legislatures adopt a "reasonable child standard." The definition of child would only include those younger than thirteen, and the regulation would limit its coverage to the types of violence that children are likely to imitate.[193] In order to survive Due Process scrutiny, however, supporters of the regulation must produce sufficient reliable data showing that the specific violent expression tends to cause harm to children.

VI. The Lack of Procedural Safeguards

Before a state may alter or limit any First Amendment rights, it must follow certain procedures.[194] Although private booksellers and video dealers implement the violence acts, their decisions are enforced under the color of state law, and thus constitute acts of the state within the meaning of the Fourteenth Amendment.[195] As a preliminary matter, the Supreme Court has declared that the burden lies on the party desiring the censorship to prove that the Constitution does not protect the speech.[196] Under the theory articulated herein, all speech is constitutionally protected but subject to limitation if, under close scrutiny, the government has a compelling interest and the regulation's means are narrowly tailored to achieve this interest. Therefore, the censor must carry the burden of proving these elements.

Second, the Court has declared that a restraint imposed prior to a judicial determination on the matter is constitutionally permissible only

190. Surgeon General's Scientific Advisory Comm. on Television and Social Behavior, *Television and Growing Up: The Impact of Televised Violence*, Report to the Surgeon General 122-25 (1972) (hereinafter "*Surgeon General's Report*").

191. Id. "For *some* children, under *some* conditions, *some* television is harmful. For other children under the same conditions, or for the same children under *other* conditions, it may be beneficial. For *most* children, under *most* conditions, *most* television is probably neither particularly harmful nor particularly beneficial." E. Barrett Prettyman, Jr. and Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 Fed. Comm. L. J. 317, 354 (1987) (quoting *Surgeon General's Report* at 20.

192. See Prettyman and Hook, 38 Fed. Comm. L. J. at 327.

193. A bill along these lines was introduced in the U.S. House of Representatives in 1973. See id. at 330-31 n.55.

194. See *Freedman*, 380 U.S. at 57-58; *Bantam Books*, 372 U.S. at 65-66.

195. See *Bantam Books*, 372 U.S. at 68.

196. *Freedman*, 380 U.S. at 58.

Temple American Inn of Court - April 2016 Program - Research and Materials

if two requirements are met: 1) the restraint must be limited to preserving the status quo; and 2) the restraint must be imposed only for the shortest time necessary for judicial resolution of the matter.[197] The violence acts fail this test. The acts require booksellers and video dealers to remove from their shelves any material they feel may meet the vague statutory definition of "violent" expression. Their other options are placing the materials on "binder racks" where minors supposedly cannot see them, not allowing minors into the store, or covering the covers of the books and videos.[198] Whichever choice is made, the effect is a drastic change of the status quo without a judicial determination that the suppression of a particular work serves a compelling governmental interest. In fact, the Due Process rights of authors of particular books or producers and writers of particular films on video cassettes are violated unless a court reviews the decision for each particular restricted work. Such a result is neither desirable nor feasible. The effect would be to make courts censors[199] of the material available to the general public, since restricting access to children would have the incidental effect of limiting access to adults.[200]

A final aspect of Due Process analysis inquires into the clarity of the regulation.[201] The degree of ambiguity that constitutionally will be permissible varies according to the importance of the interests at stake.[202] As applied to the First Amendment, the statute must pass strict standards of vagueness, due to the potential for an inhibiting effect on speech.[203] "[A] man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[204]

VII. Conclusion

Statutes that attempt to restrict the availability of expressive material to the public bear a heavy presumption of unconstitutionality. Courts must carefully scrutinize any such restrictions in order to protect against the gradual disintegration of a right deemed fundamental to the proper functioning of American society. The emergence of vio-

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197. Id. at 59.

198. Brief of Plaintiff-Appellants at 25 (cited in note 43).

199. In *Freedman*, the Court stated: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58.

200. See *Bantam Books*, 372 U.S. at 71.

201. See *Smith*, 361 U.S. 147 (1959).

202. See id. at 150-51.

203. Id. at 151.

204. Id. (citing *Winters v. New York*, 333 U.S. 507, 509-10 (1948)).

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lence statutes represents the most recent threat to the First Amendment right to freedom of speech.

Because the Constitution contains abundant competing rights and interests, it cannot be said that the right to express oneself freely and to freely receive communications from other members of society is an absolute guarantee, never subject to abatement or suspension. In order to determine when such a fundamental right constitutionally may be subject to regulation, the Supreme Court has developed certain procedures that must be followed, consonant with the Fourteenth Amendment.

The procedures delineated in the violence statutes do not survive close scrutiny. It is debatable whether these restrictions are in fact an attempt to implement the values of a majority as to what expressive material is suitable for society. While the statutes on their face are aimed at protecting children's welfare, they may also be viewed as an attempt to impose a new set of values on those who represent the country's future. Additionally, since an indirect effect of the statutes is to restrict the expressive material that is available to adults, the regulations may in fact be intended to impose a majority's definition of morality on the general public.

Nevertheless, it is also possible that the violence acts could be a bona fide attempt to reduce the number and degree of acts of violence upon society. Such an end to a statute is a compelling governmental interest, and if the means of attaining such an interest are narrowly tailored to achieve this end the right to free expression may be subordinated.

The means set forth in the violence statutes, however, do not approach the degree of precision necessary for a restriction on the First Amendment right to freedom of speech to survive a constitutional attack. Booksellers and video dealers are required to be censors for the general public. They are not provided with any guidelines to determine whether a particular material falls under the statute's terms. No possibility exists for judicial review of every bookseller's and every video dealer's determination of "violent" or "acceptable." Most importantly, researchers have not produced sufficient data to conclude that violent expression in fact causes violent actions by those who read, view, or listen to it. Absent such a connection, the violence statutes cannot survive close scrutiny under the Fourteenth Amendment. Freedom of speech is a liberty not to be denied without due process, and such process must first include a determination that the compelling governmen-

Temple American Inn of Court - April 2016 Program - Research and Materials

tal interest apparent on the face of a statute is in fact implicated and possibly achieved by way of the restriction on expression.

*Jessalyn Hershinger**

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The Forgotten Freedom of Assembly

John D. Inazu*

The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and after the New Deal, and the Civil Rights movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the second Red Scare of 1950s' McCarthyism. Abraham Lincoln once called "the right of peaceable assembly" part of "the Constitutional substitute for revolution." In 1939, the popular press heralded it as one of the "four freedoms" at the core of the Bill of Rights. And even as late as 1973, John Rawls characterized it as one of the "basic liberties." But in the past thirty years, assembly has been reduced to a historical footnote in American law and political theory. Why has assembly so utterly disappeared from our democratic fabric? This Article explores the history of the freedom of assembly and what we may have lost in losing sight of that history.

I. INTRODUCTION 566
II. THE CONSTITUTIONAL RIGHT OF ASSEMBLY 571
  A. *The Common Good* 571
  B. *Assembly and Petition* 573
III. THE FIRST TEST OF ASSEMBLY: THE DEMOCRATIC-REPUBLICAN SOCIETIES 577
IV. ASSEMBLY IN THE ANTEBELLUM ERA 581
V. ASSEMBLY MISCONSTRUED 588
VI. ASSEMBLY IN THE PROGRESSIVE ERA 590
  A. *Suffragists* 591
  B. *Civil Rights Activism* 592
  C. *Organized Labor* 593
VII. THE INTER-WAR YEARS AND THE RISE OF THE FREEDOM OF ASSEMBLY 595
  A. *A New Conception of the First Amendment* 596
  B. *New Challenges to Labor* 598
  C. *Assembly Made Applicable to the States* 599
  D. *Hague v. Committee for Industrial Organization* 599
  E. *The Four Freedoms* 601
VIII. THE RHETORIC OF ASSEMBLY 603

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Temple American Inn of Court - April 2016 Program - Research and Materials

IX. THE RISE OF ASSOCIATION AND THE END OF ASSEMBLY 606
X. CONCLUSION 611

I. INTRODUCTION

The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and after the New Deal, and the Civil Rights movement. Claims of assembly stood against the ideological tyranny that exploded during the first Red Scare in the years surrounding the First World War and the second Red Scare of 1950s' McCarthyism. Abraham Lincoln once called "the right of peaceable assembly" part of "the Constitutional substitute for revolution."[1] In 1939, the popular press heralded it as one of the "four freedoms" at the core of the Bill of Rights. And even as late as 1973, John Rawls characterized it as one of the "basic liberties."[2] But in the past thirty years, the freedom of assembly has been reduced to a historical footnote in American political theory and law. Why has assembly so utterly disappeared from our democratic fabric?

One might, with good reason, contend that the right of assembly has been subsumed into the rights of speech and association and that these two rights provide adequate protection for the people gathered. On this account, contemporary free speech doctrine protects the "most pristine and classic form" of assembly—the occasional gathering of temporary duration that often takes the form of a protest, parade, or demonstration.[3] Meanwhile, the judicially recognized right of association shelters forms of assembly that extend across time and place—groups like clubs, churches, and social organizations.

This characterization of the rights of speech and association is not implausible. Indeed, it appears to be the approach assumed by a

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1. Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860), *in* UNCOLLECTED LETTERS OF ABRAHAM LINCOLN 127 (Gilbert A. Tracy ed., 1917). In the same letter, Lincoln also wrote: "[T]he right of peaceable assembly and of petition and by article Fifth of the Constitution, the right of amendment, is the Constitutional substitute for revolution. Here is our *Magna Carta* not *wrested* by Barons from King John, but the free gift of states to the nation they create . . . ." *Id.*

2. JOHN RAWLS, A THEORY OF JUSTICE 53 (1971). Rawls relies primarily on association rather than assembly in his later work. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 221 n.8, 291, 338, 418 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. *But cf. id.* at 335 (mentioning assembly).

3. Edwards v. South Carolina, 372 U.S. 229, 235 (1963) ("most pristine and classic form").

number of contemporary political theorists.[4] Nevertheless, I want to suggest that something is lost when assembly is dichotomously construed as either a moment of expression (when it is viewed as speech) or an expressionless group (when it is viewed as association). Many group expressions are only made intelligible by the practices that give them meaning. The rituals and liturgy of religious worship often embody deeper meaning than that which would be ascribed to them by an outside observer. The political significance of a women's pageant in the 1920s would be lost without an understanding of why these women gathered or what they were doing with the rest of their lives. And the creeds and songs recited by members of hundreds of diverse associations, from Alcoholics Anonymous to the Boy Scouts, during their gatherings may reflect a way of living and system of beliefs that cannot be captured by a text or its utterance at any one event.[5]

The United States Supreme Court has partially recognized these connections in the category of "expressive association" that it introduced in *Roberts v. United States Jaycees*.[6] But by privileging "intimate" over expressive association and declaring the latter merely instrumentally valuable to other modes of communication, the Court has obfuscated the critical role that a group's practices and identity play in its expression. Even worse, the attenuated protections of expressive association underwrite a political theory whose espoused tolerance ends with those groups that challenge the fundamental assumptions of the liberal state. These changes open the door for the state to demand what Nancy Rosenblum has called a "logic of congruence" requiring "that the internal life and organization of associations mirror liberal democratic principles and practices."[7]

William Galston intimates that this result undermines liberalism itself: "Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their

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4. *See, e.g.*, STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990); FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); RAWLS, POLITICAL LIBERALISM, *supra* note 2.

5. This argument is not meant to be universal. Some assemblies that gather in single instances of fixed duration may present a relatively coherent message absent any collective background identity. A group of strangers that gathers in front of a prison to protest an execution is one example.

6. Roberts v. U.S. Jaycees, 468 U.S. 609, 618, 622 (1984).

7. NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 37 (1998).

own understanding of what gives life meaning and value."[8] We do not live under Galston's "rebuttable presumption." If we did, we might hear more about polygamist Mormons, communist schoolteachers, all-male Jaycees, and peyote-consuming Native Americans. And while today's cultural and legal climate raises the most serious challenges to practices at odds with liberal democratic values, the eclectic collection of groups that have at one time or another been silenced and stilled by the state cuts across political and ideological boundaries. The freedom of assembly has opposed these incursions throughout our nation's history. As C. Edwin Baker has argued, "[T]he function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms."[9] This core role of assembly and its broad appeal to groups of markedly different ideologies makes it a better "fit" than the right of association within our nation's legal and political heritage.[10]

Recognizing this fit requires learning the story of the right of assembly. This is no easy task. The right of association is now firmly entrenched in our legal and political vernacular. Consider the following: (1) at least twenty-five federal district and appellate court opinions have referred to a nonexistent "freedom of association clause" in the United States Constitution;[11] (2) a federal appellate court has denied associational protections to an all-male Jewish fraternity after intimating that the fraternity was neither an intimate nor an

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8. WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 3 (2002).

9. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 134 (1989).

10. By "fit," I mean to suggest the coherence with an ongoing tradition and social practice intimated in different ways by both Ronald Dworkin and Alasdair MacIntyre. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (3d ed., Univ. Notre Dame Press 2007) (1981).

11. *See, e.g.*, Swanson v. City of Bruce, No. 03-60541, 2004 WL 1491594, at *3 (5th Cir. July 1, 2004) (referring to "the freedom of association clause"); Boyle v. County of Allegheny, 139 F.3d 386, 394 (3d Cir. 1998) (asserting that the plurality opinion in *Elrod v. Burns*, 427 U.S. 347 (1976), "held that the discharge of a government employee because of his political affiliation violates the freedom of association clause of the First Amendment"); Darnell v. Campbell County Fiscal Court, No. 90-5453, 1991 WL 11255 (6th Cir. Feb. 1, 1991) (discussing the requirements for a prima facie case under "the freedom of association clause of the first amendment"); Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1203 (D. Wyo. 2006) ("The First Amendment's Free Speech Clause and Freedom of Association Clauses apply to the states through the Fourteenth Amendment."); Hyman v. City of Louisville, 132 F. Supp. 2d 528, 543 (W.D. Ky. 2001) ("The Supreme Court has interpreted the First Amendment to provide little protection under the Freedom of Association Clause to commercial enterprises.").

Temple American Inn of Court - April 2016 Program - Research and Materials

expressive association;[12] and (3) a well-respected commentator has argued that in sixteen years, *Roberts* came to represent "a well-settled law of freedom of association," an "ancien regime."[13] In this context, it takes effort to envision an alternative understanding of the constitutional protections for groups. Accordingly, part of my task is to cast a vision for recovering the freedom of assembly. Doing so requires creative engagement with regnant legal doctrine and political theory, particularly that espoused by the Supreme Court and its commentators over the past half-century. But this is a task worth doing. Constitutional language—and the ways in which we use it or ignore it—matters to the views we form about the law. Words like "assembly" and "association" by themselves convey little of the values that underlie the inevitable line-drawing that takes place around our civil liberties,[14] but in our constitutional story, these words come to represent the values that helped to shape them and give them constitutional salience.[15] Forgetting words may represent the final stage of forgetting values; reclaiming words can be a first step to reclaiming those values.

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12. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136 (2d Cir. 2007). The fraternity was located at the College of Staten Island, which is "primarily a commuter campus," and it never had more than twenty members. *Id.* at 140, 145.

13. ANDREW KOPPELMAN, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION, at xi (2009) (arguing that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), "disrupted" the law of freedom of association). Koppelman acknowledges the "germinal case" of the right of association in *NAACP v. Alabama*, 357 U.S. 449 (1958), *see KOPPELMAN, supra*, at 18-22, but it is clear that *Roberts* rather than *NAACP v. Alabama* does most of the work that he wants to embrace as the "well-settled law of freedom of association."

14. I do not presume that *unbounded* group autonomy is either preferable or possible. To borrow from Stanley Fish, there is "no such thing as free assembly." The state always constrains. The pertinent inquiry is therefore not whether the state can constrain group autonomy, but the conditions under which those constraints will be imposed. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 104 (1994) ("Speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict."); *cf.* Peter de Marneffe, *Rights, Reasons, and Freedom of Association,* in FREEDOM OF ASSOCIATION, *supra* note 4, AT 146 ("Some may think of rights as 'absolute,' believing that to say that there is a *right* to some liberty is to say that the government may not interfere with this liberty for *any* reason. But if this is how rights are understood, there are virtually no rights to liberty—because for virtually every liberty there will be *some* morally sufficient reason for the government to interfere with it.").

15. Frederick Schauer uses the phrase "constitutional salience" to refer to "the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

Temple American Inn of Court - April 2016 Program - Research and Materials

In the pages that follow, I take this first step by tracing the story of the freedom of assembly. This is the right of assembly "violently wrested" from enslaved and free African Americans in the South and denied to abolitionist William Lloyd Garrison in the North. It is the freedom recognized in public celebrations across the nation as America entered the Second World War—at the very time it was denied to 120,000 Japanese Americans. It is the right placed at the core of democracy by eminent twentieth-century Americans, including Dorothy Thompson, Zechariah Chafee, Louis Brandeis, Orson Welles, and Eleanor Roosevelt.

I begin by examining the constitutional grounding of assembly in the Bill of Rights. I then explore the use of assembly in legal and political discourse in six periods of American history: (1) the closing years of the eighteenth century that brought the first test of assembly through the Democratic-Republican Societies; (2) the appeals to assembly in the suffragist and abolitionist movements of the antebellum era; (3) the narrowing of the constitutional right of assembly by the Supreme Court following the Civil War; (4) the claims of assembly by suffragists, civil rights activists, and organized labor during the Progressive Era; (5) the rhetorical high point of assembly between the two World Wars; and (6) the end of assembly amidst mid-twentieth century liberalism and the rise of the freedom of association.

As I recount the role of assembly in the political history of the United States, I pay particular attention to three of its characteristics. First, groups invoking the right of assembly have inherently been those that dissent from the majority and consensus standards endorsed by government. Second, claims of assembly have been public claims that advocate for a visible political space distinguishable from government. Finally, manifestations of assembly have themselves been forms of expression—parades, strikes, and demonstrations, but also more creative forms of engagement like pageants, religious worship, and the sharing of meals. These three themes—the dissenting assembly, the public assembly, and the expressive assembly—emerge from the groups that have gathered throughout our nation's history. Theirs is the story of the forgotten freedom of assembly.[16]

16. My characterization of dissenting, public, and expressive assembly bears some resemblance to Timothy Zick's emphasis on the relationship between expression and physical space. *See* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009). Zick observes, "In First Amendment doctrine and scholarship, place has generally been treated as a background principle, not a *fundamental* aspect of assembly, expression, and other public liberties." *Id.* at 8. He responds that "places ground and give meaning to lives, activities, and cultures." *Id.* at 10. My argument for

II. THE CONSTITUTIONAL RIGHT OF ASSEMBLY

I begin with the text of the First Amendment and with a textual observation. As a historical matter, we should not make too much of slight variations in wording, grammar, and punctuation in constitutional clauses.[17] There is little indication that the Framers applied our level of exegetical scrutiny to the texts that they considered and created. But because modern constitutional law parses wording so carefully, our current arguments are in many ways constrained by the precise text handed down to us. And so it is for this reason a useful exercise to consider forensically the text that has survived, as well as the text that did not.

A. *The Common Good*

The most important aspect of the clause containing the constitutional right of assembly may be three words missing from its final formulation: *the common good*. Had antecedent versions of the assembly clause prevailed in the debates over the Bill of Rights and lawful assembly been limited to purposes serving the common good, the kinds of marginalized and disfavored groups that have sought refuge in its protections may have met with little success. Assembly for the common good would have endorsed the consensus narrative advanced by mid-twentieth century pluralism: we tolerate groups only to the extent that they serve the common good and thereby strengthen the stability and vitality of democracy.[18] The Framers decided otherwise.

When the First Congress convened in 1789 to draft amendments to the Constitution, it considered proposals submitted by the various states. Virginia and North Carolina proposed identical amendments covering the rights of assembly and petition: "That the people have a

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assembly builds upon Zick's theoretical approach by considering practices as well as places in the background that gives coherence to meaning.

17. Caleb Nelson cautions against placing too much reliance on punctuation in the Constitution because at the time of the Founding "punctuation marks [were] thought to lack the legal status of words." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 258 (2000). He notes that "[t]he ratification of the Constitution by the states reflects this relatively casual attitude toward punctuation" because many states that incorporated a copy of the Constitution in the official form of ratification varied its punctuation. *Id.* at 258 n.102. Nelson cites as an example the copy of the Constitution in the Pennsylvania form of ratification, which used "different punctuation marks than the Constitution engrossed at the Federal Convention" in roughly thirty-five places. *Id.*

18. For a critique of the consensus narrative and its relationship to the constitutional right of association, see John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. (forthcoming 2010).

right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances."[19]

New York and Rhode Island offered slightly different wording, emphasizing that the people assembled for "their" common good rather than "the" common good: "That the people have a right peaceably to assemble together to consult for the common good, or to instruct their Representatives; and that every [person] has a right to petition or apply to the legislature for redress of grievances."[20]

On June 8, 1789, James Madison's proposal to the House favored the possessive pronoun over the definite article: "The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances."[21]

Whether intentional or not, the endorsement of the common good of the people who assemble rather than the common good of the state signaled the possibility that the interests of the people assembled need not be coterminous with the interests of those in power.

The point was not lost during the House debates. When Thomas Hartley of Pennsylvania contended that, with respect to assembly, "every thing that was not incompatible with the general good ought to be granted,"[22] Elbridge Gerry of Massachusetts replied that if Hartley "supposed that the people had a right to consult for the common good" but "could not consult unless they met for the purpose," he was in fact "contend[ing] for nothing."[23] In other words, if the right of assembly encompassed only the common good from the perspective of the state, then its use as a means of protest or dissent would be eviscerated.[24]

On August 19, 1789, the House approved a version of the amendment that retained the reference to "their common good" and also incorporated the rights of speech and press: "The freedom of

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19. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 140 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS]. This language is substantially similar to declarations in North Carolina and Pennsylvania in 1776 that "the People have a Right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature for Redress of Grievances." *Id.* at 141.

20. *Id.* at 140.

21. *Id.* at 129.

22. *Id.* at 145 (quoting 1 ANNALS OF CONG. 760 (Joseph Gales ed., 1834)).

23. *Id.* (quoting 1 ANNALS OF CONG. 760-61 (Joseph Gales ed., 1834)).

24. *Cf.* Melvin Rishe, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 337 (1965) ("Were the courts truly bound to delve into whether or not an assembly served the common good, it is likely that many assemblies that have been held to be protected by the constitution would lose this protection.").

speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed."[25]

Eleven days later, the Senate defeated a motion to strike the reference to the common good.[26] But the following week, the text inexplicably dropped out when the Senate merged language pertaining to religion into the draft amendment: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances."[27]

B. Assembly and Petition

The striking of the reference to the common good may have been intended to broaden the scope of the assembly clause, but it also introduced a textual ambiguity. Without the prepositional "for their common good" following the reference to assembly, the text now described "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[28] This left ambiguous whether the amendment recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition.

In one of the only recent considerations of assembly in the First Amendment, Jason Mazzone argues in favor of the former.[29] Mazzone suggests:

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25. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 143 (internal quotation marks omitted). This version also changed the semicolon after "common good" to a comma.

26. S. Journal, 1st Cong., 70 (Sept. 3, 1789). The following day the Senate adopted similar language: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances." *Id.* at 70-71 (Sept. 4, 1789) (internal quotation marks omitted).

27. *Id.* at 77 (Sept. 9, 1789). The amendment took its final form on September 24, 1789: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 136 (internal quotation marks omitted).

28. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002) (internal quotation marks omitted).

29. *Id.* The only recent article to address the history of free assembly other than Mazzone's is Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

Temple American Inn of Court - April 2016 Program - Research and Materials

> There are two clues that we should understand assembly and petition to belong together. The first clue is the use of "and to petition," which contrasts with the use of "or" in the remainder of the First Amendment's language. The second clue is the use of "right," in the singular (as in "the right of the people peaceably to assemble, and to petition"), rather than the plural "rights" (as in "the rights of the people peaceably to assemble, and to petition"). The prohibitions on Congress' power can therefore be understood as prohibitions with respect to speech, press, and assembly in order to petition the government.[30]

Mazzone's interpretation is problematic because the comma preceding the phrase "and to petition" appears to be residual from the earlier text that had described the "right of the people peaceably to assemble and consult for their common good, and to apply to the government for a redress of grievances."[31] Whether left in deliberately or inadvertently, it relates back to a distinction between a right to peaceable assembly and a right to petition.[32] Moreover, at least some members of the First Congress appeared to have conceived of a broader notion of assembly, as evidenced in an exchange between Theodore Sedgwick of Massachusetts and John Page of Virginia.

30. Mazzone, *supra* note 29, at 712-13 (internal citations omitted). *But see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 26 (1998) (referring to assembly and petition as separate clauses); WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 32 (2d ed. 1995) (referring to a distinct "'peaceably to assemble' clause"); JAMES E. LEAHY, THE FIRST AMENDMENT, 1791-1991: TWO HUNDRED YEARS OF FREEDOM 202 (1991) ("The final wording of the First Amendment indicates that the first Congress intended to protect the right of the people to assemble for whatever purposes and at the same time to be assured of a separate right to petition the government if they chose to do so.").

31. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 143. The earlier version derived in turn from Madison's draft. *Id.* at 129. Mazzone recognizes that "in Madison's draft, assembly is separated from petitioning by a semi-colon, perhaps indicating that while the right of assembly is related to the right of petition, assembly is not necessarily limited to formulating petitions." Mazzone, *supra* note 29, at 715 n.409.

32. Mazzone addresses the comma in a footnote and argues that because it "mirrors the comma" preceding the words "or prohibit the free exercise thereof" in the first half of the First Amendment, "[i]t does not therefore signal a right of petition separate from the right of assembly." *Id.* at 713 n.392 (internal quotation marks omitted). The argument for textual parallelism does not hold because the free exercise clause explicitly refers back to "religion" (before the comma) with the word "thereof." A closer parallel—which illustrates Mazzone's interpretive problem—is the suggestion that the comma separating speech and press connotes that they embody only a singular freedom. My quibbles with Mazzone do not diminish my appreciation for his work. Mazzone is one of the few scholars in recent years to notice the relationship between assembly and association, and his thoughtful article posits a number of ideas with which I am highly sympathetic. *See, e.g., id.* at 646 (arguing that assembly and petition provide "a much firmer constitutional basis for protecting the rights of citizens to come together in collective activities" than "expressive association").

During the House debates over the language of the Bill of Rights, Sedgwick criticized the proposed right of assembly as redundant in light of the freedom of speech: "If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae."[33]

Page responded:

> [Sedgwick] supposes [the right of assembly] no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.[34]

Irving Brant notes that while Page's allusion to a man without a hat is lost on a contemporary audience, "[t]he mere reference to it was equivalent to half an hour of oratory" before the First Congress.[35] Page was referring to the trial of William Penn.[36]

On August 14, 1670, Penn and other Quakers had attempted to gather for worship at their meeting-house on Gracechurch Street, London, in violation of the 1664 Conventicle Act that forbade any Nonconformists attending a religious meeting, or assembling themselves together to the number of more than five persons in addition to members of the family, for any religious purpose not according to the rules of the Church of England.[37] Prevented from entering by a company of soldiers, Penn began delivering a sermon to the Quakers assembled in the street. Penn and a fellow Quaker, William Mead, were arrested and brought to trial in a dramatic sequence of events that included a contempt of court charge stemming from their wearing of hats in the courtroom.[38] A jury acquitted the two men on the charge

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33. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 143-44.
34. *Id.* at 144 (quoting 1 ANNALS OF CONG. 760 (Joseph Gales ed., 1834)).
35. IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 55 (1965).
36. *Id.* at 54-61.
37. Conventicle Act, 1664, 16 Car. 2, c. 4 (Eng.).
38. BRANT, *supra* note 35, at 57 (quoting Penn's journal). Penn and Mead were fined for contempt of court for wearing their hats after being ordered by an officer of the court to put them on. *Id.*

Temple American Inn of Court - April 2016 Program - Research and Materials

that their public worship constituted an unlawful assembly. The case gained renown throughout England and the American colonies.[39] According to Brant:

> William Penn loomed large in American history, but even if he had never crossed the Atlantic, bringing the Quaker religion with him, Americans would have known about his "tumultuous assembly" and his hat. Few pamphlets of the seventeenth century had more avid readers than the one entitled "The People's Ancient and Just Liberties, asserted, in the Trial of William Penn and William Mead at the Old Bailey, 22 Charles II 1670, written by themselves." Congressman Page had known the story from boyhood, reproduced in Emlyn's *State Trials* to which his father subscribed in 1730. It was available, both in the *State Trials* and as a pamphlet, to the numerous congressmen who had used the facilities of the City Library of Philadelphia. Madison had an account of it written by Sir John Hawles, a libertarian lawyer who became Solicitor General after the overthrow of the Stuarts in 1688.[40]

Congressman Page's allusion to Penn made clear that the right of assembly under discussion in the House encompassed more than meeting to petition for redress of grievances: Penn's ordeal had nothing to do with petition; it was an act of religious worship. After Page spoke, the House defeated Sedgwick's motion to strike assembly from the draft amendment by a "considerable majority."[41] On September 24, 1789, the Senate approved the amendment in its final form, and the subsequent ratification of the Bill of Rights in 1791 enacted "the right of the people peaceably to assemble."[42]

The text handed down to us thus conveys a broad notion of assembly in two ways. First, it does not limit the purposes of assembly to the common good, thereby implicitly allowing assembly for purposes that might be antithetical to that good (although constraining assembly to peaceable means). Second, it does not limit assembly to the purposes of petitioning the government, which means that the constitutional expression of assembly may take many forms for many

39. In addition to its pronouncement on the right of assembly, the case became an important precedent for the independence of juries. Following their verdict of acquittal, the trial judge had imprisoned the jurors, who were later vindicated in habeas corpus proceedings.

40. BRANT, *supra* note 35, at 55-56 (emphasis omitted).

41. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 145 (quoting 1 ANNALS OF CONG. 761 (Joseph Gales ed., 1834)).

42. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." *Id.* at 136 (internal quotation marks omitted).

Temple American Inn of Court - April 2016 Program - Research and Materials

purposes. Neither of these broad interpretations of the right to assembly has been readily acknowledged in legal and political discourse. But the larger vision of assembly can be found in the practices of people who have gathered throughout American history. It is to these practices that I now turn.

III. THE FIRST TEST OF ASSEMBLY: THE DEMOCRATIC-REPUBLICAN SOCIETIES

The nascent freedom of assembly faced an early challenge when the first sustained political dissent in the new republic emerged out of the increasingly partisan divide between Federalists and Republicans. By the summer of 1792, Republican concern over the Federalist administration and its perceived support of the British in their conflict with the French had reached new levels of agitation. The Republican-leaning *National Gazette* began calling for the creation of voluntary "constitutional" and "political" societies to critique the Washington administration.[43]

The first society was organized in Philadelphia in March of 1793.[44] Over the next three years, dozens more emerged throughout most of the major cities in the United States.[45] These "Democratic-Republican" societies consisted largely of farmers and laborers wary of the aristocratic leanings of Hamilton and other Federalists, but they also included lawyers, doctors, publishers, and government employees.[46] The largest society—the Democratic Society of Pennsylvania—boasted over three hundred members.[47]

The societies "invariably proclaimed the right of citizens to assemble."[48] A 1794 resolution from a society in Washington, North Carolina, asserted: "It is the unalienable right of a free and

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43. Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1536 n.46 (2004). Mazzone also highlights the importance of the Democratic-Republican Societies to early interpretations of assembly and association. Mazzone, *supra* note 29, at 734-42.

44. Philip S. Foner, *The Democratic-Republican Societies: An Introduction*, *in* THE DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800: A DOCUMENTARY SOURCEBOOK OF CONSTITUTIONS, DECLARATIONS, ADDRESS, RESOLUTIONS AND TOASTS 6 (Philip S. Foner ed., 1976).

45. Although the exact number is disputed, there were probably around forty societies. Chesney, *supra* note 43, at 1537 n.52.

46. Foner, *supra* note 44, at 7; EUGENE PERRY LINK, DEMOCRATIC-REPUBLICAN SOCIETIES, 1790-1800, at 71-74 (Octagon Books 1965) (1942); Chesney, *supra* note 43, at 1538 n.54. The term "Democratic-Republican Societies" comes from historians. Chesney, *supra* note 43, at 1527 n.5.

47. Foner, *supra* note 44, at 7.

48. *Id.* at 11.

independent people to assemble together in a peaceable manner to discuss with firmness and freedom all subjects of public concern.'"[49] That same year, Boston's *Independent Chronicle* declared:

> Under a Constitution which expressly provides "*That the people have a right in an orderly and peaceable manner to assemble and consult upon the common good*;" there can be no necessity for an apology to the public for an Association of a number of citizens to promote and cherish the social virtues, the love of their country and a respect for its Laws and Constitutions.[50]

The societies usually met monthly, although more frequently during elections or times of political crisis.[51] According to Philip Foner, a large part of their activities consisted of "creating public discussions; composing, adopting, and issuing circulars, memorials, resolutions, and addresses to the people; and remonstrances to the President and the Congress—all expressing the feelings of the assembled groups on current political issues."[52] But in addition to meeting to discuss political issues, the societies also joined in the "extraordinarily diverse array of . . . feasts, festivals, and parades" that unfolded in the streets and public places of American cities.[53] Collectively, the activities of the societies "embodied an understanding of popular sovereignty and representation in which the role of the citizen was not limited to periodic voting, but instead entailed active and constant engagement in political life."[54] As Simon Newman's study of popular celebrations of this era observes, these kinds of gatherings were self-consciously political expressions:

> Festive culture required both participants and an audience, and by printing and reprinting accounts of July Fourth celebrations and the like newspapers contributed to a greatly enlarged sense of audience: by the

49. *Id.* (quoting NORTH-CAROLINA GAZETTE (New Bern), Apr. 19, 1794).

50. *Id.* at 25 (quoting INDEPENDENT CHRONICLE (Boston), Jan. 16, 1794). It is unclear what authority the paper is quoting—the italicized text is not from the Constitution.

51. *Id.* at 10. El-Haj notes that "the centrality of large gatherings of people in public spaces as part of the election festivities—to eat, drink, and parade and by implication to affirm their role as participants in the new nation." El-Haj, *supra* note 29, at 555.

52. Foner, *supra* note 44, at 10.

53. SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC 2 (1997). These rituals were "vital elements of political life" practiced by ordinary Americans in the early republic. *Id.* at 5. While Newman cautions that some participants may have been interested only in "the festive aspects of public occasions and holidays," he writes that it was "all but impossible for these people, whatever their original motives for taking part, to avoid making public political statements by and through their participation: both their presence and their participation involve some degree of politicization and an expression of political identity and power in a public setting." *Id.* at 8-9.

54. Chesney, *supra* note 43, at 1539.

Temple American Inn of Court - April 2016 Program - Research and Materials

> end of the 1790s those who participated in these events knew that their actions were quite likely going to be read about and interpreted by citizens far beyond the confines of their own community.[55]

Celebrations of the French Revolution took on an especially partisan character when members and supporters of the emerging Federalist party refused to participate in them.[56] Without the endorsement of the Federalist government, Republicans "were forced to foster alternative ways of validating celebrations that were often explicitly oppositional."[57] In doing so, they characterized their tributes as representing the unified views of the entire community rather than just political elites. Newman writes:

> The result of the Democratic Republican stratagem was that members of subordinate groups—including women, the poor, and black Americans, all of whom were excluded from or had strictly circumscribed roles in the white male contests over July Fourth and Washington's birthday celebrations—found a larger role for themselves in French Revolutionary celebrations than in any of the other rites and festivals of the early American republic.[58]

The relatively egalitarian gestures of these celebrations were not well received by Federalists, who berated the women who participated in them with sarcasm and derision and raised fears about black participation.[59]

Federalists became increasingly agitated with the growing popular appeal of the societies. The pages of the pro-Federalist *Gazette of the United States* repeatedly warned that the societies were fostering disruptive tendencies and instigating rebellion.[60] And while there was little basis in fact to suggest that the societies were behind the Whiskey Rebellion, the Federalist press was quick to highlight that several members of societies in western Pennsylvania had been actively involved in the insurrection.[61]

President Washington came to believe that the widespread public condemnation of the rebellion had created a political opportunity for

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55. NEWMAN, *supra* note 53, at 3.
56. *Id.* at 120.
57. *Id.*
58. *Id.* at 122. It is important not to overstate these egalitarian glimpses. The officers of the societies were "virtually without exception men of considerable substance." STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 458 (1993).
59. NEWMAN, *supra* note 53, at 128-30.
60. Chesney, *supra* note 43, at 1546.
61. *Id.* at 1557-58.

the "annihilation" of the societies.[62] He had been incensed by their organized opposition to the whiskey tax, writing in a personal letter that while "no one denies the right of the people to meet occasionally, to petition for, or to remonstrate against, any Act of the Legislature," nothing could be "more absurd, more arrogant, or more pernicious to the peace of Society, than for . . . a self created *permanent* body" that would pass judgment on such acts.[63] Washington took clear aim at the societies in his annual address to Congress on November 19, 1794, asserting that "associations of men" and "certain self-created societies" had fostered the violent rebellion.[64] Robert Chesney suggests that "[t]he speech was widely understood at the time not as ordinary political criticism, but instead as a denial of the legality of organized and sustained political dissent."[65] And Irving Brant observes that "[t]he damning epithet 'self-created' indorsed the current notion that ordinary people had no right to come together for political purposes."[66]

The Federalist-controlled Senate quickly censured the societies in response to Washington's address. The House, in contrast, began an extended debate about the wording of its response, and assigned James Madison, Theodore Sedgwick, and Thomas Scott to draft a reply. The Federalist Sedgwick, who years earlier had suggested that the freedom of assembly was so "self-evident" and "unalienable" that its inclusion in the constitutional amendments was unnecessary,[67] now argued in spite of the First Amendment that the societies' efforts to organize were effectively illegal.[68] After four days of debate, Madison contended that a House censure would be a "severe punishment" and would have dire consequences for the future of free expression.[69] The final language in the House response was substantially more muted than that issued by the Senate.

Following Washington's address and the congressional response, "[s]pirited debates concerning the legitimacy of the societies were

62. *Id.* at 1559 (quoting Letter from President George Washington to Governor Henry Lee (Aug. 26, 1794), *in* THE WRITINGS OF GEORGE WASHINGTON 475 (John C. Fitzpatrick ed., 1940)).

63. *Id.* at 1526 (quoting Letter from President George Washington to Burges Ball (Sept. 25, 1794), *in* THE WRITINGS OF GEORGE WASHINGTON, *supra* note 62, at 506.

64. 4 ANNALS OF CONG. 788 (1794) (statement of President George Washington).

65. Chesney, *supra* note 43, at 1561.

66. IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800, 417 (1950).

67. THE COMPLETE BILL OF RIGHTS, *supra* note 19, at 143-44.

68. Chesney, *supra* note 43, at 1562-63.

69. 4 ANNALS OF CONG. 934 (1794) (statement of Rep. Madison).

Temple American Inn of Court - April 2016 Program - Research and Materials

conducted in every community where a society existed."[70] Due in part to Washington's wide popularity, public opinion turned the corner against the societies. Many of them folded completely within a year of the President's speech, and by the end of the decade, all had been driven out of existence.[71] Yet despite their relatively short duration, the societies' influence was not inconsequential. According to Foner, "As a center of Republican agitation and propaganda . . . the societies did much to forge the sword that defeated Federalism and put Jefferson in the presidency."[72] They did so through public and political activities, physical and communal gatherings that displayed their enthusiasm and sought to sway public opinion. But as significant as these first assertions of assembly were the heavy handed political attacks against them. The vigorous resistance to the claims of the people assembled from those in power demonstrated the precarious nature of dissenting groups in the new republic.

IV. ASSEMBLY IN THE ANTEBELLUM ERA

In spite of the government's response to the Democratic-Republican societies, the idea that the people could assemble apart from the sanction of the state continued to take hold in early American political life. Benjamin Oliver's 1832 treatise, *The Rights of an American Citizen*, called the right of assembly "one of the strongest safeguards, against any usurpation or tyrannical abuse of power, so long as the people collectively have sufficient discernment to perceive what is best for the public interest, and *individually* have independence enough, to express an opinion in opposition to a popular but designing leader."[73] Writing in 1838, the state theorist Francis Lieber described "those many extra-constitutional, not unconstitutional, meetings, in which the citizens either unite their scattered means for the obtaining of some common end, social in general, or political in particular, or express their opinion in definite resolutions upon some important

70. Foner, *supra* note 44, at 33.

71. Chesney, *supra* note 43, at 1528.

72. Foner, *supra* note 44, at 40.

73. BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 187 (1832). Oliver limited his conception of assembly to discussions of "public measures." *Id.* at 195. His lukewarm description warned that assemblies "called on the most unexceptionable business" to serve "chiefly as occasions for haranguing the people, and exciting their passions by loud and florid declamation, delivered with the regulated and precise gesture of the academy, and with all the generous and glowing ardor of holiday patriotism" but are nevertheless "a great improvement on the affrays, tumults, riots and public disturbances, which in many countries invariably attend numerous and irregular assemblies of the people." *Id.*

point before the people."[74] These "public meetings" were undertaken for a variety of purposes:

> [T]hey are of great importance in order to direct public attention to subjects of magnitude, to test the opinion of the community, to inform persons at a distance, representatives or the administration, for instance, of the state of public opinion on certain measures, whether yet depending or adopted; to resolve upon and adopt petitions; to encourage individuals or bodies of men in arduous undertakings requiring the moral support of well-expressed public approbation; to effect a union with others, striving for the same ends; to disseminate knowledge by way of reports of committees; to form societies for charitable purposes or the melioration of laws or institutions; to sanction by the spontaneous expression of the opinion of the community measures not strictly agreeing with the letter of the law, but enforced by necessity; to call upon the services of individuals who otherwise would not feel warranted to appear before the public and invite its attention, or feel authorized to interfere with a subject not strictly lying within their proper sphere of action; to concert upon more or less extensive measures of public utility, and whatever else their object may be.[75]

A generation later, John Alexander Jameson referred to "wholly unofficial" gatherings and "spontaneous assemblages" that were protected by the right of peaceable assembly, a "common and most invaluable provision of our constitutions, State and Federal."[76] These assemblies were "at once the effects and the causes of social life and activity, doing for the state what the waves do for the sea: they prevent stagnation, the precursor of decay and death."[77] They were "public opinion in the making—public opinion fit to be the basis of political action, because sound and wise, and not a mere echo of party cries and platforms."[78]

The significance of free assembly to public opinion was not lost on policymakers in southern states, who routinely prohibited its exercise among slaves and free blacks. A 1792 Georgia law restricted

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74. 2 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS: DESIGNED CHIEFLY FOR THE USE OF COLLEGES AND STUDENTS AT LAW 295 (2d ed. 1881).

75. *Id.* at 296. Lieber refers to "public meetings" at 471.

76. JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 4-5, 104 (4th ed. 1887). Jameson also refers to "spontaneous conventions" and "spontaneous assemblages." *Id.* at 4.

77. *Id.*

78. *Id.*

slaves from assembling "on pretense of feasting."[79] In South Carolina, an 1800 law forbade "slaves, free negroes, mulattoes, and mestizoes" from assembling for "mental instruction or religious worship."[80] An 1804 Virginia statute made any meeting of slaves at night an unlawful assembly.[81] In 1831, the Virginia Legislature declared "[a]ll meetings of free Negroes or mulattoes at any school house, church, meeting house or other place for teaching them reading or writing, either in the day or the night" to be an unlawful assembly.[82]

The restrictions on assembly intensified following Nat Turner's 1831 rebellion in Southampton County, Virginia, which resulted in the deaths of fifty-seven white men, women, and children. Turner's insurrection sent Virginia and other southern states into a panic.[83] Virginia Governor John Floyd made the rebellion the central theme of his December 5, 1831, address to the Legislature.[84] Floyd thought that black preachers were behind a broader conspiracy for insurrection and had acquired "great ascendancy over the minds of their fellows."[85] He argued that these preachers had to be silenced "because, full of ignorance, they were incapable of inculcating anything but notions of the wildest superstition, thus preparing fit instruments in the hands of crafty agitators, to destroy the public tranquility."[86] In response, the Legislature strengthened Virginia's black code by imposing additional restrictions on assembly for religious worship.[87]

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79. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE (3d ed. 1853).

80. *Id.* (emphasis omitted).

81. JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROES FROM EARLIEST TIMES TO THE PRESENT 71 (1936).

82. *Id.* at 175-76 (citing VIRGINIA LAWS 1831, ch. XXXIX).

83. *See generally* John W. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. NEGRO HIST. 208 (1920).

84. *Id.* at 218, 223.

85. *Id.* at 218.

86. *Id.* at 219 (quoting The Journal of the House of Delegates 9, 10 (1831)).

87. *Id.* at 230; *see* GUILD, *supra* note 81, at 106-07 ("[N]o slave, free Negro or mulatto shall preach, or hold any meeting for religious purposes either day or night." (internal quotation marks omitted)). In 1848, chapter 120 of the Criminal Code decreed: "It is an unlawful assembly of slaves, free Negroes or mulattoes for the purpose of religious worship when such worship is conducted by a slave, free Negro, or mulatto, and every such assembly for the purpose of instruction in reading and writing, by whomsoever conducted, and every such assembly in the night time, under whatsoever pretext." *Id.* at 178-79. The law also stated that "[a]ny white person assembly with slaves or free Negroes for purpose of instructing them to read or write, or associating with them in any unlawful assembly, shall be confined in jail not exceeding six months and fined not exceeding $100.00." *Id.* at 179.

Concern over Turner's rebellion also spawned additional restrictions on the assembly of slaves and free blacks in Maryland, Tennessee, Georgia, North Carolina, and Alabama.[88] By 1835, "most southern states had outlawed the right of assembly and organization by free blacks, prohibited them from holding church services without a white clergyman present, required their adherence to slave curfews, and minimized their contact with slaves."[89] In 1836, Theodore Dwight Weld aptly referred to the oppressive restrictions on blacks as "'the right of peaceably assembling' violently wrested."[90]

James Smith's slave narrative highlights the importance of assembly for religious worship and the felt impact of its loss:

> The way in which we worshiped is almost indescribable. The singing was accompanied by a certain ecstasy of motion, clapping of hands, tossing of heads, which would continue without cessation about half an hour; one would lead off in a kind of recitative style, others joining in the chorus. The old house partook of the ecstasy; it rang with their jubilant shouts, and shook in all its joints. . . . When Nat. Turner's insurrection broke out, the colored people were forbidden to hold meetings among themselves.[91]

The collective restrictions on assembly did not simply silence political dissent in a narrow sense: they were an assault on an entire way of life, suppressing worship, education, and community among slave and free African Americans.[92]

While southern states increased their efforts to suppress the freedom of assembly for African Americans, abolitionists in the North expanded their reliance on the constitutional right to spread their message. And because many abolitionists were women, freedom of assembly was "indelibly linked with the woman's rights movement

88. Cromwell, *supra* note 83, at 231-33.

89. 1 C. PETER RIPLEY, THE BLACK ABOLITIONIST PAPERS 443 n.9 (1985).

90. Theodore Dwight Weld, *The Power of Congress over Slavery in the District of Columbia* (1838), *reprinted in* JACOBUS TENBROEK, EQUAL UNDER LAW 271 (Collier Books 1965) (1951). Jacobus tenBroek has described Weld's tract as "a restatement and synthesis of abolitionist constitutional theory as of that time." *Id.* at 243 (emphasis omitted); *see also* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965). Akhil Amar writes that the right of assembly for religious worship was "a core right that southern states had violated." AMAR, *supra* note 30, at 245.

91. NAT TURNER 74 (Eric Foner ed., 1971) (quoting JAMES L. SMITH, AUTOBIOGRAPHY OF JAMES L. SMITH 27-30 (1881)).

92. William Goodell's 1853 book, *The American Slave Code*, observed that "[r]eligious liberty is the precursor of civil and political liberty and enfranchisement." GOODELL, *supra* note 79, at 328.

Temple American Inn of Court - April 2016 Program - Research and Materials

from its genesis in the abolition movement."[93] Female abolitionists and suffragists organized their efforts around a particular form of assembly: the convention. The turn to the convention was not accidental. Between 1830 and 1860, official conventions accompanied revisions to constitutions in almost every state.[94] The focus of these official conventions on rights and freedoms provided a natural springboard for "spontaneous conventions" to criticize the blatant racial and gender inequalities perpetuated by the state constitutions.[95]

Women held antislavery conventions in New York in 1837 and in Philadelphia in 1838 and 1839.[96] Two years after the 1848 Woman's Rights Convention in Seneca Falls, New York, and less than a month before the official convention to revise the Ohio Constitution, a group of women assembled in Salem, Ohio, to call for equal rights to all people "'without distinction of sex or color.'"[97] As Nancy Isenberg describes:

> [T]he Salem forum stood apart from the American political tradition. Activists used the meeting to critique politics as usual. Women occupied the floor and debated resolutions and gave speeches, while the men sat quietly in the gallery. Through a poignant reversal of gender roles, the women engaged in constitutional deliberation, and the men were relegated to the sidelines of political action.[98]

In other words, the very form of the convention conveyed the suffragist message of equality and disruption of the existing order.

Women's conventions often met with harsh resistance. When Angelina and Sarah Grimké toured New England on a campaign for the American Anti Slavery Society in 1837, they were rebuked for lecturing before "promiscuous audiences."[99] The following year, Philadelphia newspapers helped inspire a riotous disruption of the Convention of American Women Against Slavery that ended in the burning of Pennsylvania Hall.[100] The participants of the 1850 Salem

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93. LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY, at xxiii (1997). Lumsden has suggested that "virtually the entire suffrage story can be told through the prism of the right of assembly." *Id.* at 144.

94. NANCY ISENBERG, SEX AND CITIZENSHIP IN ANTEBELLUM AMERICA 16 (1998).

95. *Id.*

96. THE ABOLITIONIST SISTERHOOD: WOMEN'S POLITICAL CULTURE IN ANTEBELLUM AMERICA, at ix (Jean Fagan Yellin & John C. VanHorne eds., 1994).

97. ISENBERG, *supra* note 94, at 15 (quoting *"To the Women of Ohio,"* ANTI-SLAVERY BUGLE, Mar. 30, 1850, at 114).

98. *Id.*

99. *Id.* at 46 (internal quotation marks omitted).

100. *Id.*

Temple American Inn of Court - April 2016 Program - Research and Materials

convention were denied the use of the local school and church.[101] An 1853 women's rights convention at the Broadway Tabernacle in New York degenerated into a shouting match when hecklers interrupted the speakers. Rather than criticize the disruptive crowd, the *New York Herald* sardonically characterized the gathering as the "Women's Wrong Convention" and quipped that "[t]he assemblage of rampant women which convened at the Tabernacle yesterday was an interesting phase in the comic history of the nineteenth century."[102] The following year, the *Sunday Times* published an editorial that used racial and sexual slurs to describe the national women's rights convention in Philadelphia.[103] Isenberg intimates that proponents of these attacks believed that "women's unchecked freedom of assembly mocked all the restraints of civilized society."[104]

A striking example of the importance of free assembly to politically unpopular causes in the antebellum area occurred in 1835, when the Boston Female Anti-Slavery Society invited William Lloyd Garrison and the British abolitionist George Thompson to speak at its annual meeting. Antiabolitionists reviled Thompson, calling him an "artful, cowardly fellow" who "always throws himself under the protection of the female portion of his audience when in danger."[105] The Society originally scheduled its meeting to take place in Congress Hall, but the lessee rescinded his offer after concluding that "not the rabble" but "the most influential and respectable men in the community" intended to "make trouble" if Thompson spoke.[106] The Society responded to the lessee's rescission with a letter to the editor of the *Boston Courier* asserting:

> This association does firmly and respectfully declare, that it is our right, and we will maintain it in Christian meekness, but with Christian constancy, to hold meetings, and to employ such lecturers as we judge best calculated to advance the holy cause of human rights; even though such lecturers should chance to be foreigners. It comes with an ill grace from those who boast an English ancestry, to object to our choice on this occasion: still less should the sons of the pilgrim fathers invoke the spirit of outrageous violence on the daughters of the noble female band

101. LUMSDEN, *supra* note 93, at xxvi.
102. *Id.* at xxvii (internal quotation marks omitted).
103. ISENBERG, *supra* note 94, at 46.
104. *Id.*
105. REPORT OF THE BOSTON FEMALE ANTI SLAVERY SOCIETY 12 (1836) (quoting BOSTON COM. GAZETTE).
106. *Id.* at 11.

Temple American Inn of Court - April 2016 Program - Research and Materials

> who shared their conflict with public opinion;—their struggle with difficulty and danger. The cause of freedom is the same in all ages.
>
> . . . We must meet together, to strengthen ourselves to discharge our duty as the mothers of the next generation—as the wives and sisters of this.[107]

The editor of the *Boston Courier* appended his own comments to the Society's letter:

> When before, in this city, or in any other, did a benevolent association of ladies, publicly invite an itinerant vagabond—a hired foreign incendiary—to insult their countrymen and fellow-citizens, and to kindle the flames of discord between different members of the Union? Would not our friends of the Female Anti Slavery Society do well to cast the beams out of their own eyes, before they waste their pathos upon a justly indignant public?[108]

The Society rescheduled its meeting for October 21, 1835, a week after its initial meeting date. The meeting would now take place at the offices of Garrison's *The Liberator*. Anti-abolitionists circulated a handbill that was duly printed in the *Boston Commercial Gazette*:

> That infamous foreign scoundrel THOMPSON, will hold forth *this afternoon*, at the Liberator Office, No. 46 Washington street. The present is a fair opportunity for the friends of the Union to *snake Thompson out*! It will be a contest between the abolitionists and the friends of the Union. A purse of $100 has been raised by a number of patriotic citizens to reward the individual who shall first lay violent hands on Thompson, so that he may be brought to the tar kettle before dark. Friends of the Union, be vigilant![109]

The Society went forward with its meeting in spite of the threat. A large crowd gathered and soon turned riotous. Unable to find Thompson, some of them called for Garrison's lynching. Garrison fled through a back entrance and barely escaped with his life.[110]

Reflecting on the harrowing experience in the November 7, 1835 edition of *The Liberator*, Garrison lambasted the instigators of the riot in an editorial entitled *Triumph of Mobocracy in Boston*:

> Yes, to accommodate their selfishness, they declared that the liberty of speech, and the right to assemble in an associated capacity peaceably together, should be unlawfully and forcibly taken away from an

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107. *Id.* at 24-25 (quoting BOSTON COURIER).

108. *Id.* at 27.

109. *Id.* at 27-28 (quoting BOSTON COM. GAZETTE (internal quotation marks omitted)).

110. *See generally* JOHN L. THOMAS, THE LIBERATOR: WILLIAM LLOYD GARRISON (1963).

Temple American Inn of Court - April 2016 Program - Research and Materials

> estimable portion of the community, by the officers of our city—the humble servants of the people! Benedict Arnold's treachery to the cause of liberty and his bleeding country was no worse than this.[111]

The Boston mob "became a cause célèbre among abolitionists who defended their right to free speech and assembly."[112] But fifteen years later, when Thompson returned to Boston to address the Massachusetts Anti-Slavery Society in Faneuil Hall, he was again driven away by a mob.[113] Frederick Douglass referred to the latter incident as the "mobocratic violence" that had "disgraced the city of Boston."[114] In an 1850 address delivered in Rochester, New York, Douglass decried "[t]hese violent demonstrations, these outrageous invasions of human rights" and argued:

> It is a significant fact, that while meetings for almost any purpose under heaven may be held unmolested in the city of Boston, that in the same city, a meeting cannot be peaceably held for the purpose of preaching the doctrine of the American Declaration of Independence, "that all men are created equal."[115]

As Akhil Amar has observed, the nineteenth century movements of the disenfranchised brought "a different lived experience" to the words of the First Amendment's assembly clause.[116] They were political movements, to be sure, but they embodied and symbolized even larger societal and cultural challenges. They met with slanderous media coverage, blatant racial and sexual slurs, and even outright violence, visceral reminders of the importance of protecting free assembly from those who would seek to deny it.

V. ASSEMBLY MISCONSTRUED

Courts and commentators lost sight of the lived history of assembly, due in part to a judicial misreading of the text of the First Amendment's assembly clause. The interpretive problem began in the 1876 decision, *United States v. Cruikshank*.[117] The primary legal

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111. WILLIAM LLOYD GARRISON, SELECTIONS FROM THE WRITINGS AND SPEECHES OF WILLIAM LLOYD GARRISON 377 (1852).

112. 3 THE BLACK ABOLITIONIST PAPERS 166 n.17 (C. Peter Ripley ed., 1991).

113. FREDERICK DOUGLASS SERIES ONE: SPEECHES, DEBATES AND INTERVIEWS, *in* 2 THE FREDERICK DOUGLASS PAPERS, 1847-54, at 268 n.14 (John W. Blassingame ed., 1982).

114. *Id.* at 267.

115. *Id.* at 268-67.

116. AMAR, *supra* note 30, at 246.

117. 92 U.S. 542 (1875). *Cruikshank* unfolded in the aftermath of the 1873 Colfax Massacre in Grant Parish, Louisiana. *See* CHARLES LANE, THE DAY FREEDOM DIED: THE

Temple American Inn of Court - April 2016 Program - Research and Materials

principle articulated in *Cruikshank* was that private citizens could not be prosecuted for denying the First Amendment's freedom of assembly to other citizens.[118] But *Cruikshank's* dictum proved more significant than its holding. Reiterating that the First Amendment established a narrow right enforceable only against the federal government, Chief Justice Waite wrote:

> The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States.[119]

In context, it is likely that Waite was merely listing petition as an *example* of the kind of assembly protected against infringement by the federal government. The Constitution also guaranteed assembly "for any thing else connected with the powers of the duties of the national government," which was as broadly as the right of assembly could be applied prior to its incorporation through the Fourteenth Amendment.[120] But Waite's reference to "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances" came close to the text of the First Amendment. Read in isolation from his qualifying language, the dictum could be erroneously construed as limiting assembly to the purpose of petitioning Congress for a redress of grievances.[121]

Ten years after *Cruikshank*, Justice William Woods made precisely this interpretive mistake in *Presser v. Illinois*.[122] Woods concluded that *Cruikshank* had announced that the First Amendment protected the right to assemble only if "the purpose of the assembly was to petition the government for a redress of grievances."[123] *Presser*

COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008) (chronicling the horrific events of the massacre).

118. The holding is consistent with a contemporary understanding of most of the provisions of the Bill of Rights.

119. *Cruikshank*, 92 U.S. at 552.

120. *Id.* at 542. It is, of course, possible to read the text so that the additional clause modifies "petitioning" rather than "assemble," as if Waite were referring to "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for any thing else connected with the powers or the duties of the national government" rather than "[t]he right of the people peaceably to assemble for any thing else connected with the powers or the duties of the national government." Either way, the sentence cannot be read as limiting assembly to petitioning Congress for a redress of grievances.

121. *Id.*

122. 116 U.S. 252 (1886).

