BEYOND OFFENSE: WHY THE FIRST AMENDMENT DOES NOT PROTECT DELIBERATE MISGENDERING

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INTRODUCTION

Our names and pronouns are personal and powerful. They reflect our identities and provide a vehicle for self-definition.[1] Using someone's name and pronouns is an act of recognition.[2] Conversely, deliberate misgendering, or the intentional "assignment of a gender with which a party does not identify," is an act of hostility.[3]

To protect people from discrimination on the basis of gender, many states have enacted antidiscrimination laws—some of which make intentional and repetitious misgendering unlawful.[4] While these laws have a lot of promise, they ultimately fall short of providing perfect protections.[5] These antidiscrimination laws, and their authors, imagine

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1 *See* Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 393 (2021) ("Our first names and pronouns are fundamental to who we are."). *See generally* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

2 Importantly, using correct pronouns is a lifesaving act towards trans and nonbinary people. *See Pronouns Usage Among LGBTQ Youth*, TREVOR PROJECT (July 29, 2020), https://www.thetrevorproject.org/research-briefs/pronouns-usage-among-lgbtq-youth [https://perma.cc/S7PC-LVQC] ("Affirming LGBTQ youth's gender by using pronouns that align with their gender identity has been shown to improve mental health outcomes. . . . [Transgender and nonbinary] youth who reported having their pronouns respected by all or most of the people in the lives attempted suicide at half the rate of those who did not have their pronouns respected."); *California Appellate Court Rules Trans Pronouns Law Violates Freedom of Speech*, WASH. BLADE (July 20, 2021), https://www.washingtonblade.com/2021/07/20/calif-appellate-court-rules-trans-pronouns-law-violates-freedom-of-speech [https://perma.cc/VWY3-DVTL] ("Study after study has shown that trans people who are misgendered face alarming and life-threatening rates of depression and suicidal behavior. And older LGBTQ+ people face feelings of isolation, poor mental health and extreme vulnerability to communicable diseases like COVID-19.").

3 Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 42 (2020). Importantly, this Note analyzes deliberate misgendering that is "calculated, rather than careless." *Id.* Antidiscrimination laws target harassment that is "objectively hostile, not just subjectively offensive." Clarke, *supra* note 1, at 958. Courts, advocates, and scholars have found that intentional misgendering is objectively hostile. *See id.* at 959 ("Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity."); McNamarah, *supra*, at 43 ("[C]ourts addressing the issue [of deliberate misgendering] have almost uniformly found the practice hostile, objectively offensive, and degrading . . . ."); *id.* at 43 n.6; Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMM. & RHETORIC 61, 65 (2020) ("Language embodies human contact. It can forge connection, and it can inflict pain. Regardless of one's personal feelings about grammar rules, it is important to understand the detrimental impact of 'misgendering' an individual when we speak and write. As the Human Rights Campaign Foundation explains, 'The experience of being misgendered can be hurtful, angering, and even distracting.'").

4 *See State by State Guide to Laws That Prohibit Discrimination Against Transgender People*, NAT'L CTR. FOR LESBIAN RTS. (2010) [hereinafter *Laws Prohibit Discrimination Against Transgender People*], https://www.lgbtagingcenter.org/resources/pdfs/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf [https://perma.cc/T9AJ-SFYF].

5 *See* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 39–40 (rev. & expanded ed. 2015); *infra* Section II.B.

that discrimination is a product of aberrant perpetrators reacting to arbitrary hatred, rather than of a system marked by racism, classism, ableism, and transphobia.[6] Laws informed by this bad apple approach to antidiscrimination often enumerate particular acts that constitute unlawful discrimination and outline the appropriate punishments.[7] Not only does this approach ignore the everyday inequities of our legal system and legitimize structures that cause the most harm to communities that these laws purportedly protected, but it also runs up against a powerful legal structure: the First Amendment's protection of speech.[8]

Modern free speech jurisprudence is marked by judicial line drawing and value judgements.[9] Unlike other areas of constitutional law, history and founding era intent have little bearing on current understandings of the First Amendment's protection of speech, as contemporary free speech claims implicate questions beyond the framers' foundational commitment to democracy.[10] Questions of what kinds of speech (or actions) are afforded First Amendment protections, and to what degree, require contemporary Supreme Court Justices to make value judgments and draw lines.[11] These delineations are essentially arbitrary.[12] As the modern Supreme Court is marked by an absolutist,[13] neoliberal,[14] anti-classification[15] approach to protecting liberties, it is no surprise that contemporary judicial line drawing has created a system that values the

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6 SPADE, *supra* note 5; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–53 (1978); *infra* Section II.B.

7 SPADE, *supra* note 5; Freeman, *supra* note 6, at 1053–54; *infra* Section II.B.

8 SPADE, *supra* note 5; Freeman, *supra* note 6, at 1052–54; *infra* Section II.B.

9 *Infra* Section I.A.2; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1178 (Rachel E. Barkow, Erwin Chemerinsky, Richard A. Esptein & Ronald J. Gilson eds., 6th ed. 2020).

10 *See* CHEMERINSKY, *supra* note 9, at 1178–79.

11 The Supreme Court has used cases where free speech claims clash with the promise of equality to make absolute judgments about which rights deserve protecting. As Professor Jamal Greene discusses, this "rights absolutism" is itself part of the problem. When rights clash, the Court takes a markedly absolutist approach, rather than attempting to mediate or reconcile the seemingly conflicting rights. This all-or-nothing approach is individualizing and ahistorical, as it does not make room for more textured conversations about power and justice. *See* Harvard Book Store, *Jamal Greene Discusses "How Rights Went Wrong" with Jill Lepore*, YOUTUBE, at 15:00–16:00 (Mar. 31, 2021), https://www.youtube.com/watch?v=UGbPioV8-x4&t=2991s [https://perma.cc/DS8E-P3MJ].

12 *Id.* at 9:00.

13 *See id.* at 19:00–22:00; *see also* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART, at xix, 89, 92 (2021).

14 *See* SPADE, *supra* note 5, at 41 (noting that our "neoliberal era [is] characterized by abandonment (reduction of social safety net and infrastructure, especially in poor and people of color communities) and imprisonment (increased immigration and criminal law enforcement)").

15 *See* Boso, *supra* note 1, at 358–60.

individual's right to express a viewpoint, no matter how offensive, above all else.[16]

With increasing frequency, conservative opponents of antidiscrimination laws that prohibit deliberate misgendering use the First Amendment to challenge these laws, arguing that they encroach on a constitutionally protected right to free speech.[17] In particular, the asserted free speech liberty is the right to deliberately misgender others as an expression of an (offensive) viewpoint.[18] The Court's current approach to free speech claims not only creates a pathway for these claimants, but also arms them with an effective sword, as invocation of the First Amendment's free speech protections triggers heightened judicial scrutiny.[19]

This Note uses the recent case *Taking Offense v. State of California* to illustrate what happens when the prevailing approaches to free speech jurisprudence and antidiscrimination laws collide.[20] In *Taking Offense*, a California Appellate Court struck down the "pronoun provision" of California's LGBT Long-Term Care Facility Residents' Bill of Rights, which made it unlawful for staff of long-term care facilities to repeatedly and willfully misgender trans residents.[21] Taking Offense, a group described as comprising at least one California taxpayer, challenged the provision in court.[22] The California court agreed with Taking Offense that

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16 In fact, the Supreme Court has said that the more offensive a viewpoint is, the more deserving it is of constitutional protection. *See generally* Matal v. Tam, 137 S. Ct. 1744 (2017).

17 Boso, *supra* note 1, at 342 ("Today, anti-LGBT forces . . . seek refuge in the very legal mechanism that first facilitated disadvantaged minorities' campaigns for equal treatment: the First Amendment.").

18 *See, e.g.*, Taking Offense v. State, 281 Cal. Rptr. 3d 298 (Ct. App. 2021); Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021); Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021).

19 First Amendment claims trigger review under either intermediate or strict scrutiny. *See infra* discussion accompanying notes 31–40.

20 *See generally Taking Offense*, 281 Cal. Rptr. 3d 298. Though somewhat beyond the scope of this Note, the clash between the prevailing approaches to free speech jurisprudence and antidiscrimination laws can also be seen in cases where professors challenge university policy prohibiting the deliberate misgendering of students. For example, in *Meriwether v. Hartop*, a professor at Shawnee State University in Ohio brought a First Amendment challenge against the University's antidiscrimination policy, which required that university faculty use students' correct pronouns. *Meriwether*, 992 F.3d at 498. The Sixth Circuit concluded that the professor had a constitutionally protected right to express his opinion that sex is immutable by misgendering his students. *Id.* at 503; *see also* Boso, *supra* note 1, at 391–93; Jonathan Stempel, *Ohio Professor Who Rejected Transgender Pronouns Can Sue University: U.S. Appeals Court*, REUTERS (Mar. 26, 2021, 3:04 PM), https://www.reuters.com/article/us-usa-lgbt-professor/ohio-professor-who-rejected-transgender-pronouns-can-sue-university-u-s-appeals-court-idUSKBN2BI2WH [https://perma.cc/Q9D6-6YV7].

21 *See generally Taking Offense*, 281 Cal. Rptr. 3d 298.

22 *Id.*

the pronoun provision constituted an unconstitutional restriction of speech and struck down the provision.[23]

Part I of this Note starts by outlining the Supreme Court's protection of offensive viewpoints and then discusses government regulation of speech that does not necessarily implicate the First Amendment, including antidiscrimination laws that prohibit particular discriminatory conduct.[24] Part I then introduces the antidiscrimination law challenged on free speech grounds in *Taking Offense*, as well as the outcome on appeal.[25]

Part II addresses the limitations of the legal structures discussed in Part I. Part II then dives into *Taking Offense* more deeply, probing how the legal structures introduced in Part I—and their respective limitations—interact with each other in real time.[26] Part II explores the problems that arise when claimants invoke the First Amendment to challenge antidiscrimination laws prohibiting deliberate misgendering and concludes that the First Amendment does not protect the right to deliberately misgender anyone.[27]

Finally, Part III suggests that courts adjudicating free speech challenges to laws prohibiting deliberate misgendering should construe the challenged laws as regulating conduct, not speech.[28]

I. BACKGROUND

A. *Modern Free Speech Jurisprudence*

1. The Right to Offend

A central feature of free speech methodology is the distinction between content-based and content-neutral regulations of speech.[29] Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea expressed.[30] A law is considered content-based—and must meet strict scrutiny—if it restricts either subject matter or viewpoint.[31] The requirement of subject-

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23 *Id.*

24 *See infra* Sections I.A–I.B.

