THE FIRST AMENDMENT AND CONSTITUTIVE RHETORIC: A POLICY PROPOSAL

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First Amendment law is heavily influenced by a familiar set of policy considerations. Courts often defend their First Amendment rulings by referencing speech's place within a "marketplace of ideas." They consider whether speech facilitates self-governance or furthers society's search for truth. They weigh the relative value of certain types of speech. And so on.

The Supreme Court has used these policy arguments to resolve and craft rules for many free speech dilemmas. But in some situations, existing policy arguments have generated rules and rulings that are incoherent, ineffective, or insufficient to address the underlying free speech problem. In this Article, we propose a new policy approach to aid courts in these situations. Specifically, we argue that in addition to traditional policy arguments, courts could and should use constitutive rhetorical theory when addressing and resolving today's novel free speech dilemmas. Constitutive rhetorical theory views language as a process of meaning-making and culture building. It does not treat language only as a tool for persuasion or communication but instead emphasizes the ways language assigns value, creates communities, forges shared identities, and mediates human experiences. In this Article, we suggest that courts and legislatures should use constitutive rhetorical theory to supplement their traditional policy considerations. If judges take seriously the idea that language creates, rather than simply communicates, they might choose to restrict or protect speech not only because of its message or persuasive effects but also because of its constitutive, creative potential.

Our argument proceeds in four parts. In Part I, we review existing First Amendment policy arguments and describe their rhetorical underpinnings. We then present constitutive rhetorical theory as an alternative approach. In Part II, we discuss several contexts where the Court has hinted at, though not explicitly adopted, a constitutive rhetorical approach. In Part III, we apply a constitutive rhetorical lens to three First Amendment problems—hate speech, fighting words, and nonconsensual pornography—to show how the constitutive model might clarify or improve the law in those areas. In Part IV, we discuss the implications and limitations of our argument.

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INTRODUCTION

America is in the midst of what some consider a "[f]ree-[s]peech [c]risis."[1] School boards, legislators, and parents are clashing over which books belong in K-12 libraries.[2] Universities are struggling to protect

[1] Greg Lukianoff, *The Latest Victims of the Free-Speech Crisis*, ATLANTIC (Nov. 28, 2023), https://www.theatlantic.com/ideas/archive/2023/11/pro-palestine-speech-college-campuses/676155 [https://perma.cc/7EK3-SBDH].

[2] The American Library Association documented challenges to nearly 2,000 unique book titles in the first eight months of 2023—a twenty percent increase from the previous year. *American Library Association Releases Preliminary Data on 2023 Book Challenges*,

academic freedom while also promoting inclusive and respectful campus environments.[3] Social media giants have been accused of firing employees for workplace speech[4] and using platforms to spread misinformation about current events.[5] And the Supreme Court has weighed in on two significant cases involving the First Amendment and social media: One which asked whether the government violates the First Amendment by pressuring social media companies to ban or

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ALA News (Sept. 19, 2023), https://www.ala.org/news/press-releases/2023/09/american-library-association-releases-preliminary-data-2023-book-challenges [https://perma.cc/5GAK-MAWW]. In June 2023, Illinois became the first state to enact a law prohibiting partisan book banning. *See Governor Pritzker Signs Bill Making Illinois First State in the Nation to Outlaw Book Bans*, Illinois.Gov (June 12, 2023), https://www.illinois.gov/news/press-release.26575.html [https://perma.cc/9ZNS-XK7R]. Other states are now contemplating similar legislation. *See* Andrew Limbong, *To Fight So-Called Book Bans, Some States Are Threatening to Withhold Funding*, NPR (Dec. 14, 2023), https://www.npr.org/2023/12/14/1219428691/librarians-will-be-watching-when-illinois-anti-book-ban-law-goes-into-effect [https://perma.cc/24FM-3TCU] (describing New Jersey's efforts to draft a similar anti-book banning law). Federal courts are now hearing challenges related to book bans. In January 2024, for example, the Fifth Circuit suggested that a Texas book ban might violate the First Amendment by compelling public schools to provide sexual-content "ratings" for all library books. Book People, Inc. v. Wong, 91 F.4th 318, 340 (5th Cir. 2024).

[3] *See, e.g.*, Sharon Otterman, *Barnard College's Restrictions on Political Speech Prompt Outcry*, N.Y. Times (Jan. 24, 2024), https://www.nytimes.com/2024/01/24/nyregion/barnard-college-free-speech-restrictions-israel-hamas-war.html [https://perma.cc/MFW3-8XN7] (describing Barnard College's decision to monitor and remove pro-Palestinian statements on campus); Collin Binkley, *As A New Generation Rises, Tension Between Free Speech and Inclusivity on College Campuses Simmers*, AP News (Jan. 12, 2024), https://apnews.com/article/campus-free-speech-young-generation-tension-b931b0dd41aacaac5c50710de9549b09 [https://perma.cc/5U2S-EXBQ] (describing the "clashing versions of free speech" that have emerged on college campuses since the outbreak of the Israel-Hamas war); Stephanie Saul, Alan Blinder, Anemona Hartocollis, & Maureen Farrell, *Penn's Leadership Resigns Amid Controversies Over Antisemitism*, N.Y. Times (Dec. 11, 2023), https://www.nytimes.com/2023/12/09/us/university-of-pennsylvania-president-resigns.html [https://perma.cc/3N2P-RZR4] (describing the resignation of former university President Liz Magill, who stepped down shortly after testifying before Congress about her university's free speech policies); Jennifer Schuessler, Anemona Hartocollis, Michael Levenson, & Alan Blinder, *Harvard President Resigns After Mounting Plagiarism Accusations*, N.Y. Times (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/us/harvard-claudine-gay-resigns.html [https://perma.cc/4NRK-PKHR] (describing the resignation of Harvard's former President Claudine Gay, who stepped down in response to pressure about her free speech policies and accusations about her academic record).

[4] *See* Aisha Counts, *Elon Musk Is a 'Free Speech Absolutist,' Except at Work*, Bloomberg (Sept. 14, 2023), https://www.bloomberg.com/news/newsletters/2023-09-14/elon-musk-says-he-s-pro-free-speech-but-fired-twitter-staff-for-comments [https://perma.cc/KNZ7-ZQBR] (explaining that Elon Musk, the self-described "free speech absolutist," "had a team comb through Slack and social media postings to identify employees that may be untrustworthy" and then fired those employees).

[5] *See, e.g.*, Kelvin Chan, *Musk's X Is the Biggest Purveyor of Disinformation, EU Official Says*, AP News (Sept. 26, 2023), https://apnews.com/article/disinformation-musk-x-twitter-european-union-9f7823726f812bb357ee4225b884354f [https://perma.cc/3DQN-FZYT] (explaining that EU officials have expressed concern about disinformation on X and have urged Elon Musk to comply with EU laws that attempt to combat false news).

suppress certain content,[6] and one which asked whether the government can restrict social media platforms' ability to moderate content.[7]

The First Amendment undoubtedly protects Americans' freedom of speech, but the contours of that protection are far from clear. Indeed, if the events of the last several months have taught anything, it is that "[f]ree speech is very hard to get right."[8] The problem, one professor explains, "is that neither the left nor the right knows which model [of free speech protection] fits, making it difficult to determine any fair boundaries."[9] What's more, "[t]he politics around free speech have . . . shifted[,] and norms about what counts as dangerous speech and what ought to be done about its articulation have been changing faster than any of us can keep up with."[10]

Historically, American courts have addressed novel free speech problems using a familiar set of policy considerations. If the speech in question contributes to a marketplace of ideas, if it facilitates society's search for truth, or if it is essential to self-governance or self-actualization, courts often opt to protect it. But if the speech does not contribute to the search for truth or self-actualization, if it undermines self-government, or if it lacks value, courts allow its restriction. These general policy guidelines have helped the Court craft clear rules for several unprecedented speech dilemmas. In the early 1900s, for example, the Supreme Court upheld prohibitions on seditious speech because it determined that such speech threatened self-governance.[11] In the 1960s, it protected speech critical of Vietnam because it thought that such speech was essential to America's marketplace of ideas.[12] And in the

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6 Murthy v. Missouri, 80 F.4th 641 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 7 (2023) (No. 23-411).

7 Moody v. NetChoice, LLC, 34 F.4th 1196 (11th Cir. 2023), *cert. granted*, 144 S. Ct. 478 (2023) (No. 22-277).

8 Sophia Rosenfeld, *I Teach a Class on Free Speech. My Students Can Show Us the Way Forward.*, N.Y. Times (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/opinion/campus-free-speech-students.html[https://perma.cc/S6GW-J2WN].

9 *Id.*

10 *Id.*

11 *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 654, 667 (1925) (upholding a conviction under a statute that criminalized "advocat[ing] . . . the propriety of overthrowing . . . organized government by force or violence" because "[t]hese imperil [the State's] own existence as a constitutional State," and "a State may punish utterances endangering the foundations of organized government"); Abrams v. United States, 250 U.S. 616, 617 (1919) (upholding convictions for speech "intended to incite, provoke and encourage resistance to the United States," because the speech was "not an attempt to bring about a change of administration by candid discussion" but rather an attempt to "excite . . . disaffection, sedition, riots, and . . . revolution").

12 *See* Cohen v. California, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); Tinker v. Des Moines Ind. Cnty. Sch. Dist., 393 U.S. 503,

1980s, it permitted flag burning because it found that such expression contributed to the speech marketplace and advanced the country's search for truth.[13]

Anyone who has studied the First Amendment knows that these policy arguments often play a pivotal role in courts' free speech analyses. But many do not realize that these policy arguments also share a common approach to an understanding of language. Though each policy argument prioritizes a different set of concerns and considerations, all begin from the premise that speech is primarily a tool for communication or persuasion. All then assess the value of speech (and, by extension, whether it ought to be protected) by considering how effectively and to what end it might persuade an audience. If the speech persuades in a way that might undermine self-government, it can be restricted. If its persuasive effects further the search for truth, it should be protected. And so on.

This emphasis on communicative, persuasive effects is characteristic of what rhetoric scholars call Aristotelian rhetorical theory. Aristotelian rhetorical theory takes its name from Aristotle, who famously defined rhetoric as "the faculty of discovering the possible means of persuasion in reference to any subject."[14] It views language as primarily a tool for communication and persuasion, and it studies words to gauge their persuasive effects. Aristotelian rhetorical theory was "[T]he first formal method of rhetorical criticism developed in the communication field,"[15] and it "dominated the literature of rhetorical criticism" for many years.[16] It is no surprise, then, that Aristotelian assumptions have made their way into First Amendment jurisprudence.[17]

The Aristotelian framework may be prevalent in the law, but it is not the only way to think about and study language. In fact, in the

512 (1969) (noting that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in . . . American schools" because "[t]he classroom is peculiarly the 'marketplace of ideas'") (quoting Keyshian v. Board of Regents, 385 U.S. 589, 603 (1967)).