123. *Id.* at 267.

is the only time that the Supreme Court has expressly limited the right of assembly in this way.[124] But Woods's interpretation has persisted in decades of scholarship.[125]

VI. ASSEMBLY IN THE PROGRESSIVE ERA

In spite of the Court's misconstrual of assembly, the people claiming the right to assemble insisted on a broader purpose and meaning. This thicker sense of assembly is most evident during the Progressive Era in three emerging political movements: a revitalized women's movement, a surge in political activity among African Americans, and an increasingly agitated labor movement. In the early decades of the twentieth century, these groups turned to the freedom of assembly as an important guarantee of their ability to dissent and advocate for change. In doing so, they insisted that their public gatherings were no less political than the institutional structures they criticized. They brought together people in physical forms that both displayed and symbolized a unified purpose. Their histories are

124. Justice Fuller made a passing reference to "the right of the people to assemble and petition the government for a redress of grievances" in *United States ex rel Turner v. Williams*, 194 U.S. 279, 292 (1904). The Court has since contradicted the view that assembly and petition comprise one right. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (referring to "the *rights* of the people peaceably to assemble and to petition for redress of grievances" (emphasis added)); *cf.* Chisom v. Roemer, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (The First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances.").

125. *See, e.g.*, Note, *Freedom of Association: Constitutional Right or Judicial Technique*, 46 VA. L. REV. 730, 736 (1960) ("[Cruikshank was the] first case to construe . . . freedom of assembly to mean the right to assemble *in order to* petition the government."); CHARLES E. RICE, FREEDOM OF ASSOCIATION 109 (1962) (citing *Cruikshank* for the view that the language in the First Amendment "constituted the right of petition as the primary right, and the right of assembly as the ancillary right, thereby guaranteeing a right to assemble in order to petition"); M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 152 (2d ed. 1981) ("It is important to note that the *Cruikshank* dictum *narrowed* the federal right from that of 'the right to peaceably assemble and petition for redress of grievances' to 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government.'" (emphasis added)); EDWARD S. CORWIN, HAROLD W. CHASE & CRAIG R. DUCAT, EDWIN S. CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 332 (14th ed. 1978) (1920) (citing *Cruikshank* for the view that "historically, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read: 'the right of the people peaceably to assemble' *in order to* 'petition the government'"). *Presser* has also been cited for the view that the freedom of assembly is limited to the purpose of petition. *See* Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J.L. & PUB. POL'Y 91 (1987) (citing *Presser* for the view that the freedom of assembly is "the exercise by groups of the right to petition for redress of grievances").

Temple American Inn of Court - April 2016 Program - Research and Materials

storied and complex, and even the most elementary treatment of them is beyond the scope of this Article. Yet we can nevertheless glean insights into the importance of assembly through snapshots of each.

A. *Suffragists*

The new women's movement began at the end of the nineteenth century, when "[h]undreds of thousands of women joined the thousands of clubs united under the auspices of the General Federation of Women's Clubs and the National Association of Colored Women."[126] According to Linda Lumsden, these clubs "served as training grounds for the activist, articulate reformers who steered the suffrage movement in the 1910s."[127] In 1908, various women's clubs began holding "open-air" campaigns to draw attention to their interests:

> The success of the open-air campaigns helped prompt the organization of the first American suffrage parades, a more visible and assertive form of assembly. The spectacle of women marching shoulder to shoulder achieved many ends. One was that because of the press coverage parades attracted, suffrage became a nationwide issue. Women also acquired organizational and executive skills in the course of orchestrating extravaganzas featuring tens of thousands of marchers, floats, and bands. Better yet, parades showcased women's skills in those areas and emphasized their numbers and determination. Finally, and most crucially, marching together imbued women with a sense of solidarity that lifted the movement to the status of a crusade for many participants.[128]

As is often the case, the growth of local assemblies corresponded to the growth of the larger institutional structures that operated on a national level.[129] The National American Woman Suffrage Association grew from 45,000 in 1907, to 100,000 in 1915, to almost two million in 1917.[130] But the core of assembly in the women's movement came through networking and personal connections at the local level. Women's assemblies were not confined to traditional deliberative meetings but included banner meetings, balls, swimming races, potato sack races, baby shows, sharing of meals, pageants, and teatimes.[131]

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126. LUMSDEN, *supra* note 93, at 3.

127. *Id.* at 3.

128. *Id.* at 146.

129. *See generally* THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2003) (discussing the relationship between grassroots movements and larger institutional structures).

130. LUMSDEN, *supra* note 93, at 3.

131. *Id.* at 17-19.

Just as the Democratic-Republican Societies had earlier refused to limit their gatherings to formal meetings, the women's movement capitalized on an expanded conception of public political life built upon an array of physical gatherings. These gatherings appealed not only to reason but also to the emotions of those before whom they assembled. As Harriot Stanton Blatch affirmed in 1912, men and women "are moved by seeing marching groups of people and by hearing music far more than by listening to the most careful argument."[132]

B. *Civil Rights Activism*

A second manifestation of the right of assembly during the Progressive Era involved political organizing among African Americans. These efforts repeatedly met with mob violence by white citizens largely unrestrained by state and federal authorities. The first decade of the twentieth century saw "savage race riots" around the country, including significant violence in Atlanta in 1906 and Springfield, Illinois, in 1908.[133] Stirred by observing first-hand the carnage resulting from these riots, Mary White Ovington joined Jane Addams, William Lloyd Garrison, John Dewey, W.E.B. Du Bois and other prominent Americans in calling for a conference to discuss "present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty."[134] The first National Negro Conference that ensued led to the formation of the National Association for the Advancement of Colored People (NAACP).[135]

Based partly on the proximity between labor unrest and racial violence, government officials linked the increasing political activity among African Americans to the influence of communism, a connection that foreshadowed even greater problems for civil liberties a generation later. Theodore Kornweibel reports that J. Edgar Hoover "fixated on the belief that racial militants were seeking to break down social barriers separating blacks from whites, and that they were

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132. *Quoted in* Jennifer L. Borda, *The Woman Suffrage Parades of 1910-1913: Possibilities and Limitations of an Early Feminist Rhetorical Strategy*, 66 W. J. COMM. 25 (2002) (internal quotation marks omitted).

133. John P. Roche, *Civil Liberty in the Age of Enterprise*, 31 U. CHI. L. REV. 103, 119 (1963).

134. LANGSTON HUGHES, FIGHT FOR FREEDOM: THE STORY OF THE NAACP 22 (1962) (quoting Oswald Garrison Villard's "Call for a Conference").

135. GILBERT JONAS, FREEDOM'S SWORD: THE NAACP AND THE STRUGGLE AGAINST RACISM IN AMERICA, 1909-1969, at 13-15 (2005).

Temple American Inn of Court - April 2016 Program - Research and Materials

inspired by communists or were the pawns of communists."[136] In a report to Congress, Attorney General A. Mitchell Palmer described "'a well-concerted movement among a certain class of Negro leaders of thought and action to constitute themselves a determined and persistent source of radical opposition to the Government' ... who proclaimed 'an outspoken advocacy of the Bolsheviki or Soviet doctrines.'"[137]

Armed with these suspicions of communist influences, agents from the Bureau of Investigation carefully monitored and constrained the efforts of African Americans to organize through blatant violations of the right of assembly. When A. Philip Randolph and Chandler Owen, the editors of the black publication *The Messenger*, arrived to address a large crowd in Cleveland on August 4, 1918, two Bureau agents confiscated their publications and took them into custody for interrogation.[138] Undercover informants and the first black agents of the Bureau infiltrated local gatherings of the NAACP and other African-American organizations.[139] An agent attending a Du Bois lecture in Toledo reported that the audience consisted of "mostly radicals."[140] In Boston, an agent reported that Du Bois' editorials were urging that supporters "incite riots and cause bloodshed."[141] The Bureau also kept tabs on whites associated with the NAACP, including Jane Addams and Anita Whitney.[142]

C. Organized Labor

The most frequent articulations of the right of assembly during the Progressive Era came from an increasingly vocal labor movement. Widespread labor unrest had emerged at the end of the nineteenth century with the increase in industrialization and immigration.[143] The "Great Strike" of 1877 had involved over 100,000 workers throughout the country and brought to a halt most of the nation's transportation system.[144] By the early 1880s, the Knights of Labor had organized

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136. THEODORE KORNWEIBEL, JR., "SEEING RED": FEDERAL CAMPAIGNS AGAINST BLACK MILITANCY, 1919-1925 xii (1998).

137. *Id.* at xv.

138. *Id.* at 77.

139. *Id.* at 62, 102.

140. *Id.* at 64-66.

141. *Id.* at 65 (internal quotation marks omitted). According to Kornweibel, this was an "outrageously exaggerated charge." *Id.*

142. *Id.*

143. Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56, 58 (1980).

144. PHILIP S. FONER, THE GREAT LABOR UPRISING OF 1877, at 8, 10, 27 (1977).

hundreds of thousands of workers.[145] The Haymarket Riot of 1886 and the Pullman Strike of 1894 sandwiched "almost a decade of labor unrest punctuated by episodes of spectacular violence" which included "the strike of the Homestead Steel workers against the Carnegie Corporation, the miners' strikes in the coal mining regions of the East and hardrock states in the West, a longshoremen's strike in New Orleans that united black and white workers, and numerous railroad strikes."[146] But these labor efforts remained largely unorganized, and direct appeals to the freedom of assembly by the labor movement did not begin in earnest until the formation of the Industrial Workers of the World (IWW) in 1905.

The IWW (nicknamed the "Wobblies") formed out of a conglomeration of labor interests dissatisfied with the reform efforts of the American Federation of Labor. Led by William Haywood, Daniel De Leon, and Eugene Debs, the Wobblies employed provocative words and actions. The preamble to their Constitution declared that "the working class and the employing class have nothing in common," and the IWW advocated this message in gatherings and demonstrations throughout the country.[147]

The freedom of assembly figured prominently in the IWW's appeals to constitutional protections during organized strikes in major industries including steel, textiles, rubber, and automobiles from 1909 to 1913. In 1910, Wobblies highlighted the denial of the right to assemble at a demonstration in Spokane, Washington.[148] When members of the IWW invoked the rights of speech and assembly during the Paterson Silk Strike of 1913, Paterson Mayor H.G. McBride responded that these protections extended to the striking silk workers but not to the Wobblies:

> I cannot stand for seeing Paterson flooded with persons who have no interest in Paterson, who can only give us a bad name, who can despoil

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145. Louis Adamic reported that by May of 1886, the Knights of Labor had surpassed one million members. LOUIS ADAMIC, DYNAMITE: THE STORY OF CLASS VIOLENCE IN AMERICA 86 (1931). Despite these numbers, the Knights of Labor were "anything but effectual" throughout their history. *Id.* at 58-59, 87.

146. Richard Schneirov, Shelton Stromquist & Nick Salvatore, *Introduction* to THE PULLMAN STRIKE AND THE CRISIS OF THE 1890S, at 4 (Shelton Stromquist & Nick Salvatore eds., 1999).

147. Fiske v. Kansas, 274 U.S. 380, 383 (1927) (quoting INDUSTRIAL WORKERS OF THE WORLD CONST. pmbl., *available at* http://www.iww.org/culture/official/preamble.shtml) (internal quotation marks omitted).

148. David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1076 (1994) (citing *A Call to Action*, INDUSTRIAL WORKER (Seattle), Feb. 26, 1910, at 2).

Temple American Inn of Court - April 2016 Program - Research and Materials

> in a few hours a good name we have been years in building up, and I propose to continue my policy of locking these outside agitators up on sight.[149]

True to his word, Mayor McBride arrested a number of IWW leaders, including Elizabeth Gurley Flynn.[150] Later that year, the IWW publication *Solidarity* protested that "America today has abandoned her heroic traditions of the Revolution and the War of 1812 and has turned to hoodlumism and a denial of free speech and assembly to a large and growing body of citizens."[151]

VII. THE INTER-WAR YEARS AND THE RISE OF THE FREEDOM OF ASSEMBLY

The growing fear of communism facilitated gross incursions on the freedom of assembly across progressive movements. As Irwin Marcus has observed: "Unrest associated with the assertiveness of women, African Americans, and immigrant workers could be ascribed to the influence of the Communists and inoculating Americans with a vaccine of 100 percent Americanism was offered as a cure for national problems."[152] The rising Americanism was on the verge of claiming the freedom of assembly as one of its casualties. On the eve of America's entry into the First World War, President Wilson predicted to *New York World* editor Frank Cobb that "the Constitution would not survive" the war and "free speech and the right of assembly would go."[153] Seven months later, Wilson's words seemed ominously prescient when the Bolshevik Revolution in Russia triggered the First Red Scare. Over the next few years, the freedom of assembly was constrained by shortsighted legislation like the Espionage Act of 1917 (and its 1918 amendments) and the Immigration Act of 1918, and the Justice Department's infamous Palmer Raids in 1920, which "effectively torpedoed most notions of freedom of expression and freedom of

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149. *Paterson Checks Weavers' Strike*, N.Y. TIMES, Feb. 27, 1927, at 22.

150. *Id.*

151. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 84-85 (1997) (quoting *Heroic Contrasts*, SOLIDARITY, July 26, 1913, at 2 (internal quotation marks omitted)).

152. Irwin M. Marcus, *The Johnstown Steel Strike of 1919: The Struggle for Unionism and Civil Liberties*, 63 PENN. HIST. 96, 100 (1996). A variant of these views resurfaced during the "liberal consensus" of mid-twentieth century pluralism, just as the Court first recognized a constitutional right of association. *See* Inazu, *supra* note 18.

153. JOHN L. HEATON, COBB OF "THE WORLD:" A LEADER IN LIBERALISM 269-70 (1924) (internal quotation marks omitted). There has been some debate as to when or even whether the conversation occurred. *See* Jerold S. Auerbach, *Woodrow Wilson's "Prediction" to Frank Cobb: Words Historians Should Doubt Ever Got Spoken*, 54 J. AM. HIST. 608 (1967); Arthur S. Link, *That Cobb Interview*, 72 J. AM. HIST. 7 (1985).

Temple American Inn of Court - April 2016 Program - Research and Materials

association that survived the war fought to make the world safe for democracy."[154]

A. A New Conception of the First Amendment

Despite the Red Scare, and probably because of some of the flagrant abuses of civil liberties that occurred during it, libertarian interpretations of the First Amendment that had surfaced prior to the First World War began to take shape shortly into the inter-war period.[155] Meanwhile, Samuel Gompers repeatedly invoked the freedoms of speech and assembly in his battle against labor injunctions.[156]

The growing importance of assembly in political and legal discourse during the 1920s is strikingly evident in Justice Brandeis's famous opinion in *Whitney v. California*.[157] Anita Whitney's appeal stemmed from her conviction under California's Criminal Syndicalism Act for having served as a delegate to the 1919 organizing convention

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154. AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 57 (1995).

155. Harvard law professor Zechariah Chafee, Jr., led the doctrinal synthesis with his 1919 article "Freedom of Speech in War Time" and his book *Freedom of Speech* the following year. RABBAN, *supra* note 151, at 4-5 (citing Zechariah Chafee, *Freedom of Speech in War Time*, DUNSTER HOUSE PAPERS, July 1917, at 1; ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920)); *see also* John Wertheimer, *Freedom of Speech: Zechariah Chafee and Free-Speech History*, 22 REVS. AM. HIST. 365, 374 (1994). Although Chafee's scholarship was shaky, it "provided intellectual cover for Justices Holmes and Brandeis when they began to dissent in First Amendment cases in the fall of 1919." RABBAN, *supra* note 151, at 7. On the problems with Chafee's scholarship, see Wertheimer, *supra* at 374-75 (noting that Chafee's "record as a scholar rightly gives us pause"). Wertheimer also notes that Chafee's advocacy was not without personal risk: "A group of conservative Harvard Law School alumni, with behind-the-scenes help from J. Edgar Hoover and the Justice Department, launched a campaign to have Chafee fired from Harvard on the grounds that his free-speech writings rendered him unfit to continue teaching there." *Id.* at 368.

156. *Gompers Fights Sedition Bill*, N.Y. TIMES, Jan. 19, 1920, at 15 (Sterling-Graham sedition bill "can be used to kill free speech and free assembly"); *Labor Will Fight for Every Right, Gompers Asserts*, N.Y. TIMES, June 13, 1922, at 1 (arguing against the denial of "freedom of expression, freedom of press, and the freedom of assembly"); *Gompers Assails Harding on Unions*, N.Y. TIMES, July 1, 1923, at 3 ("[T]he Daugherty injunction . . . sought to deny the constitutional rights of freedom of speech, freedom of assembly, and freedom of the press to railroad workers."). In 1951, President Truman, speaking at the dedication of a memorial to Gompers, said, "[A]bove all, he fought the labor injunction because it was used to violate the constitutional rights to free speech and freedom of assembly." President Harry S. Truman, Addresss at the Dedication of a Square in Washington to the Memory of Samuel Gompers (Oct. 27, 1951) (transcript available at the American Presidency Project, http://www.presidency.ucsb.edu).

157. 274 U.S. 357 (1927) (Brandeis, J., concurring). The decision was formally overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). Brandeis concurred rather than dissented in *Whitney* on procedural grounds, but his opinion strongly rebuked of the majority's reasoning. *See* PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 306 (1984).

Temple American Inn of Court - April 2016 Program - Research and Materials

of the Communist Labor Party of California.[158] The Court rejected her argument that the California law violated her rights under the First Amendment, expressing particular concern that her actions had been undertaken in concert with others, which "involve[d] even greater danger to the public peace and security than the isolated utterances and acts of individuals."[159]

Chafing at this rationale, Brandeis penned some of the most well-known words in American jurisprudence:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[160]

The freedoms of "speech and assembly" lie at the heart of Brandeis's argument—the phrase appears eleven times in his brief concurrence. The two freedoms had been linked only once before; after *Whitney*, the nexus occurs in over one hundred of the Court's opinions.[161] The connection between assembly and speech highlights that a group expresses itself not only through spoken words but also through its very act of gathering. As the Court itself recognized, group expression was far more worrisome than "the isolated utterances and acts of individuals."[162]

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158. Vincent Blasi has written a fascinating account of these circumstances. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

159. 274 U.S. at 372.

160. *Id.* at 375 (Brandeis, J., concurring). Legal scholars have written volumes about these words and those that followed, and Brandeis's concurrence has been praised for its eloquent defense of free speech. Vincent Blasi has called the opinion "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment." Blasi, *supra* note 158, at 668. And Justice Brennan, writing for the Court in the landmark case *New York Times v. Sullivan*, deemed Brandeis's *Whitney* concurrence the "classic formulation" of the fundamental principle underlying free speech. 376 U.S. 254, 270 (1964); *cf.* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 194 (2002); Robert M. Cover, *The Left, the Right, and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 371 (1981) (asserting that Brandeis's concurrence is a "classic statement of free speech").

161. *E.g.*, New York *ex rel.* Doyle v. Atwell, 261 U.S. 590, 591 (1923) (noting that petitioners alleged a deprivation of the "rights of freedom of speech and assembly").

162. 274 U.S. at 372.

Temple American Inn of Court - April 2016 Program - Research and Materials

B. New Challenges to Labor

In the early 1920s, the conservative wing of the Supreme Court issued a series of antilabor decisions aimed at stopping picketing and union organizing.[163] But by 1933, workers had successfully obtained legislative relief through the National Industrial Recovery Act, which provided the first guarantee to workers of the right to organize in associations. Two years later, the Wagner Act sought to strengthen the associational rights of workers even further.

The relationship between the right of assembly and the interests of labor took on a more public dimension on April 10, 1936, when Congress held hearings on legislation to authorize the Committee on Education and Labor to investigate "violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively."[164] National Labor Relations Board chairman J. Warren Madden testified that "[t]he right of workmen to organize themselves into unions has become an important civil liberty" and that workers could not organize without exercising the rights of free speech and assembly.[165] Following the hearings and subsequent approval of the Senate measure, Committee Chair Hugo Black named Senator Robert La Follette, Jr. of Wisconsin to chair a subcommittee to investigate these concerns. The La Follette Committee embarked with "the zeal of missionaries" in an exhaustive investigation that spanned five years.[166] When it concluded, La Follette reported to Congress that "[t]he most spectacular violations of civil liberty . . . [have] their roots in economic conflicts of interest" and emphasized that "[a]ssociation and self-organization are simply the result of the exercise of the fundamental rights of free speech and assembly."[167]

Rhetoric across the political spectrum during the mid-1930s echoed the importance of assembly in the labor context. In a 1935 speech on Constitution Day, former President Hebert Hoover listed assembly among the core freedoms that guarded liberty.[168] That same year, President Roosevelt's Interior Secretary Harold Ickes referred to the freedoms of speech, press, and assembly as "the three musketeers

163. Cover, *supra* note 160, at 354.

164. Jerold S. Auerbach, *The La Follette Committee: Labor and Civil Liberties in the New Deal*, 51 J. AM. HIST. 435, 440 (1964) (citing 74 CONG. REC. 4151 (1936) (internal quotation marks omitted)).

165. *Id.* at 440 n.30 (internal quotation marks omitted).

166. *Id.* at 442.

167. *Id.* at 442 n.40 (quoting 77 CONG. REC. 3311 (1942)) (internal quotation marks omitted).

168. *Hoover's Warning of the Perils to Liberty*, N.Y. TIMES, Sept. 18, 1935, at 10.

Temple American Inn of Court - April 2016 Program - Research and Materials

of our constitutional forces" during an address before an annual luncheon of the Associated Press.[169] Ickes asserted: "We might give up all the rest of our Constitution, if occasion required it . . . [a]nd yet have sure anchorage for the mooring of our good ship America, if these rights remained to us unimpaired."[170]

C. Assembly Made Applicable to the States

In 1937, the Supreme Court made the freedom of assembly applicable to state as well as federal action in *De Jonge v. Oregon*.[171] Chief Justice Hughes asserted that the right of assembly "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause."[172] In words strikingly similar to Brandeis's *Whitney* concurrence, he emphasized:

> [The need] to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[173]

Hughes underscored the significance of applying the right of assembly to state action by observing that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[174]

D. Hague v. Committee for Industrial Organization

At the end of 1938, the American Bar Association's Committee on the Bill of Rights advocated the importance of the right of assembly in an amicus brief to the United States Court of Appeals for the Third Circuit in *Hague v. Committee for Industrial Organization*.[175] The appeal addressed Mayor Frank Hague's repeated denials of a permit to

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169. *Long and Coughlin Classed by Ickes as 'Contemptible,'* N.Y. TIMES, Apr. 23, 1935, at 1 (internal quotation marks omitted).

170. *Id.* (internal quotation marks omitted).

171. 299 U.S. 353 (1937).

172. *Id.* at 364.

173. *Id.* at 365.

174. *Id.* at 364. Brandeis had called the right of assembly fundamental in his *Whitney* concurrence ten years earlier. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

175. Hague v. Comm. Indus. Org., 101 F.2d 774 (3d Cir. 1939).

Temple American Inn of Court - April 2016 Program - Research and Materials

the Committee for Industrial Organization to hold a public meeting in Jersey City. The ABA's lengthy brief emphasized that "the integrity of the right 'peaceably to assemble' is an essential element of the American democratic system" involving "the citizen's right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social"; that "assemblies face to face perform a function of vital significance in the American system"; and that public officials had the "duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so."[176]

The amicus brief garnered an unusual amount of attention. The American Bar Association wrote:

> The filing of the brief was widely hailed as a great step in the defense of liberty and the American traditions of free speech and free assembly as basic institutions of democratic government. The clear and earnest argument of the brief was attested as an admirable exposition of the fundamental American faith. Hardly any action in the name of the American Bar Association in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief.[177]

The *New York Times* reviewed the brief with similarly effusive language:

> This brief ought to stand as a landmark in American legal history. It ought to be multiplied and spread about in all communities in which private citizens, private organizations or public officials dare threaten or suppress the basic guarantees of American liberty. It ought to be on file in every police station. It ought to be in every public library, in every school library, and certainly in the home of every voter in Jersey City.[178]

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176. Brief for the Committee on the Bill of Rights, of the American Bar Association as Amicus Curiae, Hague v. Comm. Indus. Org., 307 U.S. 496 (1939) (No. 651) [hereinafter Brief for the Committee].

177. *Association's Committee Intervenes To Defend Right of Public Assembly*, 25 A.B.A. J. 7 (1939).

178. Editorial, *A Brief for Free Speech*, N.Y. TIMES, Dec. 23, 1938, at 18. The *Times* later wrote that the brief "was received all over the country with approval as a lucid exposition and defense of the fundamental guarantee of American liberty." Editorial, *Bar and Civil Liberties*, N.Y. TIMES, July 17, 1939, at 10. Zechariah Chafee had a substantial role in drafting the brief. When he published *Free Speech in the United States* two years later, his thirty-page discussion of the freedom of assembly consisted almost entirely of verbatim sections of the brief. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 409-38 (1941).

Temple American Inn of Court - April 2016 Program - Research and Materials

The Third Circuit ruled in favor of the C.I.O., but Hague appealed to the Supreme Court, setting the stage for an even broader judicial endorsement of the freedom of assembly.[179]

E. The Four Freedoms

In 1939, assembly joined religion, speech, and press as one of the "Four Freedoms" celebrated in the New York World's Fair. Fair organizers commissioned Leo Friedlander to design a group of statues commemorating each of the four freedoms.[180] Grover Whalen, the president of the fair corporation, credited *New York Times* president and publisher Arthur Sulzberger with the idea:

> Mr. Sulzberger pointed out that if we portrayed four of the constitutional guarantees of liberty in the "freedom group" we could teach the millions of visitors to the fair a lesson in history with a moral. The lesson is that freedom of press, freedom of religion, freedom of assembly and freedom of speech, firmly fixed in the cornerstone of our government since the days of Washington, have enabled us to build the most successful democracy in the world. And the moral is that as long as these freedoms remain a part of our constitutional set-up we can face the problems of tomorrow, a nation of people calm, united and unafraid.[181]

The buildup to the opening of the Fair began with New Year's Day speeches celebrating each of the four freedoms that were broadcast internationally from Radio City Music Hall. Dorothy Thompson, the "First Lady of American Journalism," delivered the speech on the freedom of assembly.[182] Calling assembly "the most essential right of the four," Thompson elaborated:

> The right to meet together for one purpose or another is actually the guaranty of the three other rights. Because what good is free speech if it impossible to assemble people to listen to it? How are you going to have discussion at all unless you can hire a hall? How are you going to

179. The Committee on the Bill of Rights had submitted a revised version of its amicus brief when the case had reached the Supreme Court. Brief for the Committee, *supra* note 176.

180. *Mile-Long Mall Feature of Fair*, N.Y. TIMES, Dec. 12, 1937, at 57.

181. *Id.* (internal quotation marks omitted).

182. *Fair To Broadcast to World Today*, N.Y. TIMES, Jan. 1, 1939, at 13. Thompson was at the time a news commentator for the New York Herald Tribune. She was considered by some to be "the most influential woman in the United States after Eleanor Roosevelt," and her syndicated column, "On the Record," reached an estimated eight to ten million readers three times a week. SUSAN WARE, LETTER TO THE WORLD: SEVEN WOMEN WHO SHAPED THE AMERICAN CENTURY 45 (1998). Thompson's portrait made the cover of *Time* on June 13, 1939. *Id.* at 47.

Temple American Inn of Court - April 2016 Program - Research and Materials

> practice your religion, unless you can meet with a community of people who feel the same way? How can you even get out a newspaper, or any publication, without assembling some people to do it?[183]

Three months later, Columbia University president Nicholas Butler penned a *New York Times* editorial on "The Four Freedoms."[184] With the European conflict in mind, Butler warned of the "millions upon millions of human beings living under governments which not only do not accept the Four Freedoms, but frankly and openly deny them all."[185] The following month, the *Times* ran an editorial by Henry Steele Commager. Commager decried the assaults on the "four fundamental freedoms" and concluded his essay by asserting: "The careful safeguards which our forefathers set up around freedom of religion, speech, press and assembly prove that these freedoms were thought to be basic to the effective functioning of democratic and republican government. The truth of that conviction was never more apparent than it is now."[186]

On April 30, 1939, the opening day of the World's Fair, New York Mayor Fiorello la Guardia called the site of Friedlander's four statues the "heart of the fair."[187] Before an audience of fifteen to twenty thousand, la Guardia proclaimed that the right of assembly "must be given to any group who desire to meet and there discuss any problem that they desire."[188]

Barely a month after the opening of the World's Fair, the Supreme Court issued its *Hague* decision, noting that streets and parks were publicly available "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[189] The *New York Times'* coverage of *Hague* pronounced: "With Right of Assembly Reasserted, All 'Four Freedoms' of Constitution Are Well Established."[190]

Hague's words on the heels of the tribute to the four freedoms at the World's Fair seemed to anchor the freedom of assembly in political

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183. Dorothy Thompson, Democracy 1 (Jan. 1, 1939) (transcript available in the Syracuse University Library, Dorothy Thompson Papers, ser. VII, box 6). Thompson's speech pitted the free assembly of democracy against the abuses of fascism.

184. Nicholas Murray Butler, *The Four Freedoms*, N.Y. TIMES, Mar. 5, 1939, at AS5.

185. *Id.* Pictures of Friedlander's statues accompanied the editorial.

186. Henry Steele Commager, *"To Secure the Blessings of Liberty,"* N.Y. TIMES, Apr. 9, 1939, at SM3.

187. *Mayor Dedicates Plaza of Freedom*, N.Y. TIMES, May 1, 1939, at 4.

188. *Id.*

189. 307 U.S. 496, 515 (1939).

190. Dean Dinwoodey, *A Fundamental Liberty Upheld in Hague Case*, N.Y. TIMES, June 11, 1939, at E7.

discourse. Indeed, a poll by Elmo Roper's organization at the end of 1940 reported that 89.9% of respondents thought their personal liberties would be decreased by restrictions on freedom of assembly (compared to 81.5% who expressed concern over restrictions on "freedom of speech by press and radio").[191] Americans appeared resolute in their belief of the indispensability of free assembly to democracy, and the importance of assembly seemed secure.

Politics and history decided otherwise. On January 6, 1941, President Roosevelt proclaimed "four essential human freedoms" in his State of the Union Address.[192] Rather than refer to the freedoms of speech, religion, assembly and press that had formed the centerpiece of the World's Fair, Roosevelt's "Four Freedoms Speech" called upon freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. The new formulation—absent assembly—quickly overtook the old. Seven months later, Roosevelt and Winston Churchill incorporated the new four freedoms into the Atlantic Charter. In 1943, Norman Rockwell created four paintings inspired by Roosevelt's Four Freedoms. The *Saturday Evening Post* printed the paintings in successive editions, accompanied by matching essays expounding upon each of the freedoms. And like the earlier four freedoms, the new ones were also set in stone. Roosevelt commissioned Walter Russell to create the Four Freedoms Monument, which was dedicated at Madison Square Garden. Today, the Franklin and Eleanor Roosevelt Institute honors well-known individuals with the "Four Freedoms Award."[193]

VIII. THE RHETORIC OF ASSEMBLY

Despite its absence from Roosevelt's formulation of the Four Freedoms, the freedom of assembly did not disappear from political and legal discourse overnight. In 1941, an illustrious group called "The Free Company" penned a series of radio dramas about the First Amendment. Attorney General Robert Jackson and Solicitor General Francis Biddle helped shape the group, which included Robert Sherwood (then Roosevelt's speechwriter), William Saroyan, Maxwell Anderson, Ernest Hemingway, and James Boyd.[194] The group operated

191. Editorial, *Public Mind in Good Health*, WALL ST. J., Jan. 7, 1941, at 4.

192. President Franklin Delano Roosevelt, Annual Message to Congress, The "Four Freedoms" Speech (Jan. 6, 1941).

193. *See* The Franklin D. Roosevelt Four Freedoms Awards Home Page, http://www.FourFreedoms.nl (last visited Nov. 3, 2009).

194. *Radio Broadcast: Of Thee They Sing*, TIME, Feb. 24, 1941.

under what was "virtually a Government charter" to spread a message of democracy.[195]

Orson Welles wrote The Free Company's play on the freedom of assembly. "His Honor, the Mayor" portrayed the dilemma of Bill Knaggs, a fictional mayor confronted with an impending rally of a group called the "White Crusaders." After deciding to allow the rally, the mayor addressed the crowd that had gathered in protest:

> [D]on't start forbiddin' anybody the right to assemble. Democracy's a rare precious thing and once you start that—you've finished democracy! Democracy guarantees freedom of assembly unconditionally to the worst lice that want it.... All of you've read the history books. You know what the right to assemble and worship God meant to most of those folks that first came here, the ones that couldn't pray the way they wanted to in the old country?[196]

The play concluded with music followed by the voice of the narrator:

> Like his honor, the Mayor, then, let us stand fast by the right of lawful assembly. Let us say with that great fighter for freedom, Voltaire, "I disapprove of what you say but I will defend to the death your right to say it." Thus one of our ancient, hard-won liberties will be made secure and we, differing though we may at times among ourselves, will stand together on a principle to make sure that government of the people, by the people, for the people shall not perish from the earth.[197]

Not everyone shared these sentiments. Following the broadcast of "His Honor, The Mayor," the Hearst newspaper chain and the American Legion attacked it as "un-American and tending to encourage communism and other subversive groups" and "cleverly designed to poison the minds of young Americans."[198] The next week, J. Edgar Hoover drafted a Justice Department memorandum "concerning the alleged Communist activities and connections of Orson Welles."[199]

Later in 1941, festivities around the country marked the sesquicentennial anniversary of the Bill of Rights. In Washington D.C.'s Post Square, organizers of a celebration displayed an enormous

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195. *Radio Broadcast: Freely Criticized Company*, TIME, Apr. 28, 1941.

196. Orson Welles, *His Honor, The Mayor*, *in* THE FREE COMPANY PRESENTS: A COLLECTION OF PLAYS ABOUT THE MEANING OF AMERICA 143 (1941).

197. *Id.*

198. CHARLES HIGHAM, ORSON WELLES: THE RISE AND FALL OF AN AMERICAN GENIUS 175 (1985); *Freely Criticized Company*, *supra* note 195.

199. Memorandum from J. Edgar Hoover, Director, Fed. Bureau of Investigation, to Matthew F. McGuire, Assistant to the Attorney Gen. (Apr. 24, 1941), *available at* http://www.wellesnet.com/?p=186.

Temple American Inn of Court - April 2016 Program - Research and Materials

copy of the Bill of Rights next to the four phrases: "Freedom of Speech, Freedom of Assembly, Freedom of Religion, Freedom of the Press."[200] The Sesquicentennial Committee, with President Roosevelt as its chair, issued a proclamation describing the original four freedoms as "the pillars which sustain the temple of liberty under law."[201] Days before the attack on Pearl Harbor, Roosevelt declared that December 15, 1941, would be "Bill of Rights Day." Roosevelt heralded the "immeasurable privileges" of the First Amendment and signed the proclamation for Bill of Rights Day against the backdrop of a mural listing the original four freedoms.[202] The photo op was not without irony; less than three months later he signed Executive Order 9066, authorizing the internment of Japanese Americans.

Although the Supreme Court endorsed the President's restrictions on the civil liberties of Japanese Americans in *Hirabayashi v. United States*[203] and *Korematsu v. United States*,[204] it elsewhere affirmed a core commitment to the Bill of Rights generally and the freedom of assembly in particular. In 1943, Justice Jackson wrote in *West Virginia v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[205]

Two years later, the Court emphasized in *Thomas v. Collins* that restrictions of assembly could only be justified under the "clear and present danger" standard that the Court had adopted in its free speech cases.[206] By a 5-4 majority, the Court overturned the contempt conviction of a labor spokesman who had given a speech in Houston despite a restraining order prohibiting him from doing so. Because of the "*preferred place* given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," the Court

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200. Scott Hart, *America Celebrates 150th Anniversary of Bill of Rights*, WASH. POST, Dec. 15, 1941, at 19.

201. Henry Steele Commager, *Charter of Our Way of Life*, N.Y. TIMES, Dec. 14, 1941, at SM6.

202. *Day Will Honor Bill of Rights*, N.Y. TIMES, Nov. 29, 1941, at 19.

203. 320 U.S. 81 (1943).

204. 323 U.S. 214 (1944).

205. 319 U.S. 624, 638 (1943).

206. 323 U.S. 516, 527 (1945).

Temple American Inn of Court - April 2016 Program - Research and Materials

concluded that only "the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[207] Justice Rutledge's opinion noted that the right of assembly guarded "not solely religious or political" causes but also "secular causes," great and small.[208] And Rutledge recognized the expressive nature of assembly by noting that the rights of the speaker and the audience were "necessarily correlative."[209] As Aviam Soifer has suggested, Rutledge's "dynamic, relational language" emphasized that the right of assembly was "broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements."[210]

A further endorsement of assembly came by way of the executive branch in the 1947 Report of the President's Committee on Civil Rights.[211] The Report indicated that the "great freedoms" of religion, speech, press, and assembly were "relatively secure" and that citizens were "normally free ... to assemble for unlimited public discussions."[212] Noting growing concerns about "Communists and Fascists," the Committee asserted that it "unqualifiedly opposes any attempt to impose special limitations on the rights of these people to speak and assemble" and cautioned that while "the government has the obligation to have in its employ only citizens of unquestioned loyalty," our "whole civil liberties history provides us with a clear warning against the possible misuse of loyalty checks to inhibit freedom of opinion and expression."[213]

IX. THE RISE OF ASSOCIATION AND THE END OF ASSEMBLY

With an irony that rivaled President Roosevelt's Bill of Rights Day proclamation, President Truman established the Federal Employee Loyalty Program the same year that his committee issued its civil

207. *Id.* at 530-31 (emphasis added).

208. *Id.* The "preferred place" language originated in Justice Douglas's opinion for the Court in *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

209. 323 U.S. at 534.

210. SOIFER, *supra* note 154, at 77-78. Soifer argues that the principles articulated in *Thomas* "starkly contrast with the instrumental focus of more recent freedom of association decisions." *Id.* at 78.

211. THE PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947). President Truman established the Committee with Executive Order 9808. Exec. Order No. 9808, 11 Fed. Reg. 14,153 (Dec. 5, 1946).

212. THE PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 211, at 47.

213. *Id.* at 48, 50 (emphasis omitted).

rights report. The loyalty program empowered the federal government to deny employment to "disloyal" individuals.[214] The government's loyalty determination could consider "activities and associations" that included "[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive."[215] Attorney General Tom Clark quickly generated a list of 123 "subversive" organizations.[216] Within a year, the FBI had examined over two million federal employees and conducted over 6300 full investigations.[217]

The restrictions imposed by the loyalty program prompted some of the earliest articulations of a previously unseen defense of group autonomy: a constitutional right of association.[218] Constitutional scholar Thomas Emerson attacked the loyalty program in a 1947 article in the *Yale Law Journal*, contending that the investigations infringed upon the "concept of the right to freedom [of] political expression" emerged from "the specific guarantees of freedom of speech, freedom of the press, the right of assembly and the right to petition the government."[219] This right of political expression was "basic, in the deepest sense, for it underlies the whole theory of democracy."[220] Emerson cited a recent speech by Charles Wyzanski, Jr., who had argued that the "peculiarly complicated" freedom of association "cuts underneath the visible law to the core of our political science and our philosophy."[221]

These nascent references to a right of association emerged just as the Supreme Court entered the fray of the Communist Scare with its 1950 decision, *American Communications Ass'n v. Douds*.[222] *Douds* involved a challenge to the Taft-Hartley amendments to the National Labor Relations Act (NLRA), which required that union officers submit affidavits disavowing membership in or support of the

214. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 176 (1990) (quoting Exec. Order No. 9835, 3 C.F.R. 627 (1947).

215. Exec. Order No. 9835, *supra* note 214.

216. Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 32 (1948).

217. *Id.*

218. What follows in this Part is a much abbreviated version of my account of the emergence of the right of association in Inazu, *supra* note 18.

219. *Id.* at 83.

220. *Id.*

221. Charles E. Wyzanski, Jr., *The Open Window and the Open Door: An Inquiry into Freedom of Association*, 35 CAL. L. REV. 336, 337-38 (1947).

222. 339 U.S. 382 (1950).

Communist Party before a union could receive the NLRA's protections.[223] Although recognizing "[t]he high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end," Chief Justice Vinson concluded that the Act reflected "legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct."[224] The denial of associational protections continued in *Dennis v. United States*[225] and *Adler v. Board of Education*[226] before the Court finally imposed some limits on anticommunist legislation in *Wieman v. Updegraff*.[227]

Despite hints of greater associational protections in *Wieman*—Justice Frankfurter's concurrence described "a right of association peculiarly characteristic of our people"[228]—the communist cases proved inadequate for elaborating upon the right of association toward which Emerson and others had gestured. Instead, the first explicit recognition of a constitutional right of association came in the civil rights context, with the Supreme Court's 1958 decision in *NAACP v. Alabama ex rel. Patterson*.[229] By this time, the distinction between assembly and association was sufficiently muddled. Justice Harlan's opinion for a unanimous Court framed the constitutional question in terms of the "fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment."[230] He began his constitutional analysis by citing *De Jonge v. Oregon*[231] and *Thomas v. Collins*[232] for the following principle: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[233] *De Jonge* and *Thomas* had established that the freedom

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223. Taft-Hartley Act, 29 U.S.C. §§ 141, 159(h) (1947) (amending National Labor Relations Act, 29 U.S.C. §§ 151-166 (1935)).

224. 339 U.S. at 399.

225. 341 U.S. 494 (1951).

226. 342 U.S. 485 (1952).

227. 344 U.S. 183 (1952).

228. *Id.* at 195 (Frankfurter, J., concurring).

229. 357 U.S. 449 (1958). I explore the doctrinal tensions of the right of association that resulted from the Court's differing treatment of communist and civil rights cases in Inazu, *supra* note 18.

230. 357 U.S. at 460.

231. 299 U.S. 353 (1937).

232. 323 U.S. 516 (1945).

233. *NAACP*, 357 U.S. at 460.

of assembly applied to the states through the Fourteenth Amendment; that it covered political, economic, religious, and secular matters; and that it could only be restricted "to prevent grave and immediate danger to interests which the State may lawfully protect."[234] Based on these precedents, Justice Harlan could have grounded his decision in the freedom of assembly. But he instead shifted away from assembly, writing in the next sentence, "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[235] The Alabama courts had constrained the "right to freedom of association" of members of the NAACP.[236] These members had a "constitutionally protected right of association" that meant they could "pursue their lawful private interests privately" and "associate freely with others in so doing."[237] Writing a few years after *NAACP v. Alabama ex rel. Patterson*, Emerson suggested that Justice Harlan "initially treated freedom of association as derivative from the first amendment rights to freedom of speech and assembly, and as ancillary to them" and then "elevated freedom of association to an independent right, possessing an equal status with the other rights specifically enumerated in the first amendment."[238]

Despite its adventitious roots, the new right of association gained traction in a series of civil rights cases challenging state attacks on the NAACP.[239] By the mid-1960s, the only cases addressing the freedom of assembly (as distinct from the freedom of association) were those overturning convictions of African Americans who had participated in

234. *De Jonge*, 299 U.S. at 364; *Thomas*, 323 U.S. at 528 n.12 (internal quotation marks omitted).

235. 357 U.S. at 460 (emphasis added). He then proceeded to discuss the "protected liberties" of speech and press that were "assured under the Fourteenth Amendment." *Id.* at 461.

236. *Id.* at 462.

237. *Id.* at 463, 466.

238. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964). Justice Harlan's opinion is more ambiguous than Emerson suggests: it is not clear that he relied at all on the First Amendment to ground association—the opinion, in fact, never mentions the First Amendment.

239. *E.g.*, Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963). During this same era, the Court either ignored or downplayed similar freedom of association cases involving suspected communists. *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961).

Temple American Inn of Court - April 2016 Program - Research and Materials

peaceful civil rights demonstrations.[240] In political discourse, Martin Luther King, Jr., appealed to assembly in his *Letter from a Birmingham Jail* and in his speech, *I've Been to the Mountaintop*, delivered just prior to his assassination.[241] But by the end of the 1960s, the right of assembly in law and politics was limited almost entirely to public gatherings like protests and demonstrations. Earlier intimations of a broadly construed right beyond these narrow circumstances were largely forgotten.

In 1983, the Court swept the remnants of freedom of assembly within the ambit of free speech law in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[242] Justice White reasoned:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[243]

The doctrinal language came straight out of the Court's free speech cases and made no mention of the right of assembly.[244] With *Perry*,

240. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Gregory v. City of Chicago, 394 U.S. 111 (1969); *cf.* Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) ("The First [Amendment does] not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people.").

241. *See* MARTIN LUTHER KING, JR., LETTER FROM THE BIRMINGHAM JAIL 14 (Harper Collins 1944) (1963) (asserting that the Birmingham ordinance denied "citizens the First Amendment privilege of peaceful assembly and peaceful protest"); MARTIN LUTHER KING, JR., I'VE BEEN TO THE MOUNTAINTOP 12-13 (Harper Collins 1994) (1968) ("But somewhere I read of the freedom of assembly.").

242. 460 U.S. 37 (1983); *cf.* BAKER, *supra* note 9, at 316 n.18 ("An interesting, and [perhaps] ideologically telling, practice of the Supreme Court is its focus on 'speech' and expression in cases in which it has the option of using either a speech or an assembly analysis.").

243. 460 U.S. at 45 (internal citations and quotation marks omitted).

244. *Perry* cited *Carey v. Brown*, 447 U.S. 455, 461 (1980), *U.S. Postal Service v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 132 (1981); *Consolidated Edison Co. v.*

Temple American Inn of Court - April 2016 Program - Research and Materials

even cases involving protests or demonstrations could now be resolved without reference to assembly. The Court's 1988 opinion in *Boos v. Barry* exemplifies this change.[245] *Boos* involved a challenge to a District of Columbia law that prohibited, among other things, congregating "within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes."[246] On its face, the challenge to the regulation appeared to rest on the right of assembly. The petitioner challenged the deprivation of First Amendment speech and assembly rights and argued that "[t]he right to congregate is a component part of the 'right of the people peaceably to assemble' guaranteed by the First Amendment."[247] Justice O'Connor's opinion for the Court cited *Perry* three times and resolved the case under a free speech analysis without reference to the freedom of assembly. The Court, in fact, has not addressed a freedom of assembly claim in the last twenty years.[248]

X. CONCLUSION

The disappearance of the freedom of assembly from legal and political discourse is intriguing in a country that attaches so much importance to the Bill of Rights in general and the First Amendment in particular. It may be that the principles encapsulated in the constitutional right of association embrace a kind of group autonomy that broadens the conception of assembly. But I suspect otherwise. I have detailed elsewhere the doctrinal problems with the freedom of association, both in its original form that emerged in *NAACP v.*

Public Service Commission, 447 U.S. 530, 535-36 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); and *Schneider v. State*, 308 U.S. 147 (1939).

245. 485 U.S. 312 (1988).

246. *Id.* at 315 (internal quotation marks omitted).

247. Brief for Petitioners at 64, 74, *Boos*, 485 U.S. 312 (No. 86-803).

248. In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Court addressed the constitutionality of a Chicago ordinance that prohibited "criminal street gang members" from loitering in public places. But while the lower court had relied on the freedom of assembly to hold the ordinance unconstitutional, the Supreme Court cited "the First Amendment 'right of association' that our cases have recognized." *Id.* at 53. Justice Scalia has invoked the freedom of assembly (among others) in his dissents from the Court's decisions upholding restrictions on the activities of antiabortion protesters. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 785 (1994) (Scalia, J., dissenting); Hill v. Colorado, 530 U.S. 703, 774, 779 (2000) (Scalia, J., dissenting). The language of assembly reappeared in the text of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc1-5 (limiting government restrictions on "the religious exercise of a person, including a religious assembly or institution").

Temple American Inn of Court - April 2016 Program - Research and Materials

Alabama and its transformation in the Court's 1984 decision, *Roberts v. United States Jaycees*.[249] These cases and others have converted the right of association into an instrument of control rather than a protection for the people. In doing so, they have lost sight of the dissenting, public, and expressive groups that once sought refuge under the right of assembly.[250] They have ignored the wise counsel of C. Edwin Baker that "[c]hallenges to existing values and decisions to embody and express dissident values are precisely the choices and activities that cannot be properly evaluated by summations of existing preferences" and that "the constitutional right of assembly ought to protect activities that are *unreasonable* from the perspective of the existing order."[251] By losing touch with our past recognition of the freedom of assembly and the groups that embodied it, we risk embracing too easily an attenuated framework that cedes to the state authority over what kinds of groups are acceptable in the democratic experiment. Democracy and stability may be easier in the short term, but in forgetting the freedom of assembly, we forget the kind of politics that has brought us this far.

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249. 468 U.S. 609 (1984). For my critiques of the freedom of association, see Inazu, *supra* note 18, and John D. Inazu, The Forgotten Freedom of Assembly (2009) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file in the University of North Carolina thesis database). *See also* Mazzone, *supra* note 29, at 645-46 ("[E]xpressive association has shifted the focus away from associating and to the more familiar First Amendment territory of speech . . . and the like," and "the modern notion of 'expression' is a dubious peg on which to hang a constitutional right of free association."); El-Haj, *supra* note 29, at 589 ("[T]he right of assembly should not be collapsed into the right of free expression.").

250. *Cf.* El-Haj, *supra* note 29, at 588 ("We seem to have forgotten that the right of assembly, like the right to petition, was originally considered central to securing democratic responsiveness and active democratic citizens. We now view it instead as simply another facet of the individual's right of free expression, focusing almost exclusively on the question of whether the group's message will be heard."); ZICK, *supra* note 16, at 325 ("Our long tradition of public expression, dissent, and contention, from the earliest activities in the colonies to present-day peace activists, agitators, and dissenters, has been possible owing to relatively open access to embodied, contested, inscribed, and other places on the expressive topography.").

251. BAKER, *supra* note 9, at 134. I expand upon these concepts in INAZU, *supra* note 249.

Temple American Inn of Court - April 2016 Program - Research and Materials

THE *HOBBY LOBBY* MOMENT

*Paul Horwitz**

American religious liberty is in a state of flux and uncertainty. The controversy surrounding *Burwell v. Hobby Lobby Stores, Inc.*[1] is both a cause and a symptom of this condition. It suggests a state of deep contestation around one of the key markers of the church-state settlement[2]: the accommodation of religion.

The problem is social and political, not judicial, although judges are obviously influenced by those larger forces. Courts are rarely at the forefront of significant social change.[3] Judges are constrained by their function: to decide specific cases, based primarily on a finite (if malleable) set of materials such as prior precedents and statutes.[4] *Hobby Lobby* itself turned not on the vagaries of the Religion Clauses, but on the directions laid down by Congress in the Religious Freedom Restoration Act of 1993[5] (RFRA). The Court is routinely criticized for the incoherence of its Religion Clause jurisprudence.[6] Inevitably, there are doctrinal disagreements among judges on these issues. On the whole, however, the judicial treatment of the American church-state settlement has been relatively stable.

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[1] 134 S. Ct. 2751 (2014).

[2] *See, e.g.*, Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U. L. REV. 973, 981 (2012) (discussing the "Western church-state settlement").

[3] Professor Michael Klarman puts the point more strongly, arguing that "courts are *never* at the vanguard of social reform." Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 290 (2009) (emphasis added).

[4] *See, e.g.*, ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 78 (2013) (noting that "courts are supposed to make their decisions on the basis of the law, not the full range of reasons that any human being might have for acting," and specifying the legal sources they rely on in constitutional cases). As *Hobby Lobby* illustrates, statutes are another key decisional resource.

[5] 42 U.S.C. §§ 2000bb–2000bb-4 (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[6] *See, e.g.*, PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION, at xii–xiii (2011) (collecting examples).

Temple American Inn of Court - April 2016 Program - Research and Materials

Conditions are much more fraught outside the courts. In public discussion and in the scholarly community, the very notion of religious liberty — its terms and its value — has become an increasingly contested subject.[7] In the space of a few short years, the basic terms of the American church-state settlement have gone, in Professor Lawrence Lessig's useful terms, from being "taken for granted" to being "up for grabs."[8] Once a fairly "uncontested" issue that remained in the "background of public attention," religious accommodation has become a "contested" issue occupying the forefront of public debate.[9] The change has been sudden, remarkable, and unsettling. The Court's decision in *Hobby Lobby* will influence the debate outside the courts. But the decision will not resolve that debate. If anything, it seems more likely to heighten and prolong the public tension than to calm it.

Unsurprisingly, given the polarized nature of the larger debate over religious accommodation, most discussions of *Hobby Lobby* and the contraception mandate have been equally polarized. On one side of

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[7] *See, e.g.*, STEVEN D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 11, 140–41, 168–69 (2014); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 407 (2011). For prominent examples of recent work questioning whether religion deserves special treatment, albeit more as a matter of theory than of doctrine, see BRIAN LEITER, WHY TOLERATE RELIGION? (2013); and Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

[8] Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1837 (1997) (distinguishing between "taken for granted" propositions, which can be asserted with little or nothing by way of argument, and "up for grabs" propositions, which are sufficiently contested to require a more active defense).

[9] Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1803 (1997); *see also id.* at 1803–04. In a useful typology that I draw on substantially in this Comment, Lessig describes social contestation as falling within a spectrum along two axes. An issue can be contested or uncontested: subject to "actual and substantial disagreement" or to little disagreement at all. *Id.* at 1802. In our culture, abortion is a contested issue; infanticide is not. Contested issues can also lie in the foreground or background of public debate. A foregrounded issue is a matter of "sustained public attention," *id.* at 1803, while a background issue may be subject to disagreement but is "not perceived to have social salience," *id.* at 1804. For a useful chart and discussion, see *id.* at 1803–07; and Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1393–1400 (1997). *See also* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 179–82 (2011) (discussing how legal arguments may move from being "off-the-wall" to "on-the-wall"); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1824–25 (2001) (linking Balkin and Lessig's concepts in a discussion of constitutional welfare rights); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012, 2:55 PM), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/25804 [http://perma.cc/8EMV-XCVQ] (applying this idea to different current legal struggles, including the legal challenge to the Affordable Care Act's "individual mandate," *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), and to same-sex marriage litigation). Of course, specific issues and disputes involving religious freedom have always been in the foreground of public and legal debate. *See generally* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW (2010) (describing key legal contests involving religion over the past 70 years). But those controversies rarely called religious freedom itself into question.

the divide, some saw the contraception mandate as "trampling"[10] or "assault[ing]" religious liberty.[11] On the other side were those who warned that a win for Hobby Lobby threatened our local and national civil rights laws,[12] and perhaps the rule of law itself.[13] After the ruling, most of the immediate reaction to the decision was similarly divided. The polarizing nature of the issue, and of the Court's decision, was both reflected in and encouraged by Justice Ginsburg's stinging dissent.[14]

As always during times of revolutionary (or reactionary) passion, those who are more concerned with analyzing the conflict than with participating in it may find themselves squeezed from both directions. When an issue moves to the foreground of social contestation, one is expected to choose sides. Nevertheless, some writers have taken an interest in evaluating and sometimes lamenting the current struggle, not just fighting it.[15]

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[10] Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2180 (2012).

[11] *Id.* at 2189.

[12] *See, e.g.*, Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1237–40 (2014); Leslie C. Griffin, *If Conestoga Wins, Watch Out Civil Rights*, HAMILTON & GRIFFIN ON RTS. (Mar. 24, 2014) http://hamilton-griffin.com/if-conestoga-wins-watch-out-civil-rights/ [http://perma.cc/KA7S-WXKH].

[13] *See generally* MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY (2d ed. 2014).

[14] *See infra* notes 66–78 and accompanying text. Indeed, it is possible that Justice Ginsburg wrote as she did in part to spur a legal response from the political branches, as in her effective dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which helped encourage the passage of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.). *See* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 127 HARV. L. REV. 437, 437–42 (2013); *id.* at 439 ("Justice Ginsburg was courting the people." (emphasis omitted)).

[15] *See, e.g.*, Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 123 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839; Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007); Laura K. Klein, Note, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 GEO. L.J. 505 (2010). That Professor Douglas Laycock, a forceful advocate of the importance of both religious liberty and LGBT rights, has ended up being caricatured and condemned for his position is strong evidence of the squeeze that those in the middle may experience from one or both wings of the debate. *See, e.g.*, Dahlia Lithwick, *Chilling Effect*, SLATE (May 28, 2014, 5:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/douglas_laycock_gets_smeared_lgbtq_groups_attack_on_the_university_of_virginia.html [http://perma.cc/Z6DF-VXZK] (describing and criticizing some activists' efforts to obtain records of communications between Laycock and various groups, in order to gain "a full, transparent accounting of the resources used by Professor Laycock which may [have been] going towards halting the progress of the LGBT community and to erode the reproductive rights of women across the country" (internal quotation marks omitted)).

Temple American Inn of Court - April 2016 Program - Research and Materials

This Comment falls into the analytical category. I have my own views on the merits of *Hobby Lobby*.[16] But it is the controversy over the contraception-mandate litigation, not the case itself, that takes center stage here.[17] I focus less on the doctrinal questions the Court dealt with or left unanswered, and more on the legal and social factors that turned a statutory case into the legal and political blockbuster of the Term.

More specifically, in thinking about the broader social context that made *Hobby Lobby* so prominent and the debate over it so inflamed, it is the *moment* that matters. We are in the middle of a process of social contestation on some key questions: between certain issues being taken for granted in one direction and their being equally taken for granted in the other direction. It is difficult, if not impossible, to stand outside such moments. But there is some value in focusing, at a slight remove, on the fact of the moment itself.

A great deal of recent constitutional scholarship has examined the relationship between social and legal change, and between social movements and courts.[18] The *Hobby Lobby* case and its ancillary issues offer an excellent opportunity to consider these relationships. More specifically, this occasion allows us to scrutinize one particular stage in the life cycle of social and legal change: the moment at which an issue is at its most contested and foregrounded. It is unsurprising

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[16] In short, I think the Court was right in *Hobby Lobby*. I also believe that — at least as long as the federal government is unwilling or unable to eliminate the problems that result from enlisting private employers in the provision of what ought to be a public good — the Court should adhere to the compromise it offered in the case. Whether it will adhere to that compromise, a question raised but not answered by the Court's issuance of a stay in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), or whether some governmental response will alter the shape of the compromise as the *Hobby Lobby* Court depicted it, is something I do not venture to predict here. Finally, I would not have been terribly distressed if the plaintiffs had lost in *Hobby Lobby*, provided that they had lost at the interest-balancing stage rather than having their claims denied on categorical grounds.

[17] In that sense, this Comment is thus similar to Klarman's analysis of *United States v. Windsor*, 133 S. Ct. 2675 (2013), in these pages last year, which was more concerned with describing the "dramatic changes in the social and political contexts surrounding" the decision that "rendered [*Windsor*] conceivable" than with championing or criticizing its outcome. Michael J. Klarman, *The Supreme Court, 2012 Term — Comment:* Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 129 (2013).

[18] *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Theodore Ruger, *Social Movements Everywhere*, 155 U. PA. L. REV. PENNUMBRA 18 (2006), http://www.pennlawreview.com/online/156-U-Pa-L-Rev-PENNumbra-262.pdf [http://perma.cc/QG6X-NZPM]; Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013) (book review).

Temple American Inn of Court - April 2016 Program - Research and Materials

that courts will speak up at these moments, particularly if Congress has left them little leeway to avoid or postpone the question. In some ways, however, these critical moments may also be the ones in which judicial action is likely to be the least fruitful. These are surely fertile times for activists and advocates. But perhaps there is good reason at such moments to hear from ironists[19] and tragedians[20] as well.

The heated nature of our current debate over the contraception mandate and related issues may prove short-lived. It may be a mere byproduct of the energy expended in a period of dramatic social transformation. The degree of controversy occasioned by *Hobby Lobby* would have been unlikely thirty years ago, given the state of social consensus at that time. It may prove equally unthinkable thirty years from now.[21] In the meantime, the *Hobby Lobby* moment gives us a chance to take stock of the nature and effects of the social contestation we are experiencing, and of the rapid changes and reversals of view that have thrown one of the central aspects of the American church-state settlement into question.

