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COMMON LAW BASELINES AND CURRENT FREE SPEECH DOCTRINE

ERICA GOLDBERG*

ABSTRACT

Many of the current divisions in judges', scholars', and laypeople's approaches to free speech doctrine can be attributed to baseline problems. There is no neutral baseline against which to measure when the state has acted in a way that triggers constitutional scrutiny; there is no neutral baseline against which to determine which restrictions implicate speech that is covered by the First Amendment; and there is no neutral baseline against which to measure when harms caused by speech justify abridgment of that speech.

One answer to these baseline problems is to incorporate the common law as a First Amendment baseline. The common law, as it existed at the time of the ratification of the First and Fourteenth Amendments, serves as a useful and constitutionally justifiable guide for understanding when speech can be restricted due to the harms it has caused. An approach that incorporates common law baselines is justified by the text, structure, and history of the Constitution. Further, contrary to most scholars' and judges' views, incorporating common law baselines into free speech jurisprudence accords well with current doctrine and represents a compromise between different views of free speech at the Founding. Finally, importing common law baselines into our understanding of how a law should be scrutinized by free speech doctrine lends coherence to the doctrine and helps illuminate current, emerging free speech issues. Common law baselines can help define which harms to consider in our free speech calculus, can shed light on how to approach antidiscrimination laws that affect expression, and can even explain our current, contested libel jurisprudence.

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* Associate Professor of Law, University of Dayton Law School. The research and writing of this Article was primarily performed while I was a Visiting Scholar at Georgetown Law School's Center for the Constitution. I am grateful to Randy Barnett for providing me with the opportunity to serve as a Visiting Scholar and for our many substantive discussions about this idea and its implementation and to the students at Georgetown Law School. I am also thankful to Lawrence Solum and Jeffrey Schmitt.

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INTRODUCTION

FOUNDATIONAL questions about the scope of the First Amendment have divided politicians, jurists, and academics throughout the course of the Amendment's interpretation.[1] The divergence of approaches to free speech jurisprudence has, in recent years, increasingly polarized the Supreme Court, academics, and laypeople.[2] Further, the question of how best to balance free speech protections against the harms caused by speech has led to myriad proposals for limiting the breadth of the First Amendment's protections, with scholars advocating for different views about which new exceptions to First Amendment coverage courts should recognize.[3] In this Article, I offer a principled method to resolve these academic disputes based on the history of the common law.

The methods we currently use to evaluate First Amendment issues are notoriously unsatisfying. Because the text of the First Amendment requires that "speech" receive special protection, courts, politicians, and commentators have created various constructs to ensure that "the freedom of speech"[4] not be abridged. The fundamental, although controversial, distinction between speech and conduct, for example, preserves the

1. As early as the debates over the Sedition Act of 1798, members of Congress, including Framers of the Constitution, sharply disagreed over whether the First Amendment protected seditious libel. *Compare* Speech of Rep. James Otis, *in* 5 ANNALS OF CONG. 2097 (1798) (supporting Federalist theory that false speech that places the government in disrepute may be punished after it is uttered), *with* James Madison's Report on the Virginia Resolutions (1799–1800), *in* 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION . . . AND OTHER ILLUSTRATIONS OF THE CONSTITUTION 561–67 (2d ed. 1941) (arguing against the Sedition Act's constitutionality based on free speech protections and lack of federal power to enact laws prohibiting criticism of the government).

2. As an example, foundational disagreements over whether to interpret the First Amendment using an egalitarian or a libertarian approach bitterly divided the country after the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310, 365 (2010), which overturned federal campaign finance reform laws limiting expenditures on political speech. *See* Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 143–45 (2010) (discussing egalitarian and libertarian conceptions of freedom of speech that controlled dissenting and majority views in *Citizens United*). Further, in *Janus v. American Federation of State, County, and Municipal Employees Council 31*, 138 S. Ct. 2448, 2487 (2018), the dissenting judges accused the majority of undermining our democracy when the majority held that the First Amendment prohibits public sector unions from requiring that employees pay mandatory union dues to support collective bargaining. *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting) ("The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. . . . And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.").

3. *See* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 697–702 (2016) (detailing scholars' proposals to harmonize First Amendment doctrine with the regulation of violent video games, Internet speech that harms marginalized groups, and tortious speech).

4. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

specialness of speech while allowing conduct to be regulated.[5] Additionally, when speech causes particular types of harms—such as fraud or reputational harm—courts allow these harms to also be regulated either by balancing tort law with First Amendment protections or presuming that the First Amendment does not extend to the type of harm at issue.[6]

Indeed, there is an unstated spectrum that prioritizes certain harms caused by speech over other types of harms when determining the scope of First Amendment protection. Harms that affect bodily autonomy are least likely to raise First Amendment concerns, followed by harms to concrete, economic interests such as harm to reputation.[7] Harms related to privacy and, finally, emotional and dignitary interests are most likely to raise First Amendment concerns, and the regulation of these harms, when caused by speech, is least likely to survive constitutional scrutiny.[8] Many scholars find this spectrum dissatisfying or wish to add new exceptions to the First Amendment's sphere of protection.[9]

In this Article, I validate current free speech doctrine—and its spectrum of prioritizing harms in the First Amendment calculus—by using a methodology that also clarifies the jurisprudence, safeguards strong free

5. Dan M. Kahan et al., "*They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 855 (2012) ("Because the Free Speech Clause confers special protection on speech, First Amendment jurisprudence is said to 'draw vital distinctions between words and deeds, between ideas and conduct.'" (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002))). The speech–conduct distinction is unsatisfying at the margins, however, and many scholars think the distinction is a false construct. *See, e.g.*, Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 63 (1981) ("[N]one of the decisions turning on the speech-conduct distinction have articulated a convincing conceptual basis for the lines drawn.").

6. Frederick Schauer has advanced a helpful framework for articulating when certain regulations that affect speech are not invalidated by the First Amendment. In some areas, the First Amendment does not even cover the regulation at issue—even though speech is implicated. Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617–18 (2015). Examples of this lack of First Amendment "coverage" include "laws dealing with contracts, wills, trusts, gambling, warranties, and fraud [which] all involve legal regimes that specify consequences, including negative ones, for using certain words—speech—in certain ways, but routinely present no First Amendment issues whatsoever." *Id.* at 1619. In other situations, the First Amendment is applied to the regulation at issue, but the regulation still withstands constitutional scrutiny. In these cases, there is First Amendment coverage, but no First Amendment "protection." *Id.* at 1618–19. Examples of this include regulations that are upheld even though the Court applies strict or intermediate scrutiny to an area covered by the First Amendment. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (upholding prohibition on burning draft cards after applying intermediate scrutiny to the regulation of what the Supreme Court considered "expressive conduct").

7. *See infra* Part II.

8. *Id.*

9. *See* Goldberg, *supra* note 3, at 701 ("Within only the last few years, there have been calls for greater regulation of speech that causes harm in its provision of both true factual details and lies, with scholars arguing that these forms of speech are not beneficial." (footnotes omitted)).

speech protections, and illuminates the way forward. This Article advances a method for justifying and clarifying current free speech doctrine by using the common law as a baseline against which to measure potential violations to the freedom of speech.[10]

I argue that courts should treat the common law as it existed at the time of the First and Fourteenth Amendment's ratification as a baseline for determining which harms can be regulated in the face of free speech challenges. Additionally, "common law baselines"[11] can clarify when the First Amendment affords citizens negative versus positive rights, thus helping to resolve the conflict over whether the First Amendment should be viewed as primarily egalitarian or libertarian. Although the prevailing scholarly wisdom is that our current First Amendment jurisprudence has strayed quite far from the original meaning of the text or the intentions of the Framers,[12] incorporating common law baselines into our understand-

10. Baselines are set positions against which to measure losses or gains, or in this context, to measure whether the state has abridged the freedom of speech. For a fuller exposition of baseline problems in First Amendment doctrine, see *infra* Section I.A.

11. By common law, I mean judge-created law that emerged over centuries that the Framers inherited from English common law traditions. This Article takes Blackstone's *Commentaries on the Laws of England* as the primary articulation of the common law as it existed at the time of the First Amendment's ratification, but also incorporates judicial decisions, concepts of natural rights, and philosophical understandings of free speech that existed at the time of the ratification of the Fourteenth Amendment. *See infra* Part I. By common law baselines, I mean the default background legal rights and duties against which courts assess regulatory deviations to determine whether a First Amendment violation has occurred. I further explain baselines and baseline problems *infra* in Section I.A.

12. Most scholars believe modern First Amendment doctrine, with its robust speech protections extending far beyond the prohibition of prior restraints, was first developed by the Supreme Court after World War I. *See, e.g.*, David Rabbant, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 516 (1981) ("Contemporary scholars of the free speech clause of the First Amendment generally trace its modern development from the Espionage Act . . . ." (footnote omitted)); *see also* Jeremy Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1925–28 (2017) (beginning analysis of robust, judge-made, libertarian-style free speech protections in the 1930s). Leonard Levy, for example, provides a detailed history in support of the view that a civil libertarian conception of the First Amendment departs dramatically from how citizens of both England and America viewed free speech rights, and that this conception was not prevalent among lawyers or laypeople until after the ratification of the Bill of Rights. *See* LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (Harper Torchbook ed. 1963) [hereinafter LEVY, LEGACY]. Levy later revised this account, to acknowledge that free speech flourished in practice more than the doctrine or even free speech theory predicted, due in part to the limited number of actual prosecutions, but his basic account remained the same. *See* LEONARD LEVY, EMERGENCE OF A FREE PRESS ix–xii (Oxford Univ. Press 1985) [hereinafter LEVY, EMERGENCE]. Some scholars also believe that much of our modern jurisprudence has been "invented," and they claim that jurists pretend its roots are historical. *See, e.g.*, Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015) (arguing that "low-value" categories of speech, which receive little to no protection in modern First Amendment doctrine, were afforded protection at the time of the Constitution's founding). According to Professor

ing of the freedom of speech lends coherence to the doctrine and solidifies the doctrine's approach to both positive and negative First Amendment rights.

Without some baseline against which to understand First Amendment rights, the evidence of what the Framers meant by, or what the people at the time of the Founding understood "the freedom of speech" to mean, is ambiguous and scarce.[13] As an example, scholars disagree on whether the Framers intended the First Amendment to override the common law crime of seditious libel.[14] Very little debate on the meaning of "the freedom of speech" can be found either in Congress or in the state ratification conventions.[15] This is, in part, due to the fact that James Madison, who

Lakier, "[i]t 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." *Id.* The few cases that explicitly analyzed free speech issues at the Supreme Court prior to the First Amendment's incorporation into the Fourteenth Amendment's Due Process Clause in 1925 generally limited free speech protections to prohibitions on prior restraints. *See, e.g.*, Rabbant, *supra*, at 522–28 (citing, among other cases, *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)).

13. ERWIN CHEMERINSKY, THE FIRST AMENDMENT 5 (Wolters Kluwer 2019) ("There is relatively little that can be discerned as to the drafters' views other than their desire to prohibit prior restraints, such as the licensing scheme, and their rejection of the crime of seditious libel."); LEVY, LEGACY, *supra* note 12, at 4 ("We know very little, though, about the original understanding of the First Amendment's provision that 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .'" (quoting U.S. CONST. amend. I)); RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 1.2 (1996) (contending that various factors, including the Framers' thoughts being in flux and often contradicting each other, make "[d]iscerning the original meaning of the First Amendment . . . a frustrating exercise"). According to Levy, "[t]he sources, particularly for the period 1787–1791, are unfortunately almost silent on the matter under inquiry," in part because the concept of "the freedom of speech" developed as an "offshoot of freedom of the press . . . virtually . . . 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." LEVY, LEGACY, *supra* note 12, at 5. Levy's book, LEGACY OF SUPPRESSION, is an answer to the scholarship of Zechariah Chafee, who argued that the First Amendment enshrined a broad, libertarian conception of "the freedom of speech" that prohibited far more government regulation than simply prior restraints. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 18 (Oxford Univ. Press, 6th ed. 1941) ("[I]n the years before the First Amendment freedom of speech was conceived as giving a wide and genuine protection for all sorts of discussion of public matters.").

14. *Compare* LEVY, EMERGENCE, *supra* note 12, at xii ("I still aim to demolish the proposition formerly accepted in both law and history that it was the intent of the American Revolution or the Framers of the First Amendment to abolish the common law of seditious libel."), *with* CHEMERINSKY, *supra* note 13, at 4 ("There is thus little doubt that the First Amendment was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel.").

15. The main disagreement at the time was whether these Amendments should be explicitly articulated, not what they meant. *See* District of Columbia v. Heller, 554 U.S. 570, 598 (2008) ("The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.").

authored the first ten amendments, was mostly concerned with creating consensus, and states already provided free speech guarantees in their state constitutions.[16] But background conceptions of law at the time, such as the common law and natural rights systems, can help us make sense of the freedom of speech.

