COMPETING FREE SPEECH VALUES IN AN AGE OF PROTEST

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This Article endeavors to catalog and resolve cases involving competing free speech values, and then applies its solutions to violent and disruptive protests. Almost every First Amendment case can be framed as implicating free speech values on both sides of the First Amendment equation. Government action directly abridges speech, but government inaction may allow private parties too much control over others' speech. First Amendment doctrine, which generally protects speech only from suppression by state actors, can thus compromise the very free speech values that form the rationales for the First Amendment. Scholars and litigants have argued that government regulation of speech, to preserve free speech values, is necessary in areas ranging from campaign finance, to access to media resources, to bigoted speech.

This Article argues that strict adherence to a formal state action doctrine should resolve most, but not all, clashes between free speech doctrine and values. A robust application of the state action doctrine—where government interference to preserve speech values is not considered as part of the First Amendment calculus—also best advances both formal and substantive First Amendment equality.

This Article proceeds in three parts. First, the Article chronicles the Supreme Court's approach to cases involving competing free speech values. The Article then demonstrates why the state action doctrine, with its associated formal equality and neutrality principles, will ultimately advance free speech values. Finally, the Article considers political protests, and distinguishes between prosecution of violent protesters, which should be encouraged, and legislation criminalizing disruptive protest tactics, which may be unconstitutional.

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INTRODUCTION

This Article endeavors to catalog and resolve conflicts between traditional free speech doctrine and "free speech values." For the purposes of this Article, free speech values mean the ideals, goals, and rationales that provide support for legal protections for speech.[1] The protections afforded by First Amendment doctrine apply only when the government censors speech, not when private parties' actions stifle speech.[2] As a result, application of First Amendment doctrine may yield results that undermine the very rationales behind the First Amendment. Recognizing this tension, my goal in this Article is to justify the virtues of strong First Amendment doctrine, interpreted using a formal state

1 The primary rationales for the First Amendment are (1) the marketplace of ideas rationale, or the idea that competing voices freely expressed fosters the search for truth; (2) the democratic self-governance rationale, the view that free speech is essential to allowing an informed citizenry to participate in self-government; and (3) the expressive autonomy rationale, which deems free speech a moral right, which is necessary for self-actualization of autonomous agents. *See* R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 337–41 (2001) (discussing "standard and widely recognized free speech values upon which much of the free speech literature, and even the classic free speech case law itself, ultimately rely"); *see also* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (providing consequentialist and non-consequentialist justifications for the First Amendment); Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 187 (2007) ("The Free Speech Clause, along with the guarantees of press freedom and the right to petition for redress of grievances, posit open communication as central to our social and political order."). These free speech values, and their corollaries, such as the view that because we all contribute to the search for truth, we should feel secure and comfortable expressing ourselves, can often be facilitated by government action that suppresses private suppression of speech and hampered by the doctrine preventing government from interfering with speech.

2 *See infra* Section I.A.

action doctrine and an animating principle in which the government must remain neutral with respect to speech.

Behind almost every restriction on speech lurks a potential argument that the lack of a speech regulation may be as deleterious to free speech values as a proposed speech regulation.[3] As examples, without any liability for privacy torts, individuals would fear surreptitious recording of their conversations and would be more reluctant to speak about sensitive or controversial topics, chilling speech.[4] Because anonymous speech is protected, many believe that the internet has become rife with attacks that "impoverish[] online dialog."[5] More informally and routinely, without government intervention, some individuals, perhaps those with stronger opinions or more resources, will be more vocal about their views or have larger audiences, leading to a skew in the information people have.

Many scholars also claim that certain types of harassing or hateful speech should be unprotected because, in the absence of regulation, this speech leads its targets to self-censor or causes their voices and perspectives to be disrespected.[6] This argument is gaining ground, especially among young people.[7] One of the justifications for the violent protest in response to the University of California, Berkeley's hosting of alt-right speaker Milo Yiannopoulos was that his speech is so threatening and silencing to minority groups that their only recourse is

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3 One scholar has characterized all free speech questions as involving free speech values on both sides. Wright, *supra* note 1, at 336 (describing all First Amendment cases as "a battle between standard recognized free speech values on both sides of the case because the various public or other interests in favor of restricting speech may, paradoxically, be re-characterized, re-described, or translated accurately into one or more of the standard free speech values themselves"). However, to support his view that "standard free speech values are always the only values on each side of any free speech case," Wright derives the relevant speech values in a way that is highly abstract and quite attenuated fashion from the relevant government interest. *Id.* For example, he classifies the government's interest in outlawing solicitation to murder as protecting the "self-realization" (a speech value) of the potential victim. *Id.* at 346. Although killing someone does hamper his self-actualization, it is a much broader self-actualization than simply the ability to express oneself or assist in the search for truth. *Id.* at 347–48. This Article focuses only on clashing free speech values that are directly and inescapably apparent from, and central to, a speech regulation.

4 *Id.*

5 *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009).

6 Catherine MacKinnon famously argued that pornography silences women by creating a social climate where their viewpoints are discredited. CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 163–97 (1987). Feminist and critical race scholars have made similar arguments about hateful, bigoted speech as well. *See* Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 685 n.127 (2016) (citing a scholar who argues for "restriction of misogynistic pornography and hate speech . . . [as] antagonistic to free speech values because it silences its targets").

7 *See* Marina Fang, *Most College Students Want Free Speech on Campuses—but Not When It's Hate Speech*, HUFFINGTON POST (Apr. 4, 2016, 6:16 AM), http://www.huffingtonpost.com/entry/free-speech-college-campuses-survey_us_5701c58ce4b0daf53aeff94e.

to respond with violence.[8]

Further, because of free speech doctrine, private entities, especially those with their own speech rights and significant power and resources, have much greater leeway to restrict speech than the government. When the government regulates speech based on its content, those regulations are often subject to some form of strict constitutional scrutiny.[9] By contrast, social media platforms are free to adopt speech policies banning certain types of speech to foster a greater sense of community or to facilitate the values of the company.[10] In fact, a First Amendment violation would likely occur if the government banned these platforms from adopting their own policies or required them to adopt particular policies.[11]

If private entities chill too much speech, free speech values can be sacrificed by free speech doctrine, just as these values can be served by free speech doctrine. However, when private action or corporate policies lead to self-censorship or silencing, there is no First Amendment claim by the party seeking governmental regulation, whose speech values have been undermined.

Realist perspectives on legal interpretation acknowledge the potential for competing free speech values, leading some realist scholars to advance arguments for more speech regulations and a rethinking of the state action doctrine in First Amendment cases.[12] These arguments have affected our free speech culture, or the way we view the virtues of the First Amendment. This, in turn, may impact how people think the First Amendment should be interpreted. Many believe that First Amendment doctrine, in many cases, does not promote the free speech values that animate it, and that our neutral and libertarian conception of the First Amendment reinforces existing power structures and

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8 *See infra* Section III.A; *see also* Jason LeMiere, *What Is Antifa? Anti-Fascist Group Behind Violent Berkeley Protest Against Milo Yiannopoulos*, INT'L BUS. TIMES (Feb. 2, 2017, 2:29 PM), https://www.ibtimes.com/what-antifa-anti-fascist-group-behind-violent-berkeley-protest-against-milo-2485217. Since Berkeley, anti-fascist and anti-racism protesters have clashed violently with far-right marches. In one case, a white supremacist killed Heather Hay at a rally in Charlottesville. *See* Erica Goldberg, *Free Speech After Charlottesville*, IN A CROWDED THEATER (Aug. 15, 2017), https://www.inacrowdedtheater.com/2017/08/15/free-speech-after-charlottesville. The extent to which certain speech or ideologies can be considered inherently violent will be discussed in Part III.

9 Strict scrutiny invalidates a government regulation unless the law is narrowly tailored to serve a compelling government interest. *See* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 691–92, 739–42 (2016) (discussing strict scrutiny and hateful speech).

10 *See Controversial, Harmful, and Hateful Speech on Facebook*, FACEBOOK (May 28, 2013, 4:51 PM), https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054.

11 *See generally* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998).

12 *See* Jack Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.

compromises the goals of an egalitarian society.[13] Although our current First Amendment jurisprudence is highly speech protective, many scholars and citizens have lost faith in, and desire for, strong free speech protections as against the government.[14] They believe the real enemy, in many cases, is other individuals, and that the government must intervene to protect us.

This Article addresses the tension between government action and government inaction in promoting free speech values, and argues for a resurgence of a distinction between free speech doctrine and values. I demonstrate why elevating free speech doctrine will, counterintuitively, ultimately serve free speech values. I then apply my approach to current, urgent areas where free speech doctrine and free speech values collide—potentially destructive protests. I distinguish between prosecutions of violent protesters, on the one hand, and legislation that impermissibly criminalizes certain forms of destructive protest. Although scholars have proposed regulating speech in order to promote free speech values,[15] the few scholars who have written directly about clashing First Amendment values have framed the issues differently and proposed very different solutions.[16]

In Part I, I chronicle the different ways courts resolve the tension between First Amendment doctrine and free speech values. In many cases where free speech doctrine may undermine free speech values, including campaign finance and right of access cases, the Supreme Court prioritizes free speech doctrine. The Court values our speech rights against the government above any free speech values compromised by private behavior.[17] Not only is the First Amendment inapplicable to private parties, but the government generally cannot advance the desire to promote free speech values or equalize speech

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13 *See infra* Part II.

14 *See* Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1468 (2016) (arguing that the very society created by traditional First Amendment principles is now rejecting those principles).

15 *See, e.g.*, Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 163, 172–78 (arguing that the First Amendment protection afforded to lies "should not govern a specific category of low-value lies that themselves undermine First Amendment interests").

16 *See* Magarian, *supra* note 1, at 188 (framing most colliding speech interests as between expressive autonomy and rights of access, and decrying the "rigidly formalist" application of the state action doctrine); Wright, *supra* note 1, at 336 (arguing in favor of more speech restrictions through injunctive relief based on the idea that "any and all free speech cases really amount to a battle between standard recognized free speech values"); *see also id.* at 336, 356, 347–48.

17 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010) (holding that a ban on a non-profit corporation's ability to collect money to produce a political film opposing Hillary Clinton violated the First Amendment). In applying strict First Amendment scrutiny to bans on campaign expenditures by corporations, *Citizens United* rejected the notion that the government can "prevent corporations from obtaining an 'unfair advantage in the political marketplace,'" precluding Congress from equalizing speech rights so that powerful corporations cannot overwhelm the speech rights of those with less resources. *Id.* at 349–50.

opportunities as an interest in restricting a private party's free speech rights. Yet, in one limited context—the publication of illegally obtained information—the Supreme Court's majority opinion explicitly notes that free speech interests exist on both sides of the First Amendment equation (or inequality, since the interests in any First Amendment case may not be of the same magnitude).[18] In these types of cases, lower courts are instructed to resolve the conflicting speech values by resorting to a "public concern" type test, where the illegally obtained speech is protected if the media entity did not participate in the illegal interception, and the speech matters to the public or is "newsworthy."[19]

The Article then moves from my descriptive claim to my normative claim. In Part II, I justify a strong state action doctrine and clearer tests to resolve the conflicts between free speech doctrine and free speech values. I argue that the best way to foster free speech values is through a formally neutral free speech doctrine, which allows speech protections to become greater for everyone as society and technology evolve.[20] Despite the ascendance of the legal realist influence and methods of analysis, which has persuasively called the public/private distinction into question,[21] a return to a robust, neutral First Amendment is now more important than ever.[22] Ultimately, governmental intervention into speech is far more corrosive than any private interference or self-censorship, and neutral application of First Amendment principles is both possible and beneficial.

In Part II, I also discuss the use of public concern tests when balancing First Amendment doctrine against free speech values, or against other tort law interests. I argue that courts must clarify when speech qualifies as sufficiently within the public's concern. Courts should apply a broad definition of "newsworthy" that can be applied as a matter of law, to minimize jury deliberation on these issues. Although the public concern test dominates much of First Amendment analysis in the speech-torts context, little has been written to clarify the contours of this test. Public concern, or newsworthiness, should be defined broadly because a narrow conception of newsworthiness enshrines too limited a

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18 *See* Bartnicki v. Vopper, 532 U.S. 514 (2001). Although Justice Breyer's concurrences often acknowledge free speech interests on both sides of a First Amendment cases, the Supreme Court has generally rejected this approach. Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1287 (2005) ("Until Justice Breyer's arrival on the Court, however, no Justice had consistently championed these arguments, and the results of the cases make clear that the Court had rejected them.").

19 *Bartnicki*, 532 U.S. at 525. According to the Court, "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534. For a discussion on libel, privacy torts, intentional infliction of emotional distress, and hate speech, see *infra* Section I.B.

20 *See infra* Section II.A.

21 *See* Balkin, *supra* note 12, at 381.

22 *See infra* text accompanying note 25.

vision of the First Amendment.[23] Using the recent example of Hulk Hogan's lawsuit against Gawker Media, I demonstrate that tests like *Bartnicki*'s newsworthiness standard are arbitrary and malleable, and may be improperly applied by a jury to censor speech the jury dislikes.[24]

Finally, in Part III, I apply my approach and conclusions to disruptive protests. I first argue that violent protesters, even those protesting speech that itself harms free speech values, must be prosecuted as a serious threat to our First Amendment scheme. I then distinguish between the prosecution of violent protesters and legislation designed to prohibit obstructive protests, which may be constitutionally impermissible.

In an era where many question the respect the President has for the First Amendment and constitutional rights more broadly,[25] maintenance of the legitimacy of legal doctrine and the Court's respect for rule of law is critically important. Eliminating as much subjectivity as possible in First Amendment analysis is critical. Preserving a strong state action doctrine, neutral public concern tests, and great skepticism for any type of viewpoint-based discrimination by the government will ultimately strengthen First Amendment doctrine and free speech values.

I. THE TENSION BETWEEN GOVERNMENT ACTION AND INACTION

In many First Amendment contexts, a government action or regulation directly suppresses speech, but the absence of the government action would undermine free speech values. Courts have adopted a variety of methods for dealing with the clash between First Amendment doctrine, which primarily protects against interference by the state, and free speech values, which provide the reasons for First Amendment doctrine in the first place. The general rule that the First Amendment protects speech only against government abridgement leaves little room for balancing the speech benefits of government intervention versus non-intervention, except in limited contexts, such as when specific tort interests are implicated, and when speech falls somewhat on the border of an unprotected category of speech.[26]

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23 *See infra* Section II.C.