Part I of this Comment summarizes the *Hobby Lobby* decision. In my view, the decision itself is not the primary source of the controversy. In any event, both the majority and dissenting opinions are thorough and lucid, although like all opinions they leave questions in their wake.[22] My discussion in this Part is thus quite brief.

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[19] *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 73 (1989) (defining an "ironist" as someone who "has radical and continuing doubts about the final vocabulary she currently uses," "realizes that argument phrased in her present vocabulary can neither underwrite nor dissolve these doubts," and "does not think that her vocabulary is closer to reality than others, that it is in touch with a power not herself"); *id.* at 75 ("The ironist spends her time worrying about the possibility that she has been initiated into the wrong tribe, taught to play the wrong language game."). For Professor Richard Rorty, who described himself as a liberal ironist, this sense of ironism does not preclude one from taking a stand on behalf of one's political commitments, contingent though they may be. *See id.* at 61. My interest here is not in "liberal ironism," but in ironism itself, and the capacity it may offer both to interrogate one's own commitments and to appreciate the commitments of one's adversaries. I thank Professor Micah Schwartzman for pressing me to clarify this point.

[20] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 59, 87 (1988) (contrasting between "comic" readings of the Constitution as a document that can provide "happy endings" to contentious issues, and "tragic" readings that emphasize the potential that the Constitution will "present[] irresolvable conflicts between the realms of law and morality"). *See generally* MARC O. DEGIROLAMI, THE TRAGEDY OF RELIGIOUS FREEDOM 6–11 (2013) (offering a tragic reading of the Religion Clauses); HORWITZ, *supra* note 6, at 303–06 (arguing that moral remainders are inevitable in attempts to reconcile religion and liberal democracy).

[21] *Cf.* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR 206 (2013) (noting that decisions that were highly polarizing at the time may become "iconic" as public opinion coalesces around a new consensus).

[22] One important question I do not discuss here is the potential limits on religious accommodation imposed by the Establishment Clause. This question became a point of scholarly contention concerning the *Hobby Lobby* case. But it does not figure in the majority opinion, and is not essential to this Comment's analysis of the *Hobby Lobby* controversy as a moment of social contesta-

Part II discusses the legal and social sources of the controversy. Legally, it discusses a key element of the American church-state consensus as it existed until recently: the accommodation of religion.[23] That consensus is aptly summed up by Professor Andrew Koppelman: Religion is "a good thing,"[24] and "[a]ccommodation of religion as such is permissible."[25] We may debate whether courts or legislatures should be responsible for it, but it is generally agreed "that *someone* should make such accommodations."[26] Until recently, there was widespread approval for religious accommodation.[27] That consensus found strong expression in RFRA, which passed just two decades ago with the overwhelming support of Congress. There have been dissenters from this consensus.[28] On the whole, however, it enjoyed "taken for granted" status. In Lessig's terms, disagreement over religious accommodations was a background issue, not a foreground issue.[29]

The past few years have witnessed a significant weakening of this consensus. Contestation over religious accommodations has moved rapidly from the background to the foreground. Accommodations by *anyone* — courts *or* legislatures — have been called into question, including by those who acknowledge that until recently those accommodations would have been uncontroversial. Whether religion is "a good thing" — whether it ought to enjoy any kind of unique status, and whether that status should find meaningful constitutional protection — has itself come up for grabs.

This legal contestation has been accompanied by — indeed, may be driven by[30] — significant social dissensus. Although *Hobby Lobby*

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tion. For a thorough development of this argument, see Frederick Mark 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 (2014). *See also* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014). For responses, see, for example, Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014); and Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUST. (Dec. 5, 2013), http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html [http://perma.cc/37B7-MSPJ].

[23] In line with common usage in this area, I refer mostly to "religious accommodations" in this Comment rather than "religious exemptions."

[24] KOPPELMAN, *supra* note 4, at 2.

[25] *Id.* at 5.

[26] *Id.*

[27] *See id.*

[28] *See* sources cited *infra* notes 105, 118.

[29] *See supra* note 9 and accompanying text.

[30] *Cf.* Perry Dane, Doctrine and Deep Structure in the Contraception Mandate Debate (July 21, 2013) (unpublished manuscript), http://ssrn.com/sol3/abstract=2296635 [http://perma.cc/HCZ5-KQPP] (noting the heated nature of the battle over the contraception mandate and discussing the larger stakes both sides see in the debate).

Temple American Inn of Court - April 2016 Program - Research and Materials

itself involves a controversial social issue — the status of women's reproductive rights — much of the reason for the shift in views on accommodation involves another contested field in the American culture wars: the status of gay rights and same-sex marriage. The cause of marriage equality, which seems to be a fait accompli awaiting final confirmation from the Court, has come increasingly into conflict with the views of religious objectors to same-sex marriage.[31] Same-sex marriage and its consequences have become a central, foregrounded, socially contested issue. The church-state consensus, drawn into the gravitational pull of this contest, has been put up for grabs as a result. Part III offers some thoughts about the lessons and implications of this debate, both for religious liberty and for the general culture wars that have featured so heavily in the *Hobby Lobby* controversy.

A brief caveat is in order. I offer a particular framework for thinking about the *Hobby Lobby* moment in this Comment. It focuses in particular on LGBT rights and changes in the marketplace as drivers of the controversy surrounding the Court's ruling. I believe that those factors have been major influences on *Hobby Lobby* as a social and legal moment and have contributed significantly to changes in current views on religious accommodations. But other possible frameworks, and other factors, exist. One of those, obviously, is the status of reproductive rights and women's access to contraceptive services. I argue in this Comment that despite the emphasis on that subject in *Hobby Lobby*, and especially in Justice Ginsburg's dissent, other factors were at work in contributing to the degree of public attention and disagreement that accompanied this case. This focus is not intended to deny or disparage the importance of reproductive rights. It is simply intended to direct attention to other factors, less apparent on the face of the opinion, that are nonetheless essential elements of the *Hobby Lobby* moment.

I. *HOBBY LOBBY* AS AN "EASY CASE"

Hobby Lobby involves a clash between two federal laws. The Patient Protection and Affordable Care Act of 2010[32] (ACA) requires employers with fifty or more employees to provide "minimum essential coverage" in their health insurance plans.[33] Penalties for failing to do so are steep: an employer that offers a health care plan but fails to

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[31] For prescient discussions of the issues raised, see generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15.

[32] Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of the U.S. Code).

[33] *See* 26 U.S.C. § 4980H(a), (c)(2) (2012).

comply with the minimum coverage requirements faces a $100-per-day penalty for each affected individual.[34] The minimum coverage requirements promulgated by the Department of Health and Human Services (HHS) require coverage for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling."[35]

The initial regulations proposed by HHS offered exemptions for a narrow set of "religious employers," such as churches and religious orders.[36] They excluded a wide range of religious nonprofits, such as religious universities or hospitals, as well as for-profit businesses. The narrow reach of the exemptions occasioned pushback from individuals and groups outside[37] and inside[38] the Obama Administration.

Ultimately, the Administration expanded the set of accommodations. In addition to the exemption for "religious employers," the regulations provided that certain religious nonprofits that certified that they qualified for the exemption and objected to some or all of the covered contraceptive services could avoid direct coverage of those services, which would be provided by the insurer.[39] For-profit corporations were ineligible for religious accommodations.

The second statute, RFRA, was passed in response to the Court's controversial decision in *Employment Division v. Smith*.[40] The statute provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering

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[34] *See* 26 U.S.C. § 4980D(a)–(b) (2012); *see also Hobby Lobby*, 134 S. Ct. at 2762–64 (describing the contraception mandate).

[35] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147) (alterations in original) (quoting *Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.hrsa.gov/womensguidelines (last visited Sept. 28, 2014) [http://perma.cc/SQ23-MAT7]) (internal quotation mark omitted).

[36] *See* 45 C.F.R. § 147.131(a) (2013).

[37] *See, e.g.*, U.S. Conference of Catholic Bishops, Office of the Gen. Counsel, Comment Letter Re: Interim Final Rules on Preventive Services (Aug. 31, 2011), http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf [http://perma.cc/6GGK-B8CK].

[38] *See, e.g.*, MARK HALPERIN & JOHN HEILEMANN, DOUBLE DOWN: GAME CHANGE 2012, at 66–69 (2013); Byron Tau & Donovan Slack, *Biden: We 'Screwed Up' Contraception Mandate*, POLITICO (Mar. 1, 2012, 4:18 PM), http://www.politico.com/politico44/2012/03/biden-we-screwed-up-contraception-debate-116128.html [http://perma.cc/8B9T-PJCJ].

[39] *See* 45 C.F.R. § 147.131(b)–(c). Similar treatment was offered for self-insured religious organizations. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,893 (July 2, 2013) (codified in scattered sections of 26, 29, and 45 C.F.R.). HHS asserted that insurers would incur little or no additional cost as a result. *See id.* at 39,877, 39,883.

[40] 494 U.S. 872 (1990). For discussion of *Smith*, see *infra* pp. 168–70.

Temple American Inn of Court - April 2016 Program - Research and Materials

that compelling governmental interest."[41] The statute's purpose was described as the restoration of "the compelling interest test" set forth in two of the Court's prior decisions.[42] When Congress passed the Religious Land Use and Institutionalized Persons Act[43] (RLUIPA), however, it deleted a reference to First Amendment law in the section of RFRA defining "exercise of religion." RLUIPA replaced that language with a broad, freestanding definition of "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[44] Congress emphasized that this definition should "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[45] The Court struck down RFRA as applied to the states in 1997.[46] But it has affirmed and vigorously followed RFRA as applied to federal law.[47]

The contraception mandate was challenged by a wide range of plaintiffs.[48] The plaintiffs whose cases were taken up by the Court, Hobby Lobby, Conestoga Wood Specialties, and Mardel, are all closely held corporate enterprises. Mardel operates Christian bookstores; the other businesses sell non-sectarian products but operate according to religious principles.[49] They and their principal owners brought suit challenging the application of the mandate as a matter of both RFRA and the Free Exercise Clause.

Writing for a five-Justice majority, Justice Alito upheld the RFRA claim without deciding any free exercise issues. If it is not heretical to say so of a judgment that has aroused such excitement, the opinion is clear and straightforward, containing fewer rhetorical flights in its forty-nine pages than Justice Kennedy managed to squeeze into a four-page concurrence.

In the wake of the Supreme Court's decision in *Citizens United v. FEC*,[50] the most hotly anticipated question was whether corporations

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[41] 42 U.S.C. § 2000bb-1(a)–(b) (2012).

[42] *Id.* § 2000bb(b)(1) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); and Sherbert v. Verner, 374 U.S. 398 (1963)).

[43] *Id.* at § 2000cc–2000cc5.

[44] *Id.* § 2000cc-5(7)(A), *incorporated by reference in* RFRA at 42 U.S.C. § 2000bb-2(4).

[45] *Id.* § 2000cc-3(g).

[46] *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[47] *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 423–24 (2006).

[48] *See HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral (last visited Sept. 28, 2014) [http://perma.cc/YH3-TGYE].

[49] *See Hobby Lobby*, 134 S. Ct. at 2764–66. For ease of reference, I refer generally to only Hobby Lobby in this Comment.

[50] 130 S. Ct. 876 (2010) (holding that corporations may raise First Amendment claims against government restriction of political expenditures).

Temple American Inn of Court - April 2016 Program - Research and Materials

could assert claims under the Free Exercise Clause. As it happened, the question the Court decided in *Hobby Lobby* was more prosaic: Are some corporations "persons" entitled to raise statutory claims under RFRA? The answer was yes. The Dictionary Act, which applies here, defines the word "person" to include corporations.[51] Corporate claims have been "entertained" under both RFRA and the Free Exercise Clause.[52] RFRA "was designed to provide very broad protection for religious liberty"[53] and should not be read constrictively. Nothing in the corporate form, which is ultimately a flexible "fiction," demands that the statute be construed to exclude such claims; the corporations pay the penalty, but "the humans who own and control those companies" feel the sting of the religious burden.[54] Whatever questions might arise in future cases, this one involved "closely held corporations, each owned and controlled by members of a single family."[55] They were, as Justice Sotomayor noted at oral argument, the perfect plaintiffs for purposes of this question.[56]

The rest of the plaintiffs' case went smoothly. The penalties for failing to cover the objectionable contraceptive services were sufficient to constitute a substantial burden.[57] HHS's most viable argument was that the claim of a substantial burden was too attenuated, given the distance between the provision of coverage and the individual choices of employees whether to use particular contraceptive methods. Following its precedent in *Thomas v. Review Board*,[58] however, the Court declined to second-guess the religious judgment of the plaintiffs, whose sincerity the government did not question, that the provision of coverage entailed wrongful cooperation with a grave moral evil.[59]

The burden under RFRA then shifted to the government. Although the Court noted that RFRA's test for a compelling government interest requires a particularized inquiry into "the asserted harm of granting specific exemptions to [the] particular religious claimants" challenging the mandate,[60] and showed some solicitude for the plaintiffs' contention that HHS's interest could not be considered compelling given the

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[51] *Hobby Lobby*, 134 S. Ct. at 2768 (citing Dictionary Act, 1 U.S.C. § 1 (2012)).

[52] *See id.* at 2768–70.

[53] *Id.* at 2767; *see also id.* at 2772 (citing 42 U.S.C. § 2000cc-3(g)).

[54] *Id.* at 2768.

[55] *Id.* at 2774.

[56] *See* Transcript of Oral Argument at 19, Sebelius v. Hobby Lobby Stores, Nos. 13-354, 13-356, 2014 WL 1219115 at *19, *decided sub nom.* Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014), http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_3ebh.pdf [http://perma.cc/RK7G-LQC3].

[57] *See Hobby Lobby*, 134 S. Ct. at 2775–76.

[58] 450 U.S. 707 (1981).

[59] *See Hobby Lobby*, 134 S. Ct. at 2778–79.

[60] *Id.* at 2779 (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006)) (internal quotation marks omitted).

Temple American Inn of Court - April 2016 Program - Research and Materials

other exemptions to the mandate,[61] it proceeded on the assumption that the government had shown a compelling interest.[62]

The final question was whether the government had selected the "least restrictive means" of achieving this interest.[63] Here, the government was hoist by its own petard, having strenuously maintained, by way of justifying the exemption scheme for nonprofits, that the exemption would fully cover female employees of those entities without either the insurers or the employees incurring serious additional costs.[64] Under the circumstances, it was not hard for the majority to conclude that the nonprofit exemption mechanism *could* be extended to objecting closely held for-profit corporations, in a way that neither "impinge[d] on the plaintiffs' religious belief[s]" nor failed to "serve[] HHS's stated interests equally well."[65]

Writing for a four-member minority, Justice Ginsburg dissented, blasting the majority for a "decision of startling breadth"[66] that was too accepting of religious exemptions from general laws and too willing to require the public to bear the costs of those exemptions.[67] The Court, she charged, wrongly treated RFRA "as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence."[68] Congress had "enacted RFRA to serve a far less radical purpose" than that.[69]

On the merits, Justice Ginsburg charged, "the Court falter[ed] at each step of its analysis."[70] The existing caselaw did not support the extension of the right to engage in religious exercise, which is "characteristic of natural persons, not artificial legal entities," to for-profit corporations.[71] *Some* "artificial legal entities" should be protected, because "[r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith,"[72] but the line should be drawn

[61] *See id.* at 2780. Justice Kennedy wrote separately to underscore "the importan[ce] [of] confirm[ing]" the "premise . . . that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees." *Id.* at 2786 (Kennedy, J., concurring).

[62] *See id.* at 2780 (majority opinion).

[63] *Id.* at 2781 (quoting 42 U.S.C. § 2000bb-1(b)(2) (2012)).

[64] *See id.* at 2781–82; Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,882 (July 2, 2013) (codified in scattered sections of 26, 29, and 45 C.F.R.).

[65] *Hobby Lobby*, 134 S. Ct. at 2782; *see also id.* at 2786 (Kennedy, J., concurring) (emphasizing, with reference to the nonprofit exemption mechanism, that "the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage" to female employees).

[66] *Id.* at 2787 (Ginsburg, J., dissenting).

[67] *See id.*

[68] *Id.* at 2791–92.

[69] *Id.* at 2787.

[70] *Id.* at 2793.

[71] *Id.* at 2794. Justices Breyer and Kagan did not join this section of the dissent.

[72] *Id.* at 2795.

Temple American Inn of Court - April 2016 Program - Research and Materials

at "for-profit corporations."[73] Nor could the plaintiffs show a substantial burden, because of the attenuation between any religious claims by the corporate owners and the independent contraceptive choices of their employees.[74] The government's interests in "public health and women's well being," she emphasized, were clearly compelling.[75] And what she described as the "let the government pay"[76] approach of the majority on the least-restrictive-means test failed to shield female employees from potential "logistical and administrative obstacles,"[77] and would lead to an endless stream of accommodation demands by for-profit corporations.[78]

In the face of an eloquent dissent, much of which commanded four votes on the Court, it is surely a purposeful exaggeration to call *Hobby Lobby* an easy case, as I have done here. Better, perhaps, to call the Court's decision highly straightforward. Justice Kennedy is right to pay tribute to Justice Ginsburg's "powerful dissent."[79] But he is right, too, to dismiss it as overstated.[80] And he correctly places the credit (or blame) where it lies: not with Justice Alito's opinion, strong as it is, but with RFRA, which supplies the propulsion in both *Hobby Lobby* and Chief Justice Roberts's equally clear opinion in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.[81] Both opinions move forward not under their own steam, but under the compulsion of a powerful statute — one "designed to provide very broad protection for religious liberty."[82]

It would be reasonable in these circumstances for those who dislike the outcome in *Hobby Lobby* to raise doubts about RFRA itself, although I do not share those doubts. But at least such a view would properly place the blame where it lies. It is the statute, not the decision, that provides *Hobby Lobby* with its "startling breadth."[83] Given

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[73] *Id.* at 2796.

[74] *See id.* at 2798–99.

[75] *Id.* at 2799.

[76] *Id.* at 2802.

[77] *Id.* (quoting Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013) (codified in scattered sections of 26, 29, and 45 C.F.R.)) (internal quotation mark omitted).

[78] *See id.* at 2802–03, 2805–06.

[79] *Id.* at 2785 (Kennedy, J., concurring).

[80] *Id.*

[81] 546 U.S. 418 (2006).

[82] *Hobby Lobby*, 134 S. Ct. at 2767; *see also id.* at 2785 (Kennedy, J., concurring) ("As the Court notes, under our precedents, RFRA imposes a 'stringent test.'" (quoting *id.* at 2761 (majority opinion)); *O Centro*, 546 U.S. at 436 ("RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" (alteration in original) (quoting 42 U.S.C. § 2000bb-1(a))).

[83] *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting); *cf.* Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 254 (noting that RFRA is a consequence of the Court's earlier decision in *Smith*: "[r]eligious liberty was committed into the hands of shift-

Temple American Inn of Court - April 2016 Program - Research and Materials

that RFRA has been around for twenty years, and was reinforced by amendment almost fifteen years ago, it is rather late in the day to be startled. To the extent that RFRA is a "putative super-statute,"[84] one with "quasi-constitutional" status,[85] it cannot be surprising that it is powerful medicine.

II. FOREGROUNDED CONTESTATION AROUND *HOBBY LOBBY*

Hobby Lobby was not, in doctrinal terms, the hardest case of the Term. Nor, given the possibility of a legislative response, was it unfixable even if it *was* wrong. Even for those who worried that a victory for the plaintiffs might disrupt the provision of women's contraceptive care, the case was hardly a disaster.[86] As with the Court's decision on the ACA's individual mandate,[87] to which in many respects the contraception-mandate litigation was a sequel, the Court chastened the Administration but did not prevent it from substantially achieving its aims. Nevertheless, *Hobby Lobby* was indisputably the most prominent decision of the Term — and the most excoriated. How can we explain this apparent gap between a clearly written, politically revisable opinion in the case, and the sheer amount of controversy it engendered?

The answer lies outside the four corners of both RFRA and the ACA, and well outside the firm but relatively soft-spoken words of the opinion in *Hobby Lobby* itself. The majority — perhaps because it *was* the majority — did not depict itself as taking sides in a momentous culture war,[88] although it is hard to read Justice Ginsburg's

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ing political majorities precisely to the extent that the Court withdrew judicial protection under the Constitution").

[84] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230 (2001); *see also id.* at 1216 (defining a "super-statute" as "a law or series of laws that . . . seeks to establish a new normative or institutional framework for state policy" and that, if it "'stick[s]' in the public culture," ends up having a "broad effect on the law"). Although I doubt the majority would put it in these terms, much of the heat of the public and judicial contestation over *Hobby Lobby* might be seen as a struggle over whether RFRA *is* a super-statute.

[85] Laycock, *supra* note 83, at 254.

[86] *See Hobby Lobby*, 134 S. Ct. at 2782 (concluding that the accommodation for nonprofits, if extended to for-profit corporations, would ensure that "female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives"); *see also, e.g.*, Andrew Koppelman, *The* Hobby Lobby *Decision Was a Victory for Women's Rights*, THE NEW REPUBLIC (June 30, 2014), http://www.newrepublic.com/article/118488/hobby-lobby-decision-was-victory-womens-rights [http://perma.cc/U72S-3K3V].

[87] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[88] That Justice Alito wrote his opinion for a majority of the Court might have affected the tone of the opinion for several reasons. The opinion might have been written to avoid directly engaging culture-war issues in order to secure votes. It might have been written in this manner to deflect attention away from hotly contested issues, which a dissent might naturally want to emphasize. Or it might simply reflect the general rhetorical approach of majority opinions, which

Temple American Inn of Court - April 2016 Program - Research and Materials

dissent in any other way. Just the same, the case's status as both a product of and a contributor to the larger culture war is unmistakable. To understand the furor over *Hobby Lobby*, it is necessary to turn away from the opinion itself and examine the particular moment of foregrounded legal and cultural contestation it represents.

A. Legal Contestation: Reconsidering the Accommodation of Religion

Accommodation of religion is an aboriginal feature of American public law. From the earliest days of the Republic, exemptions from legally imposed burdens on religious belief and practice "were seen as a natural and legitimate response to the tension between law and religious convictions."[89] Although the principle was not universally agreed upon — Thomas Jefferson famously insisted in his letter to the Danbury Baptist Association that "[man] has no natural right in opposition to his social duties"[90] — accommodations were widely granted by both Congress and the states to religious groups or individuals confronted with laws that burdened their religious obligations. Some of those accommodations, with exemptions from military service being perhaps the most prominent example, necessarily entailed the shifting of costs onto third parties.[91] There have been arguments over whether that history suggests that the Free Exercise Clause *requires* a judicially enforceable right to religious exemptions,[92] or whether it means only that accommodations *may* be granted by legislatures or state constitutions.[93] But neither position denies that *some* branch of government could opt to accommodate religious objectors to general laws.

For close to thirty years, the Court's view was that religious exemptions — even from neutral, generally applicable laws — were more than permissible: they were mandatory and judicially enforceable. The case that announced this rule, *Sherbert v. Verner*,[94] involved a non-neutral law: the unemployment compensation law in question singled out Sunday worshippers for accommodation and thus discrimi-

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tend to adopt an official rather than a personal voice and to impart an air of inevitability and obviousness, whether warranted or not, to the prevailing view.

[89] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466 (1990).

[90] Letter from Thomas Jefferson to a Committee of the Danbury Baptist Ass'n (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (A. Lipscomb ed., 1903).

[91] *See* McConnell, *supra* note 89, at 1468–69 (offering examples and noting that religious exemptions from military service imposed "high costs" on those who were required to serve, *id.* at 1468).

[92] *See, e.g.*, *id.* at 1511–13.

[93] *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17, 929–30 (1992).

[94] 374 U.S. 398 (1963).

Temple American Inn of Court - April 2016 Program - Research and Materials

nated among religious beliefs.[95] Later cases, however, made clear that an exemption would be required unless the countervailing government interest was "of the highest order and . . . not otherwise served,"[96] even where the regulation in question was indisputably neutral.[97] The rule may have been weakly or inconsistently applied,[98] but there was little doubt that it *was* the rule.[99]

All this changed with *Employment Division v. Smith*. There, the Court held that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[100] The Free Exercise Clause would no longer be read to "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[101] But *Smith* made clear that whatever the fate of judicially ordered exemptions, political actors remained free to create "nondiscriminatory religious-practice exemption[s]" from generally applicable laws.[102]

Given the shift in views on accommodation of religion that has accompanied the contraception-mandate controversy, it is worth recalling just how harshly *Smith* was viewed at the time, by political liberals and progressives as well as religious conservatives. Writing in these pages soon after the Court's decision, Professor Robin West described *Smith* as "perhaps the most politically illiberal decision of the

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[95] *See id.* at 406. Note, however, that the Court did not treat the equality argument as *necessary* to its conclusion that the plaintiff was entitled to an exemption. *See id.* ("The unconstitutionality of the disqualification of the Sabbatarian is thus *compounded* by the religious discrimination which South Carolina's general statutory scheme necessarily effects." (emphasis added)).

[96] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[97] *See id. at* 220 (requiring an exemption for children of objecting Amish parents from a mandatory school attendance law).

[98] *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 42–45 (2007); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992); *cf.* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412, 1416–17 (1992) (noting the low success rate in the lower courts, in the decade leading up to the Supreme Court's decision in *Smith*, of religious exemption claims under the compelling interest test).

[99] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–10, 1120–21 (1990).

[100] Emp't Div. v. Smith, 494 U.S. 872 878–79. The opinion of the Court, written by Justice Antonin Scalia, distinguished or cabined the earlier cases but did not overrule them. Few people, however, including *Smith*'s defenders, credited this effort. *See, e.g.*, Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 n.50 (1992) (calling the distinctions from prior cases offered in *Smith* "so sophistic as to suggest that Justice Antonin Scalia relied upon them only for the purpose of maintaining his majority").

[101] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[102] *Id.* at 890.

term."[103] The majority, she wrote, had "reversed long-settled liberal principles of free exercise jurisprudence that explicitly balanced the impact on the individual's liberty against the state's interest."[104] The general view[105] was that *Smith* had "drastically diminished,"[106] even "gutted,"[107] "the protections of the Free Exercise Clause."[108]

This consensus helped fuel the religiously and politically diverse coalition that midwifed RFRA.[109] Both the critical academic reaction to *Smith* and the swift legislative response were emblematic of a widely held view: religious accommodations and exemptions are a good thing. *Smith* was wrong to eliminate them as a matter of judicially enforceable constitutional right. But we can, and should, at least take the opinion at its word and be "solicitous" of religious liberty through the legislature.[110] Koppelman has nicely summed up that consensus on religious accommodation:

> There is considerable dispute about whether the decision when to accommodate ought to be one for legislatures or courts, but that debate rests on the assumption, common to both sides, that someone should make such accommodations. The sentiment in favor of accommodation is nearly unanimous in the United States.[111]

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103 Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 53 (1990).

104 *Id.* at 54.

105 This position was not unanimous. *See, e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (criticizing Justice Scalia's opinion in *Smith* but defending the rejection of judicially enforceable religious accommodations).

106 Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 503 (1992).

107 *Id.* at 524.

108 *Id.* at 503; *accord* Norman Dorsen, *A Tribute to Justice William Brennan, Jr.*, 104 HARV. L. REV. 15, 19 (1990) (describing *Smith* as having "weakened the free exercise clause"); Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1355 (1990) (doubting that "most civil libertarian constitutionalists" would support the narrow reading of *Yoder* offered in *Smith*); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992) (describing *Smith* as problematically "majoritarian[]" and calling it as part of a "retreat on free exercise").

109 *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210–11 & nn.9–10 (1994).

110 Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

111 KOPPELMAN, *supra* note 4, at 5; *see also* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 120 (2008) ("[O]ver time Congress and the Court have ironed out their differences to at least some extent, converging on a regime that protects at least some judicial accommodations and allows others to be introduced legislatively, at both the federal and the state level. This part of our tradition, at least right now, is in a reasonably healthy state."); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER (forthcoming 2015) (manuscript at 1), http://ssrn.com/abstract=2466571 [http://perma.cc/DUS4-U99Y] ("Almost no one thinks that American law would be truly and adequately respectful of religious

Much has changed since *Smith* was decided. Indeed, much has changed even in the short time since Koppelman wrote those words. In particular, recent years have witnessed the ascendance of a strong form of legal egalitarianism.[112] For people holding that view, claims for judicially enforceable exemptions from general laws may be seen as little more than "a special interest demand."[113]

From this egalitarian perspective, *Smith* does not go far enough. The consensus in favor of accommodation of religion that Koppelman describes seems to have weakened, if not collapsed. A substantial body of opinion on this issue has moved from the view that *Smith* erred grievously by rejecting the prior regime of free exercise exemptions from generally applicable law, to the view that legislative exemptions are permitted but subject to careful cabining,[114] to a broader questioning of religious accommodations altogether.

We may put the point more precisely. Arguments for religious accommodation have hardly vanished. *Hobby Lobby* itself is proof of that, and the principle still has scholarly advocates.[115] What has changed is that accommodation has become highly contestable — *and* the question of accommodation has moved from the background to the foreground of contestation on church-state issues. In a way that it was not until very recently, the question of religious accommodation is in play.

One example of this shift is especially relevant to the *Hobby Lobby* moment. Last spring, with *Hobby Lobby* already teed up in the Supreme Court, the Mississippi legislature considered whether to pass its own Religious Freedom Restoration Act. Given the timing and some of the bill's content, objections to its passage were to be expected. One group of law professors, all of them prominent in church-state scholarship, wrote urging the legislature to reject the bill.[116] In addition to

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freedom if the law offered no avenue to accommodate deeply held, conscientious religious commitments.").

[112] Professor Steven Smith calls this movement "secular egalitarianism." Steven D. Smith, *Religious Freedom and Its Enemies, or Why the* Smith *Decision May Be a Greater Loss Now than It Was Then*, 32 CARDOZO L. REV. 2033, 2046 (2011). That label may be accurate if it is taken to refer specifically to the position that "legal decisions," broadly understood, "should be based on secular grounds," and that equality is a "virtually unquestioned" secular value. *Id.* But not all stringent egalitarians are nonreligious, and I fear that the label risks misleading casual readers.

[113] Laycock, *supra* note 7, at 422; *see also*, e.g., HAMILTON, *supra* note 13, at 1–3, 8–9, 349–51.

[114] Various versions of this position are canvassed in Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 157–63 (2009).

[115] *See, e.g.*, Mark L. Rienzi, *The Case for Religious Exemptions — Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395 (2014) (book review); *see also* HORWITZ, *supra* note 6, at 191–92.

[116] *See* Letter from Ira C. Lupu, Professor of Law Emeritus, George Wash. Univ., et al., to Phillip Gunn, Speaker, Miss. House of Representatives, et al. (Mar. 10, 2014), http://content.thirdway.org/publications/795/Letter_by_Religious_Liberty_Scholars_Opposing_Mississippi_Bill_2681.pdf [http://perma.cc/6MAN-KWYE] [hereinafter Mississippi RFRA Letter].

making specific criticisms of the bill, they added this candid — and telling — peroration:

> Twenty years ago, the Religious Freedom Restoration Act might have been less fraught with legal and policy peril. Now, when it will most likely be both seen and used as a shield against enforcement of civil rights laws (current and future), enacting it seems like a uniquely poor idea. Doing so will harm the state's reputation as well as its legal culture.[117]

It is not striking that the Mississippi bill should have drawn opposition. Beyond any doubts about the merits of the specific provisions of the bill in question, some of the letter's signers had already voiced more general reservations about legislative accommodations of religion.[118] What *is* striking is the particular argument employed here. RFRA's one-time legitimacy is conceded, if grudgingly. Today, however, the signatories argue that such statutes are more problematic — not because of their particulars alone, but because of how they will be "*seen*."[119]

One hesitates to build an argument on a turn of phrase. In this case, however, the language is important. It captures the movement of the religious accommodations question from the background to the foreground of contestation in our legal and political culture, and gestures at some of the reasons for this change. Even at the height of support for RFRA and other legislative accommodations for religion, after all, it was hardly unforeseeable that these laws might conflict with nondiscrimination statutes.[120] At the time, however, those concerns had to be balanced against what was then seen as the positive value of religious accommodation itself.

The balance of concerns has now shifted significantly. As I argue below, many of the reasons for that shift are obvious. Less visible, however, is the fact that, in the process, an increasing number of people have come to see religious accommodation not just as losing in the

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[117] *Id.* at 6.

[118] *See, e.g.*, Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Schwartzman, *supra* note 7. Other signers have at least treated the constitutionality of legislative accommodations as a given in the past. *See, e.g.*, Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1292–96 (2008).

[119] Mississippi RFRA Letter, *supra* note 116, at 6 (emphasis added); *cf.* Paul Horwitz, *"A Troublesome Right": The "Law" in Dworkin's Treatment of Law and Religion*, 94 B.U. L. REV. 1225, 1238 & n.100 (2014) (suggesting that for those who believe that law should express the values of nondisparagement or equal dignity, the very existence of some religious accommodations or exemptions may increasingly be seen as harmful in and of itself).

[120] *See, e.g.*, Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 208–10 (1995).

balance against other interests,[121] but as not presenting much of an interest at all. For some, religious accommodation has become virtually synonymous with, or code for, discrimination.[122] It is not so much losing in the balance as dropping out of the equation altogether. Although the phrase is perhaps not meant to suggest this much, the letter's authors are at least strategically smart to suggest that religious accommodation statutes are now viewed very differently by the legal and political culture. The ground has shifted from underneath these statutes.

B. *Social Contestation*

Shifts in contestation on legal meanings do not occur in a vacuum. They are driven by social contestation: by what positions are treated as contestable or uncontestable, utterable or unutterable. Here, too, there have been significant changes. The contraception-mandate litigation, and the public response to the decision in *Hobby Lobby*, may shed further light on these changes.

1. LGBT Rights. — *Hobby Lobby* involved the use of contraceptives, whose acceptability is "as close to cultural consensus as we get."[123] Much of the early critical reaction to *Hobby Lobby* understandably focused on women's access to contraceptive services, which is indeed an important public health issue.[124] For a variety of reasons, some sincere and some strategic, most of the public criticism and political vote-whipping in response to *Hobby Lobby* has focused on women's healthcare and equality.[125] But this issue was not the sole cause of the pre- and post-decision controversy surrounding *Hobby Lobby*.

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[121] *See, e.g.*, Feldblum, *supra* note 15 (arguing that conflicts between religious liberty claims and nondiscrimination claims should generally be decided against the religious claimants, but insisting that the burdens on religious individuals and institutions in those cases are real and substantial).

[122] *See, e.g.*, JAY MICHAELSON, POLITICAL RESEARCH ASSOCS., REDEFINING RELIGIOUS LIBERTY: THE COVERT CAMPAIGN AGAINST CIVIL RIGHTS (2013), http://www.politicalresearch.org/resources/reports/full-reports/redefining-religious-liberty [http://perma.cc/CRF3-JYVT].

[123] Ross Douthat, *Sex and Consequences*, N.Y. TIMES: EVALUATIONS, July 8, 2014, http://douthat.blogs.nytimes.com/2014/07/08/sex-and-consequences/ [http://perma.cc/7VRN-R48L]; *see also*, e.g., Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, GALLUP (May 22, 2012), http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx [http://perma.cc/WW5F-CNF8].

[124] *See, e.g.*, Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL'Y & L. 303, 336 (2014). Justice Kennedy wrote separately in *Hobby Lobby* to emphasize this point. *See* 134 S. Ct. at 2785–86 (Kennedy, J., concurring).

[125] *See, e.g.*, Hobby Lobby *Decision: Republican Senate Candidates Would Go Further than SCOTUS, Support Radical Measures to Block Birth Control*, DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE (June 30, 2014), http://www.dscc.org/pressrelease/hobby-lobby-decision-republican-senate-candidates-would-go-further-scotus-support [http://perma.cc/XWL2-YSE2]. By contrast, while much of the post-decision discussion involved reproductive rights, most of the pre-decision discussion involved LGBT issues.

The Court's decision, after all, was *premised* on the assurance that women's access to reproductive services would be secure, regardless of employer.[126] The majority may have glossed over the practical difficulties involved in making this assurance a reality, but the fact remains that the plaintiffs won only because both the government and the majority made clear that women's access to reproductive services would be unimpaired. To be sure, the decision would still have been controversial had its only subject been women's health. But more was needed to make it explosive.

The "more," it seems clear, is LGBT rights, specifically same-sex marriage and ancillary issues. The change in views on this subject is a paradigmatic example of the way that social meanings, and ultimately legal readings, can move from uncontestability at one end of the spectrum, through a period in which their meaning is "contested" and "political,"[127] and ultimately to uncontestability at the other end of the spectrum. Public views on LGBT rights and same-sex marriage have made much of this journey, in a very short time.[128]

Those views have in turn fed changes in judicial understandings of the plausible meaning of the Constitution's broad guarantees. Fifty years ago, "homosexual practices" sat comfortably on the list of seemingly self-evident exclusions from an evolving interpretation of the Due Process Clause and its protections for conduct within "lawful marriage."[129] The law has changed dramatically since then.[130] Last Term's decision in *United States v. Windsor*[131] seems likely to lead soon to final confirmation in the Court that the fundamental right that

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[126] *See Hobby Lobby*, 134 S. Ct. at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

[127] Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 417 (1995).

[128] *See, e.g.*, KLARMAN, *supra* note 21, at 130–34, 149–52, 156–57; ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE 402–06 (2010).

[129] Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("[The] laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."); *see also* Lessig, *Fidelity and Constraint, supra* note 9, at 1427 (noting that in roughly the same time period, the view that homosexuality was a "disease" was "common ground for liberals as well as conservatives" on the Court (citing Boutilier v. INS, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting))).

[130] *See generally Developments in the Law — Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1680 (2014) (discussing legal and social changes in this area).

[131] 133 S. Ct. 2675 (2013).

not long ago "dare[d] not speak its name"[132] emphatically includes the right to form a family.[133]

These myriad changes have not just been a matter of background contestation, of slow and quiet change. They have occupied the foreground of public political and cultural discussion.[134] And given the background presence of antidiscrimination laws, which in many states now cover sexual orientation,[135] they raise corollary legal issues concerning the religiously motivated conscientious refusal to provide services to gays and lesbians in relation to same-sex marriages.[136]

Gay rights and same-sex marriage barely featured at all in the texts of the opinions in *Hobby Lobby*. They surfaced briefly in Justice Ginsburg's dissent and its list of potential "minefield" issues raised by the majority's "immoderate reading of RFRA."[137] In noting that "Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs,"[138] Justice Ginsburg allowed a brief citation to the notorious *Elane Photography, LLC v. Willock*[139] case to hint at these broader questions.[140] The majority was even more circumspect. It dismissed the dissent's concerns that "discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," with the curt assertion that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and

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[132] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

[133] *See Marriage Litigation*, FREEDOM TO MARRY, http://www.freedomtomarry.org/litigation (last visited Sept. 28, 2014) [http://perma.cc/GKF4-XXGQ] (maintaining an updated list of federal and state court decisions on same-sex marriage).

[134] *See, e.g.*, KLARMAN, *supra* note 21, at 111–13; PUTNAM & CAMPBELL, *supra* note 128, at 396–401.

[135] *See Non-Discrimination Laws: State by State Information — Map*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Sept. 28, 2014) [http://perma.cc/6RLT-ERNC] (showing states that include sexual orientation among the covered classes protected by antidiscrimination laws). The number is substantial but still covers fewer than half the states.

[136] For an early, but prescient, overview of these issues, see SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15.

[137] *Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

[138] *Id.* at 2804.

[139] 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (upholding, against a challenge rooted in free speech rather than free exercise, an antidiscrimination suit against a for-profit photography business whose owners refused, on religious grounds, to photograph a lesbian commitment ceremony), *cited in Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting).

[140] The dissent also cited *In re Minnesota ex rel. McClure*, 370 N.W.2d 844 (Minn. 1985), which upheld the application of a state employment discrimination law to a group of for-profit health clubs whose owners insisted for religious reasons that "fornicators and homosexuals," among others, were not suitable employees. *See id.* at 847, *cited in Hobby Lobby*, 134 S. Ct. at 2804–05 (Ginsburg, J., dissenting).

prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[141] Other forms of discrimination, including both gender and sexual orientation discrimination, and discrimination in contexts outside employment, such as the provision of services in places of public accommodation, went unmentioned.

In this case, however, the absence of evidence is not evidence of absence. Slightly less than a year elapsed between the New Mexico Supreme Court's decision in *Elane Photography* and the decision in *Hobby Lobby*. In that time, *Elane Photography* and its implications have figured in both the contraception-mandate debate and related controversies concerning religious accommodations.[142] Both *Elane Photography* and *Hobby Lobby* played a role in the acrimonious state-by-state debate over proposed religious accommodations laws in 2013 and 2014,[143] and in national reactions to those events, such as the furor over whether Arizona Governor Jan Brewer should veto legislation that would have allowed business owners with religious objections to assert a claim under that state's mini-RFRA if sued by private parties invoking state or local antidiscrimination laws.[144] The two cases were yoked together by commentators who asked in advance of the *Hobby Lobby* oral argument whether a Supreme Court ruling in favor of the plaintiffs would allow "business owners [to] use religion as an excuse to discriminate against LGBT people"[145] and raised alarms about an

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[141] *Hobby Lobby*, 134 S. Ct. at 2783.

[142] *See, e.g.*, Sarah Lipton-Lubet, *Contraceptive Coverage Under the Affordable Care Act: Dueling Narratives and Their Policy Implications*, 22 AM. U. J. GENDER SOC. POL'Y & L. 343 (2014); Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248 (2013); Linda Greenhouse, *Early Warning*, N.Y. TIMES, Apr. 2, 2014, http://www.nytimes.com/2014/04/03/opinion/early-warning.html [http://perma.cc/JC7Z-ECF5]; Kaimipono D. Wenger, *License to Discriminate? Religious Freedom Discrimination,* Elane Photography*, and S.B. 1062*, CONCURRING OPINIONS (Feb. 21, 2014) http://www.concurringopinions.com/archives/2014/02/license-to-discriminate-religious-freedom-discrimination-elane-photography-and-s-b-1062.html [http://perma.cc/F6GL-SBNZ].

[143] *See, e.g.*, Paul Horwitz, *Same-Sex Marriage & Religious Freedom: A New Round in the Old Debate Between Liberty & Equality*, COMMONWEAL, Apr. 11, 2014, at 8, https://www.commonwealmagazine.org/same-sex-marriage-religious-freedom [http://perma.cc/L2V7-NJU5]; Laycock, *supra* note 15, at 871; Lupu, *supra* note 111, at 8–9.

[144] *See* S.B. 1062, 51st Leg., 2d Reg. Sess. § 2 (Ariz. 2014), http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf [http://perma.cc/EVM9-PXUT]; Shadee Ashtari, *Arizona Senate Passes Bill Allowing Discrimination on Basis of Religious Freedom*, HUFFINGTON POST (Feb. 20, 2014, 1:04 PM), http://www.huffingtonpost.com/2014/02/20/arizona-religious-freedom-discrimination_n_4823334.html [http://perma.cc/6P5U-24TK] (noting that one of the bill's sponsors cited the ruling in *Elane Photography* in support of the law). The bill was vetoed. *See* Letter from Janice K. Brewer, Governor of Ariz., to Andy Biggs, President of the Ariz. Senate (Feb. 26, 2014), http://azgovernor.gov/dms/upload/PR_022614_SB1062VetoLtr.pdf [http://perma.cc/5WVS-K77B] (discussing the veto of this bill).

[145] Adam Winkler, *Will the Supreme Court License Anti-Gay Discrimination?*, HUFFINGTON POST (Mar. 24, 2014, 9:28 AM), http://www.huffingtonpost.com/adam-winkler/will-the-supreme-court-li_b_5020848.html [http://perma.cc/483M-5YPV]; *cf.* Horwitz, *supra* note 143, at 8–9.

era of "Gay Jim Crow."[146] Conversely, opponents of same-sex marriage painted both cases as twin fronts in a "Silent War on Religious Liberty."[147] If both wings of the *Hobby Lobby* Court barely mentioned the conflict between religious liberty and equality for same-sex couples, it might have had less to do with prudence or minimalism, and more to do with the fact that all the epithets had already been used up.

The point, to be clear, is not that a case involving real or perceived access to contraceptive services is not significant in itself. It is clearly an important substantive issue; it has been a focus of legislative debate at the state level in recent years; and it was a prominent subject in national politics in the last presidential election and the recent midterm elections. But even on politically controversial healthcare issues such as abortion, *some* form of accommodation has been reached. For example, abortion continues to be (nominally) legal and available, but it is not publicly subsidized, and substantial conscience exemptions leave individual providers free to opt out of performing those procedures.[148] That compromise is contested.[149] But, at least with respect to funding and the mandatory provision of abortions, it is mostly background contestation. How to reconcile religious objections and LGBT equality, by contrast, remains very much in the foreground of current contestation. Obviously, the debate over same-sex marriage and religious liberty is responsible neither for the contraception mandate nor for the litigation it produced. But the debate has a great deal to do with just

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[146] *See, e.g.*, Joshua Holland, *It's Not Just AZ — "Gay Jim Crow" Laws Are Popping up Across the US*, MOYERS & COMPANY (Feb. 26, 2014), http://billmoyers.com/2014/02/26/its-not-just-az-gay-jim-crow-laws-are-popping-up-across-the-us/ [http://perma.cc/3EQG-AVTZ]; Kirsten Powers, *Jim Crow Laws for Gays and Lesbians?*, USA TODAY (Feb. 19, 2014, 1:17 PM), http://www.usatoday.com/story/opinion/2014/02/18/gays-lesbians-kansas-bill-religious-freedom-christians-column/5588643 [http://perma.cc/4DFG-YCXH]; Mark Joseph Stern, *Kansas' Anti-Gay Segregation Bill Is an Abomination*, SLATE (Feb. 13, 2014, 8:30 AM), http://www.slate.com/blogs/outward/2014/02/13/kansas_anti_gay_segregation_bill_is_an_abomination.html [http://perma.cc/4KAB-2DRC].

[147] Bobby Jindal, Governor, State of Louisiana, Prepared Remarks: The Silent War on Religious Liberty (Feb. 13, 2014), http://officeofgovernorbobbyjindal.createsend1.com/t/ViewEmail/d/930F67F00F751D63/0B5AEB36B909D8502540EF23F30FEDED [http://perma.cc/KJ7C-RP4H].

[148] *See, e.g.*, Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1463–65 (2012). Professor Elizabeth Sepper argues that "same-sex marriage objections lack the distinct and compelling features of conscientious objection recognized by law" in contexts such as the provision of abortion. Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 708 (2014). That point is important in considering whether the compromises over abortion have any purchase in cases such as *Elane Photography* or *Hobby Lobby*. But it does not contradict, and may actually support, the point made in the text above: that it has been harder to bridge the gap over religious accommodations with respect to LGBT rights than it has been to arrive at some form of compromise with respect to abortion.

[149] *See, e.g.*, Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 42–45 (2008).

how large *Hobby Lobby* loomed in the public conversation — and still does.

2. *Changing Views of the Marketplace.* — That *Hobby Lobby* was, so to speak, in some measure a gay rights case, and that any case that intersects with the culture wars is likely to receive an added amount of attention and controversy, are both fairly well understood. Another facet of the case, however, has gone relatively unnoticed. It has to do with the very terrain on which *Hobby Lobby* was fought: the lived experience of the commercial marketplace itself.

Two related assumptions about commercial life seem to have had considerable purchase in the responses to the litigation over the contraception mandate itself, and the perplexed or outraged reactions to the *Hobby Lobby* decision. The first is the *doux commerce* assumption. That assumption, which was advanced by Enlightenment figures such as Montesquieu[150] and revived as a subject by Albert Hirschman,[151] suggests that commerce "is a sociable institution and can be expected to cultivate virtues"[152] conducive to life in a diverse society. Commerce "foster[s] tolerance and understanding" and "smooth[s] over social, religious, and cultural differences."[153] Forced to work and trade together in the pursuit of goods and private gain, people will be more likely to set aside their "private grievances"[154] and observe "rules, understandings, and standards of behavior enforced by reciprocity of advantage."[155] Easily romanticized,[156] often honored in the breach,[157] it nevertheless retains a hold on our conception of market relations: dealings between employer and employee, between consumers and businesses, and so on. Those interactions should be thin, broad, and placid. Private attachments and grievances have little or no place here.

The second assumption follows from the first: religion should, for the most part, be zoned out of the marketplace and market relations. With only a little hyperbole, Professor Ronald Colombo has called this

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[150] *See* MONTESQUIEU, THE SPIRIT OF THE LAWS 338 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

[151] *See* ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 59–63 (1977).

[152] Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1048 (2011).

[153] Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 17 (2010); *see also* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 34–35 (2000); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183, 202–04 (2012).

[154] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 775 (1986).

[155] *Id.* at 776.

[156] *See id.* (calling the *doux commerce* concept "perhaps [an] overly roseate Enlightenment view of commerce").

[157] *See, e.g.*, GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND (1999).

a vision of the "naked private square."[158] The market and its participants are often viewed "as a thoroughly secular institution in which religion plays no role and has no place."[159] It is an old, now trite observation that, for many, religion is viewed as belonging mostly to the "'private' spaces of home and house of worship."[160] This position is captured in Chief Justice Burger's assertion: "The Constitution decrees that religion must be a private matter for the individual, the family, and . . . institutions of private choice" such as churches.[161] If support for this proposition has arguably faded on the Court itself,[162] it is still very much the prevailing view within the liberal mainstream, including those holding mainline religious views. In this division of life into public and private spheres, the marketplace is assumed to fall more into the public than the private sphere.[163]

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[158] Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013).

[159] *Id.* at 6; *see also* Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 92 (2010) ("[D]eep-seated patterns of thought, ingrained business practices, and social norms make it difficult to link the spheres of faith and business, leading to what Alford and Naughton call 'a divided life,' where matters of Spirit and finance occupy wholly separate spheres." (quoting HELEN J. ALFORD & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION 12 (2001)), *quoted in* Colombo, *supra* note 158, at 6 n.21).

[160] Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 108 (1998). In the 1990s, this complaint became prominent with the publication of Professor Stephen Carter's book, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993). President Clinton famously made a point of praising Carter's book publicly. *See* Marci A. Hamilton, Review Essay, *What Does "Religion" Mean in the Public Square?*, 89 MINN. L. REV. 1153, 1155 (2005) (noting that Clinton is holding a copy of Carter's book in the portrait of him that hangs at Yale Law School); Gwen Ifill, *Clinton Warns Youths of the Perils of Pregnancy*, N.Y. TIMES (Feb. 4, 1994), http://www.nytimes.com/1994/02/04/us/clinton-warns-youths-of-the-perils-of-pregnancy.html [http://perma.cc/4HWJ-QQGP]. It is no coincidence that it was this period, in which both Democrats and Republicans were seeking to capture the "values" flag and appeal to religious voters, that saw the overwhelming passage of RFRA. Anyone looking to follow the movement of mainstream American political thought over the last quarter century should simply track the changing public positions of the Clintons.

[161] Lemon v. Kurtzman, 403 U.S. 602, 625 (1971). That statement was made in the context of the Establishment Clause, not the Free Exercise Clause. There are good reasons why government might be disabled from acting in particular ways with respect to religion under the Establishment Clause, even if it is allowed or required to accommodate religion under the Free Exercise Clause, although the language of "public" and "private" may not fully capture those reasons. *See* HORWITZ, *supra* note 6, ch. 7. But Chief Justice Burger's statement captures a broader sentiment about the role of religion that has been relevant to questions of free exercise and religious accommodation as well. *See, e.g.*, CARTER, *supra* note 160, at 8, 22.

[162] *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811 (2014) (holding that town's practice of opening board meetings with a prayer did not violate the Establishment Clause).

[163] It is no coincidence that a book on the shopping mall in American law and history links the modern-day mall to the paradigmatic public space, the agora. *See* PAUL WILLIAM DAVIES, AMERICAN AGORA: *PRUNEYARD V. ROBINS* AND THE SHOPPING MALL IN THE UNITED STATES 49, 58–59 (2001).

These assumptions about the nature of the marketplace and the minimal role religion should play within it are woven into American law itself. With some exceptions,[164] the marketplace is often treated as an identity-neutral, egalitarian space.[165] To the extent that identity has a place there, it is thin, not thick.

These assumptions play into what was, at least until *Hobby Lobby*, the common, mostly undertheorized distinction between nonprofit and for-profit religious institutions, or between commercial and noncommercial institutions, for freedom of association[166] as well as religious exercise purposes.[167] Even those who take a robust view of free exercise or associational rights are inclined to respect this distinction, if only for pragmatic reasons.[168] To fail to respect it falls, for most people in polite legal circles, into the realm of "unutterability."[169]

The sacred status of this demarcation was evident in Justice Ginsburg's dissent in *Hobby Lobby*, with its concerns about the "havoc" the Court's (or RFRA's) erasure of the distinction might bring.[170] It

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164 *See, e.g.*, 42 U.S.C. § 2000e-1 (2012), *upheld in* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

165 *See, e.g.*, Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1217 (2000) ("Translating the concept of the undifferentiated public citizen to the private workplace leads to a view of the workplace as a public, neutral sphere where differences are irrelevant or emerge only as an expression of private preference."); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2063–64, 2072–74 (2003) (discussing the American desire to "sanitize" the workplace — to "suppress the personal elements of people's lives that threatened the smooth functioning of the firm," *id.* at 2073).

166 *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 632–39 (1984) (O'Connor, J., concurring in part and concurring in the judgment). For some questions about this case, see PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 215–18 (2013).

167 For a thoughtful overview of these questions, see Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369 (2013). *See also* Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2013), http://cornelllawreview.org/clronline/do-for-profit-corporations-have-rights-of-religious-conscience [http://perma.cc/WFE4-R4C6].

168 *See, e.g.*, John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 828–29 (2014).

169 *See generally* Lawrence Lessig, *Understanding Federalism's Text*, 66 GEO. WASH. L. REV. 1218, 1220–21 (1998) (describing the process by which ideas become socially "unutterable"). Professor Richard Epstein's writing is an arguable exception, *see, e.g.*, Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1277–78 (2014), but, to be slightly puckish about it, some of Epstein's interlocutors might question whether his work belongs in polite society, *see, e.g.*, Bagenstos, *supra* note 12.

170 *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting); *see also id.* at 2794–95 ("The Court's 'special solicitude to the rights of religious organizations,' however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in 'the commercial, profit-making world.'" (citations omitted) (first quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012), then quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987))). Justice Ginsburg was mostly right about this, I think. But so was Justice Alito, when he observed that both Justice Ginsburg's dissent and

featured prominently in public reactions to the litigation, which fastened fiercely on the dangers of extending free exercise claims, statutory or otherwise, to the commercial realm.[171] Hobby Lobby's claims, and those of the other for-profit businesses challenging the contraception mandate, were seen as an ominous development, accompanied by citations to the *Lochner* era.[172]

In an important sense, however, *Hobby Lobby* and the litigation surrounding the contraception mandate simply make evident something that has drawn too little scholarly notice. In many parts of the country, this picture of the marketplace as a neutral space, a realm of thin identities if not actual *doux commerce*, has been upended by actual practice.

Hobby Lobby itself, with its interweaving of religious views into business decisions about when to open or close, what to stock, and of course what benefits to support or oppose,[173] is now the most prominent example. But it is not alone.[174] Many religious traditions agree that "[d]ividing the demands of one's faith from one's work in business is a fundamental error."[175] To a growing and increasingly visible extent, a range of faiths and sects take an "integralist" view that sees "religion not as one isolated aspect of human existence but rather as a comprehensive system more or less present in all domains of the individual's life."[176] The chains and small businesses that dot the shop-

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HHS's argument failed to supply a clear, principled basis for a distinction in this area between nonprofit and for-profit institutions. *See id.* at 2769–71 (majority opinion).

[171] *See, e.g.*, Press Release, Am. Civil Liberties Union, Supreme Court Upsets Church-State Balance and Enhances Digital Privacy in Key End-of Term Decisions (July 1, 2014), https://www.aclu.org/organization-news-and-highlights/supreme-court-upsets-church-state-balance-and-enhances-digital [http://perma.cc/NS7S-3HDS]; Jeffrey Rosen, *The End of Anti-Discrimination*, NEW REPUBLIC (Mar. 25, 2014), http://www.newrepublic.com/article/117144/hobby-lobby-ruling-could-end-anti-discrimination-laws-we-know-them [http://perma.cc/GAT2-22PF].

[172] *See, e.g.*, Bagenstos, *supra* note 12, at 1233–34; Elizabeth Sepper, *Free Exercise Lochnerism* (forthcoming 2015), http://papers.ssrn.com/soi3/papers.cfm?abstract_id=2463274 [http://perma.cc/7U7F-MDQ2].

[173] *See Hobby Lobby*, 134 S. Ct. at 2764–66 (describing the faith-centered business practices of Hobby Lobby and the other plaintiffs).

[174] *See, e.g.*, Brief of the C12 Group, LLC, as Amicus Curiae Supporting the Non-Governmental Parties at 1–2, 23–30, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 343191.

[175] PONTIFICAL COUNCIL FOR JUSTICE & PEACE, VOCATION OF THE BUSINESS LEADER: A REFLECTION 6 (3d ed. 2012), http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf [http://perma.cc/M7B6-4338]; *see also* Brief of Amici Curiae the Council for Christian Colleges & Universities et al., and Petitioner Conestoga at 3–9, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 343194. For other examples, *see* Colombo, *supra* note 158, at 3–4, 18–22; Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 278–80 (2014); *and* Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 66–73 (2013).

[176] Kenneth D. Wald, *Religion and the Workplace: A Social Science Perspective*, 30 COMP. LAB. L. & POL'Y J. 471, 474 (2009), *quoted in* Colombo, *supra* note 158, at 18; *see also* Colombo,

ping areas near the cities and college towns where law schools can be found may not reflect this development as strongly, but it is happening just the same.[177]

Not everyone has noticed the extent to which many American companies or their owners adopt integralist views of religion and business. But many have noticed that moral considerations, and not just profit maximization, have played an increasingly visible and contested role in the marketplace. As Justice Alito observed, "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[178] Many for-profit businesses pursue charitable or social endeavors;[179] many investors and investment funds cater to morally and socially conscious aims;[180] and many new corporate forms or governing rules recognize the role of pursuits beyond narrow profit seeking.[181]

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supra note 158, at 16–19 (discussing and providing examples of the increase of religion and spirituality in America in the last two to three decades). *See generally* ALFORD & NAUGHTON, *supra* note 159 (providing strategies for integrating faith into business management practices); RONALD J. COLOMBO, THE FIRST AMENDMENT AND THE BUSINESS CORPORATION (2014) (on file with the Harvard Law School Library); LAKE LAMBERT III, SPIRITUALITY, INC. (2009) (tracing and analyzing the role of religion in the workplace); DAVID W. MILLER, GOD AT WORK (2007) (examining the intersection of faith and work and tracing developments in the field).

For a discussion of what has been called the "faith at work" movement and its relationship to the *Hobby Lobby* decision, see Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, THE IMMANENT FRAME (July 8, 2014, 12:33 PM), http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom [http://perma.cc/6V7K-LL74]. Professor Sullivan is more critical of RFRA than I am, and argues that in understanding the case, "it is important . . . to move beyond the culture-wars framing of most commentaries and examine why it seems obvious, even natural, to the justices in the majority and to many others outside the Court that Hobby Lobby is engaged in a protected exercise of religion." *Id.* Although I agree with her commentary in many respects, I think the "culture-war framing" *is* relevant here, in the sense that it is important to understand how our cultural divides on contested issues have led to a seeming impasse in this and other cases. It is not required, of course, that those of us who study this area participate in those battles or frame the issues from one side of the divide or the other.