A common law approach to the First Amendment is supported by the text and structure of the Constitution. The combination of the First and Ninth Amendments demonstrates that common law baselines, in conjunction with an understanding of natural rights that existed at the Founding, should set the baselines for our interpretation of "the freedom of speech." The Ninth Amendment requires that background rights not be disparaged by the existence of enumerated rights. These rights allude to a system of common law duties and natural rights that formed the cultural and intellectual lenses through which Americans understood their rights. Most Americans at the time of the ratification of the Bill of Rights were steeped in an understanding of the common law, especially as articulated in William Blackstone's widely read *Commentaries on the Laws of England*, and natural rights were the predominant philosophy by which Americans understood their rights and the obligations of a government.[17] Incorporating common law baselines, as modified by natural rights, into free speech jurisprudence better aligns our current doctrine with the original meaning of "the freedom of speech."

In addition to being justified by the text of the Constitution and the historical context in which it was written, an approach that explicitly recognizes common law baselines is normatively desirable. For one, many aspects of our current doctrine, including its protection of speech rights over most dignitary interests and its allocation of positive and negative rights, already harmonizes with the common law as it existed at the time of the Bill of Rights' ratification. Our current doctrine is actually a neat compromise between competing views of the First Amendment's original

16. The Federalists, for example, initially did not want a bill of rights included because they deemed it "unnecessary" and even "dangerous"; enumerating rights like the freedom of speech might lead some to infer either (1) that the federal government had the power to regulate speech in the first place, or (2) that only enumerated rights were retained by the people. *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton) ("Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power."). Much of the original ratification debates about freedom of the press, for example, centered on whether it needed to be enumerated at all. *See, e.g.*, RATIFICATION OF THE CONSTITUTION BY THE STATES: DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT 490 (Merrill Jensen ed. 1978), http://digicoll.library.wisc.edu/cgi-bin/History/History-idx ?type=turn&entity=history.DHRCv3.p0494&id=history.DHRCv3&isize=M [https://perma.cc/85Z2-Q7VM] (arguing that there is no need to include liberty of the press or conscience in the Constitution because "it is enough that Congress have no power to prohibit either").

17. *See infra* Part II.

meaning. In addition, incorporation of common law baselines into First Amendment doctrine will also lend greater clarity, coherence, and neutrality to First Amendment jurisprudence and will help judges understand which harms should be accounted for in free speech doctrine.

Discussions of the common law are often used in originalist methodologies,[18] and some even assume common law has relevance to the original meaning of the First Amendment. But legal scholarship has not yet fully systematized how and why the common law should be incorporated into the First Amendment and how it can be useful to retain and clarify its meaning. Further, Justices and scholars who have discussed common law baselines often do so to demonstrate why courts should constrict First Amendment freedoms,[19] or to argue that modern courts have rejected a common law understanding of the First Amendment.[20] In contrast, I believe understanding how common law baselines and the original conception of natural rights were understood at the time of the Founding can justify our current set of expansive First Amendment freedoms. A common law approach does not necessarily mean that only prior restraints on

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18. Judges using methodologies consistent with originalism look to the common law to understand a variety of constitutional provisions. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting) (citing to common law to support claim that the Fourth Amendment protects property, not privacy); Florida v. Jardines, 569 U.S. 1, 6–7 (2013) (Scalia, J.) (citing Blackstone for the definition of "curtilage," the area surrounding the home that is considered part of the home for Fourth Amendment purposes); *Heller*, 554 U.S. at 627 (using Blackstone to support holding that the Second Amendment, while protecting an individual right to keep and carry guns, allows the states to restrict guns that are not in common use). Justice Scalia's opinion in *Heller* cited to Blackstone to demonstrate the historical limitation on "dangerous and unusual weapons," which supported *Heller*'s holding that weapons not "in common use at the time" can be restricted. *Heller*, 554 U.S. at 627. Of course, Justice Scalia did not mean to restrict Second Amendment freedoms to guns in common use at the time of the Founding, but instead safeguarded guns in common use at any given time. *Id.* at 627–29. Justice Scalia thus fixed the meaning of the Second Amendment to guns in common use but allowed "common use" to remain a more abstract term, defining a category of gun with respect to its relationship to the citizenry instead of limiting specific types of guns. In this Article, I fix the common law duties as they existed at the time of the framing, because the common law is already a set of abstract rights and duties without specific factual content. Abstracting any further away and letting the common law evolve as a baseline would render our First Amendment rights dependent not on changing factual circumstances, but on changing government exercises of power. *See infra* Section I.C.

19. Justice Thomas, for example, has suggested that the Supreme Court revisit the broad First Amendment protections against the state tort of libel by examining the common law as it existed at the time of the ratification of the First and Fourteenth Amendments. *See* McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari); *see also* Rabbant, *supra* note 12, at 539–40 (demonstrating how the Supreme Court, in early free speech cases, used the common law as a way to regulate harms injurious to the public welfare).

20. *Cf.* SMOLLA & NIMMER, *supra* note 13, at § 1.5 (showing courts' usage of the Blackstone to limit free speech rights to rights against prior restraint).

speech are forbidden.[21] Looking to common law baselines can take us far in explaining our current set of First Amendment doctrines and practices.

Because using common law baselines can create coherent First Amendment doctrine and accords with precedent, this approach is normatively desirable regardless of one's theory of constitutional interpretation. This Article should appeal to originalists from a variety of disciplines within originalism, but one does not have to be an originalist to accept my proposal.[22] Thinking through the relationship of common law to free speech helps us understand why certain harms override free speech protections and others do not; thus, thinking about the First Amendment's interactions with common law baselines will help make sense of the doctrine for non-originalists as well.

In Part I of this Article, I first explain the major First Amendment baseline problems. I discuss how disputes over baselines concerning the state action doctrine and our understanding of which speech harms can be regulated have contributed to some of the greatest divisions in understanding free speech doctrine. In Part II, I argue that common law baselines, as modified by natural rights, should be incorporated into First Amendment jurisprudence. I first use the structure of the Constitution to

21. The common law relating to prior restraints is likely more relevant to the First Amendment's articulation of freedom of the press than its provision for freedom of speech. *See* Adam Griffin, *First Amendment Originalism: An Original Law and Theory of Legal Change as Applied to the Freedom of Speech and of the Press*, 17 FIRST AMEND. L. REV. 91, 93, 94 (2019) (distinguishing freedom of speech, which "springs from the Framers' conception of the natural rights of speaking, *writing, and publishing*," from freedom of the press, a positive right "derived from the common law, which carries with it certain established customary legal rules about what government can and cannot do in regards to regulating the press"); *see also infra* Section III.A.

22. My proposal would especially appeal to "original public meaning" originalists because I demonstrate that the common law was understood by ordinary Americans to set a baseline for understanding our legal rights. Randy Barnett, a leading theorist of original public meaning originalism, describes the original meaning of text as the meaning "that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment." Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999). My proposal also fits within the broader category of "new originalism" because I will distinguish between interpretation and construction. *See infra* Part III. Larry Solum, a pioneer of the distinction between interpretation and construction, describes all new originalists, whether they focus on original public meaning of the text or the Framers' original intent, as converging on the views that (1) the text has a fixed meaning that should (2) constrain judges, and (3) that constitutional interpretation, which determines the meaning of a text, is different than constitutional construction, the act of giving that meaning legal force via doctrine or legal opinion. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–57 (2013). Many schools of originalism, including those that focus on Framers' intent and those that focus on the methods the Framers used to interpret the Constitution, will find my analysis supported by their theories. For a more comprehensive summary of the different schools of originalism and the trajectory of the development of originalist theory, see LEE J. STRANG, ORIGINALISM'S PROMISE 9–42 (2019).

argue for the incorporation of common law baselines. I then explore why Founding-era understandings of natural rights should inform our understanding of these baselines, and why the ratification of the Fourteenth Amendment should not greatly modify our sense of common law baselines.

Finally, in Part III, I demonstrate how modern First Amendment jurisprudence is compatible with the original understanding of "the freedom of speech" as incorporating the common law and natural rights. I contend that both our understanding of the treatment of harms and our analysis of when free speech doctrine provides positive versus negative rights is consistent with incorporating common law baselines into our understanding of the First Amendment. I also discuss areas where, at first blush, current free speech doctrine appears inconsistent with doctrine based on common law baselines, and I argue that these apparent inconsistencies can be reconciled. I close with a discussion of what my approach means for current, contested free speech issues, including how antidiscrimination harms should be treated when they affect free speech rights, and how courts should conceptualize harms-balancing more generally.

I. THE FIRST AMENDMENT'S BASELINE PROBLEM

Baseline problems are common in many areas of the law.[23] A baseline problem exists when there is no definitive, default position against which to measure deviations, creating difficulty determining when particular actions are legally problematic.[24] Another way of articulating this problem is that there is no "neutral" position from which to measure harms or gains, so an action can be construed as either the denial of a benefit or an imposition of a penalty.[25] For example, in the Establishment Clause context, there is no set baseline for the degree to which religion is constitutionally acceptable in public life. As a result, if the baseline is considered to be one of the complete absence of endorsement of religion by

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23. Baseline problems pervade legal analysis in areas as wide ranging as copyright infringement, civil rights claims, and income taxation of employee benefits. *See, e.g.*, Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 WASH. U. L. REV. 681, 686 (2016); Herman H. Johnson, Jr., *Disambiguating the Disparate Impact Claim*, 22 TEMP. POL. & CIV. RTS. L. REV. 433, 446 (2013); Note, *Federal Income Taxation of Employee Fringe Benefits*, 89 HARV. L. REV. 1141, 1147–48 (1976).

24. *See, e.g.*, Hickey, *supra* note 23 (analyzing baseline debacle in context of infringement, and stating courts struggle over whether to use original copyrightable work as baseline or alleged infringer's work).

25. According to Emily Sherwin and Maimon Schwarzschild, the baseline problem exists because

> [g]ains and losses must be defined in reference to some state of affairs that serves as a neutral, or "baseline," position. Only with the aid of this baseline can we describe some events as harms and some as benefits. Thus if A is legally entitled to an object, B's use of it is a benefit to B. If B is entitled to the object, A's withholding it is a harm to B.

Emily Sherwin & Maimon Schwarzschild, *Epstein and Levmore: Objections from the Right*, 67 S. CAL. L. REV. 1451, 1452–53 (1995).

the government, a city's display of a picture of the Ten Commandments in a courthouse would be viewed as benefitting religion, perhaps violating the Establishment Clause.[26] Alternatively, if some amount of religiosity may be recognized by the state as a neutral baseline, erecting a Ten Commandments statue might not be an Establishment Clause problem,[27] and forcing the state to remove the monument evidences hostility towards religion. People can view a court's decision to remove religious monuments as either creating a harm to religion or simply eliminating an impermissible benefit to religion.

In the free speech context, baseline problems are responsible for a good deal of the divide in individuals' approaches to the scope of free speech rights. This Part explores how the baseline problems involving the state action doctrine and the regulation of harms caused by speech contribute to our discord in interpreting the First Amendment.

A. *State Action Baselines*

A fundamental divide exists between those who wish the First Amendment to be more egalitarian and those who wish the First Amendment to be more libertarian.[28] This divide often reduces to a discussion about baselines involving when the state can and should act with respect to free speech rights. Free speech libertarians maintain that any state intervention to affect the marketplace of ideas is a First Amendment concern; the First Amendment's state action component proscribes *government* abridgement of speech that necessitates an omission/commission distinction preventing government action.[29] Those with a more egalitarian approach to free speech doctrine believe the government has a role to play in equalizing speech opportunities, such that the government can and should intervene to protect private parties from abridging each other's speech, and, in doing so, may affect the marketplace of ideas.[30]

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26. *See* McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.").

27. *Id.* at 886–89 (Scalia, J., dissenting) (arguing that the history and practice of our nation demonstrate that the government need not remain neutral with respect to religion over non-religion).

28. *See* Sullivan, *supra* note 2.

29. For a discussion of these differences and how they affect partisan divisions, see Goldberg, *supra* note 3.

30. Government regulation of social media platforms is an area currently targeted by many scholars, but they must contend with our currently libertarian understanding of free speech. *See, e.g.*, Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1366 (2018) ("To enforce the First Amendment against online platforms, the courts would have to relax the state action doctrine as applied to speech—or at least speech occurring on privately owned online platforms. Such a transformation in the law is not completely unthinkable, but it is

Some with the egalitarian approach believe that the "state action doctrine," which limits constitutional scrutiny to government intervention, is an unworkable and undesirable legal fiction because the government has already "acted" to protect property, contract, and other common law rights—and these alter the distribution of speech opportunities.[31] Thus, there is not a neutral baseline against which the government acts when it restricts speech. When the government protects property rights, the argument goes, the wealthy and privileged have more opportunities for speaking, and thus the government is acting to influence speech opportunities. Many who wish free speech doctrine to be more egalitarian would undo the fundamental omission/commission, state action distinction that currently pervades First Amendment jurisprudence, rendering most government action that targets speech, especially based on content, impermissible. Egalitarian free speech supporters also wish to see some affirmative obligations placed on government—or at least constitutionally permitted—to equalize speaking opportunities.[32]

Indeed, many legal realists argue that common law baselines should have been discarded with the repudiation of the anti-canonical *Lochner v. New York*.[33] They believe that legal baselines, and especially common law baselines, are not natural or pre-political, but instead are rights and duties defined and provided by government. As such, the distribution of wealth, property, and opportunities, including opportunities for speech, that occurs as a result of the enforcement of common law rights and duties can and should be altered without assuming some deviation from the common law baseline.[34] Cass Sunstein, for example, argues against the remnants of

nearly so, and it is hard to imagine it occurring at any point in the foreseeable future.").

