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Not High Value Because, High Value Unless: A New Threshold Question for Speech

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NOT HIGH VALUE BECAUSE, HIGH VALUE UNLESS: A NEW THRESHOLD QUESTION FOR SPEECH

Tamara Lemmon

[T]he categorical approach [to the First Amendment] is unworkable and the quest for absolute categories of "protected" and "unprotected" speech ultimately futile.[1]

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OVERVIEW

The categorization of speech into protected and unprotected, high and low value, and the resulting consequentialist balancing test of First Amendment jurisprudence has resulted in conflicting decisions and unpredictable results. Regulations on speech that are both viewpoint and content based are acceptable in the form of Title VII prohibitions of sexual

[1] R.A.V. v. St. Paul, 505 U.S. 377, 428 (1992) (Stevens, J., concurring).

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harassment in the workplace, but restrictions on hate speech are struck down.[2] The devastating harm to children caused by child pornography is sufficient to place such "speech" outside the protections of the First Amendment, but identical harms from virtual child pornography are insufficient to do the same.[3] To remedy these inconsistencies, a complete overhaul of free speech analysis would, perhaps, be desirable, but stare decisis renders such a change extremely unlikely. Instead, this Article works within the existing First Amendment framework to suggest a new threshold inquiry that can help courts focus on the true nature of the competing values that are at stake in any proposed regulation of speech. This focus will help curtail both the over-and under-regulation of speech that has occurred in Supreme Court of the United States ("Supreme Court") decisions during the last several decades.

This Article begins with Martin Redish's assertion that modern First Amendment scholarship has largely erred in assigning an "unduly narrow description of the category of communication that is deserving of full constitutional protection."[4] Perhaps this has arisen inevitably, as Stanley Fish suggests, from answering the question, "What is the First Amendment for?"[5] According to Fish, "[W]hen you say that the First Amendment is for something . . . it becomes not only possible but inevitable that at some point you will ask of some instance of speech whether it in fact serves its high purpose or whether it does the opposite."[6] In evaluating First Amendment protections for free speech, the Supreme Court first asks if the speech being considered is of high or low value.[7] High value speech receives the utmost deference under the Constitution, where low value speech is often viewed as barely worthy of protection.[8]

Of course, this categorization brings with it an obvious opportunity for abuse. Who decides whether a particular type of speech is high or low value? As Steven Shiffrin astutely observes, "The censor will always be inclined to say that the speech suppressed is of low value. Thus, the low-

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[2] J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2306 (1999).

[3] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 473 (1996).

[4] Martin H. Redish, *The Value of Free Speech*, 130 U. PENN. L. REV. 591, 593 (1982).

[5] Stanley Fish, *What Is the First Amendment For?*, N.Y. TIMES (Feb. 1, 2010, 9:30 PM), https://archive.nytimes.com/opinionator.blogs.nytimes.com/2010/02/01/what-is-the-first-amendment-for/.

[6] Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1085 (1993).

[7] *See* Kagan, *supra* note 3, at 472–74.

[8] As Adam Liptak glibly concludes, "Strict scrutiny, like a Civil War stomach wound, is generally fatal." *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 18, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html. *See* Kagan, supra note 3, at 416. Speaking of fighting words, a form of unprotected expression, Kagan states that the court sees them as "so valueless and so harmful that the government may ban them entirely without abridging the First Amendment." *Id.*

value exception mocks the rule."[9] Perhaps this is why:

> As an active method for making law . . . the categorial approach has been declining for almost a half century . . . . The present [Roberts] Court has forcefully declared that it will not expand categorical exclusions. [But a]t the same time, and based on the same mode of analysis, the Court has more quietly reaffirmed and even strengthened existing categorical limits on the First Amendment's protection.[10]

This is a dangerous game. The Roberts Court clearly recognizes the potential for abuse in removing vast swaths of speech from First Amendment protection by declaring them low value.[11] Why, then, continue to rely on a broken methodology?

Most ideal would be a complete restructuring of the way in which we approach First Amendment jurisprudence. Since such an overhaul is neither imminent nor particularly workable, the opportunity must be seized to implement other less drastic mechanisms that can help protect speech from the dangers of both over- and under-regulation.

This Article argues that an initial evaluation, one that occurs prior to the categorization of speech into low or high value, can help provide a measure of such protection. This initial evaluation would focus on the type of harm that the speech to be regulated is alleged to inflict. This focus on the potential harms caused by speech is not new. In fact, some scholars argue that most of the categorical designations of low-value speech, with the exception of obscenity, exist because the speech to be regulated causes "some tangible harm."[12] But many scholars who advocate harm-based theories focus on identifying what types of speech are most likely to cause harm.[13] This Article is different because it favors the more precise approach of

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[9] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 44 (1990). Shiffrin then makes the following comparison, "It seems almost like saying that South Africa has a humane racial policy except for its treatment of the blacks." *Id.*

[10] Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1344–45 (2015).

[11] *See, e.g.*, Chief Justice Roberts' opinion writing for the majority in United States v. Stevens, 130 S. Ct. 1577 (2010). There the court refused to create a category of unprotected speech for depictions of heinous cruelty to animals. *Id.* at 472. The court reasoned that the government's proposed test for types of speech that could be considered unprotected (low value) by the First Amendment was "startling and dangerous." *Id.* at 470. The majority insisted, instead, that only speech that has traditionally and historically been considered unworthy as a group of First Amendment protection could be categorized as such. *Id.* at 472.

[12] Magarian, *supra* note 10, at 1357. Note that although Magarian identifies harm as the underlying factor tying these categorical exclusions together, he personally does not favor harm-based regulation of speech. *Id.* at 1358. *See also* Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONG. RES. SERV. (Sept. 8, 2014), https://fas.org/sgp/crs/misc/95-815.pdf ("Obscenity is unique in being the only type of speech to which the Supreme Court has denied First Amendment protection without regard to whether it is harmful to individuals . . . . No actual harm, let alone compelling governmental interest, need be shown in order to ban it.").

[13] *See, e.g.,* Ruane, *supra* note 12.

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focusing on the harm that is likely to occur, rather than the type of speech that is most likely to cause the harm that is likely to occur. In doing so, it advocates bringing into the light a standard that the Supreme Court is already using implicitly and allowing that standard to guide which forms of speech move on to further scrutiny under traditional First Amendment analysis.

Cass Sunstein notes that, "The most plausible alternative to an inquiry into value would be to look at the question of harm alone. On this view, the question is whether the speech causes sufficient harm to permit regulation, and it does not matter what 'value' the speech has."[14] Sunstein then notes that a main advantage of a harm-based approach to free speech analysis is that it would avoid "the risks of abuse[] involved in assessing the value of different kinds of expression."[15] Despite this admission, however, Sunstein rejects this option as untenable because it would "impose intolerable pressures on constitutional doctrine" by forcing courts to either "extend [a] weaker burden" of justification for the regulation of speech "across the board" resulting in over-regulation of speech, or "adopt for all speech a quite stringent justification requirement" potentially leading to under-regulation of harmful speech.[16]

This Article engages with Sunstein's ideas by presenting a limiting factor that would avoid the pitfalls detailed by Sunstein and simultaneously aid in limiting both the over-and under-regulation of speech. Specifically, it proposes that, since the freedom of speech is a fundamental right (as the term is traditionally used in constitutional law), courts should implement a threshold question that asks if the harm that particular speech will allegedly inflict is harm to another fundamental right.[17] If the answer to that question is yes—if the harm being inflicted is harm to a fundamental right— then the First Amendment evaluation of the speech would proceed as normal from there. If it is not—if the harm being inflicted is harm to a right that is not considered fundamental— then the speech could not be regulated regardless of the value of the speech.

Admittedly, the clear intention of establishing such a threshold question is to remove as much speech as possible from complex First Amendment analysis, including categorization by value. This is because the free speech guidance from the Supreme Court has become so convoluted that the potential for inconsistent application is significant. "Doctrines that require ordinary judges do too much work to reach obvious results ought to be avoided because too often ordinary judges will make mistakes—from the

[14] Cass R. Sunstein, Comment, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 557 (1989).
[15] *Id.* at 557–58.
[16] *Id.* at 558.
[17] Fundamental rights typically include those identified in the Bill of Rights as well as those implicated through substantive Due Process. *See Fundamental Right*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/fundamental_right (last visited Feb. 10, 2023).