24 *See infra* Section II.C.

25 *See* David Wright, *Trump: Burn the Flag, Go to Jail*, CNN (Nov. 29, 2016, 3:19 PM), https://www.cnn.com/2016/11/29/politics/donald-trump-flag-burning-penalty-proposal/index.html.

26 This type of balancing may affect how courts apply their First Amendment doctrines, including when deciding if a regulation meets strict scrutiny or is content neutral versus content based. However, except in limited circumstances, courts do not acknowledge that they are undertaking balancing the speech values fostered by government action and government inaction. This Article argues that courts should generally not resolve competing free speech values through balancing. *See infra* Part II.

In this Part, I first provide the general framework and principles courts apply when First Amendment doctrine compromises free speech values. As examples, I discuss cases involving campaign finance, access to broadcasting, and government speech. I then explore a limited example where courts do confront and resolve the tension between government action and inaction in fostering First Amendment values.

A. *The General State Action Framework*

Generally speaking, courts apply the state action doctrine rigidly to First Amendment cases.[27] This means that free speech protections are triggered only when the government abridges speech.[28] Easy cases, presenting no real clash of free speech values, involve courts striking down bans on flag burning or courts invalidating criminal convictions of those who stir crowds to anger with their unorthodox views.[29] In these cases, courts uphold the paradigmatic First Amendment principle that the government is not permitted to discriminate against particular viewpoints.[30]

In harder cases, the government seeks to intervene to prevent private parties from limiting or overriding the speech of other private parties. Because the speech-limiting effects of private behavior or private markets are not covered by the First Amendment—and state intrusion into speech is suspect in a way private intrusion is not—government intervention that fosters private speech by limiting the speech of some is generally considered unconstitutional. In First Amendment analysis, courts usually ignore any free speech values served by government regulation of private parties as part of the First Amendment problem, not as a legitimate compelling interest.[31] To allow the government to intervene to equalize speech opportunities often involves impermissible viewpoint discrimination. Thus, the speech effects of government inaction are not weighed against the speech effects of government action; only government action is constitutionally impermissible.[32]

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27 John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 571–72 (2005) (explaining that, as a threshold question in First Amendment analysis, what matters is whether the government or a private party has chosen to prohibit speech).

28 *Id.* at 575 ("[T]he state action doctrine holds that a claim based on the Constitution must be dismissed if the alleged injury is not the result of government wrongdoing.").

29 *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 163–65 (2010) (discussing First Amendment cases where both free speech libertarians and free speech egalitarians agree).

30 See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413–14, 422 (1996) (arguing that First Amendment doctrine is primarily concerned with ferreting out "purely censorial" motives of the government).

31 *But see infra* Section I.B.

32 Background government actions unrelated to speech, such as those that neutrally protect

Classic examples of the Supreme Court adhering strictly to state action principles and formal distinctions between public speech and private speech include campaign finance, access to broadcasting, and the government speech jurisprudence.

The current state of campaign finance law represents a (narrowly won) affirmation of libertarian free speech principles over egalitarian free speech principles.[33] In *Citizens United v. FEC*,[34] a 5-4 majority struck down a law that criminally banned a non-profit corporation from using corporate funds to produce a political video prior to an election.[35] Part of the government's historical justification for campaign finance reform law has been that corporations amass large amounts of money, through the corporate form, that will overwhelm the speech of individuals and distort the market of political speech.[36] In rejecting this "antidistortion rationale" as a permissible basis for speech restrictions, the Supreme Court dismissed the view that the speech of some can be constrained to better foster the speech of those with fewer resources.[37]

The Court reverted to the rationale of its previous holding in *Buckley v. Valeo*,[38] that campaign finance laws restrict political speech based on group association,[39] and overruled the rationale in the more recent case of *Austin v. Michigan Chamber of Commerce*,[40] which permitted campaign finance laws in order to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[41] Under *Citizens United*, direct campaign contributions can sometimes be regulated in order to prevent quid pro quo corruption of government officials.[42] However, the ban on campaign expenditures to produce political speech did not survive First Amendment strict scrutiny.[43] According to Justice Kennedy's majority opinion, "[t]he rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment

property interests, are not considered state action, even if they result in perpetuating imbalances in speech opportunities. *See* Fee, *supra* note 27, at 580–82.

33 *See* Sullivan, *supra* note 29, at 145 ("The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech.").

34 558 U.S. 310 (2010).

35 *Id.* at 321, 336–39.

36 *Id.* at 348–49.

37 *Id.* at 350 (disclaiming the government's "interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" (internal quotation marks omitted)).

38 424 U.S. 1 (1976).

39 *Id.* at 15.

40 494 U.S. 652 (1990).

41 *Id.* at 660.

42 *Citizens United*, 558 U.S. at 356.

43 *Id.*

generally prohibits the suppression of political speech based on the speaker's identity."[44]

Thus, the government's interest in banning speech to prevent wealthy speakers from exerting too much influence in the marketplace of ideas was dismissed as antithetical to the First Amendment. *Citizens United* produced outcry among legislators, scholars, and even President Barack Obama.[45] Yet, in many ways, this decision hewed closely to general First Amendment principles—that only state action is of constitutional concern, and that the government cannot limit private speech to correct power imbalances that undermine free speech values.[46]

A similar conflict between free speech doctrine, which prevents the government from interfering with private speech, and the free speech value of encouraging a diversity of viewpoints arises in the context of what Gregory Magarian calls "claims for access," such as access to property for expressive purposes or media access.[47] Here again, the state action doctrine generally prevails to resolve any conflict. Speakers who wish to distribute leaflets at private shopping centers generally have no First Amendment claim against private entities that prohibit them from doing so.[48] Private broadcasters and newspapers need not allow particular content or speakers on their media platforms; there is no state action or constitutional violation when private media exercises its own editorial judgment to exclude voices.[49]

In addition, the state may generally not legislatively require private parties to allow speech activities on their property,[50] unless the private entity resembles the state in some way[51] or the private entity does not have its own speech interest warranting First Amendment protection.[52] There are instances where regulations forcing broadcasters to allow air time for political advertisements have been upheld, but these have been

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44 *Id.* at 350.

45 State of the Union Address, 156 CONG. REC. H418 (daily ed. Jan. 27, 2010) (statement of Pres. Barack Obama).

46 One criticism of *Citizens United* that is not relevant to this analysis is that bans on corporate campaign expenditures serve the government's compelling interest in preventing corruption or protecting shareholders. *See Citizens United*, 558 U.S. at 348–49. These criticisms attack the Court's application of strict scrutiny to rationales that do not implicate clashes of free speech values and will thus not be addressed in this Article.

47 Magarian, *supra* note 1, at 193.

48 *Id.* at 194–95 (citing Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976)).

49 Magarian, *supra* note 1, at 199–201.

50 *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 250–51 (1974) (invalidating state statute requiring newspaper to provide a right of reply when an editorial attacks a political candidate).

51 *See generally* Marsh v. Alabama, 326 U.S. 501 (1946) (requiring a "company town" to allow expressive activity on its property).

52 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980) ("Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please.").

limited to special circumstances such as "legally qualified federal candidates" during an election.[53] As a general rule, right of access claims are resolved by holding that only state action implicates First Amendment rights, and state action to compel access by private parties is often invalidated.[54]

Finally, cases involving speech by the government itself demonstrate the importance of the distinction between state action and private action in resolving clashing free speech values. The government is generally not permitted to discriminate against speech based on its viewpoint[55] except in limited cases such as where the government is the speaker.[56] This may ultimately lead to the Supreme Court's categorizing speech as belonging to the government even though the speech's characteristics are quite similar to private speech. An over-characterization of private speech as government speech may be the result of a strong state action doctrine, which does not countenance balancing government suppression with private suppression of speech. By characterizing speech as government speech, courts avoid the principle that the government cannot stifle the viewpoints of private speech in order to allow other viewpoints to thrive.

For example, in *Walker v. Texas Division, Sons of Confederate Veterans*, the Supreme Court held that specialty license plates on cars are government speech despite the fact that the license plates are designed by private parties and despite the large and varied number of specialty license plates the state of Texas approved.[57] In so holding, the Court allowed Texas to deny a specialty license plate displaying a Confederate flag, a symbol that Texas concluded was reasonably offensive because of its association with expressions of hate.[58] This decision avoided using a rationale that the government can censor the Confederate flag in order to allow those intimidated by it to have an equal voice in public discourse.

As *Walker* demonstrates, hewing closely to the state action

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53 CBS v. FCC, 453 U.S. 367, 396 (1981) ("Petitioners are correct that the Court has never approved a general right of access to the media.").

54 Magarian argues that in right of access cases, the Supreme Court defers "to government access mandates in conceptually limited circumstances" in order to avoid the clash between a right of access and the right of expressive autonomy. *See* Magarian, *supra* note 1, at 198. However, my read on these cases is that the Supreme Court is simply honoring the state action doctrine by finding that some regulations that do not greatly infringe on speech survive constitutional scrutiny.

55 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

56 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

57 *Id.* at 2251.

58 *See id.* at 2258 (Alito, J., dissenting).

doctrine, as the Court generally does, often requires courts to resolve difficult questions about when a particular regulation or decision emanates from a state actor or a private actor. Because of ways in which private actors can often resemble government actors or perform government functions, many criticize the state action doctrine as arbitrary and unpredictable. And many also view the state action doctrine as a tool for reinforcing current power structures and status hierarchies and permit private injustice. These criticisms will be discussed later in Part II. Despite these criticisms, many First Amendment cases involving competing free speech values are handily resolved using the state action doctrine.

B. *Balancing Free Speech Values in Tort Law*

Although many cases where speech interests are implicated by both government action and inaction are resolved by simply deferring to the state action doctrine, privacy torts is one area where the Supreme Court has explicitly acknowledged when speech interests lie on both sides of the equation. In tort law, courts are accustomed to balancing speech interests against other interests, such as reputation or emotional tranquility. When speech values collide with each other in some privacy torts, courts use the same type of balancing as in other tort cases where speech conflicts are not explicitly recognized. The formula for solving the free speech equation in these types of cases is that the government cannot regulate speech, even to promote more speech, if that speech touches on a matter of public concern or is newsworthy. The First Amendment's protection against government suppression of free and open debate on important public issues supersedes any other interests at stake.[59]

The Supreme Court first began balancing First Amendment liberties against tort interests, without acknowledging a clash of free speech values, in tort areas such as libel and intentional infliction of emotional distress. The tests it created to balance tort interests and First Amendment freedoms were, later, not materially altered in contexts where speech values were acknowledged on both sides of the equation, indicating that the Court had not changed its framework based on competing free speech values.

Balancing tort interests against free speech began when the

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59 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

application of tort law was deemed state action in *New York Times Co. v. Sullivan*.[60] In that case, the Court held that a public official could sue a newspaper for false speech that was injurious to his reputation only if the plaintiff public official satisfied his burden of proving that the false "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[61] This constitutional standard was created to avoid chilling speech; the Court was concerned that truthful statements in the future might remain unpublished for fear that a jury might find them false.[62] Subsequent cases balancing reputational interests against First Amendment rights further solidified that the greater the public interest in the speech, the greater the burden on the plaintiff before she could receive different types of damages for libel. The greater the speech at issue constitutes a matter of public concern, the greater the evidentiary burden on the libel plaintiff for receiving both compensatory and punitive damages.[63]

Courts frame libel law as balancing speech versus reputation,[64] but libel law could have been framed as implicating speech interests on both sides. Government action, in imposing libel damages, directly abridges and punishes speech, but government inaction, if there were no damages for libel, would lead to an increased lack of trust in speech.[65] A version of this argument is used to justify the government's increased ability to regulate misleading commercial speech, despite the fact that false speech generally remains a protected category of speech.[66] In the commercial speech context, the Supreme Court has recognized that because commercial speech is protected based on its informational value to consumers, the government has an increased ability to regulate false or misleading advertising.[67] Similarly, false speech not only may ruin

60 *Id.* at 265.

61 *Id.* at 279–80.

62 *See id.* at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'").

63 *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–61 (1985) (holding that juries can presume compensatory and even punitive damages without a showing of malice in cases of purely private speech); Gertz v. Robert Welch, Inc., 418 U.S. 323, 334, 347, 392 (1974) (requiring plaintiff to prove actual malice for presumed or punitive damages, but requiring the state to impose only "some degree of fault" for compensatory damages when defamatory statements are made about a private figure on a matter of public concern, but limiting the "actual malice" standard).

64 *See Gertz*, 418 U.S. at 341 ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

65 Media markets may be able to rectify some of this problem, however, by exposing the false statements of other news media sources.

66 *See* United States v. Alvarez, 567 U.S. 709, 729–30 (2012) (invalidating statute criminalizing lies about the receipt of a military honor).

67 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980) ("The government may ban forms of communication more likely to deceive the public than to

reputations, but injects speech into the marketplace of ideas that will pervert the search for truth. Libel damages thus give speech greater power because speech becomes more trustworthy and protects the free speech value of the search for truth through free exchanges of ideas.

The public-concern type standards for when libel is actionable were also applied to the tort of intentional infliction of emotional distress. In *Snyder v. Phelps*,[68] for example, the Supreme Court held that claims for intentional infliction of emotional distress involving speech are not actionable when the speech is on a matter of public concern.[69] Chief Justice Roberts's 8-1 opinion thus held that the First Amendment required reversal of the five million dollar judgment against the Westboro Baptist Church for protesting near a military funeral,[70] even though the protest placards displayed homophobic epithets against the deceased.[71]

Courts applying *Snyder* followed its guidance to protect speech that concerns the public interest even in the face of valid emotional distress claims.[72] Although courts do not explicitly do so, emotional distress liability could be framed as implicating speech interests both from government action and inaction. Grave emotional distress, including feelings of despair and powerlessness, may have a silencing effect on others.[73] Courts have not framed the issue this way, however, because the greater interest implicated is emotional tranquility, and because the silencing effect from emotional distress would be a direct result of the viewpoint of the speech.[74] Instead, as Chief Justice Roberts proclaimed, "[a]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[75]

The one context where the Supreme Court has explicitly acknowledged speech interests on both sides of the equation is in the area of privacy torts and privacy statutes,[76] specifically when speech has

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inform it.").

68 562 U.S. 443 (2011).