13 *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) (declining to "create for the flag an exception to" First Amendment protection because "[t]he First Amendment does not guarantee that . . . concepts virtually sacred to our nation as a whole [like the flag] will go unquestioned in the marketplace of ideas"). The dissenters likewise used marketplace theory to justify their position. *See id.* at 429 (Rehnquist, C.J., dissenting) ("The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas . . . . I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 states, which make criminal the public burning of the flag.").

14 Aristotle, The "Art" of Rhetoric 15 (E. Capps, T. E. Page & W. H. D. Rouse, eds., John Henry Freese trans., Loeb Classical Libr. ed. 1926) (c. 384 B.C.E.).

15 Sonja K. Foss, Rhetorical Criticism: Explanation and Practice 29 (5th ed. 2018).

16 Methods of Rhetorical Criticism: A Twentieth-Century Perspective 26 (Bernard L. Brock, Robert L. Scott & James W. Chesebro eds., 3d ed. rev. 1990) [hereinafter Methods].

17 *See infra* Section I.B.

field of rhetoric, the Aristotelian model has largely fallen out of favor and has been replaced with other, more nuanced understandings of language.[18] One of these is called constitutive rhetorical theory, or the constitutive rhetorical approach. Constitutive rhetorical theory is "a theory of speech regarding the ability of language and symbols to create a collective identity for an audience."[19] It views language not just as a communicative or persuasive tool, but as a force that actually creates and shapes the way humans understand themselves, their values, and their place(s) within society.[20]

In this Article, we argue that courts can and should adopt constitutive rhetorical theory as a new First Amendment policy consideration. In the past, familiar policy arguments like the marketplace of ideas, the search for truth, self-governance theory, and low-value speech theory have helped courts resolve free speech cases.[21] But America's ongoing and escalating "free-speech crisis"[22] poses novel and challenging free speech dilemmas. And though courts continue to apply their traditional, Aristotelian policy tools, those tools sometimes yield inconsistent or confusing results.[23] In what follows, we describe how constitutive rhetorical theory could help courts address these gaps. We do not suggest that constitutive rhetorical theory can or should *replace* the traditional Aristotelian policy arguments. But we do argue that when combined with Aristotelian approaches, constitutive rhetorical theory might prove to be a useful tool to help courts approach the "treacherousness of the current moment."[24]

Our argument proceeds in four parts. In Part I, we review five prevailing First Amendment policy arguments and explain that four rely on Aristotelian assumptions. We then present constitutive rhetorical theory as an alternative approach. In Part II, we show that, though novel, the constitutive rhetorical approach is not entirely foreign to the Supreme Court. Specifically, we describe two legal contexts—gender bias and abortion—where the Supreme Court has occasionally expressed concern about the constitutive effects of judicial and statutory language. We then discuss several First Amendment cases where the

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18 *See infra* notes 73–89 and accompanying text. *See also* Foss, *supra* note 15, at 30 ("Neo-Aristotelian was virtually unchallenged as the method to use in rhetorical criticism until the 1960s, when the orthodoxy that had developed in rhetorical criticism began to be criticized on a number of grounds.").

19 David W. Seitz & Amanda Berardi Tennant, *Constitutive Rhetoric in the Age of Neoliberalism*, *in* Rhetoric in Neoliberalism 109 (Kim Hong Nguyen ed., 2017).

20 *Id.* at 111.

21 *See infra* Section I.A.

22 Lukianoff, *supra* note 1.

23 *See infra* Part III.

24 Rosenfeld, *supra* note 8.

Court has hinted at, though not explicitly adopted, a constitutive rhetorical approach. In Part III, we apply a constitutive rhetorical lens to three First Amendment problems—hate speech, fighting words, and nonconsensual pornography—to show how the constitutive model might clarify or improve the law in those areas. In Part IV, we discuss the implications and limitations of our argument.

I
First Amendment Policy and Rhetorical Theory

In First Amendment cases, courts often protect or restrict speech using a familiar set of policy considerations: (1) the speech's contribution to a "marketplace of ideas"; (2) the extent to which the speech aids in the search for truth; (3) whether the speech promotes self-governance among citizens; (4) the value of the speech as compared with the harm it causes, and (5) whether the speech facilitates individual self-realization.[25] In this Part, we briefly present each of these policy arguments. We also show that the four that are most commonly invoked—marketplace theory, the search for truth, self-governance theory, and low-value speech theory—implicitly rely on the Aristotelian assumption that speech is primarily a tool for communication or persuasion.[26] Section A summarizes the history and justifications behind each of these prevailing policy arguments. Section B shows how most of them begin from Aristotelian rhetorical principles. It then presents constitutive rhetorical theory as an alternative approach.

[25] In this paper, we focus on five specific policy arguments: marketplace theory, search for truth, self-government theory, low-value speech theory, and self-actualization theory. We have selected these arguments because they are some of the most prominent, longstanding, and well-known in First Amendment law. There are, however, many other policy arguments that explain whether and how courts should protect or restrict speech. *See, e.g.*, Donald E. Lively, Dorothy E. Roberts & Russell L. Weaver, First Amendment Anthology 1 (1994). Though we recognize that those other theories have shaped free speech law in significant ways, we do not engage with them here.

[26] As we explain below, self-actualization theory understands rhetoric somewhat differently—not as a tool for communication or persuasion, but as a vehicle for identity formation and autonomous decision making. *See infra* Section I.A.5.

A. Traditional First Amendment Policy Arguments

1. Marketplace of Ideas

> *"[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race . . . . Those who decide to suppress [an opinion] are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging."*
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> —J.S. Mill, 1859[27]

The marketplace of ideas is perhaps the Court's best-known and most well-established First Amendment policy argument.[28] The theory suggests that people establish a marketplace of speech and ideas as they collectively "generate, debate, and discuss [their] . . . ideas, hopes, and experiences."[29] Over time, this marketplace of ideas reveals objective truth: Just as good products eventually beat bad products, right ideas eventually overpower wrong ideas, high-value speech drowns out low-value speech, and truth conquers falsehood. Marketplace theory thus tolerates few restrictions on speech. Because it thinks truth is best identified through society's collective judgment, it proposes that the government should protect the competitive expression of ideas only by introducing "*more* speech," and not by imposing restrictions or regulations.[30]

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[27] J.S. Mill, On Liberty 16–17 (Elizabeth Rapaport ed., 1859).

[28] Marketplace theory has been cited in hundreds of cases protecting virtually every type of speech. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that "the ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market"); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 78 (2022) (Breyer, J., concurring) (arguing that "[t]he First Amendment, by protecting the 'marketplace' and the 'transmission' of ideas, thereby helps to protect the basic workings of democracy itself"); Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 186–87 (1999) (acknowledging that the values undergirding the First Amendment are jeopardized when the government restricts "core political speech"); R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (recognizing that strict scrutiny is necessary to protect democratic values when laws "drive certain ideas or viewpoints from the marketplace").

[29] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part and dissenting in part).

[30] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is *more* speech, not enforced silence." (emphasis added)).

2. *Search for Truth*

> *"[T]here is no such thing as a false idea."*
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> —*Gertz v. Robert Welch, Inc.*, 1974[31]

The search for truth theory stems from the belief that human beings naturally pursue truth.[32] It posits that individuals—not the government—are best able to identify truth, and it views speech as an integral part of humans' truth-seeking activities. The search-for-truth theory urges government to protect all truth-seeking activities. It thus thinks that attempts to identify truth—including speech-based efforts—should be free from government intervention.[33]

Though the search-for-truth approach tolerates few speech restrictions, it does permit limitations where speech has no truth value. For example, the search-for-truth approach might allow for restriction of false news, because such news could impede the individual pursuit of truth.[34] Marketplace theory, by contrast, would see false news as an essential part of the marketplace of ideas and would respond to falsehoods and fallacies by prescribing "more speech."[35] The search-for-truth approach is thus more restriction-friendly (though perhaps only marginally so) than the marketplace of ideas.

3. *Self-Governance*

> *"What . . . does the First Amendment forbid? . . . The voters, therefore, must be made as wise as possible. . . . this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented."*
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> —Alexander Meiklejohn, 1948[36]

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[31] Leo Tolstoy, Diary Entry of Leo Tolstoy (1903), *in* Tolstoy's Diaries 371, 371 (R.F. Christian ed., trans. Harper Collins 1994) (1847–1910); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[32] *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 Ga. L. Rev. 1, 5 n.14 (1995) (citing Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* The Papers of Thomas Jefferson 545 (Julian P. Boyd ed., 1950)).

[33] *See id.*

[34] *See, e.g.*, Brown v. Hartlage, 456 U.S. 45, 60 (1982) (noting that false statements "are not protected by the First Amendment in the same manner as truthful statements"); *see also* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) (acknowledging that "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas").

[35] Whitney, 274 U.S. at 377 (Brandeis, J., concurring).

[36] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 24–25 (1948).

Self-governance theory argues that public discourse must be "uninhibited, robust, and wide-open" to ensure that voters hear all views on political issues.[37] Speech that promotes self-governance should be protected because it advances democracy. The government should not be able to restrict such speech, even if—and especially if—that speech advocates for changes to the government.[38]

Though self-governance theory offers robust protections for speech, it also permits restrictions. Speech that does not contribute to democracy is not protected. Similarly, the government may restrict speech that undermines institutions of self-government,[39] that promotes policies which self-governing societies could not implement,[40] or that has no effect on self-government.[41]

4. Low- or No-Value Speech

> *"[N]ot all speech is of equal First Amendment importance."*
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> *—Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 1985[42]

The low- or no-value approach posits that not all speech is created equal. Some categories of speech warrant special protection because they possess "serious literary, artistic, political, or scientific value."[43] Others should be exempt from First Amendment protections because they are "of such slight social value . . . that any benefit that may be

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[37] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[38] *See* Whitney, 274 U.S. at 377 (Brandeis, J., concurring) ("Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.").

[39] Eugene Volokh, The First Amendment and Related Statutes: Problems, Cases, and Policy Arguments 32 (7th ed. 2020) (quoting United States v. Cooper, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800)) ("If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government.").

[40] *Id.* (quoting Alon Harel, *Bigotry, Pornography, and the First Amendment*, 65 S. Cal. L. Rev. 1887 (1992)) ("Political discourse extends only to those ideas and values that can legitimately play a role in the determination of our political obligations.").

[41] *Id.* (quoting Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 94 (1948)) ("[The First Amendment protects] only . . . speech which bears, directly or indirectly, upon issues with which voters have to deal.").