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point of view of a higher court—as they try to implement the complex doctrines step by step."[18]

Implementing this threshold question would also help to simultaneously guard against both the over-and under-regulation of speech. This Article theorizes that over-regulation of speech occurs when speech is regulated to prevent a harm that is not sufficiently severe to warrant the restriction of a right as important as the right to free speech. One can conceptualize this issue using a risk versus reward analogy. When the risk is that the fundamental right of free speech might be inappropriately or too aggressively regulated, the "reward" must be proportionate in order to justify the risk. If the potential harm caused by the speech is harm to another fundamental right, then the reward may justify the risk. But if the potential harm is not "great enough," then the reward cannot justify the risk. This Article postulates that only harm to another fundamental right constitutes harm that is "great enough" to justify even considering restricting the freedom of speech.

This new threshold question would also aid in preventing the under-regulation of speech. Sometimes, in adherence with the methods of speech analysis established over the last several decades, the Supreme Court categorizes speech as high or low value, moves on to the rest of the First Amendment analysis, and fails to recognize the true nature of the harm that the speech to be regulated may be inflicting.[19] By forcing the Court to quantify this harm at the beginning of its analysis, this initial inquiry orients the Court to what is at stake in each particular situation involving the regulation of speech. Examples will be given in this Article of cases where the Supreme Court appeared to not recognize that fundamental rights existed on both sides of a free speech issue, namely that the speech to be regulated was itself allegedly violating another fundamental right. For the sake of clarity, throughout the rest of this Article, the theory presented herein will be labeled "Harm to a Fundamental Right" theory.

Harm to a Fundamental Right theory builds on concepts that have been floated by others. Some scholars have suggested that one way of "protecting" certain sub-categories of speech from a consequentialist balancing test would be by subjecting only speech having conduct-like effects to the full First Amendment analysis. "[I]nstead of subjecting all speech to consequentialist balancing, courts should allow a weighing of costs and benefits only when the harms are more similar to conduct than classic speech."[20] Harm to a Fundamental Right theory goes further by introducing

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[18] Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech-- An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1076 (2017).

[19] *See, e.g.*, Chief Justice Roberts' opinion writing for the majority in United States v. Stevens, 559 U.S. 460, 470–71 (2010).

[20] Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 695 (2016).

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a new threshold inquiry for the evaluation of speech. Rather than focusing on regulating speech harms that mimic conduct harms, Harm to a Fundamental Right theory suggests that the Supreme Court focus on regulating speech harms that infringe on another fundamental liberty. In practice, this approach would not allow speech to be sacrificed for any value less than another fundamental right. It would also specifically identify and help curtail the critically damaging category of speech that itself prevents counter-speech.

The Introduction of this Article provides a brief explanation of the philosophical underpinnings and mechanics of Harm to a Fundamental Right theory. It then gives an overview of the various theories that interpret the First Amendment and its guarantee of freedom of speech and explores how those theories shape the outlook of the courts regarding which forms of speech deserve protection. Finally, the Introduction illustrates how Harm to a Fundamental Right theory can serve to protect the core values of each of these First Amendment interpretations. Part I explains why consequentialism not only makes First Amendment speech jurisprudence inconsistent and difficult to predict, but also why such reasoning untethers our interpretation of the First Amendment guarantees from first principles and the intent of the framers. Part II investigates why speech is a fundamental liberty worthy of protection, separate and apart from any desirable consequences of that speech, and how this acknowledgment sits at the center of Harm to a Fundamental Right theory. Part II proposes a starting point that assumes the inherent worth and nobility of free speech. It advocates for defining necessary exceptions to constitutional protections rather than evaluating the worthiness of particular speech and requiring each unique form of speech to "earn" its First Amendment guarantee. Part III uses defamation as a case study for the potential application of Harm to a Fundamental Right theory by examining how this classic speech tort would be analyzed under the theory's new threshold inquiry. Part IV provides specific examples of Supreme Court decisions that could have been more properly and harmoniously decided under Harm to a Fundamental Right theory instead of the consequentialist model currently in favor with the Roberts Court. Finally, Part IV situates, within the Harm to a Fundamental Right approach, some of the difficult issues in modern First Amendment jurisprudence including virtual child pornography and campaign finance reform.[21]

[21] It should be noted that, like many other treatises on First Amendment analysis, this Article carves out an exception for speech that pertains to, is directed at, or is uttered by minors. This Article will not address this exception other than to state its basic foundational premise: Because minors are in many ways treated differently under the law, and because the law is not tailored primarily to govern minors, but rather exceptions are carved out to delineate and protect the various rights and interests of children until they reach the age of majority, it is not unreasonable that the speech of minors and speech that is directed at minors also be subject to different restrictions from those that govern the rest of society. A more detailed analysis of this potential exception is needed but is beyond the scope of this Article.

A. A Brief Explanation of Harm to a Fundamental Right Theory

Harm to a Fundamental Right theory begins with the premise that the guarantee of freedom to speak under the First Amendment is one of the most critical underpinnings of our American democracy. Because this right is so crucial, and provides the foundation for many other rights, it must be vigorously protected. This protection means that other rights must sometimes be jeopardized or sacrificed to the superior value of free speech. Situated firmly within this speech-positive starting point, Harm to a Fundamental Right theory proposes that before speech is sorted into high or low value, and before any balancing test is performed, a court should ask if the speech to be regulated jeopardizes, or is alleged to harm, another fundamental right. If the answer is no, if the right that is in jeopardy from speech is not fundamental, then the analysis goes no further. The speech cannot be regulated. If the answer is yes, if the speech might do violence to another fundamental right, then a court may proceed with its First Amendment analysis as usual. The premise undergirding this theory is that only other fundamental rights are important enough to justify a potential restriction on the right to speak.

Upon initial inspection, it may appear that Harm to a Fundamental Right theory would only succeed in *preventing* certain speech from being proscribed, thereby shrinking the circle encompassing the types of speech that may be regulated. In some cases, like certain forms of defamation, this would be true.[22] But the important corollary to forcing the Supreme Court to identify and name the right that is potentially being violated by speech is that it orients the court when there is another fundamental right at stake. It forces the court to examine and wrestle with the difficult choice that must be made when two fundamental rights are at odds with one another. This examination would help to ensure that speech which *does* harm another fundamental right may more properly and readily be proscribed.

INTRODUCTION: THEORIES ABOUT WHY SPEECH SHOULD BE PROTECTED

In endeavoring to interpret the First Amendment's guarantee of freedom of speech, and to use that interpretation to fashion a workable test for when and how speech should be regulated, several schools of thought have arisen as to what makes the freedom to speak so essential to our democracy. Often, a court's understanding about what makes speech valuable determines the manner and type of regulations to speech that it is willing to accept.[23] Any discussion, therefore, of how speech should be regulated must begin with an acknowledgement of the most dominant theories regarding why free speech is important and the conclusions those theories reach regarding what types of

[22] *See infra*, Part III (discussing defamation).

[23] *See, e.g.,* Cass R. Sunstein, *supra* note 14, at 559–60 (discussing how different ideas regarding why the First Amendment is important may produce different results in the regulation of certain forms of speech).

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speech should or should not be included in the protections of the First Amendment.

A. *The Marketplace of Ideas*

The theory of the Marketplace of Ideas, at least as it has been used in modern American jurisprudence, can perhaps be summarized as follows:

> [I]n the absence of any reliable divining rod, our best method for identifying truth is to let individuals discuss various proposed ideas without constraint, and then see which ideas gain the most adherents. As a general rule, the ideas that end up the most widely accepted will tend to be truer than the ideas of any one individual. Many actively engaged minds, in other words, will tend to be better at identifying truth than any single mind, including one's own.[24]

Although Supreme Court Justice Oliver Wendell Holmes is credited with the first articulation of a "free trade in ideas" within the "competition of the market," he is not the first philosopher to champion the notion that the exercise of free speech and robust intellectual debate within society will eventually result in the truth being known.[25] John Milton expressed similar ideas over 200 years earlier,[26] and John Stuart Mill expanded on them in his 1859 treatise *On Liberty*. Mill believed that "if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility."[27] Also, "since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions, that the remainder of the truth has any chance of being supplied."[28] Even if, Mills argued, a statement was known to be wholly and entirely true, it still needed to be "vigorously and earnestly contested" to avoid its meaning being lost and descending into prejudice or dogma.[29]

Justice Holmes first connected the idea of the free-flow of speech to the economic concept of a market in his dissent to *Abrams v. United States*.[30] There, he wrote that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . That at any rate is the theory of

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[24] Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 S. CAL. INTERDISC. L.J. 1, 3 (2011).