31. According to Professors Gary Peller and Mark Tusnet, who criticize the analytic incoherence of the state action doctrine,

> application of the state action doctrine to the identification of burdens on free speech assumes that free speech opportunities exist in the social field to such a degree that one can conclude that democratic self-governance exists, as long as the legislature has not "affirmatively" acted to restrict such opportunities—but merely "tolerates" restrictions that arise from the background rules of property and contract.

Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 794 (2004).

32. For a thorough and provocative discussion of the problems with a formalistic approach to the First Amendment and the state action doctrine, see Jack Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 39 DUKE L.J. 375 (1990).

33. *See* Peller & Tusnet, *supra* note 31, at 794 "(finding "[i]n its evaluation of free speech . . . the judiciary limits itself to a *Lochnerian* concept that people have free speech liberty unless the state has burdened free speech through affirmative governmental acts. The effects of background entitlements on the exercise of free speech rights are immunized from constitutional challenge," alluding to *Lochner v. New York,* 198 U.S. 45 (1905) invalidating maximum hours law for bakers on economic substantive due proves grounds).

34. According to Mila Sohini, prominent politicians, including Senator Elizabeth Warren and President Barack Obama, have questioned the sentiment that we

Lochner that still exist in today's legal doctrine, particularly the idea that "[g]overnmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements."[35]

However problematic, baselines are necessary for giving meaning to the protections the First Amendment affords to "the freedom of speech" mentioned in the First Amendment. Baselines are necessary for applying the state action doctrine, or, in the absence of a state action doctrine, for determining when our free speech rights have been violated. Perhaps the state action doctrine's problem—that the state has always acted to some degree in every aspect of our interactions—is solved by simply claiming that the First Amendment is implicated *only* when the state intervenes with respect to speech. This approach, which is the approach of our current constitutional doctrine, however, does not satisfy those who wish to undo the state action doctrine entirely. Using this approach (where the First Amendment is implicated only when a state intervenes) does not allow the government to intervene in the marketplace of ideas to protect or redistribute free speech rights. It also prevents the government from remedying the effects of the state's creation and enforcement of background rights in property, tort, and contract—i.e., common law rights and duties.

Despite its problems, preserving the state action doctrine is critical to protecting the coherence of First Amendment doctrine. Without it, private individuals would also be required to honor the dictates of the Free Speech Clause. But forcing private individuals to respect the free speech rights of others infringes on the speech and associational rights of those private individuals. If Person A wants to have a newspaper that advances Green Party ideals, Person A should be able to discriminate on the basis of viewpoint in the selection of op-eds without violating the First Amendment. If a Giants fan asks a Patriots fan to leave the Giants fan's home because of the Patriots fan's support of the New England football franchise, the government must honor the Giants fan's property rights (that abridge the Patriots fan's speech) without violating the First Amendment, or the Giants Fan's speech and associational rights will be compromised. Thus, we cannot do away with the state action doctrine entirely.

are not responsible for each other, and that successful individuals have achieved their lots without government assistance or intervention, but the Trump administration aimed to revise ideas about neutrality and common law baselines. *See* Mila Sohini, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323 (2019) ("That individuals should be left alone to pursue their private interests; that an unregulated market is both neutral and natural; that people should be responsible for their own fates rather than reliant on the state to protect them from their shortcomings or their free choices; that redistributive measures are suspect because they take away what people have earned fair and square . . . these are all ideas that continue to possess an immense amount of intuitive appeal and political clout.").

35. Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

The First Amendment must apply only to state actors, and we must find some way to determine when the government cannot, can, or must act without violating the First Amendment. We need a coherent baseline for determining when the state has acted that also resolves whether the state can sometimes act to protect private parties from each other. The common law can provide this baseline, against which to apply the state action doctrine, and can create some affirmative obligations for the state.[36]

B. *Harm Baselines*

In order to preserve the specialness of the freedom of speech and distinguish it from conduct, speech must be distinguished from conduct and cannot be restricted every time it causes harm. However, courts also cannot entirely ignore the harms caused by speech and invalidate all restrictions on expression, no matter how harmful the speech. Many scholars propose balancing the harms caused by particular speech against its virtues, but this approach—if applied across the board—would lend increased unpredictability to free speech doctrine and lead to the chilling effect of self-censorship. Creating baselines around which tortious harms can be regulated without interfering with the freedom of speech can help resolve many current free speech debates.

Courts have solved this problem by applying a largely categorical approach to the First Amendment but building in a certain amount of harms-balancing when the speech causes tortious harm. Even this harms-balancing prioritizes some categories of harms that conflict with free speech rights. In other words, certain types of harms are categorically more or less regulable when the regulation of these harms interferes with speech. Where speech creates tortious harm, the Supreme Court has also crafted doctrines that reflect a desire to protect speech more when the speech is in "the public interest"[37] or when the speaker suing is a "public figure."[38] The end result is a spectrum that safeguards some speech harms against regulation whereas others can be more easily regulated.

At one extreme, when speech causes purely emotional injury, if the speech involves a matter of public concern, a plaintiff cannot recover, no matter how "outrageous" the injury.[39] Similarly, when speech implicates

36. *See infra* Part III.

37. The First Amendment protections that intersect with both defamation law and the tort of intentional infliction of emotional distress use this standard.

38. In defamation law, the Supreme Court has created a system where public figures must meet a higher bar before they can sue for injury to their reputations. This reflects the idea that public figures have thrust themselves into the public eye and can more easily resort to self-help methods of remedying false speech with true speech and thus should not use the more censorious method of litigation to preserve their reputations. *See* Wolston v. Reader's Digest, 443 U.S. 157, 164 (1979).

39. *See* Snyder v. Phelps, 562 U.S. 443 (2011) (overturning civil damages award for intentional infliction of emotional distress against religious group that protests at the military funeral of plaintiff's son). The Supreme Court has not yet

privacy concerns, a plaintiff cannot recover if the speech was newsworthy,[40] even if the speech was originally illegally obtained (but innocently published by the newspaper).[41] For false speech that impacts reputational concerns, however, a plaintiff who is a public figure can recover by showing "actual malice."[42] As a result, reputation is protected more than other types of dignitary concerns. And, at the other end of the spectrum of regulable speech, speech that threatens bodily injury is categorically unprotected by the First Amendment.[43]

Although some amount of balancing of harms in First Amendment jurisprudence is inevitable, a mostly categorical approach that limits both harms-balancing and the number of newly created unprotected categories is the best way to facilitate the predictability required to promote a broad array of robust speech rights.[44] I have previously established a framework for approaching free speech cases that limits the unpredictability of harms-balancing by arguing that only the harms caused by speech resembling "conduct-type harms" should be accounted for whenever harms-balancing is performed in free speech jurisprudence.[45] By regulating only the conduct-type harms caused by speech, courts can safeguard what makes speech special while preventing compensation of certain harms caused by speech.[46] Under this approach, "revenge pornography" can be regulated even in cases where the publisher has acquired the pornography

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resolved whether plaintiffs suing for speech on a purely private matter may recover for intentional infliction of emotional distress.

40. *See* Fla. Star v. B.J.F., 491 U.S. 524, 533–34 (1989) (holding that newspaper who read rape victim's name off a police report cannot be sued for publishing the name, despite victim's privacy concerns).

41. *See* Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) ("[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance."). *Bartnicki* held that a radio's broadcasting of an illegally intercepted phone call was protected by the First Amendment. *Id.* at 535.

42. The actual malice standard requires a public figure plaintiff to demonstrate that defendant's defamatory publication was intentionally false or published with reckless disregard for the truth. N.Y. Times v. Sullivan, 376 U.S. 254, 280–81 (1964). A private figure plaintiff must demonstrate at least negligence with respect to the truth. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

43. Virginia v. Black, 538 U.S. 343, 359 (2003) (holding that states may ban "true threats," which "encompass those 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").

44. *See* Goldberg, *supra* note 3, at 721–22.

45. *Id.* at 721 ("Courts should engage in balancing speech harms against the benefits of speech only where those harms are analogous to harms that flow from conduct, based on the properties that distinguish classic instances of speech (such as political satire or protest) from paradigmatic cases of conduct (such as battery or theft).").

46. *Id.* at 695 ("[I]nstead of subjecting all speech to consequentialist balancing, courts should allow a weighing of costs and benefits only of the harms more similar to conduct than classic speech. Because of our constitutional and cultural commitment to free speech, speech should be defined in a way that preserves its specialness, and some harms caused by speech simply cannot be remedied.").

legally, but only in cases where the harms of publication are closely analogous to a conduct harm—breach of contract.[47] This would be the case if there was an explicit or implied promise that sexually explicit content would not be shared with others. In cases where the harms from speech are emblematic of classic speech harms—such as where the harm is context-dependent, the listener's harm can be mediated almost entirely through the listener's own mind, and the harms are intertwined with the benefits of the speech—those harms cannot be addressed through regulation.[48]

This proposal, however, begs the question of why certain harms (such as breach of contract) are considered conduct-type harms, even when caused by speech, such that their regulation can be harmonized with protecting speech. This presents a baseline problem because, under my proposal, the state may prevent the harms that are not speech-like, but we still must define conduct-type harms to create a neutral baseline. This baseline problem, created by tension between the inevitability of harms-balancing and the necessity of preserving the specialness of speech, requires establishing why certain types of harms lead to an absence of First Amendment coverage or decreased First Amendment protection.[49] The common law torts can solve this problem; the common law has formed a type of baseline against which to measure whether the First Amendment is implicated, but this baseline and its organization of harms must be justified.

In the next Part, I will argue that the Ninth Amendment provides a way to solve the First Amendment's baseline problems by incorporating the common law, modified by an understanding of natural rights, as a baseline for determining when state action abridges the freedom of speech and how the First Amendment should interact with the harms caused by speech. Although some argue that *Lochner*'s repudiation should mean that common law baselines should be less prevalent in free speech doctrine,[50] common law baselines are justified by the Constitution's text and structure.

II. THE HISTORICAL AND TEXTUAL CASES FOR COMMON LAW BASELINES

Arguments based on the history, text, and structure of the Constitution support a fairly comprehensive incorporation of the common law as a baseline for determining the structure of free speech rights. This Part demonstrates why the common law as it existed at the time of the ratification of the First Amendment, in conjunction with an understanding of natural rights principles, can solve the baseline problems that yield diver-

47. *Id.* at 743–49.

48. *See id.* at 722–23.

49. *See* Schauer, *supra* note 6 (addressing the distinction between coverage and protection).

50. *See* Sunstein, *supra* note 35, at 914–15 (noting where "Lochner-like premises in first amendment doctrine" have led to incorrect or unjust outcomes).

gent and divisive approaches to the First Amendment. This Part also notes why the Fourteenth Amendment should generally not change the way we incorporate common law baselines and natural rights into First Amendment doctrine.

A. *The Common Law Understanding of Rights*

The Framers understood our rights as "[d]escending from natural rights philosophy and stemming from the common law tradition."[51] To some extent, the common law defined the scope of natural rights. Because both the common law and ideas about natural rights formed the intellectual backdrop against which the Framers created the Constitution, their interaction contributes to a thorough understanding of the First Amendment. The Ninth Amendment's guidance suggests that the interaction of the common law and natural rights should be considered when interpreting the First Amendment.

The reference point for the common law as a First Amendment baseline should be fixed at the time it existed at the First Amendment's ratification—later incorporated into the Fourteenth Amendment, in order to provide the appropriate baseline for interpreting the original meaning of "the freedom of speech." Although the common law has never been unitary,[52] it had many commonalities across the colonies and with England at the time of the First Amendment's ratification. Further, although one virtue of the common law is that it evolves to fit institutions,[53] adapting constitutional meaning as the common law evolves would leave our fundamental free speech rights vulnerable to constant judicial re-examination, erosion, and manipulation. Instead, the common law as of the Founding provides a useful baseline floor for understanding our free speech rights, whether one takes an original understanding of the First Amendment or whether one believes constitutional meaning can evolve over time.

As noted above, the original meaning of "the freedom of speech" is murky, in part because "Americans . . . rarely ever used the term."[54] How-

51. Griffin, *supra* note 21, at 101.

52. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556 (2007) ("Even when viewed with the originalist's spotlight on specific doctrines, the common law was far from a unified field at the time of the Founding, nor was it so conceived, as both the writings of the Founders themselves and contemporaneous legal commentary demonstrate.").

53. Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 382 (2006) ("As for change, the common law, while an identifiable body of customs and rules, was not a static body of customs and rules. New customs developed to meet new situations. In keeping with this principle, James Kent explained that while settlers had taken the English common law with them to America, it was retained only 'so far as it was adapted to our institutions and circumstances.'" (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *343 (O.W. Holmes, Jr. ed., Boston, Little, Brown & Co. 12th ed. 1873) (1826))).

54. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 251 (2017).

ever, this Section demonstrates that there is clear evidence that Americans accepted the common law as a framework for understanding the law and that the Framers were steeped in a natural rights tradition. When looking to import common law baselines into understandings of the freedom of speech, the most comprehensive articulation of the common law as it existed at the time of the Founding is Blackstone's *Commentaries*, in addition to early courts' common law decisions.