[42] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

[43] Miller v. California, 413 U.S. 15, 24 (1973). *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) (holding that selling violent video games to teenagers is not unprotected obscenity because "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music)").

derived from them is clearly outweighed by the social interest in order and morality."[44]

The Supreme Court has invoked low-value speech arguments to justify restrictions of obscenity, fighting words, and defamation.[45] But identifying other types of low-value speech has proven to be a more difficult endeavor.[46] In recent years, justices have engaged with low-value speech theory to justify (or attack) restrictions on flag burning,[47] to establish a new standard for what constitutes a "true threat,"[48] and to uphold an ordinance restricting loud and raucous noises on public streets.[49] But even in cases where the Court agrees that speech is potentially harmful, justices often disagree about whether and to what degree that speech is also valuable.[50] As a result, the Court's definition of low-value speech has shifted with time, circumstances, and political climate.[51]

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[44] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Although the Court first employed low-value speech theory in 1942, many scholars agree that the theory has strong historical support dating back to the ratification of the First Amendment. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."). *But see* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2168 (2015) (challenging the support for low-value speech theory as "invented tradition"); Thomas I. Emerson, The System of Freedom of Expression 326 (1970) (criticizing low-value speech theory because it "inject[s] the Court into value judgments concerned with the content of expression, a role foreclosed to it by the basic theory of the First Amendment").

[45] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[46] For a proposed methodology of distinguishing low- and high-value speech, see Cass R. Sunstein, *Low Value Speech Revisted*, 83 Nw. U. L. Rev. 555 (1989).

[47] *See* Texas v. Johnson, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting) ("Far from being a case of 'one picture being worth a thousand words,' flag burning is the equivalent of an inarticulate grunt or roar."); *id.* at 420 (majority opinion) ("We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.").

[48] *See* Counterman v. Colorado, 143 S. Ct. 2106, 2117–18 (2023) (finding that recklessness is the correct mens rea for true threats because it best accommodates the competing values of protecting individuals and expression).

[49] *See* Kovacs v. Cooper, 336 U.S. 77, 88 (1949) ("The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience.").

[50] *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, at 822–23 (2011) (Thomas, J., dissenting) (disagreeing with the majority's holding that violent video games are protected by the First Amendment due to their artistic nature).

[51] *See* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. Rev. 297, 303 (1995) (noting that *Chaplinsky* and other early-stage low-value speech cases "in all probability would be decided differently today").

5. *Self-Actualization*

> *"[T]he significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech, writing, pictures, and [music]. Freedom of expression permits and encourages the exercise of these [capacities]."*
>
> —David A.J. Richards, 1974[52]

The "self-actualization" or "self-fulfillment" theory posits that the "true value served by the [F]irst [A]mendment's protection of free speech" is "individual self-realization."[53] Proponents of this view believe that free speech allows humans to engage in "autonomous self-determination"[54] and "control [their] own destin[ies] through making life-affecting decisions."[55] They also view speech as an essential way for humans to develop their skills[56] and "participate in the forms of meaning-making that *shape who they are* and *constitute them* as individuals."[57] To safeguard these important processes, self-actualization theorists urge jurists and legislators to consider the ways speech helps humans express and discover themselves. And they argue that "all forms of expression that further the self-realization value . . . are deserving of full constitutional protection."[58]

Self-actualization theory is less prevalent than the other four policy arguments discussed, but it does occasionally make its way into Supreme Court opinions. Thurgood Marshall consistently championed the idea that "individual self-realization is the preeminent concern in freedom of expression cases."[59] Other Justices—and sometimes the entire Court—have likewise invoked self-actualization principles. In *Whitney v. California*, for example, the Court suggested that free speech is essential to "make men free to develop their faculties."[60] In *Citizens United v. Federal Elections Commission*, Justice Stevens argued in concurrence

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52 David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 62 (1974).

53 Martin H. Redish, *Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982).

54 Richards, *supra* note 52, at 62.

55 Redish, *supra* note 53, at 593.

56 *Id.* at 593 (explaining that "individual self-realization" can "refer . . . to [the] development of the individual's powers and abilities").

57 Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 Nw. U. L. Rev. 1053, 1061 (2016) (emphasis added). *See also* Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. Rev. 1567, 1569 (1998) (arguing that free speech "nurtures . . . certain character traits").

58 Redish, *supra* note 53, at 593.

59 N. Douglas Wells, *Thurgood Marshall and 'Individual Self-Realization' in First Amendment Jurisprudence*, 61 Tenn. L. Rev. 237, 250 (1993).

60 274 U.S. 357, 375 (1927).

that "[o]ne fundamental concern of the First Amendment is 'to protec[t] the individual's interest in self-expression.'"[61] And in *National Bank of Boston v. Bellotti*, the Court noted that "[t]he individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion."[62]

B. Aristotelian Underpinnings, Constitutive Alternatives

Of the five policy arguments just discussed, the four that are invoked most frequently—marketplace theory, the search for truth, self-governance, and low-value speech theory—reflect a shared understanding of language. Each begins from the premise that speech is primarily a tool for communication or persuasion. Each assesses the value of speech by considering how effectively (or ineffectively) it persuades its audience. And each permits restriction when speech has communicative or persuasive effects that are harmful or dangerous—e.g., because the speech does not contribute to society's search for truth, because it conveys ideas that have little value, because it persuades people to do bad things, and so on.

This emphasis on the persuasive effects of language is characteristic of what rhetorical scholars call the Aristotelian (or neo-Aristotelian) model of rhetorical criticism.[63] Like Aristotle, Aristotelian rhetorical criticism defines rhetoric as "the faculty of discovering the possible means of persuasion in reference to any subject."[64] It studies rhetoric by considering how—and how effectively—a speaker persuades.[65] The Aristotelian approach is particularly interested in the ways speakers use the techniques outlined in Aristotle's *Rhetoric*, including "[t]he Aristotelian concepts of 'ethos,' 'pathos,' and 'logos' and the classical canons of 'invention,' 'arrangement,' 'style,' and 'delivery.'"[66] It excludes

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61 558 U.S. 310, 466 (2010) (Stevens, J., concurring) (quoting Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 534, n.2 (1980)).

62 435 U.S. 765, 777, n.12 (1978). In his dissenting opinion, Justice White similarly argued that commercial speech deserves less First Amendment protection because "the use of communication as a means of self-expression, self-realization, and self-fulfillment is not . . . furthered by corporate speech." *Id.* at 804–05 (White, J., dissenting).

63 Some rhetorical scholars use the term "neo-Aristotelian" to emphasize that the model "is *derived* from, but not synonymous with," Aristotle's rhetoric. METHODS, *supra* note 16, at 25.

64 ARISTOTLE, *supra* note 14, at 15.

65 *See* FOSS, *supra* note 15, at 35–36 ("At the conclusion of . . . neo-Aristotelian[] [criticism], a critic judges the *effects* of the rhetoric. Because the rhetoric was designed to *accomplish* some goal—the rhetor sought a response of some kind—[the neo-Aristotelian critic's] task is to determine whether or not this goal was met or what happened as a result of the rhetoric.") (emphasis added).

66 METHODS, *supra* note 16, at 28; *see also* FOSS, *supra* note 15, at 33 (explaining that Aristotelian criticism involves application of the "five canons of classical rhetoric":

"all evaluations other than [how these techniques] evoke [an] intended response from an immediate, specified audience."[67]

Marketplace, search-for-truth, self-governance, and low-value speech arguments largely follow this Aristotelian approach. When judges appeal to a marketplace of ideas, they imply that the value of speech depends on whether "purchasers" (i.e., listeners) will be persuaded by it. When they inquire whether speech will contribute to a search for truth, they ask, in effect, if the speech is likely to persuade an audience to accept true principles. When they consider speech's relationship to self-government, they assess whether the speech has persuasive or communicative effects that allow people to govern themselves effectively. And when they assess whether speech has value, they often consider whether it persuades people to do harmful things. In true Aristotelian fashion, each of these policy approaches assumes that speech is, first and foremost, "a communication to a specific audience."[68] And each "holds its business to be the analysis and appreciation of the orator's method of imparting [ideas] . . . to [hearers]."[69]

It is unsurprising that the four leading First Amendment policy arguments reflect Aristotelian assumptions and norms. American law schools train students to recognize the persuasive effects of language—in briefs, in oral argument, and in classroom discussions.[70] And the Aristotelian model—"the first formal method of rhetorical criticism developed in the communication field"[71]—"dominated the literature of rhetorical criticism for thirty years."[72]

But Aristotelian rhetorical theory is not the only way to think about and study language. Beginning in the 1960s, scholars in rhetoric began expressing concerns about the Aristotelian model[73]—that it places

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invention, organization, style, memory, and delivery); Herbert Wichelins, *The Literary Criticism of Oratory*, *in* Rhetoric and Public Speaking in Honor of James A. Winans 212–13 (A. M. Drummond ed., 1925) (explaining that Aristotelian criticism examines "[t]he speaker's personality as a conditioning factor, . . . the speaker's audience, . . . his topics, the motives to which he appealed, the nature of the proofs he offered, . . . the speaker's mode of arrangement and . . . of expression, . . . his manner of delivery, [and] the effect of the discourse on its immediate hearers").

67 Karlyn Kohrs Campbell, Forbes I. Hill, Ernest C. Thompson Jr. & Edwin Black, *The Forum: 'Conventional Wisdom—Traditional Form': A Rejoinder*, 58 Q.J. of Speech 454, 454 (1972).

68 Wichelins, *supra* note 66, at 209.

69 *Id.*

70 David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105, 141–45 (2003) (discussing the aims of legal writing courses and law school generally).

71 Foss, *supra* note 15, at 29.

72 Methods, *supra* note 16, at 26.

73 Foss, *supra* note 15, at 30 ("Neo-Aristotelian criticism was virtually unchallenged as the method to use in rhetorical criticism until the 1960s, when the orthodoxy that had

too much emphasis on Aristotle's *Rhetoric*,[74] that it over-emphasizes persuasive effects,[75] that it improperly ignores non-spoken rhetorical forms,[76] and that it prioritizes rational discourse and therefore "denigrate[s] or ignore[s] nonrational [e.g., emotional or psychological] appeals."[77] And so, scholars began developing new ways to approach the study of language. Rather than focusing solely on rhetoric's persuasive effects, they started analyzing how speakers use words to develop and communicate values,[78] build relationships,[79] and form individual[80] and group identities.[81] They began analyzing the ways rhetoric reinforces power structures[82] and oppresses marginalized groups.[83] And they shifted their attention from spoken texts to other rhetorical forms:

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developed in rhetorical criticism began to be criticized on a number of grounds"); *see also* Lucy Williams, *Making a Mother: The Supreme Court and the Constitutive Rhetoric of Motherhood*, 102 N.C. L. Rev. 395 (2024).