[25] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[26] *See, e.g.*, JOHN MILTON, *Areopagitica*, *in* AREOPAGITICA AND OF EDUCATION 1, 50 (George H. Sabine, ed. 1951) (1644).

[27] JOHN STUART MILL, ON LIBERTY 93 (Leonard Kahn ed., Broadview Eds. 2015) (1859).

[28] *Id.*

[29] *Id.* at 94.

[30] *Abrams,* 250 U.S. at 630–31 (Holmes, J., dissenting).

our Constitution."[31] Holmes believed that even speech that "we loathe and believe to be fraught with death," should be protected by the First Amendment so long as it did not "imminently threaten immediate interference with the lawful and pressing purposes of the law," such that it is "dangerous to leave the correction of evil counsels to time."[32] Lee Bollinger described Holmes' dissent as "one of the central organizing pronouncements for our contemporary vision of free speech."[33]

The actual phrase "marketplace of ideas" was coined by Justice William Brennan in his concurrence in *Lamont v. Postmaster Gen*.[34] But although the metaphor always hearkened to the economic sphere, it was not until the 1970s that scholars and judges began to address the notion that the marketplace of ideas might have some ties to an actual marketplace.[35] Judge Posner took the comparison quite literally, arguing that "[i]deas are a useful good produced in enormous quantity in a highly competitive market. The marketplace of ideas of which Holmes wrote is a fact, not merely a figure of speech."[36]

Significant criticism of the marketplace theory has centered around the issue of whether the marketplace ever has, or ever can, succeed in revealing truth. "These include doubts about the existence of 'truths' that are discoverable through discussion, as well as skepticism that free speech best promotes the emergence of the truth."[37] Stanley Ingber believes that the public must "expose the flawed market model assumptions of objective truth and the power of rationality," and recognize that a "system of freedom of expression adds an aura of legitimacy to the governing system by protecting the appearance of individual autonomy."[38] Psychosocial and behavioral critiques have questioned the idea that truth can ever "rise to the top" when humans have empirically verifiable biases and tendencies to actually prefer lies to truth in certain situations.[39]

Many of these criticisms of modern marketplace theory, however, can be addressed by drawing back from the tendency to fixate on the truth-seeking function of free speech. Although today "[t]he theory of the marketplace of ideas focuses on 'the truth-seeking function' of the First Amendment," the

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[31] *Id.* at 630.

[32] *Id.*

[33] LEE. C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 18 (1986).

[34] 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[35] *See generally* Edward Nik-Khah, *The "Market Place of Ideas" and the Centrality of Science and Neoliberalism* in the Routledge Handbook of the Political Economy of Science 32–42 (David Tyfield et al., eds. 2017).

[36] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 693 (6th ed. 2003).

[37] Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 408 (2002).

[38] Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 90.

[39] *See, e.g.,* Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 649–51 (2006).

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initial formulation from Justice Holmes was more broad, and his analysis not so narrowly directed.[40] In fact, where Holmes does address regulating speech, his ideas mostly comport with the framework proposed by Harm to a Fundamental Right theory in this Article. Holmes correctly identifies that it is the potential for speech to interfere with other lawful rights that should render it unprotected, and that speech can be regulated if such harm is either actually occurring or imminently likely to occur.[41] In his relatively brief dissent, Holmes acknowledges the truth-seeking value of free speech, but he ties the enforcement of regulations on speech to the injuries that the speech is likely to effect.[42] Over the years, however, the focus has shifted. The Supreme Court has moved more and more to consider the nature of the speech in determining whether it deserves protection, rather than the nature of the harm.[43] This shift is unfortunate as it results in a narrowing of speech freedoms where there is no need to do so, and a failure to restrict truly harmful speech because its harms have not been adequately considered, defined, or valued. This Article advocates using the injury or harm-centered analysis implicitly condoned by Justice Holmes in *Abrams* as a threshold question to limit the types of speech exposed to a consequentialist balancing test.

B. Democratic Participation and Deliberation

The first version of the participation and deliberation theory of free speech may have been articulated by Justice Brandeis in *Whitney v. California*.[44] In his concurrence, Brandeis asserts that the framers believed that

> the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an

[40] Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2363 (2000).

[41] "I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent . . . . But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J. dissenting).

[42] *Id.* at 630–31.

[43] Magarian, *supra* note 10, at 1345.

[44] 274 U.S. 357, 375–76 (1927) (Brandeis, J. & Holmes, J., concurring).

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> inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[45]

Brandeis and Holmes wrote together on several free speech cases and, here, Brandeis pays homage to Holmes' idea that free speech is "indispensable to the discovery" of truth.[46] But Brandeis adds the word "political" throughout his concurrence.[47] It is "political truth" and "political duty" that Brandeis is concerned with. This distinction births a second school of thought regarding why free speech is important and what type of speech is most valuable: "Communication that serves democratic political processes, enabling citizens to deliberate over, define, and decide the common good, is the essence of democratic communication. The First Amendment fulfills its role as the guardian of speech rights in a democratic society when it protects the conditions necessary to democratic communication."[48]

Also inherent to this deliberative, participation-focused view of speech is that speech is not just a right, it is equally a duty. Each citizen "has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others."[49] Alexander Meiklejohn is widely considered the preeminent scholar of this school of thought.[50] He states that a better comparison for the dissemination of ideas through speech would be a town hall rather than a marketplace.[51] In a town hall, the primary point of speaking is to solve public problems.[52] To accomplish this, the meeting must be run according to rules and order.[53] To that end, a chairman or moderator will abridge the speech of some to ensure that all may be heard.[54] Meiklejohn views free speech as a tool of democratic governance.[55] The right to speak does not serve the speaker, rather it serves the "common needs of all the members of the body politic."[56] Thus, what is crucial "is not that everyone shall speak, but that everything worth saying shall be said."[57] Meiklejohn ultimately reaches the conclusion that it is never appropriate for the government to regulate speech according to its substantive content (perhaps because Meiklejohn realizes, as Mill did, that perceptions of what is "truth"

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[45] *Id* at 375.
[46] *Id.*
[47] *Id.*
[48] LAURA STEIN, SPEECH RIGHTS IN AMERICA: THE FIRST AMENDMENT, DEMOCRACY, AND THE MEDIA 2 (2006).
[49] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24 (2d ed. 1960).
[50] *See generally* Dara E. Purvis, *Alexander Meiklejohn,* FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1302/alexander-meiklejohn (last visited Feb. 10, 2023).
[51] MEIKLEJOHN, *supra* note 49, at 24.
[52] *See id.*
[53] *See id.* at 25.
[54] *Id.* at 24–25.
[55] *Id.* at 27; Purvis, *supra* note 50.
[56] MEIKLEJOHN, *supra* note 49, at 55.
[57] *Id.* at 26.

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are constantly evolving), but that it may be permissible for government to regulate the procedures by which the right to speak is exercised.[58]

Cass Sunstein goes even further, suggesting that the value of free speech lies in its ability to aid citizens in their duty of making informed choices within a democratic system of governance.[59] Under this theory, speech that is "low value" can be regulated without running afoul of the Constitution.[60] Harm to a Fundamental Right theory disagrees with Sunstein's stance that any speech should be eligible for regulation simply because it is "low value." Rather, there is no need to regulate speech unless it intrudes on another fundamental right.

Despite this disagreement, however, Harm to a Fundamental Right theory would help protect the core values that Meiklejohn and Sunstein champion by encouraging the Supreme Court to engage in a more deliberate process of analysis that recognizes when the speech of one party infringes on the speech rights of another party. One of the key goals of Harm to a Fundamental Right theory is to curtail speech that itself prevents counter-speech by identifying that potential harm at the outset of any First Amendment analysis. In this way, Harm to a Fundamental Right theory directly supports the town-hall-style exchange of ideas that Meiklejohn recognized was so crucial to a functioning democracy.

C. *Individual Self-Realization*

Martin Redish is perhaps the best-known advocate of the free speech theory of self-realization. Redish acknowledges that self-realization is a broad term.[61] In fact, he states that the "term has been chosen largely because of its ambiguity."[62] Redish intends the goal of self-realization to encompass the "development of the individual's powers and abilities" as well as "the individual's control of his or her own destiny through making life-affecting decisions."[63] This fundamental premise, in some ways, stands in diametric opposition to Meiklejohn's values. Rather than viewing speech as important primarily because it serves to advance the democratic process, Redish believes that "[d]emocracy . . . is not an end in itself," but rather "a means of achieving broader values."[64] These values, Redish concludes, are the values of self-realization; namely, "developing individuals' mental faculties so that they may reach their full intellectual potential," and "allowing individuals to

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[58] *Id.* at 39.