25 *See infra* Section I.C.

26 *See infra* Part II.

27 *See infra* Part II.

28 *See infra* Part III.

29 *See generally* Reed v. Town of Gilbert, 576 U.S. 155, 168–69 (2015).

30 *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

31 *Reed*, 576 U.S. at 168–69.

matter neutrality bars the government from regulating speech based on the topic of speech.[32] The requirement of viewpoint neutrality bars the government from regulating speech on the basis of the ideology of a message.[33]

Laws that restrict speech according to the idea or message expressed are subject to the most rigorous judicial review.[34] That is, content-based regulations are presumptively invalid and trigger strict scrutiny.[35] To survive strict scrutiny, the government bears the burden of persuading a court that the regulation is necessary to achieve a compelling government interest.[36] In other words, the government must persuade a reviewing court that a truly vital interest is served by the regulation in question and that the regulation is the most narrowly drawn means of achieving that end such that no less discriminatory alternatives exist.[37]

On the other hand, laws that restrict speech but are content-neutral are subject to intermediate scrutiny.[38] To survive intermediate scrutiny, the government bears the burden of persuading a reviewing court that the challenged law is substantially related to an important government interest.[39] The result of this jurisprudential scheme is that once the First

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32 *Id.*

33 *Id.*

34 *Id.* at 165–66.

35 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994); United States v. Alvarez, 567 U.S. 709, 715 (2012); *Reed*, 576 U.S. at 165.

36 *Reed*, 576 U.S. at 171.

37 *Id.* This is an incredibly difficult standard for a challenged regulation to survive. In general, strict scrutiny has been characterized as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). This means that, in the free speech context, once a regulation is characterized as a restriction of content or viewpoint, the regulation is almost certain to fail judicial review. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

38 A content-neutral law is one that "serves a purpose unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, the First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 954 (2007) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); *see also Turner Broad. Sys., Inc.*, 512 U.S. at 641–42 ("For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." (citations omitted)).

39 *Turner Broad. Sys., Inc.* at 661–62.

Amendment is invoked and a reviewing court proceeds under a First Amendment free speech analysis, a challenged law is necessarily subject to heightened scrutiny.[40]

The Supreme Court applied the distinction between content-neutral and content-based regulations of speech in *Reed v. Town of Gilbert*.[41] The *Reed* Court considered First and Fourteenth Amendment challenges to the Town of Gilbert's sign code.[42] The challenged code distinguished different categories of signs and placed varying levels of restrictions on each category.[43] Signs were assigned a category "based on the type of information [each sign] convey[ed]."[44] The code treated "Ideological Signs"[45] most favorably, allowing such signs to be up to twenty square feet and be displayed with no time limit.[46] In contrast, "Temporary Directional Signs Relating to a Qualifying Event"[47] were treated least favorably and faced restrictive limitations on size and display time.[48]

The Court found that the challenged code was unconstitutional, as it was facially content-based and failed strict scrutiny.[49] The Court explained that, if a law applies to a particular speech *because of* the message expressed, the government's regulation of speech is content-based.[50] In *Reed*, the challenged code distinguished between categories of signs based solely on the messages that the signs conveyed.[51] Thus, the *Reed* Court applied strict scrutiny and reasoned that, even if the Town's proffered interests were taken as sufficiently compelling, the code's

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40 Heightened scrutiny generally refers to intermediate or strict scrutiny.

41 *Reed*, 576 U.S. at 163–67.

42 The challenge was brought by petitioners Good News Community Church and its pastor, Clyde Reed, who wanted to use signs falling in the category "Temporary Directional Signs Relating to a Qualifying Event" in order to advertise church services. The church's signs incurred multiple infractions under the challenged code and Petitioners brought a free speech challenge against the code. *Id.* at 159, 161–62.

43 *Id.* at 159–61.

44 *Id.* at 159.

45 The code defined "Ideological Signs" as "any 'sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency.'" *Id.* at 159–60.

46 *See id.*

47 "This includes any 'Temporary Sign intended to direct pedestrians, motorists, and other passerby to a "qualifying event."' A 'qualifying event' is defined as any 'assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.'" *Id.* at 160 (citation omitted).

48 *Id.* at 159–60.

49 *Id.* at 164, 172 ("The Town's Sign Code is content based on its face.").

50 *Id.* at 163.

51 *Id.*

attempted regulation of speech was "hopelessly underinclusive" and thus failed to satisfy the narrowly tailored standard.[52]

The Court has also held that, while all content-based speech regulations are subject to strict scrutiny, laws regulating speech on the basis of viewpoint draw the most exacting scrutiny and are presumptively unconstitutional—a reflection of the high value placed on the individual's unfettered right to express their viewpoint.[53]

In *Matal v. Tam*, the Supreme Court stressed that the requirement of viewpoint neutrality extends to speech that is offensive.[54] Justice Alito, writing for the majority, announced the "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend."[55] In *Matal*, the Court considered a First Amendment challenge to the Lanham Act's "disparagement clause," which prohibited the registration of trademarks that disparaged "persons, living or dead, institutions, beliefs, or national symbols."[56] The *Matal* Court held that the disparagement clause constituted unconstitutional viewpoint discrimination,[57] finding that the clause effectively prohibited the registration of trademarks that offend any person or group.[58] The *Matal* Court explained that "[g]iving offense is a viewpoint," signaling that the First Amendment fiercely protects the right to offend.[59]

In sum, modern free speech jurisprudence fiercely protects the expression of viewpoints—including "giving offense." As explored in detail below, this protection lays a path for claimants to allege a constitutionally protected right to offend.[60] With increasing frequency, these claims are brought to challenge antidiscrimination laws protecting people from discrimination and harassment on the basis of gender identity.[61]

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52 The Town argued that it had a compelling interesting in (1) preserving the Town's aesthetic appeal and (2) traffic safety. However, the Court found that both of these aims could be achieved by means that did not implicate free speech concerns. *Id.* at 171–72.

53 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–63 (1994); *Reed*, 576 U.S. at 165; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–831 (1995).

54 *See* Matal v. Tam, 582 U.S. 218, 243–44 (2017).

55 *Matal*, 582 U.S. at 223.

56 The challenge was brought by Simon Tam, lead singer of the band "The Slants," who was denied a trademark under the disparagement clause on the grounds that the band's name was offensive. *See id.* at 1750–51.

57 *Id.* at 1763 ("Our cases use the term 'viewpoint' discrimination in the broad sense, and in that sense, the disparagement clause discriminates on the bases of 'viewpoint.'" (citation omitted)).

58 *Id.*

59 *Id.* at 1763.

60 *See infra* Section II.B.

61 *See* Boso, *supra* note 1 and accompanying text.

2. The Marketplace Metaphor

Modern free speech jurisprudence is marked by judicial line drawing that places the highest value on the individual's right to express their viewpoint, no matter how offensive.[62] While the First Amendment forcefully protects free speech, the Supreme Court has never accepted that the First Amendment is an *absolute* bar on government regulation of speech.[63] Thus, in analyzing First Amendment free speech claims, judges must consider what expression is worthy of constitutional protection and to what degree.[64] Unlike other areas of constitutional law, considerations of the Amendment's drafting history and Framers' intent do little to guide judges who parse contemporary free speech issues.[65] Without history to lean on, contemporary Justices must make value judgments to delineate what exactly is protected speech under the First Amendment.[66]

To contextualize judicial line drawing and value judgments in free speech analyses, it is useful to consider the central goals that the First Amendment's protection of free speech is understood to further: democracy, individual autonomy, tolerance, and the search for truth.[67] This Note will focus largely on the latter—the "marketplace metaphor"—because it is routinely invoked by the Court and claimants to support a constitutionally protected right to offend.[68] However, a consideration of the other rationales is instructive.

First, free speech is understood to be fundamental to a functioning democracy.[69] Constitutional protection of speech was central to the project of democracy and self-governance pursued by the framers of our Constitution.[70] Thus, safeguarding political speech is a core objective of First Amendment protections.[71] Protecting political speech means

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62 *See generally* Matal v. Tam, 582 U.S. 218 (2017); CHEMERINSKY, *supra* note 9.

63 For example, the Supreme Court has recognized that certain categories of speech are not protected by the First Amendment: the incitement of illegal activities, "true threats," and obscenity. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Virginia v. Black, 538 U.S. 343 (2003); Roth v. United States, 354 U.S. 476 (1957).

64 CHEMERINSKY, *supra* note 9, at 1179.

65 *Id.* at 1178. The First Amendment's protection of free speech was largely a reaction to the restrictive sedition laws in England. However, modern free speech claims implicate questions that go beyond the Framers' foundational commitment to the project of democracy. *Id.*

66 *Id.* at 1180 (noting that the Supreme Court must "make value choices as to what speech is protected, under what circumstances, and when and how the government may regulate").

67 *See id.* at 1180–84; Martin H. Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982).

68 *See supra* Sections I.C., II.C.2.

69 Redish, *supra* note 67, at 596–602.

70 *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948).

71 *Id.*

protecting the people's ability to criticize the government and engage in open discussion of candidates for public office.[72] However, the Supreme Court has never accepted the view that the First Amendment *only* protects political speech.[73]

A second rationale is the understanding that free expression is a vital element of autonomy and self-actualization that should not be curtailed by government regulation.[74] Proponents of the "autonomy" rationale contend that expressing oneself through speech is equivalent to defining oneself publicly.[75] Third, broad freedom of speech aims to promote tolerance.[76] Proponents of the "tolerance" justification argue that exposing the public to a wide range of ideas, including the most odious, will foster tolerance for that with which the public disagrees.[77] However, critics point out that the intolerance of others need not be tolerated by society.[78]

The "search for truth" rationale for First Amendment protections of speech, perhaps most famously articulated by Justice Holmes, is the idea that freedom of expression is necessary to aid the discovery of truth via the marketplace of ideas.[79] Proponents of this theory argue that the "truth is most likely to emerge from the clash of ideas."[80] Thus, the government must protect all viewpoints, ideologies, opinions, and ideas so that each has a fighting chance to be taken as "true" in the realm of public discourse.[81] As will be discussed in detail below, this "may the best truth win" approach to free speech has received substantial criticism.[82]

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72 *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (explaining that "the central meaning of the First Amendment" is the freedom to criticize the government); CHEMERINSKY, *supra* note 9, at 1180–81.