[177] *Cf.* Michael A. Helfand & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. (forthcoming 2015) (manuscript at 1, 18–19), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2403877 [http://perma.cc/FN82-7WTW] (noting the substantial volume of "commerce between co-religionists who intend their transactions to adhere to religious principles or pursue religious objectives"). The figures they cite do not appear to include the many businesses run on religious principles that serve a broader set of consumers, such as Hobby Lobby or Chick-fil-A.

[178] *Hobby Lobby*, 134 S. Ct. at 2771.

[179] *Id.*

[180] *See, e.g.*, Colombo, *supra* note 158, at 22–23; M. Todd Henderson & Anup Malani, Essay, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 613–15 (2009). *But see* James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1591 ("[M]ore recently, socially responsible investment has come to look a lot more like ordinary institutional investment.").

[181] *Hobby Lobby*, 134 S. Ct. at 2771 (discussing the rise of "hybrid corporate forms" such as the benefit corporation); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979) (discussing the "corporate social responsibility" movement). *See generally* Brett G. Scharffs, Our Fractured Attitude Towards Corporate Conscience (Mar. 12, 2014) (unpublished

Temple American Inn of Court - April 2016 Program - Research and Materials

Most businesses still seek to please the largest number of consumers with the least amount of disturbance.[182] Accordingly, most corporate departures from pure profit-seeking will involve relatively uncontroversial choices. It did not escape notice in some circles that in the middle of the *Hobby Lobby* litigation, President Obama praised CVS Caremark, the pharmacy chain now known as CVS Health, for its announcement that it would soon refuse to carry tobacco products.[183] That decision, and the positive response it elicited, might be distinguished from the *Hobby Lobby* case in numerous ways. But the bottom line, so to speak, is that CVS's decision concerned a habit that today finds diminishing public support. It was a safe choice.

Where foregrounded issues of contestation regarding the culture wars are concerned, we can expect those decisions to be more rare but also more salient and controversial.[184] Disputes over LGBT rights and their relationship to the marketplace offer a timely and pertinent example. To take one prominent instance, while the decision in *Hobby Lobby* was pending and state-level struggles over religious accommodation were reaching their apex, the CEO of Mozilla, Brendan Eich, resigned under pressure because of a donation he had made in 2008 to the Proposition 8 campaign in California.[185] Following the *Hobby Lobby* decision itself, there were widespread calls for a boycott of any company that refused to directly support full contraceptive coverage for women.[186]

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manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445680 [http://perma.cc/XY3B-SRXP].

[182] This is not always the case, of course. *See, e.g.*, Tushnet, *supra* note 167, at 78 (noting the possibility of niche marketing for religious or other businesses); *cf., e.g.*, Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 404–05 (2013) (noting a growth in niche markets for "enhanced-welfare animal products").

[183] *See, e.g.*, Scharffs, *supra* note 181, at 1–2.

[184] Interestingly, after *Windsor*, a number of major corporations publicly offered their support for the Court's decision. *See, e.g.*, *Big Brands Come out in Support of Supreme Court DOMA and Prop 8 Decisions*, PINK NEWS (June 27, 2013, 12:44 AM), http://www.pinknews.co.uk/2013/06/27/big-brands-come-out-in-support-of-supreme-court-doma-and-prop-8-decisions [http://perma.cc/W7P2-KZC3]. Their willingness to do so may indicate their confidence in public support for same-sex marriage. It may also be taken, however, as further evidence of the argument in the text above that the modern marketplace is not devoted solely to profit maximization, but is also an arena of moral and social contestation.

[185] *See* Taylor Casti, *Anti-Gay Marriage Mozilla CEO Resigns After Backlash*, HUFFINGTON POST (Apr. 7, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/04/03/brendan-eich-anti-gay-moz_n_5085006.html [http://perma.cc/33HN-98K3]. The episode was discussed and critiqued in a public statement issued by a variety of supporters of same-sex marriage. *See Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REAL CLEAR POLITICS (Apr. 22, 2014), http://www.realclearpolitics.com/articles/2014/04/22/freedom_to_marry_freedom_to_dissent_why_we_must_have_both_122376.html [http://perma.cc/M663-RUQS].

[186] *See, e.g.*, *Sign the Pledge: Boycott Hobby Lobby*, DAILY KOS: CAMPAIGNS, https://www.dailykos.com/campaigns/751 (last visited Sept. 28, 2014) [http://perma.cc/R6LP-YHLH].

Obviously, distinctions may be drawn between some of these examples. We may readily distinguish, for instance, between the granting of government exemptions from generally applicable laws sought by companies like Hobby Lobby and the exercise of consumer preferences by supporters or opponents of Hobby Lobby or Brendan Eich. But it is important to see the bigger picture here. Everyone understands that the questions of women's reproductive health and LGBT rights that were raised by *Hobby Lobby* are socially contested. Fewer observers have noted that the marketplace itself has become a site of social contestation rather than a refuge from the culture wars.

The reactions to *Hobby Lobby* — and to the Hobby Lobby chain itself, and the existence of numerous religiously observant businesses that are willing to forego potential customers and disregard some of the rules of *doux commerce* — suggest that this change came as a shock to many. The angry responses the decision provoked — the calls for boycotts, and the desire to put market forces to work to guarantee not just progressive corporate policies, but progressive views by individual corporate executives — suggest that the marketplace has become a battleground. Given the issues involved, it is unsurprising that many stakeholders on both sides of this debate are deeply committed on these issues, unwilling to set aside their convictions for the sake of *doux commerce*, and adamant in refusing to compromise.

Liberals are right to be concerned about this.[187] Justice Alito's assurance that "it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims,"[188] let alone succeed in them, seems correct to me, for doctrinal and other reasons.[189] But if the marketplace is indeed becoming imbricated with thick religiosity and with social and political contestation, there is no guarantee that past performance will predict future results. If the American agora

[187] *Cf.* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2272 (1997) ("[T]he attempt to fix the boundaries between church and state and the project of liberal theory (of finding an archimedean point to the side of, above, or below sectarian interest) are one and the same. They stand or fall together, and what would threaten their fall . . . is a religion that does not respect the line between public and private, *but* would plant its flag everywhere. An uncompromising religion is a threat to liberalism because were it to be given full scope, there would be no designated, safe space in which toleration was the rule.").

[188] *Hobby Lobby*, 134 S. Ct. at 2774.

[189] On the doctrinal point, as Justice Alito notes, those corporations would face significant problems showing that their claim was sincere. *See id.* More broadly, as I noted above, most companies remain interested in satisfying the greatest number of potential consumers with the least amount of bad publicity. *See supra* notes 182–184 and accompanying text. Worries that a corporation, or at least one operating outside of a narrower niche, would find it attractive to assert claims for religious exemptions, *see, e.g.*, Tushnet, *supra* note 167, at 76–82, seem overstated to me, see HORWITZ, *supra* note 166, at 227–28 (arguing that even if businesses had wider latitude to argue for a right to discriminate on associational or other grounds, most would resist taking such a step).

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calms down again, it will not be because Congress or the state legislatures are able to impose some Westphalian peace. Any new peace will require either a significant settlement of currently contested social questions or a renegotiation of the norms that govern the marketplace altogether.

III. Assessing the Hobby Lobby *Moment*

Hobby Lobby answers some pressing questions, rightly or wrongly, and wisely keeps silent on others. Notably, it is not *Citizens United* redux. Despite the fears that were voiced on this issue during the litigation, the Court did not do for the Free Exercise Clause what *Citizens United* did for the Speech Clause, although nothing in the majority's opinion suggests that it would not do so in the proper case. It does not rely on any claims about the "metaphysical status"[190] of corporations, religious or otherwise.[191] But neither does it treat the corporate form as a barrier to religious claims; it simply recognizes it as a convenient "fiction" whose purpose is to serve human affairs.[192] It reads RFRA firmly and broadly, in keeping with the powerful nature of the statute.[193] But, despite the possible ramifications of the opinion, the Court does not extend its holding beyond closely held corporations, and the opinion makes clear that the compelling-interest calculus will yield other answers to other questions and other legal regimes, including our landmark antidiscrimination laws.[194] It uses the government's own willingness to accommodate religious nonprofits as a recipe for further accommodations in the for-profit arena.[195] Indeed, in the end it appears that the government itself was responsible for Justice Kennedy's crucial fifth vote in favor of the plaintiffs.[196] To be sure, the opinion left open some tantalizing questions about whether that compromise will suffice in all cases.[197] But those questions are hardly incapable of resolution.[198] The Court handed Hobby Lobby and similarly situated corporations a significant victory — *and* made clear that the government could continue to ensure that female employees had

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[190] Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights* 2 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2013-43, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360309 [http://perma.cc/4PQY-UDQV].

[191] *See Hobby Lobby*, 134 S. Ct. at 2768.

[192] *Id.*

[193] *See id.* at 2768–75.

[194] *See id.* at 2783.

[195] *See id.* at 2769–72.

[196] *See id.* at 2786 (Kennedy, J., concurring).

[197] *See id.* at 2763 n.9, 2782 & nn.39–40 (majority opinion).

[198] *See, e.g.*, Wheaton College v. Burwell, 134 S. Ct. 2806, 2807 (2014) (noting that the government may treat direct notification of a religious objection as triggering the insurer's obligation to provide contraceptive services to employees of the objecting entity).

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full access to contraceptive services. And because the decision was statutory, not constitutional, *Hobby Lobby* leaves everything open for political negotiation and resettlement, however unlikely that looks at the moment.

Nevertheless, both the litigation over the contraception mandate and the Supreme Court's decision in *Hobby Lobby* ignited a public firestorm. A calmly worded and revisable judgment, *Hobby Lobby* sits withal in the eye of a hurricane: a perfect storm of foregrounded legal and social contestation over religious accommodation, LGBT rights, and a "re-enchanted"[199] and repoliticized marketplace. Its judgment may channel and constrain the nature of the response to it, but it will hardly be able to quell the broader contestation over these issues. Appeals to the "culture wars" as an explanation of our national debates are often exaggerated and sometimes challenged outright.[200] But they are sometimes dead right. If any controversy can be described as a part of the culture wars, the *Hobby Lobby* moment surely qualifies.

The primary goal of this Comment is to describe, not prescribe. Although I share the hope that there remains some room for mutual accommodation and compromise, I venture no predictions on that front and offer no reasons for great optimism. Rather, I want to offer three potentially disquieting assessments of the *Hobby Lobby* moment and its meaning.

First, the moment *is* a significant part of the meaning. There is a voluminous literature on the relationship between law and social change.[201] Understandably, that work tends to focus on the longer temporal sweep of social and legal development, to speak in terms of years and decades rather than particular moments. But the *Hobby Lobby* moment is important, and revealing, for *being* a moment. It offers a window into the difficulty of doing or settling *anything* at the precise juncture at which an issue is moving from one end of the spectrum of contestation to the other: from religious accommodation being overwhelmingly popular to its future being cast into doubt, for example, or from a constitutional right to same-sex marriage being "unutterable"[202] to its being so inevitable and natural that opposition to it can be said to lack even a rational basis.[203] At either end of the spectrum, the decisions that courts issue are inevitable. In that precise

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[199] Johnson, *supra* note 159, at 97–98.

[200] *See, e.g.*, MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA 8–9 (3d ed. 2011); ALAN WOLFE, ONE NATION, AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT AND EACH OTHER 88–132 (1998).

[201] *See* sources cited *supra* note 18.

[202] Lessig, *supra* note 169, at 1220–21.

[203] *See, e.g.*, Love v. Beshear, 989 F. Supp. 2d 536, 549 (W.D. Ky. 2014).

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moment of foregrounded contestation, by contrast, they are excruciating, and unresolvable by ordinary law. Absent the clearest possible textual support, decisions at the midway point of social change risk exposing the Court at its most political, for reasons having little or nothing to do with the Justices' own good or bad faith.[204]

We may draw a second observation from the *Hobby Lobby* moment. Culture wars move at different paces in different places. They involve different phenomena and institutions with different tempi, influenced by different factors with different schedules: the pace of general and elite opinion, the quick punctuation of elections and the slow and unpredictable course of judicial vacancies and appointments, the contest between different groups over who will set the agenda and which items will come first, the glacial influence of academic debates and the slow shifts in academic consensus, the tug-of-war between legislative and judicial, and state and federal, leadership on an issue, and more. We could analogize culture wars, as they play out in law and politics, to a polyrhythmic piece of music, in which various instruments play longer or shorter patterns over different measures and in different time signatures. We do not necessarily know at any given moment in the song what is happening. Nor do we know what *will* happen: whether the rhythm and the song will solidify and coalesce, or decay and fall into cacophony.

We saw much of this phenomenon in the struggle over same-sex marriage.[205] The chorus of post-*Windsor* judicial opinions and the movement of public opinion suggest that we may have reached a stable rhythm. We are not there yet, however, with respect to the issues that arose in *Hobby Lobby* and related developments outside the courts: the status of religious accommodation, its relationship to both same-sex marriage and sexual-orientation discrimination, the rise of thick religious commitments in the marketplace, and the fate of RFRA itself. We do not yet know how, whether, or with what timing this discordant nation will come together on these issues.

In that sense, Justice Ginsburg may have been both right and wrong when she protested that the result in *Hobby Lobby* was not what Congress had in mind when it enacted RFRA. When it passed RFRA, Congress was doing many things: responding to the recent decision in *Smith*, following the New Democratic theme of the 1992 presidential election and seeking to bring religious and values voters back within the Democratic Party fold, building capital for the 1994 mid-

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[204] *See* Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 HARV. L. REV. 31, 40–41 (2005). Indeed, as I suggested above, the potential "super-statute" status of a law such as RFRA may make interpretive decisions about that statute at crucial moments especially hotly contested, and hence political. *See supra* note 84.

[205] *See generally* KLARMAN, *supra* note 21.

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terms, and perhaps participating in the longer historical conversation about the free exercise of religion. It was acting in the moment, not looking twenty years ahead. If it had, it might well have found the current state of contestation impossible to imagine.[206] Indeed, it only took a few years for the coalition that built RFRA to splinter over these very issues.[207] But Justice Ginsburg is also wrong, because the statute, reinforced by RLUIPA, was strong enough to justify — if not require — the ruling in *Hobby Lobby*, despite her protestations. Congress was simply acting in a different moment and under a different rhythm, with a different state of social contestation in mind. Whether the courts, Congress, and the state legislatures will find some common ground now is doubtful but not impossible. If they do, however, it will depend on factors beyond the reach of any one institution, each of which can move only at its own speed.[208]

Both these points lead to a final observation. Precisely because these pivotal moments are moments of foregrounded contestation and uncertainty, drawing on the deep divisions that characterize the culture wars on particular issues, the real battle in these moments, within and beyond the law, is over what Lessig calls "utterability."[209] Moving an issue "on the wall,"[210] so that it forms a legally plausible argument, is only the first part of the game. More important still, if one wants to guarantee or consolidate a victory — particularly one that involves social as well as legal contestation — is to define what can and cannot

[206] *See, e.g.*, *id.* at 136–37 (noting changes in leading politicians' positions on domestic partnership, same-sex unions, and finally same-sex marriage). It is striking that Professor Chai Feldblum, a strong advocate of same-sex marriage, wrote in a book published only six years ago, in the context of the relationship between same-sex marriage and religious liberty: "In some number of years (I do not know how many), I believe a majority of jurisdictions in this country will have modified their laws so that LGBT people will have full equality in our society, including access to civil marriage or to civil unions that carry the same legal effect as civil marriage." Feldblum, *supra* note 15, at 126. It is unlikely that many people sharing her views would today view civil unions alone as recognizing the "full equality" of LGBT partners.

[207] *See, e.g.*, Laycock, *supra* note 114, at 149.

[208] Indeed, that Justice Alito wrote the opinion in *Hobby Lobby* is emblematic of the ways in which courts, in particular, move at a very different tempo in the culture wars, often creating disjunctions with the larger cultural fabric. Justice Alito built his claim to nomination largely on the strength of his involvement in the Reagan Administration, but buttressed it with the support of legal liberals who supported his strong post-*Smith* reading of the Free Exercise Clause as a Third Circuit judge in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). It is not surprising that he would now author an equally strong opinion in *Hobby Lobby* — or that, given the changes in our culture, it should find a much less receptive audience among legal liberals.

[209] Lessig, *supra* note 169, at 1218–20.

[210] *See* Balkin, *supra* note 9.

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"be said" over the long run,[211] to define a particular argument as "indecent" and thus unutterable.[212]

This is an old game. It is at least as old as the once-common suggestion that admission to polite legal circles requires one to avow that *Brown* was wholly correct and *Lochner* terribly wrong.[213] As with that conventional wisdom, it is always open to recontestation.[214] But the goal — especially when the issue is contested, and much more so when it is both socially and legally contested — is to end the contest, preemptively if possible, by declaring certain arguments unutterable.

So it is with the arguments in and around *Hobby Lobby*. The battle is for the definitional high ground: to define particular religious accommodations, or accommodation in general, as something that will "harm [a] state's reputation as well as its legal culture";[215] to define the contraception mandate as part of a "war on religious liberty";[216] to define accommodations in the area of same-sex marriage as "Gay Jim Crow";[217] or to describe the Court's reading of RFRA in *Hobby Lobby* as utterly beyond Congress's imagining and liable to lead to terrible consequences.[218] Or — as I have described it here — as an "easy" decision that is easy to fix.

These kinds of efforts are understandable, but deeply ironic. They are most true when they are least needed. No one expends that kind of rhetorical energy, or succeeds in sparking public interest to this extent, on an easy case involving an uncontested social issue. Hence the rhetorical heat of the *Hobby Lobby* moment. These arguments are inevitably pitched in terms of what the law *already* and incontestably *is* — about what RFRA, or prior cases, or the Religion Clauses themselves, "clearly" mean. It is not always evident whether those arguing in such terms believe it. Indeed, it may very well be the mark of a moment of foregrounded social contestation that the participants in the argument *do* believe that what they are saying is clearly and incontrovertibly right, even when they should know better.

In any event, the truth is otherwise. The important arguments in moments of deep social and legal contestation — including the *Hobby Lobby* moment — are not arguments about what the law is; they are

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[211] Lessig, *supra* note 169, at 1220.

[212] *Id.* at 1220–21 & n.17 (citing Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring)).

[213] *See, e.g.*, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 59, 90 (1996); Scott M. Noveck, *Is Judicial Review Compatible with Democracy?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 401, 427 (2008).

[214] *See, e.g.*, Posner, *supra* note 204, at 53.

[215] Mississippi RFRA Letter, *supra* note 116, at 6.

[216] Jindal, *supra* note 147.

[217] Holland, *supra* note 146.

[218] *See Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

assertions about what our values *should* be. They are a battle for the descriptive high ground: for mastery over the terms of utterability.

The heated level of rhetoric in and around *Hobby Lobby* — seemingly everywhere but in Justice Alito's aggressive but tempered opinion — stands as a recognition of the limits of legal reasoning in such transitional moments. It is an indirect acknowledgment that the answers to the questions posed by such cases — Is religion special? Should we accommodate it? Can we make room for both LGBT rights and religious liberty? How much room is there for pluralism in the marketplace? — lie outside the scope of *any* statute or judicial opinion, *Hobby Lobby* included. For better or worse, at least in particular moments of foregrounded legal contestation, everything is utterable and even what was once sacred is up for grabs.

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Article

The Unsettling "Well-Settled" Law of Freedom of Association

JOHN D. INAZU

This Article argues that the Supreme Court's categories of expressive and intimate association first announced in the 1984 decision, Roberts v. United States Jaycees, *are neither well-settled nor defensible. These indefensible categories matter deeply to groups that have sought to maintain an unpopular composition and message in the face of anti-discrimination laws. These groups have been denied associational protections. They have been forced to change their composition—and therefore their message. They no longer exist in the form they once held and desired to maintain.*

The Roberts *categories of intimate and expressive association are at least partly to blame. These categories set in place a framework in which courts sidestep the hard work of weighing the constitutional values that shape the laws that bind us. This Article exposes the problems inherent in these categories and calls for a meaningful constitutional inquiry into laws impinging upon group autonomy. It suggests that the Court eliminate the categories of intimate and expressive association and turn instead to the right of assembly. Our right to assemble—to form relationships, to gather, to exist as groups of our choosing—is fundamental to liberty and genuine pluralism.*

ARTICLE CONTENTS

I. INTRODUCTION 151

II. CATEGORIZING THE RIGHT OF ASSOCIATION 155

III. INTIMATE ASSOCIATION 158

A. *GRISWOLD* AND THE RIGHT OF ASSOCIATION 159
B. KARST'S INTIMATE ASSOCIATION 161
C. BRENNAN'S INTIMATE ASSOCIATION 165

IV. EXPRESSIVE ASSOCIATION 168

A. CIVIL RIGHTS AND THE RIGHT TO EXCLUDE 168
B. BRENNAN'S EXPRESSIVE ASSOCIATION 174
C. THE PROBLEMS WITH "NONEXPRESSIVE" ASSOCIATION 176

V. THE COST TO THE JAYCEES 181

A. SIZE, SECLUSION, SELECTIVITY, AND THE SPECTER OF SEGREGATION 182
B. MONOLITHIC MEANING 186

VI. WHY DOCTRINE MATTERS 189

A. THE CHI IOTA COLONY OF ALPHA EPSILON PI 190
B. THE CHRISTIAN LEGAL SOCIETY AT HASTINGS LAW SCHOOL 192

VII. REMEMBERING THE RIGHT OF ASSEMBLY 197

VIII. CONCLUSION 206

The Unsettling "Well-Settled" Law of Freedom of Association

JOHN D. INAZU*

I. INTRODUCTION

The women's soccer team at the University of North Carolina has won twenty national championships, an achievement unmatched anywhere else in amateur athletics. The LPGA hosts a women's professional golf tour with nationally televised tournaments and roughly fifty million dollars in annual prize money. Music has thrived (or perhaps suffered, depending on one's perspective) with all-male groups like the Beatles, the Righteous Brothers, and the Jonas Brothers, and all-female groups like the Pointer Sisters, the Indigo Girls, and the Dixie Chicks. All-black choirs perform gospel music, and the Mormon Tabernacle Choir consists of, well, Mormons. The Talmudical Institute of Upstate New York, the Holy Trinity Orthodox Seminary (Russian Orthodox), and Morehouse College admit only men to their programs; Barnard College, Bryn Mawr College, and Wellesley College admit only women. During the women's movement in the early twentieth century, women organized around banner meetings, balls, swimming races, potato-sack races, baby shows, meals, pageants, and teatimes.[1] Gay organizations "'have relied on exclusively

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[1] LINDA LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 3 (1997). Lumsden has suggested that "virtually the entire suffrage story can be told through the prism of the right of assembly." *Id.* at 144. Iris Marion Young has argued that:

> [Female separatism] promoted the empowerment of women through self-organization, the creation of separate and safe spaces where women could share and analyze their experiences, voice their anger, play with and create bonds with one another, and develop new and better institutions and practices.
>
> Most elements of the contemporary women's movement have been separatist to some degree. Separatists seeking to live as much of their lives as possible in women-only institutions were largely responsible for the creation of the women's culture that burst forth all over the United States by the mid 1970s, and continues to

Temple American Inn of Court - April 2016 Program - Research and Materials

gay environments in which to feel safe, to build relationships, and to develop political strategy,'" including "many exclusively gay social and activity clubs, retreats, vacations, and professional organizations."[2] Sometimes discrimination is a good thing.

Of course, discrimination also has its costs. Those excluded—the Salt Lake City atheist with perfect pitch, the male golfer with limited swing velocity but machine-like precision—are denied opportunities, privileges, and relationships they might have otherwise had. They may be harmed economically, socially, and psychologically.[3] When groups exclude based upon characteristics like race, gender, or sexual orientation, the psychological harm of exclusion may also extend well beyond those who have actually sought acceptance to others who share their characteristics. For all of these reasons, there is much to be said for an anti-discrimination norm and the value of equality that underlies it.

But our constitutionalism also includes values other than equality,

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> claim the loyalty of millions of women—in the form of music, poetry, spirituality, literature, celebrations, festivals, and dances. Whether drawing on images of Amazonian grandeur, recovering and revaluing traditional women's arts, like quilting and weaving, or inventing new rituals based on medieval witchcraft, the development of such expressions of women's culture gave many feminists images of a female-centered beauty and strength entirely outside capitalist patriarchal definitions of feminine pulchritude. The separatist impulse also fostered the development of the many autonomous women's institutions and services that have concretely improved the lives of many women, whether feminists or not—such as health clinics, battered women's shelters, rape crisis centers, and women's coffeehouses and bookstores.

IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 161–62 (1990) (internal citation omitted).

[2] Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (No. 08-1371) [hereinafter Brief in Support of Petitioner] (citations omitted) (internal quotation marks omitted). For a history of the early gay rights movement and its reliance on freedom of association, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1525–33 (2001). Carpenter notes that "[t]he rise of gay equality and public visibility coincided—not coincidentally, however—with the rise of vigorous protection for First Amendment freedom, especially the freedom of association." *Id.* at 1532–33; *see also* Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 659–60 (1st Cir. 1974) ("Considering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgement of associational rights, even if assumed to be an indirect one."); Brief for Petitioner at 30, *Martinez*, 130 S. Ct. 2971 (No. 08-1371) [hereinafter Brief for Petitioner] ("In an earlier era, public universities frequently attempted to bar gay rights groups from recognized student organization status on account of their supposed encouragement of what was then illegal behavior. The courts made short shrift of those policies." (citing Gay & Lesbian Student Ass'n v. Gohn, 850 F.2d 361, 366 (8th Cir. 1988))).

[3] Matt Zwolinski, *Why Not Regulate Private Discrimination?*, 43 SAN DIEGO L. REV. 1043, 1052 (2006) ("The feeling of social isolation that results from private discrimination can be psychologically devastating. This is especially true for children, who are particularly prone to question their own self-worth in reaction to discrimination from their peers, but the effects hold for adults as well. Private discrimination can have a tremendous impact on the psychological well-being of even the most self-assured adults.").

including the value of group autonomy.[4] When these values clash—as they inevitably do whenever anti-discrimination law challenges a group's right to exclude—we ought to encourage a weighing of these constitutional values rather than a wholesale adoption of one over the other.[5] This is no easy task. Even the polarized ways in which we describe the clash of values points to the inherent conflict and the stakes at issue: what Andrew Koppelman and Tobias Wolff characterize as a "right to discriminate"[6] might also be called "a right to exist."[7]

The Supreme Court has chosen to address these challenges through the categories of "intimate" and "expressive" association. Koppelman and Wolff have recently intimated that these categories, first announced in the 1984 decision, *Roberts v. United States Jaycees*,[8] reflect a "well-settled law of freedom of association."[9] Whether the sixteen years between *Roberts* and the Court's 2000 decision in *Boy Scouts of America v. Dale*[10] established an "*ancien regime*"[11] is open to question. But the problem with intimate and expressive association is not simply that they are less entrenched than Koppelman and Wolff assert—it is that they are indefensible. Intimate association offers no constitutional protections beyond those afforded by the right of privacy. Expressive association fails

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[4] I have chosen to call attention to the value of *group autonomy* rather than *liberty* because group autonomy bears an intrinsic relationship to associational freedom while liberty risks being construed in individualistic ways.

[5] The perennial tension between group autonomy and equality is one reason that John Rawls fails to provide a persuasive account of freedom of association in attempting to distinguish between the "basic structure" and the "background society." JOHN RAWLS, A THEORY OF JUSTICE 6, 79, 386 (1971). For one critique among many of Rawls along these lines, see NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 53–55 (1998) [hereinafter ROSENBLUM, MEMBERSHIP AND MORALS]. Rosenblum concludes that "the morality of association provides a pluralist background culture, much of it incongruent with liberal democracy." *Id.* at 55.

[6] ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION xi (2009).

[7] *Cf.* Christian Legal Soc'y v. Walker, 453 F.3d 853, 863 (7th Cir. 2006) ("[F]orcing [the Christian Legal Society] to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist."); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 142 (1984) ("When an institution that is voluntary in membership cannot define the conditions of belonging, that institution in fact ceases to exist.").

[8] 468 U.S. 609 (1984).

[9] KOPPELMAN & WOLFF, *supra* note 6, at x–xi. I take Koppelman and Wolff's claim to be that *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), "capriciously and destructively" disrupted the framework first set in place by *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *Id.* at x–xi. ("Until 2000, . . . [a]ssociations that conveyed messages were entitled to be free of restrictions, including restrictions on their membership practices, that interfered with the dissemination of those messages. Intimate associations of small groups of people had a stronger right, to refuse association with anyone for any reason."). Koppelman and Wolff may have a broader history in mind. For example, they acknowledge the "germinal case" of the right of association in *NAACP v. Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). *Id.* at 18–22. But it seems clear that *Roberts* does most of the work that they want to embrace as the "well-settled law of freedom of association." *Id.* at xi.

[10] 530 U.S. 640 (2000).

[11] KOPPELMAN & WOLFF, *supra* note 6, at xi.

to account for the expressive potential inherent in all groups.

Intimate association and expressive association are indefensible categories, but they matter deeply. They matter to the Jaycees. They matter to the Chi Iota Colony of the Alpha Epsilon Pi fraternity, a now defunct Jewish social group at the College of Staten Island that had sought to limit its membership to men.[12] They matter to the Christian Legal Society at Hastings Law School, a religious student group denied official recognition because of its desire to limit its membership to Christians who adhered to its moral code, which included a prohibition on homosexual conduct.[13] Each of these groups sought to maintain an unpopular composition and message in the face of anti-discrimination laws. Each was denied associational protection. Each was forced to change its composition—and therefore its message. Each no longer exists in the form it once held and desired to maintain.

The demise of associational protections is at least partially attributable to the *Roberts* categories of intimate and expressive association. These categories set in place a framework that allows courts to sidestep the hard work of weighing the constitutional values that shape the law that binds us. This Article exposes the problems inherent in these categories and calls for a meaningful constitutional inquiry into laws impinging upon group autonomy. Absent such an inquiry, we are left with anti-discrimination norms unchecked by principles of group autonomy. That conclusion was recently embraced by the Ninth Circuit in denying constitutional protections to a high school bible club that sought to limit its membership to Christians:

> States have the constitutional authority to enact legislation prohibiting invidious discrimination. . . . [W]e hold that the requirement that members [of a high school bible club] possess a "true desire to . . . grow in a relationship with Jesus Christ" inherently excludes non-Christians . . . , [thus violating] the District's non-discrimination policies. . . .[14]

The Ninth Circuit's reasoning is troubling, but it in some ways represents the logical end of the current doctrine of association.

This Article examines the reasoning that has led courts to conclude that a Christian group that excludes non-Christians is for that reason invidiously discriminating. Part II revisits the initial recognition of

[12] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 149 (2d Cir. 2007).

[13] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2980–81 (2010).

[14] Truth v. Kent Sch. Dist., 542 F.3d 634, 644–45 (9th Cir. 2008). The Ninth Circuit relied exclusively on *Truth* in rejecting the claims of the Christian Legal Society. *See* Christian Legal Soc'y v. Kane, 319 F. App'x 645 (9th Cir. 2009), *cert. granted*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 795 (2009), *aff'd and remanded*, 130 S. Ct. 2971 (2010).

intimate and expressive association in *Roberts*. Parts III and IV trace the roots of intimate and expressive association, respectively. Part V details how the application of these categories in *Roberts* undermined the associational claims of the Jaycees. Part VI uses the Chi Iota and Christian Legal Society cases to illustrate how the *Roberts* framework continues to damage associational freedom. Finally, Part VII proposes that the Court remedy the problems in *Roberts* by eliminating the categories of intimate and expressive association. It suggests that we recover a different constitutional right that offers better historical, theoretical, and doctrinal resources for strengthening group autonomy and the possibility of dissent: the right of assembly.[15]

II. CATEGORIZING THE RIGHT OF ASSOCIATION

The categories of intimate and expressive association first emerged in Justice Brennan's 1984 *Roberts* opinion.[16] Brennan announced that the Court had identified two distinct constitutional sources for the right of association.[17] One line of decisions protected "intimate association" as "a fundamental element of personal liberty."[18] Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[19] Brennan contended that intimate and expressive association represented, respectively, the "intrinsic and instrumental features of constitutionally protected association."[20] These differences meant that "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case."[21]

Brennan's arguments implied two corollaries: (1) some associations were "nonintimate," and (2) some associations were "nonexpressive." His reasoning thus suggested four possible categories of associations: (1) intimate expressive associations,[22] (2) intimate nonexpressive associations,

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[15] *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566 (2010) [hereinafter Inazu, *Forgotten Freedom*] (describing the historical significance of the right of assembly).

[16] The Court first recognized a constitutional right of association in *NAACP v. Alabama* ex. rel *Patterson*, 357 U.S. 449, 466 (1958). For an overview of the origins of association and its political, doctrinal, and theoretical underpinnings, see generally John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) [hereinafter Inazu, *Strange Origins*].

[17] Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

[18] *Id.*

[19] *Id.* at 618.

[20] *Id.*

[21] *Id.*

[22] *See id.* ("The intrinsic and instrumental features of constitutionally protected association may, of course, coincide.").

(3) nonintimate expressive associations, and (4) nonintimate nonexpressive associations. Since *Roberts*, it has become clear that there is no constitutionally significant distinction between the first two categories; intimate associations receive the highest level of constitutional protection regardless of whether they are also expressive.[23]

The same is not true for the distinctions between the other categories. Brennan's parsing of intrinsic and instrumental value and his reference to the varying "nature and degree of constitutional protection" for intimate and expressive associations signaled a clear privileging of the former over the latter.[24] And the category of expressive association drew a line that left nonintimate nonexpressive associations—which would include most of the groups mentioned at the beginning of this Article—without any meaningful constitutional protections.[25]

The *Roberts* framework thus created the following hierarchically ordered categories of associations:

A. Intimate Associations

B. Nonintimate Expressive Associations

C. Nonintimate Nonexpressive Associations

It turns out that the groups in B sometimes lose, and the groups in C always lose.

What is more, once a court places a group within either B or C, a

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[23] *See, e.g.*, Montgomery v. Stefaniak, 410 F.3d 933, 937 (7th Cir. 2005); Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 942 (6th Cir. 2004); City of Bremerton v. Widell, 51 P.3d 733, 741 (Wash. 2002) (en banc).

[24] Brennan's language did not expressly elevate intimate over expressive association, but it has been widely interpreted as having made this distinction. *See infra* note 25 (collecting cases in which courts have applied less than strict scrutiny to laws impinging upon expressive association); *cf.* KOPPELMAN & WOLFF, *supra* note 6, at x (explaining that, under *Roberts*, "[i]ntimate associations of small groups of people had a stronger right [than expressive associations], to refuse association with anyone for any reason"); AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 41 (1995) (contending that Brennan regarded expressive association "as instrumental and therefore subject to greater government intrusion"); David E. Bernstein, *Expressive Association After Dale*, 21 SOC. PHIL. & POL'Y. 195, 202 (2004) [hereinafter Bernstein, *Expressive Association*] ("The Court's apparent disdain for expressive association claims had a marked effect on lower courts."); George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION 35, 46 (Amy Gutmann ed., 1998) ("Running through Brennan's opinion is the assumption that all nonintimate relationships are simply inferior to intimate ones."); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 532 n.209 (2001) ("In *Roberts*, Justice Brennan described a range of associations, each deserving of different levels of Constitutional protection. While the right to 'intimate' association . . . is 'intrinsic' and worthy of the highest Constitutional protection, . . . the right of 'expressive' association [is] an instrumental right, and thus accorded less absolute protection." (citing *Roberts*, 468 U.S. at 618–20)).

[25] *See, e.g.*, City of Dall. v. Stanglin, 490 U.S. 19, 23–28 (1989) (applying rational basis scrutiny to a city ordinance governing activity that qualified neither as a form of "intimate association" nor as a form of "expressive association" as those terms were described in *Roberts*); Conti v. City of Fremont, 919 F.2d 1385, 1388 (9th Cir. 1990) ("[A]n activity receives no special first amendment protection if it qualifies neither as a form of 'intimate association' nor as a form of 'expressive association,' as those terms were described in *Roberts*."); Swank v. Smart, 898 F.2d 1247, 1251–52 (7th Cir. 1990) (concluding that the First Amendment does not protect nonintimate nonexpressive associations).

Temple American Inn of Court - April 2016 Program - Research and Materials

generic appeal to the state's interest in eradicating discrimination usually trumps the group's autonomy.[26] In other words, the precise harms that may or may not be caused by the group do not really matter. Following the Supreme Court's lead in *Roberts*, most judicial opinions weighing anti-discrimination objectives against group autonomy make little effort to link the specific remedy—forced inclusion in a particular group—to the specific harm—the effects of discrimination by that group in its particular social context.[27]

Consider the Court's analysis in *Roberts* itself. Justice Brennan's opinion appealed to "Minnesota's compelling interest in eradicating discrimination against its female citizens . . . ."[28] He reasoned that Minnesota furthered that compelling interest by assuring women equal access to the leadership skills, business contacts, and employment promotions offered by the Jaycees.[29] But the national Jaycees already allowed women to join as Associate Individual Members, a status that presumably afforded them many of these business opportunities—the associate status precluded only voting, holding office, and eligibility for national awards, but women could "otherwise participate fully in Jaycee activities."[30] Moreover, the Minneapolis and St. Paul chapters of the Jaycees had, in violation of the national organization's policies, accepted women as full members for ten years.[31]

Roberts's oft-forgotten procedural posture matters here. The litigation began when members of the Minneapolis and St. Paul chapters of the Jaycees brought an administrative enforcement action of the Minnesota Human Rights Act[32] against the national organization after it threatened to

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[26] Koppelman and Wolff note that while *Roberts* introduced a "balancing test" when "interference with membership . . . demonstrably interferes with expressive practice," as a practical matter, "free association claims unrelated to viewpoint discrimination always lost in the Supreme Court under this standard." KOPPELMAN & WOLFF, *supra* note 6, at 20.

[27] *Cf.* Bernstein, *Expressive Association*, *supra* note 24, at 202 ("Following Justice Brennan's opinion in *Roberts*, lower federal courts and state supreme courts routinely held that the right of expressive association had to yield to antidiscrimination statutes."); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 132 (2000) ("One striking feature of both *Roberts* and *Dale* is the ease with which these opinions hold that the antidiscrimination principle counts as a compelling state interest that limits the ability of voluntary associations to determine their own membership.").

[28] *Roberts*, 468 U.S. at 623.

[29] *Id.* at 626.

[30] U.S. Jaycees v. McClure, 709 F.2d 1560, 1563 (8th Cir. 1983); *cf. Roberts*, 468 U.S. at 621 ("[D]espite their inability to vote, hold office, or receive certain awards, women affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions.").

[31] *Roberts*, 468 U.S. at 614.

[32] MINN. STAT. § 363.03(3) (1982) (specifying that it is an unfair discriminatory practice "[t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex"). The federal courts deferred to the Minnesota Supreme Court for the threshold determination of whether the Jaycees fell under the scope of the Act as a "public accommodation." *See Roberts*, 468 U.S. at 615–17.

Temple American Inn of Court - April 2016 Program - Research and Materials

revoke their charters.[33] The national organization responded by suing state officials in federal district court to prevent enforcement of the Act.[34] But the underlying dispute and the immediate effects of the holding of the case were always internal to the Jaycees.[35]

For all of these reasons, it is unclear how forcing the national organization to recognize women as full members helped to eradicate gender discrimination in Minnesota by increasing access to the leadership skills, business contacts, and employment promotions offered by the Jaycees. Even if the Minneapolis and St. Paul chapters had denied full membership to women, it seems doubtful that making women eligible for leadership positions or national awards would have advanced Minnesota's statutory interests significantly beyond the networking and social opportunities already afforded by their limited membership status. Justice Brennan's *Roberts* opinion contained no explanation of why *this* remedy helped to eradicate gender discrimination in *these* circumstances sufficient to trump the autonomy of *this* group.[36] And his analysis did not only shortchange the Jaycees. The framework of intimate and expressive association that crystallized in *Roberts* obscured the need to balance equality against group autonomy more generally, in part because Brennan never adequately articulated the theoretical underpinnings of his two categories of association.

The next two sections will show why the *Roberts* categories are fundamentally misguided and how they hinder the important value of group autonomy. They explore in more detail the roots of these categories and the theoretical challenges they create. If a coherent theory exists to justify intimate and expressive association, it has yet to be identified.

III. INTIMATE ASSOCIATION

The category of intimate association likely originated in a 1980 article by Kenneth Karst in the *Yale Law Journal*.[37] Karst's article, in turn, drew from Justice Douglas's opinion in *Griswold v. Connecticut*.[38] This section

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[33] *Roberts*, 468 U.S. at 614.

[34] *Id.* at 615.

[35] Moreover, it is plausible—perhaps even likely—that the vision favoring the full inclusion of women would have won out in the national organization absent interference by the courts. As Judge Arnold pointed out in the lower court opinion, the question about whether to admit women as full members had been vigorously debated within the organization, and while resolutions favoring the admission of women had been defeated on three occasions prior to the *Roberts* litigation, each time a larger minority had voted in favor of the resolution. *McClure*, 709 F.2d at 1561–62 & n.1.

[36] William Marshall observes that the Court offered a "one-sided" interpretation of the values conflict in *Roberts*: "While the associational rights of the Jaycees were considered to be virtually nonexistent, the state interests were found to be particularly weighty because of the social and business prominence of the Jaycees organization." William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 74 (1986).

[37] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 (1980).

[38] 381 U.S. 479 (1965).

traces these precursors to intimate association and the ways in which Brennan's *Roberts* opinion adopted them.

A. Griswold *and the Right of Association*

Griswold struck down a Connecticut law that prohibited the use of contraceptives and the giving of medical advice about their use, and specifically the application of this law to the use of contraceptives by married persons.[39] Chief Justice Warren assigned the opinion to Douglas. In a draft that he shared only with Brennan, Douglas relied almost entirely on the First Amendment right of association,[40] which the Court had first recognized seven years earlier in *NAACP v. Alabama* ex rel. *Patterson*.[41] Douglas argued that while marriage did "not fit precisely any of the categories of First Amendment rights," it was "a form of association as vital in the life of a man or woman as any other, and perhaps more so."[42] He reasoned that "[w]e would, indeed, have difficulty protecting the intimacies of one's relations to [the] NAACP and not the intimacies of one's marriage relation."[43]

After reviewing the draft, Brennan urged Douglas to abandon his exclusive reliance on the right of association.[44] Brennan argued that marriage did not fall within the kind of association that the Court had recognized for purposes of political advocacy.[45] He suggested that Douglas instead analogize the Court's recognition of the right of association to a similar broadening of privacy into a constitutional right. Because neither privacy nor association could be found in the text of the Constitution, if association could be recognized as a freestanding constitutional right, then so could privacy.[46] In Douglas's memorable formulation: "[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give

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[39] *Id.* at 480, 485.

[40] BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 237 (1985). Douglas's only mention of privacy in the draft came in the concluding paragraph: "'The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives is repulsive to the idea of privacy and association that make up a goodly part of the penumbra of the Constitution and Bill of Rights.'" *Id.* at 236 (quoting Douglas's draft opinion). Schwartz writes that Douglas's sole mention of privacy in the last sentence of his draft "is scarcely enough to make it the foundation for any constitutional right of privacy, particularly for the broadside right established by the final *Griswold* opinion." *Id.* at 230.

[41] 357 U.S. 449, 462 (1958). For a discussion of the Court's initial recognition of a right of association in this case, see Inazu, *Strange Origins*, *supra* note 16, at 485.

[42] SCHWARTZ, *supra* note 40, at 235 (quoting Douglas's draft opinion).

[43] *Id.* at 235.

[44] *Id.* at 237. Brennan argued that Douglas's expanded view of association would extend First Amendment protection to the Communist Party. *Id.* at 237–38.

[45] *Id.* at 237.

[46] *Id.* at 238.

them life and substance."[47]

The connection between association and privacy had been established in the some of the earliest right of association cases.[48] In fact, Justice Harlan's seminal opinion in *NAACP v. Alabama* had referred to "the vital relationship between freedom to associate and privacy in one's associations."[49] But associational privacy drew from different values than the sense of individual autonomy conveyed by the right "to be let alone."[50] Privacy in the early right of association cases had more to do with protecting the boundaries of *group* autonomy. As Harlan had argued in *NAACP v. Alabama,* "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[51] That kind of privacy did not mean "not public"—in fact, groups like the NAACP and the Communist Party had actively sought public visibility and recognition. It was in this group context that Douglas had first argued for "the need for a pervasive right of privacy against government intrusion" and a "right of privacy implicit in the First Amendment [that] creates an area into which the Government may not enter."[52]

In *Griswold*, Douglas linked his earlier understanding of associational privacy to marriage by emphasizing the human relationships common to all associations:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[53]

This relational focus may have drawn an unlikely connection between a married couple and the NAACP, but it resisted the kind individualism

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[47] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[48] *See* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 560 (1963) (Douglas, J., concurring) (noting restrictions set forth by the Fourteenth Amendment that limit states' efforts "to investigate people, their ideas, their activities"); Sweezy v. New Hampshire, 354 U.S. 234, 266–67 (1957) (Frankfurter, J., concurring) (acknowledging "the right of a citizen to political privacy, as protected by the Fourteenth Amendment").

[49] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

[50] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (internal quotation marks omitted).

[51] *NAACP*, 357 U.S. at 462.

[52] *Gibson*, 372 U.S. at 569–70 (Douglas, J., concurring). Douglas reiterated these arguments in a lecture that he delivered at Brown University which was published subsequently in the *Columbia Law Review*. William O. Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1363, 1367 (1963).

[53] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

that equated associational privacy with "the privacy of private life."[54]

Seven years later, Brennan upended that relational focus in *Eisenstadt v. Baird*, which extended *Griswold*'s holding to unmarried persons desiring access to contraception.[55] His majority opinion relied heavily on *Griswold*, but not on Douglas's reasoning:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[56]

Brennan's language thus converted an understanding of associational freedom rooted in relationships between people to a right of individual autonomy. As H. Jefferson Powell has argued, "Brennan's reading of *Griswold* turned Douglas's reasoning on its head," and *Eisenstadt* signaled "the identification of a radically individualistic liberalism as the moral content of American constitutionalism."[57]

B. *Karst's Intimate Association*

Karst's 1980 article sought to recover the relational emphasis in *Griswold* that Brennan had abandoned in *Eisenstadt*.[58] He began by noting that Douglas had focused specifically on the association of marriage. Karst contended that this language had established a freedom of "'intimate association,'" which he suggested was "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship."[59]

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[54] Warren & Brandeis, *supra* note 50, at 215.

[55] 405 U.S. 438, 443 (1972).

[56] *Id.* at 453 (emphasis omitted).

[57] H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 176, 177 (1993).

[58] Although Karst's interpretation of *Griswold* was more nuanced than Brennan's opinions in either *Eisenstadt* or *Roberts*, Karst's own liberal individualism prevented him from fully developing Douglas's non-individualistic arguments about association. *See, e.g.*, Karst, *supra* note 37, at 626 (footnotes omitted) ("[T]he constitutional freedom of intimate association thus serves as an organizing principle in a number of associational contexts by promoting awareness of the importance of [certain] values to the development of a sense of individuality"); *cf.* Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993) (placing Karst in a class of scholars who "still structure their accounts" on the premise that "[i]lliberal, undemocratic beliefs and practices [are] seen only as expressions of ignorance and prejudice, destined to marginality by their lack of rational defenses").

[59] Karst, *supra* note 37, at 629.

Temple American Inn of Court - April 2016 Program - Research and Materials

The problem with Karst's argument is its implicit corollary that some groups are "nonintimate associations," and that a constitutionally significant line can be drawn between intimate and nonintimate associations. The fundamental critique of both Karst's argument in this subsection and Brennan's argument in the following subsection is that they fail on their own terms to provide a defensible rationale for their line-drawing. They fail for the simple reason that all of the values, benefits, and attributes that they assign to intimate associations are equally applicable to many, if not most, nonintimate associations.[60]

Karst at times recognized the broader applicability of his claims. He noted that "[a]n intimate association, *like any group*, is more than the sum of its members; it is a new being, a collective individuality with a life of its own."[61] And he wrote that "[o]ne of the points of *any* freedom of association must be to let people make their own definitions of community."[62] Yet despite these occasional concessions, Karst repeatedly placed special value on the relationships that form intimate associations.

For example, Karst repeatedly emphasized the importance of "close friendship" in intimate association.[63] For Karst, it was "plain that the values of intimate association may be realized in friendships involving neither sexual intimacy nor family ties," and that "[a]ny view of intimate association focused on associational values must therefore include friendship . . . ."[64] He also tied intimate association to the kinds of bonds that form through personal interaction: the "chief value in intimate association is the opportunity to satisfy" the "need to love and be loved";[65] "[t]he opportunity to be cared for by another in an intimate association is

[60] The one distinction that may have been plausible when Karst wrote in 1980 is no longer true today. Karst claimed that intimate association "implies an expectation of access of one person to another particular person's physical presence, some opportunity for face-to-face encounter." *Id.* at 630. While physical presence may have been a distinguishing characteristic of intimate associations thirty years ago, that is no longer true today. Many people now bridge physical separation and connect in emotionally rich ways with friends and family through online social networking sites, blogs, and video conferencing. Others project their identities or create new ones through virtual representations ranging from simple text (like an online profile) to avatars. Some of these online relationships foster deep feelings of intimacy and connectedness. *See, e.g.*, HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (revised ed., 2000); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1171–72 (2000) (noting that in online forums "pregnant women share experiences; the elderly console each other after losing loved ones; patients fighting cancer provide information and support; disabled children find friends who do not judge them immediately on their disability; users share stories about drug addiction; and gays and lesbians on the brink of coming out give each other emotional shelter").

[61] Karst, *supra* note 37, at 629 (emphasis added).

[62] *Id.* at 688 (emphasis added).

[63] *Id.* at 629 ("The connecting links that distinguish [an intimate] association from, say, membership in the PTA may take the form of living in the same quarters, or sexual intimacy, or blood ties, or a formal relationship, or some mixtures of these, but in principle the idea of intimate association also includes close friendship, with or without any such links.").

[64] *Id.* at 629 n.26.

[65] *Id.* at 632.

normally complemented by the opportunity for caring" that requires a "personal commitment";[66] "[c]aring for an intimate requires taking the trouble to know him and deal with him as a whole person, not just as the occupant of a role," which "limits the number of intimate associations any one person can have at any one time, or even in a lifetime."[67]

Karst's attention to friendship and personal bonds is eminently reasonable. But the potential for and the existence of such close friendships can be found in many kinds of associations, including many that would not meet the current legal definition of intimate associations. It may well be that attributes of friendship and personal bonds distinguish small or local groups from large and impersonal groups such as behemoth mailing list organizations. But surely fraternities, student groups, and local chapters of civic associations are capable of producing "close friendships" of the kind that Karst describes.

To be sure, some relationships between members of these groups will be superficial and casual. But this is also true of the relationships that constitute many intimate associations. Karst recognized that protecting the values he saw as inherent in intimate association required offering "some protection to casual associations as well as lasting ones."[68] In fact, "[o]ne reason for extending constitutional protection to casual intimate associations is that they may ripen into durable intimate associations."[69] Karst argued that "[a] doctrinal system extending the freedom of intimate association only to cases of enduring commitment would require intolerable inquiries into subjects that should be kept private, including states of mind."[70] It is hard to understand why these principles would not apply equally to nonintimate associations.

Karst's other attempts to mark the bounds of intimate association are similarly unavailing:

> An intimate association may influence a person's self-definition not only by what it says to him but also by what it says (or what he thinks it says) to others.[71]
>
> . . . .
>
> Transient or enduring, chosen or not, our intimate associations profoundly affect our personalities and our senses of self. When they are chosen, they take on

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[66] *Id.*
[67] *Id.* at 634–35.
[68] *Id.* at 633.
[69] *Id.*; *cf. id.* at 688 ("[A]ny constitutional protection of enduring sexual relationships can be effective only if it is extended to the choice to engage in casual ones . . . .").
[70] *Id.* at 633.
[71] *Id.* at 636.

Temple American Inn of Court - April 2016 Program - Research and Materials

> expressive dimensions as statements defining ourselves.[72]
>
> . . . .
>
> When two people [voluntarily enter into an intimate association], they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags.[73]
>
> . . . .
>
> First Amendment doctrine cautions us to be sensitive to the need to protect intimate associations that are unconventional or that may offend a majority of the community.[74]

Each of these claims applies with equal force if we remove the adjective "intimate." Some associations and associative acts will lack significance for some people, but that is true for both intimate and nonintimate associations. The extent to which expression, self-definition, and unconventional norms unfold in a group's practices is not contingent upon whether the group is an intimate association.

Some of Karst's conceptual problems likely arose because he was not explicitly attempting to distinguish intimate from nonintimate associations. He appears to focus on trying to develop a category of intimate association as an alternative to the then-nascent right of privacy,[75] and to use the right of intimate association to advance legal protections for homosexual relationships.[76] Today, these particular goals are unlikely to be advanced by the right of intimate association.[77] We need look no further than

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[72] *Id.* at 637.

[73] *Id.* at 654.

[74] *Id.* at 658.

[75] Karst regarded the freedom of intimate association as on "the cutting edge" of "the current revival of substantive due process." *Id.* at 665. In contrast, he believed that "[c]alling the rights in *Griswold* and *Roe* rights of privacy invites the rejection of comparable claims on the ground that, after all, they do not rest on any concerns about control over the disclosure of information." *Id.* at 664.

[76] *See, e.g., id.* at 672 ("[A]s I have argued in connection with the prohibition on homosexual conduct, there is no legitimacy in an effort by the state to advance one view of morals by preventing the expression of another view."); *id.* at 682 ("By now it will be obvious that the freedom of intimate association extends to homosexual associations as it does to heterosexual ones."); *id.* at 685 ("The chief importance of the freedom of intimate association as an organizing principle in the area of homosexual relationships is that it lets us see how closely homosexual associations resemble marriage and other heterosexual associations.").

[77] Toni Massaro has recognized the "problems" with relying on intimate association to advance gay rights: "While a robust freedom of association principle promises greater freedom to gay men and lesbians to choose their companions, it also promises greater freedom to others to choose not to associate with gay men and lesbians." Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 66 (1996). Massaro identifies a risk in gay rights scholars advocating for neutral applications of the right of association: "Unless we aim for an asymmetrical version of freedom of association, or one that is zoned in a manner similar to that of freedom of expression, this call to neutrality, taken alone, may be the riskiest approach of all." *Id. But see* Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R. L.J. 269, 311–12 (2006) (arguing for a greater role for intimate association in gay rights).

Lawrence v. Texas,[78] the Supreme Court's overruling of its decision in *Bowers v. Hardwick*.[79] *Bowers* drew two dissents, one from Justice Stevens that emphasized *Griswold*'s liberty arguments,[80] and one from Justice Blackmun that drew upon *Griswold*'s intimate association arguments and twice cited Karst's article.[81] *Lawrence* relied on Stevens's dissent and never mentioned the right of intimate association.[82]

C. *Brennan's Intimate Association*

Brennan's *Roberts* opinion never cites Karst's article, but the intellectual debt is apparent.[83] And while Karst had focused on increasing protections for intimate associations, Brennan's use of the category of intimate association degraded protections for nonintimate ones.[84] He

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[78] 539 U.S. 558, 578 (2003).

[79] 478 U.S. 186 (1986).

[80] *Id.* at 216 (Stevens, J., dissenting).

[81] *Id.* at 204–05, 211 (Blackmun, J., dissenting) (citing Karst, *supra* note 37, at 627, 637).

[82] *See Lawrence*, 539 U.S. at 578 ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."). Nancy Marcus has suggested that "principles of intimate association underlie the *Lawrence* decision" and that "*Lawrence* is the first actual affirmation of a litigant's intimate associational rights by the Supreme Court since *Roberts*." Marcus, *supra* note 77, at 303, 308. Laura Rosenbury and Jennifer Rothman argue similarly that the majority's "shift from sex acts to relationships aligns *Lawrence* with the right to intimate association already articulated by the Court in other contexts." Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 826 (2010). These claims seem undermined by the lack of any mention of intimate association in the *Lawrence* opinion, particularly in light of the fact that the Justices had before them Blackmun's *Bowers* dissent and arguments about intimate association from the *Lawrence* Petitioners. *See, e.g.*, Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352 at *11–12, *15 & n.9 (citing Karst's article, discussing *Roberts*'s category of intimate association, and asserting that "[t]he adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association"); Reply Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 1098835 at *5 ("The relationship of an adult couple—whether heterosexual or gay—united by sexual intimacy is the very paradigm of an intimate association in which one finds 'emotional enrichment' and 'independently . . . define[s] one's identity,' and it is protected as such from 'unwarranted state interference.'" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984))).

[83] The similarities between Karst's article and Brennan's opinion have gone relatively unnoticed. Among the few articles making the connection are Marcus, *supra* note 77, at 278, and Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231 (1998). Udell suggests that *Roberts* "lifted the right to intimate association from Karst's article." *Id.* at 232.

[84] Post-*Roberts* cases have made clear that most associations are nonintimate, and few courts have extended the category of intimate association beyond family relationships. *See, e.g.*, FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 237 (1990) (holding that patrons of a motel which limited room rentals to ten hours did not have an intimate relationship protected by the Constitution), *overruled on other grounds by* City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); City of Dall. v. Stanglin, 490 U.S. 19, 24 (1989) (holding that dance hall patrons "are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*" that give rise to the protections of intimate association); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) (holding that the relationship among Rotary Club members is not the type of intimate relationship that merits constitutional protection); Poirier v. Mass. Dep't of Corr., 558 F.3d 92, 96 (1st Cir. 2009) (refusing to extend protections of intimate association to "[t]he unmarried cohabitation of adults"); Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 173 (3d Cir. 2008) ("While the Supreme Court has held that the Constitution protects certain relationships, those protected relationships require a closeness that is not present between a high school football coach and his team."); Swanson v. City of Bruce, 105 F. App'x

began by noting: "[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."[85] This passage attempts to draw the reader into a kind of Tocquevillean ethos in which intimate associations at once facilitate support for "the Nation" and resistance to "the State."[86] But Brennan's argument lacks coherence and specificity. What is the difference between Nation and State? What are the national culture (singular) and national traditions (plural) brought about by "shared ideals and beliefs"? How do personal bonds "foster diversity" and act as "critical buffers" from state power? More to the point, why are these functions unique to intimate associations? If Brennan's argument is that intimate associations sustain some kind of shared culture—"cultivating and transmitting shared ideals and beliefs"—then why can't nonintimate associations also serve as "schools of democracy"?[87] Conversely, if he means to position intimate associations as "mediating structures"[88] between individuals and the state—"foster[ing] diversity and act[ing] as critical buffers"—then don't some of the largest—and least intimate—groups have the greatest capacity to resist the state? The passage also belies a more troubling vagueness. It contains an irresolvable tension that doesn't let the reader know whether Brennan is ultimately prioritizing the state, the non-state group, or the individual, and

540, 542 (5th Cir. 2004) ("The tight fellowship among police officers, precious though it may be, does not include 'such deep attachments and commitments of thoughts, experiences, and beliefs' or personal aspects of officers' lives sufficient to constitute an intimate relationship." (quoting *Roberts*, 468 U.S. at 620)); Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 442 (3d Cir. 2000) (holding that a college fraternity is not an intimate association); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 198 (3d Cir. 1990) (holding that intimate association is unlikely to cover religious groups because "[m]ost religious groups do not exhibit the distinctive attributes the Court has identified as helpful in determining whether the freedom of association is implicated"); Rode v. Dellarciprete, 845 F.2d 1195, 1205 (3d Cir. 1988) (holding that a brother-in-law relationship is not protected as an intimate association). *But see* Anderson v. City of LaVergne, 371 F.3d 879, 882 (6th Cir. 2004) (assuming, for summary judgment purposes, that a dating relationship between two police officers qualified as an intimate association because the two were monogamous, had lived together, and were romantically and sexually involved); Akers v. McGinnis, 352 F.3d 1030, 1039–40 (6th Cir. 2003) (concluding that some types of personal friendships may constitute intimate associations); La. Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1497–98 (5th Cir. 1995) (extending the right of "private association" to a private club).