[59] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18–20 (1995).

[60] *See* Sunstein, *supra* note 14, at 556–57. Sunstein does note, however, that "it need not follow that government will be permitted to ban all 'low-value' speech." *Id.* at 556.

[61] *See* Redish, note 4, at 593.

[62] *Id.*

[63] *Id.*

[64] Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 679 (1982).

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control their own destiny."[65]

The self-realization theory traces its roots back through John Locke all the way to Aristotle. The renowned Greek philosopher believed that communication is necessary for individuals to achieve happiness because happiness involves personal growth and development of rational faculties.[66] Locke, credited for influencing the colonists to revolt against British rule, is widely thought of as a libertarian who believed that if any government did not allow its citizens "a certain minimum area of personal freedom," the individual would be prevented from "even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred."[67]

Harm to a Fundamental Right theory shares the enthusiasm and respect for the innate value of speech championed by Redish and the self-realization camp. In fact, of all the theories seeking to quantify the value of free speech, self-actualization is the most harmonious with Harm to a Fundamental Right theory because, by introducing a threshold question, Harm to a Fundamental Right analysis seeks to protect more speech by shielding it from a consequentialist balancing test unless that speech will negatively impact another's fundamental right.

PART I: LIMITING CONSEQUENTIALISM

In a broader sense, the marketplace of ideas theory as well as the democratic participation theory are consequentialist. The general theory of consequentialism evaluates actions "according to the desirability of their consequences."[68] Specific to free speech, this creates a balancing test in which the value of particular speech is balanced against its potential for harm or against the government's countervailing interest. "Scholars who espouse explicitly consequentialist theories of the First Amendment believe that free speech's value lies in advancing particular ends, such as truth or democratic self-government."[69] And, because there are no real free speech absolutists (no serious arguments claiming that there should not be at least some exceptions to complete freedom of speech), a certain level of consequentialist evaluation may be inevitable in interpreting the First Amendment.[70]

But the application of consequentialism to the First Amendment also creates problems. Most notably, the potential for abuse or arbitrariness is high when performing a balancing test that necessitates determining the relative

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[65] *Id.* at 679–80.

[66] *See* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 79–80 (1989).

[67] ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 124 (1969).

[68] Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1285 (1989).

[69] Goldberg, note 20, at 690.

[70] Fish, *supra* note 6, at 1086.

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value of speech. Even Brian Leiter, who believes that "most non-mundane speech people engage in is largely worthless, and the world would be better off were it not expressed," acknowledges that the "one serious argument against regulation of speech" is the question of who performs the balancing test: "we do not have a reliable epistemic arbiter, and, moreover, any attempt to designate one runs the risk of sacrificing all the other goods associated with free speech insofar as the arbiter is unreliable or makes too many errors."[71] Other scholars believe that this unreliability has already come home to roost.[72] Robert Post writes, "The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories."[73] These negatives have led some legal scholars to advocate limiting the consequentialist approach.[74] Erica Goldberg suggests that "courts should constrain free speech consequentialism by considering only the speech harms that are sufficiently similar to conduct harms."[75]

There is also a compelling argument to be made from the text of the Amendment itself for distinguishing speech with the effects of conduct. Here, it is worth quoting at length from Martin Redish:

> What the language [of the Amendment itself] does refer to is "speech," and not action. Thus, we need not find a logical distinction between the value served by speech and the value served by conduct in order to justify protecting only speech, for the framers have already drawn the distinction. Whether or not the constitutional language must be read to provide absolute protection to speech, there can be little doubt that it was intended to provide greater protection to speech than to conduct, which is relegated to the fifth amendment's protection against deprivation of "liberty" without "due process of law." Indeed, that the framers deemed it necessary to create a first amendment at all, rather than merely including speech within the other forms of liberty protected by the fifth amendment, indicates that speech is to receive a constitutional status above and beyond that given to conduct.[76]

Scholars like Goldberg use this line of reasoning to justify drawing a distinction among types of speech and allowing for greater regulation of speech that mimics conduct.[77] But, taking Redish's reasoning one step

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[71] Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 409, 434 (2016).
[72] *See* Post, *supra* note 40, at 2355.
[73] *Id.*
[74] *See* Goldberg, *supra* note 20, at 689.
[75] *Id.*
[76] Redish, *supra* note 4, at 600.
[77] *See* Goldberg, *supra* note 20, at 725–26.

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further, this distinction within the Amendments themselves between speech and conduct raises the question of why the framers thought to provide speech with greater protections than conduct. Perhaps it is because the likely injury from inappropriate conduct is more immediately destructive and less able to be mitigated than that from inappropriate speech. While this may be true generally, and regulating speech that may have more destructive "conduct-like" qualities may be a step in the right direction, a more precise approach is to focus on the harm that is likely to occur, rather than the type of speech that is most likely to cause the harm that is likely to occur. This is the position of Harm to a Fundamental Right theory.

The distinction is subtle, but important. For example, speech that itself prevents counter-speech strikes at the very heart of the democratic process, but it may not be conduct-like at all in its character.[78] Conversely, Goldberg specifically notes that anti-spam legislation may pass constitutional muster under a conduct-like harm analysis because spam can be likened to trespass upon chattels, a conduct harm.[79] Harm to a Fundamental Right theory, in contrast, would be unlikely to allow for spam regulation unless the injury resulting from the spam was particularly severe in that it infringed on another party's fundamental rights. Some inconveniences, even those as annoying as spam, must be endured to preserve the sanctity of free speech.

Harm to a Fundamental Right theory establishes a threshold at the outset of speech analysis. This initial gate-keeping question seeks to shield many instances of speech from the scrutiny of the courts and to narrow the number of distinctions that must be drawn in the evaluation of speech. It provides a funnel of sorts and at least the semblance of a bright-line rule at the outset of First Amendment analysis. This pushes back against the demands of consequentialism that all speech be placed on a scale and evaluated according to a balancing test weighing the value of the speech against the nature of the competing interest. It seeks to keep some speech from reaching the point where it is sorted into high and low value because, often, this sorting functions as a de facto ruling as to whether the speech will or will not be regulated.

Although the accuracy of the adage "strict in theory, fatal in fact" has been questioned lately, the truth remains that regulation of speech classified by the Supreme Court as high value must undergo a strict scrutiny test from which very few regulations emerge intact. "Indeed, outside the realm of low-value speech, the Supreme Court has invalidated almost every content-based restriction that it has considered in the past thirty years."[80] Conversely, government interests in regulating low-value speech are upheld far more

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[78] *See* discussion of *Arizona Free Enterprise infra*, Part IV.B.
[79] *See* Goldberg, *supra* note 20 at 721–22.
[80] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987).

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often.[81] This leads to the obvious question of whether the only real balancing that is being done is when the Supreme Court decides whether the particular speech at issue is "high value" enough to be protected. And the idea that First Amendment guarantees come down to what a particular set of Justices, in a particular moment in time, feel is important enough to label as high value is a terrifying notion indeed.

Justice Kagan was concerned about a similar form of arbitrariness that she observed when the Supreme Court examined justifications for regulating speech. Writing before she was appointed to the Supreme Court, Kagan argued that the convoluted classification system established by the Supreme Court to handle First Amendment questions is "best understood and most readily explained as a kind of motive-hunting."[82] Kagan's analysis claims that the Supreme Court is mostly concerned with "the discovery of improper governmental motives" in regulating speech and that the Supreme Court has used its authority to "construct and use objective tests to serve as proxies for a direct inquiry into motive."[83] In other words, the Supreme Court is making use of what appears to be objective rules in order to arrive at its preferred subjective outcome.

Any form of consequentialist test fails to appreciate the most critical First Amendment consideration: free speech is a fundamental liberty with innate value beyond, and unaffected by, any consequences of its use. Strict consequentialism professes the utmost allegiance to the sanctity of free speech while leaving this freedom open to potentially unlimited diminution through a balancing of harms analysis. Introducing a threshold inquiry that removes at least some speech from this balancing test aims to decrease the over-regulation of speech where such regulation is not necessary to preserve other fundamental liberties.