73 Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

74 R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 338–41 (2001).

75 CHEMERINSKY, *supra* note 9, at 1183 ("[T]o engage voluntarily in a speech act is to engage in self-definition of expression.").

76 *Id.* at 1184.

77 *Id.* ("The claim is that tolerance is a desirable, if not essential value and that protecting unpopular or distasteful speech is itself an act of tolerance. Moreover, such tolerance serves as a model that encourages more tolerance throughout society.").

78 *Id.*

79 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, and that truth is the only ground upon which their wishes can be carried out.").

80 CHEMERINSKY, *supra* note 9, at 1181; *see also* Alexander Tsesis, *Deliberative Democracy, Truth, and Holmesian Social Darwinism*, 72 SMU L. REV. 495 (2019).

81 Tsesis, *supra* note 80, at 496–503, 508 (introducing Holmes' conceptualization of the "marketplace of ideas" framework).

82 *See infra* Section II.C.3.

In a concurring opinion in *Matal*, Justice Kennedy grounded the protection of offensive viewpoints in the "marketplace of ideas" rationale for the First Amendment's protection of speech.[83] Justice Kennedy expressed a concern that viewpoints suppressed for being offensive or unpopular would be removed from public discourse.[84]

B. *Government Regulation of Speech Beyond the First Amendment*

The divide between speech and conduct is "murky,"[85] thus delineating which actions are considered speech is one of the lines contemporary Justices must draw.[86] Actions like flag burning,[87] cross burning,[88] hosting parades,[89] and donning armbands[90] have all been considered forms of speech by the Supreme Court. Conversely, harmful words uttered in the workplace that are sufficiently pervasive and severe so as to create a hostile environment have been considered unlawful actions under Title VII.[91]

The Supreme Court addressed hostile environment sex discrimination for the first time in *Meritor Savings Bank v. Vinson*.[92] In

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83 Matal v. Tam, 582 U.S. 218, 249 (Kennedy, J., concurring) ("By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.").

84 *Id.* at 250 ("[T]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. That danger is all the greater if the ideas or perspectives are ones a particular audience might think offense, at least at first hearing. An initial reaction may prompt further reflection, leading to a more reasoned, more tolerant position.").

85 Boso, *supra* note 1, at 389–90.

86 CHEMERINSKY, *supra* note 9, at 1184.

87 *See* Texas v. Johnson, 491 U.S. 397 (1989); Smith v. Goguen, 415 U.S. 566 (1974); Spence v. Washington, 418 U.S. 405 (1974).

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

89 Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos., 515 U.S. 557 (1995).

90 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that wearing a black armband to protest the Vietnam War constituted speech that was protected by the First Amendment).

91 *See generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Sys., Inc, 510 U.S. 17 (1992); Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & LAW 67, 71–72 (2002) ("Title VII of the Civil Rights Act of 1964 prohibits unions and employers that have fifteen or more workers and are engaged in an industry affecting interstate commerce from committing discriminatory acts. Title VII makes it unlawful for an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" (footnotes omitted)).

92 Kirshenbaum, *supra* note 91, at 73–74. "Prior to *Meritor*, Title VII only prohibited quid pro quo sexual harassment, which did not protect women from hostile work environments unless they experienced a tangible job detriment." *Id.* at 74.

Meritor, the Court established that a claim of hostile environment sex discrimination is actionable under Title VII if the alleged harassment is inflicted on the basis of sex and is "severe or pervasive [enough] to alter the conditions of the victim's employment and create an abusive working environment."[93]

In *Meritor*, Respondent Michelle Vinson brought an action against her supervisor Sidney Taylor, a Vice President of Meritor Savings Bank, claiming that during her four years of employment she had been subject to constant sexual harassment by Taylor in violation of Title VII.[94] In addressing Vinson's claim, the Court deferred to EEOC guidelines defining sexual harassment as including "unwelcome sexual advances, requests for sexual favors, and other *verbal* or physical conduct of a sexual nature."[95] The *Meritor* Court emphasized that, under Title VII, employees have the right to work in a place where they are not subject to insult, intimidation, ridicule, or inappropriate sexual comments—notably all speech-based conduct.[96] Since *Meritor*, the Supreme Court has broadened prohibitions on "sex discrimination" to include discrimination on the basis of gender.[97]

In the few times that the Supreme Court has considered whether prohibitions of hostile environment discrimination implicate First Amendment concerns, the Court has, in dicta, intimated that these prohibitions target *conduct*—not speech—and are thus beyond the reach of the First Amendment.[98] Federal court decisions in the wake of *Meritor* reflect that words alone are enough to establish a claim of sexual

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93 *Meritor*, 477 U.S. at 65 ("[S]exual misconduct constitutes prohibited 'sexual harassment' . . . where 'such conduct has the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive workplace environment.'" (quoting 29 C.F.R. § 1604.11(a)(3) (1985))).

94 *Meritor*, 477 U.S. at 59–60.

95 § 1604.11(a) (emphasis added).

96 *Meritor*, 477 U.S. at 65.

97 In *Bostock v. Clayton County*, the Supreme Court for the first time recognized that anti-gay and anti-trans discrimination are forms of sex discrimination under Title VII. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

98 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1991) ("[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), . . . speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech."); Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993); Kirshenbaum, *supra* note 91, at 92–93 ("Although the Court did not expressly call hostile environment sexual harassment 'conduct' in either [*R.A.V.* or *Mitchell*], the Court intimated in *R.A.V.* that Title VII does not 'target conduct on the basis of its expressive content' and that 'acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.' The Court more explicitly addressed the issue in *Mitchell*, where it referred to the comment it made regarding Title VII in *R.A.V.* The *Mitchell* Court stated that 'in *R.A.V. v. St. Paul*, we cited Title VII as an example of a permissible content-neutral regulation of conduct.'" (footnotes omitted)).

harassment under Title VII,[99] and that laws prohibiting hostile environment discrimination regulate conduct and thus do not conflict with the First Amendment.[100]

In *Aguilar v. Avis Rent a Car System Inc.*, the California Supreme Court concluded that an injunction prohibiting racial epithets in the workplace did not violate First Amendment rights.[101] The *Aguilar* court reasoned that where there has been a judicial determination that using such language creates a hostile work environment, and thus constitutes employment discrimination, enjoining the use of racial epithets does not run afoul of the First Amendment.[102] The *Aguilar* court noted that, as the Supreme Court clarified in *Meritor*, not all harassing speech necessarily creates a hostile environment so as to violate Title VII.[103] To rise to the level of hostile environment discrimination, speech must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."[104] The lower court enjoined the racist speech, finding that it met this standard, and the California Supreme Court had no problem upholding the injunction.[105]

Government regulation of conversion therapy[106] is another area implicating the murky distinction between speech and conduct. These regulations have been routinely challenged by claimants asserting that such regulations encroach on their free speech liberty interests.[107] Some courts have dealt with these challenges by rejecting the premise that conversion therapy is speech and instead assessing the constitutionality

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99 See, for example, *Reeves v. C.H. Robinson Worldwide, Inc.*, a unanimous decision in which the Eleventh Circuit held that words alone, without more, established a sufficiently hostile environment to violate Title VII. 594 F.3d 798 (11th Cir. 2010).

100 Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1246–47 (10th Cir. 1999) (finding that harassing speech forming the basis of a hostile environment sexual harassment claim "amounts to discriminatory conduct, not just speech"); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (finding that Title VII's prohibition of hostile environment sex discrimination targets conduct rather than speech).

101 Aguilar v. Avis Rent a Car Sys., Inc., 980 P.2d 846, 848–49 (Cal. 1999).

102 *Id.* at 860.

103 *Id.* at 851.

104 *Id.*

105 *Id.* at 862–63.

106 Conversion therapy describes the practice of attempting to "alter same-sex attractions or an individual's gender expression with the specific aim to promote heterosexuality as a preferable outcome." *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/aacap/policy_statements/2018/Conversion_Therapy.aspx [https://perma.cc/T4SR-35MA].

107 *See, e.g.*, King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014); *see also* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

of the regulations in terms of the permissibility of regulating *conduct*.[108] For example, in *Pickup v. Brown*, the Ninth Circuit considered a constitutional challenge to a California law prohibiting state-licensed mental health practitioners from using conversion therapy on minor patients.[109] The Ninth Circuit found that the challenged law regulated conduct, not speech, and was thus beyond the scope of the First Amendment and subject only to rational basis review.[110]

In making this distinction, the *Pickup* court articulated a spectrum of professional behavior, with public speech necessitating First Amendment protection at one end and professional conduct having only an "incidental effect on speech" at the other.[111] The court placed the challenged law on the latter end, finding it to be a "regulation of professional *conduct*."[112]

The Third Circuit came to a very different conclusion in *King v. Governor of the State of New Jersey*, when assessing a First Amendment challenge to New Jersey's ban on conversion therapy.[113] In *King*, the plaintiffs, a group of individual practitioners and organizations that provided conversion therapy, alleged that the ban violated their right to free speech and free exercise of religion and sought an injunction to prevent the ban from being enforced.[114] The district court applied the Ninth Circuit's reasoning in *Pickup v. Brown* and classified the challenged law as a regulation of conduct—not speech—removing the challenge from the realm of the First Amendment and ultimately upholding the law.[115] On appeal, the Third Circuit found that the ban did violate the

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108 James Hampton, *The First Amendment and the Future of Conversion Therapy Bans in Light of* National Institute of Family and Life Advocates v. Harris, 35 BERKELY J. GENDER L. & JUST. 169, 177–81 (2020).

109 *Pickup v. Brown* was a consolidated appeal of two district court cases, *Welch v. Brown* and *Pickup v. Brown*, both concerning the same California law—SB 1172—which banned mental health providers from engaging in "sexual orientation change efforts" (SOCE) with patients under eighteen years of age. S.B. 1172, 2011–2012 Leg., Reg. Sess. (Cal. 2012); *see* Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), *rev'd sub nom.* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014); Pickup v. Brown, 42 F. Supp. 3d 1347 (E.D. Cal. 2012), *aff'd*, 740 F.3d 1208 (9th Cir. 2014).