[85] *Roberts*, 468 U.S. at 618–19 (1984).

[86] The textual tension in some ways replicates the strain between stability and pluralism of mid-twentieth century liberalism and the ways in which scholars like Robert Dahl and David Truman appropriate Tocqueville. *See generally* Inazu, *Strange Origins*, *supra* note 16.

[87] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 511 (Henry Reeve trans. 1899). Indeed, as Nancy Rosenblum has argued: "The onus for cultivating the moral dispositions of liberal democratic citizens falls heavily on voluntary groups such as the Jaycees and their myriad counterparts." Nancy Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, *in* FREEDOM OF ASSOCIATION 75, 76 (Amy Gutmann ed., 1998) [hereinafter Rosenblum, *Compelled Association*].

[88] PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 51–63 (2d ed. 1996).

Temple American Inn of Court - April 2016 Program - Research and Materials

the answer to that question matters a great deal. From the rest of his opinion and his broader jurisprudence, we might infer that Brennan wants to privilege the individual, then the state, and lastly, the group. But if that is where his argument rests, then some language—"critical buffers," "traditions," "shared ideals"—becomes much harder for him to employ in an unqualified sense.

Brennan next enlisted notions of liberty and autonomy in his defense of intimate association, embracing the individualistic gloss that his *Eisenstadt* opinion had cast on *Griswold*: "[T]he constitutional shelter afforded [intimate associations] reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[89] These phrases—"emotional enrichment," "[defining] one's identity," and "[the] concept of liberty"—again call to mind lofty ideals, but their meanings are imprecise.[90] As before, Brennan fails to explain why his reasoning extends only to intimate associations. People form close ties with others through all kinds of associations. Some lifelong friendships emerge from within nonintimate associations; some intimate associations collapse in a matter of months.[91] Self-definition also comes in myriad forms of association—one's decision to join the ACLU or make a financial contribution to Greenpeace can speak volumes about his or her identity.

Like Karst, Brennan fails to offer a convincing rationale for privileging intimate associations over nonintimate ones. His theoretical anchor is the residue of *Eisenstadt* that supplants the inherently relational aspects of association with an individualistic notion of privacy. Intimate association is reduced to intimate individualism.[92]

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[89] *Roberts*, 468 U.S. at 619.

[90] *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

[91] Or hours. *See, e.g.*, *Britney Spears Sheds Another Husband*, N.Y. TIMES, Aug. 1, 2007, at E2 (referencing Spears's annulment of marriage to her childhood friend, Jason Alexander, fifty-five hours after they wed).

[92] The constitutional protections offered by intimate association are today almost completely redundant of those found in the right of privacy. *See, e.g.*, Montgomery v. Stefaniak, 410 F.3d 933, 937 (7th Cir. 2005) ("The freedom of intimate association 'receives protection as a fundamental element of personal liberty,' and as such is protected by the due process clauses." (quoting *Roberts*, 468 U.S. at 618)); Flaskamp v. Dearborn Pub. Sch., 385 F.3d 935, 942 (6th Cir. 2004) ("Whether called a right to intimate association, or a right to privacy, the point is similar: 'choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.'" (quoting *Roberts*, 468 U.S. at 617–18)); City of Bremerton v. Widell, 51 P.3d 733, 741 (Wash. 2002) (en banc) ("[O]ur own cases have held that the right of intimate association stems from the right of privacy, which normally applies only to familial relationships, and 'extend[s]

IV. EXPRESSIVE ASSOCIATION

The second category that Brennan announced in *Roberts* was expressive association. Like intimate association, it has distant echoes of Douglas's *Griswold* opinion and the Court's earliest cases on the right of association.[93] But it is shaped even more determinatively by decisions that emerged out of the Civil Rights Era. This section assesses the doctrinal developments in these cases and then examines the ways in which Brennan adopted them in *Roberts*.

A. *Civil Rights and the Right to Exclude*

Douglas had argued in *Griswold* that the right of association "includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[94] In other words, as he had asserted in a dissent four years earlier, "[j]oining is one method of expression."[95] Seven years after *Griswold*, Douglas insisted that the right of association included the right not to associate:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.[96]

For Douglas, the First Amendment "precludes government from interfering with private clubs or groups."[97]

Douglas's defense of the "right to exclude" came in the midst of the Civil Rights Era when racist white groups repeatedly invoked the right of association in an attempt to curb integration. In Herbert Wechsler's infamous formulation, "integration force[d] an association upon those for

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only as far as the principles of substantive due process permit.'" (quoting Bedford v. Sugarman, 772 P.2d 486, 495 (Wash. 1989))).

[93] Karst may have also played a role in shaping the category of expressive association by recasting *NAACP v. Alabama* ex rel. *Patterson* as a case of "political association." Karst, *supra* note 37, at 656–57 n.149 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958)). Harlan's opinion in the earlier case had contained no such adjective. In recent decades, the Court appears to have developed a distinct right of "political association" in a line of cases involving closed and semi-closed primaries. *E.g.*, Clingman v. Beaver, 544 U.S. 581, 592 (2005); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

[94] Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

[95] Lathrop v. Donohue, 367 U.S. 820, 882 (1961) (Douglas, J., dissenting).

[96] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting).

[97] *Id.* at 179; *see also* Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person . . . solely on the basis of personal prejudices including race.").

Temple American Inn of Court - April 2016 Program - Research and Materials

whom it [was] unpleasant or repugnant."[98] Wechsler's objection made no sense in public settings.[99] But Charles Black's response to Wechsler was equally unavailing. Black argued that the freedom not to associate "exists only at home; in public, we have to associate with anybody who has a right to be there."[100] In our society, the boundary between public and private is not, and never has been, the home. People live their private lives outside of the home in religious communities, civic groups, social clubs, and a panoply of other collective enterprises that do not border on "public" in the sense that Black employed the term.

The critical question for the right of association during the Civil Rights Era was the extent to which it could justify private discrimination by whites against African Americans, and the issue was far more complicated than either Wechsler or Black suggested. Three important legal developments provided an answer to this question: (1) the Civil Rights Act of 1964; (2) the Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*;[101] and (3) the Court's 1976 decision in *Runyon v. McCrary*.[102]

Title II of the Civil Rights Act of 1964 prohibited racial discrimination in places of "public accommodation."[103] The legislation encompassed inns, restaurants, gas stations, and places of entertainment but exempted private clubs and other establishments "not in fact open to the public."[104] Five years later, the Court made clear that sham attempts to meet the private club exception would not prevail.[105]

The second important development for the right of association during the Civil Rights Era was the Court's 1968 decision in *Jones v. Alfred H. Mayer*, which interpreted a Reconstruction statute, the Civil Rights Act of 1866, to bar racial discrimination in the sale or lease of private property.[106]

[98] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

[99] Although Wechsler directed part of his critique against *Brown v. Board of Education*, 347 U.S. 483 (1954), it was implausible to argue that segregationists had a freedom to associate (or a right to exclude) in situations where the government provided a public good or service. *Cf.* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 179 (1996) ("Wechsler's objection to *Brown* is silly with respect to public schools . . . .").

[100] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429 (1960). The exchange between Wechsler and Black is recounted in KOPPELMAN & WOLFF, *supra* note 6, at 17.

[101] 392 U.S. 409, 444 (1968).

[102] 427 U.S. 160 (1976).

[103] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 1981–2000h-6 (2006)); *cf.* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 816 (2007) ("The statute's extension of the civil rights norm to private conduct marks a striking shift from constitutional requirements that pertain only to a state actor.").

[104] 42 U.S.C. § 2000a(b), (e).

[105] Daniel v. Paul, 395 U.S. 298, 301–02 (1969) (rejecting an amusement park's contention that it was a private club exempt from the Act because it charged patrons a twenty-five cent "membership" fee and distributed "membership" cards).

[106] *Jones*, 392 U.S. at 444. As George Rutherglen notes, the Court's interpretive analysis "has proven to be controversial," but "the extension of the 1866 Act to private discrimination in *Jones* was

Temple American Inn of Court - April 2016 Program - Research and Materials

The Court reasoned that the 1866 Act reached even private discrimination because "the exclusion of Negroes from white communities" reflected "the badges and incidents of slavery."[107] It extended the reach of *Jones* to membership in a community park and playground in *Sullivan v. Little Hunting Park, Inc.*,[108] and a private swimming pool in *Tillman v. Wheaton-Haven Recreation Ass'n.*[109] *Jones, Sullivan,* and *Tillman* all involved sales or leases related to real property covered under the Fair Housing Act of 1968.[110] The Court's reliance on a somewhat strained interpretation of the Civil Rights Act of 1866 rather than a straightforward application of the Fair Housing Act prompted Justice Harlan (joined by Justice White and Chief Justice Burger) to dissent in *Sullivan,* noting that the "vague and open-ended" construction of section 1982 risked "grave constitutional issues should [that authority] be extended too far into some types of private discrimination."[111]

These two developments—the Civil Rights Act of 1964 and the Court's decision in *Jones*—represented major steps toward ending segregation. Both also constrained group autonomy. But few people today object to these constraints along racial or any other lines—the idea that owners of businesses open to the public or sellers of private homes should have a constitutional right to discriminate finds few defenders. In other words, if the constraints on group autonomy were limited to these applications, contemporary debates would be virtually nonexistent.

More complicated questions arose from the Court's line of cases addressing private school segregation that culminated in its 1976 decision in *Runyon v. McCrary.*[112] These private segregated schools, many of which emerged in the wake of the Court's integration of public schools, represented a key battleground of the Civil Rights Era.[113] Preliminary challenges focused on government financial support, and in the late 1960s, the Court affirmed a number of decisions enjoining state tuition grants to

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both much more acceptable and much less radical" because "the Civil Rights Act of 1964 had legitimatized federal regulation of private discrimination." George Rutherglen, *Civil Rights in Private Schools: The Surprising Story of* Runyon v. McCrary, *in* CIVIL RIGHTS STORIES 119 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

[107] *Jones*, 392 U.S. at 441–42.

[108] 396 U.S. 229, 234–35 (1969).

[109] 410 U.S. 431, 432, 437 (1973).

[110] 42 U.S.C. §§ 3601–3631 (2006). In *Sullivan*, the Court characterized Little Hunting Park's exclusion of African Americans as "a device functionally comparable to a racially restrictive covenant." 396 U.S. at 236. In *Tillman*, a unanimous Court concluded that "[t]he structure and practices of Wheaton-Haven . . . are indistinguishable from those of Little Haven Park." 410 U.S. at 438.

[111] *Sullivan*, 396 U.S. at 241, 248 (Harlan, J., dissenting).

[112] Runyon v. McCrary, 427 U.S. 160 (1976).

[113] On the emergence of segregated private schools in the late 1960s and early 1970s, see, for example, DAVID NEVIN AND ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH (1976).

students attending racially discriminatory private schools.[114] In 1973, the Court concluded in *Norwood v. Harrison* that state-funded textbook loans to students attending these schools were "not legally distinguishable" from tuition grants.[115] *Norwood* was the Court's first explicit consideration of the conflict between anti-discrimination norms and the right of association. Summarizing recent legislative and judicial developments, Chief Justice Burger noted that "although the Constitution does not proscribe private bias, it places no value on discrimination."[116]

Shortly after *Norwood*, the Justices addressed the use of public recreational facilities by private segregated schools in *Gilmore v. City of Montgomery*.[117] Justice Blackmun's majority opinion noted that in contrast to the relatively easy question of integrating public facilities and programs, "[t]he problem of private group use is much more complex."[118] The dispositive question was whether the use of public facilities made the government "a joint participant in the challenged activity."[119] The Court concluded that municipal recreational facilities, including parks, playgrounds, athletic facilities, amphitheaters, museums, and zoos, were sufficiently akin to "generalized governmental services" like traditional state monopolies, such as electricity, water, and police and fire protection.[120] Accordingly, the use of these facilities by private groups that discriminated on the basis of race did not rise to the level of government endorsement of discriminatory practices.[121] But Blackmun went even further, noting that the exclusion of a discriminatory group from public facilities would violate the group's freedom of association.[122] He asserted that "[t]he freedom to associate applies to the beliefs we share, and to those we consider reprehensible" and "tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful,

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[114] *E.g.*, Brown v. S.C. Bd. of Educ., 296 F. Supp. 199, 202–03 (D.S.C. 1968), *aff'd per curiam*, 393 U.S. 222 (1968); Poindexter v. La. Fin. Assistance Comm'n, 275 F. Supp. 833, 835 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

[115] 413 U.S. 455, 463 (1973).

[116] *Id.* at 463. Burger concluded that simply because "the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination." *Id.* Additionally, "even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment . . . ." *Id.* at 470.

[117] Gilmore v. City of Montgomery, 417 U.S. 556, 567 (1974). The decision came after repeated instances of Montgomery's blatant disregard of mandates to integrate its public facilities. *Id.* at 569–72.

[118] *Id.* at 572.

[119] *Id.* at 573 (internal quotation marks omitted).

[120] *Id.* at 574.

[121] Blackmun observed that the result might be different if "the city or other governmental entity rations otherwise freely accessible recreational facilities" in a manner suggestive of discriminatory intent. *Id.*

[122] *Id.* at 575. (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Douglas, J., dissenting)).

Temple American Inn of Court - April 2016 Program - Research and Materials

orderly change."[123] At the same time, he cautioned that "the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action."[124]

Two years later, the Court retreated from both its defense of the right of association and its state action requirement in *Runyon*, a decision that construed another provision of the Civil Rights Act of 1866 to preclude racial discrimination by "private, commercially operated, nonsectarian schools."[125] Rejecting the suggestion that the legislation "d[id] not reach private acts of racial discrimination,"[126] Justice Stewart wrote:

> From [the] principle [of the freedom of association] it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.[127]

Stewart buttressed his argument with a truncated quotation from *Norwood*. Burger had written in *Norwood* that, "*although the Constitution does not proscribe private bias*, it places no value on discrimination."[128] Stewart's quotation omitted Burger's prefatory clause and asserted: "As the Court stated in *Norwood*[,] . . . the Constitution . . . places no value on discrimination."[129] The abbreviated language stood for a broader legal principle. *Norwood* had prevented government subsidization of a disfavored social practice. *Runyon* precluded the practice itself and marked the first time that Court had in the interest of anti-discrimination norms denied the right of existence to a private group with neither ties to state action nor meeting the definition of a public accommodation.[130]

Runyon's symbolic and substantive importance is beyond challenge. The decision made clear that the Court understood the Civil Rights Act of 1866 "to reach all intentional racial discrimination, public and private, that interfered with the right to contract," and that it trumped the right of

[123] *Id.*
[124] *Id.*
[125] Runyon v. McCrary, 427 U.S. 160, 168 (1976).
[126] *Id.* at 173.
[127] *Id.* at 176 (emphasis omitted).
[128] Norwood v. Harrison, 413 U.S. 455, 469 (1973) (emphasis added).
[129] *Runyon*, 427 U.S. at 176 (internal quotation marks omitted).
[130] *See* Rutherglen, *supra* note 106, at 111 (*Runyon* "subordinated private choice to civil rights policy and extended federal law beyond the limitations of the state action doctrine").

Temple American Inn of Court - April 2016 Program - Research and Materials

association.[131] That core holding has been undisturbed and was, in fact, codified in the Civil Rights Act of 1991.[132] Few people today believe that private schools ought to have a constitutional right to exclude African Americans, and the decision as a symbolic marker for civil rights and racial integration is indisputable.

Runyon's doctrinal significance is less clear, and it is on this doctrinal level that the case maintains its greatest significance for contested questions of group autonomy today. Two moves in particular are open to question, and both of them are mirrored eight years later in *Roberts*'s much different context. The first is the argument that forced inclusion of unwanted members does not change the core expression of a discriminatory group. Justice Stewart quoted with approval the Fourth Circuit's conclusion that "'there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.'"[133] If we set aside the political and moral context of *Runyon* and examine the argument on its own terms, it is implausible to claim that forcing a school to abandon its racially discriminatory admissions policy would not inhibit its teaching of racist ideas and dogma.[134] The United States Court of Appeals for the First Circuit made a related observation about the message conveyed by a group's very existence in upholding the associational rights of a gay student group:

> [B]eyond the specific communications at [its] events is the

[131] John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1138 (1990).

[132] *See* Rutherglen, *supra* note 106, at 111, 122 (noting that in *Patterson v. McLean Credit Union*, 491 U.S. 164, 171–75 (1989), the Court decided against overruling *Runyon* and that *Patterson* was superseded by the Civil Rights Act of 1991, "which amended section 1981 to make clear that it covered all aspects of contractual relations and applied to all contracts").

[133] *Runyon*, 427 U.S. at 176 (*quoting* McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

[134] *See* KOPPELMAN & WOLFF, *supra* note 6, at 19 ("If the schools are integrated, it is hard to imagine that this will not have some effect on the ideas taught."); William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 831 (1989) ("[T]he assertion that forcing a school to admit black children will 'in no way' inhibit the school's intended message that racial integration is bad proves too much to swallow. Just as government-mandated school segregation conveys a powerful message that black people are unworthy to associate with whites, state-mandated integration conveys a powerful message that blacks and whites are human beings with equal worth and dignity. That message must blunt any merely verbal message, taught in the school, that segregation is a good thing." (footnote omitted)). Some scholars have nevertheless left Stewart's reasoning here unchallenged, arguing instead that the defendants in *Runyon* never contended that they should be protected as "expressive associations," notwithstanding the fact that the Court had yet to recognize such a category. *See, e.g.*, David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 626–27 (2001) ("[A] close reading of *Runyon* and the briefs filed in it reveal that *Runyon* was not an 'expressive association' case. The defendants in *Runyon* made what amounts to a short, throw-away argument that their right to 'freedom of association,' floating somewhere in the penumbral ether of the Constitution, was violated by compelled integration. However, the defendants did not make an expressive association claim grounded in the First Amendment. They did not argue in their briefs that the school's ability to promote segregation would be compromised, nor did they provide evidence at trial on that issue.").

Temple American Inn of Court - April 2016 Program - Research and Materials

> basic "message" [Gay Students Organization] seeks to convey—that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.[135]

Stewart's second questionable doctrinal move was his distinction between the act of discrimination and the message of discrimination. In Stewart's view, the right of association protected only the latter, and the exclusion of African Americans counted only as the former. In other words, the right of association only extended to the expression of ideas, and exclusion wasn't expression. But that argument makes an arbitrary distinction between act and message that could be applied to any form of symbolic expression. It tells us nothing about the value or harm of the expression itself.[136]

B. *Brennan's Expressive Association*

Brennan's *Roberts* opinion characterized expressive association as "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[137] The Court had "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[138]

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[135] Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652, 661 (1st Cir. 1974).

[136] Stewart soon reiterated this narrower understanding of the right of association in cases beyond the Civil Rights context. Writing for the majority in *Abood v. Detroit Board of Education*, a 1977 case involving an "agency shop" arrangement for state government employees, he described "the freedom of an individual to associate *for the purpose of advancing beliefs and ideas*." 431 U.S. 209, 233 (1977) (emphasis added). And four years later, writing for the Court in *Democratic Party of the United States v. Wisconsin*, a case involving political parties, Stewart referred to the "freedom to gather in association *for the purpose of advancing shared beliefs*." 450 U.S. 107, 121 (1981) (emphasis added). That same year, Burger echoed Stewart's view in *Citizens Against Rent Control v. Berkeley*. 454 U.S. 290 (1981) (emphasis added). Although acknowledging that "the practice of persons sharing common views banding together *to achieve a common end* is deeply embedded in the American political process," Burger asserted that the real value of association was "that by collective effort individuals can *make their views known*, when, individually, their voices would be faint or lost." *Id.* at 294 (emphasis added). Three years later, Brennan adopted Stewart's distinction between belief and practice and rendered association wholly instrumental to other First Amendment freedoms. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

[137] *Roberts*, 468 U.S. at 618.

[138] *Id.* at 622. Lower courts have generally adopted Brennan's instrumental gloss on expressive association. *See, e.g.*, Schultz v. Wilson, 304 F. App'x 116, 120 (3d Cir. 2008) ("A social group is not protected unless it engages in expressive activity such as taking a stance on an issue of public, political, social, or cultural importance."); Willis v. Town of Marshall, 426 F.3d 251, 261 (4th Cir. 2005) ("[A] constitutionally protected right to associate depends upon the existence of an activity that is itself protected by the First Amendment."); Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 50 (1st Cir. 2005) ("[I]n a free speech case, an association's expressive purpose may pertain to a wide array of ends (including economic ends), but the embedded associational right protects only collective

Temple American Inn of Court - April 2016 Program - Research and Materials

Despite his instrumental characterization of expressive association, Brennan proposed an ostensibly protective legal test: "Infringements on [the right of expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[139]

The language of "compelling state interests, unrelated to the suppression of ideas" calls to mind the strict scrutiny standard established in other areas of the Court's First Amendment law.[140] But the reference to "means significantly less restrictive" differs from the usual strict scrutiny language of "least restrictive means."[141] On closer examination, what resembles a strict scrutiny test might actually invert the presumption favoring the protected First Amendment activity to one that favors the government. Brennan's phrasing suggests that a government regulation that is to a large extent—but not significantly more—restrictive of associational freedoms than a less onerous regulation would survive the test. Although Brennan elsewhere intimated that he was applying strict

speech and expressive conduct in pursuit of those ends; it does not cover concerted action that lacks an expressive purpose." (internal citations omitted)); McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994) ("The right of expressive association . . . is protected by the First Amendment as a necessary corollary of the rights that the amendment protects by its terms. . . . [A] plaintiff . . . can obtain special protection for an asserted associational right if she can demonstrate . . . that the purpose of the association is to engage in activities independently protected by the First Amendment." (internal citations omitted)); Salvation Army v. Dep't of Cmty. Affairs, 919 F.2d 183, 199 (3d Cir. 1990) ("The [Supreme] Court has not yet defined the parameters of the right to associate for religious purposes, but it has made it clear that the right to expressive association is a derivative right, which has been implied from the First Amendment in order to assure that those rights expressly secured by that amendment can be meaningfully exercised. Thus, there is no constitutional right to associate for a purpose that is not protected by the First Amendment." (internal citations omitted)). *But see* Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., 274 F.3d 377, 396 (6th Cir. 2002) (finding that the First Amendment "protects the entertainers and audience members' right to free expressive association" at an adult establishment because "[t]hey are certainly engaged in a collective effort on behalf of shared goals" and "[t]he dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless").

[139] *Roberts*, 468 U.S. at 623. Brennan also emphasized that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.*

[140] The most commonly asserted elements of the test require that a statute subject to strict scrutiny must be narrowly tailored and use the least restrictive means to further a compelling government interest. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (summarizing the strict scrutiny test); Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989) (finding that protecting the psychological and physical wellbeing of minors is a compelling government interest, but that the government must still choose the least restrictive means to further said interest); First Nat'l Bank of Bos. v. Bellotti, 435 U. S. 765, 786 (1978) (noting that a state-imposed restriction on corporate speech cannot stand in the absence of a compelling state interest).

[141] It is worth noting that in the twenty-five years since *Roberts*, the Court has never elaborated on its "significantly less restrictive" language and has cited it only four times, twice in footnotes. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 (2010) (quoting *Roberts* for this language); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (same); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 388 n.3 (2000) (same); Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 303 n.11 (1986) (same).

Temple American Inn of Court - April 2016 Program - Research and Materials

scrutiny,[142] his only formulation of the legal test proposed a different standard, and, unsurprisingly, some courts have construed *Roberts* as intending something less than strict scrutiny.[143]

C. *The Problems with "Nonexpressive" Association*

Brennan's rendering of the constitutional test for regulations impinging upon expressive association was not the only problem with his analysis. His category of expressive association implied that some associations were "nonexpressive."[144] The problems with this line-drawing are not merely doctrinal—they are philosophical as well.[145] The purported distinction between expressive and nonexpressive association fails to recognize that: (1) all associations have expressive potential; (2) meaning is dynamic; and (3) meaning is subject to more than one interpretation. These three claims rely on hermeneutical arguments whose full consideration exceeds the scope of this Article and which are addressed here in summary fashion.[146]

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[142] *See Roberts*, 468 U.S. at 626 (noting that the state achieved its interest through "the least restrictive means"); *id.* at 628 (finding that the "incidental abridgment" of protected speech "[was] not greater than [was] necessary"). Four Justices later equated the *Roberts* test of "means significantly less restrictive" to strict scrutiny. *See Dale*, 530 U.S. at 680 (Stevens, J., dissenting) (finding that eliminating discrimination is a compelling government interest, and observing that the court in *Roberts* "held that Minnesota's law [was] the least restrictive means of achieving [the state's compelling] interest"). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissent. *Id.* at 663. But in some ways, *Dale* only adds to the ambiguity of the test the Court applies in freedom of association cases. *See id.* at 658–59 (rejecting "the intermediate standard of review enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968)," but noting that under the proper analysis, "the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other").

[143] *See, e.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 105 (2d Cir. 2007) ("*Roberts* does not require the government to exhaust every possible means of furthering its interest; rather, the government must show only that its interest 'cannot be achieved through means *significantly less restrictive* of associational freedoms.'" (emphasis added) (quoting *Roberts*, 468 U.S. at 623)); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 139 (2d Cir. 2007) ("The mere fact that the associational interest asserted is recognized by the First Amendment does not necessarily mean that a regulation which burdens that interest must satisfy strict scrutiny."); Hatcher v. Bd. of Pub. Educ., 809 F.2d 1546, 1559 n.26 (11th Cir. 1987) (describing a "balancing of interests" (quoting *Roberts*, 468 U.S. at 623)); Every Nation Campus Ministries v. Achtenberg, 597 F. Supp. 2d 1075, 1083 (S.D. Cal. 2009) ("'[S]tate action that burdens a group's ability to engage in expressive association [need not] always be subject to strict scrutiny, even if the group seeks to engage in expressive association through a limited public forum.'" (quoting Truth v. Kent Sch. Dist., 542 F.3d 634, 652 (9th Cir. 2008) (Fisher, J., concurring))); *cf.* Forum for Academic & Institutional Rights v. Rumsfeld, 390 F.3d 219, 247 (3d. Cir. 2004) (Aldisert, J., dissenting) (describing *Roberts* as having announced a "balance-of-interests test").

[144] Justice O'Connor's concurrence explicitly refers to "nonexpressive association." *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring) ("[T]his Court's case law recognizes radically different constitutional protections for expressive and nonexpressive associations.").

[145] *Cf.* Epstein, *supra* note 27, at 122 (arguing that the distinction between expressive and nonexpressive association "is indefensible both as a matter of political theory and constitutional law").

[146] For the kind of argument on which these claims are based, see generally LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., Basil Blackwell & Mott, Ltd. 3d ed. 1958) (1953).

1. *The Ubiquity of Expressive Association*

The first problem with "nonexpressive association" is that every association—and every associational act—has expressive potential. Expressive meaning comes through the performance of communal acts, and communicative possibility exists in joining, excluding, gathering, proclaiming, engaging, or not engaging.[147] Once an association is stipulated between two or more people, almost any associative act by those people—when consciously undertaken as members of the association—has expressive potential reflective of that association.[148]

Erwin Chemerinsky and Catherine Fisk reject this capacious understanding of expressive meaning in their consideration of *Dale*.[149] For example, they assert that "[t]he membership of an association is not inherently expressive in the way that the membership of a parade is . . . ."[150] But this is not always the case—membership in the Ku Klux Klan likely conveys greater expressivism than marching in the Macy's Thanksgiving Day Parade.[151]

Chemerinsky and Fisk make a related error when they propose a *speech*-based remedy for the Boy Scouts in a world in which the Court had decided *Dale* differently. They argue that even if the Scouts had been forced to include James Dale as part of its association,.

> [it] easily could proclaim to the world that it is anti-gay and that it was accepting gay scoutleaders, like James Dale, because the law required it to do so. In other words, the Boy Scouts could use the forced inclusion of homosexuals as the occasion for making clear its anti-gay message, and that the inclusion of Dale was a result of legal compulsion and not a

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[147] *Cf. Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.").

[148] The claim is intentionally broad—it is difficult to envision any associative act that lacks expressive potential. William Marshall posits a counterexample: "Tom and Fred walking down the street is, in no meaningful sense, expression." Marshall, *supra* note 36, at 77. But as long as Tom and Fred's stroll reflects a conscious decision to walk with one another, then the act of walking may express a kind of shared (though perhaps fleeting) affiliation. The meaning of that expression will vary based upon the surrounding circumstances. Consider, for example, the expressive meaning if Tom is black and Fred is white and they are walking merrily down the main street of a small southern town in the 1950s.

[149] Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 600–04 (2001).

[150] *Id.* at 604. Chemerinsky and Fisk make the comment in an attempt to distinguish *Dale* from *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 578 (1995). Chemerinsky & Fisk, *supra* note 149, at 604.

[151] *Cf.* Chemerinsky & Fisk, *supra* note 149, at 599 ("[T]he Klan likely could exclude African Americans or the Nazi party could exclude Jews because discrimination is a key aspect of their message.").

Temple American Inn of Court - April 2016 Program - Research and Materials

matter of condoning his sexual orientation.[152]

Chemerinsky and Fisk's proposal assumes that policy statements made by the Boy Scouts will perfectly mitigate the direct and indirect expressive effects of Dale's forced inclusion. But once we recognize that expressive meaning extends beyond words, there is no guarantee that words alone will restore an expressive equilibrium. For example, the Scouts might be forced to adjust their policy statement about homosexuality in a way that is suboptimal to their associational purposes and beliefs. It is also possible that the Scouts could believe that no words or statements would adequately disavow the symbolic meaning of Dale's forced inclusion in their group.

To illustrate further why the category of expressive association fails to encompass the broader understanding of meaning suggested in this Article, consider a gay social club.[153] Suppose that the club has twenty members, placing it well outside of the currently recognized contours of an intimate association. Suppose further that the club's members engage in no verbal or written expression directed outside of their gatherings but make no effort to conceal their membership from their friends, colleagues, and acquaintances who are not part of the club. There is no way that the members of this club are engaging in "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[154] And yet there is clearly an expressive message in their very act of gathering.[155]

2. *Meaning Is Dynamic*

The second problem with the reasoning underlying expressive association is that meaning is dynamic. The messages, creeds, practices,

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[152] *Id.* at 603.

[153] *See* Brief in Support of Petitioner, *supra* note 2, at 11 (emphasizing that "many exclusively gay social and activity clubs, retreats, vacations, and professional organizations" have "relied on exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy" (quoting Carpenter, *supra* note 2, at 1550)).

[154] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). I assume here that Justice Brennan's conception of assembly is a narrow and historically decontextualized one. For an alternative vision of assembly, see *infra* Part VII.

[155] Provided, of course, that at least one person external to the group is aware of the gathering. The expressiveness inherent in an act of gathering presupposes an audience of some kind. Thus, for example, the gathering of a secret society would not have an outward expressiveness. *Cf.* Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) ("The right to engage in verbal locutions which no one can hear and in conduct which no one can observe may sometimes qualify as a due process 'liberty,' but without an actual or potential audience there can be no first amendment speech right."). While Nimmer's observation may be formally correct, it makes little difference in the *application* of an expressive restriction. Any act of self-expression (for example, expression undertaken without an actual or potential audience) becomes communicative when the state attempts to restrict it. The very determination by a government actor that an act is not "communicative" or not "protected" is an interpretation of the meaning of the act that creates an audience in the government actor restricting the act.

and even the central purposes of associations change over time. Justice Souter missed this reality when he argued in his *Dale* dissent that "no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way."[156] That standard proves too much. What would it mean for a group to advocate a "clear position" "over time" in "an unequivocal way"?[157]

3. *Meaning Is Subject to More Than One Interpretation*

The final problem with the idea of expressive association is that meaning is subject to more than one interpretive gloss.[158] Acknowledging the subjective interpretation of meaning exposes a related problem inherent in the "message-based" approach of the expressive association doctrine: who decides what counts as the message of the group? Chemerinsky and Fisk criticize the Supreme Court in *Dale* for unduly deferring to the Boy Scouts' leadership's views about the group's expressive message.[159] But there is not a readily apparent alternative that more "justly" or "accurately" captures the group's expressive meaning. For example, it is not obvious that a majority of the group's members should be recognized as having the authoritative interpretation of the group's meaning, particularly for

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[156] Boy Scouts of Am. v. Dale, 530 U.S. 640, 701 (2000) (Souter, J., dissenting).

[157] Even "[t]he 'message' conveyed by a monument may change over time." Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1136 (2009). The character of an organization or association may likewise change over time:

> [T]he line between commercial associations and political organizations is not easily drawn, nor can one predict when a commercial association will metamorphose into an important expressive association. For example, America's most powerful lobbying organization, the American Association of Retired Persons, began as a commercial association organized to sell health care products to the elderly, and still has substantial business interests.

David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 183 [hereinafter Bernstein, *Sex Discrimination*].

[158] *Cf.* ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 5, at 6 ("There are always alternative understandings of an association's nature and purpose, and competing classifications."). Justice Alito recently made a similar observation about monuments:

> Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. . . .
>
> . . . [T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.

Summum, 129 S. Ct. at 1135.

At least three of the other *Dale* justices appear to share Souter's view. Justices Ginsburg and Breyer joined Souter's dissent. 530 U.S. at 702. Justice Stevens made a similar claim in his dissent. *Id.* at 685 (Stevens, J., dissenting) ("Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being 'morally straight' and 'clean' is a far cry from the clear, unequivocal statement necessary to prevail on its claim.").

[159] *See* Chemerinsky & Fisk, *supra* note 149, at 600 (arguing that the Court's holdings in *Dale* "will allow any group that wants to discriminate to do so by claiming . . . a desire to exclude based on any characteristics that it chooses").

Temple American Inn of Court - April 2016 Program - Research and Materials

hierarchically structured groups.[160] And as Andrew Koppelman has suggested, "it is unseemly, and potentially abusive, for courts to tell organizations—particularly organizations with dissenting political views—what their positions are."[161]

The challenges to determining a group's meaning get even thornier. Consider three different characterizations that Chemerinsky and Fisk offer about the purposes of the Boy Scouts: (1) a "significant number of current and former scouts . . . reasonably believed that scouting was, and should be, about camping";[162] (2) all members of the Boy Scouts understand that "the Boy Scouts is for boys," and "[a]ll presumably believe that same sex experiences offer valuable developmental opportunities for children";[163] and (3) "we suspect [that] Boy Scouts of America is understood [by its members] to be about honesty, self-reliance, service, leadership, and camping."[164] These descriptions are not interchangeable. They assign different purposes to the Boy Scouts (camping vs. gender-based activities vs. camping plus other things), they attribute those purposes to different subsets of the association (a significant number of current and former scouts vs. all members vs. members), and they attach varying degrees of certainty to the asserted meaning (the belief was "reasonable" vs. all members "presumably believed" vs. the belief is something that Chemerinsky and Fisk "suspect"). All of these variations and their varying rhetorical emphases spring from the description of a single association in a single law review article. It is not hard to see how the interpretive dilemmas multiply when assertions of purpose and meaning are expanded ever further. These interminable inquiries into what counts as *the* expressive message of a group are artificially imposed by the artificial distinction between expressive and nonexpressive associations.

4. *The Limits of Expression*

Once we acknowledge the multivalent expression inherent in group activity, we can no longer easily label some groups as "nonexpressive." It might be argued that this claim runs afoul of basic First Amendment doctrine. For example, in *United States v. O'Brien*, the seminal case on symbolic speech, the Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging

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[160] For examples of groups whose meaning and message are not determined by majority vote, see U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."); Roberts v. U.S. Jaycees, 468 U.S. 609, 613 (1984) ("The ultimate policymaking authority of the Jaycees rests with an annual national convention, consisting of delegates from each local chapter, with a national president and board of directors," instead of by a majority vote of the entire membership).

[161] KOPPELMAN & WOLFF, *supra* note 6, at 24.

[162] Chemerinsky & Fisk, *supra* note 149, at 608.

[163] *Id.* at 609.

[164] *Id.* at 611.

Temple American Inn of Court - April 2016 Program - Research and Materials

in the conduct intends thereby to express an idea."[165] But the Court has itself undermined this distinction with its expansive embrace of the concept of symbolic speech, and interpreting *O'Brien*'s parsing of speech and conduct too mechanically is "doomed to failure."[166] All that the purported definitional limitation on "speech" means is that some conduct can be regulated based upon its content or harm irrespective of whether it has an expressive component.[167] Thus, the Court acknowledges the expressive dimensions of dancing naked[168] and sleeping in a park[169] even as it endorses the government's proscription of those activities. Of course, as these examples illustrate, not every expressive act warrants constitutional protection: *defining what constitutes expression differs from determining the scope of legal protection.* Recognizing the expressive potential of associations tells us nothing about whether they will be constitutionally protected. But it prevents those who exercise coercive power over our lives from avoiding a meaningful weighing of constitutional values simply by classifying some groups as "nonexpressive."[170]

V. THE COST TO THE JAYCEES

The preceding two sections have traced the developments leading to the Court's recognition of the categories of intimate and expressive association in *Roberts* and identified the problems with these categories. This section explores how the Court's use of intimate and expressive association in *Roberts* illegitimately rejected the associational claims of the

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[165] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[166] *See* Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 110 (1989) ("[The] attempt to distinguish between speech and conduct is doomed to failure.").

[167] *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("We have sometimes said that [certain] categories of expression are 'not within the area of constitutionally protected speech,' or that the 'protection of the First Amendment does not extend' to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all.' What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution . . . ." (internal citations omitted)).

[168] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.").

[169] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) (assuming that "overnight sleeping" in a park, as an act of protest, might be expression covered by the First Amendment but upholding a ban on overnight sleeping as a content-neutral restriction).

[170] The Supreme Court occasionally evades this distinction. *See* Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 66 (2006) (claiming that "we have extended First Amendment protection only to conduct that is inherently expressive"). Commenting upon this sentence in *FAIR*, Dale Carpenter rightly notes that the Court "cites no precedent for this conclusion or for the phrase 'inherently expressive.' No prior majority opinion on the subject has suggested that in deciding whether conduct is expressive we should look *only* at the conduct itself, rather than at both the conduct and the context in which it occurs." Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 243.

Temple American Inn of Court - April 2016 Program - Research and Materials

Jaycees. It first considers Justice Brennan's unconvincing focus on the size, seclusion, and selectivity of the Jaycees in his attempt to cast the group as nonintimate. It then turns to the ways in which both Brennan and Justice O'Connor, in her concurrence, characterized the purpose and activities of the Jaycees in denying the group protection as an expressive association.

A. *Size, Seclusion, Selectivity, and the Specter of Segregation*

After distinguishing between intimate and nonintimate associations, Justice Brennan attempted to determine where an association's "objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[171] He defined an intimate association as "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[172] He noted that factors relevant to determining intimacy include "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent."[173] The size of an association is critical to Brennan's argument. He had reported in the first part of his opinion that the Jaycees was a 295,000-member organization.[174] In considering whether the group was an intimate association, he observed that even "the local chapters of the Jaycees are large and basically unselective groups."[175] The Minneapolis chapter, for example, had "approximately 430 members."[176] These figures are meant to persuade the reader that the Jaycees clearly falls outside of the bounds of an intimate association. But Brennan's numbers also deflect attention away from the actual relationships that undoubtedly formed in local chapters of the large national organization. It is hard to imagine the Minneapolis Jaycees coming together in meetings, social events, charitable activities, and planning sessions without meaningful interaction between members, including some that led to close friendships

[171] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

[172] *Id.* at 620. Brennan continued: "As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty." *Id.*

[173] *Id.* Brennan's appeal to "other characteristics that in a particular case may be pertinent" has not offered a very clear judicial test for defining the contours of intimate association. As Justice Stevens noted in his *Dale* dissent, "the precise scope of the right to intimate association is unclear." Boy Scouts of Am. v. Dale, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting); *see also* Udell, *supra* note 83, at 239–40 (describing the "chaos" of lower court attempts to construe intimate association and noting "myriad tests, even within the same circuit"). *But see supra* note 84 and accompanying text (suggesting that courts have found most associations to be nonintimate).

[174] *See Roberts*, 468 U.S. at 613 ("At the time of trial in August 1981, the Jaycees had approximately 295,000 members in 7,400 local chapters affiliated with [fifty-one] state organizations.").

[175] *Id.* at 621.

[176] *Id.*

and personal bonds.

Brennan's focus on lack of seclusion as an indicator of intimacy is also problematic. He critiqued the Jaycees because women and nonmembers—"strangers," actually—were present at the group's events:

> [W]omen affiliated with the Jaycees attend various meetings, participate in selected projects, and engage in many of the organization's social functions. Indeed, numerous nonmembers of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, awards ceremonies, and recruitment meetings. In short, the local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship.[177]

These assertions raise a number of questions. How does Brennan know which activities were "central to the decision of many members to associate with one another"? Similarly, on what basis can he purport to know "the activity central to the formation and maintenance of the association"?[178] Even if he were capable of making these determinations, what is the significance of the fact that "strangers" participated in "various community programs, awards ceremonies, and recruitment meetings"?[179] Isn't this the case with many associations that rent conference space, enlist professional fundraisers, or cater their events?[180]

Brennan's least convincing argument in his attempt to characterize the Jaycees as nonintimate was his focus on the group's lack of selectivity. He distinguished the Kiwanis Club from the Jaycees because the Kiwanis had "a formal procedure for choosing members on the basis of specific and selective criteria" while the Jaycees looked only at gender and age.[181] That distinction seems strained, and it also calls into question the relationship between selectivity and intimacy. Book clubs, gardening clubs, and some recreational sports leagues are often less selective than the Jaycees in their

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[177] *Id.* (internal citations omitted).

[178] *Id.*

[179] *Id.*

[180] *Cf. id.* at 635 (O'Connor, J., concurring) ("No association is likely ever to be exclusively engaged in expressive activities, if only because it will collect dues from its members or purchase printing materials or rent lecture halls or serve coffee and cakes at its meetings."). One might also wonder exactly which "local chapters of the Jaycees" Brennan is describing, given that the Minneapolis and St. Paul Jaycees already admitted women as full members. *Id.* at 627 (majority opinion).

[181] *Id.* at 621, 630. In fact, the Jaycees looked at more than gender and age. *See* U.S. Jaycees v. McClure, 709 F.2d 1560, 1571–72 (8th Cir. 1983) (noting that the St. Paul bylaws required that applicants be of "good character and reputation").

Temple American Inn of Court - April 2016 Program - Research and Materials

membership requirements, but they can foster intimate connections among their members.

Brennan's focus on selectivity did, however, establish a link between the Jaycees and segregationist groups.[182] To support his contention that "the local chapters of the Jaycees are large and basically unselective groups,"[183] Brennan cited three cases: *Tillman v. Wheaton-Haven Recreation Ass'n*,[184] *Sullivan v. Little Hunting Park, Inc.*,[185] and *Daniel v. Paul.*[186] But the problem with *Tillman*, *Sullivan*, and *Daniel* wasn't that they employed a single membership criterion. It was that the criterion was: (1) race; (2) used by whites to exclude blacks; (3) in membership groups closely tied to housing (*Tillman* and *Sullivan*) or created as an obvious sham (*Daniel*); (4) in the midst of the Civil Rights Era. The constitutional rationale underlying these cases wasn't that unselective groups lacked an intimacy worthy of constitutional protection but that: (1) their lack of selectivity factored against qualifying under the public club exception to the public accommodations provisions of the Civil Rights Act of 1964; and (2) "the exclusion of Negroes from white communities" reflected "the badges and incidents of slavery."[187]

Toward the end of his *Roberts*'s opinion, Brennan revisited the connection between the Jaycees and segregationist groups:

> [E]ven if enforcement of the [Minnesota] Act causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes. *As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.* In prohibiting such practices, the Minnesota Act therefore "responds precisely to the substantive problem which legitimately concerns" the

[182] *Roberts*, 468 U.S. at 621 (citing Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 236 (1969); Daniel v. Paul, 395 U.S. 298, 302 (1969)). Andrew Koppelman and Tobias Wolff's recent book employs a similar approach. *See* KOPPELMAN & WOLFF, *supra* note 6, at 6 ("The libertarian right to exclude, then, is racist at the core.").

[183] 468 U.S. at 621.

[184] 410 U.S. 431 (1973).

[185] 396 U.S. 229 (1969).

[186] 395 U.S. 298 (1969).

[187] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441–42 (1968).

> State and abridges no more speech or associational freedom than is necessary to accomplish that purpose.[188]

Notice the italicized language. It adds little to Brennan's analysis of whether Minnesota's Act was narrowly tailored and minimally intrusive (the doctrinal focus of the paragraph). In fact, it contradicts that analysis, asserting that the Jaycees's desire to limit the participation of women was "entitled to no constitutional protection."[189] If the right of expressive association was "plainly implicated in this case,"[190] then it clearly enjoyed *some* constitutional protection. Brennan's citation to *Runyon* is also problematic. His pincite tags Stewart's distinction between belief and practice, which rested on the view that "even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment."[191] Stewart relied on the Thirteenth Amendment in this passage not as a source of congressional power but for the direct authority to interfere with some forms of private discrimination. That raises the question of whether the principle announced in *Runyon* trumps a right of association claim in cases involving discrimination not based on race.[192] Brennan never explained how remedying the "unique evils" in *Runyon* (rooted in the "badges and incidents of slavery") provided a legal justification for destroying the Jaycees for their gender-based discrimination.

Whether he intended it or not, the real force of Brennan's references to *Runyon* and "invidious discrimination" was the visceral emotion that they stirred, equating the Jaycees's position to the racism of segregation.[193] The Jaycees had warned of this danger in its brief to the Court:

> Sprinkled throughout the opposing briefs are references to "invidious discrimination" as applied to the Jaycees' all-male policy. The term is used in such cases as *Runyon v. McCrary* and *Gilmore v. City of Montgomery* against a backdrop of racial discrimination. The use of this term is

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[188] *Roberts*, 468 U.S. at 628–29 (emphasis added) (citations omitted) (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)). Both *Roberts* and the Civil Rights cases Brennan cited stretched the meaning of "public accommodation" to bring private activity within the reach of the relevant statutes.

[189] *Id.* at 628.

[190] *Id.* at 622.

[191] Runyon v. McCrary, 427 U.S. 160 175–76 (1976).

[192] *Cf.* William Buss, *Discrimination by Private Clubs*, 67 WASH. U. L.Q. 815, 826 (1989) ("The thirteenth amendment, then, seems a fully adequate power to prevent race discrimination and race-like discrimination, but it is not a likely candidate as a source of federal legislative power for preventing private club discrimination on the basis of sex.").

[193] *Roberts*, 468 U.S. at 628; *cf.* Bernstein, *Expressive Association*, *supra* note 24, at 200–01 ("Brennan characterized the Jaycees' discriminatory practices as akin to violence and not worthy of constitutional protection, and therefore gave the right of expressive association short shrift in his compelling interest analysis.").

> apparently intended to suggest that the Jaycees' all-male membership policy is somehow immoral and unsavory and therefore not entitled to protection against the State's police powers.[194]

Yet rather than heed this warning, Brennan embraced the comparison, writing that the "stigmatizing injury [of discrimination], and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[195] In one sense, the claim is correct—the kind of exclusion in which the Jaycees engaged is undoubtedly hurtful and stigmatizing to some people. But we ought to pause before accepting Brennan's specific application of the general principle. It is not clear that the circumstances facing women in Minneapolis in 1984 were on the same order of those facing African Americans in Montgomery in 1974, or that the judicial remedies in these situations would have accomplished objectives of similar magnitude, and these differences may well have mattered had Brennan engaged in a meaningful weighing of constitutional values.

B. *Monolithic Meaning*

The Court's treatment of the Jaycees in *Roberts* also illustrates the thin protections of expressive association when expression is narrowly construed. Justice Brennan contended that the Jaycees "failed to demonstrate that the Act impose[d] *any* serious burdens on the male members' freedom of expressive association."[196] He dismissed as "sexual stereotyping" the Jaycees' argument that allowing women to vote "will change the content or impact of the organization's speech."[197] Judge

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[194] Brief of Appellee at *23, Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (No. 83-724), 1984 U.S. S. Ct. Briefs LEXIS 237 [hereinafter Brief of Appellee] (internal citations omitted).

[195] *Roberts*, 468 U.S. at 625.

[196] *Id.* (emphasis added). The assertion is indefensible. *See* SOIFER, *supra* note 24, at 40 ("Surely the Jaycees . . . will be a different organization [after admitting women with voting rights]. Surely that difference will be felt throughout an intricate web of relationships and different voices in immeasurable but nonetheless significant ways."); Richard W. Garnett, Jaycees *Reconsidered: Judge Richard S. Arnold and the Freedom of Association*, 58 ARK. L. REV. 587, 597 n.53 (2005) ("[I]f the application of the Human Rights Act really imposed *no* 'serious burdens' on the freedom of expressive association, it is not clear why the Act's application should require justification under the Court's strict-scrutiny methodology."); Kateb, *supra* note 24, at 55 ("Brennan's claim that young women may, after their compulsory admission, contribute to the allowable purpose of 'promoting the interests of young men' is absurd."); Rosenblum, *Compelled Association*, *supra* note 87, at 78 ("The Jaycees' 'voice' was undeniably altered once it was forced to admit young women as full members along with young men."). *But see* Sunder, *supra* note 24, at 539 ("In *Roberts* and the cases immediately following it, the balance between liberty and equality swung in favor of equality interests because the associations at issue offered *no* evidence of any expressive message that would be threatened by inclusion of the plaintiffs.").

[197] *Roberts*, 468 U.S. at 628. Richard Garnett suggests that some of Brennan's "assertions sound dated today, like the kind of things one might have expected from an elderly, well-meaning, liberal

Richard Arnold's reasoning in the court below provides a useful contrast:

> If the statute is upheld, the basic purpose of the Jaycees will change. It will become an association for the advancement of young people. . . .
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> . . . .
>
> [S]ome change in the Jaycees' philosophical cast can reasonably be expected. It is not hard to imagine, for example, that if women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the "brotherhood of man," or declaring how "free men" can best win economic justice. Such phrases are not trivial. The use of language betrays an attitude of mind, even if unconsciously, and that attitude is part of the belief and expression that the First Amendment protects.[198]

Judge Arnold's attention to the Jaycees's expressivism is missing not only from Brennan's opinion but also from Justice O'Connor's concurrence.[199] O'Connor concluded that the Jaycees's attention to and success in membership drives meant that it was "*first and foremost*, an organization that, at both the national and local levels, promote[d] and practice[d] the art of solicitation and management."[200] Other language in her concurrence suggested that:

> [A]n association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective

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male jurist eager to say 'the right thing' about sex discrimination and stereotypes in the mid-1980s." Garnett, *supra* note 196, at 600.

[198] U.S. Jaycees v. McClure, 709 F.2d 1560, 1571 (8th Cir. 1983). Garnett offers a more detailed contrast between Judge Arnold's reasoning and the Brennan and O'Connor opinions. *See generally* Garnett, *supra* note 196.

[199] O'Connor's concurrence is sometimes viewed more favorably than Brennan's majority opinion. *See, e.g.*, Douglas O. Linder, *Freedom of Association After* Roberts v. U.S. Jaycees, 82 MICH. L. REV. 1878, 1896 (1984) ("On balance, the O'Connor approach seems to enjoy several distinct advantages over the majority approach."); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 876 (2005) ("Justice O'Connor's concurrence in *Jaycees* was largely correct.").

[200] *Roberts*, 468 U.S. at 639 (O'Connor, J., concurring) (emphasis added).

voice that would otherwise be heard.[201]

O'Connor's reasoning is problematic on three counts. First, she posits a false dichotomy between commercial and expressive associations—associations can be both commercial and expressive.[202] Second, her requirement that an association be "predominantly engaged"[203] in protected expression to avoid being classified as commercial hurts associations that, because of their size or unpopularity, must devote a substantial portion of their activities to fundraising or other commercial activities.[204] Finally, she leaves unclear which activities are "of the type protected by the First Amendment."[205]

Judge Arnold's opinion offers a very different perspective to O'Connor's assertion that the Jaycees was "first and foremost" a commercial association:

> Some of what local chapters do is purely social. They have parties, with no purpose more complicated than enjoying themselves. Some of it is civic. They have conducted a radio fund-raising drive to combat multiple sclerosis. They have conducted a women's professional golf tournament. They have engaged in many other charitable and educational projects for the public good. (And there is no claim, incidentally, of any discrimination in the offering to the public of the benefits of these projects. Money raised to fight disease, for example, is not used to benefit only male patients.) And they have advocated, through the years, a multitude of political and social causes. Governmental affairs is one of the chief areas of the organization's activity. Members on a national, state, and local basis are frequently meeting, debating issues of public policy, taking more or less controversial stands, and making opinions known to local, state, and national officials.[206]

Arnold further elaborated:

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[201] *Id.* at 635–36.

[202] As Larry Alexander notes, "[l]aws regulating membership in *any* organization—including commercial ones—will affect the content of that organization's expression." Larry Alexander, *What Is Freedom of Association and What Is Its Denial?*, 25 SOC. PHIL. & POL'Y 1, 7 (2008).

[203] *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

[204] One of the clearest illustrations of this consequence is the disparate effect of some charitable solicitation regulation on small or unpopular charities. *See* John D. Inazu, *Making Sense of* Schaumburg*: Seeking Coherence in First Amendment Charitable Solicitation Law*, 92 MARQ. L. REV. 551, 581–83 (2009) (explaining that, in the area of charitable solicitation, the more burdensome content-neutral regulations tend to threaten less established charities, and thus endanger their First Amendment rights).

[205] *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

[206] U.S. Jaycees v. McClure, 709 F.2d 1560, 1569 (8th Cir. 1983).

Temple American Inn of Court - April 2016 Program - Research and Materials

> The Jaycees does not simply sell seats in some kind of personal-development classroom. Personal and business development, if they come, come not as products bought by members, but as by-products of activities in which members engage after they join the organization. These activities are variously social, civic, and ideological, and some of them fall within the narrowest view of First Amendment freedom of association.[207]

His view is consistent with the Jaycees' own assertions that they were:

> [O]rganized for such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.[208]

Parsing which of these activities constitute the group's "predominate" activities is a difficult interpretive task, one that neither Brennan nor O'Connor undertook.[209]

VI. Why Doctrine Matters

The harm of the doctrinal framework in *Roberts* did not end with the Jaycees. The categories of intimate and expressive association continue to shape legal decisions that profoundly affect people's lives. This section recounts two more recent examples of groups that have suffered under the *Roberts* framework.[210] The first is the Chi Iota Colony of the Alpha

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[207] *Id.*

[208] Brief of Appellee, *supra* note 194, at *5.

[209] Brennan's opinion did note that the Jaycees engaged in "protected expression on political, economic, cultural, and social affairs" and recognized that "the Jaycees regularly engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment." *Roberts*, 468 U.S. at 626–27. But in the very next sentence, he wrote that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at 627.

[210] Of course, the case law on freedom of association has changed since *Roberts*. Some post-*Roberts* cases have affected the doctrinal development of freedom of association in important ways, most notably *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). *See also* Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 68–70 (2006) (refusing to expand the scope of *Dale*); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos., Inc., 515 U.S. 557, 559 (1995)

Temple American Inn of Court - April 2016 Program - Research and Materials

Epsilon Pi fraternity at the College of Staten Island (a nonintimate nonexpressive association). The second is the student chapter of the Christian Legal Society at Hastings Law School (a nonintimate expressive association).

A. *The Chi Iota Colony of Alpha Epsilon Pi*

Alpha Epsilon Pi ("AEPi") is a national social fraternity founded in 1913 "to provide opportunities for the Jewish college man seeking the best possible college and fraternity experience."[211] According to its Supreme Constitution, AEPi seeks "to promote and encourage among its members: Personal perfection, a reverence for God and an honorable life devoted to the ideal of service to all mankind; lasting friendships and the attainment of nobility of action and better understanding among all faiths . . . ."[212]

In 2002, the Chi Iota Colony ("Chi Iota") of AEPi formed at the College of Staten Island.[213] Between 2002 and 2005, Chi Iota never had more than twenty members.[214] Its past president described the purpose of the fraternity as fostering a "lifelong interpersonal bond termed brotherhood," which "results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives."[215] In furtherance of those goals, the fraternity limited its membership to males.[216]

Chi Iota applied to be chartered and officially recognized by the College of Staten Island in March 2004.[217] The Director of the Office of

(rejecting, on free speech rather than free association principles, the challenge of a gay, lesbian, and bisexual group of its exclusion from a city parade); City of Dall. v. Stanglin, 490 U.S. 19, 20–21 (1989) (denying the expressive association claim of the owner of a for-profit skating rink who challenged an ordinance restricting admission to certain ages); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 7–8 (1988) (upholding anti-discrimination laws applied to a consortium of New York City social clubs); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (upholding anti-discrimination laws applied to the Rotary Club). But the basic premise of this article is that the categories of intimate and expressive association that began in *Roberts* remain essentially intact, and it is in these categories that the most significant doctrinal and theoretical problems surrounding the right of association remain. Neither *Dale* nor any of the other post-*Roberts* cases alters this premise. *Cf.* Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right To Discriminate?*, 67 LAW & CONTEMP. PROBS. 27, 57 (2004) ("*Dale* is a mess, but the upshot of the mess is that we still have the old message-based rule of *Roberts*."); Shiffrin, *supra* note 199, at 841 ("The Court's framing of the issues [in *Dale*] grew straight out of Justice Brennan's opinion in *Roberts v. Jaycees*.").

[211] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 376 (E.D.N.Y. 2006) (quoting Alpha Epsilon Pi's mission statement).

[212] *Id.* at 377 (quoting Alpha Epsilon Pi's bylaws).

[213] *Id.* at 376. The College of Staten Island is a primarily commuter campus of just over 11,000 undergraduates.

[214] *See id.* (noting that, at the time of the case in 2005, the fraternity had eighteen members, and the plaintiffs estimated that membership was unlikely to exceed fifty persons).

[215] *Id.* at 377 (quotation marks omitted).

[216] *See id.* at 379 (explaining the selection and initiation process for prospective members).

[217] *Id.* at 380.