Some argue that the First Amendment was intended to override the common law as articulated by Blackstone, especially the proposition that freedom of the press consists solely in laying no previous restraints on the press and that seditious libel may be criminalized. Debates over the Alien and Sedition Act support both sides of this proposition.[55] Instead of incorporating or abandoning the common law wholesale, therefore, this Section contends that Blackstone's articulation of the common law should be qualified, to some degree, by the natural rights framework as understood by the Framers and ordinary Americans. The distinction between freedom of speech and freedom of the press, both of which were articulated in the First Amendment, further underscores the idea that natural rights to freedom of speech added more liberties to the common law understanding of freedom of the press.

1. *Blackstone Sets the Common Law Standard*

Most Americans, at the time of the ratification of the First Amendment, "viewed their rights as based on traditional English law."[56] Although there are several authoritative sources on the common law as it existed at the time of the First Amendment's drafting and ratification, Blackstone's four volumes of *Commentaries*, the first edition of which was published between 1765 and 1769, provides a primary resource for understanding the common law rights and duties as understood by the Framers and ordinary Americans.

Blackstone's *Commentaries* articulated the rights and duties of British citizens and provided a particular approach to adjudicating those rights and duties. Each book covers a particular subject. Book One covers the rights of persons; Book Two explores property and title; Books Three and Four discuss private and public wrongs, respectively, or ways to infringe the rights outlined in the first two books, as against an individual (private wrongs) and as against the community (public wrongs, or crimes).

Blackstone's *Commentaries* were very popular in the colonies, perhaps more popular than in England.[57] They were readily accessible and could be understood by intelligent laymen.[58] "Partly because the Commentaries

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55. *See supra* Introduction.

56. Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 200 (2010).

57. *Id.* at 202.

58. *Id.* at 201–02.

were more accessible to Americans than were other published sources of law, '[a]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's *Commentaries*].'"[59]

Blackstone's exposition of the common law was not without its detractors. Blackstone himself disputed the notion that the colonists had rights granted by the common law[60] and believed in the doctrine of "parliamentary supremacy" over common law rights.[61] However, the colonists believed they were due the rights provided by the common law as articulated by Blackstone.[62] Perhaps because a more diverse variety of legal sources were available in England than in America, "[i]t would be hard to exaggerate the degree of esteem in which . . . the *Commentaries* were held" in America.[63]

As demonstrated later, the interaction of the Ninth Amendment and the First Amendment counsels in favor of using the common law as a baseline for resolving difficult First Amendment questions. However, importing Blackstone as the primary source of the common law wholesale into the First Amendment is a controversial—and ultimately too simplistic—exercise. For one, many believe that the First Amendment was intended to supersede the common law as articulated by Blackstone, especially the views that freedom of the press prohibits only prior restraints, and that truth is not a defense to criminal libel.[64]

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59. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (alterations in original) (quoting ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984)).

60. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *108; *see also id.* at *107 ("But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country." (footnote omitted)).

61. Parliamentary supremacy, which would recognize parliamentary authority over the common law, was an ascendant doctrine in England at the time of the framing, and Blackstone's *Commentaries* attempted to recognize this doctrine while elevating a common law system. *See* Jackson, *supra* note 56, at 203–04.

62. *See id.* at 205 ("[I]t is imperative to look at what source gave the public its ideas of rights. At the time of the framing, those 'other' rights [referenced in the Ninth Amendment] were the rights that the people thought they possessed at common law, and their ideas about the common law came from Blackstone. If what we are searching for is the original common meaning of unenumerated rights, then Blackstone is the place to start.").

63. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 23 (1991).

64. According to Blackstone,

> [i]n a civil action, we may remember, a libel must appear to be false as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation . . . therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace is the

According to Blackstone, freedom of the press consisted solely in laying no previous restraints on publication.[65] Anyone who published statements tending to breach the peace because of their defamatory nature could be called to account for those statements. Truth was a defense to civil libel, but not criminal libel, because truthful statements had an even greater tendency to cause a breach of the peace than false statements.[66] Freedom of thought or inquiry also was not stifled by punishing speech after the fact, because "liberty of private sentiment is still left; the disseminating, or making public of bad sentiments, destructive of the ends of society, is the crime which society corrects."[67]

The Framers tended to have a more expansive view of speech rights than Blackstone's articulation of freedom of the press. Even the Sedition Act,[68] which James Madison, drafter of the First Amendment, still argued was unconstitutional (in part as a violation of free speech), allowed truth as a defense to criminal libel. The Sedition Act criminalized false statements that were injurious to the reputation of the government,[69] but, contrary to Blackstone's articulation of freedom of the press, allowed for truth as a defense.[70] Many early American politicians believed the First Amendment was entirely intended to do away with even "false" seditious libel and rejected the idea that a government could be defamed.

Thus, although early Americans understood their rights to be emanating from the common law system that existed in England, there is reason to believe that the common law should not be incorporated wholesale as a way to understand the First Amendment. If criminal libel laws were intended to protect the monarchy, for example, these laws would not be as important in a democracy, where unrestricted access to information would

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> whole that the law considers. And, therefore, in such prosecutions the only points to be inquired into are, first, the making or publishing of the book or writing, and secondly, whether the matter be criminal . . . .

3 WILLIAM BLACKSTONE, COMMENTARIES *150–51.

65. Blackstone wrote that,

> [t]he 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. 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 consequence of his own temerity.

Id. at *151–52.

66. Indeed, a common maxim at the time was "the greater the truth, the greater the libel," which was attributed to the English judge Lord Mansfield. *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 44 (1904).

67. 4 WILLIAM BLACKSTONE, COMMENTARIES *152.

68. Ch. 74, 1 Stat. 596 (1798).

69. *Id.*

70. The Sedition Act prohibited "any false, scandalous and malicious writing" against the government or its officials. *Id.*

be essential to self-government.[71] Further, the conception of natural rights at the time of the ratification complicated importing the common law in its entirety into the First Amendment, especially considering the textually distinct protections for freedom of speech and freedom of the press.[72] A fuller appreciation of these natural rights is necessary to the endeavor of determining which aspects of the common law should be used as a First Amendment baseline, and how to understand both freedom of the press and freedom of speech.

2. *Natural Rights Enrich the Common Law Approach*

In some ways, the common law was directly contradicted by the natural rights understanding that existed among "elites"[73] at the Founding, but, in other ways, natural rights and the common law existed in harmony. Some at the Founding believed that the common law articulated the "positive law"[74] scope of our natural rights, or was a mechanism for enforcing our natural rights, while others believed that the common law was subordinate to our natural rights.[75] Examining the natural rights paradigm enriches and complicates our understanding of how the common law should be used as a baseline to develop free speech doctrine.

In social compact theory,[76] natural rights are those that exist even in the state of nature, prior to the organization of government.[77] A government is not necessary to provide a natural right to bodily autonomy, for

71. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 23 (2000).

72. Although the conventional view, and the approach taken by the Supreme Court, is that freedom of speech and freedom of the press are redundant concepts, some scholars have advanced the position that freedom of speech either arose from the legislative privilege of speech and debate or did not truly exist as an independent concept at the time of the First Amendment's ratification. *See* Campbell, *supra* note 54, at 249–50 nn.1–9 (citing sources). If freedom of speech is an independent concept, it would augment notions of freedom of the press, supplying more freedoms.

73. Founding-era elites had a thorough understanding of natural rights, *id.* at 252, 261, although it is unclear if members of the ordinary public did. In contrast, Blackstone was read by intelligent laypeople, which may have included more ordinary Americans, but likely not those who were uneducated.

74. Positive law is law that has been enacted by those with authority to do so and includes statutes and judicial exposition of the common law. *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1860–61 (2006). This is distinct from the concept of positive liberties versus negative liberties. *See infra* note 131.

75. Campbell, *supra* note 54, at 290–93 ("Not surprisingly, then, forceful disagreements emerged about the extent to which the common law defined the scope of natural rights.").

76. Social compact theory is the view that individuals, when forming a government, agree to give up some freedoms in order to benefit the common good, and "[t]he social compact's objects are therefore to protect, order, and facilitate the right ordering of human freedom." Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 887.

77. James Madison categorized rights as follows,

example, or a right to conscience. Speaking, writing, and publishing were considered natural rights.[78] Positive rights,[79] by contrast, were those necessarily created by government, such as the right to habeas corpus, and were "primarily contained in the principles, precepts, and precedents of the common law," which also codified some of the natural rights.[80] Positive rights secured liberties, and natural rights defined their contours.[81]

The right to "free presses," according to Thomas Jefferson when discussing the constitutional amendments, was placed in a category alongside habeas corpus and the right to trial by jury as one of the "certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right."[82] Jefferson thus likely considered freedom of the press as a "positive right,"[83] distinct from the natural right of speaking, writing, and publishing.[84]

Freedom of the press may have been inserted into the First Amendment as a way of securing other natural rights, such as freedom of conscience and freedom of speech.[85] Indeed, preventing prior restraints such as licensing meant that speech would be punished, if at all, after the fact. As a result, juries had the power to (and did) nullify libel laws and acquit defendants, even if the truth was not technically a defense to criminal libel under the common law.[86]

> [o]f rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; . . . and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.

Griffin, *supra* note 21, at 101–02, 101 n.46 (alterations in original) (internal quotation marks omitted) (citing Federal Farmer No. 6 (Dec. 25, 1787), *in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 979, 983–84 (John P. Kaminski et al. eds., 2004)).

78. Campbell, *supra* note 54, at 253.

79. This usage of positive right is slightly different than the usage of positive liberty as contrasted to negative liberty, *see infra* note 133, although both positive rights must be provided by the government.

80. Griffin, *supra* note 21, at 104.

81. *Id.*

82. Letter from Thomas Jefferson to Noah Webster, Jr. (Dec. 4, 1790), *in* 18 THE PAPERS OF THOMAS JEFFERSON 131, 132 (Julian P. Boyd ed. 1971).

83. *But see* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 908–11 (1993) (classifying freedom of the press as a natural right).

84. Not all Founders considered freedom of the press to be a positive right instead of a natural right. *See* Campbell, *supra* note 54, at 288–90.

85. Letter from Thomas Jefferson to Noah Webster, Jr., *supra* note 82. Jefferson believed freedom of conscience to be part of the "certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly incroaching on, if submitted to them." *Id.*

86. The famous Zenger trial is an example of this. *See* CURTIS, *supra* note 71, at 41. John Peter Zenger was imprisoned for seditious libel for statements made criticizing William Morris, the Governor of New York. Zenger's lawyer argued that truth should be a defense to libel, and although the court did not accept this as a

By this account, the natural right of freedom of speech would supplement the positive right of freedom of the press. Freedom of speech could therefore be much more expansive than freedom of the press—which may have been limited to the notion that prior restraints were prohibited.

However, even states that provided separately for freedom of speech and freedom of the press allowed speech to be punished after the fact if it was "abusive." For example, the Pennsylvania Constitution of 1776 separated freedom of speech and freedom of the press,[87] yet Pennsylvania courts articulated publishing freedoms as being somewhat consistent mainly with freedoms against prior restraints, holding that "every citizen may freely speak write and print on every subject, being responsible for the abuse of that liberty."[88] Understanding when speech constitutes "the abuse of that liberty," then, is important. The natural right to freedom of speech can help clarify how much the constitutional right to "the freedom of speech" adds to the restrictions on prior restraints—and the notion that juries should assess harmful speech, not licensors—contained in the freedom of the press. What this natural right entails will thus add color to our understanding of our free speech liberties.

Under the prevailing view at the time of the Founding, once a consensual government is formed, some natural rights could be sacrificed to secure the common good, if the people or their legislatures consent.[89] Other natural rights were inalienable.[90] Freedom of conscience and freedom of religion were generally considered inalienable.[91] According to Professor Jud Campbell, by the end of the eighteenth century, the right that he describes as the freedom to make "well-intentioned statements of one's thoughts" was considered inalienable in the absence of direct injury to others,[92] even if some natural rights involving speaking and publishing could be regulated for the common good.[93] False speech, according to Campbell, could be restricted and was not part of the inalienable natural right to expressing oneself.[94] Under this view, the Sedition Act, which did not penalize truthful speech, had problems because it was administered in

matter of law, the jury disregarded the law and invalidated Zenger's conviction on the basis of the truth of Zenger's statements. Albert W. Alshuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–74 (1994).

87. PA. CONST. of 1776, art. 12 ("[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.").

88. Commonwealth v. Davies, 1 Binn. 97, 98 note a (Pa. 1804).

89. Campbell, *supra* note 54, at 253.

90. Griffin, *supra* note 21, at 102.

91. *Id.* at 103.

92. Campbell, *supra* note 54, at 286.

93. *Id.* at 253.