74 Foss, *supra* note 15, at 30. Aristotle wrote the *Rhetoric* to train *speakers*, not to guide rhetorical criticism. Because of this, many scholars believe the Aristotelian model was never intended as a general theory of rhetoric.

75 *See, e.g.*, Otis M. Walter, *On the Varieties of Rhetorical Criticism*, in Essays on Rhetorical Criticism 162–65 (Thomas R. Nilsen ed., 1968) (observing that a neo-Aristotelian analysis of the Sermon on the Mount would not help readers understand how the Sermon illustrated or developed Jesus's theology, or whether Jesus's arguments were consistent with or a departure from Old Testament morality).

76 *See* Foss, *supra* note 15, at 30 (noting that "[n]eo-Aristotelianism . . . was not used to study written discourse or non-discursive rhetoric").

77 Foss, *supra* note 15, at 31; *see also* Karlyn Kohrs Campbell, *The Ontological Foundations of Rhetorical Theory*, 3 Phil. & Rhetoric 97, 97–100 (1970) (critiquing the neo-Aristotelian assumption that "man is capable of and subject to persuasion because he is, by nature, a rational being"); Edwin Black, Rhetorical Criticism: A Study in Method 34 (1978) (explaining that neo-Aristotelianism criticism emphasizes "the close relationship between rhetoric and logic").

78 *See, e.g.*, Kenneth Burke, Language as Symbolic Action: Essays on Life, Literature, and Method 45 (1966) (arguing that speakers' words reveal their values and worldviews); Kenneth Burke, A Rhetoric of Motives 41 (1969) (defining rhetoric as "the use of words by human agents to form attitudes").

79 *See, e.g.*, John B. Hatch, *Reconciliation: Building a Bridge from Complicity to Coherence in the Rhetoric of Race Relations*, 6 Rhetoric & Public Affairs 737, 738 (2003) (arguing that genuine group apologies help alleviate racial divisions).

80 *See, e.g.*, Foss, *supra* note 15, at 61 (discussing Kenneth Burke's definition of rhetoric).

81 *See* Ernest G. Bormann, *Fantasy and Rhetorical Vision: The Rhetorical Criticism of Social Reality*, 58 Q.J. Speech 396, 398 (arguing that language creates "symbolic realit[ies]" that "sustain [listeners'] sense of community"); Foss, *supra* note 15, at 105–06 (describing Bormann's "symbolic convergence theory," which assumes that language "can converge to create a shared reality or community consciousness"); Carole Blair, Julie R. Brown & Leslie A. Baxter, *Disciplining the Feminine*, 80 Q.J. Speech 383, 385 (1994).

82 *See* Pierre Bourdieu, Language and Symbolic Power 242 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991) (discussing the symbolic power of naming and classifying "the right order").

83 *See* Foss, *supra* note 15, at 143 (describing the feminist model of rhetorical criticism, which "analy[zes] . . . [rhetorical] artifacts that oppress[], subordinate[], or silence[] individuals in order to identify the ways in which oppressive conditions are created").

writing,[84] film,[85] photography,[86] artwork,[87] built monuments,[88] and even national parks.[89]

These new modes of rhetorical criticism differ in their understandings of what rhetoric is, does, or should be. But all believe that rhetoric is not solely (or even primarily) communicative. And most begin from the premise that rhetoric has both persuasive and constitutive power—that it not only *describes* our experience of reality, but actually *creates* it. For example, symbolic convergence theory—a rhetorical theory pioneered by Ernest G. Bormann[90]—assumes that "communication creates reality" and that "our *experience* of [an] object or idea will be different depending on the symbols we use to frame it."[91] Feminist rhetorical criticism recognizes language's power to construct relations of dominance.[92] Linguistic philosophers like Charles Taylor treat language as a "vehicle of . . . reflective awareness," a means by which humans may become "conscious of the things they experience in a fuller way."[93] And rhetoricians in the tradition of Kenneth Burke

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84 *See, e.g.*, Martin Nystrand & John Duffy, Towards a Rhetoric of Everyday Life: New Directions in Research on Writing, Text, and Discourse, at ix (2003) (examining "the leading edge of research on writing" to "unveil[] the rhetorical character of popular culture and institutional discourse[.]"); James Berlin, *Rhetoric and Ideology in the Writing Class*, 50 College English 477, (1988) (examining how rhetoric is employed in college writing classes).

85 *See, e.g.*, Paul Martin & Valerie R. Renegar, *The Man for His Time:* The Big Lebowski *as Carnivalesque Social Critique*, 58 Commc'n. Studies 299, 299 (2007) (analyzing *The Big Lebowski* as a "carnivalesque text" and arguing that the film's rhetorical strategies "encourage[] receptive audiences to question both the nature and the values of [their] social world").

86 *See, e.g.*, Davi Johnson Thornton, *The Rhetoric of Civil Rights Photographs: James Meredith's March Against Fear*, 16 Rhetoric & Pub. Affairs 457 (2013) (analyzing photographs of James Meredith's 1966 March Against Fear as rhetorical texts).

87 *See, e.g.*, Victoria Gallagher & Kenneth S. Zagacki, *Visibility and Rhetoric: The Power of Visual Images in Norman Rockwell's Depictions of Civil Rights*, 91 Q.J. of Speech 175, 177–78 (2005) (arguing that "visual images can work both to articulate and to shape public knowledge" and considering how "[Norman] Rockwell's paintings worked rhetorically to establish visibility—to make visible people, attitudes, and ideas in the context of the [Civil Rights movement]").

88 *See, e.g.*, Places of Public Memory: The Rhetoric of Museums and Memorials (Greg Dickinson, Carole Blair & Brian L. Ott eds., 2010) (analyzing built monuments as rhetorical "texts"); Carole Blair, *Contemporary U.S. Memorial Sites as Exemplars of Rhetoric's Materiality*, *in* Rhetorical Bodies 16 (Jack Selzer & Sharon Crowley eds., 1999) (same).

89 *See, e.g.*, Gregory Clark, Rhetorical Landscapes in America: Variations on a Theme from Kenneth Burke 26 (2004) (considering the rhetorical power of tourism, travel, and place).

90 *See* Foss, *supra* note 15, at 105.

91 *Id.* at 105.

92 *Id.* at 144 (explaining that feminist criticism aims to "disrupt, transgress, and invent possibilities" for seeing and being in the world).

93 Charles Taylor, Philosophical Papers: Vol. 1, Human Agency and Language 229 (1985) [hereinafter Human Agency].

believe that the act of naming affects the way humans understand and perceive their situations.[94]

In the field of rhetoric (and in some law and literature circles),[95] scholars call this non-Aristotelian approach constitutive rhetoric, or the constitutive rhetorical model. "Constitutive rhetoric is a theory of speech regarding the ability of language and symbols to create a collective identity for an audience."[96] It "recognize[s] discourse as productive of the very categories by which the world, and indeed the self, are understood,"[97] and it explores the ways speakers use language to define meaning, create culture, and forge identities. The constitutive model does not view creation as rhetoric's *only* effect—it acknowledges that rhetoric has communicative, persuasive purposes, too. But unlike the Aristotelian model, which emphasizes language as a tool for persuasion, the constitutive model instead considers "the role of rhetoric in producing the very identity and character of the audience" to be persuaded.[98]

The constitutive rhetorical model has become so prevalent that many rhetorical scholars now recognize creation as one of language's core functions.[99] Rhetoric may persuade, communicate, or facilitate self-discovery, but it also determines "[w]hat we count as real."[100] "Is an unexpected situation a *struggle* or an *adventure*? Is a coworker's behavior *irritating* or *eccentric*?"[101] The answers, constitutive rhetoric posits, depend in large part on the words we use—not just because of their persuasive effect, but because those words "influence our perceptions and interpretations of what we experience and . . . the kinds of worlds in which we live."[102]

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94 Kenneth Burke, The Philosophy of Literary Form: Studies in Symbolic Action 4 (3d ed. 1973).

95 *See, e.g.*, James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 692 (1985) (arguing that law is a constitutive rhetorical process through which "our perceptions of the universe are constructed and related, in which our values and motives are defined, and which our methods of reasoning are elaborated and enacted"); Williams, *supra* note 73.

96 David W. Seitz & Amanda Berardi Tennant, *Constitutive Rhetoric in the Age of Neoliberalism*, *in* Rhetoric in Neoliberalism 109 (Kim Hong Nguyen ed., 2017).

97 Maurice Charland, *Constitutive Rhetoric*, *in* Encyclopedia of Rhetoric (Thomas O. Sloane ed., 2006).

98 *Id.* For a general discussion of the constitutive rhetorical model, see Williams, *supra* note 73, at 404–08.

99 *See, e.g.*, Foss, *supra* note 15, at 6 (listing "construct[ing] reality" as one of rhetoric's essential purposes).

100 *Id.* at 5–6.

101 *Id.*

102 *Id.*; *see also* Kimberly Gross, *Framing Persuasive Appeals: Episodic and Thematic Framing, Emotional Response, and Policy Opinion*, 29 Pol. Psych. 169, 169–70 (2008) (finding that the way information is presented—or framed—can change individuals' policy

Though the constitutive rhetorical model is now commonplace in rhetoric studies,[103] in First Amendment law, Aristotelian policy arguments remain the norm.[104] As explained above, four of the five leading policy arguments we have described (marketplace, search for truth, self-governance, and low-value speech) emphasize language's persuasive, communicative effects. And though self-actualization theory reflects some constitutive considerations—it recognizes that speech enables humans "to participate in the forms of meaning-making that *shape who they are* and *constitute them* as individuals"[105]—it is primarily concerned with a relatively narrow set of constitutive effects: those that affect *individual*, but not *social* or *cultural*, identities, values, and norms. Self-actualization theory is also an anomaly in First Amendment law: A few prominent scholars have endorsed its constitutive approach,[106] but there are many more who prefer the more common, Aristotelian policy arguments. For the most part, then, First Amendment scholarship remains focused on speech's persuasive, communicative effects.[107]

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preferences); Brian Dolan, *Framing Effect: What It Is and Examples*, Investopedia (May 11, 2023), https://www.investopedia.com/framing-effect-7371439 [https://perma.cc/B2GG-7L7Y] ("Framing effect proposes that individuals make decisions based on how an issue is presented, or 'framed,' rather than on the facts presented. It is a cognitive default to choose an option that is more positively presented, or framed.").