PART II: SPEECH AS A FUNDAMENTAL LIBERTY

The problem with the most popular theories of why free speech is important (marketplace of ideas, democratic participation and deliberation, individual self-realization) is that they all devolve into consequentialism, and a primarily consequentialist theory of free speech is doomed to endless re-evaluation and fact-specific inquiry. Whenever speech is valuable because it produces a certain benefit, then any speech that does not aid in that benefit becomes suspect. Also, because what society views as beneficial is constantly evolving, the question of which types of speech should be protected must be constantly re-evaluated.

Perhaps we have reached this Sisyphean cycle because our legal

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[81] *Id.* at 47–48.
[82] Kagan, *supra* note 3, at 414.
[83] *Id.*

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theorists have tried so hard to quantify a liberty that defies deconstruction. Euclid acknowledged that mathematics could not be established without relying on axioms.[84] An axiom "is an unprovable rule or first principle accepted as true because it is self-evident or particularly useful."[85] Aristotle developed his own set of axioms and described them as first principles.[86] The most important was the principle of non-contradiction, of which Aristotle stated that "without the principle of non-contradiction we could not know anything that we do know."[87]

There are axioms of community life as well. John Locke, whose philosophy played such an enormous role in the birth of the American Revolution, believed that natural law conveyed on every man the right to life, health, liberty, and possessions.[88] These values are repeated with only slight changes in the Declaration of Independence, and in that founding document, the five authors explain that these rights exist because they are "self-evident," "unalienable," and "endowed by their Creator."[89] There is no attempt to explain why humans should be entitled to these rights. There is simply an acceptance that they are necessary for the formation and maintenance of a government that is for and by the people.

Just because something is a "self-evident" right, however, does not mean that there will not be complicated or difficult questions of how that right plays out among competing interests. When it comes to the self-evident right to life itself, there are thorny problems surrounding the death penalty, abortion, and euthanasia. But, even though complicated philosophical and legal constructs must be brought to bear on these problems, the foundational axiom undergirding them never changes. Human life is valuable, even if it must sometimes be taken, and even if it must sometimes be sacrificed for the greater good. The inherent (and nearly universally accepted) value of human life does not need to be re-negotiated in every new factual circumstance. It is the constant starting point.

This is what is missing from our free speech jurisprudence. Despite the clear command of the First Amendment that the government shall not abridge the freedom of speech, our legal scholars and judges have thought it best to interpret this to mean that only some speech is valuable, only some

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[84] Euclid's axioms include statements like: "Things which are equal to the same thing are equal to one another," and "If equals be added to equals the wholes are equal." SIR THOMAS HEATH, THE ELEMENTS OF EUCLID 6 (Isaac Todhunter ed., J.M. Dent & Sons Ltd. last ed. 1943).

[85] *Axiom,* MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/axiom (last visited Feb. 3, 2023).

[86] Henry Mendell, *Aristotle and First Principles in Greek Mathematics*, STANFORD ENCYCLOPEDIA OF PHIL. (2004), https://plato.stanford.edu/entries/aristotle-mathematics/supplement1.html.

[87] Paula Gottlieb, *Aristotle and Non-Contradiction*, STANFORD ENCYCLOPEDIA OF PHIL., (Mar. 6, 2019), https://plato.stanford.edu/entries/aristotle-noncontradiction/#ThreVersPrinNonCont.

[88] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT & A LETTER CONCERNING TOLERATION 5 (Mark Goldie ed., Oxford Univ. Press 2016) (1689).

[89] DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

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speech is worthy of protection. There is no starting point. Reframing our analysis so that we begin with a presumption of the inherent value of free speech would not eliminate difficult decisions, just as a firm starting point does not preclude challenging issues with other self-evident freedoms, but it would provide a foundational axiom on which to build.

This idea of the inherent value of speech is certainly not new and not without supporters. Returning to John Stuart Mill, on whose philosophies the marketplace of ideas theory is thought to rest, we find the following:

> If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is not only a co-ordinate element with all that is designated by the terms civilisation, instruction, education, culture, but is itself a necessary part and condition of all those things; there would be no danger that liberty should be under-valued, and the adjustment of the boundaries between it and social control would present no extraordinary difficulty. But the evil is, that individual spontaneity is hardly recognised by the common modes of thinking, as having any intrinsic worth, or deserving any regard on its own account.[90]

These are not the words of a philosopher that values freedom of expression only for the somewhat mercenary assertion that such expression will allow the best idea to arise within a marketplace. Rather, Mill champions self-expression as a fundamental element of civilization and right of human expression. As Ronald Dworkin explains, "freedom of speech is valuable, not just in virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members… as responsible moral agents."[91]

Indeed, the simplicity and clarity of the words of the First Amendment itself eschew free speech consequentialism. As the Supreme Court noted in *United States v. Stevens*, "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[92]

PART III: APPLYING HARM TO A FUNDAMENTAL RIGHT THEORY

To illustrate how Harm to a Fundamental Right theory might be applied in free speech decision making, it is instructive to consider an area in which courts have consistently found that speech may be regulated:

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[90] MILL, *supra* note 27, at 97.
[91] Ronald Dworkin, *The Coming Battles Over Free Speech*, THE N. Y. REV. (June 11, 1992), https://www.nybooks.com/articles/1992/06/11/the-coming-battles-over-free-speech/.
[92] 559 U.S. 460, 470 (2010).

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defamation. Defamation is an excellent starting point because the courts' analysis in defamation cases can arguably be considered the most harm-dependent. Under most sets of facts, in order to succeed on a claim for defamation or libel, the person being defamed must not only prove that the defamer uttered untrue statements about them, but that these untrue statements caused actual damage.[93] Rebecca Brown explains that "[l]ong actionable at common law, libel was 'regarded as a form of personal assault,' the remedy for which could be provided under the state's police powers."[94]

Using Harm to a Fundamental Right theory, the courts would begin by identifying what harm, or damages, the speech is alleged to have caused. Courts already conduct a similar inquiry in defamation cases under the current analytical framework because damages are a necessary element of the tort of defamation. Under current First Amendment analysis, no matter how egregious or low value the speech itself might be, if it does not cause actual harm, then it cannot be proscribed. Harm to a Fundamental Right theory would also require an initial showing of harm or damages, but, to justify the curtailment of speech, the harm would have to violate a fundamental right.

The right to property has traditionally been upheld as a fundamental right consistent with the Due Process Clause of the Fourteenth Amendment. Since many defamation cases establish damages in terms of economic loss, and this loss represents an infringement on the property rights of the defamed, these cases would likely be decided similarly under Harm to a Fundamental Right theory as they are now. An exception might be when the primary damage caused by the defamatory utterances is emotional, such as compensation for pain and suffering.[95] There are times when courts have found that some speech induces emotions in the hearer strong enough that the speech can be proscribed.[96] An example would be threats that induce debilitating fear in the victim. Under these circumstances, if applying Harm to a Fundamental Right theory, a court may hold that some speech intrudes on another person's right to live and thus can be considered for regulation. In some cases of defamation, however, where the suffering caused by the speech is not nearly so extreme, it is likely that Harm to a Fundamental Right theory would not find an injury sufficient to limit the defamatory speech.

Critics may argue that this leaves innocent victims without recourse

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[93] *See* *Defamation*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/defamation (last visited Jan. 25, 2023). "To prove prima facie defamation, a plaintiff must show four things: 1) a false statement purporting to be fact; 2) publication or communication of that statement to a third person; 3) fault amounting to at least negligence; and 4) damages, or some harm caused to the reputation of the person or entity who is the subject of the statement." *Id.*

[94] Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 984 (2016).

[95] It is worth noting here that several states will not allow an alleged victim to pursue non-economic damages unless they can first prove actual damages.

[96] Brown, *supra* note 94, at 962–63.

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for some false statements that cause them real emotional pain. It is a fair criticism. But the counterbalancing benefit comes from the safeguard that the fundamental right requirement provides for the sanctity of speech. Speech that is subjected to an unfettered balancing test is vulnerable to potentially unlimited diminution based on a weighing of competing interests. Harm to a Fundamental Right theory simply states that, unless speech is violating another fundamental right, the weighing of interests is not worth the risk.