110 In *Welch*, the district court "held that SB 1172 [was] subject to strict scrutiny because it would restrict the content of speech and suppress the expression of particular viewpoints." *Pickup*, 740 F.3d at 1224; *see Welch*, 907 F. Supp. 2d 1102. Conversely, in *Pickup*, the district court "reasoned that, because the plain text of SB 1172 bars only treatment, but not discussions about treatment, the law relates primarily to conduct rather than speech." *Pickup*, 740 F.3d at 1225; *see Pickup*, 42 F. Supp. 3d 1347. Thus, the Ninth Circuit ultimately followed the latter court's lead.

111 *Pickup*, 740 F.3d at 1227 ("In determining whether SB 1172 is a regulation of speech or conduct, we find it helpful to view this issue along a continuum.").

112 *Id.* at 1229.

113 King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014).

114 *Id.* at 220–21.

115 *Id.* at 223–25.

plaintiffs' First Amendment rights and classified the challenged law as one targeting speech.[116] Finding that the ban was viewpoint-neutral, the Third Circuit applied intermediate scrutiny and ultimately upheld the law.[117]

Notably, the Eleventh Circuit recently struck down Florida's ban on conversion therapy, rejecting the classification of conversion therapy as conduct and finding that the plaintiff's asserted free speech interest outweighed the State's interest in protecting minors from the harmful practice.[118]

State antidiscrimination laws that prohibit deliberate misgendering test the government's ability to regulate words without implicating the First Amendment. Nearly one hundred state antidiscrimination laws were enacted in the last decade.[119] Of these laws, those that protect people from discrimination on the basis of gender offer protections in a wide range of situations, including employment, housing, education, credit, and public accommodations.[120] Some states particularly provide for protection against discrimination on the basis of gender identity, while others broadly define discrimination on the basis of sexual orientation to include discrimination on the basis of gender.[121] While these antidiscrimination schemes differ in their scope and definition, they share a common feature: the enumeration of particular actions that

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116 *Id.* at 224–25 ("We hold that these communications are 'speech' for purposes of the First Amendment."); Hampton, *supra* note 108, at 179–80 ("The court reasoned that those who provide conversion therapy are using speech to provide a specialized service designed to alter client's behaviors and thoughts, and thus it fell under the category of professional speech.").

117 The *King* court found the ban survived intermediate scrutiny as it was based on findings by the New Jersey legislature that conversion therapy is ineffective and harmful. *King*, 767 F.3d at 237–40; *see also* Hampton, *supra* note 108, at 179–80.

118 Izzy Kapnick, *11th Circuit Splits with Sister Courts on Gay-Conversion Ban*, COURTHOUSE NEWS SERV. (Nov. 20, 2020), https://www.courthousenews.com/11th-circuit-splits-with-sister-courts-on-gay-conversion-bans [https://perma.cc/6DYE-XXUT].

119 2021 STATE EQUALITY INDEX, HUM. RTS. CAMPAIGN FOUND. (2022), https://reports.hrc.org/2021-state-equality-index-2?_ga=2.19247288.1810185291.1673131647-1875371371.1673131647&_gac=1.194411999.1673131678.Cj0KCQiAzeSdBhC4ARIsACj36uHf-6KZ6WnoGrHzY3ZVbaSf1ztE1JS_HxwJca-drMICiFnuYXW-jpAaAkEYEALw_wcB#good-vs-bad-2021 [https://perma.cc/9H2H-Z7LU]. In 2021 alone, forty-six state antidiscrimination laws were introduced, though only eight were passed into law. *Id.*

120 NAT'L CTR. FOR LESBIAN RTS., STATE BY STATE GUIDE TO LAWS THAT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE (2010).

121 *See, e.g.*, N.Y. EXEC. LAW § 292(35) (McKinney 2022); N.J. STAT. ANN. § 10:5-5(rr) (West 2023); HAW. REV. STAT. ANN. § 489-2 (West 2022); IOWA CODE ANN. § 216.2(10) (West 2022); N.M. STAT. ANN. § 28-1-2(Q) (West 2022); 1 R.I. GEN. LAWS § 11-24-2.1 (2022); VT. STAT. ANN. tit. 1, § 144 (2022); WASH. REV. CODE ANN. § 49.60.040(27) (West 2022) (including gender identity within the definition of sexual orientation); ME. REV. STAT. ANN. tit. 5, § 4553(5-C) (2023) (same).

constitute discriminatory conduct.[122] Deliberate, repetitious misgendering has been targeted as a prohibited discriminatory act in such laws.

An example can be found in California's attempt to prohibit deliberate, repetitious misgendering in long term care facilities. In 2017, the California state legislature enacted Senate Bill 219 (SB 219), which added the Lesbian, Gay, Bisexual, and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights to California's Health and Safety Code.[123] SB 219 details specific actions that would be considered discriminatory towards LGBTQIA* elders in long term care facilities.[124] Of particular relevance to this Note is California Health and Safety Code section 1439.51(a)(5) (the "pronoun provision"), which made it unlawful for the staff of long-term care facilities to willfully and repeatedly fail to use a resident's correct name or pronouns.[125]

This watershed LGBTQIA* rights bill was enacted to protect LGBTQIA* elders from discrimination in long-term care facilities.[126] Though California's existing antidiscrimination laws purportedly protect LGBTQIA* people from discrimination "on the basis of a person's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus (HIV) status,"[127] the California legislature found that these laws were not effectively reaching LGBTQIA* elders in long-term care facilities.[128]

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122 *See, e.g.*, N.Y. EXEC. LAW §§ 296, 296-a, 296-c, 296-d (McKinney 2022); COLO. REV. STAT. ANN. § 24-34-402 (West 2023) (prohibiting discriminatory employment practices); *id.* § 24-34-502 (prohibiting discriminatory housing practices); *id.* § 24-34-601 (prohibiting discrimination related to public accommodations); HAW. REV. STAT. ANN. §§ 515-3 to 515-6 (West 2022); IOWA CODE ANN. § 216.8(1)(d) (West 2022) (prohibiting discriminatory housing practices); *id.* § 216.6(1)(b) (prohibiting discriminatory employment practices).

123 Taking Offense v. State, 281 Cal. Rptr. 3d 298, 305 (Ct. App. 2021) ("In 2017 the California Legislature enacted Senate Bill No. 219 (2017-2018 Reg. Sess.), which added to the Health and Safety Code the Lesbian, Gay, Bisexual, and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights.").

124 *Hearing on S.B. 219 Before the S. Standing Comm. on Judiciary*, 2017–18 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Hearing on S.B. 219*].

125 CAL. HEALTH & SAFETY CODE § 1439.51 (West 2022) ("Except as provided in subdivision (b), it shall be unlawful for a long-term care facility or facility staff to . . . [w]illfully and repeatedly fail to use a resident's preferred name or pronouns after being clearly informed of the preferred name or pronouns.").

126 *Hearing on S.B. 219*, *supra* note 124 ("SB 219 is a bill that will protect LGBT seniors who are living in long term care facilities." (statement of Sen. Scott Weiner)).

127 2017 Cal. Stat. ch. 483 ("Existing law, the California Fair Employment and Housing Act, makes it unlawful to discriminate against any person in any housing accommodation on the basis of, among others, sex, gender, gender identity, gender expression, or sexual orientation.").

128 *Id.* § 1(e) ("While state and local laws already prohibit discrimination in public accommodations on the basis of actual or perceived sexual orientation, gender identity, gender

SB 219 was supported by findings that LGBTQIA* elders are particularly vulnerable in these facilities.[129] The studies cited by the California legislature show an already marginalized population at its most vulnerable.[130] The bill cited a 2011 study finding that almost half of respondents saw or experienced discrimination in long-term care facilities on the basis of an LGBTQIA* identity, including staff misgendering patients.[131] The bill was also supported by a 2013 study reporting that the majority of LGBTQIA* elders lived alone, either without children or without children that would be available to care for them.[132] The California legislature concluded that LGBTQIA* seniors "have a heightened need for care" yet face barriers to accessing this care, namely, the threat of discrimination in healthcare facilities.[133]

C. *The Right to Offend as an Attack on State Prohibitions of Misgendering*

State laws protecting people from discrimination on the basis of gender identity have a great deal of promise.[134] These laws create a path for victims of harassment to seek legal redress, potentially deter would-be harassers, and increase the visibility of trans communities within the

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expression, and HIV status, the promise of these laws has not yet been fully actualized in long-term care facilities.").

129 *Id.* § 1(b) ("Recent studies confirm the state's findings and provide evidence that LGBT seniors experience discrimination, including in long-term care facilities where residents are particularly vulnerable because they must rely on others for necessary care and services, and may no longer enjoy the privacy of having their own home or even their own room.").

130 *Id.*; *see also* Clarke, *supra* note 1, at 960–61 ("Such a rule [as the pronoun provision] is warranted in the context of the long-term care industry, which involves a captive and vulnerable population of LGBT seniors. Long-term care providers are charged with protecting the physical and mental health of this population and should not endanger the well-being of their charges by disrespecting their identities, however idiosyncratic.").

131 *Id.* § 1(c) ("43 percent of respondents reported personally witnessing or experiencing instances of mistreatment of [LGBTQIA*] seniors in a long-term care facility, including . . . staff refusal to refer to a transgender resident by [their] preferred name or pronoun.").

132 *Hearing on S.B. 219*, *supra* note 124 ("Sara Kelly Keenan, still intersex And [sic] this matters to intersex people as well, because most intersex people cannot procreate. And I'm an only child, so if I live to be an older person no one's going to come make sure I'm safe in senior housing. There need to be protections." (statement of Sara Keenan)).

133 2017 Cal. Stat. ch. 483, § 1(d) ("These results indicate that, as compared to seniors in San Francisco generally, LGBT seniors have a heightened need for care, but often lack family support networks available to non-LGBT seniors. Further, LGBT seniors' fear of accessing services is justified. Nearly one- half of the participants in the San Francisco study reported experiencing discrimination in the prior 12 months because of their sexual orientation or gender identity.").

134 For examples, see generally *Laws Prohibit Discrimination Against Transgender People*, *supra* note 4.

law.[135] However, the realities of our legal system limit how far these laws can actually go.[136] Even with antidiscrimination laws in place, socioeconomic barriers mean that those most affected by discrimination often cannot afford the legal help needed to go to court.[137] And most relevant to the discussion here, these laws are vulnerable to challengers claiming a right to offend.