103 Scholars in other fields likewise recognize constitutive effects, though they typically focus on the creative effects of social practices and performances, rather than of language. For example, political theorist Judith Butler has used the concept of performativity to argue that human beings *create* or *constitute* gender categories through the ways they enact and perform their gender identities (dress, behavior, etc.). Put differently, Butler argues that gendered behaviors do not reflect underlying gender categories but in fact *create* those categories. *See generally* Judith Butler, Gender Trouble (1990). A few legal scholars have similarly explored the constitutive power of social performances. Clare Huntington, for example, has suggested that the performance of family roles "construct[s] familial categories and create[s] social meaning." *See* Clare Huntington, *Staging the Family*, 88 N.Y.U. L. Rev. 589, 614 (2013). And Devon Carbado and Mitu Gulati have argued that "[g]rooming requirements such as makeup for women and short hair for men help to constitute gender." *See* Devon W. Carbado & Mitu Gulati, Acting White? 94 (2013).

104 *But see infra* Part II (arguing that although the Supreme Court has never expressly adopted the constitutive rhetorical approach, it has relied on parallel arguments in several prominent First Amendment cases).

105 Balkin, *supra* note 57, at 1061 (emphasis added).

106 Martin Redish and Jack Balkin, to name two. *See* Redish, *supra* note 53, at 593; Balkin, *supra* note 57, at 1061.

107 *See* Blasi, *supra* note 57, at 1568 (noting that "[w]hen pressed to defend . . . the freedom of speech in the United States . . . First Amendment devotees typically invoke . . . basic [i.e., Aristotelian] rationales."); Mill, *supra* note 27, at 16 (arguing that "the peculiar evil of silencing the expression of an opinion is that" the opinion may be true or may help discover the truth even if it is untrue); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1, 6 (1984) ("[c]lassic marketplace theory assumes that truth is discovered through competition with falsehood and stresses that any authoritatively imposed truth is plagued with the danger of error."); Alexander Meiklejohn, Political Freedom 73 (1960)

This emphasis on Aristotelian rhetoric is evident in legal practice, as well. When faced with new legal questions, judges and lawyers still invoke the four Aristotelian policy arguments.[108] And though the Supreme Court has sometimes gestured toward a constitutive rhetorical framing, its most developed policy discussions are Aristotelian, not constitutive.[109]

In what follows, we consider how constitutive rhetoric might operate as a First Amendment policy argument. More specifically, we consider what it might look like if judges, lawyers, and legal scholars took seriously the idea that words have constitutive, world-building effects—not just for individuals (as self-actualization theory suggests), but also for entire societies. We do not claim that constitutive rhetoric should supplant other, more traditional policy arguments. We also do not suggest that First Amendment policy should abandon Aristotelian considerations. Instead, we propose constitutive rhetoric as an *additional* tool for thinking about whether, when, and how to restrict speech.

In the next Part, we discuss several cases where the Supreme Court has gestured toward—though not explicitly adopted—a constitutive rhetorical approach. We do this to show that the Supreme Court is already thinking constitutively; though it has never said so directly, it is already open to constitutive considerations. We then turn to three areas of First Amendment law—hate speech, fighting words, and child pornography—to consider how a constitutive lens might enhance, clarify, and transform existing legal rules.

II
Constitutive Considerations in Supreme Court Jurisprudence

As discussed above, most First Amendment policy proceeds from Aristotelian rhetorical assumptions. Consequently, arguments based in constitutive rhetorical theory are not common in First Amendment

(arguing that in a system of self-government, testing truth through the marketplace of ideas "is not merely the 'best' test. There is no other").

108 *See, e.g.*, Counterman v. Colorado, 143 S. Ct. 2106, 2113–14 (2023). *Counterman* asked the Court to consider what mens rea—if any—is required for a speaker to articulate a "true" (i.e., unprotected) threat. The Court held that true threats must be spoken with at least "recklessness." *Id.* at 2111–12. The majority's opinion cited the low-value speech and search for truth theories to explain why some speech is not protected. *See id.* at 2113–14 ("This Court has 'often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest' in their proscription." (citations omitted)). Justice Barrett's dissent invoked the low-value speech theory to argue that mens rea should not be relevant to a true threat analysis, because a "[n]either [a threat's] 'social value' nor its potential for 'injury' depends on the speaker's subjective intent." *Id.* at 2134 (Barrett, J., dissenting).

109 *See infra* Part II.

law. But while constitutive rhetorical theory is not the norm in First Amendment cases, it is also not entirely foreign. Though the Supreme Court has never explicitly invoked constitutive rhetorical theory in a First Amendment case, it has occasionally gestured toward the idea that language might have creative force. And in non-First Amendment contexts, the Court has expressed concern about the constitutive effects of statutory language, of its *own* language, and of the law itself. The Court has eschewed language that perpetuates narrow views of gender roles, for example, and it has recognized that certain legal labels (e.g., "separate but equal") inflict pernicious dignitary harms.[110] It has also rejected statutes and policies that are neutral in their language but that, by their very existence, signal, create, or perpetuate biased or unequal norms.[111]

In what follows, we describe several cases where the Supreme Court is attentive to these constitutive rhetorical themes. Section A identifies several non-First Amendment contexts where the Supreme Court has expressed concern about the constitutive effects of judicial language, statutory language, or the mere existence of a policy or law. Section B describes several First Amendment cases where the Court has gestured toward—though not explicitly articulated—a constitutive rhetorical approach.

Our purpose in highlighting these examples is not to prove that constitutive rhetoric is central to or prominent in Supreme Court decision making. Indeed, we could not prove that if we tried, because as an empirical matter, instances of constitutive rhetorical reasoning are few and far between. Our aim in this Part is more modest: to contextualize the policy approach we recommend in Part III. Though most First Amendment cases invoke Aristotelian policy arguments, this Part reveals that the Supreme Court does, occasionally, think constitutively. Embracing the constitutive model (as we recommend in Part III) would thus be a natural—though novel—extension of the Court's current approach.

A. Constitutive Rhetoric in Non-First Amendment Cases

Supreme Court opinions are, first and foremost, functional rhetorical texts. They exist primarily to communicate the Court's decisions. They also articulate legal rules that will govern future cases,

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110 *See, e.g.*, Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 600 U.S. 2141, 2194–95 (2023) (Thomas, J., concurring) (stating that the "separate but equal" standard "is precisely antithetical to the notion that all men, regardless of the color of their skin, are born equal and must be treated equally under the law" (internal quotation marks omitted)).

111 *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (invalidating a state schooling initiative that, though facially neutral, had the constitutive effect of perpetuating segregated education).

and they explain how and why the Court reaches its results. Opinions are generally written for specific, legally-trained audiences—judges, lawyers, and academics who are familiar with the underlying law.[112] And they use language and logic to persuade those audiences that "the [C]ourt's conclusion was firmly grounded in law and was not simply a policy choice or the reflection of the justices' personal beliefs."[113] In short, Supreme Court opinions are quintessential examples of Aristotelian rhetoric.[114]

The Supreme Court certainly recognizes that its decisions serve communicative and persuasive functions. Perhaps because of this, Supreme Court justices write painstakingly—drafting, revising, and re-revising to craft decisions that are convincing, coherent, and clear.[115] But if the Court generally uses language in an Aristotelian sense—to communicate and persuade—it also seems to recognize that its decisions sometimes have non-Aristotelian (or perhaps *extra*-Aristotelian) effects. And though most of its rhetorical decisions are likely motivated by Aristotelian concerns, its writing occasionally reflects non-Aristotelian considerations, as well.

Grutter v. Bollinger provides one example.[116] *Grutter* was a high-profile and hotly contested affirmative action case that presented a challenge to the race-conscious admissions policies at the University of Michigan Law School. The Supreme Court decided *Grutter* in a 5–4 opinion written by Justice O'Connor.[117] Initially, Justice Souter planned to publish a short, separate concurrence. But he withdrew his concurrence because Justice Stevens urged him that "[the] separate writing, though brief, diminishes the force of [Justice O'Connor's] opinion."[118]

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112 Erwin Chemerinsky, *Foreword: Judicial Opinions as Public Rhetoric*, 97 Calif. L. Rev. 1763, 1764 (2009).

113 *Id.*

114 Because Supreme Court opinions are largely Aristotelian, the scholars who study them generally use Aristotelian rhetorical techniques. For example, Erwin Chemerinsky has proposed that Supreme Court scholars might "gain new insights about the Court and constitutional law by looking at opinions from a rhetorical perspective." *See* Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 Mich. L. Rev. 2008, 2008 (2002). But Chemerinsky defines rhetoric as Aristotle did—as "reasoned arguments intended to persuade." *See id.* And the method of rhetorical analysis he recommends is thoroughly Aristotelian, emphasizing "the speaker, the message, and the audience." *Id.* at 2009.

115 *See, e.g.*, Bryan A. Garner, *Garner's Interviews*, L. Prose, https://lawprose.org/bryan-garner/videos/garners-interviews [https://perma.cc/H9MT-WMAR] (video interviews of Supreme Court justices describing their writing and editing processes).

116 Grutter v. Bollinger, 539 U.S. 306 (2003).

117 *Id.* at 310–11.

118 Justice Souter had originally written a brief concurrence "to separate himself from what he regarded as the [opinion's] 'affirmative tone'" toward Justice O'Connor's position in *Gratz v. Bollinger*. *See* Joan Biskupic, *Memos Show How the Supreme Court Justices Scramble at the*

Justice Stevens's request and Justice Souter's response reveal that both were thinking in non-Aristotelian registers. To be sure, a concurrence would have served the Aristotelian functions of persuasion and clarification. It would have allowed Justice Souter to specify his views, and it might have convinced audiences who did not accept the lead opinion's reasoning. But Justices Souter and Stevens seemed to recognize that a concurrence might have had unwanted *symbolic* effects, as well—it could have given the appearance of a divided majority or signaled that Justice Souter found the lead opinion lacking. If Justices Souter and Stevens had prioritized Aristotelian considerations, they might have published in spite of these symbolic possibilities. That they instead withdrew the concurrence suggests that they were also attentive to and concerned about the non-Aristotelian effects of their writings.

The *Grutter* concurrence (or lack thereof) shows that non-Aristotelian considerations sometimes motivate justices to *not* write. But occasionally, non-Aristotelian concerns also color what the Court *does* say. This is particularly true in the Court's gender discrimination cases. Until the late-twentieth century, many state laws reflected and reinforced stereotypical assumptions about men and women—that men should be "the head of the family,"[119] that mothers are "best suited to care for young children,"[120] that wives are "bound to live with [their] husbands and to follow [them] wherever [they] choose to reside," and so on.[121] For many years, judges upheld these statutes using prejudiced

End of the Session, CNN (May 15, 2023, 5:02 AM), https://www.cnn.com/2023/05/15/politics/supreme-court-backchannel-affirmative-action-namby-pambies/index.html [https://perma.cc/4Y5P-D4AC]. After learning of Justice Stevens's concerns, Justice Souter responded, "I accept your suggestion . . . and, after touching base with Ruth, have written to Sandra saying that I withdraw the separate concurring paragraph." *See id.* (internal quotation marks omitted).