The counter argument, in the case of defamation, is that the utterance of false facts is not worthy of First Amendment protection. But this idea has been convincingly disputed by scholars who push back against the Supreme Court's trend towards devaluation of false speech.[97] "Assertions are catalysts for inquiry and debate which engender informed analysis. Claims, perhaps false even more than true ones, promote reflection, elicit rebuttal and controversy, and compel reevaluation, refinement, or reaffirmation."[98] The Supreme Court has attempted to circumscribe their devaluation of false speech by confining it only to false facts, stating that while false ideas may have value, false facts, as in defamation, do not.[99] But, as Donald Lively explains, "This 'fact-idea' dichotomy is blurred at best and illusory at worst. . . . Even if it were sensible to draw a line between fact and idea, the difficulty, if not impossibility, of so doing cautions against using truth as a standard by which to measure the scope of first amendment protection."[100]

If we accept that even false speech has value, and, more importantly, that attempts to restrict false speech inevitably run the risk of prohibiting true speech as well, then the value of finding ways to limit the speech that is subjected to consequentialist balancing becomes clear. As with other instances of sorting speech into low and high value, *stare decisis* likely prevents the Supreme Court from abandoning this form of classification, but the threshold question of Harm to a Fundamental Right theory attempts to protect speech by preventing a balancing test unless the speech is alleged to violate another fundamental right.

Because the threshold question of Harm to a Fundamental Right theory presents a high bar, in some cases it may not be possible to prove that speech is infringing on another fundamental right until after the harm has occurred. In those cases, defamation provides an excellent example of how harm-focused theories can use consequences rooted in tort law to discourage further violations of the fundamental rights of others. Just as enforcing liability for damages caused by defamation serves as a deterrent to future bad acts, Deanna Pollard Sacks explains that enforcing liability for other speech

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[97] Donald E. Lively, *The Supreme Court's Emerging Vision of False Speech: A First Amendment Blind Spot*, 38 RUTGERS L. REV. 479, 489 (1986).
[98] *Id.*
[99] *Id.* at 485.
[100] *Id.* at 485–86.

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harms can do the same. "Tort policy and efficient cost-avoidance mitigate toward shifting the actual costs of cognizable injury that can be proven to be caused by unreasonably dangerous speech onto the speech producers."[101] Further, "[a] socially optimal speech-tort balance would encourage producers of potentially dangerous speech to exercise some degree of social responsibility to avoid grave public harm resulting from their speech without chilling free speech."[102]

In fact, a significant movement has taken shape around the idea that speech would more properly be regulated by focusing on the harms that it can produce.[103] Unfortunately, many of the scholars advocating a harm-based analysis take a strictly consequentialist view of speech regulation.[104] This need not be the case. Remedies in tort law, like those already offered in defamation cases, can provide an effective deterrent to speech harms without the chilling effects of prior restraints on speech.[105]

Regulating after the fact is also more in keeping with the tradition of robust free speech protections in the United States. Perhaps the single area in which free speech protection has been affirmed in the strongest and most unequivocal terms has been the issue of prior restraint. If the ringing concurrences in the "Pentagon Papers" case stand for nothing else, they emphatically reinforce the Supreme Court's distaste for prior restraint on speech.[106] Justice White, in his concurrence, makes clear that even crimes, which can be punished after the fact, do not justify the use of prior restraint to prevent them.[107] Rather, the punishment of these crimes and the example of that punishment must provide an adequate deterrent to future abuses.

Thus, Harm to a Fundamental Right theory would remove speech from any potential for regulation unless that speech was alleged to cause harm to another fundamental right. Further, the high bar of this threshold question may push some regulation to necessarily occur after the violation. Defamation and its use of tort law provides an excellent example of how the law is already equipped to deal with these violations and how this method could be expanded to deal with other forms of speech-causing-harm as well.

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[101] Deana Pollard Sacks, *Constitutionalized Negligence*, 89 WASH. U. L. REV. 1065, 1084 (2012).

[102] *Id.* at 1083.

[103] For an excellent overview of three categories of speech harms and their analysis, *see* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81.

[104] *See* Goldberg, *supra* note 20, at 689 ("Strong free speech protections come at the expense of many types of speech-related harms, including emotional distress, privacy intrusions, reputational damage, and violence provoked in audiences. A recent wave of scholarship argues for more explicit and more heavy-handed forms of free speech consequentialism to remedy these harms.").

[105] For an excellent short introduction to this concept *see* Daniel F. Wachtell, *No Harm, No Foul: Reconceptualizing Free Speech Via Tort Law*, 83 N.Y.U. L. REV. 949, 972–73 (2008).

[106] *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

[107] *See id.* at 737 (White, J. concurring) ("I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.").

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PART IV: CASE STUDIES IN APPLYING HARM TO A FUNDAMENTAL RIGHT THEORY

A. *Ashcroft v. Free Speech Coalition and the Regulation of Virtual Child Pornography*

The application of Harm to a Fundamental Right theory to the question of "virtual" child pornography provides a good example of how the theory can help to prevent not only over-regulation of speech, but under-regulation as well. The threshold question when applying Harm to a Fundamental Right theory must be: "What harm is alleged to occur as a result of this speech?" In the case of virtual child pornography, the answer to that question, according to those who argue for regulation, is an increase in the exploitation and abuse of children.[108] Putting aside for one moment the question of the directness of causation, the great advantage of Harm to a Fundamental Right theory when it is applied to analyze virtual child pornography is that the theory forces the Supreme Court to identify and name the harm that a potential speech regulation is seeking to prevent and to squarely confront that harm at the outset of its analysis. This may help ensure that the Court does not inadvertently minimize the harm speech is alleged to produce or reduce the evaluation of that harm to an abstract, academic exercise sanitized of real-world consequences.

This suggestion that the Supreme Court take a more clear-eyed, deliberate look at the harm speech is alleged to produce is not out of keeping with precedent. Courts already take harm into account when making value judgements as to what types of speech deserve protection and what restrictions on speech will be allowed to stand. This can be seen in the similarities of the categories of speech that the Supreme Court has deemed fit to place outside the protection of the First Amendment.[109] With the single exception of obscenity, all of these categories of unprotected speech cause "tangible harm" to others by the very nature of the speech itself.[110] But refusing to acknowledge fully the role that a harm analysis is already implicitly playing in the Supreme Court's decisions does a disservice to any attempt to structure a coherent methodology from those decisions.

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[108] COMM. ON THE JUDICIARY, CHILD OBSCENITY AND PORNOGRAPHY PREVENTION ACT OF 2002, H.R. REP. NO. 107-526 at 12 (2002) (stating that "[c]hild pornography—virtual or otherwise—is detrimental to . . . our children" and "there is compelling evidence that visual depictions of sexually explicit conduct involving children cause real physical, emotional and psychological damage not only to depicted children but also to non-depicted children").

[109] These categories of speech include obscenity, child pornography, fighting words, and true threats. Ruane, *supra* note 12, at 1.

[110] *Id.* at 2 ("According to the Court, there is evidence that, at the time of the adoption of the First Amendment, obscenity 'was outside the protection intended for speech and press.' Consequently, obscenity may be banned simply because a legislature concludes that banning it protects 'the social interest in order and morality.' No actual harm, let alone compelling governmental interest, need be shown in order to ban it.").

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Take, for example, the issues of virtual child pornography and sexual harassment in the workplace. Courts have allowed persons to bring suit and recover under Title VII for "hostile work environment" including hostilities that occur only through words.[111] These claims are allowed even though such restriction of speech in the workplace is essentially both content-based and viewpoint-discriminatory.[112] The Supreme Court realizes that there is a greater value that must be protected in sexual harassment cases, but by failing to clearly identify and name that value, and the threat that harassing speech poses to it, the Court creates a line of decisions inconsistent with one another.[113] How, then, can the Supreme Court adequately explain why this censorship of free speech in the workplace is permissible, but the regulation of virtual child pornography is not? A coherent answer to these questions can be more readily found if the Supreme Court allows itself to explicitly acknowledge the harm analysis that it is already implicitly engaging in, and Harm to a Fundamental Right theory can assist.

This is because Harm to a Fundamental Right theory focuses analysis on the true reason why certain speech must be regulated: because it produces harm. This is a realization that the Supreme Court already implicitly condones, but often goes to great lengths to avoid explicitly relying on.[114] For example, a consideration of *New York v. Ferber* reveals a case in which the Supreme Court, in its majority opinion, repeatedly emphasized the harm caused to children by child pornography, but, in the end, engaged in convoluted analysis to attempt to support its ruling using justifications other than that harm.[115]

In *Ferber*, the Supreme Court upheld a New York statute that criminalized the "use of a child in a sexual performance," including any who produce or promote such performances.[116] Justice White, writing for the majority, recognized that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child" and the "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[117] He also rejected the opinion that a work must be obscene in order to "have

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[111] *Title VII,* CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/title_vii (last visited Jan. 22, 2023).