69 *Id.* at 452 (holding that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest").

70 *Id.* at 459–61.

71 *Id.* at 454 (describing signs such as "Thank God for IEDs," "Fag Troops," "Semper Fi Fags," and "God Hates Fags").

72 *See* Gleason v. Smolinski, 125 A.3d 920, 938–42, 944–45 (Conn. 2015) (holding that a family's putting "Missing Person" posters along the bus route of the person they suspected to be involved in the disappearance was of public concern, even though animus existed between the parties).

73 *See infra* Section I.C.

74 If the Westboro Baptist Church had written kind, respectful things about Matthew Snyder, *Snyder v. Phelps* would likely never have been initiated as a lawsuit.

75 Snyder v. Phelps, 562 U.S. 443, 461 (2011).

76 The Supreme Court has generally rejected Justice Breyer's jurisprudential philosophy of acknowledging and balancing speech interests on both sides of a controversy. *See* Lillian R.

been illegally recorded. Other privacy torts, such as public disclosure of private facts (of legally obtained information), have unknown constitutional stature, and may indeed violate the First Amendment.[77] The Supreme Court has, however, squarely addressed the question of whether there is a First Amendment right to publish illegally obtained information, in instances where the publisher was not responsible for the illegal interception. In those cases, prohibiting publication would involve direct government censorship of speech. On the other side of the equation, allowing the publication would lead to an increase in self-censorship by people afraid their private speech is being intercepted, thus undermining free speech values.

In acknowledging the competing free speech values presented, the Court nonetheless employed the same public interest test as in other speech torts cases, here using the term "newsworthy," to determine when First Amendment interests trump privacy values and their concomitant speech values. In *Bartnicki v. Vopper*,[78] the Supreme Court held that a radio station had a First Amendment right to air a tape of a phone call that had been illegally recorded by an unidentified, anonymous person, who gave the tape of a radio station.[79] In invalidating portions of federal and state wiretapping acts, Justice Stevens's majority opinion noted that the phone call between a union president and his chief negotiator, which threatened to violate the law to achieve the union's purposes, was "newsworthy" and that the radio host was not involved in the illegal interception of the call.[80] The Court left for another day the decision of whether the publication of illegally obtained domestic gossip, trade secrets, or other purely private information would merit First Amendment protection.[81]

Unlike in other First Amendment cases, the majority opinion explicitly noted the clashing free speech values and the presence of "important interests to be considered on both sides of the constitutional calculus."[82] The Court appreciated that the statute forbidding the media from publishing illegally intercepted information posed a direct threat of government censorship, but recognized that privacy of

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BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1287–07 (2005).

77 *See, e.g.*, Jared A. Wilkerson, *The Battle for the Disclosure Tort*, 49 CAL. W. L. REV. 231, 263–66 (2013) (discussing competing views about constitutionality of privacy torts); *see also* Whitney Kirsten McBride, *Lock the Closet Door: Does Private Mean Secret?*, 42 MCGEORGE L. REV. 901, 912–21 (2011) (detailing instances when public disclosure of private facts tort violates and does not violate the First Amendment).

78 532 U.S. 514 (2001).

79 *Id.* at 534–35.

80 *Id.* at 525, 535 ("We think it clear that . . . a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

81 *Id.* at 533–34.

82 *Id.* at 533.

communication secured by government action was also an important interest.[83] According to Justice Stevens, "fear of public disclosure of private conversations might well have a chilling effect on private speech."[84]

Bartnicki and the privacy torts context seem fundamentally different than other cases presenting competing free speech values, because the speech at issue was illegally produced in the first place. Perhaps, for that reason, the Court was willing to acknowledge the possibility of speech values compromised by government action and government inaction, rather than simply rigidly applying the state action doctrine and recognizing only the speech values compromised by the government. The acknowledgement of clashing speech interests in *Bartnicki* did not alter the Court's general framework for balancing tort interests against speech interests, however, and the Court again determined that "privacy concerns give way when balanced against the interest in publishing matters of public importance."[85]

Tests involving the public concern, such as the newsworthiness test, are difficult to articulate and thus unpredictable, rendering the balance of free speech values somewhat subjective.[86] In Hulk Hogan's privacy tort against Gawker Media, for example, the Florida Court of Appeals reversed a preliminary injunction against Gawker, concluding that the illegally recorded tape published by Gawker was likely newsworthy.[87] Even so, the trial court, on remand, allowed the jury to decide the newsworthiness issue, and the jury's $140 million judgment bankrupted Gawker.[88] This Article will explore in Part II ways to clarify this newsworthiness test, and will argue that its application should be limited to the privacy torts context, specifically where information has been illegally recorded.

C. *The Confused Status of Bigoted Speech and Workplace Harassment*

Scholars and lawyers have advanced other important arguments for exempting speech from First Amendment protection due to competing free speech values. These arguments have not generally been explicitly

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83 *Id.* at 532.

84 *Id.* at 533.

85 *Id.* at 534.

86 *See infra* Section II.C.

87 Gawker Media, L.L.C. v. Bollea, 129 So. 3d 1196, 1200–01 (Fla. Dist. Ct. App. 2014) ("Mr. Bollea openly discussed an affair he had while married to Linda Bollea in his published autobiography and otherwise discussed his family, marriage, and sex life through various media outlets.").

88 Jonathan Guilford, *How the Gawker Media Bankruptcy Will Work*, GAWKER (June 21, 2016, 9:45 AM), http://gawker.com/how-the-gawker-media-bankruptcy-will-work-1782289841.

accepted by the courts, but have affected how courts interpret statutes that incidentally restrict speech. The treatment of bigoted speech is currently in a confused state, partially because free speech values are implicated both by government regulation and government passivity with respect to this speech. A significant portion of the public has also, to a large extent, embraced the idea that speech that harms or silences minorities should be unprotected.

For several decades, prominent scholars have argued that the government should be permitted to regulate speech that can be categorized as "hate speech."[89] This type of speech remains protected under the First Amendment but is banned in most other Western democracies.[90] The view that speech that disparages individuals on the basis of race, gender, national origin, sexual orientation, or another historically oppressed status should be regulated—even if this speech does not rise to the level of unprotected incitement, true threats, or fighting words—is often supported by the argument that this type of speech actually silences the voices of others or marginalizes them such that their voices are more easily discredited or ignored.[91] Under that rationale, unless the government acts to regulate hate speech, free speech values are compromised because members of minority groups will self-censor, or their contributions to public discourse will be unfairly and irrationally delegitimized.

Courts addressing this clash of free speech values generally apply the state action doctrine to prohibit viewpoint discrimination by the government, despite the competing free speech values. For example, proponents of a state statute outlawing pornography, defined as "the graphic sexually explicit subordination of women,"[92] believed that pornography showing women as servile would contribute to men seeing women as lesser, thus diminishing their voices and status in society and

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89 *See, e.g.*, Kammy Au, *Freedom from Fear*, 15 LINCOLN L. REV. 45 (1984); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

90 *See* Guy E. Carmi, *Dignity—the Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 988–89 (2007) (describing America's unique commitment to "robust free speech protections").

91 *See* Matsuda, *supra* note 89, at 2357–58 ("Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse."). Scholars also present other rationales for exempting hate speech from First Amendment protection. Jeremy Waldron, for example, argues that removing visible signs of hate from public life provides the public good of assurance that we are all equal citizens. Jeremy Waldron, *2009 Oliver Wendell Holmes Lectures: Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1609–12, 1626–32 (2010) (explaining how hate speech robs victims of a sense of dignity and threatens their sense of equal status under the law).

92 Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985).

leading to discrimination and violence.[93] In *American Booksellers Ass'n v. Hudnut*, Judge Easterbrook agreed that certain types of pornography may be corrosive in this way, but claimed that regulating pornography for that reason is a form of "thought control."[94]

> Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. *None is directly answerable by more speech, unless that speech too finds its place in the popular culture*. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.[95]

The Seventh Circuit thus recognized that more speech cannot always remedy the effects of bigoted speech, but held that the government cannot direct culture by removing particular viewpoints.[96]

Thus, as evidenced by the protection of the homophobic slurs in *Snyder v. Phelps*,[97] the First Amendment continues to protect hateful, objectionable, distressing speech. Yet, uncertainty abounds as to the level of protection of bigoted speech. Courts generally strike down speech restrictions on public university campuses and high schools that prohibit speech that degrades others based on group membership in a historically disadvantaged class.[98] However, public universities continue to promulgate speech restrictions that appear to censor protected speech, and many of these restrictions remain unchallenged, often because students are unaware of their actual First Amendment rights.[99]

Further, federal civil rights statutes such as Title VII,[100] which prohibits discrimination in the workplace on the basis of sex, race, color, national origin, or religion, and Titles VI and IX, which prohibit discrimination on the basis of race and gender in federally funded

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93 *Id.* at 329.

94 *Id.* at 328.

95 *Id.* at 330 (emphasis added).

96 *Id.* at 328.

97 562 U.S. 443 (2011); *see supra* Section I.B.

98 *See, e.g.*, McCauley v. Univ. of the V.I., 618 F.3d 232, 248 (3d Cir. 2010) (holding that several regulations restricting offensive and degrading speech were unconstitutional); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d Cir. 2001) ("[T]he free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991) (overturning policy banning discriminatory comments); Doe v. Univ. of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (finding school's sexual harassment policy overbroad). *But see* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (upholding public school's prohibition of students' shirts condemning homosexuality for religious reasons), *vacated as moot*, 549 U.S. 1262 (2007).

99 *See Spotlight on Speech Codes 2016: The State of Free Speech on Our Nation's Campuses*, FIRE, https://www.thefire.org/spotlight-on-speech-codes-2016.

100 42 U.S.C. § 2000e (2012).

educational institutions,[101] are often applied to penalize pure speech, without much First Amendment scrutiny.[102] Courts have found that instances of what is generally considered core, protected speech—such as religious articles in a company newsletter or defendant's conversations about defendant's homosexuality that challenged plaintiff's support for the Pope and others who decried same-sex relationships—was illegal harassment until Title VII.[103] The application of these statutes to pure speech, which does not involve discriminatory conduct, constitutes state action that directly censors speech on the basis of viewpoint.[104] On the other hand, invalidation of these statutes as applied to hateful speech arguably would compromise the opportunities of members of historically oppressed minorities and diminish their contributions to the "marketplace of ideas."[105] The inconsistency with which courts (and the public) determine the level of protection of hateful speech at universities, in the workplace, and in public spaces, had yielded an unpredictable status for speech that might be perceived as hateful.

II. APPROACH TO CONFLICTING SPEECH VALUES

Cases that present potential conflicts between speech values are myriad, and many more areas of First Amendment law could be framed as presenting potential conflicts—intentional infliction of emotional distress, for example.[106] The potential for eroding strong free speech protections, especially in an era of increasing free speech skepticism among young people,[107] is great. As noted in the last Section, courts

101 *See* Title VI, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin); 20 U.S.C. §§ 1681–88 (prohibiting gender discrimination).

102 *See, e.g.*, Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305 (1996) (discussing First Amendment implications of Title VII); *The History, Uses, and Abuses of Title IX*, AAUP (June 2016), https://www.aaup.org/report/history-uses-and-abuses-title-ix (describing how the Office of Civil Rights, which implements Title XI, has conflated speech and conduct).

103 *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800–07 (1992) (discussing actual and potential conflicts between Title VII and the First Amendment).

104 *See id.* at 1793–95 (discussing how, although "[f]ew courts applying harassment law even discuss free speech issues, and many commentators have almost taken the constitutionality of harassment law for granted," religious and political speech is suppressed by workplace civil rights harassment laws like Title VII).

105 The notion that the true test of an idea is its ability to receive acceptance in the marketplace of ideas originated in a dissent by Justice Holmes. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

106 *See supra* Section I.B.

107 Studies show that younger generations are increasingly in favor of more government regulation of speech that is considered protected. *See, e.g.*, Jacob Poushter, *40% of Millennials*

currently treat these conflicts haphazardly, using different approaches in different cases. In most cases, courts defer to the state action doctrine to avoid recognizing the conflict.[108] In torts cases, courts use public concern type tests to resolve conflicts between speech values (and other values as well).[109] Courts only infrequently acknowledge these conflicts and provide no justification for taking various approaches in various cases.[110]

In this Part, I provide a roadmap for how courts should approach cases where applying free speech doctrine may undermine free speech values. Part I defends using a robust, formal state action jurisprudence to implicate First Amendment protections generally only when created by government action, without diluting these protections by weighing them against free speech values compromised by government inaction. Part II defends the neutrality of both the state action doctrine and the public concern test, and explores when each test is appropriate. Part III provides some parameters for clarifying the public concern test so that it can be applied with more coherence and predictability.

A. *Justifying the State Action Doctrine*

Legal realists argue that rigid application of the state action doctrine to the First Amendment benefits mainly the rich and powerful, undermining substantive free speech equality and imposing a rigidly formal distinction between private speech suppression and government censorship.[111] However, the state action doctrine preserves formal equality of free speech values and, as society evolves, will more fulsomely protect substantive free speech equality as well. Because no private entity, no matter how large, possesses the government's monopoly power on the use of coercive force, the government's ability to suppress speech should be considered to generally overwhelm free speech values compromised by private suppression of speech. Case-by-case balancing, which is subjective and unpredictable, will ultimately compromise free speech values and the formal neutrality of the First Amendment.[112] A formalist application of the state action doctrine—

OK with Limiting Speech Offensive to Minorities, PEW RES. CTR. (Nov. 20, 2015), http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities. A significant portion of students even think the First Amendment is "outdated." *Opinion Commentary, Notable & Quotable: Unfree Speech on Campus*, WALL ST. J. (Oct. 22, 2015, 7:15 P.M.), https://www.wsj.com/articles/notable-quotable-unfree-speech-on-campus-1445555707.

108 *See supra* Section I.A.

109 *See supra* Section I.B.

110 *See supra* Section I.B.

111 *See infra* note 133 and accompanying text.

112 As two small examples, consider the right to "erasure," in Europe, where the

where the state's abridgement of free speech is necessarily worse than a private party's chilling of speech—also preserves the First Amendment rights of property owners whose property serves expressive purposes, and is thus the appropriate answer to most speech problems that present conflicting speech values. Applying a formalist state action doctrine means that only speech abridged by the government is appropriate for consideration in First Amendment analysis. This solution is ultimately the best way to foster free speech values, especially given the ease of creating conflicts between speech values.