94. *Id.* at 282–83.

an improperly partisan way, not that it facially infringed upon people's natural rights.[95]

The right to speaking, writing, and publishing, however, may have even been broader than simply the right to make well-intentioned statements of one's thoughts. The source of our natural rights was a subject of disagreement at the Founding, leading to a divergence of views on the freedom of speech. Federalists generally believed that the common law articulated our natural rights, while many Republicans wished to look to common sense and practical experience, which was more speech-protective, leading to a broader understanding of free speech protections.[96] Madison argued that "[o]pinions are not the objects of legislation."[97] Additionally, there is also some evidence that Madison did not believe abusive speech, or false speech, should be punished. According to Madison, punishment for the so-called "abuse" of retained rights, such as "the liberty of speech, and of the press" would be a serious punishment if it fell on particular people or classes.[98] This speaks to a concern about selective prosecution or targeting of speech in a way that would be unduly censorious.

Further, unlike Professor Campbell,[99] I read some statements by Thomas Jefferson as perhaps wishing to deny the federal government the power even to regulate false speech, and leaving the states—who were not yet subject to the First Amendment—to hold printers liable for false facts.[100] Then, upon incorporation of the First Amendment's privileges into the Fourteenth Amendment, the states would also lack the power to regulate false speech as well. Thomas Jefferson described the original Constitution as needing a supplementary "declaration of rights" to secure "the rights of thinking, and publishing our thoughts by speaking or writ-

95. *See id.* at 284–86.

96. *Id.* at 254. This partially explains the disagreement over the Sedition Act. *See id.* The speech-protective practical experience and common sentiments of ordinary Americans is discussed in CURTIS, *supra* note 71. According to Curtis, "[t]here was a chasm between the orthodox understanding of the right many judges would apply and the popular right many citizens exercised and thought they had." CURTIS, *supra* note 71, at 3–4.

97. 4 ANNALS OF CONG. 934 (1794) (statement of Rep. James Madison). Campbell acknowledges that opinions were also within the realm of protection.

98. *Id.*

99. Campbell, *supra* note 54, at 281 n.167.

100. Letter from Thomas Jefferson to James Madison (July 31, 1778), *in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed. 1956) ("A declaration that the federal government will never restrain the presses from printing any thing they please, will not take away the liability of the printers for false facts printed. . . . My idea then, is, that tho' proper exceptions to these general rules are desirable and probably practicable, yet if the exceptions cannot be agreed on, the establishment of the rules in all cases will do ill in very few. I hope therefore a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their state governments in most instances.").

ing."[101] Rights such as these are "useless to surrender to the government, and which yet, governments have always been fond to invade."[102] According to Jefferson, "it is better to establish trials by jury, the right of habeas corpus, freedom of the press and freedom of religion, *in all cases*, and to abolish standing armies in time of peace, and monopolies in all cases, than not to do it in any."[103] Under this reading of Jefferson, the retained right to freedom of speech meant, at least to some, that a broad swath of speech, even if it caused abuse, could not be regulated.

On the other hand, the First Amendment may have codified deference to the legislature to determine what was in the common good. Under this reading, the retained right of speaking—enumerated in the First Amendment,— could be abridged only if the legislature punished speech for a reason that was not for the benefit of the public.[104] Congress would then have broad powers to restrict speech, subject mostly to the positive right against prior restraints enumerated in the Freedom of the Press Clause. This reading is belied, however, by a common understanding at the time shielding certain types of thoughts and opinions from regulation.[105]

The Founders disagreed about which restrictions were in the public good. Any given restriction could enhance debate by punishing deceptive speech or restrict debate by chilling too much speech in the process.[106] For example, the Framers—during the Constitutional debates—disagreed about whether the government could punish libelous speech after the fact. But even those who believed that states could punish speech after the fact were doing so based on a definition of "liberty of the press."[107] The First Amendment, added after the ratification of the Constitution, adds "the freedom of speech" to that provision. Libel may or may not have been associated with freedom of the press, thus allowing the provision "the freedom of speech" to supplement our notions of what the common law pro-

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101. Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON 676–79 (Julian P. Boyd ed. 1958).

102. *Id.*

103. Letter from Thomas Jefferson to James Madison, *supra* note 100 (emphasis added).

104. *See* Campbell, *supra* note 54, at 305 ("This liberty [of freedom of speech], moreover, was circumscribed by social obligations—either imposed by natural law or voluntarily assumed in a social contract—and therefore only restrictions of expression *beyond those that promoted the public good* were 'abridgments' of natural rights.").

105. *See id.* at 306–07.

106. *See id.* at 254–55.

107. *See, e.g.*, PENNSYLVANIA RATIFICATION CONVENTION DEBATES (Dec. 1, 1787) (statement of James Wilson), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 455 (John P. Kaminski & Gaspare J. Saladino eds., 1976) ("The idea of liberty of the press is not carried so far as this in any country—what is meant by liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual.").

tected. Additionally, truth as a defense to libel seems to have developed prior to the drafting of the First Amendment.[108]

Our current libel laws can be seen as resolving the disagreement over whether libelous speech could be punished through compromise; the solution was to insulate deceptive speech, but only in certain circumstances—for example, a public figure will succeed in a defamation suit against a defendant whose speech was knowingly or recklessly false. Our current semi-categorical, semi-balancing approach to libel encapsulates an understanding of the "common good" that is administratively more predictable, leading to less chilling of speech, even if legislatures,[109] not judges, were originally empowered to decide what was in the common good. Part III will detail how our current doctrine does and does not harmonize with incorporating common law baselines, as modified by natural rights.

B. *The Ninth Amendment and the Common Law*

The history surrounding the ratification of the Bill of Rights and the text and structure of the Constitution support the use of the common law as a baseline for understanding the original public meaning of "the freedom of speech." Judges often look to the common law to determine the original meaning of a constitutional right. As one example of equating originalist understandings with common law practices, in a concurrence in the denial of certiorari, Justice Thomas admonished the Court for using a "policy-driven approach to the Constitution."[110] Instead, he believed the Justices should "carefully examine the original meaning of the First and Fourteenth Amendments."[111] Justice Thomas looked to the common law of libel at the time the two Amendments were ratified, noting that "there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law,"[112] which he assumed "formed the backdrop against which the First and Fourteenth Amendments were ratified."[113]

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108. Griffin, *supra* note 21, at 105; *see also supra* note 86 (discussing the Zenger trial).

109. Campbell, *supra* note 54, at 287 ("Consequently, although the freedom of opinion was fixed in some respects—allowing individuals to criticize the government in good faith, for instance—determining its scope called for the same policy-driven analysis that characterized the Founders' general approach to natural rights. In short, outside of the core protection for well-intentioned statements of one's thoughts, the boundaries of the freedom of opinion depended on political rather than judicial judgments.").

110. McKee v. Cosby, 139 S. Ct. 675, 676 (2019).

111. *Id.*

112. *Id.*

113. *Id.* Justice Thomas cited to a law review article about judicial power, but this article supported only his claim that the common law delineated private rights in reputation. *See id.* (citing Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007)).

This practice of using the common law to determine original public meaning is more justified if the Constitution was intended to enshrine the rights and duties that existed at the time of drafting, and less justified if a given constitutional provision was either orthogonal to, or directly contrary to, the common law.[114] Indeed, many scholars believe our Founders intended for the First Amendment to supersede aspects of the common law.[115] Plus, just because the First Amendment may not have explicitly overruled the common law does not necessarily indicate that those ratifying the Constitution considered the common law to form a backdrop against which free speech protections should be granted. It also does not necessarily mean that citizens would regard the Constitution as operating against a backdrop of common law rights and duties.

However, there is good evidence that the First Amendment enshrined many "*existing* concepts."[116] According to Professor Jud Campbell, "to the extent that Founding Era elites originally understood the First Amendment as imposing determinate limits on congressional power, these limits were delineated by accepted common-law rules and by the inalienable natural right to make well-intentioned statements of one's thoughts."[117] The right to "the freedom of speech" was likely much broader than the common law protection against prior restraints,[118] but the common law—in conjunction with an understanding of natural rights[119]—should form a baseline against which we assess how free speech protections interact with the harms caused by speech. The interaction of the common law and natural rights will be discussed later in this Section, but this assessment of the First Amendment as enshrining common law concepts and structures is textually supported by the Ninth Amendment.

The inclusion of the Ninth Amendment in the Constitution supports the presumption that an entire edifice of legal rights and traditions that existed at the time of the Constitution's ratification should be considered when interpreting the Constitution. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be con-

114. *See generally* James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 448–50 (2013) (exploring the difference between Justice Scalia's and Justice Stevens's originalist interpretations of the Second Amendment, including whether it codified the common law's right to self-defense).

115. *See supra* Introduction.

116. Campbell, *supra* note 54, at 256.

117. *Id.*

118. Even Leonard Levy, who argues that history does not support a broad reading of the First Amendment (but would go beyond history in determining free speech protections), noted that restrictions on prior restraints are simply the start to First Amendment analysis. LEVY, EMERGENCE, *supra* note 12, at xi. The government could punish people for *abuse* of the freedom of the press, so "[t]he test for criminal abuse of freedom of the press constituted the real problem." *Id.* The fact that freedom of speech should be interpreted more broadly than simply freedom from prior restrains is also supported by the fact that freedom of speech and freedom of the press were listed as two separate protections in the First Amendment.

119. *See infra* Section I.C.

strued to deny or disparage others retained by the people."[120] This Amendment could support the inclusion of common law rights and duties in two ways—(1) directly, through direct protection of common law rights/duties in the Ninth Amendment, or (2) by analogy, through an understanding—evidenced in part by the Ninth Amendment—that pre-constitutional frameworks remain despite the enumeration in text of a written Constitution. The latter idea—that the Ninth Amendment imports the use of common law baselines by analogy—is more persuasive.

The Ninth Amendment reminds readers "that there are rights other than those in the text of the Constitution that should be recognized as constitutional."[121] Although the Ninth Amendment has in the past been referred to as an "inkblot,"[122] due to its lack of relevance to constitutional decision-making, scholars have focused for decades on how to give the provision meaning.[123] Theories that certain rights are directly provided for by the Ninth Amendment, which could overturn state and federal law, are controversial and political,[124] such as Justice Goldberg's suggestion, in a concurrence, that the Ninth Amendment provides one of the bases for overturning Connecticut's ban on contraception.[125]

Some scholars have also argued for a more modest interpretation of the Ninth Amendment—that it serves as a "rule of construction."[126] Under this approach, instead of providing rights that judges can use to overturn democratically elected laws, the Ninth Amendment is triggered only when judges must determine the scope of enumerated rights—they cannot be used to deny or disparage other "retained" unenumerated or even enumerated rights.[127] Retained rights are thus especially important when they conflict with enumerated rights, and courts cannot use enumerated rights in a way that limits or otherwise accords second-class status to

120. U.S. CONST. amend. IX.

121. Jackson, *supra* note 56, at 167–68. Jackson argues that courts should use the common law, as articulated by William Blackstone, to determine a baseline against which they can judge whether common usage, tradition, and practice supports identifying a "present-day rights" pursuant to the Ninth Amendment. *Id.* at 172. Jackson is using the common law as a baseline in a different sense than this article; he means that Blackstone's common law is a reference point for determining whether rights are sufficiently part of our legal and cultural tradition to be considered part of the rights covered by the Ninth Amendment. *See id.* at 170.

122. Ryan Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 500 n.1 (2011).

123. Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 77 (2012).

124. *Id.* at 77–78.

125. Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

126. *See, e.g.*, Williams, *supra* note 122, at 509 (arguing that instead of creating independent, judicially enforceable rights or protecting federalism concerns, "the Ninth Amendment's sole function as providing a response to a very specific form of argument—namely, that the enumeration of rights in the Constitution might be used as a basis for limiting or denying other claimed rights").

127. *Id.* at 572–73.

other retained rights.[128] For example, if rights associated with the Eighth Amendment are retained in the Ninth Amendment, this approach would suggest that the prohibition on cruel and unusual punishment could not be interpreted to exclude capital punishment simply because the Fifth Amendment alludes to the death penalty, if the ban on cruel and unusual punishment is a right retained in the Ninth Amendment.[129]

Some scholars argue that the Ninth Amendment imports, even if simply as a rule of construction, particular common law rights that might affect courts' interpretations of "the freedom of speech," including, for example, a right to reputation, and possibly to privacy or some degree of emotional tranquility.[130] The existence of these Ninth Amendment "rights" might mean that the First Amendment has less to say in the area of libel law, due to the Ninth Amendment's "right" to reputation.

This approach is undermined by the fact that the first eight Amendments generally specify negative liberties[131]—rights against restraints on liberty by government action or coercion. When the first eight Amendments specify positive liberties, they obligate the government to provide certain procedural rights when taking away one's liberty or property—such as trial rights.[132] Common law torts like defamation and invasion of privacy are instead rights people have against each other,[133] which are safeguarded *by* the state, not *against* state interference.[134] Further, torts

128. Tilley, *supra* note 123, at 78.

129. Williams, *supra* note 122, at 558–60.

130. *See, e.g.*, Tilley, *supra* note 123, at 66 (arguing "that defamation, invasion of privacy, and intentional infliction [of emotional distress] are entitled to constitutional respect and are protected by the Ninth Amendment from intraconstitutional diminishment").

131. "Negative liberties protect someone's right to do X, while positive liberties require someone else to provide the wherewithal to do X." Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 518 n.86 (1986). The distinction between negative and positive liberties was articulated in a seminal article by Isaiah Berlin. *See* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, *in* FOUR ESSAYS ON LIBERTY 118, 121–22 (1969).