Student Life denied the application on the basis that the fraternity's exclusion of women violated the college's nondiscrimination policy.[218] The denial of official recognition precluded Chi Iota from using the college's facilities, resources, and funding, as well as from using the college's name in conjunction with the group's name, and from posting events to the college's calendars.[219]

In 2005, the members of Chi Iota filed suit in the United States District Court for the Eastern District of New York, arguing violations of their rights to intimate and expressive association and to equal protection.[220] The district court granted the fraternity's motion for a preliminary injunction against the college on its intimate association claim but concluded that Chi Iota had not shown a clear or substantial likelihood of success on its expressive association claim.[221] On appeal, the United States Court of Appeals for the Second Circuit reversed the district court's grant of a preliminary injunction and remanded the case, noting that the fraternity's "interests in intimate association are relatively weak."[222] Although the district court would still have had Chi Iota's intimate and expressive association claims before it on remand, neither looked to have a reasonable chance of success given the posture of the litigation. As the Second Circuit was considering the case, the Chi Iota Colony of the Alpha Epsilon Pi Fraternity at the College of Staten Island disbanded.[223]

Chi Iota is not the most sympathetic plaintiff to bring a freedom of association claim. Although its Jewish roots suggested religious freedom interests, most of its members were nonpracticing Jews.[224] It was a social group, but some of its social activities were coarse and banal, including visits to strip clubs.[225] It may well be that the brothers of Chi Iota were a self-focused, hedonistic group of boys who brought a collective drain on whatever community existed at the mostly commuter campus at the College of Staten Island.[226]

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[218] *Id.*

[219] *Id.* at 380; *cf.* Healy v. James, 408 U.S. 169, 181 (1972) ("There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges [the right of individuals to associate to further their personal beliefs].").

[220] *Chi Iota*, 443 F. Supp. 2d at 381.

[221] *Id.* at 389, 395.

[222] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 149 (2d Cir. 2007).

[223] E-mail from Gregory F. Hauser, to author (Sept. 30, 2009) (on file with author and *Connecticut Law Review*). Mr. Hauser represented Chi Iota in the litigation.

[224] *See Chi Iota*, 443 F. Supp. 2d at 378 (quoting Chi Iota's president, explaining that the fraternity members were "not extremely religious, but [did] talk about [their contributions] to the community, an expression of Judaism").

[225] *Chi Iota*, 502 F.3d at 141.

[226] Of course, the brothers of Chi Iota may also have had many endearing characteristics, especially to one another. As David Bernstein notes:

> [M]any believe that college fraternity and sorority members experience a "special camaraderie" that would not exist if members of the opposite sex were included.

But all of this is beside the point. Associational protections should not turn on whether a group's purposes or activities are sincere or wholesome to an outsider's perspective. The group's practices and activities meant something to the brothers of Chi Iota. They meant enough for the brothers to pursue membership through an application and rush process, to participate in the group's activities, and to bring a federal lawsuit in an attempt to preserve their associational bonds.

B. *The Christian Legal Society at Hastings Law School*

The Christian Legal Society ("CLS") is a "nationwide association of lawyers, law students, law professors, and judges who profess faith in Jesus Christ."[227] Founded in 1961, its purposes include "providing a means of society, fellowship, and nurture among Christian lawyers; encouraging, discipling, and aiding Christian law students; promoting justice, religious liberty, and biblical conflict resolution; and encouraging lawyers to furnish legal services to the poor."[228] CLS maintains student chapters at many law schools around the country.[229] These student chapters invite anyone to participate in their events but require members—including officers—to sign a Statement of Faith consistent with the Protestant evangelical and Catholic traditions.[230] Part of this Statement of Faith affirms that sexual conduct should be confined to heterosexual marriage. Accordingly, CLS student chapters do not accept as members anyone who engaged in or affirmed the morality of sex outside of heterosexual marriage.[231]

In 2004, the CLS chapter at Hastings Law School in San Francisco inquired about becoming a recognized student organization.[232] Hastings officials withheld recognition because CLS's Statement of Faith violated the religion and sexual orientation provisions of the school's

> For young people especially, the presence of the opposite sex in a social setting is likely to create sexual tension and concern for one's appearance, making it harder for them to relax and to get away from the pressure and stress of everyday life.

Bernstein, *Sex Discrimination*, *supra* note 157, at 186–87.

[227] Petition for Writ of Certiorari at 6, Christian Legal Soc'y Chapter of Univ. of Cal. v. Newton, No. 08-1371 (S. Ct. May 5, 2009).

[228] *Id.*

[229] *Id.*

[230] *Id.* at 7 (citation omitted).

[231] *See id.* at 8 ("In view of the clear dictates of Scripture, unrepentant participation in or advocacy of a sexually immoral lifestyle is inconsistent with an affirmation of the Statement of Faith, and consequently may be regarded by CLS as disqualifying such an individual from CLS membership." (internal quotation marks omitted)). CLS specifies that "[a] person's mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership," but "CLS individually addresses each situation that arises in a sensitive Biblical fashion." *Id.*

[232] *Id.*

Nondiscrimination Policy.[233] As a result, the school denied CLS travel funds and funding from student activity fees.[234] It also denied them the use of the school's logo, use of a Hastings e-mail address, the opportunity to send mass e-mails to the student body, participation in the annual student organizations fair, and reserved meeting spaces on campus.[235] Hastings subsequently asserted that its denial of recognition stemmed from an "accept-all-comers" policy that required any student organization to accept any student who desired to be a member of the organization.[236]

CLS filed suit in federal district court asserting violations of expressive association, free speech, free exercise of religion, and equal protection.[237] In *Christian Legal Society v. Kane*, the court granted summary judgment against CLS on all of its claims.[238] With respect to CLS's expressive association claim, the court concluded that *Roberts* and *Dale* were inapplicable because "CLS is not being forced, as a private entity, to include certain members or officers" and "the conditioned exclusion of [an] organization from a particular forum [does] not rise to the level of compulsive membership."[239] The court also asserted that "Hastings has denied CLS official recognition based on CLS's conduct—its refusal to comply with Hastings's Nondiscrimination Policy—not because of CLS's philosophies or beliefs."[240]

Despite resting its holding on the inapplicability of *Roberts* and *Dale*, the court held in the alternative that CLS's claim failed under those

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[233] *Id.* at 9.

[234] *Id.* at 10.

[235] Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *17 (N.D. Cal. May 19, 2006); Petition for Writ of Certiorari, *supra* note 227, at 10. Hastings did not deny CLS the "use of campus facilities for meetings and other appropriate purposes," which the Supreme Court has called "[t]he primary impediment to free association flowing from nonrecognition." Healy v. James, 408 U.S. 169, 181 (1972). Still, nothing in *Healy* suggests that the lack of access to campus facilities for meetings is the only burden caused by nonrecognition, and it is not hard to see how the inability to reserve meeting spaces, to access e-mail lists, or to participate in student fairs could burden associational freedoms:

> Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.

Id. at 181–82 (footnote omitted).

[236] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).

[237] *Kane*, 2006 WL 997217, at *4.

[238] The district court granted leave for a group called Hastings Outlaw to intervene in the case. Outlaw asserted that its members had a right to be officers and voting members in any other campus group (including CLS) and that its members opposed their student activity fees funding an organization that they found offensive. Petition for Writ of Certiorari, *supra* note 227, at 10–11.

[239] *Kane*, 2006 WL 997217, at *15 (citing Boy Scouts of Am. v. Wyman, 335 F.3d 80, 91 (2d Cir. 2003)).

[240] *Id.* at *17.

authorities as well. It assumed that CLS qualified as an expressive association because Hastings did not dispute that characterization.[241] But the court determined that "CLS has not demonstrated that its ability to express its views would be significantly impaired by complying with [the school's nondiscrimination] requirement."[242] The court concluded:

> [U]nlike the Boy Scouts in *Dale*, CLS has not submitted any evidence demonstrating that teaching certain values to other students is part of the organization's mission or purpose, or that it seeks to do so by example, such that the mere presence of someone who does not fully comply with the prescribed code of conduct would force CLS to send a message contrary to its mission.[243]

In fact, the court found "no evidence" that "a non-orthodox Christian, gay, lesbian, or bisexual student" who became a member or officer of CLS, "by [his or her] presence alone, would impair CLS's ability to convey its beliefs."[244] That conclusion repeats the fallacy in *Runyon* that forcing integration on a racist group wouldn't alter its message and the fallacy in *Roberts* that forcing an all-male group to accept women wouldn't alter its message.

CLS appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The appellate court affirmed the district court with a terse two-sentence opinion: "The parties stipulate that Hastings imposes an open membership rule on all student groups—all groups must accept all comers as voting members even if those individuals disagree with the mission of the group. The conditions on recognition are therefore viewpoint neutral and reasonable."[245] CLS petitioned for a writ of certiorari to the United States Supreme Court, arguing, among other things, that the Ninth Circuit's *Kane* decision (subsequently restyled as *Christian Legal Society v. Martinez*) created a circuit split with a Seventh Circuit case invalidating the denial of official recognition to a CLS student chapter at the Southern Illinois University School of Law.[246]

A divided Supreme Court rejected CLS's challenge.[247] Justice

[241] *Id.* at *20; *cf.* Christian Legal Soc'y v. Walker, 453 F.3d 853, 862 (7th Cir. 2006) ("It would be hard to argue—and no one does—that CLS is not an expressive association.").

[242] *Kane*, 2006 WL 997217, at *20.

[243] *Id.* at *22.

[244] *Id.* at *23.

[245] Christian Legal Soc'y v. Kane, 319 F. App'x 645 (9th Cir. 2009), *cert. granted*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 795 (2009), *aff'd and remanded*, 130 S. Ct. 2971 (2010). The court cited its opinion in *Truth v. Kent School District*, 542 F.3d 634, 649–50 (9th Cir. 2008), in which it ruled that a school district could deny recognition to a high school Bible club that limited its voting members and officers to those who shared the group's beliefs.

[246] Christian Legal Soc'y v. Walker, 453 F.3d 853, 859–60 (7th Cir. 2006).

[247] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

Ginsburg's majority opinion concluded that Hastings' all-comers policy was "a reasonable, viewpoint-neutral condition on access to the student-organization forum."[248] Justice Alito authored a dissent joined by Chief Justice Roberts and Justices Thomas and Scalia.[249]

The majority's free speech analysis is not entirely persuasive—its reasoning obscures a tension between the viewpoint neutrality of the all-comers policy (under a public forum analysis) and Hastings' non-neutral policy preferences expressed through its own speech and subsidies (under something akin to a government speech analysis).[250] But in the context of this Article, an even more disturbing aspect of the opinion is the majority's failure to take seriously CLS's freedom of association claim.

From the premise that it "makes little sense to treat CLS's speech and association claims as discrete," Ginsburg concluded that the Court's "limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights."[251] The problem with this doctrinal move is two-fold. First, it essentially elects rational basis scrutiny over strict scrutiny, and therefore all but preordains the outcome.[252] Second, it casts aside the competing constitutional values underlying CLS's freedom of association claim.[253]

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[248] *Id.* at 2978.

[249] *Id.* at 3000 (Alito, J., dissenting).

[250] *See, e.g., id.* at 2976 (Hastings' policy "encourages tolerance, cooperation, and learning among students" and "conveys the Law School's decision 'to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.'"). In addition to the doctrinal complications, *Martinez* involved a disputed factual question as to whether Hastings' applied an all-comers policy or a policy that prohibited certain kinds of discrimination, including discrimination based upon religion and sexual orientation. The Court remanded on the question of whether Hastings selectively applied its all-comers policy. *Id.* at 2995. While this factual question might be important to a public forum analysis, it is less relevant to the freedom of association analysis that I believe the Court should have made. The strength of CLS's constitutional claim to exist as a group should not turn on whether the restriction against it is viewpoint neutral or selectively enforced against it.

[251] *Id.*

[252] *See id.* ("[T]he same considerations that have led us to apply a less restrictive level of scrutiny to speech in limited public forums as compared to other environments apply with equal force to expressive association occurring in limited public forums."); *id.* ("[T]he strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may 'reserv[e] [them] for certain groups'"). After deciding to pursue a public forum analysis, the viewpoint neutrality of Hastings' all-comers policy was self-evident to the majority. *See id.* at 2993 ("It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers."); *id.* ("An all-comers condition on access to RSO status, in short, is textbook viewpoint neutral."). Accordingly, the majority "consider[ed] whether Hastings' policy is reasonable taking into account the RSO forum's function and 'all the surrounding circumstances,'" *id.* at 2988, and concluded that "the several justifications Hastings asserts in support of its all-comers requirement are surely reasonable in light of the RSO forum's purposes." *Id.* at 2991.

[253] For example, Ginsburg cites an important article by Eugene Volokh. *Id.* at 2985–86 (citing Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1940 (2006)). Among other things, Volokh's article considers a conflict very similar to the one at issue in *Martinez*: whether a public university can apply anti-discrimination rules to the Christian Legal Society. *Id.* at 1935. Ginsburg highlights Volokh's observation that a school may limit official recognition to groups comprised only of students, even though this infringes upon the associational

CLS's associational claim highlights the underlying conflict of values in this case: the clash between group autonomy and equality, the same tension at issue in *Runyon* and *Roberts*. Taking this values clash seriously means refusing to make an artificial distinction between expression and conduct and recognizing that, in some cases, they are one and the same. Contrary to Justice Ginsburg's insistence that "CLS's conduct—not its Christian perspective—is, from Hastings' vantage point, what stands between the group and RSO [registered student organization] status,"[254] CLS's "conduct" is inseparable from its message.

Ginsburg's opinion misses this connection. Quoting from CLS's brief, she writes that "expressive association in this case is 'the functional equivalent of speech itself'"[255] to set up the idea that expressive association is entitled to no more constitutional protection than speech. But CLS had asserted:

> [W]here one of the central purposes of a noncommercial expressive association is the communication of a moral teaching, its choice of who will formulate and articulate that message is treated as the functional equivalent of speech itself.[256]

CLS wasn't arguing that association is nothing more than speech but that association is itself a form of expression—who it selects as its members and leaders communicates a message. CLS underscored this point elsewhere in its brief, arguing that "[b]ecause a group's leaders define and shape the group's message, the right to select leaders is an essential element of its right to speak."[257] Ginsburg interpreted this assertion to mean that "CLS suggests that its expressive-association claim plays a part auxiliary to speech's starring role."[258] That interpretation may be consistent with the *Roberts* understanding of expressive association, but as I have argued throughout this Article, it misses the more fundamental connection between a group's message and its composition.

Ginsburg distinguished the Court's associational cases like *Dale* and *Roberts* because those cases "involved regulations that *compelled* a group

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freedoms of those who wish to form a group with non-students. *Martinez*, 130 S. Ct. at 2986. The point is a nice one, but the non-student constraint could also be construed as a jurisdictional limit linked far more closely (and less ideologically) to the nature of the public forum than an all-comers policy. More importantly, Volokh spends considerable time accounting for the values introduced by the right of association. Volokh, *supra*, at 1935. The majority subsumes this dimension into its speech analysis and avoids the harder questions.

[254] *Martinez*, 130 S. Ct. at 2994.

[255] *Id.* at 2984–85 (quoting Brief for Petitioner, *supra* note 2, at 35).

[256] Brief for Petitioner, *supra* note 2, at 35.

[257] *Id.* at 18.

[258] *Martinez*, 130 S. Ct. at 2985 (citing Brief for Petitioner, *supra* note 2, at 18).

to include unwanted members, with no choice to opt out."[259] But this is really a matter of perspective. Sometimes a group must choose between receiving benefits and adhering to its policies at the cost of those benefits.[260] But withholding some benefits—like access to meeting space or email lists or the opportunity to be part of a public forum—can be akin to stamping out a group's existence. After *Martinez*, the Hastings-Christian-Group-that-Accepts-All-Comers can exist, and the Christian-Legal-Society-for-Hastings-Law-Students-that-Can-Sometimes-Meet-on-Campus-as-a-Matter-of-University-Discretion-If-Space-Is-Available-but-Can't-Recruit-Members-at-the-Student-Activities-Fair can exist. But the Hastings Christian Legal Society—whose views and purposes are in no way sanctioned by and can be explicitly disavowed by Hastings—cannot.[261]

VII. REMEMBERING THE RIGHT OF ASSEMBLY

On the same day that the Court issued its *Martinez* opinion, it released its decision in *McDonald v. City of Chicago*.[262] Justice Alito's opinion in the latter case observed:

> In [*United States v. Cruikshank*], the Court held that the general "right of the people peaceably to assemble for lawful purposes," which is protected by the First Amendment, applied only against the Federal Government and not against the states. Nonetheless, over 60 years later the Court held that the right of peaceful assembly was a "fundamental righ[t] . . . safeguarded by the due process clause of the Fourteenth Amendment."[263]

It was only the sixth time in the last twenty years that the Court had even *mentioned* the right of assembly.[264] But this passing nod to a long-

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[259] *Id.* at 2986.

[260] Ginsburg cites *Grove City College v. Bell*, 465 U.S. 555, 575–76 (1984), and *Bob Jones Univ. v. United States*, 461 U.S. 574, 602–04 (1983).

[261] "Official recognition" is a term of art that doesn't entail any endorsement of private groups by the state actor. Hastings made clear that it "neither sponsor[]s nor endorse[s]" the views of registered student organizations and insisted that the groups inform third parties that they were not sponsored by the law school. Brief for Petitioner, *supra* note 2, at 4.

[262] 130 S. Ct. 3020 (2010).

[263] *Id.* at 3031 (alteration in original) (quoting United States v. Cruikshank, 92 U.S. 542, 551–52 (1876) and De Jonge v. Orgeon, 299 U.S. 353, 364 (1937)).

[264] Other than *McDonald*, a majority opinion of the Supreme Court has mentioned the right of assembly five times in the last twenty years. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730 (2010) ("Our decisions scrutinizing penalties on simple association or assembly are therefore inapposite."); District of Columbia v. Heller, 128 S. Ct. 2783, 2790 (2008) (describing "right of the people" clause in relation to assembly); *id.* at 2797 (intimating that assembly and petition are two separate rights); Watchtower Bible and Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 164 (2002) (quoting discussion of free assembly in Thomas v. Collins, 323 U.S. 516, 539–40 (1945));

forgotten right gestured toward the constitutional framework that should have decided *Martinez* and should have protected the Christian Legal Society.

From the House debates over the Bill of Rights that appealed to William Penn's defense of assembly to the rallying cries of the Democratic-Republican Societies, from the early suffragist and abolitionist movements of the antebellum era to the labor and civil rights movements of the Progressive Era, and from the political rhetoric of Abraham Lincoln to the political rhetoric of Martin Luther King, Jr., the right of assembly has emphasized the importance of shielding dissident groups from a state-enforced majoritarianism throughout our nation's history.[265] As C. Edwin Baker has argued, "the function of constitutional rights, and more specifically the role of the right of assembly, is to protect self-expressive, nonviolent, noncoercive conduct from majority norms or political balancing and even to permit people to be offensive, annoying, or challenging to dominant norms."[266] This role of assembly and its appeal to groups of different ideologies "makes it a better 'fit' than the right of association within our nation's legal and political heritage."[267] Indeed, principles of constitutional interpretation suggest that the First Amendment's right of assembly, not the late-arriving and judicially-constructed right of association, holds a central place in our constitutional tradition.[268]

The importance of assembly is strikingly evident in Justice Brandeis's famous opinion in *Whitney v. California*.[269] The now discredited majority opinion expressed particular concern that Anita Whitney had undertaken her actions in concert with others, which "involve[d] even greater threat to the public peace and security than the isolated utterances and acts of

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McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n.1 (1995) ("The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights." (citation omitted)); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 476 (1995) ("'Fear of serious injury cannot alone justify suppression of free speech and assembly.'" (quoting Whitney v. California, 274 U.S. 357, 376, (1927))). The last time the Court *applied* the constitutional right of assembly appears to have been in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 88 (1982)—twenty-eight years ago.

[265] *See generally* Inazu, *Forgotten Freedom*, *supra* note 15 (chronicling the role of assembly in these historical events and movements).

[266] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 134 (1989).

[267] Inazu, *Forgotten Freedom*, *supra* note 15, at 568. By "fit," I refer to the ways in which assembly falls plausibly within our tradition of American constitutionalism. The notion of fit is intimated in different ways by both Ronald Dworkin and Alasdair MacIntyre. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (3d ed. 2007).

[268] Philip Bobbitt has suggested that we engage in six modalities of constitutional argument: textual, structural, prudential, historical, doctrinal, and ethical). PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION xi, 7–8 (1982).

[269] 274 U.S. 357 (1927) (Brandeis J., concurring). The decision was formally overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

Temple American Inn of Court - April 2016 Program - Research and Materials

individuals."[270]

Rejecting this rationale, Brandeis penned some of the most well-known words in American jurisprudence:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[271]

The freedoms of "speech and assembly" lie at the heart of Brandeis's argument—the phrase appears eleven times in his brief concurrence. The Court had linked these two freedoms only once before; after *Whitney*, the nexus occurs in over one hundred of its opinions.[272] Brandeis's entwining of speech and assembly establishes two important connections. First, it recognizes that a group's expression includes not only the spoken words of those assembled but also the expressive message inherent in the group's existence. Second, it emphasizes that the rights of speech and assembly extend across time, preceding the actual moment of expression or gathering.[273] Just as freedom of speech guards against restrictions imposed prior to an act of speaking, assembly guards against restrictions imposed prior to an act of assembling—it protects a group's autonomy, composition, and existence.[274]

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[270] *Whitney*, 274 U.S. at 372.

[271] *Id.* at 375 (Brandeis, J., concurring). Judges and scholars have written volumes about these words and those that followed, but almost all of them focus on speech alone rather than speech and assembly. Justice Brennan, writing for the Court in the landmark case *New York Times v. Sullivan*, deemed Brandeis's *Whitney* concurrence the "classic formulation" of the fundamental principle underlying free speech. 376 U.S. 254, 270 (1964); *see also* Robert Cover, *The Left, the Right, and the First Amendment: 1918–1928*, 40 MD. L. REV. 371 (1981) (describing the "classic statement of free speech"); *cf.* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 194 (2002).

[272] The only mention of "speech and assembly" prior to *Whitney* came in *New York* ex rel *Doyle v. Atwell*. 261 U.S. 590, 591 (1923) (noting that petitioners alleged a deprivation of the "rights of freedom of speech and assembly").

[273] *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713, 720–25 (1971) (Douglas, J., concurring); Kingsley Int'l Pictures Corp. v. New York, 360 U.S. 684, 697–98 (1959) (Douglas J., dissenting) ("I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."); Poulos v. New Hampshire, 345 U.S. 395, 423 (1953) (Douglas, J., dissenting) ("There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment.").

[274] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (noting that *Douds* referred to "the varied forms of governmental action which might interfere with freedom of assembly"

As M. Glenn Abernathy argued in his seminal work, *The Right of Assembly and Association*, assembly "need not be artificially narrowed to encompass only the physical assemblage in a park or meeting hall" but "can justifiably be extended to include as well those persons who are joined together through organizational affiliation."[275] Abernathy also noted that assembly avoids the artificial line-drawing inherent in the right of association. Writing in 1961, he observed that the Court's initial recognition of a constitutional right of association three years earlier had inserted an instrumental gloss on group autonomy:

> It must be noted that [*NAACP v. Alabama*] does not clearly extend the First Amendment protection to *all* lawful affiliations or organizations. What Justice Harlan discusses is the association "for the advancement of beliefs and ideas." Clearly a vast number of existing associations would fall within this description, but it is questionable whether the characterization would fit the purely social club, the garden club, or perhaps even some kinds of trade or professional unions.[276]

As Abernathy noted, this message-based analysis—explicitly recognized twenty-six years later in *Roberts*'s category of expressive association—is absent in the right of assembly: "No such distinction has been drawn in the cases squarely involving freedom of assembly questions. The latter cases emphasize that the right extends to any lawful assembly, without a specific requirement that there be an intention to advance beliefs and ideas."[277]

The right of assembly may thus provide a less arbitrary and more persuasive framework for protecting dissenting practices than the right of

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and concluding that "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order"); Am. Commc'ns Ass'n. v. Douds, 339 U.S. 382, 402 (1950) ("[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. (forthcoming 2010). The principle that assembly encompasses membership is also evident in the now discredited logic underlying a number of the communist cases decided prior to the Court's recognition of the right of association. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. Clark, 177 F.2d 79, 84 (D.C. Cir. 1949) ("[N]othing in the Hatch Act or the loyalty program deprives the Committee or its members of any property rights. Freedom of speech and assembly is denied no one. Freedom of thought and belief is not impaired. Anyone is free to join the Committee and give it his support and encouragement. Everyone has a constitutional right to do these things, but no one has a constitutional right to be a government employee."); *cf.* Bailey v. Richardson, 182 F.2d 46, 74 (D.C. Cir. 1950) (Edgerton, J., dissenting) ("[G]uilt by association . . . denies both the freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth.").

[275] M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 173 (2d ed. rev. 1961).

[276] *Id.* at 236–37 (quoting *NAACP*, 357 U.S. 449).

[277] *Id.* at 237.

expressive association. Its approach is captured in Justice Rutledge's opinion in one of the most important cases on the right of assembly, *Thomas v. Collins*.[278] Rutledge argued that, because of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," only "the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[279] He explained:

> Where the line shall be placed in a particular application rests, not on such generalities, but on the concrete clash of particular interests and the community's relative evaluation [of] both of them and of how the one will be affected by the specific restriction, the other by its absence. That judgment in the first instance is for the legislative body. But in our system where the line can constitutionally be placed presents a question this Court cannot escape answering independently, whatever the legislative judgment, in the light of our constitutional tradition. And the answer, under that tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.[280]

Justice Rutledge's opinion also noted that the right of assembly guarded "not solely religious or political" causes but also "secular causes," great and small.[281] As Aviam Soifer has suggested, Rutledge's "dynamic, relational language" emphasized that the right of assembly was "broad enough to include private as well as public gatherings, economic as well as political subjects, and passionate opinions as well as factual statements."[282]

Soifer, Rutledge, Abernathy, and Brandeis gesture toward an important insight about group autonomy. Its primary value is not intimacy or expressivism—we have other rights, such as privacy and speech, that are better suited toward those ends. Rather, its primary value is that it permits dissent to manifest through groups. Justice Brennan glimpsed this value in *Roberts* when he noted that "collective effort on behalf of shared goals" is "especially important in preserving political and cultural diversity and in

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[278] 323 U.S. 516 (1945).

[279] *Id.* at 530.

[280] *Id.* at 531–32 (internal citation omitted).

[281] *Id.* at 531. The "preferred place" language originated in Justice Douglas's opinion for the Court in Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943), in which Douglas wrote: "Freedom of press, freedom of speech, freedom of religion are in a preferred position."

[282] SOIFER, *supra* note 24, at 77–78; *see also* Herndon v. Lowry, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule . . . ."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("[T]he right [of assembly] . . . cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions . . . ."); *id.* ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . .").

shielding dissident expression from suppression by the majority."[283] This value of dissent entails risk because it strengthens a genuine pluralism against majoritarian demands for consensus.[284] It resists what Nancy Rosenblum has called the liberal state's "logic of congruence," which requires "that the internal life and organization of associations mirror liberal democratic principles and practices."[285]

Dissenting practices often embody meaning different than that ascribed to them by outside observers, and "[m]any group expressions are only made intelligible by the practices that give them meaning."[286] Because "[c]hallenges to existing values and decisions to embody and express dissident values are precisely the choices and activities that cannot be properly evaluated by summations of existing preferences," the right of assembly protects "activities that are *unreasonable* from the perspective of the existing order."[287] And a group need not lack privilege or status in

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[283] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000) (finding that freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas" (footnote omitted)).

[284] The importance of dissent was downplayed by the "liberal consensus" that formed the background to the initial recognition of the constitutional right of association in the middle of the twentieth century. Inazu, *Strange Origins*, *supra* note 16, at 541–42, 558 & n.558 (describing the prominence of mid-twentieth century liberalism that accompanied the Court's initial framing of the constitutional right of association). In particular, pluralists like David Truman and Robert Dahl failed to recognize that "the capacity for groups to maintain autonomous practices, detached from and even antithetical to the will of the majority, was in some ways a destabilizing freedom. . . . [G]roup autonomy poses risk rather than stability for the democratic experiment." *Id.* at 542–45, 555–57. For the contrast between the competing narratives of dissent and the pluralist consensus, see Sheldon S. Wolin, *Democracy, Difference, and Re-Cognition*, 21 POL. THEORY 464, 464 (1993), observing:

> From Roger Williams's Bloody Tenent (1644) to John Calhoun's Disquisition, Margaret Fuller's Woman in the Nineteenth Century, Booker Washington's Up from Slavery, and the Autobiography of Malcolm X, discursive representations of difference have appeared but until recently have had little effect on the main conceptual vocabulary or thematic structure of the theoretical literature of American politics. Instead, from Madison's Tenth Federalist to the writings of Mary Follett, Charles Beard, Arthur Bentley, David Truman, and Robert Dahl, those modes of difference mostly disappeared or were reduced to the status of interests. The result: on one side, themes of separation, dismemberment, disunion, exploitation, exclusion, and revenge and, on the other, themes extolling American pluralism as the distinctive American political achievement and the main reason for the unrivaled stability of American society and its political system.

To Wolin's second list, we can add John Rawls, who became for Wolin the paradigmatic thinker of liberalism's suppression of difference. *See* SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 549 (2004) (noting that the "repressive elements in Rawls's liberalism . . . reflect an aversion to social conflict that is in keeping with his elevation of stability, cooperation, and unity as the fundamental values").

[285] ROSENBLUM, MEMBERSHIP AND MORALS, *supra* note 5, at 36; *see also* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 3 (2002) ("Liberalism requires a robust though rebuttable presumption in favor of individuals and groups leading their lives as they see fit, within a broad range of legitimate variation, in accordance with their own understanding of what gives life meaning and value.").

[286] Inazu, *Forgotten Freedom*, *supra* note 15, at 567. *See generally* MACINTYRE, *supra* note 267.

[287] BAKER, *supra* note 266, at 134.

society to assume an "unreasonable" or dissenting posture—dissent is defined by a group's refusal to ascribe to state-enforced majoritarian norms in the particular setting in which it finds itself.[288] Successful businessmen, non-practicing Jewish male college students, and Christian law students all play a part in "political and cultural diversity."[289] When the state seeks to inhibit or destroy their way of life, the groups that they inhabit become forms of "dissident expression."[290] We tolerate these forms of expression not because we endorse them or seek to emulate them, but because we recognize the state's tendencies to dominate and control through the interpretations and meanings it assigns to a group's activities.

Facilitating a space for meaningful dissent against suppression by majoritarian norms is also a fundamentally democratic goal. It protects not only Christian groups that oppose homosexual conduct but also gay groups that embrace and embody it.[291] As Stephen Carter has argued, "[d]emocracy needs diversity because democracy advances through dissent, difference, and dialogue. The idea that the state should . . . create a set of meanings, [and] try to alter the structure of institutions that do not match it, is ultimately destructive of democracy because it destroys the differences that create the dialectic."[292] Beginning from a very different perspective, William Eskridge arrives at a similar conclusion: "The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the

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[288] *Cf.* Healy v. James, 408 U.S. 169, 196 (1972) (Douglas, J., concurring) ("[T]he *status quo* of the college or university is the governing body (trustees or overseers), administrative officers, who include caretakers, and the police, and the faculty." (emphasis added)).

[289] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[290] *Id.*

[291] *See, e.g.*, Brief in Support of Petitioner, *supra* note 2, at 9 ("The genius of the First Amendment is that it knows no bias. Protections for one minority voice extend to all."). One proponent of gay rights has critiqued the "overly formal, inconsequential, empty version of equality" that underlies the application of anti-discrimination law to the Christian Legal Society. *See* Joan W. Howarth, *Religious Exercise, Expression, and Association in Schools*, 42 U.C. DAVIS L. REV. 889, 897 (2009).

[292] Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 33 (Michael W. McConnell et al. eds., 2001). The importance of protecting difference and dissent is particularly relevant to the "counter-assimilationist" ideal of religious freedom that allows people "of different religious faiths to maintain their differences in the face of powerful pressures to conform." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990). In the context of religious freedom, and in contrast to his relatively unsympathetic treatment of the Jaycees throughout his *Roberts* opinion, Justice Brennan adopted a more communitarian approach. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."); Goldman v. Weinberger, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting) ("A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against [the] quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.").

Temple American Inn of Court - April 2016 Program - Research and Materials

triumph of one community over all others."[293]

The call for greater group autonomy through the right of assembly is not without limiting principles. The text of the First Amendment offers one: assemblies must be peaceable.[294] Our constitutional, social, and economic history suggests another: anti-discrimination norms should typically prevail when applied to commercial entities.[295] Other questions are more difficult to answer. I take up some of them in my forthcoming book, *Liberty's Refuge*.[296] Among the most difficult is whether the right of assembly tolerates racial discrimination by peaceable, noncommercial groups. Our constitutional history supports a plausible argument that "race is just different," that the state's interest in eliminating racial discrimination justifies a nearly total ban on racially segregated private groups.[297] As Justice Stewart states in *Jones v. Alfred H. Mayer Co.*:

> Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. . . . [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[298]

For these reasons, we might plausibly treat race differently when considering the boundaries of group autonomy. I would be quick to do so as a matter of personal preference—I can think of no racially discriminatory group to which I attach personal value or worth. But treating race differently in all dimensions of the private sphere ultimately

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[293] William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2415 (1997).

[294] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .").

[295] *See, e.g.*, Brief for Petitioner, *supra* note 2, at 2 ("All *noncommercial* expressive associations, regardless of their beliefs, have a constitutionally protected right to control the content of their speech by excluding those who do not share their essential purposes and beliefs from voting and leadership roles." (emphasis added)). Justice O'Connor proposed a similar line. *See Roberts*, 468 U.S. at 635–36 (O'Connor, J., concurring). As I suggested earlier in this Article, O'Connor's requirement that an association be "predominantly engaged" in expressive activity introduces considerable difficulty to her conceptual categories, and her conclusion that the Jaycees itself was a commercial association is problematic. *Id.* at 635–37. For a clearer example of a commercial association, see *City of Dallas v. Stanglin*, 490 U.S. 19, 24–25 (1989), in which the Supreme Court denied the freedom of association claim of the owner of a skating rink who challenged a Dallas ordinance restricting admission to "dance halls" to people between the ages of fourteen and eighteen. As the Court noted, "[t]he hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment." *Id.* at 24.

[296] *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (forthcoming 2011, Yale University Press).

[297] Even here, however, very few people make categorical arguments—the Ku Klux Klan, for example, is still permitted to tout its racist message.

[298] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Temple American Inn of Court - April 2016 Program - Research and Materials

undercuts a vision of assembly that protects pluralism and dissent against state-enforced orthodoxy. We cannot move from the premise that genuine pluralism matters to an effort to rid ourselves of the groups that we don't like.[299]

On the other hand, the right of assembly will not always trump competing interests. Courts will have to draw lines and balance interests, just as they do with the freedom of speech. In my view, the protections for assembly ought to be constrained when a private group wields so much power in a given situation—as private groups did in the American South from the decades following the Civil War to the end of the Civil Rights Era—that it prevents other groups from meaningfully pursuing their own visions of pluralism and dissent.[300] Seen in this light, assembly is a self-limiting right.[301] But as long as private groups do not tip the balance of power in this way, we should tolerate even those groups that offend our sensibilities.

Line drawing questions like the permissibility of race-based discrimination are immensely important. But these difficult questions should not prevent us from beginning to address the inadequacies of

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[299] The question of racial discrimination, and specifically discrimination by whites against African Americans, is one of the most difficult issues confronting any argument for greater group autonomy. My argument would permit some racially discriminatory groups. It is an argument rooted in social change and hope in social change—that we are a different society today than we were in 1960 and that we will continue to hold the ground that has been won. I do not mean to suggest that we have solved the problem of race. I do argue that in this, as in many other areas of the law, we recognize that the structural politics today are different. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2516 (2009) ("More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. In part due to the success of that legislation, we are now a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today." (citing South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966))); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); Freeman v. Pitts, 503 U.S. 467, 491–92 (1992) ("[W]ith the passage of time, the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish . . ."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future"); Green v. Cnty. Sch. Bd. of New Kent Cnty., Va., 391 U.S. 430, 435–38 (1968) (holding that a school district may be declared unitary and lacking racial discrimination based on satisfactory performance in five areas of a school district's operations).

[300] My proposal for assembly differs in this respect from what Andrew Koppelman and Tobias Wolff have called the "neolibertarian[]" position, which they attribute to an eclectic group of scholars that includes David Bernstein, Dale Carpenter, Richard Epstein, Michael McConnell, John McGinnis, Michael Paulsen, Nancy Rosenblum, and Seana Valentine Shiffrin. KOPPELMAN & WOLFF, *supra* note 6, at xii (quotation marks omitted).

[301] A similar rationale underlies the free exercise of religion. A religious group that used its freedom to establish a theocracy would undermine the principles of the free exercise of religion. The relationship between the right of assembly and the religion clauses of the First Amendment is a yet unexplored dimension of constitutional law that might shed some light on the troubled jurisprudence surrounding "church-state" issues.

current doctrine. This Article has suggested that the current balance—or lack of balance—is deeply problematic. Our world is one in which courts have decided that fraternities cannot exclude women and Christian student groups cannot exclude those who do not share their religious convictions. The relevant question today is not whether a constitutional vision that offers strong protections for pluralism and dissent will be realized (as if this area of the law could ever reach finality), but whether we ought to move in that direction.

Some people will be unpersuaded by any constitutional vision that gives greater protections to dissenting groups, particularly one that limits the reach of anti-discrimination laws. They will push instead for greater congruence and less difference. That is the logic underlying the Court's decision in *Martinez*. It surfaces in Justice Kennedy's belief that a state-run public school "quite properly may conclude that allowing an oath or belief-affirming requirement, or an outside conduct requirement, could be divisive for student relations."[302] It is the fundamental tenet of the Ninth Circuit's decision in *Truth v. Kent* that equates a Christian club's desire to limit its members to Christians to invidious discrimination.[303]

Those who endorse decisions like *Martinez* and *Kent* and reject a constitutional vision that challenges the current approach to protecting group autonomy need to provide a better justification for the categories of intimate and expressive association. They should articulate a convincing constitutional doctrine and ethos that legitimates the jurispathic silencing of "those who would make a *nomos* other than that of the state."[304] What Thomas Emerson observed almost fifty years ago remains true today: "[T]he constitutional source of 'the right of association,' the principles which underlie it, the extent of its reach, and the standards by which it is to be applied have never been clearly set forth."[305] The protections for group autonomy deserve greater respect—and a more coherent jurisprudential approach—than we have given them thus far.

VIII. CONCLUSION

This Article has called attention to flaws in the Supreme Court's categories of intimate and expressive association. It is unlikely that these categories reflect "well-settled" doctrine.[306] But even if they do, sometimes well-settled doctrine is wrong. The very real constitutional issues unfolding before us should not be answered by rote invocations of

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[302] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2998 (2010) (Kennedy, J., concurring).

[303] Truth v. Kent Sch. Dist., 542 F.3d 634, 644–45 (9th Cir. 2008).

[304] Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

[305] Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 2 (1964).

[306] KOPPELMAN & WOLFF, *supra* note 6, at xi.

these ill-formed categories.

The alternative constitutional vision of assembly is not without risk. It reintroduces a weighing of constitutional values that some would prefer remain suppressed. It strengthens protections for groups that you and I do not like. But it also strengthens protections for groups that we care about, against a state-enforced majoritarianism whose threat we might not recognize. As Justice Black once wrote: "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."[307]

[307] Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting).

When to Regulate Hate Speech

John C. Knechtle*

Introduction

Laws that prohibit the expression of hate, commonly called hate speech, against individuals or groups based on national or ethnic origin, race, or religion are widely debated. Such laws proscribe a variety of types of speech including racial, ethnic and religious epithets,[1] historical revisionism about racial or religious groups (i.e. denying the Holocaust),[2] or incitement to ethnic, racial or religious hatred, discrimination or violence.[3] Hate speech also arises in the context of a harassing and hostile work or educational environment[4]; however this article addresses the former three types of hate speech.

The extent of hate speech regulation in the world, including liberal democracies, sharply contrasts with that of the United States, where free speech interests prevail. Hate speech regulations impact much more than the podium speaker on the street; they impact many areas of everyday life, such as the Internet, freedom of the press, tort law, criminal law, and reading materials, *inter alia*. Not only are hate speech regulations affecting more areas of life, they are increasingly growing in favor

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1. *See* Michel Rosenfeld, *Hate Speech in Comparative Perspective: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 133-34 (1982).
2. *See generally* KENT GREENWAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH (1995).
3. *See* ERIC BARENDT, FREEDOM OF SPEECH (1985); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341 (1989); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY (1982).
4. *See* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995); Abigail C. Saguy, *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 LAW & SOC'Y REV. 1091 (2000); *see also infra* note 208 and accompanying text.

throughout the world. This contrast is especially clear in the area of Internet hate speech, state laws and international conventions.

While the United States is becoming a hub for Internet hate speech,[5] other countries are prohibiting hateful content distributed on the Internet in their countries. Internet hate speech is of particular interest because the Internet is available in all countries and contains vast amounts of information that is easily accessible. The United States Supreme Court afforded the highest level of protection to Internet speech under the First Amendment.[6] This is not the case in other countries.[7] In China, for example, the government controls access to all communications through the use of firewalls.[8] In a highly publicized French case, Yahoo, Inc. was found liable for allowing French citizens access to sites which sold Nazi memorabilia.[9] Germany, which has some of the strongest prohibitions of Internet hate speech, will subject persons to criminal prosecution for providing a hate speech site accessible to Germans.[10] Decisions by the German courts have prompted Internet service providers (ISPs) to block access to sites containing hate speech or symbols of hate speech.[11] In Canada, ISPs are protected from criminal prosecution for allowing access to hate speech. However, under the Canadian Human Rights Act,[12] individual web sites that communicate discriminatory material pertaining to race, religion or national or ethnic origin are subject to injunctions against the use of their sites.[13] This Act was enforced in 1997 when the

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5. *See* Christopher D. Van Blarcum, Note, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 822 (2005); Peter J. Breckheimer II, Note, *A Haven for Hate: The Foreign and Domestic Implications for Protecting Internet Hate Speech Under the First Amendment*, 75 S. CAL. L. REV. 1493, 1518 (2002).

6. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997); Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1012 (9th Cir. 2001).

7. Internet hate speech is the subject of considerable discussion. *See, e.g.*, Van Blarcum, *supra* note 5, at 781; Breckheimer, *supra* note 5, at 1518; Amy Oberdorfer Nyberg, Note, *Is All Speech Local? Balancing Conflicting Free Speech Principles on the Internet*, 92 GEO. L.J. 663, 663-64 (2004); Alexander Tsesis, *Prohibiting Incitement on the Internet 2002*, 7 VA. J.L. & TECH. 5 (2002); Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?* 6 COMM. L. & POL'Y 287, 295 (2001).

8. Breckheimer, *supra* note 5, at 1509.

9. Joshua Spector, *Hate Speech on the Internet, Spreading Angst or Promoting Free Expression? Regulating Hate Speech on the Internet*, 10 U. MIAMI INT'L & COMP. L. REV. 155, 173-76 (2002).

10. Van Blarcum, *supra* note 5, at 803.

11. Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253, 264 (2003); Breckheimer, *supra* note 5, at 1513.

12. Canadian Human Rights Act, R.S.C., Ch. H-6 (1985) (Can.).

13. Breckheimer, *supra* note 5, at 1516.

Canadian government successfully removed an anti-Semitic web site.[14] In addition to state sponsorship of Internet hate speech regulations, the Council of Europe and the European Union are actively advocating civil and penal liabilities for the distribution of hate speech via the Internet.[15]

Foreign governments are increasingly adding laws that prohibit various forms of hate speech. Many hate speech regulations were in response to the human rights violations during World War II. The United Kingdom, for instance, enacted laws pursuant to its international obligations that made the publication or utterance of words "which are threatening, abusive or insulting" subject to criminal prosecution if that expression were intended to incite hatred on the basis of race, national origin or color.[16] The United Kingdom has added to this framework by passing Section 5 of the Public Order Act[17] and the Protection from Harassment Act[18]. Germany has been particularly vigilant in passing laws that prohibit hate speech. German law prohibits and criminalizes incitement of hatred, or attacks on human dignity on account of race, nationality, ethnic origin, or religion.[19] In Australia, in New South Wales, the Anti-Discrimination Amendment Act No. 48 of 1989 was the first law that criminalized the incitement of hatred, serious contempt, or severe ridicule of person(s) on the basis of race or membership in a group by threatening harm or inciting others to threaten harm.[20] Canada has also passed legislation that provides for criminal sanctions for advocacy of genocide and "inciting hatred against any identifiable group where such incitement is likely to lead to a breach of the peace."[21] These are only a few examples of the increasing number of countries enacting hate speech regulations.[22]

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14. Citron v. Zündel (Canadian Human Rights Tribunal Jan. 14, 2002), *available at* http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=252&lg=_e&isruling=0.

15. Van Blarcum, *supra* note 5, at 789-802.

16. Rosenfeld, *supra* note 1, at 1546 (quoting Section Six of the Race Relations Act).

17. Public Order Act, 1986, c. 64, 5-6 (Eng.).

18. Protection from Harassment Act, 1997, c. 40, 7 (Eng.).

19. Friedrich Kübler, *How Much Freedom for Racist Speech? Transactional Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 344-45 (1998).

20. Sharyn Ch'ang, *Legislating Against Racism: Racial Vilification Laws in New South Wales, in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 90 (Sandra Coliver ed., 1992) [hereinafter STRIKING A BALANCE] (quoting Section 20D).

21. John Manwaring, *Legal Regulation of Hate Propaganda in Canada, in* STRIKING A BALANCE, *supra* note 19, at 107-08 (quoting Section 319).

22. *See, e.g.*, Gilbert J. Marcus, *Racial Hostility: The South African Experience, in* STRIKING A BALANCE, *supra* note 19, at 208; Stephen J. Roth, *Laws Against Racial and Religious Hatred in Latin America: Focus on Argentina and Uruguay, in* STRIKING A BALANCE, *supra* note 19, at 197; Eliezer Lederman and Mala Tabory, *Criminalization of Racial Incitement in Israel, in* STRIKING A BALANCE, *supra* note 19, at 182; Venkat

Another example of international condemnation and prohibition of hate speech are international conventions prohibiting such speech. Among these conventions, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for the condemnation of all expression advocating the superiority of one race or group over another group based on race, color or ethnic origin or promoting racial hatred.[23] CERD also requires criminalization and injunction by states against persons who engage in those activities.[24] Even the United Nations Human Rights Committee (Committee) took a harsh stance against hate speech when it upheld a conviction of a French literature professor who denied, among other things, the existence and use of gas chambers against Jews during the Holocaust.[25] The Committee determined that under the United Nations Covenant on Civil and Political Rights the Professor's statements would increase anti-Semitism and interfere with the rights of the Jews to live free from the fear of anti-Semitism.[26] Furthermore, the European Court of Human Rights has consistently decided that hate speech regulations do not violate freedom of expression.[27] In *Jersild v. Denmark*,[28] a racist youth group made degrading remarks against immigrants. The European Court agreed with the Danish court that the conviction of the youths was proper because there were limitations on free speech when hate speech does not provide for "the protection of the reputation or rights of others."[29] Internationally, the world is placing less emphasis on the freedom of speech, and more emphasis on the dignity of persons.

The divide between the U.S. approach and the growing international

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Eswaran, *Advocacy of National, Racial and Religious Hatred: The Indian Experience, in* STRIKING A BALANCE, *supra* note 19, at 171; Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 1999, 7 WM. & MARY BILL RTS. J. 305, 309 (1999).

23. State Parties [must] condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.... [State Parties] shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination ... and also the provision of any assistance to racist activities, including the financing thereof.... Shall declare illegal and prohibit organizations ... and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as punishable by law....

Rosenfeld, *supra* note 1, at 1555 (quoting Art. 4).

24. *Id.* at 1555.

25. *Report of the Human Rights Committee, Volume II*, U.N. GAOR, 52nd Sess., Supp. No. 40, at 84, U.N. Doc. A/52/40 (1999).

26. *Id.* at 96.

27. Rosenfeld, *supra* note 1, at 1555-56.

28. Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994).

29. *Id.* at 28.

consensus on hate speech is substantial. Those involved in this public debate either support or oppose such laws despite the broad range of histories with genocide, violence and discriminatory practices, values, cultures, legal systems and jurisprudence, and despite the wide range of harms hate speech laws seek to address. This article seeks to discover the reasons for the differences, find common ground in the debate, and propose a way for hate speech regulation to develop in the U.S.

The first section of this article identifies two umbrella harms that regulations of hate speech seek to address: the harm of potential violence and the harm to human dignity. This section also discusses the rationale behind providing and prohibiting a legal remedy for such harms. The second section describes two critical factors for consideration in deciding when and how a country chooses to regulate hate speech: 1) a country's history with ethnic, racial and religious violence, genocide, and discriminatory practices; and 2) its jurisprudential history, which reflects the hierarchy of its constitutional value choices. These factors are under-appreciated in the debate because to give them their proper place would require understanding of not only the legal arguments, but also a people's history and hierarchy of constitutional values.

Finally this article posits that as each country decides how best to balance its constitutional values, at a minimum, hate speech that threatens unlawful harm or incites to violence may be proscribed. To accomplish this in the U.S., this article proposes that in addition to *Brandenburg*'s "incitement to imminent violence test," the "true threats" test should apply to hate speech. The true threats doctrine was initially developed to protect the president, vice president and other high level government officials from threats of violence and has since been expanded to a broader application. It requires that the speaker intend his or her language to be a threat (whether or not he or she actually intends to carry out the threat), and that a reasonable listener, in context, would interpret the language as a threat of unlawful harm. Intimidation can constitute a true threat if it is to create a fear in its victims that they are a target of violence. Such an approach addresses the more virulent forms of hate speech, which, although not as extensive as hate speech regulations adopted elsewhere in the world, constitute a starting point for regulating hate speech.

I. Forming a Basis of Hate Speech Codes

Although there are many arguments for why hate speech should be regulated, many of these arguments fail because they do not take into consideration the peculiarities of people from different countries, and the

ideas upon which their governments were founded. Many commentators have addressed the adverse impact of hate speech and have attempted to invent mechanisms that they believe will adequately compensate for those harms. However, the more pressing issue that theorists should address is the practicability of the proposed theory and its potential acceptability with legislators, judges, and the voting public. Many commentators have suggested radical reforms, which are unlikely to gain in popularity, except, perhaps, in the labyrinths of academia. On the other hand, other commentators have so myopically focused on real-world utilitarian solutions for hate speech regulations that they propose that the current system is adequate.[30] While it is true that the current *corpus juris* works, the aspirational components of a better, more peaceful society should not be forgotten or overlooked. This article attempts to provide an alternative basis that will be closely tailored to the history of a people, and the ideas associated therewith.

A reality based approach must first determine what harms are created by hate speech. In practice, states have sought to protect their citizens from violence and/or attacks against dignity. These harms are recognized in state histories as harms that government has an interest in protecting against pursuant to its police powers. Many hate speech commentators have focused on why hate speech should or should not be regulated. In an attempt to prove why such speech should or should not be regulated, their postulates focus on the importance of the market place of ideas,[31] that feelings have a real emotive impact,[32] or that judges

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30. *See* Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for Post-Brown Era*, 46 VAND. L. REV. 865 (1993).

31. One commentator explains:

> But it is not just the prevalence and strength of the idea of racism that makes the unregulated marketplace of ideas an untenable paradigm for those individuals who seek full and equal personhood for all. The real problem is that the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat). Racism is irrational and often unconscious. Our belief in the inferiority of non-whites trumps good ideas that contend with it in the market, often without our even knowing it. In addition, racism makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas. It also decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets.

Charles R. Lawrence III, *Frontiers of Legal Thought II The New First Amendment: If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 432, 470 (1990) (citing JOHN STUART MILL, ON LIBERTY ch. 2 (1859)). *See also* Breckheimer, *supra* note 5, at 1500; Dana Moon Dorsett, *Note, Hate Speech Debate and Free Expression*, 5 S. CAL. INTERDISC. L.J. 259, 269-70 (1997); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradignms of Free Expression*, 40 UCLA L. REV. 103, 167 (1992); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 16 (1991); Robert C. Post, *Free Speech and Religious,*

should place more emphasis on the idea of equality[33]. These postulates are "how to" arguments; in other words, they focus on "how to" prove a libertarian or hate speech code advocate view. Although these postulates add to the volumes of academic literature and philosophical debate, this article emphasizes what harms states are willing and wanting to protect against. Instead of focusing on "how to" arguments, the following analysis will begin with what states, in practice, are protecting: harms involving violence and harms against human dignity.

Racial, and Sexual Harassment: Racist Speech, Democracy and the First Amendment, 32 WM. AND MARY L. REV. 267, 274 (1991); Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

32. One of the most prominent harms discussed by commentators is that racial speech is inherently injurious to the individual to whom the racial speech is addressed. Post, *supra* note 29, at 272; N. Douglas Wells, *Whose Community? Whose Rights—Response to Professor Fiss*, 24 CAP. U. L. REV. 319, 321 (1995); Kim M. Watterson, *Note, The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 U. PITT. L. REV. 955, 969 (1991); Lawrence, *supra* note 31, at 462; J. Anglo Corlett and Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 WAYNE L. REV. 1071, 1089 (2002). This harm is many times magnified when the racial expression is directed at a group which has been historically discriminated against. Some have even suggested that racist speech is a form of "spirit-murder." Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987). Victims of racist expression experience feelings of self-hatred, inferiority, alienation, isolation, self-doubt, and helplessness. Richard Delgado and David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations*, 82 CAL. L. REV. 871, 887 (1994); Post, *supra* note 31, at 274. Proposals under this harm focus on the content of the hate expression, its abusive nature, and the substantiality of the impact of the harm upon the individual. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179 (1982); Post, *supra* note 31, at 274, n.38, n.39.

33. At least one commentator has characterized hate speech as a deontic harm due to its affects on the individual's rights. Post, *supra* note 31, at 272 (citing George R. Wright, *Racist Speech and the First Amendment*, 9 MISS. C.L. REV. 1, 14-22 (1988)). Some have argued that toleration and protection for racist expression are inconsistent with the Fourteenth Amendment's principle of equality. Post, *supra* note 31, at 272; Wells, *supra* note 32, at 320; Massey, *supra* note 31, at 173-74. One commentator has explained: "[A] society committed to ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals. Laws prohibiting racist speech must be regarded as important components of such expressions and statements." Post, *supra* note 31, at 272. Another commentator suggests that many civil libertarians and judges have ignored the special status of equality in the Constitution and have focused exclusively on First Amendment values. James E. Fleming, *Panel I: The Constitutional Essentials of Political Liberalism: Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1435-36 (2004). He suggests that the courts should balance First Amendment rights with equal protection when the court must make a determination as to the constitutionality of the allowance of hate speech and/or discriminatory action. *Id.*

A. Harm of Potential Violence

The harm of potential violence refers to the propensity of hate speech to incite and cause violence.[34] Society has a compelling interest in limiting and eliminating violence due to its axiomatic harm, and the more subtle harm created by engendering fear, suspicion, distrust, and alienation.[35] The government's function is twofold: (1) protect individuals threatened with immediate violence, and (2) to "preserv[e] the social conditions . . . that foster individual autonomy."[36] To maintain societal harmony at a minimum, the government must ensure safety from violence.[37] One commentator observes:

> In order for autonomous individuals to flourish [in a society] there must exist certain social conditions conducive to autonomy. Freedom and individual dignity can only survive in a community that recognizes their value and is prepared to maintain them as principles of the social order. But there are moments when the autonomous individual takes actions that are inimical to the maintenance of the social fabric which supports individual autonomy. One such moment is when the individual incites violence.[38]

To ignore or deny the relationship between hate speech and the threat or incitement to violence is to not know history, including recent history. One need not return to Nazi Germany in the 1930s and '40s to understand the connection between hate speech and violence. Hate speech was an integral component of the "ethnic cleansing" in the war in Bosnia. In an effort to quell the fomenting violence, Bosnian police dispersed peaceful demonstrations because of their hate speech content. For example, at the urging of foreign democratic leaders, Bosnian Serb police used tear gas and water cannons to disperse "hundreds" of demonstrators chanting nationalist songs and anti-Muslim slogans in Banja Luka on June 18, 2001. The demonstrators were attempting to prevent the rebuilding of the 16th-century Ferhadija mosque, which Bosnian Serb irregulars destroyed during the 1992-1995 war as part of a campaign to remove all physical aspects of Bosnia's Muslim heritage.[39] A U.S. State Department official asserted: "There are obvious free-speech concerns, but we need to put in place something to deal with the

34. Massey, *supra* note 31, at 155.
35. *Id.*
36. *Id.* at 156.
37. Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 AZ. ST. L. J. 953, 956-57 (2004).
38. Massey, *supra* note 31, at 156.
39. *RFE/RL Newsline*, Vol. 5, No. 115, Part II (June 18, 2001).

abuses of the media—the hate, the racial epithets and ethnic slurs."[40] The media stoked the violence and even though proving a causal relationship between racial or religious epithets in a particular newspaper article or radio or television program and a specific act of violence may be impossible, when understood in the context of the overall violence engulfing the region, the state's interest in procuring peace supersedes the right to express hate.

The 2004 movie *Hotel Rwanda* effectively portrayed the role that hate speech broadcast over the radio played in the Rwandan genocide. Between January and July of 1994, Radio-Television Libre des Mille Collines (RTLM) in Kigali, Rwanda broadcast hate speech towards the Tutsi minority encouraging the population on political grounds to commit acts of violence against the Tutsi population.[41] Initially the French and U.S. governments opposed taking any action against RTLM, with the U.S. Ambassador claiming that its euphemisms were subject to many interpretations.[42] The Canadian ambassador later said: "The question of Radio Mille Collines propaganda is a difficult one. There were so many genuinely silly things being said on the station, so many obvious lies, that it was hard to take it seriously. . . . Nevertheless, everyone listened to it—I was told [about it] by a Tutsis [sic]—in a spirit of morbid fascination and because it had the best music selection."[43]

RTLM's radio hate speech grew increasingly virulent with devastating impact. On June 4, 1994 RTLM journalist Kantano Habimana told listeners that "[t]hey should all stand up so that we kill the *Inkotanyi* and exterminate them . . . the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it."[44] These more virulent expressions of hate occurred during the peak of the massacres.

Only after the Rwandan genocide had occurred did the international community take RTLM's radio hate speech seriously. On December 3, 2003, after a three-year trial, the International Criminal Tribunal for

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40. Philip Shenon, *Allies Create Press-Control Agency in Bosnia*, N. Y. TIMES, Apr. 24, 1998, at A8),

41. Radio Netherlands, *Hate Radio: Rwanda*, *at* http://www2.rnw.nl/rnwen/features/media/dossiers/rwanda-h.html (last visited July 22, 2005). *See also* Jean Marie Kamatali, *Freedom of Expression and its Limitations: The Case of the Rwandan Genocide,* 38 STAN. J. INT'L L. 57 (2002). The author is the former dean of the National University of Rwanda.

42. Radio Netherlands, *supra* note 41.

43. *Id.*

44. Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Judgement and Sentence (Summary) at 7, International Criminal Tribunal for Rwanda, Case No. ICTR-99-52-T, *available at* http://www.ictr.org/default.htm.