This vulnerability is illustrated by the fate of SB 219. From its inception, SB 219 came under attack from conservative opponents.[138] In particular, the "pronoun provision," which carries criminal penalties, was harshly criticized by right-wing groups that feared the provision would result in jail time for staff at long-term care facilities who repeatedly used the wrong pronouns to refer to patients.[139] State Senator Scott Wiener, the author of SB 219, called these attacks a "far right freak out" that misrepresents the true nature of the bill.[140] Wiener pointed out two flaws in these attacks: first, SB 219 only prohibits willful and repetitious discrimination, and does not purport to criminalize mistakes or the occasional slip up;[141] and second, despite criminal sanctions for violations of the bill, these sanctions would most likely result in no more than a

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135 SPADE, *supra* note 5, at 39 ("Proponents [of anti-discrimination laws] argue that passing these laws does a number of important things. First the passage of anti-discrimination laws can create a basis for legal claims against discriminating employers, housing providers, restaurants, hotels, stores, and the like. Trans people's legal claims when facing exclusion is a legitimate preference on the part of the employer, landlord, business owner. Laws that make gender identity/expression-based exclusion illegal have the potential to influence courts to punish discriminators and provide certain remedies to injured trans people. There is also a hope that such laws, and their enforcement by courts, would send a preventative message to potential discriminators, letting them know that such exclusions will not be tolerated; these laws would ultimately increase access to jobs, housing, and other necessities for trans people." (footnotes omitted)).

136 *Id.* at 41 ("In a neoliberal era characterized by abandonment (reduction of social safety net and infrastructure, especially in poor and people of color communities) and imprisonment (increased immigration and criminal law enforcement), anti-discrimination laws provide little relief to the most vulnerable people.").

137 *Id.* at 40. Further, "[a]nti-discrimination laws are not adequately enforced," and "the Supreme Court has severely narrowed the enforceability of these laws over the last thirty years, making it extremely difficult to prove discrimination." *Id.* at 40–41.

138 Chris Nichols, *Claims Mislead About California Forcing Jail Time for Using Wrong Transgender Pronoun*, POLITIFACT (Sept. 26, 2017, 5:13 PM), https://www.politifact.com/article/2017/sep/26/claims-mislead-about-california-bill-forcing-jail- [https://perma.cc/U22T-QF5U].

139 *Id.* ("[C]onservative groups have continued with a separate, more persistent allegation: That Senate Bill 219 would send people to jail for using the wrong pronoun to describe transgender residents in a senior home.").

140 *Id.*

141 *Id.* ("The bill is very, very clear that what is prohibited is the willful engagement and repeated engagement in discriminatory conduct against LGBT seniors. So, if someone makes a mistake or doesn't know what a person's gender identity is and uses the incorrect pronoun that is not a violation of the statute.").

fine.[142] Professor Courtney Joslin assured that "the bar for criminal prosecution would be extremely high" and that criminal charges would only be brought in cases where the alleged discriminatory conduct carried the potential to cause serious harm or death.[143]

The conservative response reached a head when Taking Offense,[144] a group described as being comprised of at least one California taxpayer, challenged the constitutionality of the pronoun provision in court.[145] Taking Offense argued that the First Amendment protects the right to misgender as an expression of ideology, and thus the pronoun provision should be taken as unconstitutional viewpoint discrimination.[146]

In its briefs, Taking Offense painted a picture of a society marked by two competing worldviews: gender essentialism on one side and a progressive worldview on the other.[147] As Taking Offense defines it, gender essentialism, or biological essentialism, holds that "sex and gender are linked and immutable."[148] On the other hand, Taking Offense defines the progressive worldview, which it at times refers to as "the 'non-binary' gender constructivist worldview," as the view that "gender is a matter of

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142 *Id.* ("Wiener has said purposefully using the wrong pronoun would be treated the same way as someone who violates a center's smoking ban. It would be considered a minor violation but 'no one is going to jail for that.' Facilities that fail to comply would most likely get a notice of violation, akin to 'a parking ticket,' the senator said in an interview with PolitiFact California. He added that the provisions apply only to care facility staff, not to residents.").

143 *Id.* ("The bill doesn't spell this point out explicitly, but instead refers to the state's health and safety code, which under Section 1248.8 outlines factors which a court should consider before imposing punishment for someone guilty of a misdemeanor. One of those factors includes the risk of death or serious physical harm.").

144 Notably, Taking Offense was represented by David Llewelyn, Jr., an attorney known as "God's Lawyer" for his extensive work with the religious right. Llewelyn has a long track record of representing anti-LGBTQIA* clients in court. James Factora, *A Court Just Ruled That Misgendering Is Protected Free Speech*, THEM (July 20, 2021), https://www.them.us/story/california-court-case-misgendering-law-struck-down [https://perma.cc/DPC9-2G2G].

145 California Health and Safety Code section 1439.5(a)(5), the "pronoun provision," was challenged as violating First Amendment rights of freedom of expression, thought, religion, conscience, and association. In addition, section 1439.5(a)(3), the "room assignment provision," was challenged as violating, inter alia, equal protection of the laws. *See generally* Taking Offense v. State, 281 Cal. Rptr. 3d 298 (Ct. App. 2021). However, discussion of this provision is beyond the scope of this Note.

146 *See generally* Appellant's Opening Brief, *Taking Offense*, 281 Cal. Rptr. 3d 298 (No. C088485), 2019 WL 3384404.

147 Taking Offense argued that:

> People with these conflicting worldviews—that is, essentialists who believe that sex and gender are linked and immutable and progressives who believe that gender is mutable and who conflate sex and gender—have long lived together in mutually tolerant disagreement, but California has now taken sides with the progressives against the essentialists.

Id. at 18 (footnote omitted).

148 *Id.*

personal choice unconstrained by biology, genetics, reproductive capacity, and other objective factors."[149]

Taking Offense asserted that the deliberate choice to misgender is an expression of the gender essentialist worldview.[150] Thus, Taking Offense argued, by prohibiting deliberate misgendering, California "sides with the progressives against the essentialists."[151] In making this argument, Taking Offense repeatedly invoked the "marketplace of ideas" justification for First Amendment protections of speech.[152] In Taking Offense's view, the contrasting gender ideologies should be left to public debate.[153]

Taking Offense contended that, because the pronoun provision restricts speech on the basis of viewpoint, the provision triggers the most exacting judicial scrutiny.[154] Conceding that its "gender essentialist worldview" might offend LGBTQIA* residents of long-term care facilities, Taking Offense emphasized that "speech is most protected when it is most offensive."[155] Though dubious that the pronoun provision was supported by a compelling government interest, Taking Offense took a firm stance that the provision should fail strict scrutiny at the narrowly tailored prong.[156] Taking Offense took particular issue with the criminal penalty imposed by SB 219, labeling the pronoun provision an imposition of a "speech crime."[157] In its briefs, Taking Offense proposed that a more appropriate antidiscrimination approach would be through agency

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149 Appellant's Reply Brief at 17–18, *Taking Offense*, 281 Cal. Rptr. 3d 298 (No. C088485), 2020 WL 35310.

150 Appellant's Opening Brief, *supra* note 146, at 18 ("[T]o fail or refuse to accept and express the progressive worldview by using pronouns demanded by another person according to that person's chosen gender identity, gender expression or transgender status.").

151 *Id.*

152 *Id.* at 22 ("The freedom of expression protected by the First Amendment exists to preserve an uninhibited marketplace of ideas and to further individual rights of self expression.").

153 *Id.* at 21 ("If the present generation has truly discovered new realities about sex and gender, the proper course is to invoke free speech to promote these insights in the 'marketplace of ideas' guaranteed to all people in the First Amendment, not to impose them dictatorially on people of good conscience who disagree.").

154 *Id.* at 18 ("Health and Safety Code § 1439.51(a)(5) censors speech on the basis of its content and viewpoint, content relating to science, biology, psychology, thought, conscience, opinion, religion and belief, and viewpoint regarding gender, whether it is sex-linked and immutable, as the essentialists understand it, or volitional and mutable, as the progressives claim. Such content regulation of speech is subject to strict scrutiny and is manifestly unconstitutional, especially when exacerbated by declaring speech a crime punishable by fines and imprisonment.").

155 *Id.* at 38–39; *see also* Appellant's Reply Brief at 8, Taking Offense v. State, 281 Cal. Rptr. 3d 298, 696 (Ct. App. 2021) (No. C088485), 2020 WL 1809918 ("The speaker's choice of pronouns may indeed be offensive to the resident, to the legislators of the State of California, to judges, justices and other people, perhaps even to a majority of the state and nation, but speech with offensive content is nevertheless constitutionally protected expression.").

156 Appellant's Opening Brief, *supra* note 146, at 34–35.

157 Appellant's Reply Brief, *supra* note 155, at 7–8.

regulation akin to "hostile environment" laws enforced by the Fair Employment and Housing Agency.[158]

Though the trial court dismissed Taking Offense's First Amendment challenge,[159] California's Appellate Court accepted Taking Offense's argument, finding the pronoun provision to be an unconstitutional restriction of speech.[160] The appellate court began by assessing what level of heightened scrutiny to apply.[161] In defense of SB 219, California's Attorney General argued that the pronoun provision is merely a content-neutral restriction of speech and as such should be subject only to intermediate scrutiny.[162] In support of this reading, the Attorney General argued that (1) California's motives in enacting SB 219 were benign and antidiscriminatory;[163] (2) the provision does not compel speech as staff of long-term care facilities are free to avoid using pronouns at all;[164] (3) the provision restricts speech in the interest of LGBTQIA* residents and not the state;[165] and (4) that the challenged provision restricts the use of pronouns, which are "merely stand-ins for nouns and are not ideological messages."[166] The court was not persuaded by any of these arguments[167] and concluded that the pronoun provision was a content-based restriction of speech because the provision "compels long-term care facility staff to alter the message they would prefer to convey."[168] Thus, the court, citing *Reed*, concluded it was bound to apply the most exacting level of judicial review to the pronoun provision.[169]

Before reaching this conclusion, the court considered the Attorney General's argument that *Reed*'s mandate of strict scrutiny for content-based speech regulations did not necessarily apply to the pronoun provision.[170] The Attorney General pointed out that "courts have been hesitant to apply *Reed*'s holding to areas of law where alternative tests and

158 *Taking Offense*, 281 Cal. Rptr. 3d at 318.