The state action doctrine, as applied to the provisions of the Constitution, recognizes that only the government is restrained from abridging constitutional rights.[113] This distinction between private action and government action preserves spheres of liberty in which private parties are free to act.[114] For example, any government action that discriminates on the basis of gender is subjected to Fourteenth Amendment scrutiny, but individuals are free to use this status characteristic when selecting romantic partners.[115] If a homeowner refuses to allow guests to bring guns onto his land, there is no Second Amendment violation.[116]

In the free speech context, the state action doctrine is written explicitly into the text of the First Amendment.[117] The First Amendment's prohibition on Congress making no law abridging the freedom of speech has been interpreted to mean that federal and state actors cannot discriminate against speech on the basis of viewpoint or even create substantial burdens on speech.[118] Content- and viewpoint-

indeterminate balancing of privacy rights versus speech rights have created an administrative mess for companies like Google. Further, in the Freedom of Information Act context, courts balancing whether the public has the right to certain information against whether the government can withhold that information have difficulty conducting this analysis.

113 Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 186–87 (2004). The Thirteenth Amendment's prohibition on slavery is the one exception to this principle of constitutional interpretation. *Id.* at 186.

114 Fee, *supra* note 27, at 575 ("The state action doctrine reflects a dichotomy between government and the individual that is fundamental to Western liberalism: government exists to protect individual freedom, and for that purpose it must also be restrained.").

115 For a discussion of how the Supreme Court has resisted altering the state action component of the Fourteenth Amendment, even after the Civil Rights Movement, see Christoper W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 770–71 (2010).

116 Bruce D. Black & Kara Kapp, *State Constitutional Law as a Basis of Federal Constitutional Interpretation*: *The Lessons of the Second Amendment*, 46 N.M. L. REV. 240, 247–49 (2016) (discussing the evolution of the application of Second Amendment from applying only to the federal government to likely applying to the states).

117 The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. This provision has been incorporated against the states via the Due process Clause of the Fourteenth Amendment. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

118 *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 704–06, 716 (2011) (discussing various ways in which the government infringes speech rights,

based restrictions on speech by the government are subject to strict scrutiny.[119] Even "time, place, [and] manner" restrictions, which do not discriminate against speech on the basis of content, are permissible only if the government's speech restriction allows for ample channels of communication of the speech affected.[120]

However, First Amendment state action is not triggered when the government neutrally enforces background state laws unrelated to the suppression of expression, such as property and contract rights, even if this enforcement incidentally impacts speech.[121] Private citizens can thus refuse entry into their homes to anyone whose views, on any topic, from the best city for pizza to the most suitable presidential candidate, they disagree with. If the uninvited guest refuses to leave, the state can enforce property laws, even if they incidentally affect that speaker's message. Private employers can often fire individuals for speech they dislike, and social media platforms can remove users for speech they find hateful or otherwise objectionable.[122] Individuals can contract to limit each other's speech rights, to the extent these contracts do not interfere with a state's public policy.[123] A newspaper can refuse to publish an editorial whose viewpoint it disdains.[124]

In this way, the state action doctrine preserves the speech and associational rights of private parties by allowing them to restrict the speech of other private parties. Formally, we are all equal with respect to free speech.[125] We have equal rights as against the government

including the prohibition on discriminating against speech on the basis of viewpoint and failing to provide adequate channels for communication when speech restrictions are viewpoint neutral).

119 *See* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014) (holding that if a statute discriminates on the basis of viewpoint, "then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest").

120 *Id.* at 2529 (discussing scrutiny for time, place, and manner restrictions).

121 State action for constitutional purposes is generally not triggered by judicial enforcement of private rights, except in the case of racially restrictive covenants, which presented a special case where the courts' involvement in enforcing property agreements had a dramatic effect on racial discrimination. *See* Shelley v. Kraemer, 334 U.S. 1 (1948). *Shelley* is generally considered to be a sui generis case. *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 463–64 (2007) (describing how lower courts decline to apply *Shelley* outside of the context of racial discrimination).

122 *See generally* Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325 (2014).

123 *See, e.g.*, Joan H. Krause, *The Brief Life of the Gag Clause: Why Anti-Gag Clause Legislation Isn't Enough*, 67 TENN. L. REV. 1 (1999) (discussing "gag clauses—provisions in contracts between health maintenance organizations (HMOs) and physicians that allegedly restrict the information that physicians are permitted to discuss with their patients—quickly garnered national attention"). These gag clauses do not raise First Amendment concerns.

124 *See supra* Section I.A.

125 See Nadine Strossen, Michigan Department of State Police v. Sitz*: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 290 (1991) (describing the Supreme Court's emphasis on formal equality in free speech and free exercise doctrine). This way of understanding the First Amendment has also been described as formal

restricting our speech, no matter our views, and we have formally equal rights as against each other. Under the First Amendment, we are all permitted to allow whatever views we want on our own property, in our own associations,[126] and with our own for profit and non-profit organizations.

This formal equality means that the First Amendment is also fairly neutral with respect to speech. Neutrality is preserved by the state action doctrine because the government cannot, except for in limited circumstances, discriminate against speech on the basis of content and viewpoint.[127] Private parties may discriminate on these bases, thus preserving private parties' First Amendment rights, but government action must generally be neutral with respect to the content of the speech. Further, when the government seeks to intervene to suppress the speech of some to foster the speech of others, this intervention is often based on the identity of the speaker, like in campaign finance reform legislation,[128] or the viewpoint of the speaker, like in proposed regulations of bigoted speech.[129] As a result, abandoning the state action doctrine, even if First Amendment laws are applied equally to all private parties, will compromise the neutrality of the First Amendment, especially given the government's relative power in suppressing speech.

Some scholars argue that the First Amendment is not, in fact, neutral because it carves out certain categories of unprotected speech on the basis of content, such as obscenity, or because courts engage in more deferential review of time, place, and manner restrictions.[130] These arguments are overstated. Although there are a limited number of categories of speech that do not receive First Amendment protection, none of these categories is based on the viewpoint of the speech, and only a few are based on the content. The Supreme Court believes that these categories are based on speech that was historically unprotected—with history being a neutral way of distinguishing between protected and unprotected speech.[131] The Court has also articulated that new

neutrality in the First Amendment free exercise context. *See* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 26 (2000).

126 *See, e.g.*, Erica Goldberg, *Amending* Christian Legal Society v. Martinez*: Protecting Associational Rights in a Limited Public Forum*, 16 TEX. J. C.L. & C.R. 129, 142–45 (2011).

127 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992) (holding that the government cannot discriminate on the basis of viewpoint even when speech it itself unprotected).

128 *See* Citizens United v. FEC, 558 U.S. 310, 365–66 (holding that that "the Government may not suppress political speech on the basis of the speaker's corporate identity").

129 *See supra* Section I.C.

130 *See* DeGirolami, *supra* note 14, at 1490–91 ("Why should 'keeping the sidewalks free from obstructions' or the channels of traffic moving efficiently be self-evidently more important interests in public order than upholding other 'conventions of decency'?").

131 *See* United States v. Stevens, 559 U.S. 460, 468–72 (2010) (describing the Court's inability to create new, unprotected categories of speech beyond a limited number of traditional restrictions on speech).

categories of speech should not be created by weighing the harms and benefits of speech,[132] and even speech that is truly objectionable to all of the Justices cannot be unprotected by creating new unprotected categories of speech.[133]

First Amendment formal equality and neutrality thus enshrines a process of achieving truth. Because no one is forbidden to express her viewpoint, perspectives clash and resolve through individuals changing their minds and voting on their ultimate views. No idea is completely out of bounds, and we are all the arbiters of what we believe, not the government. Formal equality is justified by all three of the rationales animating free speech doctrine.[134]

The result of this formal state action doctrine, according to many realist critiques, is an actual reduction in speech and free speech values. Realist scholars thus criticize strict application of the state action doctrine, with its concomitant distinction between public speech and private speech.[135] The reason, they believe, that formal equality for speech liberties diminishes substantive liberty is that the government has some limited power to restrict speech on its own property, but generally cannot censor speech in public forums or private spheres.[136] Individuals thus have limited ability to speak in public spaces, and they may not have adequate property or resources to communicate their message in the private sector. The government's inability to censor private censorship (happening on private property), in conjunction with the fact that state action does not apply to background contract and property enforcement, means that those with power, resources, and property will have inflated opportunities for speaking, and will have

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132 *Id.* at 470–71 ("When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis.").

133 In *United States v. Stevens*, the Court, in an 8-1 decision, overturned a statute criminalizing depictions of animal torture. *Id.* at 469.

134 *See supra* Introduction.

135 *See, e.g.*, Balkin, *supra* note 12, at 397–99. Balkin believes that the state action doctrine is misguided because "one had to show state interference (or its equivalent) with speech in order to demonstrate a restraint on liberty" even though "private restraints on liberty may have been the most serious obstacles to the exercise of free speech rights all along, even in cases that appear at first glance to involve only governmental restraints on liberty." *See* Magarian, *supra* note 1, at 188 (exploring how a "rigidly formalist version of the public-private distinction" ignores the speech interests of those seeking access to expressive property).

136 In nonpublic forums, like courthouses, the government can restrict speech, so long as the restriction is reasonable and does not discriminate on the basis of viewpoint. In public forums, by contrast, any restriction based on either the content or the viewpoint of the speech triggers strict scrutiny. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799–800 (1985) ("Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum."). Content-based discrimination encompasses whole categories of speech, whereas viewpoint-based discrimination, a greater First Amendment evil because of its censorious motivations, targets specific viewpoints within a category. *See* Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 698–701 (1996).

complete discretion to restrict others who do not express agreeable viewpoints. The voices of the powerless, or those without property or other opportunities for speaking, will be artificially marginalized from the marketplace of ideas.[137] Corporations, in particular, can pool resources and unduly influence political elections or restrict the speech of their employees.[138]

These critiques present compelling reasons for the government to intervene to equalize speech opportunities, in the name of the free speech values of promoting truth and democratic participation. A rigid application of the state action doctrine prevents this government intervention to equalize speech markets and may compromise free speech values and substantive free speech liberties. Because less and less speech takes place on public property, there are fewer opportunities for effectively conveying one's message for those who do not own a significant amount of property.[139]

This realist critique is, in many ways, descriptively accurate, but there are equally plausible reasons to think that the state action doctrine can improve substantive speech equality without compromising the First Amendment freedoms gained by formal speech equality. Thus, in addition to the respect for the constitutional text that the state action doctrine affords, formal speech equality should be the top priority in First Amendment jurisprudence.

In other legal contexts, government intervention is often necessary to right historical wrongs.[140] Because of our unequal standing in society, a formal position of neutrality in many areas may dramatically compromise substantive equality. However, in the First Amendment context, formal neutrality may ultimately produce greater and greater substantive equality of speech. Speech must be given a pride of place different than generalized economic regulations because of both the text of the First Amendment and because of the speech rights of the private parties whose speech would be restricted in the name of substantive equality of speech.

The government, using its monopoly of force, can completely ban a person from speaking his viewpoint, whereas a private employer can prevent that person only from working at its company. This may

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137 *See* Balkin, *supra* note 12, at 397–400 ("However, what is crucial to situations in which protesters seek access to a public forum is that most of the protesters in such situations do not, in fact, own much property.").

138 *See id.* ("If one had little property, then one would have no liberty in fact, even if a formal right to speak were guaranteed.").

139 *Id.* at 397–400 ("Thus what appears to be a question of the individual's rights against the government actually is related to the private power of property owners—a power that in turn results from legal protections afforded to the economic system through the rules of private property and criminal trespass.").

140 This Article takes no position on the relationship between formal equality, neutrality, and substantive equality in any context outside of First Amendment jurisprudence.

present a Hobson's choice for the employee, but companies can compete for employees using their views about free speech or particular speech. Plus, although a private mall may prevent protests on its property, there are still plenty of public spaces to gather, so long as the government must meet its constitutional burden before enacting time, place, and manner restrictions. The increased protest activity in the wake of Donald Trump's election evidences the fact that public fora are still amenable to free speech activity.[141]

Further, free speech intermediaries, such as newspapers and social media platforms, may have increasing control over speech, but that control will never rise to the level of government control.[142] With the advent of the internet, the scarcity issues related to property ownership that have prevented the powerless from communicating their views are all but gone. Social media platforms, like Facebook, may create speech policies that some find restrictive, like its policy on nudity and breastfeeding, but it cannot criminalize speech.[143] Facebook's ability to abridge speech is limited to its own platform. Other social media platforms can experiment with their own community norms and speech restrictions, some of which will allow for more speech.[144] This experimentation fosters different varied speech communities based on different free speech norms, which only enhances opportunities for discourse and a diversity of ways of engaging. The Internet has heralded in an era where speech is almost costless. As society evolves, there will be more opportunities for speech and less disparity between the communication opportunities of the rich and the poor. There is less and less reason to compromise formal free speech equality, which allows everyone at least an opportunity to be heard, for substantive speech equality.

Further, the formal equality of the state action doctrine can actually increase substantive equality—not just become less and less problematic for substantive equality as society evolves. Applying First Amendment protections only to government action in cases of conflicting free speech values means that Facebook's own speech rights (to control expression

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141 *See Anti-Trump Protests Continue Across U.S. as 10,000 March in New York*, GUARDIAN (Nov. 12, 2016, 3:14 PM), https://www.theguardian.com/us-news/2016/nov/12/anti-trump-protests-new-york-portland-shooting.

142 *See* Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949, 954 (1995) ("The government alone has a monopoly of force. if Random House rejects my manuscript, I can peddle it at Simon & Schuster. On the other hand, if the government bans my novel, I may have to move to France.").

143 Rachel Moss, *Facebook Clarifies Its Nudity Policy: Breastfeeding Photos Are Allowed (as Long as You Can't See Any Nipples)*, HUFFINGTON POST (Mar. 3, 2015, 2:12 PM), http://www.huffingtonpost.co.uk/2015/03/16/breastfeeding-facebook-nudity-policy_n_6877208.html.