[112] *See* Kingsley R. Browne, *Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech*, 27 OHIO N.U. L. REV. 563, 578–79 (2001).

[113] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 409–11 (1992) (White, J., concurring) (discussing the incongruities between the reasoning the court used to decide R.A.V. and the analysis that provides that hostile work environment claims do not run afoul of the First Amendment).

[114] *See* Wachtell, *supra* note 105, at 949 ("For many years now, free speech jurisprudence has been focused, albeit implicitly, on John Stuart Mill's 'harm principle.' Yet the Supreme Court has avoided explicitly justifying speech restrictions on the basis of harm prevention.").

[115] *See* 458 U.S. 747 (1982).

[116] *Id.* at 750.

[117] *Id.* at 758–59.

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required the sexual exploitation of a child for its production."[118] Further, the Supreme Court embraced the statement of Assemblyman Lasher that "[i]t is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value."[119] But, even after this clear acknowledgment that the true issue in *Ferber* was the harm that the speech causes to children, the Court still felt obligated to explain that the reason child pornography can be regulated, in part, is because "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[120] But the Court then backtracks by suggesting that should "visual depictions of children performing sexual acts or lewdly exhibiting their genitals . . . [be] necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized."[121] This conclusion foreshadowed the Court's tragic ruling in *Ashcroft v. Free Speech Coalition* where it held that virtual child pornography was protected by the First Amendment.[122]

Analysis under Harm to a Fundamental Right theory would begin by requiring the Supreme Court to identify the alleged harm the speech would produce and would then require those seeking to regulate speech to demonstrate sufficiently direct causation between the speech and the alleged harm. At first glance, this may appear to make it more difficult to regulate virtual child pornography because it requires those advocating regulation to prove that making, viewing, or possessing virtual child pornography is linked to an increase in the exploitation of children. But, in practice, making this showing may increase the likelihood of statutes like the Child Pornography Prevention Act surviving First Amendment analysis. For example, in *Ashcroft v. Free Speech Coalition*, the Supreme Court ruled that the Child Pornography Prevention Act, which prohibited computer-generated images meant to look like children engaged in sexual acts, was an unconstitutional burden on free speech.[123] The Court rejected the government's contention that legalizing such virtual child pornography increases the likelihood that actual children will be exploited for illicit acts.[124] At least partly, according to the Supreme Court, this rejection was because the government failed to provide any data to substantiate their claim.[125]

Regarding the use of empirical data to prove harm in free speech analysis, Rebecca Brown says the following:

Empirical methods are expanding beyond anything imagined

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[118] *Id.* at 761.
[119] *Id.* at 761.
[120] *Id.* at 762.
[121] *Id.* at 762–63.
[122] 535 U.S. 234, 256–58 (2002).
[123] *Id.*
[124] *Id.* at 253.
[125] *Id.* at 253–54.

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> back in the days of *Chaplinsky* in 1942, when harm was simply presumed for certain categories of harm. It is time for the Court both to unleash the potential of social science research and to harness it. Government should bear the burden to demonstrate consequences of harmful expression that it wishes to restrict. At the same time, the Court should discipline its response to this kind of showing and put an end to using seat-of-the-pants intuitions to resolve difficult questions of ordered liberty. The important values at stake in these judgments are not well served by a jurisprudence of unexamined, tradition-bound assumptions that mechanically allow governments, for example, to protect children from obscenity but not violence.[126]

The goal in utilizing the Harm to a Fundamental Right threshold question is that by forcing the Supreme Court to recognize the fundamental right being violated by particular speech and forcing regulators to prove that the speech actually causes the alleged harm, the Supreme Court will be more willing to consider regulating the harmful speech. For example, the dissent in the House of Representatives' Report worried that "this bill would . . . criminalize . . . speech that has redeeming literary, artistic, political or other social value. For example, the bill would punish therapists and academic researchers who used computer-generated images in their research, and film makers who create explicit anti-child abuse documentaries."[127] Were the Supreme Court provided with concrete evidence that virtual pornography harms children, it might be more willing to reach the conclusion that preventing film makers from using explicit images of virtual child pornography in their otherwise socially valuable documentaries should not trump the fundamental right of children to live free from exploitation and abuse.

Justice O'Connor's concurrence in *Ferber* speaks implicitly to this notion of competing rights. O'Connor attempts to assure states that *Ferber* does not stand for the proposition that legislatures "must except 'material with serious literary, scientific, or educational value'" from statutes prohibiting child pornography and the exploitation of children.[128] Perhaps, O'Connor opines:

> the Constitution might in fact permit [states] to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed

[126] Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 1003 (2016).
[127] COMM. ON THE JUDICIARY, CHILD OBSCENITY AND PORNOGRAPHY PREVENTION ACT OF 2002, H.R. REP. NO. 107-526 at 93 (2002) (dissent).
[128] New York v. Ferber, 458 U.S. 747, 774 (1982) (O'Connor, J., concurring).

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> while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless."[129]

In so saying, Justice O'Connor recognizes that even the fundamental right of free speech must be balanced against other fundamental rights. The Harm to a Fundamental Right theory seeks to make that need for balance more clear.

B. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett and the Regulation of Political Speech to Allow Counter-Speech*

As with child pornography, the chief advantage in applying Harm to a Fundamental Right theory to questions of speech that prevent counter-speech is that, at the outset of analysis, the theory forces the Supreme Court to identify what harm the speech to be regulated is alleged to produce. With speech that itself prevents counter-speech, it is vital that the Supreme Court understand that the right to free speech exists on both sides of their consequentialist balancing test. Often, as in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* ("*Arizona Free Enterprise*"), the Supreme Court seems oblivious that there is a countervailing free speech issue at bar.[130] The Supreme Court focuses so completely on the value of the speech to be regulated that it fails to recognize the hypocrisy in a categorical refusal to regulate speech even if that speech prevents other speech.[131] Harm to a Fundamental Right theory would force the Supreme Court to identify, at the outset of its analysis, that the harm the speech is alleged to produce is a restriction on another party's right to free speech. Hopefully, this realization would result in more nuanced and fair-minded decisions from the Supreme Court in these situations.

In *Arizona Free Enterprise*, the Supreme Court struck down an Arizona campaign finance reform law that established a public fund from which candidates could receive campaign funding.[132] Any candidate who ran for a position in state government could opt in to the public funding scheme.[133] Those who did would receive a certain lump sum amount of public funding to run their campaign.[134] If their opponent in the race elected to privately fund their campaign, and if that opponent spent more than the public funding lump sum, the state fund would provide additional funding to the publicly funded candidates, matching the money spent by the privately funded candidates dollar-for-dollar, up to a certain maximum.[135] In a 5-4

[129] *Id.* at 774–75.
[130] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 *passim* (2011).
[131] *Id.* at 734, 750–51.
[132] *Id.* at 728.
[133] *Id.*
[134] *Id* at 728–29.
[135] *Id.* at 730, 733–36.

decision, Chief Justice Roberts, writing for the majority, found that the "vigorous exercise" of the privately funded candidates' right to speech resulted in "advantages" for their opponents in the form of more money to fund responsive speech.[136] The majority felt that this was a substantial and impermissible burden on the First Amendment rights of the privately funded candidates and overturned the Ninth Circuit, finding that the Arizona campaign finance reform scheme violated the First Amendment.[137]

In so doing, the Supreme Court failed to diagnose the real harm that the unfettered political speech from the privately funded candidates was causing. Because of this failure to diagnose the harm, the Court overturned Arizona's proper attempts to equalize that unfettered speech.[138] Justice Roberts and the majority framed the balancing test as between high-value political speech on one side and combatting corruption (according to Arizona) or "leveling the playing field" (according to the majority) on the other.[139] Counsel for Arizona tried to avoid the majority's reading that the statute was designed to "level the playing field" because the Supreme Court had already ruled in *Davis v. FEC* that such attempts at equalization are unconstitutional.[140] Even the dissent, hamstrung by *stare decisis*, was forced to attempt, as Arizona did, to frame the issue as a contest between free speech and the government's right to combat corruption.[141] In reality, "leveling the playing field" is the closest to the truth that either party comes in their analysis.[142] The real balancing in *Arizona Free Enterprise* is between political speech on both sides. Perhaps, had the Supreme Court recognized the true injury, the outcome might have been different. The Arizona voters were acting on their accurate understanding that when one side of a political debate is allowed to monopolize free speech channels, the other sides may not have the opportunity to exercise their right to counter-speech. Arizonans sought, through their campaign finance reform scheme, to "level the playing field" by allowing for all relevant parties to engage in free speech, not just those who could raise the most money. Viewed in this way, it becomes clear that the balancing test was not between the fundamental right to free speech on one side and the lesser right of the state to combat corruption on the other side. Rather, the scale was occupied by the fundamental right to speech on both sides.