119 *See* Idaho Code Ann. § 32-902 (West 1947), *repealed by* Act Relating to Domestic Relations, ch. 194, 1974 Idaho Sess. Laws 1502, § 1, *cited in* Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45, 74 n.226 (1981); *see also* La. Civ. Code Ann. art. 2404 (1971) (repealed 1979) ("The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife."), *cited in* Kirchberg v. Feenstra, 450 U.S. 455, 457 n.1 (1981); Brief for Appellant at 32, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1970 U.S. S. Ct. Briefs LEXIS 5 at *56–57 (observing that a survey of state laws taken in 1968 revealed that most jurisdictions did not permit married women "to establish a separate domicile" for a variety of purposes).

120 *See* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Fam. L. 423, 430–32 (1976–77) (describing several best interest custody statutes passed in the 1960s and 1970s). In the early 1970s, Arizona's statute likewise established a best interest test but provided that, "other things being equal, if the child is of tender years, it shall be given to the mother." *Id.* at 432 (citation omitted).

121 *See* La. Civ. Code Ann. art. 120 (1952) (repealed 1979), *cited in* Thomas E. Carbonneau, *Analytical and Comparative Variations on Selected Provisions of Book One of the Louisiana*

language. In *In re Goodell*, for instance, the Supreme Court of Wisconsin refused to admit a woman to the state bar, reasoning that because women are "destine[d] and qualifie[d] . . . for the bearing and nurture of . . . children," they should not be allowed "to mix professionally in all the nastiness of the world which finds its way into courts."[122] And in *Bradwell v. Illinois*, which held that the Privileges and Immunities Clause does not guarantee all citizens the right to obtain a law license, Justice Bradley opined that "[t]he paramount destiny and mission of a woman are to fulfil the noble and benign offices of wife and mother."[123] These descriptions and characterizations had the practical, legal effects of excluding women from legal practice. But they also constituted and perpetuated a particular conception of women—one that equates womanhood with child rearing, benevolence, and domesticity.

In the early 1970s, this began to change. In the pivotal case *Reed v. Reed*, the Supreme Court invalidated an Idaho statute that instructed probate courts to "prefer[] [males] to females" when appointing estate administrators.[124] The Court acknowledged that the statute might promote desirable ends (e.g., "avoiding intrafamily conflict" and "reducing the workload on probate courts"), but it determined that the state could not accomplish those ends through "arbitrary" gender classifications.[125] Less than two years later, in *Frontiero v. Richardson*, the Court invalidated a military benefits statute that established different

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Civil Code, with Special Consideration of the Role of Fault in the Determination of Marital Duties, 27 LOY. L. REV. 999, 1014 (1981). State statutes also reinforced the belief that women are particularly fragile, that childcare is and should be their primary responsibility, and that they are best equipped to nurture young children. *See, e.g.*, CAL. PENAL CODE § 415 (Deering 1960) (making it a misdemeanor to "willfully disturb[] the peace or quiet of any neighborhood or person . . . by . . . indecent language within the presence or hearing of women or children"), *cited in* Cohen v. California, 403 U.S. 15, 16 n.1 (1971); 1945 Mich. Pub. Acts 133, § 19(a) (prohibiting women from becoming licensed bartenders unless married to or the daughter of the bar owner), *cited in* Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

122 39 Wis. 232, 245 (1875). The court's shocking analysis reads as follows: "We cannot but think the common law wise in excluding women from the profession of the law . . . . Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things." *Id.* at 244–45.

123 Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring). In *Bradwell*, Illinois refused to grant a law license to a woman. The woman sued, arguing that Illinois had violated the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 137–38. The Supreme Court affirmed, holding that "the right to admission to practice in the courts of the state is not one of [the privileges and immunities belonging to citizenship]." *Id.* at 139.

124 *See* IDAHO CODE § 15-314 (1864) (repealed effective July 1, 1972) (providing that "of several persons claiming and equally entitled [under § 15-312] to administer [an estate], males must be preferred to females, and relatives of the whole to those of the half blood"), *cited in* Reed v. Reed, 404 U.S. 71, 73 (1971). The Supreme Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment. *See Reed*, 404 U.S. at 77.

125 *Id.* at 76.

eligibility criteria for servicemen and servicewomen.[126] This time, the Court concluded that "classifications based upon sex . . . are inherently suspect."[127] It thus applied a "stricter standard of review" and concluded "that the statutory scheme . . . [was] constitutionally invalid."[128]

In reaching that result, the *Frontiero* Court began to highlight and critique the constitutive effects of the statute's gendered assumptions. The Court acknowledged that "as an empirical matter, wives in our society frequently are dependent on their husbands, while husbands rarely are dependent on their wives."[129] It recognized, in other words, that the statute might accurately reflect the norms of American life, and it conceded that the law's gender classification might have functional, administrative advantages.[130] But the Court also emphasized that "the Constitution recognizes higher values than speed and efficiency."[131] And though it admitted that many women might, in fact, be financially dependent on their husbands, it worried that codifying that assumption might "have the effect of invidiously relegating the entire class of females to inferior legal status."[132]

If the *Frontiero* Court had cared only about Aristotelian concerns—persuasion, clarity, coherence, functionality—it might have upheld the statute as a reasonable and well-crafted response to a documented social trend. Instead, it considered how the statute's gendered assumptions might affect society's views and treatment of women. Regardless of whether the statute correctly described the world, the Court worried that the law's stereotyped language would

126 411 U.S. 677 (1973). The challenged statute defined a military "[d]ependent" as "(A) the wife; [or] (C) the husband, *if he is in fact dependent on the member . . . for over one-half of his support . . . .*" *Id.* at 679 n.2 (emphasis added) (quoting 37 U.S.C. § 401).

127 *Id.* at 688.

128 *Id.* The *Reed* Court had applied something like rational basis review: "The Equal Protection Clause," it stated, requires that classifications based on criteria unrelated to the objective of the statute "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *See Reed*, 404 U.S. at 75–76 (internal quotation marks omitted) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The *Frontiero* Court applied what it described as "strict judicial scrutiny," but it did not conduct a traditional strict scrutiny analysis (it did not consider whether the governmental interest was compelling or whether the statute was narrowly tailored to promote that interest). *Frontiero*, 411 U.S. at 688.

129 *Frontiero*, 411 U.S. at 688–89.

130 The Government argued that the statute served "no purpose other than mere 'administrative convenience.'" *Id.* at 688. The Court was skeptical that "differential treatment in fact saves the Government any money," *id.* at 689, but it ultimately agreed that "efficacious administration of governmental programs is not without some importance." *Id.* at 690.

131 *Id.*

132 *Id.* at 684.

"put women, not on a pedestal, but in a cage."[133] And even if the statute functioned well from an Aristotelian perspective—even if it was clear, persuasive, and coherent—the Court feared that it would reinforce the "pervasive, although at times . . . subtle, discrimination" that for centuries had limited American women's educational, professional, and political opportunities.[134] The Court thus rejected and invalidated both the statute and its underlying gendered assumptions—not because it doubted the statute's logic, but because it feared the world the statute might create.

In *United States v. Virginia*, the Court made its concern for constitutive, world-building effects even more explicit. *Virginia* involved a challenge to a males-only admissions policy at the Virginia Military Institute (VMI).[135] As in *Frontiero*, the Court assessed the gender classification using a "heightened review standard."[136] This time though, it specified that gendered distinctions violate the Equal Protection Clause unless the state provides an "exceedingly persuasive justification" for the classification and shows that "the discriminatory means employed are substantially related to the achievement of . . . [important governmental] objectives."[137] VMI attempted to meet this heightened standard by arguing that the males-only policy was necessary for training citizen soldiers. VMI also argued that "females tend to thrive in a [more] cooperative atmosphere"[138] and that the school's unique, adversative pedagogical method was not "effective for women as a group."[139]

Although the Court questioned the generalizability of Virginia's proffered justifications,[140] it ultimately did not challenge the descriptive accuracy of the school's claims about women, men, and their respective preferences and abilities.[141] The Court also did not question the wisdom of VMI's policy; in fact, it admitted that "[s]ingle-sex education affords pedagogical benefits to at least some students."[142] Instead, the Court focused on the policy's likely constitutive effects. Because the policy

133 *Id.*

134 *Id.* at 686.

135 United States v. Virginia, 518 U.S. 515, 520 (1996).

136 *Id.* at 533.

137 *Id.* at 524 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

138 *Id.* at 541.

139 *Id.* at 549.

140 It noted, for instance, that "some women are capable of all of the individual activities required of VMI cadets," *id.* at 550, and that "some women may prefer [VMI's adversative method] to the methodology a woman's college might pursue." *Id.* at 540.

141 *See id.* at 542 (acknowledging that "most women would not choose VMI's adversative method").

142 *Id.* at 535.

rested on "generalizations about 'the way women are,'" the Court feared it might create and reinforce a world where women are expected to be soft, cooperative, and gentle.[143] And though the policy may have captured what was "appropriate for *most women*,"[144] the Court also worried that it might "perpetuate historical patterns of discrimination."[145] The Court did not, then, reject VMI's justifications because they were unfounded, unwise, or inaccurate. Instead, it invalidated the policy because of its dangerous constitutive potential.

The Court has shown similar attention to constitutive rhetorical effects in other contexts. In abortion cases, it has resisted stereotypes about women and mothers—not because they are inaccurate, but because they reduce women to a set of pre-defined roles and traits.[146] Some Justices have also critiqued analyses that overemphasize the legal dimensions of abortion (substantive due process, stare decisis, etc.), arguing that such analyses constitutively frame the abortion debate in a way that excludes and omits women's interests.[147] The Court has likewise raised constitutive concerns in cases involving racial equality. In *Brown v. Board of Education*, for instance, the Court famously rejected the doctrine of "separate but equal."[148] It did so in large part because it concluded that racially segregated facilities—however equally resourced—would inevitably and necessarily "deno[te] the inferiority" of blacks and would "generate[] [read: *create*] a feeling of inferiority . . . that may affect [the] hearts and minds [of black students] in a way unlikely ever to be undone."[149]

The Court's most recent pronouncement on marriage equality also reflects constitutive considerations. In *Obergefell v. Hodges*, the Supreme Court recognized a fundamental right to marry for both hetero

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143 *Id.* at 550.

144 *Id.*

145 *Id.* at 542 (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139 n.11 (1994)).

146 *See, e.g.*, Williams, *supra* note 73, at 444–54 (describing the constitutive effects of the Court's rhetoric about women and mothers in abortion cases).