144 Reddit, for example, is known for having fairly lax restrictions on speech, which has been both good and bad for dialog. *See Reddit Content Policy*, REDDIT, https://www.reddit.com/help/contentpolicy (last visited June 8, 2018).

on its own medium) are preserved, in addition to the rights of those who can speak on Facebook, subject to Facebook's restrictions, or speak more freely on other speech platforms, or speak entirely freely, subject to lawful government restrictions on speech, on their own blogs.[145] Although the efficacy of communicating a message may depend on one's resources or the size of her platform, so long as the government does not discriminate against speech on the basis of viewpoint, opportunities are created for all voices to be heard. Even those with relatively few resources and power can be heard quite loudly if their views are compelling to enough people.[146]

Finally, preserving the formal equality of the state action doctrine helps mitigate the slippery-slope problems inherent in balancing competing free speech values. Scholars and courts who believe that strong First Amendment protections harm their preferred causes, or who disfavor particular speech, can find a way to convince others that the particular speech at issue is too corrosive to other free speech values and must be regulated.[147] In *Citizens United*, for example, the government's rationale also supported the banning of political pamphlets (quite close to banning books).[148] Scholars believe that a wide variety of speech is too harmful to society to be unrestricted. Giving courts wide latitude to consider speech values that are undermined by government inaction in their First Amendment calculus provides ample cover for viewpoint discrimination and increased suppression of speech. In these troubled political times, where the President has been chastised for having little knowledge of or respect for constitutional rights, our country needs as broad and as principled free speech rights as possible. Perverting the doctrine or its animating principles to serve other political ends will render others cynical about the First Amendment and will give the government too much power to restrict speech.

Hard questions abound, of course, in applying First Amendment doctrine in this way, such as to how to determine when the state or a

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145 For this reason, I believe proposals that apply the state action doctrine to protect free speech liberties against the enforcement of background property and contract rights are ultimately misguided. *But see* Fee, *supra* note 27, at 610 ("If the police arrest and remove a person from private land for attempting to demonstrate against the owner's wishes, the government is, in fact, acting in a way that restrains speech."). Fee argues in favor of what he refers to as a formal application of the state action doctrine. *Id.* at 574. However, Fee contends that courts should apply this doctrine even to neutral judicial enforcement of state and property laws. *Id.* at 610.

146 In recent years, many famous musicians have been discovered by posting their music videos to YouTube, a website where posting content is free. *See* Amy-Mae Turner, *15 Aspiring Musicians Who Found Fame Through YouTube*, MASHABLE (Jan. 23, 2011), https://mashable.com/2011/01/23/found-fame-youtube/#2Mik96Lx3Oqm.

147 *See* Goldberg, *supra* note 9, at 700–02 n.77 (detailing work of scholars who propose allowing more free speech restrictions in order to advance free speech values and other goals, including equality and consequentialist harms prevention).

148 *See Citizens United*, 558 U.S. at 333; *see also supra* Section I.A.

private party is the relevant actor abridging speech,[149] or when private behavior should even be considered speech, worthy of First Amendment protections.[150] These questions demand coherent answers, but abolishing the state action doctrine entirely will engender much greater legal incoherence, reducing every clash of free speech values to an unpredictable and unconstrained balancing problem.[151] As I will argue in the next Section, in the limited context of privacy torts involving illegally obtained information, resolving the clash of speech values by employing a "public concern" test is appropriate because, if properly articulated, this test preserves the neutrality of a strong state action doctrine.

B. *Limited Application for the Public Concern Test*

For the reasons mentioned in the previous Section, most cases that can be styled as presenting competing speech values should not result in courts weighing those values when navigating First Amendment rights. Instead, courts should consider only speech interests directly infringed by government action. However, in *Bartnicki v. Vopper*, the Supreme Court explicitly considered speech interests compromised by both action and inaction and determined that innocent publishers of illegally obtained speech are given First Amendment protection so long as the speech is "newsworthy."[152] This approach mirrors the way courts handle other speech torts issues—speech that matters to the public concern receives a higher level of First Amendment protection, even when that speech causes material harm.[153] In this Section, I argue that *Bartnicki* rightly applied the newsworthiness test to the publication of illegally obtained speech, but that this type of test should not be applied beyond this context.[154]

The newsworthiness test, when applied in limited contexts, does

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149 Law review articles decrying the unpredictability of the state action doctrine in this area are legion. *See* Fee, *supra* note 27, at 576 n.20 (collecting articles for the proposition that "[a]lthough the state action doctrine is fundamental to constitutional law, scholars have widely criticized the judiciary's application of it.").

150 Questions such as whether Google deserves speech protection for its algorithm, as an example, represent cutting edge First Amendment issues. *See* Mark Joseph Stern, *Speaking in Code: Are Google Search Results Protected by the First Amendment?*, SLATE (Nov. 2014, 11:07 AM), http://www.slate.com/articles/technology/future_tense/2014/11/are_google_results_free_speech_protected_by_the_first_amendment.html.

151 *See* Goldberg, *supra* note 9, at 688–98 (discussing problems inherent in First Amendment balancing).

152 *See supra* Section I.B.

153 *See supra* Section I.B.

154 Although there are reasons to question whether speech that is of purely private concern should receive less First Amendment protection than newsworthy speech, that distinction is beyond the scope of this Article.

not undermine the benefits of formal equality provided by the First Amendment for several reasons. First, the newsworthiness test, like the state action doctrine,[155] can be decided using tests that are neutral with respect to the views expressed in the speech at issue. This neutrality preserves the benefits of formal equality of First Amendment doctrine.[156] Courts can determine whether speech is a matter of public concern based on how much speech matters to public discourse, not based on the content or viewpoint of the speech. There are neutral ways for judges to assess whether speech is newsworthy that do not unduly give judges discretion to import their subjective opinions of the speech. By contrast, if judges enjoy too much discretion in defining whether speech fits into a particular legislative category, for example if speech is "disparaging,"[157] that discretion provides leeway for judges to engage in impermissible viewpoint-based discrimination.[158]

In contrast, as the next Section explores, there are ways to cabin public concern tests to limit a judge's discretion.[159] Determining whether speech is a matter of public concern, the newsworthiness analogue, presented in emotional distress and libel claims, takes into account factors such as the "context, form, and content" of the speech at issue.[160] Courts also examine how much the plaintiff has already inserted speech similar to the alleged privacy violation into public conversation.[161] There are ways, further explored in the next Section, to define public concern that avoid giving courts and juries too much discretion in deciding whether speech is newsworthy.[162]

Second, because the newsworthiness test is the same test used in other torts contexts,[163] applying this test to resolve the competing speech

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155 *See supra* Section II.A.

156 *See supra* Section II.A.

157 *See In re* Tam, 808 F.3d 1321, 1335 (Fed. Cir. 2016) (holding federal statute denying trademark registration to trademarks that disparaged a racial group amounted to unconstitutional viewpoint-based discrimination on speech), *cert. granted*, Lee v. Tam, 137 S. Ct. 30 (2016).

158 In *Boos v. Barry*, for example, the Supreme Court held that a District of Columbia provision prohibiting signs critical of a foreign embassy within fifty feet of the embassy was not an impermissible viewpoint-based prohibition on speech, because "[t]he display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments." 485 U.S. 312, 319 (1988).

159 *See infra* Section II.C.

160 *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011) (holding that speech in a public place near a military funeral, protesting military policies, was speech of a public concern despite the vile, antagonistic messages of the speech).

161 In Gawker Media, L.L.C. v. Bollea, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014), the Florida Court of Appeals reversed the trial court's grant of a preliminary injunction on plaintiff's privacy claim against the publication of a video tape that included plaintiff engaging in sexual acts. Important to the court's rationale was that plaintiff's reality television show made his sex life a matter of public discourse. *Id.* at 1202.

162 *See infra* Section II.C.

163 *See supra* Section I.B.

values in privacy torts cases does not compromise a strong state action doctrine or lead to slippery slope balancing problems. Even though in *Bartnicki* the Supreme Court acknowledged that there are speech interests on both sides of some privacy torts,[164] the Court did not materially alter its approach to handling speech torts in which the Court has not countenanced speech interests on both sides of the First Amendment equation. Thus, the limited acknowledgement of speech interests from government action and government inaction in *Bartnicki* does not open the door to balancing competing speech values in other contexts outside of the speech torts realm.[165]

Finally, the publication of illegally obtained speech involves particularly troubling speech. Because this speech is troubling *not* because of its content or viewpoint, there is less of a censorship threat in regulating the speech.[166] Speech that has been illegally recorded does not belong to the publisher of that speech in the same way as speech created by or communicating the ideas of the publisher. For this reason, this speech may be less worthy of First Amendment protection. Further, publication of speech that has been illegally recorded can, in some ways, be considered "fruit of the poisonous tree."[167] But for an illegal act that is not protected by the First Amendment, there could be no publication of the speech. The type of speech at issue in *Bartnicki*, and cases like *Bollea v. Gawker*, discussed in the next Section, therefore occupies a distinct place in First Amendment jurisprudence such that the Supreme Court can limit its consideration of conflicting free speech values to this context without conducting this balancing in other types of cases.

C. *Defining "Newsworthy"*

In the limited number of cases where conflicting speech values are weighed against each other, courts apply the "newsworthiness" test to determine whether our First Amendment interests prevail.[168] This term currently lacks a clear definition, leaving room for courts and juries to

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164 *See supra* Section I.B.

165 *See supra* Section I.B.

166 *See* Kagan, *supra* note 30, at 413–14 (arguing that the primary purpose of First Amendment doctrine is to ferret out impermissibly censorial motivations).

167 This metaphor as doctrine, primarily used in criminal law to exclude evidence procured as the indirect result of a constitutional violation, originated in *Nardone v. United States*, 308 U.S. 338 (1939). "[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." *Id.* at 341.

168 Newspapers generally do not need to meet an independent standard of newsworthiness to merit First Amendment protection. Lerman v. Flint Distrib. Co., 745 F.2d 123, 138 (2d Cir. 1984) (holding that "[e]ven 'vulgar' publications are entitled to [First Amendment] guarantees").

impose their own content-based judgments on whether, for example, the publication of illegally obtained information is newsworthy. Courts should give this term a broad definition.[169] Defining newsworthy broadly, to encompass all speech with some relevance to public discourse, honors the more comprehensive set of free speech values and rationales animating First Amendment doctrine, not just those that value speech for its connection to democratic self-governance. A broad definition would give courts greater ability to find speech newsworthy as a matter of law, thus removing the issue from jury consideration and mitigating the threat of juror bias against the content or viewpoint of speech. A broad definition of newsworthy, with cleaner, bright-line rules, could avoid what happened in *Gawker v. Bollea*, where a Florida jury awarded a judgment so large that it bankrupted an online media company,[170] likely based on the jury's distaste for the speech at issue.

The *Bartnicki* test for whether speech is newsworthy reflects the view that speech important to the public is more valuable, and thus warrants greater protection, than speech that is of a purely private concern.[171] This view is also articulated in the public concern tests deployed when balancing speech rights against tort interests like libel or intentional infliction of emotional distress.[172] The Supreme Court has deemed not all speech equally worthy of First Amendment protection.[173] Speech on purely private matters does not implicate the critical free speech value that debate on public issues be open, robust, and rigorous.[174] According to the Court, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[175]

Despite these articulations, the connection between free speech and able participation in democratic self-government is only one rationale claimed by courts as animating First Amendment protections. Another "significant goal of the First Amendment's speech and press protections

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169 Some state courts already interpret their privacy statutes to contain a broad newsworthiness exception in part to account for First Amendment considerations. *See* Messenger v. Gruner Jahr Printing & Publ'g, 208 F.3d 122, 126 (2d Cir. 2000) ("[T]his Court has held that 'newsworthiness' is to be broadly construed.").

170 Mathew Ingram, *Billionaire Who Funded Gawker Lawsuit Said He Would Do It Again*, FORTUNE (Aug. 15, 2016), http://fortune.com/2016/08/15/thiel-essay-gawker.

171 Some courts have explicitly held that dissemination of purely private facts does not merit First Amendment protection. *See* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (holding that "dissemination of non-newsworthy private facts is not protected by the first amendment" unless the private facts are "discussed in connection with 'matters of the kind customarily regarded as "news"'").

172 Holloway v. Am. Media, 947 F. Supp. 2d 1252, 1262 (N.D. Ala. 2013) (describing the "'special protection' for speech on matters of public concern, even where it is false and 'insulting' or 'outrageous').

173 Snyder v. Phelps, 562 U.S. 443, 451–52 (2011).

174 *Id.* at 452

175 Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

is to foster a 'marketplace of ideas.'"[176] Sharing private details with others can help individuals come to their own private truths about the world, and these truths may ultimately help them in their public lives as well. Public concern tests, like the newsworthiness test, dismiss the value of private details and enshrine a particular view of the value of free speech that fails to account for other rationales, such as speech's truth-seeking function, and its respect for autonomy and connection to self-actualization through expression.[177] A broad definition of newsworthy (and of public concern) could harmonize these rationales while recognizing that speech material to public discourse does occupy a special place in the First Amendment pantheon.[178]

The Supreme Court's articulation of the newsworthiness standard offers little help in defining the term because the speech was so obviously newsworthy. In *Bartnicki v. Vopper*, the speech at issue—a telephone conversation between a union president and the union's chief negotiator—was deemed a newsworthy matter of public concern as a matter of law.[179] This telephone conversation, although illegally recorded, was clearly newsworthy because the union leaders discussed engaging in illegal action to affect wage negotiations for public school teachers, and thus implicated our educational system and our understanding of union practices.[180] Not all cases involving the media's publishing of speech will be this obviously newsworthy, but courts should generally decide these issues as a matter of law, to prevent juries from converting a neutral test like newsworthiness into an opportunity for viewpoint-based discrimination.[181]

In a recent case, a Florida jury awarded a $140 million judgment to Hulk Hogan in his invasion of privacy suit against Gawker Magazine.[182] The verdict was based on Gawker's publishing, with commentary, a tape

176 Collard v. Smith Newspapers, 915 F. Supp. 805, 810 (S.D. W.Va. 1996).

177 *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 259 (2011) (exploring the theories animating First Amendment jurisprudence and arguing "that the most appealing approach supports seeing the constitutional status of free speech as required respect for a person's autonomy in her speech choices").

178 Of note is the fact that the *Bartnicki* Court explicitly did not decide whether purely private speech also merited First Amendment protection, even when it was illegally obtained. Bartnicki v. Vopper, 532 U.S. 514, 533 (2001).

179 *Id.* at 533–35 ("The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.").

180 *Id.* at 535 ("That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in Whitney v. California, 274 U.S., at 372, but it is no less worthy of constitutional protection.").