This is an uncomfortable realization because, once a fundamental right conflicts with another fundamental right, the path of decision is no longer clear. According to Jeremy Waldron,

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136 *Id.* at 736.
137 *Id.* at 739, 755.
138 *Id.* at 755.
139 *Id.* at 728, 734, 748–49.
140 *Id.* at 748; Davis v. FEC, 554 U.S. 724, 741 (2008).
141 Ariz. Free Enter. Club's Freedom Club PAC, 564 U.S. at 755–57, 765–68 (Kagan, J., dissenting).
142 *Id.* at 749.

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> The idea of rights was seized on by many as a way of resisting . . . trade-offs. Rights express limits on what can be done to individuals for the sake of the greater benefit of others; they impose limits on the sacrifices that can be demanded from them as a contribution to the general good . . . . They are, to use Ronald Dworkin's image, our "trump cards," to be played in the last resort to protect the basics of our individual freedom and well-being. But if rights themselves conflict, the specter of trade-offs is reintroduced.[143]

It is no wonder then that the Supreme Court may balk at identifying conflicts of fundamental rights. Inaccurately classifying the harm as government corruption allows the Supreme Court to dismiss the concerns of Arizona voters rather than engage in a more nuanced balancing test as appropriate for competing fundamental rights.

The Supreme Court also appears to struggle with the conceptualization of the state as a protector of free speech. This may be because "[t]he debates of the past were premised on the view that the state was the natural enemy of freedom. It was the state that was trying to silence the individual speaker, and it was the state that had to be curbed."[144] This skepticism is necessary and wise. But the balance of power has shifted tremendously in the last fifty years, and corporations and special interests now hold much greater sway over politics and personal liberties than ever before. Now, the government must be called upon to use its counterbalancing power to protect the private right to speech from other "private aggregations of power."[145] In fact, as in *Arizona Free Enterprise*, there are times when the state may be the only power that *can* protect the right to responsive speech. As Owen Fiss noted:

> [T]he state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech. It may have to allocate public resources–hand out megaphones–to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way.[146]

This is especially true of political speech. Alexander Meiklejohn believed that the voting citizenry needs as much information as possible to properly execute their responsibility of self-governance.[147] As explained by

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143 Jeremy Waldron, *Rights in Conflict*, 99 U. CHI. PRESS 503, 508 (1989).
144 OWEN M. FISS, THE IRONY OF FREE SPEECH, 2 (1996).
145 *Id.*
146 *Id.* at 3–4.
147 *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

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Berelson, Lazarsfeld, and McPhee, "If there is one characteristic for a democratic system (besides the ballot itself) that is theoretically required, it is the capacity for and the practice of discussion."[148] In order to accomplish this objective, the role of the government must sometimes be to act as a mediator of sorts, making sure that each party to a controversy has the ability to be heard. Sometimes, just as in a live political debate, the mediator must silence one debater in order to allow another to respond.

This free flow of ideas is necessary not only because we hope that the best idea will rise to the top, but because, as Meiklejohn recognized, "Governments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers."[149] A Pew research study conducted in 2018 found that only 36-37% of Americans have at least a "fair" amount of confidence in elected officials.[150] More than half of Americans (53%) believe that the role of lobbyists and special interest groups in Washington is a "very big problem."[151] It may not be immediately apparent how significant this percentage is until one considers that more Americans feel that special interests are a very big problem than those who feel that climate change (46%), racism (40%), or the quality of public schools (36%) are very big problems.[152] Surveys like this one confirm that most Americans feel that special interest groups are thwarting the political process, yet the Supreme Court continues to pretend that more speech (even if it is all coming only from one side) equals more discussion.[153]

This delusion can be analogized to a five-mile race that will be decided among a field of 100 contestants. Of these 100, ninety-five are on foot, three have a bicycle, and two have sportscars. The Supreme Court seems to believe that the race is fair, just so long as the government is not the one handing out the sportscars. This perception of more speech as the universal panacea has its roots in a statement made by Justice Brandeis in his concurrence in *Whitney v. California*. Brandeis wrote that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[154] This may be true in situations where everyone has equal ability to make their voice heard, but it is not true in today's America, not unless the state intervenes to promote more equal speech. A foot racer simply does not beat a sportscar—not in a trial of a thousand years.

As Chief Justice Roberts wisely observed, "[I]n a democracy,

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[148] BERNARD R. BERELSON ET AL., VOTING 307 (1954).
[149] MEIKLEJOHN, *supra* note 49, at 9.
[150] LEE RAINIE ET AL., PEW RSCH. CTR., TRUST AND DISTRUST IN AMERICA 16 (2019).
[151] *Id.* at 12.
[152] *Id.*
[153] Citizens United v. FEC, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").
[154] 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

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campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas.'"[155] What the Supreme Court failed to realize in *Arizona Free Enterprise* is that Arizona's political reform laws were intended to ensure an interchange of important political ideas, until the Supreme Court thwarted that purpose.

Reframing the analysis of speech in *Arizona Free Enterprise* may not have changed the outcome, but at least it would have provided a clearer view of what was actually at stake. As Owen Fiss observed, "[A] failure of theory can lead to a failure of inquiry," and this can lead to the courts failing to appreciate that in many of the cases brought before them, "speech [is] both the threatened value and the countervalue."[156] Such was the case in *Arizona Free Enterprise*.

CONCLUSION

Stare decisis can be a crucial shield that guards democracy from the buffeting winds of change, which do not always blow in the direction of liberty. It can create stability, predictability, and confidence in the rule of law. It can legitimize our government and solidify our standing in the democratic world. Unfortunately, at times, it can also be an anchor that binds us to malformed ideas and methods of analysis that prove unwieldly and inconsistent. This country's jurisprudence is intellectually stunning, but it is not always right. The First Amendment's guarantee of free speech has baffled us. Its interpretation has divided and fractured our brightest legal minds.

Part of this confusion stems from the complicated nature of the Supreme Court's consequentialist balancing test. The purpose of Harm to a Fundamental Right theory is to remove from this balancing test any speech that does not infringe on another fundamental right. By forcing the Supreme Court to make this determination as a threshold inquiry, Harm to a Fundamental Right theory also ensures that when speech does infringe on a fundamental right, the seriousness of the potential harm can be recognized and adequately assessed. This aids in preventing both the over- and under-regulation of speech.

Harm to a Fundamental Right theory is based on the acknowledgement that the freedom to speak is vital to the preservation of democracy. It honors the value the Founders placed on this freedom as expressed in the First Amendment. Harm to a Fundamental Right theory believes that speech is so important that it cannot and should not be restricted unless the injury the speech causes is harm to another fundamental right.

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[155] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 750 (2011).
[156] FISS, *supra* note 144, at 25.

Simultaneously, Harm to a Fundamental Right theory acknowledges that the Supreme Court often fails to properly identify the harm that certain speech regulations seek to prevent, and when it does recognize that harm, it sometimes underestimates the harm's severity. Finally, Harm to a Fundamental Right theory specifically recognizes that in order to protect the right of all Americans to speak, there are times when some speech must be regulated. This is not an oxymoron. When freedom of speech occupies both sides of a consequentialist balancing test, it may be necessary for the government to ensure that speech from both sides has the opportunity to be heard.

Ultimately, Harm to a Fundamental Right theory is an overlay. It is a brace that can provide structure and corrective shape to an unruly process that produces conflicting results and confusing paradigms. It is unlikely that the Supreme Court will undo decades of sorting speech into high and low value buckets, so Harm to a Fundamental Right theory proposes a new first step in the same old analysis. This new step would not be difficult to implement and would not contradict previous First Amendment jurisprudence. The barrier to application is small, but the potential benefits of asking the Supreme Court, at the outset, to consider and define the harm that speech is alleged to produce are significant. This consideration can help ensure that when speech is placed on one side of a consequentialist scale, it is completely clear what value occupies the other side of the balance. Then, the Supreme Court can move into their First Amendment analysis with eyes wide open.

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