Rwanda (ICTR) sentenced one of the founders and Steering Committee members of RTLM to thirty-five years in prison after it found him guilty of five of the seven charges, including direct and public incitement to commit genocide.[45] In addition, the ICTR found a causal connection between RTLM's broadcast of the names of Tutsi individuals and their families and their murders.[46]

Order inheres in a successful society. If a government is unable to protect its citizenry from violence, it will not be able to function. For this reason, governments around the world have enacted hate speech codes that address the harm of violence, or the potential for violence.[47]

In the United States, the Supreme Court has affirmed the power of the government to protect itself from change procured by "violence, revolution and terrorism."[48] In *Brandenburg v. Ohio*, the leader of a Ku Klux Klan group was convicted under Ohio's Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[49] The defendant organized a rally wherein twelve hooded Ku Klux Klan members privately united to burn a cross and make derogatory racial epithets.[50] Additionally, the defendant made threats against the government: "[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[51] The Court ruled that the government may only prohibit the advocation of unlawful conduct if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[52] The Court found that Ohio's statute was unconstitutional as a violation of the First and Fourteenth Amendments because it did not require imminent lawless action, nor did it distinguish between mere advocacy and incitement.[53] The Court found that certain forms of advocacy could be prohibited only if predicated upon imminent violence.[54] Therefore, the United States has recognized that hate speech may be prohibited, but set a very high standard for its prohibition.

The Netherlands prohibits hate speech that advocates violence. Under section 137 of the Criminal Code, "Any person who, by means of

45. *Id.* at 28-31.
46. *Id.* at 16.
47. *See text of Section II.A.*
48. Dennis v. United States, 341 U.S. 494, 501 (1951).
49. 395 U.S. 444, 444-45 (1969).
50. *Id.* at 445-46.
51. *Id.* at 446.
52. *Id.* at 447.
53. *Id.* at 448-49.
54. *Id.* at 447.

the spoken or written word or pictorially, deliberately and publicly incites . . . violence against persons or property of others on account of their race, religion or conviction or sexual preference, shall be liable. . . ."[55] Likewise, France, in 1972, made "incitement to discrimination, hatred or violence against a person or a group of persons on grounds of origin or because of their belonging or not belonging to a given ethnic group, nation, race or religion . . . an offence."[56]

Even where violence is not explicitly mentioned, many states prohibit insulting or racist speech. These states realize that there is a cumulative affect of racial incitement, which, over time, will lead to increased violence.

Israel has enacted laws to protect its citizens from violence. In Israel, which has been plagued with racial unrest, the penal law provides: "A person who publishes anything with the purpose of stirring up racism is liable to imprisonment for five years."[57] This amendment to the penal law was in response, in large part, to Rabbi Meir Kahane's election to the Knesset.[58] Kahane established a "political-racial movement," which advocated the expulsion of Arabs from Israel and the reestablishment of a theocracy.[59] After his election, Kahane openly called for the persecution of Arabs in Israel to encourage their emigration.[60] He even started to visit Arab communities to persuade the residents to leave Israel and go to an Arab country.[61] Understandably, Kahane's ideas were not warmly received by Arab citizens and the police were forced to "quell the resulting confrontations."[62] Israel's penal code seeks to prevent violence that results from racist expression.

The implementation of hate speech codes to curtail violence is necessary to facilitate an ordered, peaceful state. Few would argue that the state does not have an interest in prohibiting speech that will lead to violence. The real concern with the curtailment of violence as applied to hate speech is one of degree. In the United States, a very high degree of correlation between hate speech and violence is required before the government may prohibit the speech: incitement to imminent violence. Whereas, in other states, mere incitement is sufficient. However this

55. Ineke Boerefijn, Incitement to National, Racial, and Religious Hatred: Legislation and Practice in the Netherlands, *in* STRIKING A BALANCE 202 (Sandra Coliver ed., 1992).

56. Roger Errera, *In Defence of Civility: Racial Incitement and Group Libel in French Law*, *in* STRIKING A BALANCE 147 (Sandra Coliver ed., 1992).

57. Lederman, *supra* note 22, at 185.

58. *Id.* at 183.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

balance between civil liberties and government protection from violence fluctuates based in part on how fearful the population is of potential violence. Recent events in international terrorism appear to have swung the pendulum in the U.S. in the direction of greater government protection, even when it impinges on rights of free speech, freedom of association and the right to privacy. In the wake of September 11, 2001, supermajorities in both houses of Congress agreed to limit civil liberties to achieve greater security by adopting the Patriot Act which among other things, expanded the government's surveillance powers.[63] In addition to the surveillance allowed under the Patriot Act, President Bush authorized the National Security Agency to eavesdrop within the U.S. without a warrant.[64] Although the legality of some of these approaches is debated, they show that when a majority of the population feels that its safety is seriously threatened, people in the United States are willing to make compromises between their rights and their safety. Time will show us whether this current shift is a momentary reaction to the terrorist attack of September 11th, or a more permanent re-balancing.

It is also critical to realize that minority groups may have more legitimate fears of violence being perpetrated upon them than the majority does, particularly if there is a history of injuries being inflicted by the dominant racial, religious or ethnic group. Minority groups may therefore possess a keen interest in curtailing hate speech which instigates this violence. However because of their minority status and relationship with the majority, it may be difficult or even impossible for them to persuade the majority of the importance of their concerns.

B. *Harms Affecting Human Dignity*

Human dignity has become a "fashionable concept" in modern constitutions and conventions. This concept is hard to define because its progeny was a dynamic process, and the concept is still in a state of flux. Different states define human dignity differently. One commentator has explained the basic nature of human dignity accordingly: "human dignity is not merely a general philosophical concept or even an

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63. *See generally* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 50 U.S.C. § 401(a). The House approved the Act by a vote of three hundred fifty-six for and sixty-six against, and the Senate vote was ninety-eight for and one against. Michael Leon, *Citizens Blast Patriot Act Madison Passes Civil Liberties Resolution, Counter Punch*, at http://www.counterpunch.org/leon1016.html (last visited February 9, 2006).

64. Bob Deans, *Bush Defends Eavesdropping Program, Preview State of Union Speech*, Cox News Service at http://www.coxwashington.com/reporters/content/reporters/stories/BC_BUSH27_COX.html (last visited February 9, 2006).

individual attribute, but rather an expression of a sense of being that is simultaneously personified and imbedded in the relationship between individuals and their community. . . ."[65] Human dignity reflects a certain standard of respect by which all persons must be treated simply due to their intrinsic worth as human beings living in a community.

The right of human dignity may be exercised by the state or by persons. For example, in Germany, a female stripper is not allowed to voluntarily strip if she cannot engage her audience directly.[66] The court reasoned that regular strip shows engage the audience directly, thereby participating in a form of self-expression similar to theatre or dance.[67] Because the stripper was unable to engage the audience, her exposure was simply degrading, which violated her right to dignity.[68] The right to human dignity is so important that the German government has an independent duty to protect against abuse, even when the "abused" do not want the government's protection.[69]

In South Africa, the concept of human dignity was foundational in correcting the harms prevalent in the apartheid era. The Constitutional Court has marked the vitality of human dignity: "the importance of dignity as a founding value of the new Constitution cannot be overemphasized . . . [t]his right therefore is the foundation of many of the other rights. . . ."[70] The concept of human dignity was entrenched into the Constitution to combat the extreme abuses of human dignity in the apartheid era of South Africa.[71] South African courts have since used the Constitution to prevent many apartheid abuses, by, *inter alia*, invalidating apartheid laws that allowed the police to use lethal force in order to arrest someone.

Laws prohibiting sodomy were struck down due to concern that sodomy laws create disdain by punishing a form of sexual expression common to homosexuals, thereby degrading and devaluing the dignity of homosexuals.[72]

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65. Heinz Klug, *Symposium Article: The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?* 64 MONT. L. REV. 133, 142 (2003) (explaining Peep Show Case (1), 64 BVerfGE 274 (1981) (F.R.G.)).
66. *Id.* at 143.
67. *Id* at 143.
68. *Id.* at 143.
69. *Id.* at 143-44.
70. *Id.* at 149 citing Justice O'Regan in S v. Makwanyane, 1995 (3) SA 391 & 328 (CC). To see how South Africa has incorporated dignitary harms into antidiscrimination law under the new South African Constitution, *see* Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004).
71. *Id.* at 148.
72. *Id.* at 152-53.

The concept of human dignity has played an important role in Europe and South Africa in forming constitutional standards that the government must enforce to ensure the rights of its citizens.

II. A Factored Approach to Whether Hate Speech Codes Should Be Implemented

Many speech code advocates argue that the United States should borrow from hate speech laws in other countries; however, this approach is flawed because it does not account for the peculiarities of people in different countries. This "good for the goose, is good for the gander" approach ignores the history and associated attitudes and assumes that all peoples are homogeneous. Hate speech codes have typically focused on radical approaches to regulation based on academics' views of what are appropriate regulations in an ideal society without accounting for the peculiarities of a people. This article proposes a positivist, factored approach to determining whether hate speech code regulations should be implemented and, if so, the degree of implementation on a state-by-state basis.

There are two predominant factors that should be considered: (1) historical accounts of ethnic, racial and religious violence, genocide, and discriminatory practices; and (2) jurisprudential history. Hate speech regulations are becoming increasingly prevalent in states that experience or have experienced severe racial tensions and atrocities. These states are implementing policies in order to facilitate a peaceful, harmonious state by recognizing that hate speech codes may prevent hateful conduct. Although the United States has been plagued with interracial tensions and violence, and has performed genocidal atrocities, when it comes to freedom of speech, it has placed a greater value on individual rights than community rights, and a greater value on liberty than equality. This libertarian bent almost always allows hate speech, unless there is an imminent risk of violence. This threshold should be lowered to reflect the reality of its pluralistic environment, coupled with its record on human rights. However, one must also balance the jurisprudential history of the United States in realizing workable solutions that have a basis in United States legal tradition. Within that tradition, as well as in other states, there is a strong interest in protecting citizens against violence.

However, the concept of human dignity has not had the same impact in the United States as it has in other countries. Because the concept's development, as applied to political rights, was not incorporated into the federal Constitution, it has not significantly developed in the common law. In its place, the right of free expression has taken root.

A. Historical Accounts of Ethnic, Racial and Religious Violence, Genocide, and Discriminatory Practices

The first factor focuses on racial violence, genocide, and discriminatory practices within the target state. Where these practices are more prevalent and egregious, there is greater need to implement hate speech code regulations. Like other governments, the United States has a history of violence that needs to be regulated and controlled.

Germany is a strong supporter of hate speech codes.[73] It has a peculiar history due to the atrocities the Nazis carried out against the Jews during World War II.[74] Germany has enacted very broad hate speech codes:

> Whosoever, in a manner liable to disturb the public peace,
>
> (a) incites hatred against parts of the population or invites violence or arbitrary acts against them, or
>
> (b) attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population shall be punished by imprisonment of no less than three months and not exceeding five years.[75]

"Human dignity" is also broadly defined as an attack "on the core area of [the victim's] personality, a denial of the victim's 'right to life as an equal in the community,' or treatment of a victim as 'an inferior being excluded from the protection of the constitution.'"[76] The hate speech codes prescribe significant punishments, including up to five years' imprisonment or a fine.[77]

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73. *See* Ranier Hofmann, *Incitement to National and Racial Hatred: The Legal Situation in Germany*, *in* STRIKING A BALANCE, *supra* note 20, at 159.

74. STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES (University of Pennsylvania Press 2005); Douglas-Scott, *supra* note 21, at 319-20; DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY (Oxford University Press 2001).

75. Kübler, *supra* note 19, at 344-45.

76. Douglas-Scott, *supra* note 22, at 322-23.

77. The German code includes the following punishment:

(2) Imprisonment, not exceeding five years, or fine will be the punishment for whoever

(a) distributes,

(b) makes available to the public,

(c) makes available to persons of less than 18 years, or

(d) produces, stores or offers for use as mentioned in letters (a) to (c) documents inciting hatred against part of the population or against groups determined by nationality, race, religion, or ethnic origin, or inviting to violent or arbitrary acts against these parts or groups, or attacking the

There is a strong connection between Germany's history and its hate speech codes. In a case against the leader of a right wing German political party *Bundesgerichtshof*, the defendant posted leaflets in a public forum that declared that the murder of millions of Jews amounted to "a Zionist swindle that could not be accepted."[78] The *Bundesgerichtshof*, the German Federal Supreme Court, upheld the conviction by drawing a distinction between "mere falsification" and "injurious invective," and found that the defendant was guilty of the latter.[79] The Court found that the he had denied the Jews their "inhuman" and "unique" fate.[80] The Court focused on the relationship between the past instances of Third Reich genocide committed against the Jews and the present views of the Jewish people, who identify themselves as "belonging to a fatefully selected group," which is tantamount to their "self-worth." Accordingly, denial of the Holocaust denies the Jewish people of their personal value due to the "continuation of discrimination against the group to which they belong."[81] This case illustrates how Germany has disallowed hate speech because of the historical instances of discrimination, hate and genocide, and the effect thereof on the current Jewish citizens of Germany.[82]

In Canada, which has a similar record of human rights abuses to the

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> human dignity of others by insulting, maliciously ridiculing or defaming parts of the population or such a group, or
>
> (e) distributes a message of the kind described in (1) by broadcast.
>
> (3) Imprisonment, not exceeding five years or fine, will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes an act described in section 220a paragraph 1 committed under the regime of National-socialism, in a manner which is liable to disturb the public peace.

Kübler, *supra* note 19, at 345.

78. Douglas-Scott, *supra* note 22, at 320, 324-25 (citing BGHZ 75, 160-61); Hofmann, *supra* note 73, at 169.

79. Douglas-Scott, *supra* note 22, at 325 (citing BGHZ 75, 162).

80. *Id.*

81. The Court stated the Jews' fate:

> [G]ives every one of them a claim to recognition and respect.... The single fact that people were singled out under the so-called Nuremberg laws and were robbed of their identity with a view to their extermination allocates to the Jews living in the Federal Republic a special personal relationship with their fellow citizens. In the context of this relationship the past is present even today. They are entitled, as a matter of their personal identity, to be viewed as belonging to a fatefully selected group, to which others owe a special moral responsibility which is part of their self worth. Respect for their personal identity is for each of them a guarantee against a return to such discrimination and a fundamental condition for their living in Germany. Whenever someone tries to deny these precedents, they deny each of these individuals their personal value. For this signifies the continuation of discrimination against the group to which they belong.

Douglas-Scott, *supra* note 22, at 325 (citing BGHZ 75, 162).

82. *Id.*

United States, the government has enacted hate speech codes to counteract its past.[83] During the 1960s, Canada experienced increased racial activities.[84] The Canadian government formed an investigative committee to make recommendations concerning the troubling amount of hate speech.[85] The committee recommended that new legislation be passed because the existing laws were inadequate.[86] Although its recommendations were criticized by hate speech advocates, a newly elected liberal government in 1970 passed new legislation that provides criminal penalties for advocacy of genocide or the incitement of hatred that is likely to lead to a breach of the peace.[87] The supreme court of Canada has upheld the law by reasoning that the suppression of hate propaganda is likely to reduce the harm to Canadian citizens.[88]

The United States Supreme Court's decision in *Beauharnais v. Illinois*[89] is an illustrative example of hate speech codes that correlate to historical accounts of ethnic, and racial discriminatory practices.[90] In *Beauharnais*,[91] the Supreme Court upheld the constitutionality of an Illinois statute that punished violators who engaged in hateful expression.[92] The Illinois statute provided:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition

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83. STEFAN BRAUN, DEMOCRACY OFF BALANCE: FREEDOM OF EXPRESSION AND HATE PROPAGANDA LAW IN CANADA (University of Toronto Press 2004); Manwaring, *supra* note 20, at 107-08; James Weinstein, *An American's View of the Canadian Hate Speech Decisions, in* FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY 175-221 (W.J. Waluchow ed., 1994); Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425.

84. Manwaring, *supra* note 21, at 107-08.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 109-16.

89. 343 U.S. 988 (1952).

90. However, the Court has suggested that Beauharnais would probably not stand today. Smith v. Collin, 439 U.S. 916, 919 (1978) (Blackmun, J. dissenting from denial of petition for writ of certiorari); 578 F. 2d 1197, 1204 (7th Cir. 1978) (the "approach sanctioned [in] *Beauharnais* would [not] pass constitutional muster today").

91. Although *Beauharnais* was never expressly overruled, scholars question whether such a decision would be held up as constitutional. The concept of group libel as unprotected expression in *Beauharnais* was not limited to false statements of facts. Subsequent Supreme Court opinions have clearly held that libel is of low 1st Amendment value only insofar as it consists of false statements of fact. *See* GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, THE FIRST AMENDMENT (2d ed. Aspen, 2003).

92. 343 U.S. 250, 266-67 (1951).

> portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .[93]

The defendant was prosecuted for violating the Illinois statute because he organized the distribution of leaflets on the streets of downtown Chicago. The leaflets included a petition entreating the mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. . . ."[94] The petitions called for "[o]ne million self respecting white people in Chicago to unite [against] becoming mongrelized by the negro [and against the] rapes, robberies, knives, guns, and marijuana of the negro."[95]

In framing the context of the Illinois statute, the United States Supreme Court examined the history of racial prejudice in Illinois, and the effect of "willful purveyors of falsehood."[96] The Court found that Illinois was a polyglot community with "exacerbated tension between races."[97] These tensions were illustrated by numerous riots and bombings, desecration of personal property, and murder. The Illinois legislature enacted the statute to counteract the effects of the culmination of violence and ever-increasing diversity.[98] The Court granted the Illinois legislature deference due to the abstruseness of the science of government and its need to deal with "obstinate social issues" on a trial and error basis.[99] The Court found that ruling against the Illinois legislature would be an act of "arrant dogmatism" outside the scope of the Court's authority.[100] The Illinois legislature was in a far better position to assess the gravity of Illinois's history of racial hegemony in relation to the deleterious effects on the dignity and "the position and esteem in society [with which] the affiliated individual may be inextricably involved."[101] Although the Illinois statute was subject to discriminate enforcement, "the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels. . . ."[102] Accordingly, the Court found that libelous utterances are

93. *Id.* at 251.
94. *Id.* at 252.
95. *Id.*
96. *Id.* at 259.
97. *Id.*
98. *Id.*
99. *Id.* at 262.
100. *Id.* at 263.
101. *Id.*
102. *Id.*

not within the confines of constitutionally protected expression; *ergo*, a showing of "clear and present danger" was unnecessary.[103]

The *Beauharnais* Court properly considered Illinois' history in determining whether the statute was constitutional, thereby giving great deference to the legislature in formulating policies that would further governmental interests in maintaining order. Although the *Beauharnais* court focused on the constitutionality of libel law, the court's analytical and historical approach to hate speech is useful because it realizes the special needs of Illinois citizens, and grants deference to the legislature to accommodate those needs. Hate speech advocates should also implement the analytical approach applied in *Beauharnais*. The Court focused on the substantiality of racial tensions, and deferred to the judgment of the legislature in its intent to counteract those historical tensions. In all of the above cases, the courts were concerned with the peculiar history of the state in question. Those peculiar histories included genocide, discrimination, and interracial violence.

The United States has a long history of committing human rights atrocities, yet it has not embraced hate speech codes to the same extent as its Western counterparts. In fact, courts in the United States seem increasingly unwilling to impose restraints on the "freedom of speech," even though it has a troubled, highly emotional history of interracial violence and suppression.[104] These abuses include, *inter alia*, the genocide of Amerindians,[105] African American enslavement,[106] Jim Crow politics,[107] the internment of Japanese-Americans,[108] human rights abuses of Iraqi prisoners,[109] sterilization programs,[110] government abuses against

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103. *Id.* at 266-67.

104. *See* Scott v. School Board of Alachua County, 324 F.3d 1246 (11th Cir. 2003) (upholding a school board ban on displays of the confederate flag based, in part, on the importance of achieving a "civilized social order" in the classroom).

105. *See generally* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002); WARD CHURCHILL, PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW (2002).

106. *See generally* Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883 (2004); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 216 (2000).

107. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (Oxford University Press 2004); JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW (St. Martin's Press 2002).

108. *See generally* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 949-58 (2004); GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (Harvard University Press 2001); ERIC K. YAMAMOTO, RACE, RIGHTS, AND REPARATION : LAW AND THE JAPANESE AMERICAN INTERNMENT (Aspen Law & Business 2001).

109. *See generally* Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners,*

minorities,[111] the disproportionate killings of poor blacks in the prison systems.[112]

Although these abuses may not be tantamount to the extermination of 6 million Jews, the United States has not implemented sufficient reforms to counteract the tensions brought about by its history of abuse. These tensions were manifested during the Los Angeles riots,[113] are prevalent on campuses and in schools,[114] and are felt on the street by ordinary victims of hate speech[115]. Despite these stresses and the problems associated therewith, the United States has remained callous towards the victims, and ignorant of its history, by failing to lower the high threshold of imminent harm. The United States should lower the threshold requirement to adequately reflect the current social problems caused by its history of racial, ethnic, and religious abuses.

B. *Jurisprudential History*

The second factor that must be analyzed in order to assess the

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and the Revelations of Abu Ghraib, 37 VAND. J. TRANSNAT'L L. 1353 (2004); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel, Cambridge University Press 2005).

110. *See generally* PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES (1992).

111. *See, e.g.*, Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77 (1994); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 679 (1996); MICHAEL D'ORSO, LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD 323 (1996); Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 882-99 (1993).

112. *See* Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs (Section III: Incarceration and Race)*, *available at* http://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm (last visited July 22, 2005).

113. Smith, *supra* note 109, at 77; LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD (Westview Press 1997).

114. *See generally* Adam A. Milani, *Harassing Speech in the Public Schools: The Validity of Schools' Regulations of Fighting Words and the Consequences If They Do Not*, 28 AKRON L. REV. 187 (1995); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); HATE SPEECH ON CAMPUS: CASES, CASE STUDIES, AND COMMENTARY (Milton Heumann, Thomas W. Church, and David P. Redlawsk. eds., Northeastern University Press 1997); RICHARD DELGADO AND JEAN STEFANCIC, MUST WE DEFEND NAZIS: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (New York University Press 1997); TIMOTHY C. SHIELL, CAMPUS HATE SPEECH ON TRIAL (University Press of Kansas 1998).

115. *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (Rowman & Littlefield 2003); Christopher A. Bracey, *Symposium: Race Jurisprudence and the Supreme Court: Where Do We Go From Here? Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 703-04 (2005).

viability of hate speech codes and the extent of the regulations pertaining thereto is the jurisprudential history of the state. This would include: case law, statutes, constitutions, legislative debate, and ideas and comments from the founders of the state. Jurisprudential history is a vital component because it solidifies the basis by which a state should be governed. Once these state laws and principles are declared and developed, people rely on them in the act of expression, and in response to a perceived violation of those rights. These ideas are also reinforced by the judiciary, which interprets legislative action in accordance with constitutional principles and jurisprudence.

Hate speech codes, although enacted, may fail to take effect if the people protest and demonstrate against perceived wrongs by the executive, judicial and legislative branches of government. Alternatively, a judicial officer may declare unconstitutional those hate speech codes, or limit their application so severely as to defeat their purpose.[116] These examples, among others, illustrate that hate speech codes that are too broad or expansive will have no realistic chance of survival due to revolt or vote by the public at large or by limiting interpretations by the judiciary. Although over-expansive hate speech codes are interesting to talk about in the spirit of academic intercourse, hate speech codes should be drafted in such a way as to pass constitutional muster, and reflect constitutional principles with which the people can identify.

European conceptions of human dignity are incongruent with the United States Constitution because human dignity has not developed as a constitutional right, and there is a strong emphasis on the First Amendment—limited only by violent acts. Expansive hate speech codes in Europe have enjoyed more support because its jurisprudential history is radically different from that of the United States. In Europe, hate speech is liberally prohibited based on the concept of human dignity. Accordingly, freedom of expression does not have as many protections. However, the United States' approach has centered on the harms of violence. The United States Constitution does not mention the concept of human dignity; instead, its history emphasizes free speech.

1. The Use of Human Dignity in Conventions and Constitutions in Europe

Although the concept of human dignity is not new in Western history, it is not an explicit concept in United States jurisprudence.[117]

116. Kübler, *supra* note 19, at 337-38.

117. The sole exception is Montana, which makes reference to human dignity but has not developed a jurisprudence on the subject. Klug, *supra* note 65, at 133.

Additionally, although the theological underpinnings of human dignity have evolved over centuries and are now extensive,[118] the humanistic progeny of dignity started in the Renaissance and is largely attributed to Fra ncesco Petrarca.[119] His writings inspired other Renaissance writers, including Bartolomeo Facio, Giannozzo Manetti, and Giovanni Pico della Mirandola.[120] These Renaissance thinkers considered dignity a creation of God; however, their ideas reflected a personal autonomy.[121] Over time, this concept deemphasized man as a creature subjected to God, and emphasized autonomy in an inter-personal society.[122] John Locke posited that a person's rational capacities are the foundations of his individuality.[123] Samuel von Pufendorf further developed this idea by describing man's dignity as embodying a privileged position in this world and humankind's rational nature as engendering equality.[124] Immanuel Kant added to this framework by defining dignity "as a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence."[125] The concept of human dignity as it applied to political rights was embellished by Pierre-Joseph Proudhon, who theorized that justice can be accomplished through man's ability to reason, and that justice is "the respect of human dignity in [a] person."[126] These political embellishments were embraced by Ferdinand Lasalle in his attempt to describe the conditions of the working class as a deprivation of dignity.[127] On that same theme, Peter Kropotkin considered human dignity the basis for morality and justice.[128] The concept of dignity, especially in recent years, has been the subject of much political debate and academic review in Europe and abroad.[129]

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118. *See* JOHN PAUL II, ENCYCLICAL LETTER ON THE VALUE AND INVIOLABILITY OF HUMAN LIFE: *EVANGELIUM VITAE* (1995); HENRI J. M. NOUWEN, LIFE OF THE BELOVED, SPIRITUAL LIVING IN A SECULAR WORLD, 10TH ED. (CROSSROAD, 2002); THOMAS MERTON, NO MAN IS AN ISLAND (DELL,1955); ROLLO MAY, MAN'S SEARCH FOR HIMSELF (NORTON, 1953); JEAN VANIER, BECOMING HUMAN (ANANSI, 1998); JEAN VANIER, THE HEART OF L'ARCHE (CROSSROAD, 1995).

119. Izhak Englard, *URI and Caroline Bauer Memorial Lecture: Human Dignity; From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1910 (2000). *See also* CHARLES TRINKAUS, THE POET AS PHILOSOPHER: PETRARCH AND THE FORMATION OF RENAISSANCE CONSCIOUSNESS, 124 (Yale University Press 1979).

120. Englard, *supra* note 119, at 1912-14.

121. *Id.* at 1912.

122. *Id.* at 1914. *See also* NATHAN ROTENSTREICH, MAN AND HIS DIGNITY 53 (1983).

123. Englard, *supra* note 119, at 1917.

124. *Id. See also* SAMUEL PUFENDORF, DE IURE NATURAE ET GENTIUM LIBRI OCTO bk. II, ch. 1, § 5 (C.H. & W.A. Oldfather trans., 1995) (1706).

125. Englard, *supra* note 119, at 1918.

126. *Id.* at 1920 n.84.

127. *Id.* at 1920-21.

128. *Id.* at 1920 n.85.

129. Judith Resnik and Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2000).

The ideal of human dignity was memorialized, and embellished, in conventions after World War II in Europe.[130] For example, Kant's idea of dignity's "absolute and intrinsic character" influenced the: Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Council of Europe's Convention on Human Rights and Biomedicine; and Universal Declaration on the Human Genome and Human Rights.[131]

Increasingly, newly adopted constitutions relied heavily on the concepts of human dignity.[132] Human dignity, "stripped of both religious connotation and strict Kantian moral meaning," is popularized in constitutions as being the "ultimate justification" for fundamental human rights.[133] This trend is illustrated in the German, Puerto Rican, and South African constitutions.[134]

In Germany, the first article of the Basic Law boldly declares that "Human Dignity is inviolable. To respect and protect it is the duty of all state authority.[135] The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[136] In Germany, which hosts some of the most expansive hate speech codes, the jurisprudential history was largely predicated upon equal rights due to the treatment of the Jews during the Holocaust.[137] Prior to 1945, German courts refused to punish or bar anti-Semitic propaganda.[138] Once the Nazis were defeated by the Allies, those jurisprudential precedents were overturned.[139] A German post-World War II court explained that the Nazi persecution of Jews provided Jews with a new distinguishing identity that should be owed a certain

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130. Englard, *supra* note 119, at 1921.

131. *Id.* at 1921 n.88. Bracey, *supra* note 115, at 678. Luis Anibal Aviles Pagan, *Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 REV. JUR. U.P.R. 343, 346 (1998) (stating "[i]n Germany, the ideas of Kantian moral theory are deeply ingrained in the legal structure"); *see also* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 975-76 (1997).

132. Pagan, *supra* note 131, at 351.

133. Englard, *supra* note 119 at 1923.

134. Other states have similar constitutional provisions for human dignity, such as: Brazil, Costa Rica, Nicaragua. *See* Christopher A. Bracey, *Symposium: Race Jurisprudence and the Supreme Court: Where Do We Go From Here? Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 683 (2005).

135. Art. 1, Sec. 1, The German Basic Law of 1949.

136. Art. 1, Sec. 2, The German Basic Law of 1949.

137. Kübler, *supra* note 19, at 342; Douglas-Scott, *supra* note 22, at 319.

138. *Id.* at 341.

139. *Id.*

degree of respect and dignity.[140] The court reasoned that esteem and respect was an indispensable condition to continued living in Germany, and a guarantee that anti-Semitic genocide and discrimination would be protected against.[141] Thus, German courts increasingly became paternalistic in their endeavor to ensure adequate protection of those post-Holocaust values.[142]

Under this framework of German jurisprudential history, hate speech codes have been effectively proposed and implemented into the German *corpus juris*. The German legislature has clearly defined its values and aspiration for the state vis-à-vis the constitution, which values have been perpetuated by the German judiciary. Under these auspices, it is little wonder that hate speech codes have enjoyed such acceptance in Germany.

The Puerto Rican Constitution uses human dignity as a fundamental source of rights, and as an interpretive tool. The Constitution of the Commonwealth of Puerto Rico declares:

> [t]he dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.[143]

The Puerto Rican courts have emphasized the fundamental importance of human dignity to the constitution, and the interpretation of rights.[144] It reflects a balance between the United States Constitution and an expansion of rights under emerging international human rights norms during the 1940s "to gather . . . [from] different cultures . . . new categories of rights."[145]

Likewise, in South Africa, in response to the de-humanization of apartheid, the concept of human dignity was memorialized in the Constitution and serves as an interpretative tool to other rights

140. *Id.* at 342.
141. *Id.* at 341.
142. *Id.*; Douglas-Scott, *supra* note 22, at 327.
143. Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 22-25 (2004).
144. *Id.*
145. *Id.* at 22 (citing Estado *Libre Asociado v. Hermandad de Empleados*, 104 P.R. Dec 436, 439-40 (1975)). The Supreme Court of Puerto Rico has stated that:

> "Formulation of a Bill of Rights following a broader style than the traditional, that would gather the common feeling of different cultures on new categories of rights[,] was sought. Hence the Universal Declaration of Human Rights and the American Declaration of Human Rights and Duties exercised such an important influence in the drafting of our Bill of Rights."

Estado Libre Asociado v. Hermandad de Empleados, 104 P.R. Dec. 436, 439-40 (1975)).

guaranteed in the Constitution.[146]

Even in some Western nations that do not have express constitutional provisions, human dignity is of constitutional importance. The Canadian Supreme Court has held that the rights and freedoms in the Canadian charter "are inextricably tied to the concept of human dignity."[147] Likewise, Israel enacted the Basic Law of Human Dignity, which gives constitutional importance to dignity concerns.[148]

2. Human Dignity in U.S. Jurisprudence

The United States Constitution does not mention human dignity. Although Kant lived during the genesis of the United States Constitution, his most influential writings on human dignity were not published until 1785. Theological and natural law underpinnings of human dignity seeped into the Declaration of Independence and Gettysburg Address in the words, "all men are created equal,"[149] which implies that before the Creator and in the eyes of the country's founders as least as understood by Abraham Lincoln, each person is intrinsically equal, apart from any ability or inability, appearance, or argument. If each individual and group of persons possess intrinsic equality and human dignity, then "no state interest can justify practices that both reflect and reinforce cultural assumptions about the intrinsic superiority of whites over blacks, men over women, "legitimate" over "illegitimate" children, or heterosexuals over homosexuals."[150] Equality based on a common trait disappears when that trait is no longer shared. However, equality flowing from human dignity because we are all created equal is all-encompassing and never disappears. Because this language did not make it into the more secularized language of the Constitution, to develop this concept would require the Supreme Court to at least use it as an interpretative tool regarding the Equal Protection Clause.

In any case, recognizing that the idea of human dignity gives rise to rights under a constitution was a dynamic process, which was not popularized until after the World Wars.[151] In other words, the drafters of the United States Constitution were not concerned with the developed Kantian view of human dignity prevalent in many parts of the world and they did not include the natural law language of the Declaration of

146. Klug, *supra* note 65, at 153.
147. *See* R. v. Morgentaler [1998] S.C.R. 30, 164 (Can.).
148. *See* Bracey, *supra* note 115, at 683.
149. THE DECLARATION OF INDEPENDENCE, para II (U.S. 1776). THE GETTYSBURG ADDRESS, para. I (U.S. 1863).
150. George P. Fletcher, In God's Image: The Religious Imperative of Equality Under Law, 99 COLUMB. L. REV. 1608, at 1624 (1999).
151. *See* Bracey, *supra* note 115, at 681.

Independence. Due to this absence in the federal Constitution, human dignity has been "relegated to [the] background of extra-constitutional principles."[152] Although it has some proponents, such as Justice Brennan[153] and Justice Stevens,[154] it has not been used to interpret or guaranty rights as do, for example, the constitutions of Puerto Rico, Germany, and South Africa with dispositive affect.[155]

3. Restrictions on Free Speech in the United States are Generally Based on Fear of Violence, or Endangerment of the Federal Government

The jurisprudential history of the United States has focused on a more libertarian approach to freedom of speech. The United States has been reluctant to interfere with free speech unless the speech will lead to violence, or directly endanger the foundations of government.

Despite the absolutist language of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[156] the Supreme Court has never in its history advocated an absolutist theory of free speech.[157] Free speech, like all rights and freedoms, will at times conflict with other rights and freedoms. In balancing competing rights and freedoms the Supreme Court has held that free speech does not prevail when it comes to obscenity,[158] defamation,[159] national security,[160] fighting words,[161] incitement to

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152. Pagan, *supra* note 131, at 360. *But also see* Hugo Adam Bedau, *The Eighth Amendment, Human Dignity and the Death Penalty*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, 151 (Michael J. Meyer & William A. Parent eds., Cornell 1992) (discussing Chief Justice Earl Warren and human dignity).

153. Justice William J. Brennan, Jr., *Address, Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 8 (1985); Bracey, *supra* note 115, at 683.

154. "Justice Stevens . . . regularly draws inspiration from the religious foundation of equal protection and quotes the principle that all persons are created equal." George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUMB. L. REV. 1608, at 1628. *See also* footnotes 50 and 71.

155. Pagan, *supra* note 131; Jackson, *supra* note 143. *But also see* Lawrence v. Texas, 539 U.S. 558 (2003).

156. U.S. CONST. amend. I.

157. Justice Black maintained that laws limiting speech were unjustified "by a congressional or judicial balancing process." Barenblatt v. United States, 360 U.S. 109, 141 (Black, J., dissenting). His view was never shared by a majority of the court. *See* Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 393 (2004).

158. *See* Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15 (1973).

159. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

160. *See* New York Times Co. v. United States; United States v. Washington Post Co., 403 U.S. 713 (1971). In Haig v. Agee, 453 U.S. 280 (1981), the court upheld Agee's passport revocation because his statements and activities abroad caused "serious damage to the national security." The court stated,

> [L]ong ago, [this] Court recognized that "No one would question but that a

imminent violence,[162] the counseling of murder,[163] extortion,[164] blackmail,[165] perjury, and true threats.[166] In addition, the Court has found some speech more regulable than others, such as commercial speech and public employee speech,[167] and allowed government to place content neutral time, place and manner restrictions on speech.

In *Whitney v. California*, decided in 1927, the Court placed limitations on the freedom of speech when the foundations of government were at risk.[168] Defendant Whitney was a member of the Communist Labor Party of California, which advocated the creation of a "unified revolutionary working class" to conquer and overthrow the capitalist United States.[169] Defendant was convicted under California's Criminal Syndicalism Act.[170] The Court addressed whether defendant's constitutional rights to the freedom of speech were violated, but found "[t]hat the freedom of speech which is secured by the Constitution does not confer . . . an unbridled license [to] those who abuse [the freedom of speech] by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."[171] Thus, the Court found that there were certain limitations to the freedom of speech.

In *Dennis v. United States*, the United States Supreme Court reaffirmed the principle that Congress may enact laws protecting the United States government.[172] The defendant conspired to organize the Communist Party.[173] The Supreme Court reasoned that the government

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> government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Agee's disclosures [have] the declared purpose of obstructing intelligence operations and the recruiting of personnel. They are clearly not protected by the Constitution.

Id.

161. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
162. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
163. *See* Frohwerk v. United States, 249 U.S. 204 (1919) (prohibiting counseling to murder is constitutionally permissible).
164. *See* 18 U.S.C. 1951 (2000) (prohibiting conspiracy to commit extortion under the Hobbs Act).
165. *See* 18 U.S.C. 873 (2000) (outlawing blackmail).
166. *See* Watts v. United States, 394 U.S. 705 (1969); Bridges v. California, 314 U.S. 252 (1941).
167. Connick v. Myers, 461 U.S. 138 (1983) (limiting public employee speech is constitutional).
168. 274 U.S. 357, 371 (1927) (overruled in part by Brandenburg v. Ohio, 395 U.S. 444 (1969).
169. *Id.* at 363-64.
170. *Id.* at 363. *See* CAL. PENAL CODE §§ 11400-11402 (1953).
171. *Id.* at 371.
172. 341 U.S. 494, 501 (1951).
173. *Id.* at 497.

has a substantial interest in limiting speech where there is a "clear and present danger."[174] The Court interpreted this phrase to mean that "[i]n each case involving the 'clear and present danger' test, courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[175] The Court concluded that defendant's communist expression subjected him to criminal liability.[176]

In *Brandenburg v. Ohio*, the Supreme Court determined that hate speech may only be prohibited when the content of the expression is likely to incite imminent harm.[177] The leader of a Ku Klux Klan group was convicted under Ohio's Criminal Syndicalism statute[178] for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[179] Defendant Brandenburg organized a rally wherein twelve hooded Ku Klux Klan members privately united to burn a cross, and make derogatory racial epithets, including, *inter alia*: "bury the niggers," "this is what we are going to do to the niggers."[180] Additionally, Brandenburg made threats against the government: "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[181] The Court declined to follow *Whitney*, ruling that *Whitney* had been "thoroughly discredited" and that the State may only prohibit advocating of unlawful conduct if advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[182] The Court found that Ohio's statute was unconstitutional as a violation of the First and Fourteenth Amendments because it did not require imminent lawless action, nor did it distinguish between mere advocacy and incitement.[183]

In *Beauharnais v. Illinois*,[184] discussed above, the Supreme Court upheld the constitutionality of an Illinois statute that punished those who engaged in hateful expression.[185] The Court examined the history of

174. *Id.* at 504.
175. *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
176. *Id.* at 542.
177. 395 U.S. 444 (1969).
178. OHIO REV. CODE ANN. § 2923.13 (1972).
179. *Id.* at 444-45.
180. *Id.*
181. *Id.* at 446.
182. *Id.* at 447.
183. *Id.* at 448-49.
184. 343 U.S. 250 (1951). Although *Beauharnais* was never expressly overruled, scholars question whether such a decision would be upheld as constitutional. *See supra* notes 92 and 93, with accompanying notes.
185. *Id.* at 251.

racial violence in Illinois and determined that the Illinois legislature was in the best position to assess the needs of the polyglot community.[186]

In *Chaplinski v. New Hampshire*, the Court upheld a statute because it found that the statute was not a prohibition of the speaker's words "except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."[187] The Court upheld the conviction because certain classes of speech were unprotected by the Constitution, such as fighting words.[188] Fighting words are those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[189] The Court reasoned that the utterance must be "likely to cause a fight."[190] Thus, the Court upheld the constitutionality of the statute based on the propensity of the speaker's words to incite violence.[191]

These cases are illustrative of the jurisprudential tendency to uphold convictions and statutes that are predicated upon the right of the state to protect its citizens from harm exclusively caused by violence, or violent revolution. Overall, courts have typically enforced limitations on the freedom of speech in the United States where the statutes are an exercise of state police power to protect the citizenry from physical harm.

In order for hate speech codes in the United States to pass constitutional muster, based upon the jurisprudential history outlined above, they must predicate themselves upon elimination or reduction of physical harm. The courts do not, however, appear to be concerned with the European concept of human dignity.

4. The Approach to Freedom of Expression in Countries that Emphasize Human Dignity in Their Constitutions

Freedom of expression as understood in the United States does not address the harms of speech to the same extent as in states whose constitutions embrace the concept of human dignity. Because the German legislature has imposed considerable restraints on the freedom of expression, hate speech codes that interfere with that right have received more support.[192] Much like the guarantee of free speech in the United States Constitution, the German Basic Law also guaranties freedom of expression. Freedom of speech is protected accordingly: "Everyone shall have the right freely to express and disseminate his

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186. *Id.* at 259.
187. 315 U.S. 568, 573 (1942).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 574.
192. Douglas-Scott, *supra* note 22, at 321.

opinion by speech, writing, and pictures and freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasting and films are guaranteed. There shall be no censorship."[193] However, a delineation is affixed: "These rights are limited by the provision of the general laws, the provisions of law for the protection of youth, and right of inviolability of personal dignity."[194] The German Basic Law is premised on the inviolable "dignity of man" and "[t]o respect and protect it shall be the duty of all state authority."[195] Article 1 of the German Constitution serves as an interpretative guide to the judiciary of the entire German legal experience.[196]

In line with the German Basic Law, German courts have consistently denied freedom of expression where it might conflict with human dignity.[197] In *Straubeta Caricature*, a magazine published a set of harsh cartoons of a political figure dressed as a pig engaging in various forms of sexual activity.[198] The court reasoned that the cartoon deprived the political figure of human dignity.[199]

Human dignity has even played a significant role in the development of defamation law in South Africa.[200] In *Khumalo v. Holomisa*,[201] the plaintiff, a public official, brought a defamation suit against a publisher based on an alleged violation of his dignity. The publisher argued that the rule in *New York Times v. Sullivan*[202] should be adopted, which requires a showing of actual malice.[203] The court reasoned that free speech must be "construed in the context of other values enshrined . . . [in] the values of human dignity, freedom, and equality."[204] The court rejected the publisher's arguments because the "value of human dignity . . . values both the personal sense of self worth as well as the public's estimation of the worth or value of an

193. *Id.* (quoting Art. 5.2 GG).

194. *Id.*; Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1557 (2004).

195. Pagan, *supra* note 131, at 346.

196. Douglas-Scott, *supra* note 22, at 322.

197. In addition to criminal sanctions, some written forms of expression are strictly forbidden, such as *Mein Kampf.* Krotoszynski, *supra* note 194, at 1597.

198. *Id.* at 1575-77.

199. *Id.* at 1576. *But see* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

200. Klug, *supra* note 65, at 153.

201. Khumalo v. Holomisa, 2002 (5) SA 401, & 40 (CC), 2002 (8) BCLR 771, & 40 (CC), 2002 (53) SALR 01, & 40 (CC).

202. 376 U.S. 254 (1964).

203. Klug, *supra* note 65, at 153.

204. *Id.* at 153-54.

individual."[205] Justice O'Regan, writing for the court, stated,

> The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.[206]

The court balanced both freedom of expression and human dignity in fashioning a rule which allowed a suit by an allegedly defamed plaintiff, but a defense of reasonable publication by the publisher.[207]

III. Hate Speech Regulation: Building on Common Ground

Hate speech that threatens unlawful harm or incites violence should be proscribed in all countries. This is merely the baseline because of the fundamental obligation of government to protect its citizens. Based on the two factors discussed above, a country's history of ethnic, racial, and religious violence, genocide and discriminatory practices and a country's jurisprudential history, a country may restrict additional forms of hate speech consistent with the principle of freedom of expression. At a minimum, however, it has the constitutional authority to restrict speech that leads to violence or the threat of violence.

This common ground for hate speech regulation to prevent violence and fear of violence is rooted in both historical experience and common constitutional values. Because all genocides have been motivated by hatred rooted in racial, religious, ethnic, or national origin differences, laws regulating hate speech naturally focus on those areas. In some instances they include gender and sexual orientation. Of course, most violence is inflicted apart from genocide, but often the motivating factors are the same and these factors are what often conflagrate the violence. This approach is, for the most part, already embraced outside the U.S., so we now look at how the U.S. can implement this approach.

To implement this article's proposal, hate speech laws in the U.S. should be written to cover hate speech that incites to imminent violence or contains a true threat. Hate speech may currently be regulated in the

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205. *Id.* at 154.

206. Christopher J. Roederer, *Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law*, 19(3) S. AFR. J. HUM. RTS. 57 (2003) at 66-67, quoting Dawood v. Minister of Home Affairs 2000(3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 35.

207. Khumalo, *supra* note 201 at 44.

U.S. if it fits under the *Brandenburg v. Ohio*[208] test: "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[209] Thus, hate speech purveyors must advocate imminent illegal conduct, intend to incite such conduct, and be likely to produce such action.

The imminence requirement of this test makes it difficult to meet in most cases, and if law enforcement waits until the violence begins, of what use is this standard in preventing violence? In recent years Congress and the U.S. Department of Justice (Department) have become concerned about the increased availability of bomb-making instructions on the Internet, probably a legitimate concern in our world of increased terrorist activity. In a 1997 report to Congress the Department argued that *Brandenburg* should not apply to the publication of such information, stating that when it is foreseeable that such speech will be used for criminal purposes, "imminent should be of little, if any, relevance."[210] In Rice v. Paladin,[211]which involved civil liability of publishers of murder manuals, the Fourth Circuit, recognizing the danger of such speech, held that Brandenburg only applied to "the mere abstract teaching . . . of the moral propriety or even moral necessity for resort to lawlessness" and not to technical teachings on the fundamentals of murder.[212]

In *NAACP v. Claiborne Hardware Co.*, seventeen white merchants sued the NAACP and Mississippi Action for Progress and 146 individuals over a boycott of their stores.[213] At issue was Charles Evers,' the Field Secretary of the NAACP in Mississippi, words to a crowd of African-Americans: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[214] The Court found that because the violence that took place occurred weeks or months after the

208. 395 U.S. 444 (1969) (per curiam).

209. *Id.* at 447.

210. Department of Justice, 1997 Report on the Availability of Bombmaking Information 26 (1997) Feb. 10, 2000, at 24, http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html.(last visited February 1, 2006).

For an excellent discussion of how the Brandenburg test does not achieve the appropriate balance when speech advocating lawless behavior does not cause any imminent danger but still poses a grave risk, *see* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159 (2000).

211. Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 841 (D. Md. 1996), *rev'd*, 128 F. 3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

212. *Id* at 263.

213. 458 U.S. 886 (1982).

214. *Id.* at 902.

speech, defendants could not be held liable.[215] The rationale for the requirement that the violence occur almost immediately after the words in question are delivered is that it makes it difficult for the government to suppress political speech and ensures that the danger is real, not speculative. In addition, arguably Evers' statement was a rhetorical statement, not a specific threat.

However, the imminence requirement also raises a question: why should the government be unable to regulate hate speech that foments violence just because the violence does not happen immediately after the speech is delivered? In Paladin 13,000 copies of the murder manuals had been published over a period of ten years before John Perry decided to use them to commit murder, an absence of immediacy which the court did not find compelling.[216] Criminal prosecutions since September 11, 2001 also show a change in the government's answer to this question. The conviction and sentence to life in prison of Muslim scholar Ali al-Tamimi in July 2005 for encouraging his followers in Virginia to join the Taliban in Afghanistan in anticipation of the U.S. invasion shows a weakening of the immediacy prong of the imminence requirement, at least by one federal district court judge.[217] To follow through on al-Tamini's exhortation would require traveling to Afghanistan and training to fight for the Taliban, which would take months if not years, which is certainly not imminent violence under traditional *Brandenburg* analysis. Although two of his followers admitted that he inspired them to join the Taliban, they went to Pakistan and joined a separatist group in Kashmir, never making it to Afghanistan and never joining the Taliban.[218]

Perhaps the most direct way to transcend the imminence requirement is to prohibit threats of unlawful acts.[219] In the U.S., this involves applying the "true threats" doctrine to hate speech.

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215. *Id.* at 932.

216. *Rice v. Paladin*, 128 F. 3d at 241.

217. *Scholar Is Given Life Sentence in 'Virginia Jihad' Case*, N.Y. TIMES, July 14, 2005, at A17.

218. Matthew Barakat, *Islamic Scholar Ali Al-Timimi Convicted* (April 26, 2005) http://abcnews.go.com/US/print?id=705180. Note: If this decision stands, opponents will use it as evidence that flexibility with hate speech restrictions is greater when the threatened group is the majority population, not a minority group, because they can identify more easily with the threat and the threat is from without, not within.

219. Another way to transcend the imminence requirement in a constitutional fashion is to address hate speech that harasses. Harassing speech typically must be persistent, directed at specific individuals, and inflict significant emotional or physical harm. When this occurs in a work environment, it causes economic harm which arguably should be recoverable. *See* Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993).

There are a number of federal statutes that make threatening statements grounds for criminal prosecution or civil liability.[220] Some are specific regarding to whom the threat must be made, such as the President or Vice-President,[221] federal judges and other federal officials,[222] IRS employees,[223] jurors,[224] and providers of abortion services.[225] Others are more general regarding to whom the threat must be made. Perhaps the most general federal statute to criminalize threats makes it a crime to transmit in commerce "any communication containing . . . any threat to injure the person of another."[226]

The Supreme Court's only interpretation of a "threat" statute came in the 1969 case *Watts v. United States*.[227] In this case, Watts was convicted under the aforementioned statute, which prohibited threats made to the President.[228] At a public rally at the Washington Monument in Washington, D.C., Watts made the following statement to a small group of people: "I have received my draft classification as 1-A and I have got to go for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[229] The Supreme Court reversed his conviction, distinguishing threats from political hyperbole and saying this case involved the latter.[220] The Court concluded that Watts' "only offense was a kind of very crude offensive method of stating a political opposition to the President."[221] However, the Court held the statute constitutional "on its face" and stated that free speech requires "threats" to be limited to threats that are "true."[222] Not until 2003 did the Supreme Court provide further guidance on what constitutes a "true threat."[230]

In the meantime, the circuits adopted various approaches to true threats, mostly focusing on a subjective or objective analysis of the speaker's intention and the listener's perception of the threat.[223] The speaker must intend to make the threatening statement.[224] The speaker need not, however, intend to carry the threat out or even have the ability to carry it out.[225] The objective part of the test concerns whether the

220. *See, e.g.*, 18 U.S.C. § 875(c) (2000).
221. *Id.* at § 871(a).
222. *Id.* at § 115(a)(1)(b).
223. 26 U.S.C. § 7212(a) (2000).
224. 18 U.S.C. § 1503.
225. *Id.* at § 248.
226. *Id.* at § 875(c).
227. 394 U.S. 705 (1969).
228. *Watts*, 394 U.S. at 706; 18 U.S.C. 871.
229. *Watts*, 394 U.S. at 706 (quoting an Army investigator's testimony of the defendant's statements).
230. Virginia v. Black, 538 U.S. 343, 359-60 (2003) (defining true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence").

speaker should "have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."[226] Some circuits consider the reasonable person the listener, as opposed to the speaker, asking whether a reasonable listener would interpret the speech as a threat.[227] Finally, in keeping with the finding of political hyperbole in *Watts*, the court must consider the context of the speech.[228]

Commentators have wisely proposed that the true threats test consist of the following two prongs:

> 1. [A] person speaks or engages in expressive conduct, intending it to be taken as a threat of unlawful result that would place the listener in fear of his or her injury . . . regardless of whether the speaker intends to carry out the threat; and
>
> 2. [A] reasonable listener, in context, would interpret the speech or expressive conduct as communicating a serious expression of intent to unlawfully harm the listener.[229]

I would modify the first prong slightly by defining intent as "knowing or reckless" so that intent could be inferred from reckless threats.[230] Professor Gey argues that the Supreme Court's "incitement to violence" theory and jurisprudence should govern the "true threats" theory and jurisprudence.[231] Although both are categorical exceptions to the First Amendment, they are different, and one should not govern the other. As the Eighth Circuit wrote, "the *Brandenburg* test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes . . . that prohibit someone from directly threatening another person."[232]

Because states handle most criminal matters, it comes as no surprise that state courts are also addressing the true threats test. In 2003, the Supreme Court of Connecticut upheld a conviction under a statute that provides in relevant part that a person is guilty of a breach of the peace when that person, "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . threatens to commit any crime against another person or such other person's property."[233] The court applied an objective test, whether "a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person," along with a contextual analysis of examining "the surrounding events and reaction of the listeners."[234]

R.A.V. v. City of St. Paul, Minnesota[235] and *Virginia v. Black*[236] show how the U.S. Supreme Court struggles with government attempts to protect its citizens from hate speech threats. The factual scenario of the case that gave rise to *R.A.V.* is the following. Russ and Laura Jones, who are African-Americans, moved into a working-class white

neighborhood in St. Paul, Minnesota that was well known among local African-Americans for its racism. Within a few months of moving there, the tires on their new station wagon were slashed, the tailgate of their car was broken, and their son was called a "nigger" on their front sidewalk. Then, one night a group of skinheads burned three crosses in or near the Joneses' yard.[237] Russ Jones recounted his reaction: "When I saw that cross burning on our lawn, I thought of the stories my grandparents told about living in the South and being intimidated by white people. When a cross was burned down there they either meant to harm you or put you in your place."[238]

The skinheads later admitted they were "really disgusted" by the presence of an African-American family in their neighborhood and were trying to drive the Joneses out.[239] The City of St. Paul charged one of the skinheads who had burned the cross on the Joneses' yard with violating the St. Paul Bias Motivated Crime Ordinance,[231] which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[240]

The U.S. Supreme Court accepted the Minnesota Supreme Court's "authoritative statement that the ordinance reaches only those expressions that constitute 'fighting words' within the meaning of *Chaplinksy*,"[241] yet all nine justices held the ordinance unconstitutional. Justice Scalia, writing the majority opinion joined by Rehnquist, Kennedy, Souter, and Thomas, stated that even though fighting words are excluded from First Amendment protection, the government can still regulate how they are prohibited and what they prohibit, concluding that this statute impermissibly discriminates based on content. The statute was unconstitutional because "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[232] Justice White, writing a concurrence joined by Blackmun, O'Connor and Stevens, stated the ordinance was unconstitutionally overbroad.

Regardless of the Joneses' disagreement with the skinheads' views, what concerned them most was the threat of more violence. If St. Paul's statute criminalized true threats, it could have constitutionally punished the type of symbolic conduct involved in *R.A.V.* The petitioner, R.A.V.,

231. *R.A.V.*, 505 U.S. at 379.
232. *Id.* at 391.

intended to make the threatening statements, and a reasonable listener knowing both the context of the events surrounding this incident and the history of the use of burning crosses, would interpret this expressive conduct as communicating a serious expression of intent to unlawfully harm the listener. Justice Scalia hinted at this possibility in the first footnote of his opinion when he indicated that the conduct in *R.A.V.* might violate the Minnesota statute criminalizing terrorist threats.[233]

In addition, if St. Paul or Minnesota adopted a hate crime penalty enhancement statute, sentencing of R.A.V. could be increased because he selected the Joneses for this criminal act because of their race. In *Wisconsin v. Mitchell*, another unanimous U.S. Supreme Court upheld Wisconsin's hate crime penalty enhancement statute over a First Amendment challenge.[234] Although the statute punished criminal conduct, it increased the maximum penalty for conduct motivated by race, religion, color, disability, sexual orientation, national origin or ancestry such that it was more severe than the same conduct engaged in for some other reason or for no reason at all.[235] Chief Justice Rehnquist wrote that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination [laws],"[236] which the Court has upheld in the face of First Amendment challenges.[237] Rehnquist went on to explain the rationale for such statutes: "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[238]

Eleven years after *R.A.V.*, the Supreme Court heard *Virginia v. Black*,[239] another cross-burning case that provided the Court with the opportunity to further define the lines between symbolic speech, intimidation and free speech under the First Amendment. In *Virginia*, the following two cases were consolidated on the constitutional challenge to the state statute:

On August 22, 1998, Barry Black led 25-30 people in a Ku Klux Klan rally on private property with the owner's permission and participation in Cana, Virginia.[240] The rally was in an open field visible from the state highway where the County Sheriff and others observed the event. During the rally, participants gave speeches about white

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233. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 379. *See* note 1.
234. Wisconsin v. Mitchell, 508 U.S. 476 (1993).
235. *Id.* at 480.
236. *Id.* at 487.
237. *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984) (Title VII does not infringe upon employer's First Amendment rights).
238. *R.A.V.*, 505 U.S. at 488.
239. 538 U.S. 343 (2003).
240. *Id.* at 348.

supremacy and how bad blacks and Mexicans are; one speaker stated that "he would love to take a .30/.30 and just random[ly] shoot the blacks."[241] At the end of the rally, the group circled around a large cross, which they burned while "Amazing Grace" blared over the loudspeakers.[242] At that moment, the Sheriff entered the property and arrested Barry Black for violating Virginia's cross-burning statute, which states:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[243]

On May 2, 1998, Richard Elliott and Jonathon O'Mara attempted to burn a cross on the yard of James Jubilee, an African American and Elliott's next-door neighbor in Virginia Beach, Virginia.[244] Jubiliee had moved his family from California into his house in Virginia Beach four months before this incident, and sometime prior to the incident had heard gunshots coming from Elliott's property.[245] When he inquired at Elliott's home about the shots, Elliott's mother explained to Jubilee that her son shot firearms as a hobby and used the backyard as a firing range.[246] On the night of May 2, in order to "get back" at Jubilee for complaining about the shooting in his backyard, Elliott and O'Mara drove a truck onto Jubilee's property, planted a cross and set it on fire.[247] The next morning, while Jubilee was pulling his car out of his driveway, he noticed the partially burned cross.[248] He became "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard . . . tells you that it's just the first round."[249] Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning and O'Mara plead guilty to both counts while Elliott went to trial and was convicted of attempted cross burning and acquitted of conspiracy to commit cross burning.[250]

In 2001, the Virginia Supreme Court consolidated these cases and

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241. *Id.* at 349.
242. *Id.*
243. VA. CODE ANN. § 18.2-423 (1950).
244. *R.A.V.*, 505 U.S. at 350.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 350-51.

declared the statute unconstitutional on its face for two reasons. First, because of all prohibitive possibilities, the statute "selectively cho[se] only cross burning because of its distinctive [racist] message," the court found the statute "analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*"[251] The second reason was that to allow juries to infer intent from the burned cross posed too high a risk that those who had no such intent would be convicted.[252]

In 2003, the U.S. Supreme Court affirmed in part and reversed in part. Justice O'Connor, with whom the Chief Justice, Stevens, and Breyer joined, held that: 1) cross burning with no intent to intimidate was protected by the First Amendment; 2) the state may prohibit cross burning when such intent is present; and 3) cross burning cannot be prima facie evidence of such intent.[253] Justice Souter, joined by Kennedy and Ginsburg, argued that any cross burning law constitutes impermissible content discrimination.[254] Justice Thomas argued that the entire statute was constitutional because it regulated conduct, not speech.[255] Finally Justice Scalia, the author of the majority opinion in *R.A.V.*, agreed with the plurality that Virginia's cross burning prohibition is constitutional if the intent is to intimidate, but not if it is to express a viewpoint.[256] He disagreed with the plurality, however, in his conclusion that Virginia could make cross burning prima facie evidence of intent to intimidate.[257]

A majority of the Court supported the proposition that the government can proscribe the burning of crosses with intent to intimidate or threaten. Thus, a true threats statute can list cross burning as a prohibited form of hate speech as long as it is accompanied with the intent to threaten or intimidate.