159 *Id.* at 307 ("Following briefing, the trial court issued a tentative ruling denying the petition in its entirety. No party contested the tentative ruling, which became the court's order. Taking Offense timely filed a notice of appeal.").

160 *Id.* at 306.

161 *Id.* at 310.

162 *Id.*

163 *Id.* at 311.

164 *Id.* at 312.

165 *Id.*

166 *Id.* at 313.

167 *Id.* at 311 ("The Attorney General presents several arguments in support of [the assertion that the pronoun provision is content-neutral], none of which persuade.").

168 *Id.* at 308.

169 *Id.*

170 *Id.* at 314.

different levels of scrutiny had been applied before *Reed* was decided."[171] The Attorney General argued that the "captive audience doctrine" should be considered among the categories of cases beyond *Reed*'s reach.[172] The captive audience doctrine applies in limited situations where listeners are unable to avoid unwanted speech.[173] The court conceded that residents of long-term care facilities are the appropriate *listeners* for application of the doctrine; however, the court found that the staff of such facilities were inappropriate *speakers* such that the doctrine did not apply.[174] Thus, the court followed *Reed* and applied strict scrutiny.[175]

In applying strict scrutiny, the court began by assessing whether California had a compelling interest in enacting the pronoun provision.[176] Recounting the legislative findings it previously discussed,[177] the court conceded that the challenged provision furthers California's compelling interest of eliminating sex discrimination.[178] However, the court struck down the provision, finding that it failed strict scrutiny at the narrowly tailored prong.[179]

Notably, the court dismissed Taking Offense's concern that the criminal nature of SB 219 necessarily meant that the pronoun provision did not take the least restrictive means in effectuating California's compelling government interest.[180] As the court explained, criminal penalties are not universally harsher than civil sanctions.[181] However, the court found that the pronoun provision was overbroad, as it threatened

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171 *Id.* at 313.

172 *Id.* at 314.

173 *Id.* ("Generally, listeners exposed to offensive speech are expected to avoid the speech if they are not receptive thereto. But in limited circumstances, 'when an audience has no reasonable way to escape hearing an unwelcome message, greater restrictions on a speaker's freedom of expression may be tolerated.'" (citations omitted)).

174 *Id.* at 315 ("Long-term care facility residents are analogous to citizens in their homes. There is little doubt that many—if not all—residents who have expressed a pronoun preference are an unwilling audience for repeated and willful misgendering, if it should occur, and they have little, if any, ability to simply avoid harassing or discriminatory speech. However, while long-term care facility residents are similar to other captive audience *listeners*, the speakers in this case are distinguishable from *speakers* in other instances where the captive audience doctrine has been applied.").

175 *Id.* ("While the residents are in what amounts to their own home, the employees are in their own workplace. Given the First Amendment rights of employees in their workplace, we decline to rely on the captive audience doctrine here to apply less than strict scrutiny.").

176 *Id.* at 316–17.

177 *Id.*

178 *Id.* at 317.

179 *Id.* at 317–20.

180 *Id.* at 319.

181 *Id.* ("Although we recognize Taking Offense's concerns, the high court has also recognized that criminal penalties are not always more severe than civil penalties, and civil actions often offer fewer procedural safeguards than their criminal counterparts.").

to criminalize any "occasional, isolated, off-hand instances of willful misgendering" that were subsequent to a prior incident of misgendering.[182] The court took particular issue with the provision's lack of a requirement that the targeted misgendering have a negative impact on a resident's medical care.[183]

In a concurring opinion, Justice Robie emphasized the importance of affirming pronoun use,[184] but explained that the California legislature had gone too far with the remedies offered by the pronoun provision.[185] Justice Robie suggested that the legislature go back to the drawing board to fashion a less restrictive antidiscrimination law.[186]

Following the appellate court's decision, both Taking Offense and the State of California petitioned California's highest court for review.[187] The California Supreme Court granted review on November 10, 2021.[188]

II. ANALYSIS

A. *Modern Free Speech Jurisprudence Subordinates*

Contemporary judicial line drawing has not only placed outsized value on the individual's right to offend but has also become increasingly formalistic.[189] In other words, contemporary free speech jurisprudence is more concerned with formal equality than inequitable results.[190] As

182 The court found that the pronoun provision "restrict[ed] more speech than is necessary to achieve the government's compelling interest in eliminating discrimination, including harassment, on the basis of sex." *Id.*

183 *Id.* at 319–20 ("There is no requirement in the statute that the misgendering at issue here negatively affect any resident's access to care or course of treatment. Indeed, there is no requirement that the resident even be *aware* of the misgendering.").

184 *Id.* at 329 (Robie, J., concurring) ("I concur fully in the majority opinion but write separately to express further thoughts on the use of pronouns. One's name or the pronoun that represents that name is the most personal expression of one's self. To not call one by the name one prefers or the pronoun one prefers, is simply rude, insulting, and cruel. The impact of using inappropriate pronouns is even more offensive and hurtful when it occurs in an environment where one cannot choose the persons with whom one associates.").

185 *Id.*

186 *Id.* ("[W]e do not reject the need for persons to use appropriate pronouns but, in my opinion, are suggesting that the Legislature fashion a workable means of accomplishing the laudable goal of the legislation.").

187 Reply in Support of Petition for Review, *Taking Offense*, 281 Cal. Rptr. 3d 298 (No. C088485), 2021 WL 4526769.

188 Taking Offense v. State, 498 P.3d 90 (Cal. 2021).

189 Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2120 (2018).

190 *Id.*

Professor Genevieve Lakier explains, "[t]he result is that today the First Amendment often serves as the 'primary guarantor of the privileged' rather than the champion of the powerless it used to be."[191]

The first half of the twentieth century saw First Amendment cases brought and won by civil rights groups representing marginalized communities.[192] The Supreme Court adjudicated these cases with an understanding that some laws that treated speakers differently were necessary to make up for social, political, and economic differences, while other laws, though formally neutral, disparately burdened marginalized speakers.[193] By the 1970s, however, the Supreme Court's approach to equal protection became notably ahistorical and individualizing—moving away from context-specific considerations of history and power.[194] The Court's understanding of the First Amendment followed suit.[195] Rather than considering the social position of speakers and listeners, the Court began to denounce any law that purported to treat people differently based on the ideas or messages they expressed.[196]

For example, in the 1980s, policies attempting to curtail the problem of racist hate speech clashed with the right to offend protected by the First Amendment.[197] Critical race theorists and progressive advocates took issue with the view of the First Amendment that prioritized the free speech liberty interest over claims to equality as not adequately responding to the issue of hate speech.[198] Professor Boso diagnoses this "antiquated conception of liberty" as the product of a libertarian approach to free speech that ignores systems of inequality and power and,

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191 *Id.* at 2118.

192 *Id.*

193 *Id.* at 2125–26.

194 *Id.* at 2120.

195 *Id.* at 2121. The individualizing and ahistorical nature of the libertarian approach to free speech jurisprudence becomes especially apparent when examining how the requirement for viewpoint neutrality is used today. Boso, *supra* note 1, at 361. While viewpoint neutrality "was initially a minority-friendly theory of free speech[,] . . . . [d]ominant groups today have subverted [the content neutrality doctrine] to protect privileged status and views on the inferiority of certain groups." *Id.* at 361–62. For example, consider *R.A.V. v. City of Saint Paul*, in which the Supreme Court found unconstitutional

> an ordinance that criminalized cross-burning as a subcategory of constitutionally unprotected "fighting words." . . . [T]he *R.A.V.* Court reasoned that the government engages in impermissible content discrimination when it explicitly prohibits only racist fighting words. In this case, content neutrality prevented the oppressed from obtaining any protection from their oppressors. Protecting hate speech directed at minorities implicates the government in enforcing long-standing status hierarchies.

Id. at 362–63 (footnote omitted); *see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

196 Lakier, *supra* note 189, at 2120.

197 Boso, *supra* note 1, at 354.

198 *Id.*

in doing so, perpetuates these systems—directly conflicting with constitutional commitments to equal protection.[199]

The government subordinates when it relegates traditionally marginalized communities to the bottom of the social stratum.[200] This reification of social inequity is in tension with constitutional and statutory demands of equality.[201] Thus, scholars who critique the formalist, or libertarian, approach to free speech proffer a more socially conscious alternative: an antisubordination approach.[202] Unlike a libertarian understanding of individual freedoms and formal equality, an antisubordination approach takes history, context, and political power into account when assessing free speech claims.[203] Under an antisubordination approach to free speech jurisprudence, free speech claims that enforce status hierarchies must fail.[204]

B. *Antidiscrimination Laws Operate from the Perpetrator Perspective*

Antidiscrimination laws are fundamentally flawed and misunderstand that which they seek to prohibit.[205] Professor Dean Spade addresses the limitations of antidiscrimination laws and explores how critical race theorists' critiques of antidiscrimination laws prohibiting racial discrimination provide a generative framework for interrogating how and why antidiscrimination laws "continue to fail to deliver

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199 *Id.* As Professor Genevieve Lakier explains:

> The result has been to limit the effectiveness of the First Amendment as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies—those whose speech is most likely to be constrained by forces other than the discriminatory animus of government actors. It has also turned the First Amendment into a barrier to legislative efforts to protect the expressive freedom of the (relatively) poor and (relatively) powerless by limiting the expressive freedom of the richer and more powerful.

Lakier, *supra* note 189, at 2127.

200 Strict Scrutiny, *Living Textualism*, CROOKED (Mar. 14, 2022), https://podcasts.apple.com/kw/podcast/living-textualism/id1469168641?i=1000553915022 [https://perma.cc/VW6K-PUSU].

201 Boso, *supra* note 1, at 356.

202 *See generally* Lakier, *supra* note 189; Boso, *supra* note 1.

203 Boso, *supra* note 1, at 366.

204 *Id.* at 341, 356–57 ("Unlike a libertarian free speech jurisprudence that treats all speakers and viewpoints as equally worthy of constitutional respect, an anti-subordination approach to free speech is attentive to historical and contemporary modes of group-based oppression. Simply put, if the triumph of a free speech claim would enforce a status hierarchy that positions historically marginalized groups as inferior, that free speech claim should fail.").