181 Goldberg, *supra* note 9, at 753–54 (discussing how juries, given wide discretion in deciding torts claims that implicate free speech, can use the power of the state to "target messages they dislike").

182 Eriq Gardner, *Why Hulk Hogan's $140 Million Gawker Verdict Is a Signpost for the Future*, HOLLYWOOD REP. (Mar. 21, 2016, 11:20 AM), https://www.hollywoodreporter.com/thr-esq/why-hulk-hogans-140-million-876990.

that included nine seconds of Hogan participating in sexual acts with the ex-wife of his best friend.[183] The trial court allowed the issue of newsworthiness to be decided by the jury, who found that the tape was not newsworthy.[184] This sizeable judgment exists in tension with a ruling by the Florida Court of Appeals, which, in overturning a preliminary injunction, found that Hogan was unlikely to win on the merits because Gawker excerpted only a tiny portion of the sex tape onto its website, and sexually explicit content does not nullify speech's newsworthiness.[185] Importantly, Hogan, as a reality star, placed his own sex life into the public discourse, rendering the video a topic for shared, public dialog.[186] In a different iteration of *Bollea v. Gawker*, a federal district court judge came to the same conclusion.[187]

Although the speech at issue in *Bollea v. Gawker* is likely objectionable to many, distaste for speech is not a legally permissible reason to abridge it.[188] There is reason to believe that the jury punished Gawker, bankrupting the media company, for the sensationalist coverage of Hogan instead of applying facts to law to decide if the speech was newsworthy. Hulk Hogan's lawyers stressed how the out-of-state, New York–based media company did not share the Florida jury's values.[189] Further, the lawsuit was funded by someone who may have sought to silence Gawker for personal reasons. Peter Thiel, the billionaire venture capitalist and political activist, helped finance Hogan's suit against Gawker, perhaps because the media company had published an article identifying Thiel as gay several years prior.[190] Thiel

183 Erica Goldberg, *The Florida Court of Appeals Will Likely Overturn Hulk Hogan's $140 Million Judgment Against Gawker on First Amendment Grounds*, IN A CROWDED THEATER (Mar. 22, 2016), https://inacrowdedtheater.com/2016/03/22/the-florida-court-of-appeals-will-likely-overturn-hogans-140-million-judgment-against-gawker-on-first-amendment-grounds-first-in-a-series-on-bollea-v-gawker.

184 *Id.*

185 Gawker Media, L.L.C. v. Bollea, 129 So. 3d 1196, 1202 (Fla. Dist. Ct. App. 2014) (reversing trial court's grant of a preliminary injunction).

186 *Id.* ("Here, the written report and video excerpts are linked to a matter of public concern—Mr. Bollea's extramarital affair and the video evidence of such—as there was ongoing public discussion about the affair and the Sex Tape, including by Mr. Bollea himself.").

187 Bollea v. Gawker Media, L.L.C., No. 12–cv–02348–T–27TBM, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012).

188 Lerman v. Flynt Distrib. Co., 745 F.2d 123, 138 (2d Cir. 1984) (holding that "[t]he compass of the First Amendment covers a vast spectrum of tastes, views, ideas and expressions[,]" including ones that are "far afield from what one might consider the community's standard of decency").

189 Hogan's lawyer described Hogan as a boy from Tampa who was treated indecently by an out-of-state media company that does not share the jury's values of decency. Eriq Gardner, *Hulk Hogan, Gawker, Brace for Jury Verdict at Sex Tape Trial*, HOLLYWOOD REP. (Mar. 18, 2016, 9:47 AM), https://www.hollywoodreporter.com/thr-esq/hulk-hogan-gawker-brace-jury-876708.

190 Michelangelo Signorile, *Gawker Didn't "Out" Peter Thiel— Nor Did It Wrong Him in Any Way*, HUFFINGTON POST (May 26, 2016, 9:53 AM), https://www.huffingtonpost.com/michelangelo-signorile/gawker-didnt-out-peter-thiel_b_10141996.

claimed that instead of being motivated by censorious revenge, he was protecting the integrity of other media sources from having to compete with privacy-invading tabloids like Gawker.[191]

Bollea v. Gawker also demonstrates that the clash between free speech doctrine and free speech values can have disastrous consequences on both sides of the equation: as raised by Thiel, free speech interests such as respect for journalistic integrity may be promoted by Hulk Hogan's lawsuit, but forcing Gawker into bankruptcy for publishing pure speech has far-reaching free speech implications.[192] To truly honor the speech interests at stake, this case, which contained subject matter brought to the public's attention by the plaintiff himself, should have never gone to trial.

Instead, courts should broadly interpret the term newsworthy, looking to "content, form, and context," like in other public concern applications,[193] and fashion bright-line rules to give media companies and individuals clarity about their First Amendment rights. Newsworthiness should encompass, as the Second Circuit held, "political happenings, social trends or any subject of public interest."[194]

Most speech capturing conversations that a public figure plaintiff himself has made relevant to the public should be considered newsworthy, to avoid self-censorship by the media and by individuals. For example, if a public figure discusses his sex life and relationships, and if the media company is not responsible for the illegal recording of the speech, the publication of that speech should be protected, as is most pornography.[195] The video in *Bollea v. Gawker* serves as proof that Hogan's marriage, one of the subjects of his reality television show, was not particularly monogamous. This situation is quite distinct from a celebrity, whose body is secretly captured on film, who has never made claims about her body or voluntarily turned her body into a topic of public discussion. If naked photographs are unnecessary to substantiate an item placed into public discourse by the public figure herself, they would not be newsworthy.

Courts should determine other bright-line rules in applying the newsworthiness test, to reduce the unpredictability already engendered by courts balancing free speech values. What qualifies as newsworthy

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191 *Id.*

192 Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 19, 2016), https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment.

193 Snyder v. Phelps, 562 U.S. 441, 453 (2011) (holding that the Westboro Baptist Church's protest of a military funeral was protected against a suit for intentional infliction of emotional distress, despite the personal, vitriolic nature of the protest).

194 Messenger v. Gruner Jahr Printing & Publ'g, 208 F.3d 122, 126 (2d Cir. 2000).

195 Pornography is considered unprotected obscenity only if it has no artistic, literary, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973).

should be defined broadly, so that juries are given minimal opportunity to punish speech for its content.[196] A public figure, like Hulk Hogan, deserves some privacy, but federal and state laws prohibiting the illegal recording of information already deter wiretapping and secret videotaping.[197] The media is protected only when it is not involved in the illegal interception of information. First Amendment rights exist in order to protect speech that many people would find objectionable, to let newspapers use their own journalistic standards to decide what they will and will not disclose to the public. Publishing tapes of a celebrity's sex act will not enhance a newspaper's reputation, but the government should not be policing media integrity and taste in this way.[198]

III. FREE SPEECH VALUES AND PROTEST

In our climate of increasing political polarization,[199] individuals on the extremes of both the right and the left have increasingly resorted to or legitimized violence against their political enemies. On the far right, individuals marching in alt-right and white supremacist rallies have assaulted others, and, in one instance, murdered a counter-protester.[200] The leaders of these rallies often do not denounce the violence and may be interpreted as glorifying it.[201] On the left, due to increasing concern about how certain types of speech undermine free speech values or instigate hateful conduct, a movement is growing that seeks, through aggressive action, to eliminate hateful or bigoted speech.[202] This

196 Of course, juries can also discriminate against speech they dislike (or defendants they dislike) when applying generalized contract or property laws, but a defendant's speech in that case will not be an actual, relevant part of the case and may not even be presented in evidence.

197 As an example, celebrity sportscaster Erin Andrews received a $55 million judgment against a stalker and a Nashville Marriott Hotel, after the stalker used the hotel's peephole to secretly record Andrews walking around nude. Julie Miller, *Erin Andrews Awarded $55 Million Over Nude Peephole Video*, VANITY FAIR (Mar. 7, 2016, 6:26 PM), https://www.vanityfair.com/hollywood/2016/03/erin-andrews-nude-peephole-video-trial.

198 *See* Florida Star v. B.J.F., 491 U.S. 524. 532 (1989) (holding that a newspaper cannot be sued for releasing the name of a rape victim it had obtained from a police report made available to public).

199 *See, e.g.*, *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public.

200 *See* Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as "a Strong Woman"*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html.

201 *See Charlottesville: Race and Terror*, VICE NEWS (Aug. 15, 2017), https://www.youtube.com/watch?v=P54sP0Nlngg&oref=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DP54sP0Nlngg&has_verified=1 (white supremacist leader discussing the need for Heather Hayes's death and noting that more deaths will likely happen in the future).

202 Danielle Tcholakian, *Anti-Fascist Group Behind NYU Clashes Were in NYC Long Before Trump Elected*, DNA INFO, https://www.dnainfo.com/new-york/20170203/greenwich-village/antifa-anti-fascist-anarchist-student-protest (last updated Feb. 6, 2017, 7:32 AM).

movement has gained new traction,[203] especially on college campuses, where students have for generations protested private speech or government behavior they deemed incompatible with their sense of social justice.[204]

When peaceful protests turn violent, the protected speech of a protest morphs into the unprotected conduct of property destruction, threats of violence, or outright physical assault.[205]

In response to violent protests, or protests that engage in unprotected conduct such as blocking highways or destroying property, legislators have introduced bills criminalizing certain methods of protesting and enabling private individuals to avoid harm from the protestors' tactics.[206] In this Part, I use the above-established framework for understanding the clash between the free speech doctrine and free speech values to distinguish between prosecution of violent protestors, on the one hand, and legislation designed to target particular forms of protest, on the other. I argue that, to properly serve the First Amendment and free speech values, the state should arrest and prosecute those who coordinate or contribute to violence that occurs during protests, including at public universities. However, many legislative responses to the specter of violent or obstructive protests may reflect the impermissible goal of targeting particular viewpoints and are unconstitutionally chilling of speech.

A. *"Speech as Violence"*

Public universities, bound by the dictates of the First Amendment, cannot discriminate against students' speech or expression on the basis of viewpoint.[207] As a result, public universities must often host controversial speakers invited by student groups.[208] Students who dislike

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203 Natasha Lennard, *Anti-Fascists Will Fight Trump's Fascism in the Streets*, NATION (Jan. 19, 2017), https://www.thenation.com/article/anti-fascist-activists-are-fighting-the-alt-right-in-the-streets.

204 *See* THE REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970) (covering student protests on university campuses).

205 *See* Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance,* 59 OHIO ST. L.J. 185, 206 (1998) (discussing "the general principles of the current free speech clause model," which distinguish between protected speech and unprotected conduct). *But see* Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 826 (1993) (discussing the discredited "speech/conduct distinction" and its relationship to the government's ability to constitutionally regulated hate crimes).

206 *See infra* Section III.B.

207 Christian Legal Soc. v. Martinez, 561 U.S. 661, 685 (2010) (noting that public universities, as arms of the state, cannot discriminate against speech on the basis of viewpoint).

208 *See* Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J.

the speaker's message express their outrage, at both the speaker and the university for seemingly sanctioning the speaker, by exercising their right to protest the speaker. However, when students believe that a speaker's message is itself a form of violence, they may feel a greater sense of entitlement to protest violently. A growing number of students classify certain types of protected speech, often referred to as "hate speech," as a form of violence that silences traditionally disenfranchised voices.[209] According to this view, reacting violently to pure speech actually serves both free speech values and equality, because hateful speakers chill minority voices, muting the richness and diversity of expressions of the American experience.[210]

Hard questions exist about when an ideology *is* inherently violent, especially in light of increased visibility of white supremacists marching with torches or weapons.[211] Legally, unless speech threatens or results in imminent lawless action, the speech is protected. Speakers and rallies, regardless of viewpoint, should be considered nonviolent as long as the individuals speak or march with the immediate purpose of simply expressing a viewpoint and the leaders of the protest profess nonviolence.

This Section applies the competing free speech values framework to analyze violent and disruptive protests on college campuses, although the principles can be extrapolated more broadly to non-university contexts. This Section tackles only how to resolve competing free speech values in the context of violent campus protests. Individuals, on both the right and the left,[212] who threaten violence against speakers or professors without raising issues of competing free speech values present even easier analysis and justification for criminal prosecution in light of free speech values.

Unless speech is legally unprotected as incitement,[213] public

349 (2011) (discussing students' associational and free speech rights to host student speakers and non-students' rights to enter university campuses). In *Smith v. Tennessee*, a federal district court noted that although "[n]o one has the absolute, unlimited right to speak on a university campus . . . when the university opens its doors to visiting speakers, it must follow constitutional principles if it seeks to regulate those whom recognized groups may invite." Smith v. Univ. of Tenn., 300 F. Supp. 777, 780–81 (E.D. Tenn. 1969).

209 Less extreme versions of these arguments have also been advanced by legal scholars and practitioners. *See supra* Section I.C.

210 *See supra* Section I.C.

211 *See* Josh Delk, *ACLU Will No Longer Defend Hate Groups That Protest with Firearms*, HILL (Aug. 17, 2017, 11:40 PM), at http://thehill.com/homenews/347053-aclu-revises-policy-to-avoid-supporting-hate-groups-protesting-with-firearms.

212 *See* Colleen Flaherty, *Old Criticisms, New Threats*, INSIDE HIGHER ED. (June 26, 2017), https://www.insidehighered.com/news/2017/06/26/professors-are-often-political-lightning-rods-now-are-facing-new-threats-over-their.

213 Speech is unprotected as incitement when it is intended to cause, and is reasonably likely to cause, imminent lawless action. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or

universities are constitutionally required to allow speakers invited by student groups. University officials and state actors must not credit those who wish to blur the line between speech and conduct and react violently to speech. The view that speech should be met with violence cannot be tolerated under traditional free speech doctrine, and ultimately does not serve free speech values.

First, the argument that even if a speaker is permitted to spread his vile sentiments, universities should not place their imprimatur on the speech by giving the speaker a venue is constitutionally unsound. Public universities, as state actors under the First Amendment, may not discriminate against speech on the basis of viewpoint.[214] Allowing student groups to host speakers whose message the university condones but not speakers the university opposes constitutes unconstitutional viewpoint-based discrimination, just as allowing a student Republicans group but not a student Democrats group would.[215] The university does not have to invite a speaker whose views it opposes as an official university-sponsored speaker, but it cannot forbid students from inviting speakers on the basis of viewpoint.