147 In *Dobbs v. Jackson Women's Health Org.*, for example, the majority said very little about women or their lived experiences. 592 U.S. 215 (2022). Instead, the majority focused on the legal issues: Whether there is textual or historical support for a constitutional right to abortion, whether stare decisis concerns required the Court to preserve *Roe*'s holding, and so on. *See id.* at 231–32 (listing the bases for the Court's decision). The dissent critiqued the constitutive effects of the majority's approach, arguing that by over-emphasizing legal questions, the majority neglected women and their interests. *See id.* at 372–73 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (discussing how the majority's focus on historical and textual factors consigns its analysis to a world where women had "second-class citizenship"); *see also* Williams, *supra* note 73, at 453 (describing the *Dobbs* Court's engagement with language about women and mothers).

148 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

149 *Id.* at 494.

and same-sex couples.[150] The Court's analysis listed many practical legal justifications for recognizing a same-sex couple's right to marry (e.g., marriage provides access to a "constellation of [state] benefits,"[151] marriage is a natural extension of the right to "intimate association,"[152] and so on). But the Court also described the symbolic, constitutive effects that marital status confers. It noted, for example, that marriage "offer[s] symbolic recognition,"[153] "promise[s] nobility and dignity,"[154] and that "[c]hoices about marriage shape an individual's destiny."[155] It also argued "laws excluding same-sex couples from the marriage right impose stigma and injury"[156] and that excluding same-sex couples "from [marriage] has the [*constitutive*] effect of teaching that gays and lesbians are unequal"[157] and that "their families are somehow lesser."[158] These constitutive considerations were central to the *Obergefell* Court's holding. Though the Court recognized the right to same-sex marriage for pragmatic and legal reasons, it also emphasized that marriage (and exclusion from marriage) has significant constitutive effects.

B. Constitutive Rhetorical Themes in First Amendment Cases

The Court has also hinted at a constitutive rhetorical approach in its First Amendment jurisprudence. In various cases, justices have noted that "[s]peech is powerful"[159]—both as a communicative or persuasive tool and as a means of "develop[ing] character,"[160] "stir[ring] people to action,"[161] and influencing the social order.[162] These constitutive effects rarely carry the day in the Court's decisions; we know of no First Amendment case where the Court's holding rests solely on constitutive rhetorical concerns. But constitutive rhetorical themes are occasionally relevant to the Court's analysis, and the Court sometimes cites them for support.

This is particularly true in cases involving harmful or offensive speech. In *Federal Communications Commission v. Pacifica Foundation*,

150 576 U.S. 644 (2015).
151 *Id.* at 670.
152 *See id.* at 667 (noting that the fundamental right extends past this point).
153 *Id.* at 669.
154 *Id.* at 656.
155 *Id.* at 666.
156 *Id.* at 671.
157 *Id.* at 670.
158 *Id.* at 668.
159 Snyder v. Phelps, 562 U.S. 443, 460 (2011).
160 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).
161 *Snyder*, 562 U.S. at 460.
162 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 433 n.9 (1992) (Stevens, J., concurring) (discussing how a statute prohibiting race-based threats is justified because of the effect race has on society's structure).

for example, a public radio station played George Carlin's "Filthy Words" monologue,[163] which included many of "the words you [can't] say on the public . . . airwaves."[164] Soon after, a man who had heard the monologue while driving with his young son complained to the FCC.[165] In response to the complaint, the FCC issued a declaratory order explaining that it could and would regulate indecent and profane language on the radio.[166] The FCC also concluded that because the monologue aired when children were likely listening, and because it contained words that "depicted sexual and excretory activities in a patently offensive manner," the entire broadcast "was indecent and prohibited."[167]

The Supreme Court agreed. Much of its analysis emphasized traditional Aristotelian policy considerations—the marketplace of ideas, low-value speech, and the search for truth.[168] But the Court also alluded to the monologue's constitutive, creative effects. For example, the Court reasoned that the "Filthy Words" monologue "debas[ed] and brutaliz[ed] human beings by reducing them to their mere bodily functions."[169] Put differently, it worried that the monologue's "obnoxious, gutter language" might cause people to view and interact with each other not as human beings, but as body parts, bodily fluids, and excretory processes.[170] The Court also noted that the monologue was offensive "irrespective of [its] message"[171]—that is, regardless of the ideas it might communicate. It thus permitted censorship both because of the broadcast's persuasive, communicative effects *and* because of its creative, constitutive potential.[172]

The Court adopted similar reasoning in *Paris Adult Theatre I v. Slaton*.[173] In that case, a local district attorney filed a complaint against the owner of an adult movie theatre after the owner screened two

163 438 U.S. 726, 729 (1978).

164 *Id.*

165 *Id.* at 730.

166 *Id.* at 730–31. The FCC cited two statutes to justify this exercise of regulatory authority: 18 U.S.C. § 1464 (1976) (amended 1994), which prohibits "any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C. § 303(g) (1976), which makes the FCC responsible for encouraging broader radio use. *Id.* at 731.

167 *Id.* at 732.

168 *See id.* at 745–46 (reasoning that certain types of speech are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))).

169 *Id.* at 746 n.23.

170 *See id.*

171 *Id.*

172 *See id.*

173 413 U.S. 49 (1973).

pornographic films.[174] The issue was whether the State could regulate the exposure of obscene materials to consenting adults in places of public accommodation.[175] In analyzing this question, the Court relied in part on the constitutive effects of creative works. It noted that just as "good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character," obscene materials "have a tendency to exert a corrupting and debasing impact" that can lead to antisocial behavior.[176] Put differently, obscene speech has power beyond persuasion: It can "debase[] and distort" "key relationship[s] of human existence, central to family life, community welfare, and the development of human personality."[177] These constitutive, world-building effects made up a small part of the Court's ultimate analysis—indeed, the Court itself described them as "intangible and indistinct."[178] But they nonetheless supported the Court's conclusion that the challenged films were not constitutionally protected.

Even when constitutive concerns do not sway the Court's majority, they often animate concurring and dissenting opinions. For example, in *Brown v. Entertainment Merchants Association*, Justice Alito wrote separately to warn of the "important societal implications" of violent video games.[179] Unlike other forms of speech, Alito argued, video games "*create* realistic alternative worlds."[180] These alternate realities then allow players to "experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence."[181] Alito dissented from the majority's decision (which afforded full constitutional protection to violent video games) largely because he worried that this constitutive, world-building potential might train individuals and society to brook "antisocial theme[s]" and behaviors.[182]

Similarly, in *R.A.V. v. City of St. Paul*, Justice Stevens accused the majority of failing to consider the unique constitutive power of race-based threats.[183] He argued that a city ordinance prohibiting such

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174 *Id.* at 51.

175 *See id.* at 57 (discussing the district court's reasoning that the state could not regulate this material).

176 *Id.* at 63.

177 *Id.*

178 *Id.*

179 564 U.S. 786, 806 (Alito, J., concurring).

180 *Id.* at 816 (emphasis added).

181 *Id.* at 818–19 (discussing the violent, realistic themes of existing video games that allow players to reenact the Columbine High School shootings, rape Native American women, and engage in ethnic cleansing, among other criminal behaviors).

182 *See id.*

183 505 U.S. 377, 433 n.9 (1992) (Stevens, J., concurring) ("One need look no further than the recent social unrest . . . to see that race-based threats may cause more harm to society and to individuals than other threats. . . . [A] statute prohibiting race-based threats is justifiable because of the place of race in our social and political order.").

threats was facially valid because it restricted speech based on the resulting harm of that speech and not on the viewpoint expressed.[184] To Stevens, then, race-based threats did more than carry a message to their victims—they disrupted society's "social and political order."[185] And in *United States v. Alvarez*, constitutive considerations fueled a dissent by Justices Alito, Thomas, and Scalia, who would have upheld a statute that made it illegal to falsely claim to have received military honors.[186] These lies, the dissenters reasoned, not only persuaded others to provide false recipients financial benefits (an Aristotelian effect), but also "tend[ed] to debase the distinctive honor of military awards"—a "less tangible, but nonetheless significant" constitutive effect.[187]

The examples above show that the Court sometimes references constitutive effects in cases where it *restricts* speech. But the Court also occasionally relies on constitutive reasoning to *protect* speech. In *Texas v. Johnson*, for example, the Court held that flag burning was a form of protected speech.[188] In reaching this conclusion, the Court noted that affording this protection would "reaffirm[] . . . the principles of freedom and inclusiveness that the flag best reflects."[189] It also reasoned that tolerating unsavory speech like flag burning would be a "sign *and source of* . . . the Nation's resilience."[190] In short, the Court protected flag burning both because the act of burning a flag communicates ideas (an Aristotelian effect) and because tolerating flag burning creates and reinforces important democratic values (constitutive effects).[191]

Similarly, in *Snyder v. Phelps*, the Court recognized that there are situations where offensive speech must be permitted because of its constitutive effects.[192] The Court acknowledged that the speech in *Snyder*—impassioned protests at a military funeral—had the potential to "inflict great pain."[193] But the Court identified value in that constitutive potential. Words, it noted, create sensations which in turn "stir people

184 *Id.* at 433. The ordinance criminalized the placing of "a symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender . . . ." *Id.* at 380.

185 *Id.* at 433 n.9.

186 *See* 567 U.S. 709, 739 (2012) (Alito, J., dissenting).

187 *Id.* at 743.

188 491 U.S. 397, 419–20 (1989).

189 *Id.* at 419.

190 *Id.* (emphasis added).

191 *See id.*

192 *See* 562 U.S. 443, 460 (2011) (discussing the power of speech outside of its content).

193 *Id.* at 461.

to action."[194] To protect *action*, then, we must also protect words—even offensive ones—because those words constitute opportunities for undertaking.

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The foregoing discussion has demonstrated that the Supreme Court is not always or exclusively an Aristotelian rhetorical actor. Though much of its writing serves functional, Aristotelian ends, the Court occasionally writes and reasons in ways that reflect constitutive considerations. And while these considerations rarely (if ever) carry the day (to our knowledge, the Court has never upheld or invalidated a law *solely* for its constitutive effects), they nonetheless shape the Court's reasoning in significant and unmistakable ways. Embracing the constitutive model—the proposal we recommend—would not, then, profoundly alter the Court's First Amendment jurisprudence. It would instead simply magnify the Court's pre-existing (though subtle) constitutive tendencies.