132. *See* U.S. CONST. amend. I ("Congress shall make no law . . . ."), amend. II (protecting right to "bear arms" against government interference), amend. III (prohibiting the quartering of soldiers in people's homes), amend. IV (preventing "unreasonable searches and seizures" by the government), amend. V (protecting trial rights, including "due process"), amend. VI (protecting rights during "criminal prosecutions"), amend. VII (preserving right to trial by jury), amend. VIII (preventing cruel or unusual punishment and excessive bails and fines).

133. These rights—ones that the government provides by restricting other people's actions with respect to each other—are generally called "positive liberties," but that should be distinguished from what is also called "positive rights" later in the Article, which are those natural rights that require a system of government for their existence, such as the right to a trial by jury. *See supra* notes 79 and 81 and accompanying text.

134. The seminal article discussing the Ninth Amendment as a rule of construction notes that certain constitutional provisions apply only *against* the state. Ryan Williams argues that the Ninth Amendment does not permit interpreting a constitutional right broadly enough to encompass rights against private action if that would infringe on the retained right to freedom of speech. *See* Williams, *supra*

protecting emotional tranquility, and even most privacy torts, did not become part of state common law until well after the ratification of the First Amendment, and even after ratification of the Fourteenth Amendment.[135] Thus, even if the Ninth Amendment, as a rule of construction, provides for some common law "rights" that the government must affirmatively provide, privacy rights and rights to emotional tranquility would not be included.

Although the right to reputation was included as part of the core private right to personal security under the common law conception of rights,[136] the Ninth Amendment's placement in the first ten Amendments indicates that the Ninth Amendment, to the extent it invokes independent judicially enforceable rights exists as a rule of construction, is likely referencing negative rights. The Ninth Amendment then would not be enshrining state-law duties to be protected by the federal Constitution under the Ninth Amendment. Of course, the Ninth and Tenth Amendments reserve certain powers to the states, but this reservation would simply mean that the states could regulate defamation to protect individuals' reputations if this regulation did not conflict with the First Amendment. The Ninth Amendment cannot persuasively or effectively function as a method for meting out private rights against other individuals (and not against the government), given the reason the Ninth Amendment was placed in the Constitution. The purpose of the Ninth Amendment was to protect feder-

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note 122, at 562. According to Williams, because of the Ninth Amendment, the equality values expressed in the Fourteenth Amendment cannot be used to restrict the First Amendment's protection of hate speech, because freedom of speech is a "retained right." *Id.* To wit:

> By its express terms, the Fourteenth Amendment's Equal Protection Clause prohibits only discriminatory conduct by state actors, and a refusal to prohibit private discriminatory speech, no matter how hateful or abusive, does not constitute state action sufficient to give rise to a Fourteenth Amendment violation. Because the Equal Protection Clause neither requires nor expressly allows governmental limitations of private speech, "construing" that provision to limit the scope of the First Amendment's protection of free speech would be impermissible under the Ninth Amendment's express command.

Id. (footnote omitted). The Supreme Court also understands the Constitution as mainly protecting negative rights, not positive rights like those to economic redistribution or education. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 551–53 (2006).

135. *See* Tilley, *supra* note 123, at 93 (discussing English common law's adoption of tort of intentional infliction of nervous shock in 1897); *id.* at 103 (discussing American scholarship on the need for privacy torts in 1890); *id.* at 104 (noting a "1936 article often credited as the springboard for the American tort of intentional infliction of emotional distress"). For a more thorough articulation of the state of the common law in covering dignitary torts at the time of the First Amendment's ratification, see *infra* Section III.A.

136. 1 WILLIAM BLACKSTONE, COMMENTARIES *129 ("The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."). The right to reputation was considered an "absolute right," meaning that "every man" was entitled to its enjoyment, "whether out of society or in it." *Id.* at *119.

alism and to ensure that people understood that individual freedoms were not limited to the negative rights enumerated in the first eight Amendments.[137]

Thus, the Ninth Amendment likely does not directly safeguard particular *positive* rights that must be provided by the state or federal governments and may override free speech rights. The intuition that the common law is a good source for a historical understanding of our constitutional rights, however, is supported by the text of the Ninth Amendment.

A less politically charged way to remedy the obsolescence of the Ninth Amendment would be to appreciate the Ninth Amendment's role in invoking an *approach* to the law that existed prior to the enumeration of rights. Under this theory, if the Ninth Amendment contains rights retained by the people despite their lack of enumeration,[138] then by analogy, the Framers were explicitly acknowledging, preserving, and retaining the pre-constitutional legal system and methodologies that should be safeguarded despite enumeration of rights. Independent of the specific rights protected by the Ninth Amendment, the existence of the Ninth Amendment demonstrates that those ratifying the Constitution were, to some degree, importing a pre-constitutional framework into their interpretation of the Constitution.

The Ninth Amendment indicates and alerts us that an entire edifice of rights and duties existed at the time of the ratification of the First Amendment, and our constitutional rights should be interpreted using that context. As a result, the common law—as it existed at the time of ratification of the First and Fourteenth Amendment, and the fully developed view of "natural rights" shared by the Framers and Americans—should give cultural context to any interpretation of the Constitution.[139] The common law "method of adjudication" informed people of their rights at the Founding.[140] If the common law provided specific rights that were referenced in the Ninth Amendment,[141] it also, by analogy, should

137. Many involved in the drafting and ratification process worried that including a bill of rights would trivialize rights and cause people to assume a right was either enumerated or lost. Massachusetts Congressional Representative Theodore Sedgwick, for example, objected to enumerating a right to assemble because, "[i]f 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." 1 ANNALS OF CONG. 759 (Joseph Gales ed. 1834). The Ninth Amendment was intended to alleviate this concern.

138. According to Jeffrey Jackson, the Ninth Amendment "evidences a whole body of preexisting rights." Jackson, *supra* note 56, at 175.

139. For an explanation of natural rights and why they should influence our understanding of the First Amendment, see *supra* Section II.A.

140. Jackson, *supra* note 56, at 170–71.

141. This Article does not take a view as to which rights are contained in the Ninth Amendment, or even whether the Ninth Amendment specifies particular rights that can invalidate state or federal law or should, instead, be used only as a

be used as a historical baseline against which we should interpret our other constitutional rights.

This proposal means, in other words, that the Ninth Amendment does not necessarily directly protect certain common law interests, like the interest in reputation, but that the Ninth Amendment alludes to an entire system of pre-constitutional thinking and methodologies of adjudication that must be considered when interpreting enumerated rights. The scope of the First Amendment, and how far the protections for freedom of speech extend, should be understood based on background understandings of the common law that existed at the time of the ratification of the First and Fourteenth Amendments.

Courts should therefore understand the common law as forming a baseline against which we assess our free speech rights, which should also be informed by the Framers' and ratifiers' understanding of "natural rights." What the Ninth Amendment does, by analogy, is explicitly reference a whole set of laws and rights that might not necessarily be disrupted by enumeration.

C. *The Fourteenth Amendment Does Not Change Much of The Paradigm*

The First Amendment serves its greatest function as applied to the states through the Fourteenth Amendment. The application of free speech protections to the states through the Fourteenth Amendment necessitates an inquiry into whether the ratification of the Fourteenth Amendment alters the common law and natural rights baselines courts should apply when interpreting the First Amendment. The First Amendment, as incorporated through the Fourteenth Amendment and including its disallowance of state restrictions upon speech, is somewhat beyond the scope of this Article. However, I will address this issue briefly. For several reasons, the existence of the Fourteenth Amendment should not greatly influence the common law baselines supplied to analyze free speech cases.

First, the Fourteenth Amendment does not change how the common law prioritizes an understanding of harm and determines which positive liberties and negative liberties are necessary to protect free speech.[142] Around the time of the ratification of the Fourteenth Amendment, harms against bodily integrity were still considered the most regulable and most injurious types of harms, followed by harms to reputation, although truth had become a defense to libel in most states.[143] Harms to privacy and emotional tranquility still were not recognized as separate torts in most states.[144] The Fourteenth Amendment also echoes the state action no-

"rule of construction," when analyzing clashes of rights with common law understandings. *See* Williams, *supra* note 122, at 500–02, 501 n.8.

142. *See supra* Part I for analysis of why these issues remain some of the most divisive in interpreting the First Amendment.

143. Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952).

144. *See* Tilley, *supra* note 123, at 102–06 (discussing the privacy tort's creation in the 1890s, except for privacy concerning the commercial use of one's name

tions inherent in our current doctrine; the only place the Fourteenth Amendment might establish an affirmative duty on the states to act is to ensure "the equal protection of the laws," not in its Due Process or Privileges and Immunities provisions, through which the First Amendment is most likely incorporated.[145] Thus, the Fourteenth Amendment should not change the general state action notions that apply to the First Amendment.

Secondly, the Fourteenth Amendment, if anything, should render free speech doctrine more protective and closer to what current doctrine looks like today. The Fourteenth Amendment's freedom of speech conception is either the same or broader than the First Amendment's,[146] such that the common law duties set as a baseline should not be augmented in a way that would encroach upon First Amendment freedoms. Around the time of the ratification of the Fourteenth Amendment, politicians and citizens were aware of how state law had been marshalled to suppress antislavery speech.[147] In addition, from 1800 to 1860, most politicians treated the Sedition Act as unconstitutional.[148]

Those responsible for drafting and ratifying the Fourteenth Amendment did not appear to wish to change free speech baselines. Abraham Lincoln read Blackstone and recommended the *Commentaries* to prospective lawyers.[149] Blackstone also deemed slavery "repugnant to reason, and the principles of natural law."[150] Although a full inquiry into this topic is beyond the scope of this Article, most originalists do not believe that free speech protections should be interpreted differently depending on whether they apply to the states or to the federal government.

In sum, the common law as it existed at the time of the First Amendment's ratification, as supplemented and modified by natural rights, should greatly influence how we understand our free speech rights. However, looking to both the common law and natural rights is rife with problems. Unanswered questions abound, including how should courts, in a principled way, import the common law into the First Amendment, and when should courts assume that the First Amendment was intended to override the common law. Further, courts must consider what to do with

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or likeness, and the even later development of the tort of intentional infliction of emotional distress).

145. Thomas K. Landry, *Unenumerated Federal Rights: Avenues for Application Against the States*, 44 FLA. L. REV. 219, 232–33 (1992).

146. CURTIS, *supra* note 71, at 5–6.

147. *Id.*

148. *Id.* at 5.

149. *See* LETTER FROM ABRAHAM LINCOLN TO JAMES T. THORNTON (Dec. 2, 1858), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 485 (Roy P. Basler ed. 1946).

150. 1 WILLIAM BLACKSTONE, COMMENTARIES *423; *see also id.* at *424 ("Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life and liberty, both of which, in absolute slavery, are held to be in the master's disposal?").

current precedent that deviates from the common law at the time of the ratification, or even with approaches—such as the categorical approach—that seem inconsistent with how the Framers thought about free speech rights. Part III begins to address these problems, by first outlining where free speech doctrine is already consistent with the common law, then addressing what to do about the areas inconsistent with the common law, as modified by natural rights, and, finally, exploring how a common law approach can lend coherence to free speech doctrine.

III. THE NORMATIVE CASE FOR COMMON LAW BASELINES

Part III advances the position that incorporating common law baselines into free speech jurisprudence is, in addition to being supported by the history, text, and structure of Constitution, normatively desirable. In this Part, I demonstrate that a common law approach, as viewed through a natural rights lens, already provides the structure of our free speech rights and can be harmonized with many aspects of the doctrine. I then confront the areas where this approach is more difficult to reconcile with our current conception of First Amendment liberties but show how the current construction of our First Amendment doctrine can harmonize with the incorporation of common law baselines. Finally, I demonstrate why an approach modeled around common law baselines would lend clarity and coherence to future free speech cases and discuss new ways to think about difficult First Amendment issues, such as the treatment of new harms and the distinction between public-oriented and private-oriented speech.

A. *Common Law Compatibilities*

Modern First Amendment jurisprudence is already highly compatible with a conception of the First Amendment that incorporates common law baselines. Notwithstanding the view of many scholars that current First Amendment doctrine is a modern invention,[151] several aspects of our free speech regime harmonize well with the original public meaning of "the freedom of speech," if common law baselines and natural rights are employed. The common law can be used as a guide to determine when the state has affirmative obligations to protect an individual's speech and which harms caused by speech can be prevented through regulation or tort law.

First, the common law sets out a system of reciprocal rights and duties,[152] which can help determine when the state has abridged speech. Determining when the state has acted to infringe free speech rights—ver-

151. *See, e.g.*, CURTIS, *supra* note 71, at 9 ("Strong judicial protection of speech is a worthy tradition. It is also a comparatively recent one.").

152. Common law rights and duties are reciprocal because each person owes them to others and receives them from others. For example, no one can invade my bodily integrity without consent, and I cannot invade others' bodily integrity without their consent.

sus when a private party has instead exercised its rights to control speech—is necessary to applying the First Amendment.[153] A common law approach justifies our current state action doctrine and helps answer questions about when the state has acted and when the state must act with respect to speech.