The University of California, Berkeley recognized this constitutional duty when it permitted Milo Yiannopoulos, invited by the Berkeley Republicans, to speak on its campus.[216] Yiannopoulos, promoting his book *Dangerous*, often gave speeches where he mocked feminists, lesbians, and transgender students.[217] The sentiment that universities should not permit Yiannopoulos to speak on their campuses, circulated among many students at Berkeley before his

proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

214 *See* cases and sources cited *supra* notes 207–08. Robert Post has argued that there is no First Amendment right to speak on a college campus. *See* Robert C. Post, *There Is No First Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-campuses-milo-spencer-protests. However, although universities may impose professional and viewpoint neutral norms on students' and professors' academic work, the Supreme Court has held that universities may not discriminate on the basis of viewpoint. *See* Rosenberger v. Rector, 515 U.S. 819, 828–31 (1995). And this includes not forbidding student groups to invite speakers on the basis of viewpoint.

215 *See, e.g.*, *Rosenberger*, 515 U.S. at 828–31 (holding that denial of university funding to student group that published a religious newspaper amounted to unconstitutional viewpoint discrimination).

216 Pub. Affairs, UC Berkeley, *Chancellor's Message on Public Appearance by Milo Yiannopoulos*, BERKELEY NEWS (Jan. 26, 2017), http://news.berkeley.edu/2017/01/26/chancellor-statement-on-yiannopoulos. Distinguishing between the rights of free speech on campus and the university's values of equality and inclusion, Berkeley's chancellor remarked that "[l]ike all student organizations, the [Berkeley College Republicans] is a separate legal entity from the university, and it is technically the BCR, and not the university, that is the host of this upcoming event."

217 Abigail Edge, *Two Nights on Milo Yiannopoulos's Campus Tour: As Offensive as You'd Imagine*, GUARDIAN (Jan. 28, 2017, 11:24 AM), https://www.theguardian.com/world/2017/jan/28/milo-yiannopoulos-campus-speaking-tour-colorado.

speaking engagement.[218] This view misunderstands a public university's constitutional obligation to treat protected speech equally and not discriminate on the basis of viewpoint when student groups choose to invite speakers.[219] Yiannopoulos's speech, for the most part, contains purely political expressions, entitled to the highest degree of First Amendment protection,[220] regarding his distaste for progressive politics and legislative agenda and his disdain for what he sees as the hypocrisy of the feminist movement. None of the highly offensive statements of Yiannopoulos incite immediate lawless action or are reasonably perceived as a serious expression of intention to cause bodily harm.[221] Although he sometimes mocks students, these students have made their causes public in student newspapers, and his remarks about particular students are factually true, if distastefully crass.

There are aspects of Yiannopoulos's speeches that are less obviously protected, but are still fully protected nonetheless. Anonymous sources claimed that Yiannopoulos was planning on disclosing the names of undocumented immigrants.[222] If these names were released in a way that was intended to incite others to violently attack the students or to threaten the students with bodily harm, Yiannopoulos's speech would then not receive First Amendment protection. Otherwise, if true, his speech contained factual statements on a matter of public concern related to America's foreign policy and California's commitment to Sanctuary Cities.[223] As much as his speech is highly disturbing and morally blameworthy, meriting *peaceful* protests, the speech is protected by the First Amendment.[224]

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218 *See, e.g.*, *Shut Down Milo Yiannopoulos*, BAMN (Jan. 21, 2017), http://www.bamn.com/social-justice/shut-down-milo-yiannopoulos.

219 *See* case cited *supra* note 215; *see also* Erica Goldberg, *Hecklers of Campus Speakers: Easy Answers and Hard Questions*, IN A CROWDED THEATER (Apr. 19, 2018), https://inacrowdedtheater.com/2018/04/19/hecklers-of-campus-speakers-easy-answers-and-hard-questions/amp/?__twitter_impression=true.

220 *See In re* Anonymous Online Speakers, 661 F.3d 1168, 1173 (9th Cir. 2011) ("Given the importance of political speech in the history of this country, it is not surprising that courts afford political speech the highest level of protection.").

221 *See* William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579, 585 (2006) (explicating incitements and true threats).

222 Maya Oppenheim, *UC Berkeley Protests: Milo Yiannopoulos Planned to "Publicly Name Undocumented Students" in Cancelled Talk*, INDEPENDENT (Feb. 3, 2017), http://www.independent.co.uk/news/world/americas/uc-berkely-protests-milo-yiannopoulos-publicly-name-undocumented-students-cancelled-talk-illegals-a7561321.html.

223 Sanctuary cities are places of refuge and support for undocumented immigrants. These cities refuse to cooperate with the federal government's program of deporting undocumented immigrants. *See* Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html.

224 Yiannopoulos's alleged release of these names is distinct from, as an example, a judge's decision to seal the identifies of jurors in a criminal trial to prevent press access to these names. *See* Scott Sholder, *What's in a Name?: A Paradigm Shift from Press-Enterprise to Time, Place, and Manner Restrictions When Considering the Release of Juror-Identifying Information in*

Significantly, Yiannopoulos has also denied the claim that he was planning on releasing the names of undocumented students.[225]

In addition to misunderstanding a university's constitutional obligations, students' views that universities are obligated to deny certain speakers entry to their speaking venues also reflect a diminishing appreciation for some free speech values. Many universities appear to recognize that, in addition to their upholding free speech doctrine, free speech values are ultimately served when academic institutions do not sanitize objectionable viewpoints from public discourse. Academia, like the media, is a true "First Amendment institution"[226]—where debate should be open and robust, and where clashing viewpoints should compete for individuals' acceptance. Further, members of minority groups are often galvanized to engage in counterspeech when exposed to hateful speech, fostering free speech values.[227]

Protesting Yiannopoulos peacefully can be a vital part of this conversation. However, when protests turn violent, speakers are forced to silence their message for fear of imminent physical injury. The protests at Berkeley, which ultimately became destructive and violent, forced the university to cancel Yiannopoulos's speaking event.[228] Protesters threw fire bombs, looted ATM machines, smashed car windows, and punched people waiting to hear Yiannopoulos speak.[229] However much of these protestors believed that Yiannopoulos's speech resembled violence, these destructive actions actually transcended speech and became unprotected conduct.

The divide between pure speech—no matter how objectionable—and conduct is fundamental to preserving First Amendment freedoms.[230] Unless speech imminently threatens violence or imminent

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Criminal Trials, 36 AM. J. CRIM. L. 97, 110–11 (2009). However, even if the release of these names constituted unprotected speech, Yiannopoulos has denied the allegations that he planned to "out" undocumented students. *See* Oppenheim, *supra* note 222.

225 *See* Oppenheim, *supra* note 222.

226 Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1513–18 (2007) ("The United States Reports are replete with examples of the Supreme Court extolling the unique, and uniquely important, role played by universities in the accumulation and advancement of knowledge and in contributing to public debate.").

227 Goldberg, *supra* note 9, at 736–37.

228 Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Cause $100,000 in Damage*, CNN (Feb. 2, 2017), http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley.

229 *Riot Forces Cancellation of Yiannopoulos Talk at UC Berkeley*, CBS SF BAY AREA (Feb. 1, 2017, 10:30 PM), http://sanfrancisco.cbslocal.com/2017/02/01/berkeley-braces-for-protests-at-yiannopoulos-talk.

230 *See* Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 864 (2015) ("The somewhat blurry line between speech, which is presumptively protected, and conduct, which is generally regulable, is premised at least in part on the notion that pure speech is a communicative act that directly causes only emotional harm, whereas conduct involves direct, physical, tangible interactions and harm."); *see also* Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 976 (1995) ("The distinction between mind and body—or, as it is usually called in

lawless action, it cannot be regulated or abridged, whereas the state retains wide latitude to regulate conduct. The distinction between speech and conduct, although difficult to discern at the margins, is not only necessary to operationalize the First Amendment, but it is necessary for a peaceful, "pluralistic" society.[231] A society that blurs the line between speech and conduct, and thus reacts to speech with violence as if the two are commensurate, becomes a place where those who embody nonviolent views or lifestyles, which are objectionable or hurtful to some segment of the population, cannot openly share those views or lifestyles.[232] Speech that is attenuated from violence must be given room to flourish.

In seeking to advance their own brand of free speech values, violent protesters undermine the very foundations of our First Amendment protections. Because violence as a response to speech seeks to undermine the premises of the First Amendment, this violence is perhaps the greatest threat to free speech values. Accepting violent reactions to objectionable speech means that we, as a society, have abandoned the idea that violence is always more destructive than expression. This abandonment extends to the critical components of pluralism and a free speech culture—the ethos that all views should be permitted in the search for truth, that democratic legitimacy requires that the governed are able to share their criticisms of the functioning of society, that individuals must be permitted to express their own values and ways of life, so long as they do not violently coerce others to abandon their own identities.

The state should thus deter, using punishment, the unprotected acts of destroying property and assaulting people in response to speech. Movements that promote violence as a tactic, on both the right and the left, subvert free speech values, and allowing these movements to silence speakers ultimately compromises First Amendment doctrine. The

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this context, speech and conduct, or expression and action—holds that speech is privileged above conduct in the sense that government may properly regulate the clash of bodies but not the stirring of hearts and minds.").

231 Pluralism may be given meanings by different people, especially if they seek to promote a particular cause in addition to free speech. *See* Balkin, *supra* note 12, at 393–94 (discussing how the term pluralism may be co-opted by the right in ways that are not "progressive and transformative"). Balkin's project, however, is explicitly to craft arguments so that academics and litigators can continue to "use the First Amendment as an effective tool for promoting a progressive agenda." *Id.* at 384. Balkin's goal, however laudable, treats First Amendment rights as secondary to a progressive agenda, whereas this Article elevates First Amendment rights independent and regardless of the political cause they serve.

232 Some of these tensions exist in the debate, in other countries, over banning women from wearing burkinis. *See* Erica Goldberg, *First Amendment Lessons from France's Burkini Ban Debacle*, IN A CROWDED THEATER (Sept. 22, 2016), https://inacrowdedtheater.com/2016/09/22/first-amendment-lessons-from-frances-burkini-ban-debacle. Claims that the religious garb may offend French secular sensibilities, lead to violence, or promote sexism, undermine pluralism because Muslims were prevented from adhering to their faith on France's beaches. *Id.*

government is not constitutionally permitted to acquiesce to the "heckler's veto" by silencing or arresting speakers in the face of listener violence without attempting to protect speakers' First Amendment rights, or even charging controversial speakers more to obtain speaking permits in order to cover the costs of listener reactions.[233] To further protect the expressive rights of speakers, the government should arrest and prosecute those who seek to undermine, through violence, fear, and destruction, these free speech protections.[234]

When the state enforces general laws prohibiting property destruction and physical violence, unrelated to the expression of those engaging in the conduct, this state action does not implicate First Amendment doctrine.[235] The state can neutrally, without selecting among viewpoints, attempt to thwart any violent reactions seeking to silence those with objectionable views. Arresting violent protesters to deter violence is therefore constitutionally permissible. However, President Trump's response, which threatened to deny federal funding to Berkeley because of its protects, may be unconstitutional state action.[236]

Threatening Berkeley with the divestment of hundreds of millions of dollars in federal funding,[237] despite Berkeley's behaving admirably from the First Amendment perspective, may evince a censorious motive. Perhaps President Trump, whose election Yiannopoulos supported,[238] sought to punish Berkeley for the liberal views of its students, or at least

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233 *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *see also* John J. McGuire, *The Sword of Damocles Is Not Narrow Tailoring: The First Amendment's Victory in* Reno v. ACLU, 48 CASE W. RES. L. REV. 413, 417 n.16 (1998) (describing the heckler's veto as "one of the pariahs in First Amendment jurisprudence," and explaining that "[c]ourts are loathe to allow one person (the 'heckler') in the audience who objects to the speaker's words to silence a speaker").

234 Indeed, some argue that the government has an affirmative obligation to intervene to arrest those threatening speakers with violence. *See* Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 32–34 (2006). Although this affirmative obligation would entail an expanded, and in some cases different, understanding of the state action doctrine than I am advocating, it would not interfere with private parties' speech rights because those threatening speakers with violence are not engaging in protected speech.

235 *See supra* Section II.A.

236 Susan Svriuga, *Trump Threatens UC-Berkeley's Funding After Violent Protests Shut Down a Speaker*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/local/education/trump-threatens-uc-berkeleys-funding-after-violent-protests-shut-down-a-speaker/2017/02/02/2a13198a-e984-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.916ec46c07a4.

237 In 2015–2016, UC Berkeley received $370 million in federal research funding. Peter Jacobs, "*No Federal Funds?*": *Trump Threatens UC Berkeley After Campus Erupts in Protests Over Milo Yiannopoulos Speech*, BUS. INSIDER (Feb. 2, 2017, 6:57 AM), http://www.businessinsider.com/trump-threatens-uc-berkeley-after-campus-protests-milo-yiannopoulos-2017-2.

238 Pamela Engel, "*The President Is Watching*": *Milo Yiannopoulos Responds to Show of Support from Trump*, BUS. INSIDER (Feb. 2, 2017, 11:13 AM), http://www.businessinsider.com/milo-yiannapoulos-trump-berkeley-protest-2017-2.

its student protesters. As I explore in the next Section, when government actors, instead of enforcing background, generally applicable criminal prohibitions, create laws and policies that explicitly regulate destructive protests and particular protest techniques, this type of state action has problematic implications for both First Amendment doctrine and free speech values. Thus, while violent protests should be actively discouraged and punished, legislative action targeting protesters may not always withstand constitutional scrutiny and is bad policy that may unduly jeopardize free speech values.

B. *Legislation to Prohibit Unprotected Disruption by Protests*

In response to disruptive protests, specifically those that block highways or interfere with law enforcement activity, politicians have proposed legislative solutions that impose significant penalties on protesters. In these cases, the state action component of First Amendment scrutiny attaches not simply to enforcing background laws protecting property and bodily integrity. Instead, legislators are targeting tactics of known protesters, with known positions.