The true threats test could also be applied to other forms of hate speech that threaten unlawful acts that place a reasonable listener in fear of physical injury. This lowers the high *Brandenburg* threshold of imminent violence to a level where people threatened or intimidated by hate speech have a legal remedy. This new standard addresses such hate speech as racial, ethnic and religious epithets, under certain circumstances, and incitement to ethnic, racial or religious discrimination or violence, but does not address historical revisionism about racial or religious groups (i.e. denying the Holocaust).

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251. Black v. Commonwealth, 553 S.E. 2d 738, 744 (Va. 2001).
252. *Id.* at 746.
253. Virginia v. Black., 538 U.S. 343 (2003).
254. *Id.* at 380-81.
255. *Id.* at 394-95.
256. *Id.* at 368.
257. *Id.*

Other Commentary

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Nov5

What Does "Freedom of Assembly" Mean for Occupy Wall Street?

By Matt Giffin, First Amendment 5 comments

Still only seven weeks old, the Occupy Wall Street protest and its myriad offspring throughout the United States are beginning to engage in what will surely be a long battle with local authorities over curfews and other types of assembly permits. Leaders and counsel of "Occupy" movements across the country are presenting First Amendment challenges to municipal actions. Though making the usual ritual reference to the "freedom of speech and assembly," the defenders of the Occupy movement—and their opponents—have framed the debate thus far almost entirely on the usual free speech terrain: the speech vs. conduct distinction, the issue of content-neutrality, and the reasonableness of "time, place, and manner" public forum restrictions. Even on these terms, the protesters often have strong claims that city governments have violated their rights. One fascinating question, however, is the extent to which the freedom of *assembly*—that often-mentioned but underdeveloped provision of the First Amendment—could contribute to a stronger conception of the rights of Occupy Wall Street protesters than is provided by relying solely on speech as a framework.

The most egregious attempted use of a municipal curfew to disperse an Occupy protest in the last several weeks occurred in Nashville, Tennessee. There, Republican Governor Bill Haslam decided to crack down after "tolerating" the demonstrations around the Tennessee State House for three weeks. The governor promulgated a series of brand-new regulations—including a restrictive curfew—which led to the temporary abandonment of the Occupy campsite and more than 50 arrests. Even by the low standards governing such transparently political hatchet-jobbery, Tennessee's efforts were sloppy. In granting the ACLU's request for a restraining order against the new curfew, the U.S. District court noted that the government had violated the state's own Administrative Procedure Act as well having trampled on the protesters' First Amendment rights.

In attempting to quell statehouse protests in Albany, New York, the city government has not been nearly as clumsy, but it has acted in a similarly pretextual manner. The city government there recently announced that by "oral tradition," the protest restrictions which apply to the statehouse grounds themselves apply to the adjacent park hosting Albany's "Cuomoville" protester camp as well. As of now, the government has not yet enforced this unwritten curfew and attempted to evict the protesters.

Protesters obviously face more serious obstacles in challenging legitimate curfews or land-use restrictions—those which are longstanding and ostensibly content-neutral. In all major cities hosting Occupy protests, city officials have at their disposal ordinances which limit the availability of public spaces such as parks and restrict camping or overnight congregation. Some cities have not yet cracked down on the protesters, but others—including Oakland, Portland, and Austin—have begun to enforce their regulations against Occupy encampments and arrested dozens of protesters.

When subjected to the usual free-speech analysis, such regulations—assuming they are content-neutral on their face—are likely to pass muster as applied to Occupy protests. Though areas like city or state parks are quintessentially public forums, governments may subject both pure speech and "expressive conduct" to reasonable "time, place, and manner" restrictions, provided that they are narrowly tailored and provide alternate channels for communication. The issue of protest encampments and free speech has come before the Supreme Court before, and the results are not encouraging. In *Clark v. Community for Creative Non-Violence* (1984) , the Court dealt with the application of a prohibition against sleeping on the National Mall as applied to a group which had set up tents to raise awareness of homelessness. The Court found first that the regulation was tailored to the government's interest in protecting, and second that the protesters were left with plentiful alternate ways to spread their message even if denied permission to sleep on the Mall.

As with its other "expressive conduct" cases, the Court in *Clark* considered the activity as worthy of First Amendment protection *only* to the extent that it was expressive; in other words, the protesters' act of public assembly had Constitutional value only instrumentally, as a means of furthering the individual speech of the activists. According to this approach, the "Freedom of Assembly" invoked by protesters becomes legally irrelevant, a rhetorical garnish on a First Amendment claim that entirely boils down to speech rights. As long as governments can show an absence of content-discrimination (which will be a tall order in some cases), they will have strong arguments that the significant government interest in keeping avenues for local commerce and transit clear justifies clearing away long-term protester encampments and imposing time-of-day restrictions. Moreover, they can argue that protesters retain plentiful opportunities to spread their message even if the size or timeframe of their assemblies are curtailed.

The current, weak conception of the freedom of assembly—subordinating it almost entirely to freedom of speech—is not a historical inevitability, however. The First Amendment itself names speech and assembly as discrete rights, and the two were considered as such in the Supreme Court's limited jurisprudence on the subject until relatively recently. For instance, in its 1937 decision in *De Jonge v. Oregon* incorporating the freedom of assembly into the 14th Amendment, the Court found that assembly—*as well as* "speech"—was an indispensable guarantor of democracy: it was vital "to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." As John Inazu noted in a recent article on the "Forgotten Freedom of Assembly," however, the Court in the late 20th Century began to conflate the two rights to the extent that they became indistinguishable in its jurisprudence, a process that cumulated with cases like *Perry Education Association v. Perry Local Educators' Association* and *Clark*. On one hand, the Court's modern public forum analysis values *ad hoc* assembly only as a conduit for speech; on the other hand, the Court's "freedom of association" jurisprudence has made the rights of more permanent groupings dependent on the extent to which their association with each other has expressive content. Assembly on its own terms—the

right to gather together in public—has become dormant.

As a considerable amount of recent scholarship has pointed out, something important may have been lost in relegating the status of freedom of assembly to a rhetorical afterthought. First, the act of assembly itself creates a value for congregants that exists apart from any political expression that takes place. Sharing space with others, feeling the strength of numbers, and experiencing solidarity all contribute to a kind of "secular communion" which derives its power not simply from any shared ideology (if any) but from shared *existence*. In Inazu's words, assembly "may reflect a way of living and system of beliefs that cannot be captured by a text or its utterance at any one event." Even more to the point, assembly has historically played a unique role in democratic self-government—the preservation of which is often held to lie at the heart of the First Amendment's purpose. In a March article in the *Yale Law Journal*, Ashutosh Bhagwat argued that speech, assembly, and association should be reconceptualized as independent and coequal First Amendment protections. Treating assembly as a handmaiden to "speech" shortchanges the indisputable historical fact that the cause of democracy has been nudged forward as often by popular action as by talk:

"Voting and civilized discussion among individuals are of course important elements of democratic government, but they are hardly the sum total of the matter….In the typical modern protest or assembly utilizing the public forum, speeches are no doubt made and signs are waved, but they are hardly the main point of the exercise. After all, most of the speeches are inaudible and the signs often illegible. The point, rather, is the assembly itself. The fact of a large public gathering forms a sense of solidarity, helps to influence public opinion, and sends a message to political officials. Assembly, in short, is a form of petition and a form of associational speech, quite aside from what is said during the assembly." (120 Yale L.J. 978, 996)

Adopting a thicker conception of First Amendment freedom of assembly would not, of course, help protesters avoid entirely the very real dilemma faced by even the freest societies in balancing competing interests. Even with a stronger right to assembly, neither Occupy Wall Street nor any other movement has the right to cripple local businesses or hold cities hostage. However, courts granting greater recognition to the independent right of assembly might gauge the reasonableness of government restrictions in a new light; in particular, the question of whether "alternate ample channels" exist might well have a different answer. Courts might well ask not only whether restrictions like curfews will leave protesters other opportunities to deliver their message, but also whether the restrictions deny them their meaningful right to gather together in public without undue harassment. In smaller cities and towns, especially, excessively restrictive curfews on use of centrally-located parks or squares could amount to an effective total ban on large assembly. The issue would become not whether overnight encampment significantly furthered protesters' expression, but whether it furthered their interest in assembly—which it almost certainly does. Moreover, a stronger vision of the freedom of assembly might spur reconsideration of the maze of bureaucratic hurdles in modern cities which have greatly increased the difficulty of securing permission to march or assemble. To the extent that permit regimes turn ordinary citizens, in the words of Tabatha Abu El-Haj, into "supplicants in the democratic process," they place very real strain on a fundamental right.

Occupy Wall Street and its sister protests well illustrate the independent value of assembly. Whatever their excesses or ideological inconsistencies, they have clearly tapped into a widely felt discontent whose strength is manifested not so much by verbal communication as by the *act* of gathering together and providing a visible demonstration of solidarity and demographic strength. A stronger conception of the freedom of assembly would capture, better than courts' current doctrine, the unique benefits which such a movement can bring to the process of American self-government.

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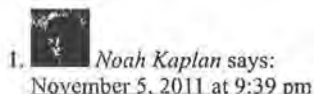
5 Comments

1.  *Noah Kaplan* says:
November 5, 2011 at 9:39 pm

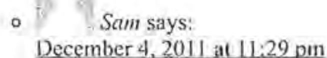
Matt, really interesting post. The freedom of assembly is not something we have really had think about much, particularly since so much collective action is now undertaken online and in other non-physical forms.

I'm not sure I agree with your analysis that there is a freedom to assemble that is separate from any element of speech. The list of freedoms in the First Amendment is entirely disjunctive, except the assembly clause. "Congress shall make no law respecting an establishment of religion, *or* prohibiting the free exercise thereof; *or* abridging the freedom of speech, *or* of the press; *or* the right of the people peaceably to assemble, *and* to petition the Government for a redress of grievances." The last two parts are conjuctive, people have the right to assemble *for the purpose of* petitioning Congress for a redress of grievances. As inchoate as Occupy may be with coalescing around message, it's safe to say the movement is, in a modern sense, petitioning Congress for a redress of grievances. However, that doesn't mean that there is necessarily a right to assemble indefinitely and continuously.

I don't know what the case law says on this subject, but I think textually the First Amendment can be read to have two limitations on the right to assembly. First, there is no right to assemble for non-expressive purpose. The right is to peaceably assemble, and while assembled, to petition for redress. Second, it is reasonable to limit the assembly right to times when the expressive conduct is most effective. If an expressive element is required to assert the assembly right, then there are certainly ample alternative channels for expression even if assembly is not allowed at night.

Given the need to clean public spaces, the overtime costs of employing police all night at Occupy sites, the increased risk of misconduct at night, etc, I don't think cities interfere with any expressive right when they enforce content neutral camping regulations and similar restrictions. I certainly understand the concern for pretextual adoption and application of regulations, but I don't think Occupy protesters can assert a right to camp continuously and indefinitely with no specific stated goal.

Reply

-  *Sam* says:
December 4, 2011 at 11:29 pm

I agree with Dr. Kaplan that a textualist reading of the first amendment should not issue any freedom of assembly independent of the right to

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"petition the Government for a redress of grievances." And I'd point to the alternate use of semicolons and commas to reinforce what has already been said. Moreover, I'd stress that this doesn't just subordinate the freedom of assembly to the freedom of expression, it establishes the former only insofar as it is means to make expressions of a particular content and purpose – to petition the Government for a redress of grievances. And note well that both content and purpose would be necessary; the freedom to assemble would not be assured by a textual interpretation if the assembly only complained but sought no remedy. All this – I hope – makes clear how absurd a purely textualist reading would be.

I really appreciate the delicacy with which Mr. Griffin has treated the issue of interpretation. I am very glad to have read the extra discussion of Inazu's work in his reply. I think it provides a great deal of motivation to the considerations of the article.

Thank you, Mr. Griffin, for the nicest discussion of this timely topic I have yet to find. I'll be sure to recommend it.

Reply

2. *Matt Giffin* says:
November 5, 2011 at 10:15 pm

You're certainly right that the conventional interpretation has been that the right of assembly is specially limited to "petition for redress of grievances" by the "and" in the First Amendment's text. And of course that's a pretty facially plausible interpretation. The Inazu article on "the Forgotten Freedom of Assembly" that I mention in the post, however, makes what I think is a pretty strong historical argument that the "and" is more or less a textual accident–a leftover from when the phrase "for the common good" was struck from the text. Several other scholars have made a similar point recently or supported Inazu's position, including Tabatha Abu El-Haj in the UCLA law review and Ashutosh Bhagwat at Yale. Even apart from the textual argument, its pretty clear historically that as a rhetorical matter the independence of assembly was far more pronounced until the middle of the twentieth century than it was thereafter, when it became more or less "freedom-of-speech-and-assembly." One of the articles even points out that "assembly" was one of the original Four Freedoms of 1930s and 40s US propaganda until President Roosevelt decided to change the formulation.

When it comes to Zucotti Park itself and similar situations, I think I agree with you. Regardless of whether freedom of assembly is given more independent content, there have to be limits; the right to literally "occupy" a large public space permanently is obviously not consistent with the competing rights of the public at large. At the margins, however, and against more questionable regulatory schemes, this could make a difference; moreover, I think distinguishing and understanding the democratic function of the two rights — even if in practice they overlap overwhelmingly — is important as an expressive matter.

Reply

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Author

Matt Giffin

Matt Giffin is a CR-CL Executive Editor for Online Content. Matt has a bachelor's degree in international history from Georgetown University's School of Foreign Service. Having worked for the Indianapolis Public Defender agency and the Harvard disability litigation clinic, he has special interest in criminal law, social justice, and First Amendment issues. Matt is a 3L at Harvard Law School.

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AMERICAN CIVIL LIBERTIES UNION of TENNESSEE

ACLU-TN Victory in Protecting Free Speech of Occupy Nashville Protesters

Federal Judge Rules State Violated Demonstrators' First Amendment Rights

FOR IMMEDIATE RELEASE
June 13, 2013

CONTACT:
Hedy Weinberg, ACLU-TN Executive Director, 615-320-7142

NASHVILLE – In a ruling underscoring Tennesseans' right to political speech, a federal judge ruled late yesterday that the state of Tennessee's arrest of Occupy Nashville protesters was an unconstitutional violation of their First Amendment rights.

"The Court's ruling is a resounding victory for the principles of free speech and protest championed by Occupy Nashville and the ACLU," said ACLU-TN cooperating attorney David Briley, of Bone McAllester Norton PLLC. "This decision reinforces that the state cannot just arbitrarily limit free speech in any manner it wants to."

In the ruling, Judge Aleta A. Trauger wrote, "The First Amendment cannot yield to the enforcement of state regulations that have no legal effect…In choosing to adopt and implement new regulations by fiat without seeking necessary approval from the Attorney General, they made an unreasonable choice that violated the plaintiffs' constitutional rights in multiple respects."

"The right to free speech and political protest is crucial to a healthy democracy, perhaps today more than ever," said ACLU-TN Executive Director Hedy Weinberg. "We applaud the Court for safeguarding the essential guarantees of the First Amendment."

ACLU-TN filed the lawsuit, Occupy Nashville et. al., v. Haslam et. al., in October 2011 after the State of Tennessee met in secret and revised the rules controlling Legislative Plaza to implement a curfew and require use

and security fees and $1,000,000 in liability insurance prior to community members engaging in assembly activity. The state then arrested the Occupy Nashville demonstrators under the new rules. Prior to their arrests, the demonstrators had been gathered at Legislative Plaza in downtown Nashville to peacefully express their frustration with the government for a couple of weeks.

The lawsuit was filed in the United States District Court for the Middle District of Tennessee, Nashville Division.

In addition to Briley, the plaintiffs are represented by ACLU-TN Legal Director Tom Castelli; ACLU-TN Cooperating Attorney Patrick Frogge of Bell Tennent & Frogge PLLC; and ACLU-TN Cooperating Attorney Tricia Herzfeld of Ozment Law.

The decision for this case can be found here.

The order for this case can be found here.

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The Right to Peaceably Assemble: U.S. Constitutional Law and Occupy Wall Street

A legal memo prepared by the Constitutional Litigation Clinic at Rutgers School of Law-Newark as part of the Protest and Assembly Rights Project

About the Protest and Assembly Rights Project

In January 2012, international human rights and U.S. civil liberties experts at seven law school clinics across the United States formed the *Protest and Assembly Rights Project*. This joint project investigated the United States response to Occupy Wall Street in light of the government's international legal obligations. The participating law clinics are:

Project Directors and Coordinators:

The Global Justice Clinic (GJC) at NYU School of Law provides high quality, professional human rights lawyering services to individual clients and non-governmental and inter-governmental organizations, partnering with groups based in the United States and abroad, or undertaking its own projects. Serving as legal advisers, counsel, co-counsel, or advocacy partners, Clinic students work side-by-side with human rights activists from around the world.

The Walter Leitner International Human Rights Clinic at the Leitner Center for International Law and Justice at Fordham Law School aims to train a new generation of human rights lawyers and to inspire results-oriented, practical human rights work throughout the world. The Clinic works in partnership with non-governmental organizations and foreign law schools on international human rights projects ranging from legal and policy analysis, fact-finding and report writing, human rights training and capacity-building, and public interest litigation. The views expressed herein are not reflective of the official position of Fordham Law School or Fordham University.

The International Human Rights Clinic at Harvard Law School is a center for active engagement in human rights within a context of critical reflection. The Clinic works on a range of international human rights and humanitarian law projects on a variety of topics and in countries throughout the world, including the United States. Under the close supervision of clinical faculty, and in collaboration with other organizations and advocates working towards social justice, Clinic students advance the interests of clients and affected communities through a range of approaches and strategies, including documentation, litigation, research, and community education.

The International Human Rights and Conflict Resolution Clinic at Stanford Law School provides direct representation to victims and works with communities that have suffered or face potential rights abuse. The Clinic seeks both to train advocates and advance the cause of human rights and global justice and to promote sustainable conflict resolution. In its first year, the Clinic has addressed labor rights, transitional justice, gang violence and violations of the laws of war in countries as diverse and distant as Brazil, Cambodia, El Salvador, Turkey and the United States.

Participating Clinics:

The Constitutional Litigation Clinic at Rutgers School of Law-Newark has worked on cutting-edge constitutional reform since its founding in 1970. Through the clinic, students not only learn the law, they make the law. Students are actively involved in all aspects of the clinic's work, including deciding which cases to take, interviewing clients, developing the facts, crafting legal theories, drafting legal briefs and preparing for oral arguments.

The Civil Rights Clinic at the Charlotte School of Law gives students an opportunity to engage in real-world advocacy while at the same time advancing local civil rights causes. The Clinic educates students in various ways to perform many of the different traditional litigation skills (fact investigation, pleading, motions practice, depositions, trial work, etc.), and also teaches how to be creative within ethical bounds in order to embrace different models of advocacy to advance the particular cause or client's interest for which they are working.

The Community Justice section of Loyola Law Clinic-New Orleans teaches law students substantive, procedural and practical advocacy skills in order to assist community members with post-disaster housing and government accountability issues. Particular emphasis is placed on social justice issues and community lawyering. Under faculty supervision, clinic students work as the lead lawyers and partner with co-counsel on individual and impact litigation civil and human rights cases.

Acknowledgements

This legal memo is part of a series by the Protest and Assembly Rights Project addressing the United States response to Occupy Wall Street. This memo discusses aspects of U.S. constitutional law pertaining to the rights to assembly and expression. The first report in the series, *Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street*, examined the response in New York City. Subsequent reports will address the responses in Boston, Charlotte, Oakland, and San Francisco.

The Protest and Assembly Rights Project is a collaborative initiative. However, each product is independently authored by the clinic identified as the Lead Author of the report. The views expressed in any one of the Project's publications may not be representative of the views of every clinic involved in the Project.

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The Right to Peaceably Assemble: U.S. Constitutional Law and Occupy Wall Street

This memo addresses questions regarding the constitutional right to assembly and to engage in peaceful protest in public parks and other public and quasi-public spaces. This memo provides information on the current state of U.S. constitutional law regarding assembly and peaceful protest in such spaces.[1] The memo has been made available to the public in the hopes that it will prove useful to anyone wishing to exercise their constitutional rights. However, because of the varied types of property that may be involved in protest actions and the various kinds of expressive activities that may be exercised thereon, this memo can only be used for purposes of general guidance and should not be considered legal advice.

It has long been the law that parks and public squares are quintessential public forums for free speech and public assembly pursuant to the First Amendment of the United States Constitution. However, it is also the law that those who hold title to public space may enforce reasonable regulations governing such activity so long as they serve a significant public purpose and leave ample alternative channels of communication for speakers and protesters.

Additionally, there are some privately owned spaces which operate as quasi-public forums because of agreements between the private owners and governmental entities. The use of such forums for expressive activity is also subject to reasonable time, place and manner regulations.

Moreover, some state constitutions may protect some types of expressive activity in private spaces which have invited the public to congregate in such space so long as the activity is not incompatible with the normal use of the property.

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[1] For a discussion of the United States' obligations under international law, see GLOBAL JUSTICE CLINIC AND WALTER LEITNER INTERNATIONAL HUMAN RIGHTS CLINIC, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET, Ch. 3 (International Law and Protest Rights) (2012) [hereinafter SUPPRESSING PROTEST].

Public Parks and Streets as Traditional Public Fora

Prior to the outgrowth of the Occupy Wall Street (OWS) movement, rights of free speech and assembly in parks may have been taken for granted. U.S. Supreme Court precedent is quite amenable to the idea that parks are a suitable and historically desirable venue for groups of concerned persons to gather and exercise First Amendment rights. Nevertheless, a review of government responses to protest activity in the United States, both preceding and including the Occupy movement, indicates that city and police actions against protesters do not always reflect the desire expressed in court opinions to protect public protests in public arenas.[2]

In the interest of preservation and understanding, it is important to flesh out the history of parks as public forums for speech and assembly. Knowledge of what has led to this point may illuminate the problems currently encountered and lead to a more lively and informed discussion.

The people who have gathered in support of OWS do so in the footsteps of historic figures who also exercised their protest rights to promote social change. Earlier movements have repeatedly, and often successfully, faced down those who wished to cleanse the public square of ideas that ran contrary to their goals and their comfort. In March 1961, for example, demonstrators in South Carolina gathered on the open public area of the State House grounds to express their displeasure with the legal standing of the African-American community.[3] They were met with an unprovoked show of force, and arrested by authorities on location. The Supreme Court overturned their convictions, stating:

> (A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ...is... protected against censorship or punishment, unless shown likely to produce

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[2] See, e.g., SUPPRESSING PROTEST, *supra* note 1.
[3] Edwards v. South Carolina, 372 U.S. 229, 233 (1962).

> a clear and present danger of a serious *substantive evil that rises far above public inconvenience, annoyance, or unrest.* There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community group.[4]

The Court recognized that "[the demonstrators] were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."[5] What individuals engaged in peaceful protest should remember is that in theory, at least, the police should be there to protect them and their rights. The police must remember that, "constitutional rights may not be denied simply because of hostility to their assertion or exercise."[6] Boisterous public demonstrations that draw attention, often negative, are a foundation for real change and have been for centuries.

Until the late nineteenth century, the idea of asking permission to gather in a public space was a foreign concept.[7] It was an accepted principle that, "(o)ne was entitled to be on the streets, in a place of one's choosing, for however long one wished, as long as one did not breach the peace."[8] While featuring what some may now deem outrageous behavior (i.e. burning an effigy), several demonstrations of the time ran their course without running afoul of this "breach the peace" standard.[9] The U.S. Supreme Court as recently as 2011 upheld this standard, affirming that even "outrageous" and upsetting behavior in a public place is afforded special protection and "cannot be restricted simply because it is upsetting or arouses contempt."[10]

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[4] Edwards v. South Carolina, 372 U.S. at 237-38 (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949))(emphasis added).
[5] Id. at 237
[6] Cox v. State of La., 379 U.S. 536, 551 (1965) (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963))
[7] Tabatha Abu El-Haj, The Neglected Right of Assembly, 56 UCLA L. Rev. 543, 561-62 (2009)
[8] Id. at 564
[9] El-Haj, 56 UCLA L.Rev. at 562
[10] Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011).

Our forefathers saw the right of assembly to be so fundamental as to be beyond debate. In fact, "in the first United States Congress a discussion of the proposed Bill of Rights amendment [regarding assembly] was declared beneath the dignity of the members."[11] It was only with the passage of time that abridgments of this right have come to pass as acceptable checks on our constitutional freedoms. One such abridgement was the acceptance of permit requirements for public assembly.[12] In the 1890's, in contradiction with the holdings of the vast majority of state supreme courts across the land, the U.S. Supreme Court chose to follow the Massachusetts Supreme Judicial Court in declaring, among other things, that permit requirements were not an unconstitutional abridgment of First Amendment rights.[13] The Supreme Court did rectify many of the mistakes of that decision in 1939 when in the matter of Hague v. CIO it affirmed the use of parks for purposes of assembly.[14] However, the opinion failed to address the permit issue, tacitly affirming permit requirements.[15]

Though permit requirements may be a difficult hurdle to overcome, it is important to remember that permit requirements have not dampened the affections courts have for parks as traditional public fora. It is undisputed that, "[t]he right to a public forum for the discussion and interplay of ideas is one of the foundations of our democracy."[16] However, "public forum" is not a term without distinctions. Under public forum doctrine, public spaces are generally defined as a "traditional public forum," "discretionary public forum," or a "non-public forum."[17] The

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[11] Leon Whipple, Our Ancient Liberties: The Story of the Origin and Meaning of Civil and Religious Liberty in the United States 101 (1927)
[12] For a discussion of how permit requirements are disfavored in international human rights law, see SUPPRESSING PROTEST, *supra* note 1, at 59-61.
[13] See Davis v. Massachusetts (Davis III), 167 U.S. 43 (1897)
[14] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939)
[15] El-Haj, 56 UCLA L. Rev. at 584
[16] Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir. 1980)
[17] Kevin Francis O'Neill, Disentangling the Law of Public Protest, 45 Loy. L. Rev. 411, 422-29 (1999)

definitions of the first two have been constructed through years of judicial opinions, with the third comprising what does not fall under the first two:

> Traditional public fora "are those places which 'by long tradition or by government fiat have been devoted to assembly and debate,'" places whose "principal purpose. . . is the free exchange of ideas." Designated public fora are likewise narrowly conceived. The government does not create such a forum "by inaction," or by allowing the public "'freely to visit,'" or by "permitting limited discourse" there; instead, such a forum is created only where the government " 'intentionally open(s) a nontraditional forum for public discourse.'"[18]

Of the three, the protections afforded under "traditional public forum" are strongest. The details of what those protections are will be discussed further below.

Jurisprudence has yielded a strong foundation. It is well established that public parks have been, for time immemorial, a traditional public forum.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[19]

While public parks may historically be some of the most clearly protected venues for public assembly and expression, it does not mean that the Occupy movement or other protest movements need restrict themselves solely to government-owned public parks. As the lines blur between public and private spaces, the answers to questions of the right to assembly and expression become murky. So beyond an understanding of the historic importance of the public park as a forum for grievance, it is necessary to examine the constitutional issues raised by the choices of venues made by local Occupy movements around the country.

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[18] Id. at 424-425 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) and International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992))
[19] Hague, 307 U.S. at 515-16

What are Reasonable Time, Place and Manner Restrictions?

While First Amendment activities receive the greatest protection in traditional public fora, it is well settled that the First Amendment protection of speech and assembly is not absolute. Government authorities may impose restrictions on First Amendment activities in public spaces within a permissible scope of regulation. Under U.S. constitutional law, authorities may impose a reasonable time, place and manner restriction provided it is (1) content neutral, (2) is "narrowly tailored" to "advance[] a significant government interest" and (3)"leave[s] open ample alternative channels for communication."[20]

To determine whether a restriction is content neutral, a court generally looks to the terms of the restriction to see if the restriction "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed."[21] Furthermore, even if the measure, on its face, appears neutral as to content and speaker, but is "directed at certain content and is aimed at particular speakers,"[22] it is not content neutral. A regulation that imposes either on its face or in "its practical operation" a burden "based on the content of speech" or on the "identity of the speaker" does not pass constitutional muster.[23] "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."[24]

A court will also go beyond the text of the restriction and examine any binding judicial or administrative construction of the restriction. The practice of the authority enforcing the

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[20] Clark v. Community for Creative Non-Violence, 468 U.S. 288, at 293. Under international law, restrictions on the freedoms of assembly and expression are permitted only if they conform to the principle of legality and are proportionate and necessary, in the context of a democratic society, to achieve one of these legitimate aims: national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. See SUPPRESSING PROTEST, *supra* note 1, at 56.
[21] Solantic LLC v. City of Neptune Beach, 410 F.3d 1250, 1259 (11th Cir. 2005)(quoting Turner Broad Sys. V. FCC.)
[22] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2665 (2011).
[23] Id.
[24] Id. at 2664.

restriction is also considered in determining whether a regulatory scheme is content neutral.[25] A regulation that is overly broad and not uniformly applied is unconstitutional. The Supreme Court has held that "[i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not….either by use of a statute providing a system of broad discretionary licensing power or….the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."[26] Furthermore, "when the use of its public streets and sidewalks is involved….a [government] may not empower its….officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."[27]

The requirement for narrow tailoring means that a complete ban on expressive activity in a public forum is extremely suspect and rarely upheld. A complete ban is overbroad. The U.S. legal requirement of "narrowly tailored" does not have to equal "least restrictive means,"[28] but it does bar the government from "burden[ing] substantially more speech than is necessary to further" its governmental interest.[29] Even if the government has a significant interest, it "may not seek to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers…."[30] Certainly, the government "may not burden the speech of others in order to tilt public debate in a preferred direction."[31]

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[25] MacDonald v. Safir, 206 F.3d 183, 191 (2d Cir. 2000)(citing to Forsyth County. v. Nationalist Movement, 505 U.S. 123, 131 (1992)).
[26] Cox v. Louisiana, 379 U.S. 536, 557-58 (1965).
[27] Shuttlesworth v City of Birmingham, Ala., 394 U.S. 147, 153 (1969).
[28] In this respect, current U.S. law is not in compliance with international human rights law, which does require U.S. officials to use the least intrusive means. See SUPPRESSING PROTEST, *supra* note 1, at 58.
[29] Ward v Rock Against Racism, 491 U.S. 781, 799 (1989).
[30] IMS Health Inc., 131 S. Ct. 2653, at 2670.
[31] Id.

The Supreme Court has made clear that "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."[32] The Court looks at the practicalities of a given situation in determining whether available alternative modes of communication are satisfactory.[33] Therefore, the inquiry is not merely whether alternatives exist, but also whether those alternatives constitute an adequate and practical opportunity to convey the same information. The analysis also includes consideration of the economic viability of employing more expensive means of reaching the public.[34] If a regulation prevents a speaker from reaching his intended audience, the regulation fails to leave open ample alternative channels of communication.[35] Every citizen enjoys the right to "reach the minds of willing listeners and to do so there must be opportunity to win their attention."[36]

There is no dispute that much of the conduct engaged in by the OWS movements and its participants falls within the protection of the First Amendment. The movement's efforts involving rallies, marches, distribution of literature, displaying signs and posters and engaging in conversations regarding the movement's platform are well within the protection of the First Amendment. More problematic is establishing that First Amendment protection extends to sleeping and camping activities. Recently, courts have assumed that sleeping and camping are symbolic expressions protected by the First Amendment, but reasonable, time, place and manner restrictions have, generally, precluded the protestors from actually sleeping and camping in public fora.[37]

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[32] Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984).
[33] See Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977).
[34] See New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1261 (3rd Cir. 1986).
[35] Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981); Edwards v. City of Coeur D'Alene, 262 F.3d 856, 866; Bay Area Peace Navy v. United States, 914 F.2d 1224, 1227 (9th Cir. 1990).
[36] Kovacs v. Cooper, 336 U.S. 77, 87 (1949).
[37] See Clark v Community for Creative Non-Violence, 466 U.S. 288, 293 (1984); Watters v. Otter, 2012 WL 640941, at *4 (D.Idaho Feb. 26, 2012); Occupy Columbia v. Haley, 2011 WL 6318587, at *6 (D.S.C. Dec. 16, 2011); Occupy Minneapolis v. County of Hennepin, 2011 WL 5878359, at *4 (D.Minn. Nov. 23, 2011); Occupy

"[T]he First Amendment protects symbolic conduct as well as pure speech."[38] Conduct is symbolic expression and protected by the First Amendment when "in context, [it] would reasonably be understood by the viewer to be communicative."[39] The Supreme Court in Clark v Community for Creative Non-Violence, however, upheld a prohibition on "camping." The Court held that "activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation." While the Court in Clark appears to allow the closing of public parks at night, it is important to note that Clark involved Lafayette Park, a special space in the nation's capital, directly opposite the White House, and the Court did distinguish Lafayette Park from other public fora.

In a New York federal case, a district court held that it was lawful to sleep on sidewalks as a form of political protest.[40] The Metropolitan Council on Housing, a tenants' advocacy group that planned sleep-outs near Gracie Mansion to protest rent increases for rent-regulated apartments, approved by the New York City Rent Guidelines Board, challenged a general absolute ban on sleeping in public places. The group's sleep-outs were meant to symbolically convey the homelessness that would be caused by the proposed rent increases. Judge Kimba M. Wood held that "the First Amendment of the United States Constitution does not allow the city to prevent an orderly political protest from using public sleeping as a means of symbolic expression."[41]

The case turns on the balance between the demonstrators' interest in engaging in expressive activity and New York City's interest in protecting sleeping individuals from the

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Fort Myers v. City of Fort Myers, 2011 WL 5554034, at *5 (M.D.Fla. Nov. 15, 2011); Mitchell v. City of New Haven, 2012 WL 1188247 (D.Conn. Apr. 9, 2012).

[38] Virginia v. Black, 538 U.S. 343, 360 n.2 (2003).

[39] Clark v. Community for Creative Non-Violence, 468 U.S. 288, at 294.

[40] Metropolitan Council, Inc. v Safir, 99 F.Supp.2d 438 (S.D.N.Y. 2000).

[41] Id. at 439.

dangers of the street and preventing the obstruction of city sidewalks. Judge Wood held that a complete ban on sleeping or lying on the city's public sidewalks was overbroad and not narrowly tailored to the city's substantial interests. The demonstrators planned to occupy no more than half the width of the city sidewalk and to avoid obstructing any entrances to buildings. The demonstrators also assured the city that the protest would be staffed by marshals that would ensure that participants did not obstruct the remainder of the sidewalk and protect the demonstrators from the dangers of the street. The police presence, maintained by the city regardless of whether the protest involved sleeping, also served this two-fold purpose. Because the suppression of the symbolic use of sleeping was unnecessary to further the interests that underlie the sleeping ban, Judge Wood found that the ban was not narrowly tailored.[42]

In an effort to distinguish Metropolitan Council from Clark, Judge Wood emphasized that in Clark the ban was not overbroad in that it applied to demonstrators and non-demonstrators because damage to Lafayette Park and its partial inaccessibility to other members of the public could easily result from camping by demonstrators as by non-demonstrators. Furthermore, unlike the situation in Metropolitan Council, the major value of sleeping to the demonstrators in Clark was that it facilitated a continuous presence in the parks and the attraction of homeless people to the tent city.[43] In Metropolitan Council, sleeping played a more significant expressive role relative to other aspects of the protest and was not primarily facilitative.[44]

In New Jersey, Occupy Trenton was not successful in obtaining a court order that permitted its participants to sleep in Veterans Park and the WWII Memorial, but was successful in obtaining an order that allowed it to maintain a continuous 24-hour a day presence in the

[42] See Id. at 445-46.
[43] See Id. at 296.
[44] See Id. n.12.

absence of any regulations banning it, albeit without erecting structures, accessing electrical outlets, using a gas generator or attaching anything to the park's walls.[45]

Occupy Trenton's successful argument is helpful to all OWS movements. Twenty-four hour presence in public fora has been an essential part of the Occupy movement's communication. The movement's message is intertwined with its presence in public fora. The movement demands that the economically disenfranchised become more central to American public life by literally placing the economically disenfranchised in the center of the nation's public spaces.[46]

Furthermore, the demonstrators' ability to "live-stream" their presence and provide 24-hour commentary and proof of their activities is an essential part of their speech. As much as traditional signs held in front of pedestrians and motorists, the demonstrators' live-streaming, live-chatting and live-blogging activities is their speech. The demonstrators' message is that there is strength in the masses of people that do not control the majority of the wealth in the country. The movement's very message is conveyed by its participants' constant presence in public spaces and its broadcast of that presence to other Occupy demonstrators in different locales around the country and around the globe.

The OWS movement is a grass-roots operation with minimal financial support. It is what the U.S. Supreme Court once referred to as the "poorly financed causes of little people,"[47] for which the First Amendment provides "special solicitude."[48] In an age when Super PACs spend hundreds of millions of dollars to spread the political messages of wealthy donors, the movements of the poor struggle to be seen and heard. They can only do so in ways that attract

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[45] Occupy Trenton v. Zawacki, No. C-72-11 (N.J. Super. Ct. Ch. Div. Feb. 3, 2012) (Judgment and Permanent Injunction).
[46] Mitchell, 2012 WL 1188247, at *6.
[47] Martin v. City of Struthers, Ohio, 319 U.S. 141, 146 (1943).
[48] Taxpayers for Vincent, at 812 n. 30 (citing Struthers, 319 U.S. at 146).

media attention without requiring significant financial resources. The economic viability of the movements is sufficiently tenuous that the use of more expensive means of reaching the public would be prohibitive to their continued operations.[49]

The OWS movement found a way to do this by 24-hour encampments in strategic locations. As a consequence, the movements were able by mid-November 2011 to grab 13 percent of the news generated by United States news organizations.[50] That number dropped below 1 percent in January and February of 2012,[51] once those encampments were destroyed by police action.

A New York Times article highlighted the importance of visibility to the movement: "Driven off the streets by local law enforcement officials, who have evicted protesters from their encampments and arrested thousands, the movement has seen a steep decline in visibility....With less visibility, the movement has received less attention from the news media, taking away a national platform."[52]

The OWS movement does not have ample alternative channels of communication to compete in the marketplace of ideas, which places a significant burden on law enforcement and other government agencies to demonstrate that prohibition of around the clock vigils represent reasonable regulations of free speech.

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[49] See New Jersey Citizen Action v. Edison Township, 797 F.2d at 1261.
[50] http://www.journalism.org/index_report/pej_news_coverage_index_november_1420_2011
[51] Id.
[52] Michael S. Schmidt, For Occupy Movement, a Challenge to Recapture Momentum, N.Y. TIMES, Apr. 1, 2012, at A21.

Arbitrary and Inconsistent Rules and Conditions Restricting the Use of Public Space

In many municipalities, Occupy participants have been subject to *ad hoc*, arbitrary and inconsistent rules and conditions restricting their use of public space.[53] Where there are no rules on the books, due process claims are likely to hold up in court. The Occupy Trenton movement was successful on these grounds. Any municipal regulations must have been properly enacted. State Administrative Procedure Acts (APA), modeled on the federal APA, require that a government agency engage in formal rule-making before imposing prohibitions and restrictions.[54] Agencies have recognized that rules regulating the public use of parks must be adopted pursuant to the APA and no municipality may seek to engage in agency rulemaking without conforming to APA's notice and comment requirements.[55] Furthermore, a municipal authority must have been granted rule-making authority by means of a statute, executive order or some other authority.[56] It is useful to explore whether the municipal authority exceeded the agency's grant of authority.

Demonstrating in Privately Owned Public Spaces (POPS)

Municipalities throughout the United States are increasingly turning to private developers to create public space. These privately owned parks, plazas, courtyards, and atriums are known as "POPS" — Privately Owned Public Space. The ubiquitous presence of POPS in urban areas made headlines in the fall of 2011 when the Occupy movement chose to begin its protests in New York City's Zuccotti Park (also known as Liberty Plaza), now inarguably America's most famous POPS.

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[53] For discussion of the requirements of legality under international law, see SUPPRESSING PROTEST, *supra* note 1, at 57.
[54] Administrative Procedure Act, 5 U.S.C §§551-59 (2012).
[55] See Occupy Trenton, No. C-72-11, at 23-26.
[56] See Id. at 28 .

While POPS may have been novel to most Americans prior to OWS demonstrations, city planners have for decades utilized POPS as a means of ensuring open space for city dwellers. Since 1961, the City of New York has created approximately 520 POPS, and, there are currently 15 POPS in San Francisco's downtown district.[57] As public space in America's cities becomes increasingly scarce, the number of POPS is expected to rise. As the number of POPS continues to grow, so too does the likelihood of OWS, and activists, generally, relying on POPS to engage in free speech activities.

POPS are typically created in two ways. First, a government agency grants to a private developer zoning and tax concessions for its proposed construction project. In return, the private developer agrees to construct and maintain a POPS within or adjacent to the exterior of the soon-to-be-built building. Second, municipalities may enact land development and zoning ordinances that compel developers to build a minimum amount of public space for each defined amount of private space constructed.

POPS in Court

While POPS are often aesthetically indistinguishable in appearance from publicly owned parks and plazas, a multitude of court rulings evidence they are distinct in the eyes of the law. Publicly owned sidewalks and parks have historically been considered by courts as traditional public fora, and are therefore constitutionally bound to enforcing only reasonable time, place, and manner restrictions on speech. POPS, however, in light of their private ownership, are not invariably subject to the same First Amendment protections of quintessential public fora. Accordingly, POPS may be governed in a variety of ways.

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[57] New York City Dep't of City Planning, Privately Owned Public Space, NEW YORK CITY DEP'T OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/priv/priv.shtml.

For instance, POPS may be governed by ordinances enacted by a city agency.[58] Alternatively, a city agency may vest oversight of a POPS solely in its private owner. In this scenario, courts may compel the private developer to abide by reasonable time, place, and manner restrictions on speech.[59] Alternatively, courts may rule that private ownership of POPS eviscerates the public's right to free speech.[60] Last, there may exist no regulations governing the use of particular POPS.

There are a multitude of factors courts will scrutinize when determining whether to uphold free speech restrictions of a particular POPS. Two factors appear fundamental to the majority of courts' analyses. First, courts will consider the actual use and purposes of the property,[61] such as whether the POPS is used primarily as a thoroughfare or as an entranceway to a privately owned building.[62] Courts will also focus on the "area's physical characteristics,"[63] particularly whether the POPS has certain physical barriers to entry and how easily distinguished its design is from publicly owned spaces in close proximity. No bright line rules exist for courts

[58] The Salt Lake City Council adopted the following ordinance in regulating the use of the Church of the Ladder Day Saint's two-acre plaza situated in downtown Salt Lake City: "2.2 Right to Prevent Uses Other Than Pedestrian Passage: Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting." First Unitarian Church of Salt Lake v. Salt Lake City Corp., 146 F. Supp. 2d 1155 (D. Utah 2001).

[59] In The People of the State of New York against Ronnie Nunez, the Criminal Court Of The City Of New York, New York County, held that "POPS owners may establish 'rules of conduct,' so long as these restrictions on the use of the POPS are reasonable and designed to address nuisance or other conditions that would interfere with or are inconsistent with the intended use of the POPS by the general public. Those steps could include the temporary closing of the park for cleaning and other remedial actions, as long as the duration of the closure is as short as reasonably necessary to accomplish the goal . . . These rules included a prohibition on (i) camping and the erection of tents and other structures; (ii) lying down on the ground or lying down on benches, sitting areas or walkways in a manner that unreasonably interferes with the use of benches, sitting areas or walkways by others; (iii) the placement of tarps or sleeping bags or other coverings on the property; and (iv) the storage or placement of personal property on the ground, benches, sitting areas or walkways in a manner that unreasonably interferes with the use of such areas by others." 2012 NY Slip Op 22089.

[60] See Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1225 n. 24 (D. Utah 2004).; stating that " . . . whether the Church allows the public to use the Plaza at all and under what conditions are entirely up to the Church as the private property owner."

[61] See Venetian Casino Resort v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 941 (9th Cir. 2001).

[62] Id.

[63] ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1101 (9th Cir. Nev. 2003).

to follow when determining the rights of demonstrators on POPS.[64] The cases below illuminate the confounding unpredictability of courts when confronted with issues concerning POPS.

In Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas, ("Venetian"), the court considered whether a privately owned sidewalk outside of the Venetian Casino was a public forum subject to the First Amendment.[65] In the Development Agreement between the Venetian Casino and the State of Nevada Department of Transportation, the Venetian Casino agreed to construct outside of its casino a private sidewalk that also allowed for unobstructed pedestrian access.[66] However, the Venetian Casino, in 1999, demolished the sidewalk and set up a temporary pedestrian walkway. While the temporary walkway was in place, unions applied for and were granted by Clark County ("the County"), a permit to engage in picketing in front of the Venetian.[67] Approximately 1,300 members of the unions attended the rally. Venetian Casino security personnel warned demonstrators that because they were picketing on private property, they would have to vacate the premises. The unions' members declined to leave. The Las Vegas Municipal Police Department was advised by the District Attorney to neither arrest nor cite any of the demonstrators for trespassing.

The unions then planned for an additional rally on Venetian Casino property. Again, the County said it would grant the unions a permit. Following the County's approval of the second rally, the Venetian Casino filed suit. It alleged that the County had taken its private property without due process of the law to create a public forum, and sought a declaratory judgment that the sidewalk is not a public forum.

[64] "No clear-cut test has emerged for determining when a traditional public forum exists. In the absence of any widespread agreement upon how to determine the nature of a forum, courts consider a jumble of overlapping factors, frequently deeming a factor dispositive or ignoring it without reasoned explanation." Id. at 1099-1100.
[65] Venetian Casino 257 F.3d at 941.
[66] Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd., 45 F. Supp. 2d 1027 (D. Nev. 1999).
[67] Venetian Casino, 257 F.3d at 941.

The central issue before the Court was whether the privately owned pedestrian sidewalk was a public forum subject to the First Amendment. In determining whether the sidewalk was a public forum, the Court focused its analysis on whether the sidewalk served a traditional public function. The court reached a number of conclusions. First, the sidewalk served as a crucial segment for pedestrians traversing the Las Vegas Strip. Second, the sidewalk was indistinguishable from the publicly owned property to which it was connected. Therefore, the court found that the Venetian Casino sidewalk was performing a public function, and, thus held it to be a public forum subject to the First Amendment.[68] Accordingly, the unions were lawfully allowed to picket on the property.

In ACLU of Nev. v. City of Las Vegas ("Freemont Street"), the court was again charged with determining whether a particular POPS is a public forum for First Amendment purposes. Here, it was confronted with whether the Fremont Street Mall ("FSM"), a pedestrian mall, was subject to the First Amendment.[69] The FSM is publicly owned and lined by casinos and commercial business. In order to jump start the economy of blighted Freemont Street, the City of Las Vegas ("Las Vegas") contracted with the Fremont Street Experience Limited Liability Corporation ("FSELLC"), a private corporation, to undertake extensive renovations of Freemont Street. The remodeling of the FSM cost approximately $70 million, costs of which were borne jointly by the public and FSM-area businesses. Pursuant to the Development Agreement between Las Vegas and FSELLC, FSELLC was solely responsible for the operation and maintenance of the mall, on which it spends upwards of $10 million annually.[70]

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[68] Venetian Casino Resort 45 F. Supp. 2d at 1035 (". . . thoroughfare sidewalks parallel to the main public street in a city, that allow citizens to move from one part of the city to the next, have traditionally been exclusively owned and maintained by the government. Consequently, by owning and maintaining this particular sidewalk at issue in this case, Venetian is performing a public function.")
[69] 333 F.3d 1092 (9th Cir. Nev. 2003).
[70] ACLU of Nev. v. City of Las Vegas, 13 F. Supp. 2d 1064, 1069 (D. Nev. 1998)

The Las Vegas City Council then enacted ordinances that broadly restricted First Amendment activities on the FSM. It advanced two overarching objectives for enacting the disputed ordinances.[71] First, by prohibiting fundamental free speech activity such as leafleting and tabling, the City Council sought to shield FSM visitors from activities that it viewed as nuisances that could hamper the FSM's economic resurgence. Second, the City Council wanted to protect the Investment-Backed Expectations of those businesses that contributed financially to FSM's revival. The Court, however, found such justifications as insufficient grounds for limiting free speech, and held that "[T]he use and purpose of the Fremont Street Experience support the conclusion that it is a traditional public forum."[72] Therefore, such sweeping speech restrictions would not be able to stand.

In First Unitarian Church of Salt Lake City v. Salt Lake City Corp ("First Unitarian"), the court considered whether Salt Lake City had "the authority to prohibit all expressive activities on a public easement it reserved across otherwise private property."[73] The easement traversed a two-acre plaza owned by the Church of Jesus Christ of Latter Day Saints ("LDS Church"). The plaza is located in a bustling downtown section of Salt Lake, and, is abutted by the LDS Church's Temple and Conference Center, each of which host nearly 4,500 daily (Temple) and 15,000 weekly (Center), respectively.[74]

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[71] ACLU at 1095 n. 2, (citing Las Vegas Municipal Code (LVMC) § 11.68.10.) ("The relevant portion of the Pedestrian Mall Act reads:
Prohibited. The following are prohibited within the Pedestrian Mall: . . .(B) Mall vending, mall advertising, mall entertainment special events or other commercial activities unless conducted or authorized by The Fremont Street Experience Limited Liability Company; . . .(H) The placement of any table, rack, chair, box, cloth, stand, booth, container, structure, or other object within the Pedestrian Mall except as necessary for emergency purposes, or the maintenance or repair of the Pedestrian Mall, or as authorized by The Fremont Street Experience Limited Liability Company for special events, mall advertising, mall entertainment or mall vending or other commercial and entertainment activities;(I) In-person distribution to passersby in a continuous or repetitive manner of any physical or tangible things and printed, written or graphic materials .")
[72] Id. at 1102.
[73] 308 F.3d 1114, 1121 (10th Cir. 2002).
[74] First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 146 F. Supp. 2d 1155, (D. Utah 2001).

The Salt Lake City Council approved the Church's proposal to construct the plaza in order to "increase useable public open space in the downtown area, encourage pedestrian traffic generally . . . [and] stimulate business activity."[75] Though Salt Lake conveyed to the LDS Church the parcel of land on which the plaza now sits for approximately $8 million, it retained ownership of a pedestrian easement that traversed the Plaza. The LDS Church agreed to keep the plaza open for public use 24 hours a day, seven days a week, and, the legislation that closed and sold what was previously a public street expressly required that the easement encourage and invite public use. In light of the easement's location in downtown Salt Lake; that it is a pedestrian passageway; and, the goals of the enabling legislation, the Court found that the easement "shares many of the most important features of sidewalks that are traditional public fora."[76] Accordingly, the Court held that "the easement warrants the application of First Amendment principles."[77]

Though the courts in Venetian, Fremont Street, and First Unitarian sided with demonstrators in finding the POPS at issue to be traditional public fora, other courts have not been so hospitable to the rights of protestors when deciding whether POPS are subject to the First Amendment. In Utah Gospel Mission v. Salt Lake City Corp. ("Utah Gospel"), the court held that the pedestrian plaza of the LDS Church was a nonpublic forum for First Amendment purposes.[78]

In Utah Gospel, the court again considered the enforceability of restrictions prohibiting free speech within the LDS Church plaza – the same plaza in dispute in the Court's First Unitarian decision. After the First Unitarian decision, the easement that the Court in First

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[75] First Unitarian, 308 F.3d at 1127.
[76] Id. at 1128.
[77] Id. at 1129.
[78] Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249 (10th Cir. Utah 2005), (*concluding* that the plaza was "beyond the reach of the First Amendment.")

Unitarian held to be a public forum was sold to the LDS Church for nearly $6 million.[79] The sale of the Easement from Salt Lake City to the LDS Church was instrumental in the Court's finding that the Plaza was not a public forum, concluding that the sale extinguished the public nature of the space and rendered the entirety of the plaza private property.[80]

The Court focused its analysis on two attributes of the Plaza. First, it scrutinized whether the plaza was physically distinguishable from the publicly owned property nearby. Due to the myriad signs posted throughout the Plaza that inform visitors it is owned by the LDS Church, the court concluded that the plaza was easily delineated from property in close proximity. In addition to the signs, the plaza is comprised of sculptures and a fountain, further differentiating the plaza grounds for neighboring property. Second, and particularly poignant in the Court's decision, was that following Salt Lake's sale of the easement, title in the plaza rested solely in the LDS Church. Accordingly, the plaza was private property. And, therefore, the Court refused to prohibit the LDS Church from enforcing restrictions on free speech.

In Utah Gospel, the Court of Appeals for the Tenth Circuit distinguished its treatment of the plaza from its ruling in Venetian.[81] As mentioned, the Court in Venetian Casino found the sidewalk at issue to be a public forum in large part because it was incorporated seamlessly into the surrounding sidewalks. Therefore, pedestrians using the sidewalk would not necessarily even realize they were even on private Venetian Casino property. In Utah Gospel, however,

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[79] Utah Gospel Mission v. Salt Lake City Corp., 316 F. Supp. 2d 1201, 1228 (D. Utah 2004).
[80] Id. at 1235, (concluding that the Plaza "is now an entirely private, Church-owned Plaza devoid of any government property interests that could possibly create a public forum. The Main Street Plaza is not a speech forum at all. The free speech guarantees of the First and Fourteenth Amendments do not apply to the Plaza or to the now-extinguished Pedestrian Easement.")
[81] Venetian Casino, 257 F.2d at 945-46, *concluding* that the sidewalk at issue was a public forum subject to the First Amendment even though title rested solely with the Venetian: "Property that is dedicated to public use is no longer truly private. Although the owner of the property retains title, by dedicating the property to public use, the owner has given over to the State or to the public generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property," the right to exclude others. Dolan v. City of Tigard, 512 U.S. 374, 393, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979))."

conspicuous entrance signs and a number of unique features of religious significance were sufficient for the court to conclude that a reasonable visitor would be aware that the Plaza was privately owned. The court reasoned that an implicit awareness that plaza visitors knew on LDS Church property, enabled the Court to find it was a non-public fora on which free speech restrictions were enforceable.[82]

In Hotel Emples. & Rest. Emples. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec., ("Hotel Employees*")* the Second Circuit took a similar stance on free speech rights on POPS, holding that New York City's Lincoln Center was not a public forum.[83] Akin to the LDS Church plaza, the Court found that Lincoln Center served not primarily as a pedestrian thoroughfare, but, rather, as a "pleasing forecourt" for patrons of the Lincoln Center arts complex.[84]

Pursuant to a Licensing Agreement between Lincoln Center Inc. ("LCI"), a not-for-profit corporation, and the City of New York, LCI, agreed to bear the costs of maintaining and operating Lincoln Center's grounds.[85] Additionally, the Agreement stated that no event could be hosted in Lincoln Center without LCI's prior approval. LCI's policy stated that it not only preferred events that had a performance component, but that it would "prohibit[] political and labor-oriented events, including demonstrations and rallies."[86]

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[82] Utah Gospel, at 1256, concluding that "[i]n this case, because of the signs posted at all entrances to the Plaza and its differentiation from the surrounding sidewalks, the objective, physical characteristics demonstrate that the Plaza is privately owned. Further, although the easement required the government to allow expressive activity, the Plaza is no longer owned or controlled by the government."
[83] 311 F.3d 534 (2d Cir. N.Y. 2002).
[84] Id. at 551-52.
[85] Recall Freemont Street, where the private corporation, FSELLC, paid all of the costs associated with operating and maintaining the FSM POPS.
[86] Hotel Employees, 311 F.3d 534 at 541, *stating that* "when electioneering or leafletting or the like has been spotted on the Plaza (i.e. without a prior request), Lincoln Center has notified security and the local police, and the participants have been told to move."

The suit arose when LCI rejected the application of a union to host a rally in Lincoln Center in which it would picket and distribute leaflets. The union informed LCI that the rally would consist of approximately 40 union members, and would take place during one evening from 4:00 p.m. to 7:30 p.m.

The court in Hotel Employees contrasted Lincoln Center from POPS that had been held by other courts to be public fora subject to the First Amendment. In Freemont Street Mall, the Court found the FSM to be a public forum in part because it functioned as a vital pedestrian corridor. In Hotel Employees, however, the Court concluded that pedestrian traffic was incidental to the Lincoln Center's primary function, and, Lincoln Center did not form part of the City's transportation grid .[87] Rather, it was a "pleasing forecourt at the center of a prominent performing arts complex," whose function was "to facilitate patrons' passage into the events taking place in the arts buildings, and symbolically to promote the cultural arts for the benefit of the community."[88]

Similar to the court's reasoning in Hotel Employees, the court in Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth. ("Chicago Acorn") held that Chicago's Navy Pier was not a public forum subject to the First Amendment.[89] Navy Pier is located in downtown Chicago. In 1989, the Illinois Legislature vested oversight of the Pier in the Metropolitan Fair and Exposition Authority ("MFEA") and appropriated $200 million for the Pier's renovation. The Pier "juts out 3,000 feet into Lake Michigan and is 400 feet at its widest point."[90] It consists of parks, meeting and exhibitions facilities, shopping venues, and even an amusement park. Just as public parks owned by the Chicago Park District are required by

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[87] Hotel Employees, 311 F.3d 534 at 550.
[88] Id. at 551-52.
[89] 150 F.3d 695 (7th Cir. Ill. 1998).
[90] Chicago Acorn, 150 F.3d 695 at 698.

ordinance to close from 2 a.m. to 6. a.m. each day of the week, so too are certain sections of the Pier.

The Chicago Acorn plaintiffs sought to engage in a variety of expressive activities, such as leafleting, petitioning, and the carrying of signs and banners, in order to promote its view of the necessity to increase the federal minimum wage standard. Plaintiffs wanted to hold their rally during the Democratic National Convention, which was to be held on the Pier.

Though MPEA is a public entity that owns the Pier, the court nonetheless held that the Pier is not a traditional public forum and, is therefore not subject to the First Amendment. The Court emphasized the Pier did not serve a traditional public function (as did the sidewalk outside of the Venetian Casino). Similar to the rationale employed by the Court in Hotel Employees, the Court in Chicago Acorn was apparently swayed that the Pier was a "discrete, outlying segment or projection of Chicago rather than a right of way."[91] Whereas the Investment Backed Expectations (IBE) of the Freemont Street Mall businesses did not trump the rights to engage in free speech activities on the FSM, the IBEs of the Pier's commercial businesses were given substantial weight.[92]

Individuals contemplating the exercise of their right to protest within a privately-owned public space should keep in mind the following: (1) find out the regulations that are applicable to a particular POPS and check to make sure they have been legally authorized; (2) research the relevant legal opinions in the jurisdiction; and (3) investigate whether there are favorable arguments that can be raised in jurisdictions where there are no applicable precedents regarding POPS.

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[91] Chicago Acorn, 150 F.3d 695 at 702. ("Rather than being part of the city's automotive, pedestrian, or bicyclists' transportation grid, the sidewalks on the pier and the service street on its north side are internal to the pier, like the sidewalks, streets, and parking lots in Disney World or McCormick Place (Chicago's major convention center, also owned by the MPEA).")
[92] See Generally, Chicago Acorn, 150 F.3d 695.

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