Under a common law approach, affirmative state action to enforce property law, contract law, and other private rights should not affect the coverage of the First Amendment. These common law rights are protected by the state as a baseline, and even if their enforcement interferes with someone's speech, the First Amendment's state action doctrine will not be triggered. In other words, the state has not acted when it enforces these common law rights because they are a baseline against which we measure state action, even though the state is affirmatively acting. If A demands that B leave B's property because of B's politics, and the state enforces A's property rights, B is essentially being removed by the state due to B's politics, but there is no First Amendment violation. The state was simply performing its baseline duties of enforcing reciprocal property rights.

This regime preserves A's free speech rights by allowing A to make choices about which speech to allow on A's own property. This approach also ensures that property rights are protected without that protection triggering First Amendment scrutiny. This is important because the state has not acted in a censorious way: its actions are simply applying property law neutrally. Generally speaking, therefore, the state's actions will trigger free speech scrutiny only when it acts directly and primarily with respect to speech. If the state acts in a way that targets speech or directly implicates speech, the First Amendment will be involved, but not if the state is acting simply to enforce common law rights and duties. This also explains the doctrine involving expressive conduct: if the government acts to regulate conduct, those laws will generally not present First Amendment problems unless the government is targeting the expressive components of that conduct.[154]

Additionally, the state has few affirmative duties. The common law methodology, however, does support a speech-protective approach to the "heckler's veto," a thorny and somewhat contested area of free speech doctrine.[155] If an individual is engaging in protected speech that provokes an angry mob (but does not rise to the level of incitement), the state should not acquiesce to the heckler's veto by arresting the speaker but should first discharge its affirmative duty to protect, instead of silence, that speaker.[156]

153. *See supra* Section I.A.

154. United States v. O'Brien, 391 U.S. 367, 377 (1968).

155. *See* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 159–60 (2017).

156. According to an en banc Eighth Circuit opinion, "before removing the speaker due to safety concerns, and thereby permanently cutting off his speech, the police must first make bona fide efforts to protect the speaker from the

This duty comports with the state's affirmative obligations, under the common law, to protect our right to bodily integrity as against attack by others.[157] Those wishing to attack the speaker are doing so based on what may be well-intentioned statements of the speaker's thoughts, and the speaker has a right to bodily integrity. This approach also prevents the state from deciding when to protect a speaker from assault on the basis of the speaker's content or viewpoint, the most pernicious forms of censorship.[158]

In addition to supporting a coherent state action doctrine and its related doctrines about when the state has acted and when the state must act (i.e., in cases of the heckler's veto), the common law approach creates a spectrum of harms that comports with our current understanding of how free speech liberties should interact with the harms caused by speech. Because the common law defines harms and places them on a spectrum of importance when considered against free speech interests, the common law duties that were most sacred at the time of the First Amendment's ratification will be least displaced by free speech doctrine, and those that were not protected at all will be most displaced by free speech liberties. Additionally, the natural law at the time of the ratification protected well-intentioned statements of one's thoughts in the absence of direct injury.[159] The common law can define which injuries are direct injuries.

As a result, behavior that causes emotional and dignitary harms, with no economic injury, are largely un-regulable because they conflict with free speech doctrine. Intentional infliction of emotional distress (IIED), as a tort, did not exist at the time of the ratification of the First Amendment,[160] and most states also did not accept that tort at the time of the ratification of the Fourteenth Amendment.[161] Privacy torts also were first

crowd's hostility by other, less restrictive means." Bible Believers v. Wayne County, 805 F.3d 228, 255 (8th Cir. 2015).

157. Blackstone articulated a right against having one's body meddled with "in any the slightest manner." According to Blackstone,

> [t]he least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. . . . But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice.

3 WILLIAM BLACKSTONE, COMMENTARIES *120 (footnote omitted).

158. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove 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.").

159. *See supra* Section II.B.

160. English common law did not recognize the tort of intentional infliction of "nervous shock" until 1897. *See* Tilley, *supra* note 123, at 93.

161. "There is little documentation that courts vindicated claims of emotional distress through defamation or other avenues at the time of the ratification." *Id.* at 104. By the late 1800s, emotional injuries were compensated parasitic to other

proposed well after the ratification of the Fourteenth Amendment,[162] with an exception possibly being a precursor to the right to publicity—a privacy tort that protects one's likeness from being appropriated in ways that benefit the appropriator financially.[163] This spectrum of the prioritization of harms accords well with our current doctrine, where IIED torts that involve speech on a matter of public concern are entirely trumped by the First Amendment,[164] as are many privacy torts,[165] with the exception of torts involving the right to publicity—which is grounded in property interests more than privacy interests.[166] The conception of natural rights protected well-intentioned statements of one's thoughts, however, so the final Section of this Article will address how to deal with IIED where the thoughts are not "well-intentioned."[167]

In the middle of the spectrum of the ability of the government to prevent harms caused by speech, at common law, certain harms could be somewhat regulated notwithstanding free speech claims. Defamation and libel were well-protected by the common law, although they were limited somewhat by the natural rights of speaking and writing, which were protected by juries. By the time of the Fourteenth Amendment, many states had accepted truth as a defense to libel, a strain of thought that dates back to the Zenger trial.[168]

Although the next Section will confront the commonly held belief that common law understandings of defamation and libel are inconsistent with current free speech doctrine, their place on the spectrum of harms is

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compensable injuries, a freestanding tort of IIED did not develop until the 20th century. *See id.*

162. Samuel Warren and Louis Brandeis's famous seminal article proposing a tort protecting the right to privacy was written in 1890. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

163. *See* Tilley, *supra* note 123, at 99, 102–03 (discussing how although "[u]ntil the early 1900s, the only common-law cause of action permitting redress for dignitary harms was defamation," sometimes defamation suits compensated for privacy injuries, mostly in cases sounding in misappropriation of one's image). An English case in 1898 held, for example, that plaintiffs cannot enjoin publications that use their images and likenesses in unauthorized ways unless the unauthorized use harms their reputation or property interests. Dockrell v. Dougall (1898) 78 L.T. (N.S.) 840. Emotional distress from unauthorized use of one's image or likeness was not actionable. *Id.*

164. *See, e.g.*, Snyder v. Phelps, 562 U.S, 443, 458 (2011) (overturning $11 million jury verdict on IIED because the outrageous and offensive speech at issue, protesting American policy using anti-gay vitriol, at military funerals, involved a matter of public concern).

165. Bartnicki v. Vopper, 532 U.S. 514, 528–34 (2001) (holding that federal wiretapping prohibitions cannot be applied to broadcasting of illegally taped phone conversation when the broadcaster innocently acquired the conversation, which involved a matter of public concern).

166. *See* Hart v. Electr. Arts Inc., 717 F.3d 141, 151 (3d Cir. 2013) ("[T]he goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his identity through his labor and effort.").

167. *See infra* Part III.

168. *See supra* note 86.

consistent with modern doctrine. In modern free speech doctrine, courts must balance reputational harms against free speech concerns. Even public figures can win libel lawsuits so long as the speech at issue was intentionally or recklessly false.[169] The First Amendment does not entirely displace defamation law, consistent with importing common law baselines into free speech jurisprudence.

Indeed, in *United States v. Alvarez*,[170] a plurality of the Supreme Court noted that lies are still protected as a category of speech, but they can be punished if they lead to concrete, cognizable injury, like reputational harm or fraud.[171] *Alvarez*'s understanding about speech causing direct injury is consistent with a common law approach. Although the concurrence in *Alvarez* does mention IIED as a concrete injury where false speech is not protected, the *Alvarez* Court seemed to require that this injury be inflicted directly and not involve a matter of public concern to remain outside the First Amendment's protection.[172]

Indeed, according to the analysis in *Alvarez*, if a lie affects others' dignity or sense of honor, instead of being defamatory or fraudulent, laws regulating that sort of harm are subject to strict scrutiny.[173] In *Alvarez*, for example, because the harm was to veterans' sense of pride in their accomplishments and to the integrity of the system for awarding military honors, the Stolen Valor Act was invalidated for failing to satisfy strict scrutiny.[174]

At the least protected end of the spectrum are speech harms related to assault and bodily integrity. "True threats"[175] that place people in reasonable fear of bodily harm and "incitement to imminent lawless action"[176] are unprotected categories of speech. The state may punish these without performing any balancing test, based on the common law rights to bodily integrity. The spectrum of how much speech rights supersede the harms caused by speech, from assault-type harms to reputational harms to emotional injuries, is quite consistent with setting common law baselines.

This harms regime is as it should be because emotional and dignitary injuries are those most likely caused by the viewpoint of speech, where jurors are afforded the most discretion to punish offensive speech. The

169. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (establishing "actual malice" standard applicable to public officials suing newspaper for defamation).

170. 567 U.S. 709 (2012).

171. *Id.* at 719.

172. *See id.* at 734 (Breyer, J., concurring). In dissent, Justice Alito noted that false speech may be punished if associated with torts like IIED and false light privacy claims, even though these torts did not exist at the time of the ratification of the First Amendment, but cited cases expanding free speech protections and nullifying dignitary claims for IIED and invasion of privacy unless there was malicious falsity. *See id.* at 746–47 (Alito, J., dissenting).

173. *See id.* at 725–26.

174. *Id.* at 724.

175. Virginia v. Black, 538 U.S. 343, 359 (2003).

176. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

right to publicity, on the other hand, stifles the speech of only those who wish to gain financially from one's likeness or reputation, and those people should compensate others for the intellectual property in their personage.

Other examples abound. Prior restraints are still considered much worse from a free speech perspective than after-the-fact punishment for speech.[177] The broad outlines of First Amendment doctrine are easily organized using a common law approach. The specifics are perhaps less justified, but there are many areas where the specifics are justified.

B. *Common Law Incompatibilities*

Most scholars and judges believe that modern First Amendment doctrine was created in the twentieth century, and that certain aspects are deeply inconsistent with a common law approach to free speech.[178] It is true that the doctrine today is not the same as the doctrine was in 1791. Yet, the doctrine can be traced back to themes from our common law history. Although there are areas where First Amendment doctrine has abandoned a common law approach, many superficial incompatibilities between a common law approach and First Amendment are accounted for elsewhere in the doctrine.

For example, our current set of First Amendment protections for libel law make it exceptionally difficult for public figures to remedy harm to their reputations. Public figures and officials must show not only that the defamatory speech was false but also that it was maliciously false—either intentionally false or uttered with a reckless disregard for the truth.[179] This "actual malice" standard, in addition to the fact that even private figures must show at least negligence with respect to falsity,[180] is contrary to the common law view that libelous speech can be punished—especially libelous speech against the government[181]—and to the many trials and punishments for libel around the time of the ratification of the First Amendment.[182]

177. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

178. *See, e.g.*, Lakier, *supra* note 12, at 2214–15 ("By requiring courts to extend full First Amendment protection to everything 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.").

179. N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

180. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

181. LEVY, EMERGENCE, *supra* note 12, at 7–8.

182. *Id.* at 29–61.

However, several aspects of the common law view of libel are accounted for elsewhere in our approach to free speech protections. For one, the common law and the approach at the time of the ratification considered the harm from criminal libel to be a breach of the peace.[183] Blackstone allowed truth to be a defense to civil libel, but not criminal libel, where the predominant concern is a breach of the peace.[184] (By the time of the First Amendment's ratification, truth as a defense to libel had become commonplace among states.)[185] Modern doctrine incorporates this common law concern by removing from First Amendment protection the category of speech known as "incitement." Speech that is directed to and is reasonably likely to produce imminent lawless action is not protected.[186]

This exception to First Amendment protection for incitement makes the strictness of libel laws less necessary and resolves, through doctrinal compromise, the competing views about the punishment of libel that were aired during the Sedition Act debates.[187] Plus, the "actual malice" standard protects (and gives breathing room around) well-intentioned statements of one's thoughts, preserving the natural rights conception that existed at the time of the Founding.[188] Further, just as today, speech on matters of public concern was, in some ways, more protected at the Founding. Even though libel against the government was considered potentially more injurious to public order, states also offered more immunizations for allegedly libelous speech that involved official conduct or information important to the public.[189]

There are more fundamental, and more general, apparent inconsistencies between modern free speech jurisprudence and a common law and natural rights approach. For example, modern doctrine relies on a strong judicial role in protecting speech, using a semi-categorical approach that protects a wide swath of speech almost absolute, subjecting content-based restrictions on most protected speech to strict scrutiny.[190] Natural rights theory protected well-intentioned statements of one's thoughts, unless they caused direct injury,[191] but beyond that, the legislature was entrusted to make determinations about which restrictions on

183. Sir Edward Coke, *De Libelous Famosis, in* 3 THE REPORTS OF SIR EDWARD COKE 254 (1572–1617).

184. 4 WILLIAM BLACKSTONE, COMMENTARIES *150–53.

185. *See* Lakier, *supra* note 12, at 2184–85.

186. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

187. *See supra* note 1.

188. *See supra* Part II.

189. *See* Lakier, *supra* note 12, at 2184–85.

190. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (subjecting content-based restrictions on the sale of violent video games to strict scrutiny and overturning California law restricting the sale of violent video games to minors).