A recent spate of proposed legislation, initiated by right-leaning politicians in what appears to be a response to protests supporting left-leaning causes, has the potential to impair important speech and one's ability to protest, and raises concerns for both First Amendment doctrine and First Amendment values. On the left, lawmakers in the future may also consider banning protesters from carrying firearms, and city or university officials make seek to deny permits to protesters marching with legally owned firearms.[239]

Republican lawmakers in several states have proposed criminal legislation that appears to target the highway-blocking techniques of supporters of the Black Lives Matter Movement or opponents of the construction of the Dakota Access Pipeline.[240] For example, in North Dakota, a House bill would absolve motorists of negligence liability for causing injury or death to anyone blocking traffic on a public road or highway.[241] A proposed Minnesota bill would increase maximum

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239 John Culhane, *Should Protesters Be Allowed to Have Guns?*, POLITICO MAG. (Aug. 18, 2017), https://www.politico.com/magazine/story/2017/08/18/should-protesters-be-allowed-to-have-guns-215504.

240 Reid Wilson, *State Legislators Take Steps to Criminalize Protests*, HILL (Feb. 24, 2017, 12:09 PM), http://thehill.com/homenews/state-watch/321018-state-legislators-take-steps-to-criminalize-protests; Spencer Woodman, *Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protest*, INTERCEPT (Jan. 19, 2017, 8:38 AM), https://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest.

241 H.B. 1203, 65th Leg. Assemb. (N.D. 2017) ("Notwithstanding any other provision of law, a driver of a motor vehicle who negligently causes injury or death to an individual obstructing vehicular traffic on a public road, street, or highway may not be held liable for any damages.").

penalties for obstructing the freeway from $1000 and ninety days in jail to $3000 and a year in jail.[242] A separate Minnesota bill imposes a maximum of $10,000 and not less than a year in jail if an emergency responder's access to a highway is blocked.[243] A Washington senator sought to classify certain instances of blocking public transportation as "economic terrorism," worthy of a class C felony.[244] University administrators are also considering rules expelling students for disruptive speech.[245]

Blocking highways does not constitute legally protected speech. Disrupting traffic is dangerous, and can be fatal, both to the protesters and to the public, especially if emergency responders cannot traverse public roads.[246] Police may legally arrest or disperse these activists, who are engaging in civil disobedience. However, this latest round of proposed restrictions increases penalties so dramatically, in response to certain protests, that they deserve some amount of First Amendment scrutiny. Coordinated efforts to disrupt speech are also not protected speech,[247] but any efforts to target speech disruptions would be either vague or overbroad unless defined narrowly.

The strictest First Amendment scrutiny would apply if protesters could prove that state legislation was motivated by the desire to target particular speech or particular causes.[248] Some scholars have even suggested that viewpoint-based discrimination against speech is per se unconstitutional, meaning courts need not even apply the strict scrutiny applicable to content-based regulations.[249] If a court deemed any of

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242 Pat Kessler, *New Bill Would Make Freeway Protesting Serious Crime*, CBS LOC. (Jan. 12, 2017, 6:38 PM), http://minnesota.cbslocal.com/2017/01/12/minnesota-bill-freeway-protesting-serious-crime.

243 Woodman, *supra* note 240.

244 Essex Porter, *Protest Bill Creates Crime of 'Economic Terrorism'*, KIRO7 (Nov. 18, 2016, 9:41 AM), http://www.kiro7.com/news/local/washington-state-senator-seeks-to-criminalize-illegal-protests/467962158.

245 *See* Karen Herzog, *Regents Approve Punishments Up to Expulsion for Students Who Repeatedly Disrupt Speakers*, J. SENTINEL (Oct. 6, 2017, 10:02 AM), https://www.jsonline.com/story/news/education/2017/10/06/regents-consider-punishments-uw-students-who-disrupt-speakers/738438001.

246 Henry K. Lee, *Paramedics Were Delayed Berkeley by Protest—Patient Later Died*, SFGATE (Feb. 6, 2015, 11:03 AM), https://www.sfgate.com/crime/article/Medics-were-delayed-by-Berkeley-protest-6065429.php.

247 *See* "*Irvine 11*": *10 Students Sentenced to Probation, No Jail Time*, L.A. TIMES (Sept. 23, 2011, 2:37 PM), http://latimesblogs.latimes.com/lanow/2011/09/irvine-11-sentenced-probation-no-jail-time.html.

248 Brown v. Louisiana, 383 U.S. 131, 143 (1966) (holding that state "may not invoke regulations as to use [of a library]—whether they are ad hoc or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights").

249 Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2425 n.44 (1996) (discussing how the Supreme Court has treated viewpoint-based restrictions on speech as more suspect than content-based restrictions, including prohibiting viewpoint-based discrimination in limited public fora). Some courts,

these highway-blocking laws (or potential gun-possession laws) to be motivated by viewpoint-based animus, the restriction would likely be invalidated as impermissible viewpoint-based discrimination without determining whether the speech restriction was narrowly tailored to serve a compelling government interest.[250] Because the government cannot target viewpoints to restrict even speech that is unprotected, such as fighting words,[251] even laws regulating conduct, such as blocking a highway, may be deemed unconstitutional if the reason for the regulation is the suppression of particular views.[252] The fact that these highway-blocking laws are so onerous, and were passed in the wake of specific protests by lawmakers of only one political party, provides some evidence of viewpoint-based animus. The North Dakota law insulating drivers from negligence liability for killing a protester blocking a road is particularly concerning from a First Amendment perspective, especially given that the bill's co-sponsor claimed that accidents might happen if a motorist "punched the accelerator rather than the brakes."[253]

State legislators, however, will likely take the position that their proposed laws were enacted after particularly disruptive protests, regardless of the message. In that case, if the state laws pass, the state governments may have a legitimate argument that the laws were simply regulating the time, place, and manner of speech, or that the laws were permissible restrictions on expressive conduct.[254]

When the government regulates conduct with an expressive component, these regulations are subject to more deferential First Amendment scrutiny. Expressive conduct refers to the regulation of behavior, not speech, that has an expressive element. Generally, the conduct must be intended to communicate a message, such as the burning of a draft card to protest the Vietnam War, the expressive

however, have applied strict scrutiny to viewpoint-based restrictions on speech before determining the restriction is unconstitutional. *See, e.g.*, Griffin v. Bryant, 30 F. Supp. 3d 1139, 1178 (D.N.M. June 18, 2014) ("Third, the Court concludes that—although a viewpoint-based restriction might be constitutional if it passes strict scrutiny—Section 5Ff fails strict scrutiny, and is thus unconstitutional.").

250 Blocher, *supra* note 118, at 703 ("The first rule of free speech theory and doctrine is that the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint."). According to Blocher, "[t]he Court has suggested that a speech regulation may be held unconstitutional if viewpoint discrimination is so much as a part of the motivation for passing it." *Id.* at 703–04.

251 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (holding facially unconstitutional a disorderly conduct ordinance that "applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'").

252 *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) ("Where the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional.").

253 Woodman, *supra* note 240.

254 *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

conduct at issue in *United States v. O'Brien*,[255] or burning the flag, at issue in *Texas v. Johnson*.[256] Whether conduct is considered expressive depends on whether an individual displayed an intent to convey a message that would likely be understood by a viewer or listener.[257] Unlike burning a draft card, protesters of the construction of the Dakota Access Pipeline are not communicating their message *by* blocking the highway. The blocking of the highway does not express their actual message of opposition to the pipeline, and a reasonable viewer is not likely to understand the message based on the protest tactic. Instead, the blocking of the highway is a way of communicating the intensity and seriousness of their message; it is a way of getting the message across. Thus, the First Amendment scrutiny for expressive conduct may be inapposite.

Under a more expansive view of expressive conduct, the legislative solutions to the real problems of highway obstruction may trigger scrutiny as expressive conduct because these laws are aimed directly at protesters and are a direct reaction to specific protests. In *O'Brien*, the Court defined expressive conduct as cases where "'speech' and 'nonspeech' elements are combined in the same course of conduct."[258] The Supreme Court has found the wearing of black armbands to protest the Vietnam War to be sufficiently expressive to trigger First Amendment scrutiny,[259] even though the message may not be obvious from the armband. Similarly, a "sit-in" at a whites only area to protest segregation was considered expressive conduct.[260]

Thus, the fact that blocking a highway[261] is not immediately associated with a particular message may not defeat scrutiny under *O'Brien*. Highway-obstruction laws are directly aimed at protesters and their methods of protesting, such that speech and non-speech elements do combine. In some instances, courts have held that the methods of protesting may be considered part of expressive conduct, subject to the *O'Brien* test. For example, sleeping in tents for the purpose of bringing

255 391 U.S. 367 (1968).

256 491 U.S. 397 (1989).

257 *Id.* at 404 ("In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974))).

258 *O'Brien*, 391 U.S. at 371.

259 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).

260 Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

261 Laws banning firearms during protests present different issues. Some protests in which protesters carry firearms communicate messages about the right to gun ownership. As applied in those cases, the expressive conduct analysis is more appropriate than in facial challenges to state laws that generally prohibit protesters from carrying weapons. Laws generally banning firearms are likely more constitutionally permissible because carrying a firearm is not linked to a method of protesting.

awareness to the plight of the homeless was assumed to be expressive conduct, although the Supreme Court did not decide the issue.[262] Although this method of protesting is more interlinked with the message than blocking a highway, protesters could argue that their methods are inextricably tied to their message; they wish to show how many people are greatly distressed by government action, and how far they are willing to go to advance their cause. These methods have also been associated with particular types of protest and particular points of view.

If the *O'Brien* test is applied, protesters have at least as valid an argument that the laws are unconstitutional as the government does that the laws should be upheld. Under *O'Brien*, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[263] A regulation of expressive conduct is permissible only if (1) it furthers an important governmental interest; (2) the governmental interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[264] The incidental restrictions from these proposed bills have great effects on protesters' ability to communicate their message or organize to raise awareness about their case. Protest movements rely on increased social attention, and protesters increasingly have few public places to congregate. Onerous criminal sanctions, of years in jail or thousands of dollars in fines, are a draconian price to pay for peaceful protest.

The government, however, could also advance a persuasive argument that previous criminal sanctions have been ineffective at deterring unprotected aspects of protesting that have endangered the lives of protesters and non-protesters or caused major traffic disruptions for people trying to use public roads and highways. These important government interests are unrelated to the protests and must be enforced through greater criminal penalties. Ultimately, the protesters' evidence about how chilling these laws are on free expression will compete with the government's evidence on how dangerous these protests have become. In *O'Brien*, the Court upheld regulations prohibiting the burning of draft cards because "the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies."[265] In contrast, in *Texas v. Johnson*, the Court overturned defendant's criminal conviction for burning the

262 Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).
263 *O'Brien*, 391 U.S. at 376.
264 *Id.* at 377.
265 *Id.* at 381.

American flag, holding that *O'Brien* was not satisfied because no breaches of the peace occurred and the government sought to suppress viewpoints disrespectful to our national symbol.[266] The state's proposed legislation may satisfy a court as unrelated to the suppression of expression, or a court may deem that the incidental effects on speech are too great to justify the laws.

Protesters could also attempt arguments that courts should analyze state laws like the ones proposed in response to protests by the Black Lives Matter Movement and the Dakota Access Pipeline opponents using the court's scrutiny for time, place, and manner restrictions. These restrictions, as the name suggests, regulate when speech can occur, where speech may be uttered, and how speech can be communicated. The Supreme Court clarified its scrutiny of time, place, and manner restrictions in a case involving a city's sound amplification laws, as applied to a rock concert.[267] According to the Court,

> the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[268]

This test is likely inapposite to highway-blocking laws because the protesters' obstruction of public roads is not protected speech, the way music was in *Ward v. Rock Against Racism*.[269] However, in some cases, the Court has applied time, place, and manner scrutiny to cases involving expressive conduct.[270] In a roughly similar situation, a state trial court held that Occupy Wall Street protesters, seeking to call attention to wealth disparities, could not show that restrictions on "the erection of structures, the use of gas or other combustible materials, and the accumulation of garbage and human waste in public places" were not reasonable time, place, and manner restrictions, designed to allow a public park's "owner to maintain its space in a hygienic, safe, and lawful condition."[271]

Some of the laws at issue here, however, although justified without

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266 Texas v. Johnson, 491 U.S. 397, 407–08, 410 (1989).

267 Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989).

268 *Id.* at 791 (internal quotation marks omitted).

269 *Id.* at 790 ("Music is one of the oldest forms of human expression.").

270 *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297 (1984) ("We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, or manner regulation that withstands constitutional scrutiny.").

271 Waller v. City of New York, 933 N.Y.S.2d 541, 545 (N.Y. Sup. Ct. 2011) (denying temporary restraining order blocking enforcement of rules regulating city park, including evictions of protesters).

reference to the content of the speech (the laws block all highway obstructions or all weapons possession during protests, for example), are not narrowly tailored to serve the significant public interest of highway safety. Insulating motorists from liability for negligence in killing a protester will not only deter protesters who are blocking traffic but may deter protesters who are standing in permissible locations. For this reason, civil liberties lawyers believe that laws that greatly enhance penalties for peaceful protest are unconstitutionally chilling to speech. These lawyers also argue that imposing large penalties for "stepping in the wrong place, or [encouraging] a driver to get away with manslaughter because the victim was protesting, is about one thing: chilling protest."[272]

The protesters' argument that these proposed bills are unconstitutional deserves consideration, in contrast to the police reacting to violent and disruptive protests by applying background statutes involving assault and property destruction. The proposed bills involve state action that will have a serious impact on peaceful protest and may even have been designed to target particular messages. This chilling of protesters may violate First Amendment doctrine and will have a deleterious effect on free speech values, such as the ability to associate with others to express displeasure with government behavior. In contrast, applying generalized criminal laws to target coordinated, disruptive protests evinces no intent to suppress protesters' message, and actually serves free speech values by ensuring that individuals do not react to speech with violence.

CONCLUSION

Free speech values are served by both government action and government inaction, and thus exist on both sides of almost every First Amendment equation. Precisely because of the ease with which litigants can frame speech restrictions as actually serving free speech values, courts should continue to apply a formal state action doctrine to First Amendment cases. This formal state action would credit only free speech values abridged by the government, except in limited cases, such as where speech is illegally recorded. In those cases, courts should apply a broad definition of public concern to protect speech that is newsworthy. Ultimately, adhering to First Amendment doctrine, even in cases where government suppression of speech promotes some free speech values, will enhance free speech values overall. A formal conception of the state action doctrine demonstrates why even though violent protests are not protected speech, and thus law enforcement

272 Woodman, *supra* note 240.

should take punishing violent protests to serve free speech values, legislation targeting specific types of protests may nonetheless be unconstitutional.