205 *Id.* at 39–40; *see also* Freeman, *supra* note 6.

meaningful change to trans people."[206] As critical race theorist Professor Alan David Freeman explains, the foundational flaw of antidiscrimination laws is their focus on the "perpetrator perspective."[207] As opposed to centering the "victim's perspective," which understands racial discrimination as a set of lived conditions experienced by communities of racial minorities,[208] the "perpetrator perspective" sees racial discrimination as successive actions inflicted by perpetrators on victims.[209]

Much like a libertarian approach to free speech, antidiscrimination laws that enumerate, prohibit, and punish potentially discriminatory conduct—thus centering the perpetrator perspective—fail in two key ways. First, these laws "individualize[] racism," and second, they "obscure the historical context of racism."[210] Rather than make affirmative changes to eliminate the conditions associated with racial discrimination, laws working from the perpetrator perspective attempt to stop deviant, would-be perpetrators from acting on racial animus.[211] In doing so, these laws critically misunderstand racism by "imagining that the fundamental scene is that of a perpetrator who irrationally hates people on the basis of their race" and takes deliberate discriminatory actions because of that arbitrary hatred.[212] In focusing on the anomalous harasser who acts on arbitrary hatred, antidiscrimination laws overlook the myriad "daily disparities in life chances that shape our world along lines of race, class, indigeneity, disability, national origin, sex, and gender."[213]

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206 SPADE, *supra* note 5, at 42.

207 *Id.*; Freeman, *supra* note 6, at 1052–54.

208 As Professor Freeman explains, rather than understand that racism creates "objective conditions of life—lack of jobs, lack of money, lack of housing—and the consciousness associated with those objective conditions—lack of choice and lack of human individuality in being forever perceived as a member of a group rather than as an individual," antidiscrimination laws tend to operate from the "perpetrator perspective," which "sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator." Freeman, *supra* note 6, at 1052–53.

209 Spade, *supra* note 5, at 42; Freeman, *supra* note 6, at 1052–54.

210 SPADE, *supra* note 5, at 42–43; Freeman, *supra* note 6, at 1054 ("The perpetrator perspective presupposes a world composed of atomistic individuals' whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.").

211 Freeman, *supra* note 6, at 1053.

212 SPADE, *supra* note 5, at 42.

213 *Id.*

C. *Systems Collide:* Taking Offense

Undeniably, SB 219's pronoun provision addresses a need of great importance.[214] However, SB 219, like the antidiscrimination laws the bill sought to bolster, falls short of providing perfect protections for residents of long-term care facilities. Both the generalized antidiscrimination laws in place before SB 219 and SB 219 itself center the perpetrator perspective.[215] SB 219's intervention of outlining specific discriminatory actions, including deliberate misgendering, focuses on the actions of potential harassers rather than on what affirmative care for trans residents would look like.[216] Supporters of SB 219's assessment that previous antidiscrimination laws were failing to adequately protect trans elders evinces the failure of the prevailing approach to antidiscrimination laws—a failure SB 219 reifies.

1. The Pronoun Provision's Design

SB 219 was enacted because other, more generalized antidiscrimination laws enacted by the California legislature were not working.[217] Daniel Redman, an attorney who previously led the Elder Law Project at the National Center for Lesbian Rights, described the problem as one of implementation.[218] In a senate hearing, Redman explained that though California law already prohibits discrimination against LGBTQIA* people, "[California's] nursing homes don't know how to put that principle into practice."[219] Senator Wiener, the bill's author, hoped that by enumerating "specific actions" that constitute discrimination on the basis of sexual orientation, gender identity, gender expression, or HIV status, long-term care facilities would be better equipped to protect LGBTQIA* residents and would empower residents to know their rights and thus be able to hold facilities accountable.[220]

The attempt to bolster protections via the enumeration of prohibited discriminatory conduct—including the pronoun provision—is informed by the perpetrator perspective. This attempt centers potential harassers rather than the patients SB 219 was drafted to protect.

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214 *See supra* notes 126–33 and accompanying text.

215 *See supra* Section II.B.

216 *See supra* Section II.B.

217 *Hearing on S.B. 219*, *supra* note 124.

218 *Id.* (statement of Daniel Redman).

219 *Id.*

220 *Id.* (statement of Sen. Scott Wiener).

However, the biggest problem with SB 219 by far is the criminal penalties it carries. SB 219 attempts to rectify the problem of transphobia in long-term care facilities through the threat of criminal punishment.[221] In this way, SB 219 reinforces and legitimizes the criminal punishment system, "a system that targets the very people [the law was] supposedly passed to protect."[222]

2. The Pronoun Provision's Fate

Both the California Appellate Court and California's Attorney General accepted Taking Offense's premise: that the pronoun provision implicated First Amendment free speech principles.[223] As such, the court was bound to review the pronoun provision under heightened scrutiny.[224] However, the court's analysis fundamentally misunderstands misgendering, diminishes the harm that deliberate misgendering causes, and perpetuates the systemic marginalization of trans and nonbinary people.

The court acknowledged that misgendering "may be disrespectful, discourteous, and insulting, and used as an inartful way to express an ideological disagreement with another person's expressed gender identity."[225] However, the court emphasized that offensive statements are protected by the First Amendment.[226]

In doing so, the court downplays the harm that deliberate, repetitious misgendering causes, stating that "[t]he pronoun provision at issue here tests the limits of the government's authority to restrict pure speech that, while *potentially* offensive or harassing to the listener, does not *necessarily* create a hostile environment."[227] However, deliberate misgendering, especially in a long-term care facility where already

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221 CAL. HEALTH & SAFETY CODE § 1290(c) (West 2022); Taking Offense v. State, 281 Cal. Rptr. 3d 298, 307 (Ct. App. 2021) ("Section 1290, in turn, provides that willful and repeated violation of [the pronoun provision] is a misdemeanor punishable by a fine not to exceed $2,500 or by imprisonment of up to 180 days.").

222 SPADE, *supra* note 5, at 45. Trans people face "ongoing struggles with police profiling harassment, violence, and high rates of both youth and adult imprisonment." *Id.* at 46. Thus, "[c]riminal punishment cannot be the method we use to stop transphobia when the criminal punishment system is the most significant perpetrator of violence against trans people." *Id.* at 47.

223 *See* Taking Offense v. State, 281 Cal. Rptr. 3d 298, 315–16 (Ct. App. 2021); Respondent's Brief, *supra* note 149.

224 *Taking Offense*, 281 Cal. Rptr. 3d at 316.

225 *Id.* at 313.

226 *Id.* at 309 ("Generally, the free speech clause protects a wide variety of speech a listener may find offensive, including insulting speech based on race, national origin, or religious beliefs.").

227 *Id.* at 310.

marginalized trans elders are at their most vulnerable, is necessarily hostile.[228]

The court's analysis of the captive audience doctrine illustrates its ties to a formalist, libertarian understanding of free speech. As the court concedes, elderly patients in long-term care facilities are absolutely a captive audience.[229] In equating the position of these patients with that of facility staff, the court ignores palpable power differentials and reinforces status hierarchies.

In sending SB 219 back to the California legislature, the court perpetuates a cycle—the prevailing approaches to free speech jurisprudence and antidiscrimination law are sure to collide again.

3. Reliance on the Marketplace Metaphor

As noted above, invocation of the marketplace metaphor has received ample criticism.[230] Critics point out that it is incorrect and dangerous to assume that all ideas have a fair shot at entering the marketplace or that all ideas that enter the marketplace do so on equal footing.[231] In reality, some ideas end up being louder than others merely because of a maldistribution of resources for getting a message out.[232] Critics also argue that truth cannot necessarily be trusted to win out over falsity, as history has shown that people may be swayed more by emotion than reason, a phenomenon that has only become more prominent as misinformation has been increasingly politicized.[233]

In makings its viewpoint argument, Taking Offense repeatedly relies on the marketplace metaphor, accusing California of removing the question of gender essentialism from the realm of public debate.[234] Taking Offense asserts that people with "conflicting worldviews" about gender

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228 Clarke, *supra* note 1, at 960–61.

229 *Supra* note 174 and accompanying text.

230 *See supra* Section I.A.2.

231 *See generally* Tsesis, *supra* note 80.

232 CHEMERINSKY, *supra* note 9, at 1182; *see also* Tsesis, *supra* note 80, at 503 ("The marketplace of ideas model is neutral about the use of financial resources, political influence, and market standing to so dominate the speech markets as to silent minority, heterodox voices.").

233 CHEMERINSKY, *supra* note 9, at 1182; *see also* Tsesis, *supra* note 80, at 497–98 ("Tragic twentieth century examples of popular dictatorships that benefitted from charismatic orators—in Nazi Germany, Maoist China, Soviet Union, and Khmer Rouge Cambodia—should give us pause about Holmes's perfunctory assumption about truth being the eventual outcome of deliberative discourse.").

234 Appellant's Opening Brief, *supra* note 165, at 21–22.

"have long lived together in mutually tolerant disagreement."[235] This assertion cannot be squared with the lived experiences of trans people facing discrimination. The "viewpoint" that trans peoples' pronouns need not be respected is anything but tolerant as, "at a minimum, intentional misgendering is generally considered a demeaning act."[236]

Allowing the marketplace metaphor to justify deliberate misgendering not only ignores the harm misgendering causes, but also perpetuates social hierarchies that place trans people in positions of social inferiority.[237] As illustrated by a long history of marginalization,[238] it is wrong to assume that trans people and advocates have a fair shot at battling it out in the realm of public discourse, if they are given the chance to enter it in the first place. Moreover, in the time it takes for the true harm of misgendering to win out over other "truths" in the marketplace of ideas, immeasurable damage will continue to be done.[239] But most importantly, the marketplace metaphor threatens trans and nonbinary people by seemingly putting their identities up for debate. There is no truth to be uncovered by claimants retaining the right to misgender. Rather, invoking the marketplace metaphor in this context clouds the truth by making space for transphobic people to refute the reality that trans people exist.