191. Campbell, *supra* note 54, at 260.

speech promoted the common good.[192] According to Professor Campbell, "the First Amendment did not enshrine a judgment that the costs of restricting expression outweigh the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote the public good."[193] Modern doctrine appears to do the opposite, preventing the government from deciding which speech is good or valuable and protecting a vast array of what many believe is undesirable speech without subjecting it to harms-balancing.[194]

Or perhaps leaving these issues to the legislature was appropriate in an era where the First Amendment did not apply to the states. In addition, our current placement of policing boundaries placed upon the legislature in the judiciary, so that the government cannot decide which speech is in the common good, may be a permissible implementation of the original understanding of free speech doctrine.[195] According to Campbell, "a natural-rights reading of the First Amendment would require the government to act for reasons that promote the public good, and modern doctrine can perhaps be understood, or justified, as prophylactic rules that help ferret out illicit motives."[196] This is especially so because current constitutional doctrine, especially since *New York Times v. Sullivan*,[197] gives a lot less deference to the legislature generally; our judiciary is much more activist now.

Originalists might describe this implementation of the original understanding of the meaning of speech as a permissible "construction"—giving legal effect to text in a way that is not inconsistent with the text.[198] There is ambiguity in the meaning of the freedom of speech, and the early American experience with seditious libel trials demonstrates that even those who believed in free speech as a principle often used their power, once obtained, to censor their enemies.[199] Given this context, expanding the

192. *Id.* at 316 ("Historically, it was up to legislators to assess which restrictions of speech would best serve the common good, with very little room for judicial oversight.").

193. *Id.* at 257.

194. For example, Chief Justice Roberts in *United States v. Stevens* described the government's view that the creation of new categories of unprotected speech, such as speech depicting animal torture, should be based on "a categorical balancing of the value of the speech against its societal costs" as "startling and dangerous." 559 U.S. 460, 470 (2010) (quoting Brief for the United States at 8, *Stevens*, 559 U.S. 460 (No. 08-769)).

195. Campbell, *supra* note 54, at 264.

196. *Id.*

197. 376 U.S. 254 (1964).

198. According to Lawrence Solum, "'Constitutional interpretation' is the activity that discerns the communicative content (linguistic meaning) of the constitutional text. 'Constitutional construction' is the activity that determines the content of constitutional doctrine and the legal effect of the constitutional text." Solum, *supra* note 22, at 457.

199. CHAFEE, JR., *supra* note 13, at 27–30.

power of the judiciary to place most speech in a protected category and holding that content-based speech regulation is generally not in the "common good"—and thus impermissible for the legislature to do without a compelling reason—can be reconciled with an original understanding of the freedom of speech, if one allows for an expansive judicial role in creating legal doctrine. "The heightened scrutiny that applies to content-based regulations, for instance, may correspond to an increased risk of parochial, rather than public-spirited, objectives."[200] First Amendment doctrine thus sets firm boundaries to prevent legislatures from impermissibly and pretextually regulating speech with bad motives, judicially preserving our natural rights.

Further, First Amendment doctrine currently follows a semi-categorical approach, so the judiciary must determine which categories of speech are considered high value, and thus subject to strict scrutiny. Professor Genevieve Lakier argues that the New Deal Court invented our system of categorizing speech as high value—and worthy of extremely robust protection—or categorizing speech as low value—and worthy of almost no protection. She draws largely upon state law from the eighteenth and nineteenth centuries because the First Amendment had not yet been incorporated against the states, and there was scant federal free speech case law. Nevertheless, there was widespread agreement "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 speech and press clauses provided for in all the state constitutions."[201] This methodology is sound for understanding how states viewed free speech protections.

However, the doctrine under our current categorical approach does not look much different than our historical common law approach. Professor Lakier's examples do not entirely bear out her thesis. Indeed, many of the current unprotected or low value categories of speech received similar treatment as they do today, even if courts' approaches were not exactly the same as now. Fighting words were generally unprotected if they had a tendency to lead to a breach of the peace,[202] and today the fighting words doctrine is basically limited to that context. For libel, states generally protected truthful speech as non-libelous,[203] and the same is true now. Obscenity was prosecuted at common law, even before the fact, because states could target the sale and distribution of obscene materials, if not the sale itself.[204] And although the government was mostly prevented simply from placing prior restraints on high value speech, Professor Campbell's understanding of natural rights protection for the well-intentioned statements of

200. Campbell, *supra* note 54, at 314.
201. Lakier, *supra* note 12, at 2177–78.
202. *Id.* at 2190–91.
203. *Id.* at 2184–85.
204. *Id.* at 2188–89.

one's thoughts greatly expands notions of what was protected during the Founding era. The conception of freedom of speech at the Founding, among many, was far greater than simply the protection against prior restraints.[205]

The final Section of this Article will argue that a common law approach is normatively desirable because, in addition to reflecting most of our current free speech doctrine, it can give coherence to this doctrine and provide justifications at the margins for particular First Amendment decisions.

C. *Common Law Coherence, Going Forward*

The crafting of modern free speech doctrine may not have intentionally or self-consciously used the common law as a baseline when defining the scope of First Amendment protections. Even so, to some extent, most of constitutional law imports common law notions about when the state has acted and defines "neutrality" in the absence of this type of state action.[206] In the First Amendment context, continually checking in with common law baselines will render the doctrine more coherent and illuminate how we should consider difficult First Amendment problems going forward. The common law can help define which types of expression are covered by the First Amendment, which harms to incorporate into our strict-scrutiny calculus when considering content-based restrictions on speech, and how to move forward with new types of expression and new types of restrictions on speech.

A sense of which laws do not implicate the First Amendment is necessary. Setting "speech" apart and designating it as special enables courts to protect "the freedom of speech" without undoing legislation touching upon anything with an expressive component.[207] Frederick Schauer rightly points out that some utterances that can easily be defined as speech are outside the First Amendment's coverage, and some that are covered, still receive lesser First Amendment protection.[208] The common law can assist in this endeavor. The common law explains, for example, why securities fraud prohibitions do not implicate speech; fraud in the "acquisition of goods" was restricted at common law,[209] and the harms caused by fraudulent speech are economic in nature. Contract law similarly does not gen-

205. CHAFEE, JR., *supra* note 13, at 16–17. In the Maryland convention, a reason for protecting free speech in the Bill of Rights was that this constitutional protection would "prove invaluable" in federal libel prosecutions. *Id.* at 17.

206. *See* Sunstein, *supra* note 35, at 874.

207. For example, conduct like murder or even theft could, theoretically, be expressive, but it would be nonsensical to afford these acts First Amendment protection against regulation.

208. Schauer, *supra* note 6, at 1617–18.

209. 3 WILLIAM BLACKSTONE, COMMENTARIES *145.

erally implicate speech protections, even when the contacts involve speech.[210]

Antidiscrimination statutes, which are a relatively new phenomenon,[211] sometimes do infringe on protected speech. The *conduct* of refusing to hire someone based on a protected characteristic or of discriminating against that person in their job duties clearly does not implicate expression. However, sometimes antidiscrimination statutes implicate expression, or require conduct that contains expressive elements. Following a common law methodology, expression can be regulated under these statutes when the cumulative expression is severe or pervasive enough to deprive individuals of their ability to perform their jobs or receive their educations —in this way, the harm from the speech rises to the level of depriving claimant of a material, economic benefit. This is essentially the standard for discrimination under federal civil rights statutes.[212]

Besides delineating First Amendment coverage, the common law can define which harms are material to constitutional scrutiny when a restriction does target protected expression. When a law restricts speech, the constitutional scrutiny that applies to the regulation should not countenance particular harms caused by speech that are classically considered "speech harms," or harms that arise from paradigmatic instances of expression. In a previous paper, *Free Speech Consequentialism*, I argue that harms that are classically speech harms are those that are context dependent, caused by diffuse parties, or mediated mostly through the listener's own mind.[213] In addition, speech harms cannot be separated from speech benefits; the ability to anger also affects the ability to create change through dialog.[214] By contrast, when a harm caused by speech can be analogized to a harm caused by conduct—[215] as defined by common law conduct—then the strict scrutiny applied to speech restrictions can account for this harm. In this way, the characteristics that make speech special are what render it constitutionally protected.

As an example, the economic harms caused by speech can be incorporated into the strict scrutiny applied to a content-based restriction on that speech, but the emotional and dignitary harms caused by that speech should not rise to a level sufficient to permit a restriction on protected speech, at least when that speech involves a matter of public concern or public interest. Thus, in a case like *Masterpiece Cakeshop v. Colorado Civil*

210. Naoko Ohno v. Yuko Yasuma, 723 F.3d 984, 998–99 (9th Cir. 2013) (describing federal and state court enforcement of private contracts involving speech restrictions).

211. Tyler S. Smith, Note, *A Mid-Life Crisis in the Interpretation of the Iowa Civil Rights Act of 1965: How Should State Courts Interpret Original Antidiscrimination Statutes After Federal Counterpart Statutes Are Amended*, 64 DRAKE L. REV. 1117, 1122–32 (2016).

212. Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 758 (8th Cir. 2004).

213. Goldberg, *supra* note 3, at 728–29.

214. *Id.* at 729–30.

215. *Id.* at 730.

Rights Commission,[216] where a Christian baker refused to bake a custom-designed cake for a same-sex wedding, the restriction the baker violated was a Colorado public accommodations statute.[217] If baking a custom-designed cake is considered speech or expressive conduct, then when applying strict or intermediate scrutiny to determine whether this antidiscrimination statute was constitutional (the Supreme Court did not address the free speech issue and instead decided the case on religious animus grounds),[218] the Court could consider the economic reasons justifying application of the public accommodations law but not the emotional or dignitary reasons.[219] Forcing a baker to engage in expression (if it is expression) to avoid stigmatizing individuals or groups is a classic "speech harm" and should not be countenanced in constitutional scrutiny that applies to speech. However, if Colorado's main goal is to ensure that gay couples are not excluded from participation in commerce, that harm is analogous to one that would be recognized at common law. Similarly, privacy harms involving actual physical transgressions and economic damage should be more redressable, despite their free speech implications, than privacy harms without illegal behavior causing only emotional distress.[220]

One reason the common law adds coherence to our free speech calculus is because common law rights are, in an important sense, neutral. At its heart, the common law approached rights as symmetrical and reciprocal. We all have the same rights, which necessarily extend until the exercise of those rights disturbs someone else's rights. My right to property extends as far as it can without infringing on someone else's property rights. My right to bodily integrity, just like anyone else's, is a sovereign space, so that the right must be defined in a way that its correlative duties are reciprocal. My right to my own body extends until I use that right to injure someone else's body. The rights are defined just broadly enough to allow everyone the same rights.

This approach accords well with First Amendment freedoms. The First Amendment would be unrecognizable without its commitment to neutrality, requiring the government to treat everyone the same. Viewpoint neutrality is the quintessential requirement of current First Amendment doctrine. Beyond the common law, many new statutory and tort-law rights do not contain this sort of reciprocity. That is fine—and we have moved far beyond the *Lochner* era when it comes to economic harm—but

216. 138 S. Ct. 1719 (2018).

217. *Id.* at 1723.

218. *Id.* at 1723–24.

219. *Id.* at 1746 (Thomas, J., concurring in part) ("States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified.").

220. Perhaps IIED and certain privacy harms can still give rise to tort liability if the speech involves solely a matter of private concern. The Supreme Court has not yet decided this issue. Given that the natural right of speaking and writing protected well-intentioned statements of one's thoughts, purely private invectives or privacy violations involving expression might be less protected.

our approach to free speech should remain consistent with the concepts of neutrality embedded into the common law when a restriction targets speech.

More newly protected harms, like emotional harm, cannot be reciprocal in the same way as physical harm. My property rights can extend until they affect your property rights, and this can be defined clearly and reciprocally, even when considering intangible harms like nuisance. I can use my property unless the sound waves emanating onto your property are too loud, and you, my neighbor, can do the same. The rights and responsibilities can be clearly defined and apply equally to both neighbors. However, when it comes to emotional harm, it is more difficult to measure these harms and it is almost impossible to afford everyone the same reciprocal rights. If my emotional well-being is protected except to the extent it interferes with your emotional well-being, then people who are more emotionally sensitive will have greater rights. If we define emotional well-being by a "reasonable person" instead, rights cannot be easily predicted prior to their being infringed. In addition, juries or judges would find it difficult to determine that speech caused emotional harm to a reasonable person without judging the speech based on its viewpoint. An easy and predictable way to ensure that no one is treated better than anyone else on the basis of viewpoint is to set the common law as a baseline and use its reciprocal rights to determine both the coverage of the First Amendment and how free speech doctrine should define harms.

CONCLUSION

The First Amendment baseline problems that create division among judges, scholars, and laypeople are difficult to resolve, but they are not intractable. The common law, as it existed at the time of the ratification of the First and Fourteenth Amendments, gives some guidance on issues of both First Amendment coverage—which speech even triggers First Amendment scrutiny and protection—when protected speech may not be regulated. Incorporating the common law into free speech doctrine is justified by the text, structure, and history of the First Amendment. A common law approach also harmonizes surprisingly well with current doctrine and can give coherence to the doctrine. For new emerging areas or new speech harms, using a common law approach, safeguarded by a strong judiciary, to determine both First Amendment coverage and protection can illuminate the way forward.