Not only is the marketplace metaphor inapplicable and harmful when used to support Taking Offense's claim, but so too are the other central justifications of the First Amendment's protections of free speech, illustrating that the First Amendment need not be invoked to challenge laws banning deliberate misgendering. First, though often politicized, pronouns are not political speech.[240] So, protecting misgendering is not necessary to further democracy and self-governance. Second, the autonomy argument protects expression as a form of *self*-definition. But what is more self-definitional than controlling the way in which others refer to you? As Professor Boso writes, "our first names and pronouns are fundamental to who we are."[241] Deliberately misgendering someone else

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235 *Id.* at 18.

236 McNamarah, *supra* note 3, at 43; *see also* Clarke, *supra* note 1, at 959 ("Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity.").

237 Tsesis, *supra* note 80, at 495–96.

238 For more about the history of the marginalization and criminalization of LGBTQIA* people and trans people in the United States in particular, see JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (Michael Bronski ed., 2011); SPADE, *supra* note 5.

239 CHEMERINSKY, *supra* note 9, at 1182 (noting that critics of the marketplace metaphor also fear that "even if truth ultimately prevails, enormous harms can occur in the interim").

240 *See supra* notes 69–73 and accompanying text.

241 Boso, *supra* note 1, at 393.

is not self-definitional; rather it is an attempt to impose a definition *on* someone, which is antithetical to the goal of autonomy. Finally, the goal of increased societal tolerance is not served by allowing others to invoke free speech to be intolerant of others.

4. Applying an AntiSubordination Approach

Taking Offense mischaracterizes reality. Trans people exist. This is not a progressive ideology, but is rather an objective fact.[242] Courts cannot accept deliberate misgendering as an expression of viewpoint, even a false one, because, as will be discussed in this Note's proposal, deliberate misgendering necessarily reaches the level of hostility needed to constitute a discriminatory *act*.[243] While transphobic individuals retain the right to announce their hateful opinions about gender and trans people, deliberately and repeatedly misgendering someone is a hostile act and not a vehicle for the expression of an offensive opinion. To demonstrate this distinction, Professor Jessica Clarke offers the following example:

> [I]magine a scenario in which xenophobes harass a coworker they know to be from India by referring to him as an "Arab." This deliberate ascription of an incorrect identity is a form of racism—among other things, it expresses the idea that all people with brown skin are "Arab" and that Indian identity is unworthy of respect.[244]

Taking Offense repeatedly leans on *Matal* and an asserted constitutionally protected right to offend others.[245] Labeling deliberate misgendering as merely "offensive" downplays the "measurable psychological and physiological harms" inflicted by deliberate misgendering.[246]

An antisubordination approach to free speech would not accept this argument.[247] Importantly, "offense" is a subjective concept; it only has

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242 Appellant's Opening Brief, *supra* note 146, at 17 ("Social elements of personhood, such as appearance, mannerisms, and conformity to behavioral stereotypes can be transformed as an individual chooses. But core physical elements of sex remain immutable. What can be changed, and progressives often seek to change, is gender, that is, the psychological and social elements of being, and being perceived as, male, female, nonbinary, 'third gender,' gender fluid, or something else.").

243 *See infra* Part III.

244 Clarke, *supra* note 1, at 959 (footnotes omitted).

245 Appellant's Reply Brief, *supra* note 155, at 8 ("The speaker's choice of pronouns may indeed be offensive to the resident, to the legislators of the State of California, to judges, justices and other people, perhaps even to a majority of the state and nation, but speech with offensive content is nevertheless constitutionally protected expression.").

246 McNamarah, *supra* note 3, at 43.

247 *See supra* Section I.A.2.

meaning in the context of a subject—i.e., offense *to someone*. When the subject of offensive expression is the majoritarian perspective, the worthiness of that expression of constitutional protection is called into question.[248] In contrast, when the subject of offensive expression is broadened, the expression is constitutionally protected to the highest degree.[249]

Under an antisubordination approach, Taking Offense's free speech claim must fail.[250] Taking Offense claims a constitutionally protected right to misgender people as an expression of an (offensive) viewpoint.[251] In making this claim, Taking Offense adopts a libertarian view of First Amendment protections, obscuring the history of systemic marginalization of and violence against trans people.[252] Taking Offense argues that SB 219 and the pronoun provision give trans residents in long-term care facilities outsized power, comparing them to kings and slaveowners.[253] When history and longstanding social hierarchies are considered, the absurdity of this argument is striking.[254]

Taking Offense relies on "the rhetoric and law of content neutrality [as] a shield for hate speech."[255] Taking Offense argues that "SB 219 promotes ideological indoctrination" in its restriction of deliberate misgendering.[256] As will be discussed below, allowing claimants to argue that misgendering is a viewpoint delegitimizes the harm of misgendering and obscures an objective truth: trans and nonbinary people exist, and that is not up for debate.[257]

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248 The current standard for characterizing obscenity, a category of unprotected speech, includes a consideration of "whether the work depicts or describes, in a *patently offensive* way, sexual conduct specifically defined by the applicable state law." *See* Miller v. California, 413 U.S. 15, 24 (1973) (emphasis added).

249 *See supra* Section II.A.

250 Boso, *supra* note 1, at 393 ("Under an antisubordination approach, claimants should lose free speech claims to misgender others.").

251 Appellant's Opening Brief, *supra* note 146, at 38–39.

252 *Supra* Section II.A.

253 Appellant's Opening Brief, *supra* note 146, at 35 ("Who else, throughout history, has ever wielded power to control the language by which they must be addressed? Only kings over their subjects; masters over their slaves. SB219 elevates one favored group to be kings and masters over the rest of the people, their virtual subjects and slaves, by coercing the language by which they must be addressed.").

254 This argument ignores "the uncomfortable truth that hurtful speech directed at members of minority groups imposes barriers and physiological harms not experienced by members of dominant groups targeted with hurtful speech." Boso, *supra* note 1, at 365.

255 *Id.* at 363.

256 Appellant's Opening Brief, *supra* note 146, at 35.

257 *See infra* Section II.B.3.

III. PROPOSAL: MISGENDERING AS MISCONDUCT

The outsized value that modern free speech jurisprudence places on the individual right to express offensive viewpoints puts defenders of antidiscrimination laws in an impossible bind. Pronouns clearly have meaning. However, conceding this point places laws regulating pronouns in danger of being labeled "viewpoint discrimination." On the other hand, arguing, as the California Attorney General did, that pronouns are merely parts of speech devoid of independent significance downplays the importance of pronouns and diminishes the harm caused by deliberate misgendering.[258]

This Note proposes that laws prohibiting deliberate misgendering be seen as regulating conduct, not expression, so that reviewing courts and advocates are not trapped by a libertarian approach to viewpoint neutrality. As explained above, none of the foundational goals of the First Amendment's protection of speech are served by considering misgendering a form of speech. Moreover, current hostile environment frameworks easily include deliberate misgendering, which does necessarily create a hostile environment for trans and nonbinary people.[259]

Deliberate misgendering, whether at work, in school, or in a long-term care facility, is objectively hostile.[260] Though the framework the Supreme Court established in *Meritor* was specific to the Title VII context, the principle that pervasive, hostile language directed at someone because of their identity rises to the level of discriminatory *conduct* applies more broadly. As evidenced by the argument that misgendering is the expression of a viewpoint about gender and trans identities, people who deliberately misgender others do so on the basis of sex and gender.

Here, *Aguilar* is instructive. SB 219's prohibition of deliberate, repetitious misgendering is analogous to the prohibition on racial slurs

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258 In rejecting the Attorney General's argument, the court noted: "[T]he Legislature understood the importance of pronouns' content and, thereby, their *meaning* in this context, to the point that it passed a law criminalizing misgendering transgender residents of long-term care facilities." Taking Offense v. State, 281 Cal. Rptr. 3d 298, 313 (Ct. App. 2021).

259 Boso, *supra* note 1, at 389–90 ("Importantly, and hopefully of some comfort to LGBT equality advocates, some anti-LGBT 'speech' might not truly count as speech, thus falling outside of the protections of the First Amendment. Many conflicts between free speech and equality involve speech that may rise to the level of a hostile environment under federal statutes, like Title VII, Title IX, and comparable state and local laws. In those cases, courts have reasoned that the speech in question is tantamount to conduct, and this conduct is unlawful precisely because it directly contradicts statutory equality demands." (footnotes omitted)).

260 Clarke, *supra* note 1, at 959 ("Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity.").

upheld by the California Supreme Court in *Aguilar*. Like *Meritor*, the claims at issue in *Aguilar* arose in a workplace setting.[261] However, both the prohibition in *Aguilar* and the pronoun provision were designed to protect a captive audience from discrimination. Repetitious and deliberate misgendering, especially in a context like long-term care facilities where the audience is fairly considered "captive," arguably meets the "severe and pervasive" standard of hostile environment discrimination.[262]

Not only would taking antidiscrimination laws that prohibit deliberate misgendering as regulating conduct help advocates break out of the bind imposed by modern free speech jurisprudence, but also these laws would then be subject to a more deferential standard of review. When challenged, provisions regulating conduct are assessed under rational basis review, allowing state legislatures to advance their legitimate interest in protecting trans and nonbinary people.[263]

In the alternative, if laws regulating deliberate misgendering must be reviewed in the free speech context, it is critical that an antisubordination approach is taken. Under an antisubordination approach, claims asserting a constitutionally protected right to misgender others must fail.

CONCLUSION

Relying largely on the marketplace metaphor, the Court has enshrined a constitutional right to offend. In doing so, the Court has armed conservative opponents to antidiscrimination laws prohibiting deliberate misgendering with a powerful sword that is being used with increasing frequency, as conservative opponents of these laws use the First Amendment to assert a constitutionally protected right to deliberately misgender others as an expression of an (offensive) viewpoint.

This Note argues that the search for truth is neither furthered by nor supports a protected right to misgender anyone.[264] Application of free speech methodologies to the problem of deliberate misgendering obscures objective facts—that intentional misgendering is hostile and harmful—in favor of legal abstractions.[265]

The biases of modern free speech jurisprudence and legislators drafting antidiscrimination laws from the perpetrator perspective

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261 Aguilar v. Avis Rent a Car Sys, Inc., 980 P.2d 846 (Cal. 1999).

262 *Id.* at 862–63 (Cal. 1999).

263 *See* Pickup v. Brown, 740 F.3d 1208, 1231–32 (2014).

264 *See infra* Section II.B.2.

265 *See* Clarke, *supra* note 1, at 959.

become apparent when they interact with each other—as they invariably do—as evidenced by the law and claims at issue in *Taking Offense*.