III
Constitutive Rhetoric as First Amendment Policy

As discussed above, the Supreme Court often invokes Aristotelian policy arguments to inform its First Amendment analyses. But this narrow focus on persuasive effects sometimes yields confusing, incoherent, or problematic results. For example, the Court has used Aristotelian policy arguments to conclude that hate speech is constitutionally protected, while other types of harmful speech (fighting words, incitement, true threats, etc.) are not.[195] This result is both perplexing and problematic: Though hate speech arguably has unique qualities that make it distinct from other types of "harmful" speech, it is not obvious that it should be more protected than incitement, fighting words, or threats. The Court has also used Aristotelian considerations to craft a fighting words doctrine that many scholars believe is now "moribund."[196] And lower courts have used Aristotelian logic to reach the odd result that nonconsensual pornography is both constitutionally protected *and* permissibly subject to restriction.[197]

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194 *Id.* at 460.

195 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 380–81 (1992) (holding that an ordinance banning cross-burning when "one knows or has reasonable grounds to know [it will] arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" is facially unconstitutional because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses").

196 *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L.Q. 531, 535 (1980).

197 *See, e.g.*, People v. Austin, 155 N.E.3d 439, 462 (Ill. 2019) (declining to find revenge porn categorically exempt from First Amendment protection).

In this Part, we illustrate the potential of the constitutive rhetorical approach by considering whether and how a constitutive rhetorical lens might clarify these three murky areas of First Amendment law (hate speech, fighting words, and nonconsensual pornography). We begin each Section by describing the Court's current approach to these specific First Amendment problems. We then use the constitutive rhetorical model to offer three "fixes"—ways the Supreme Court might clarify, revive, or enhance the existing law. Though our proposed constitutive "fixes" are not perfect, they might work in tandem with Aristotelian considerations to clarify the scope of the First Amendment's speech protections. They thus illustrate the potential of constitutive rhetorical theory to improve, enrich, and refine difficult areas of First Amendment law.

A. Hate Speech

1. The Current Doctrine

"Hate speech" is speech that attacks or debases a listener on the basis of race, ethnicity, religion, gender, or sexual orientation.[198] In the United States, this speech is constitutionally protected. Though the Supreme Court has exempted other types of harmful and dangerous speech from First Amendment protection (fighting words, incitement, threats, etc.), it has never recognized hate speech as a separate category of unprotected speech.[199] The Court has also treated bans on hate speech as content-based speech restrictions, which has made it especially difficult for state and local governments to restrict hate speech through legislation.[200]

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[198] 1 Rodney A. Smolla, Smolla & Nimmer on Freedom of Speech § 12.2 (Apr. 2024 update); *see also* Steven J. Heyman, *Introduction: Hate Speech and the Theory of Free Expression*, *in* Controversies in Constitutional Law ix, ix (Paul Finkelman ed., 1996) (defining hate speech as "expression that abuses or degrades others on account of their racial, ethnic, or religious identity"); Michael W. McConnell, *America's First "Hate Speech" Regulation*, 9 Const. Comm. 17, 17 (1992) (defining hate speech as "speech that is designed to degrade or injure other people on the basis of their race, ethnic origin, sex, sexual orientation or other sensitive characteristic").

[199] *See* Eugene Volokh, *No, There's No "Hate Speech" Exception to the First Amendment*, Wash. Post (May 7, 2015, 6:02 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment [https://perma.cc/8SC8-BC8Y].

[200] *See R.A.V.*, 505 U.S. at 377. *R.A.V.* involved a challenge to St. Paul, Minnesota's "Bias-Motivated Crime Ordinance," which prohibited the display of any "symbol, object, appellation, characterization or graffiti . . . which . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380 (quoting Saint Paul, Minn., Legis. Code § 292.02 (1990), https://library.municode.com/mn/st._paul/codes/code_of_ordinances?nodeId=PTIILECO_TITXXVIIIMIOF_CH292OFDIREBERAORGE_S292.02DICO [https://perma.cc/78DH-8SYF]). The Minnesota Supreme Court construed the ordinance to apply only to speech that otherwise qualified as fighting words. *Id.* at 391.

Although the Court has never formally exempted hate speech from First Amendment protection, it has occasionally signaled that it disapproves of speech that harms or offends on the basis of race, religion, sexual identity, or similar characteristics. In *Beauharnais v. Illinois*, for instance, the Supreme Court upheld a conviction under Illinois's "group libel" statute, which prohibited the distribution of literature or depictions "which . . . portray[] depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion . . . [and] expose[] [such] citizens to contempt, derision, or obloquy."[201] And in *Snyder v. Phelps*, the Court hinted that speech which inflicts emotional distress through extreme or outrageous means might be barred if it is not on a matter of public concern.[202] Ultimately, neither case did much to change America's legal landscape: *Beauharnais* is widely thought to no longer be good law,[203] and *Snyder* only hinted at—but did not officially recognize or define—an intentional infliction of emotional distress (IIED) exception. As an official matter, then, hate speech is and remains constitutionally protected.

The United States is unique in its protection of hate speech. Many European countries prohibit hateful language,[204] and the European

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Still, the Supreme Court invalidated the ordinance. Though the Court acknowledged that St. Paul could have regulated a specific subset of fighting words if it had singled that subset out for "the very reasons why the [broader] class of speech at issue . . . is proscribable," *id.* at 393, it also determined that St. Paul had singled out race-, gender-, and creed-based speech for reasons unrelated to the fighting words doctrine. *Id.* at 393–95 (explaining that "fighting words are categorically excluded from [First Amendment] protection [because] their content embodies a particularly intolerable . . . *mode* of expressing *whatever* idea the speaker wishes to convey," whereas the St. Paul ordinance prohibited bigoted speech *regardless* of how those ideas were conveyed). The Court thus held that the ordinance was impermissibly content- and viewpoint-based. *Id.* at 391, 395–96.

201 343 U.S. 250, 251 (1952).

202 562 U.S. 443 (2011). In *Snyder*, the Court considered whether the father of a fallen soldier could succeed on a state tort claim for IIED against members of the Westboro Baptist Church, who had protested near the soldier's funeral. *Id.* at 448–50. The Court ultimately held that the protesters could not be punished because their speech was on a matter of public concern. *Id.* at 451–56. But it left open the possibility that speech might be permissibly proscribed if the speaker "intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress" and was *not* on a matter of public concern. *Id.* at 451.

203 *See, e.g.*, Am. Booksellers Ass'n v. Hudnut III, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986) (noting the erosion of *Beauharnais*).

204 *See, e.g.*, Strafgesetzbuch [StGB] [Criminal Code], § 130, para. 1 (1960) (prohibiting any attack on the dignity of another person and later expanded to prohibit Holocaust denial); Public Order Act 1986, F65 18 (United Kingdom 1986) (criminalizing "abusive or insulting words" that are intended or likely to "stir up racial hatred"); Erik Bleich, *The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies*, 37 J. Ethnic & Migration Studs. 917, 920 (2011) (describing France's 1972 hate speech law which prohibited "provocation to hatred or violence based on ethnicity, nationality, race or religion"); U.S. Dep't of State, Bureau of Democracy, H. R., and Lab., The Netherlands 2022 Human Rights Report 9 (2022)

Union prohibits pictures and writings that incite "hatred directed against a group . . . defined by reference to race, colour, religion, descent, or national or ethnic origin."[205] Countries in Asia,[206] Oceania,[207] and North

(citing Wet van 18 februari 1971, Stb. 1971, 309 (amended 2006)) (describing the Netherlands's prohibition of "verbally or in writing . . . deliberately offend[ing] a group of persons because of their race, their religion or beliefs, their sexual orientation, or their physical, psychological, or mental disability"); Konstytucja Rzeczypospolitej Polskiej [Constitution] Apr. 2, 1997, art. 13 (Pol.) (prohibiting organizations that rely on totalitarian methods and practices associated with Nazism, fascism, and communism, as well as those that endorse racial or national hatred). For analysis and description of these laws and their history, *see* Ann Goldberg, *Minority Rights, Honor, and Hate Speech Law in Post-Holocaust West Germany*, 17 L. Culture & Humans 1 (2017) (describing the origins and development of German hate speech law); Bleich, *supra*, at 919 ("[t]here were few meaningful legal restrictions on racist expressions in pre-World War Two Europe," but by the early 1970s, all major European democracies had some form of hate speech restriction); Dan Glaun, *Germany's Laws on Hate Speech, Nazi Propaganda & Holocaust Denial: An Explainer*, PBS (July 1, 2021) https://www.pbs.org/wgbh/frontline/article/germanys-laws-antisemitic-hate-speech-nazi-propaganda-holocaust-denial [https://perma.cc/C5ZC-XHK8] (noting that Germany's hate speech laws are "rooted in its history and national identity," making Germany extra cautious of the threat posed by hate speech).

[205] Council Framework Decision 2008/913/JHA of Nov. 28, 2008, On Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008 O.J. (L 328) 55, 56; *see also Communication From the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime*, COM (2021) 777 final (Dec. 9, 2021).

[206] 本邦外出身者に対する不当な差別的言動の解消に向けた取組の推進に関する法律 [Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior Against Persons with Countries of Origin other than Japan], Act No. 68 of June 3, 2016, *translated in* https://www.japaneselawtranslation.go.jp/en/laws/view/4081 [https://perma.cc/35YU-4X5D]. The Act's preamble states, "[i]t is therefore declared that the unfair discriminatory speech and behavior is unacceptable, and this Act is established to promote efforts to eliminate the unfair discriminatory speech." *Id. See also* Tomohiro Osaki, *Diet Debates Hate-Speech Bill that Activists Call Narrow and Toothless*, Japan Times (Apr. 19, 2016), https://www.japantimes.co.jp/news/2016/04/19/national/politics-diplomacy/diet-debates-hate-speech-bill-activists-call-narrow-toothless [https://perma.cc/UD3E-NBW4] (discussing debate and criticism around Japan's hate-speech law). The Act does not, however, criminalize or provide punishments for hate speech. Instead, it operates as "a general statement that Japan has no tolerance for hate speech." Koji Higashikawa, *Japan's Hate Speech Laws: Translations of the Osaka City Ordinance and the National Act to Curb Hate Speech in Japan*, 19 Asian-Pacific L. & Pol'y J. 1, 4 (2017); *see also* Junko Kotani, *Proceed with Caution: Hate Speech Regulation in Japan*, 45 Hastings Const. L.Q. 603, 604 (2018) (explaining that "[t]he law narrowly defines hate speech and declares it inappropriate and impermissible, but it does not criminalize or illegalize such speech, nor does it have a built-in system through which the law can be enforced").

[207] *See Racial Discrimination Act* 1975 (Cth) s 18C (Austl.) (making it unlawful "to offend, insult, humiliate, or intimidate . . . because of the race, colour or national or ethnic origin" of a person or group). As of 2015, all but one Australian state have enacted their own prohibitions (both civil and criminal) on racist speech. Some states have also added prohibitions against hate speech based on gender, sexuality, religion, and HIV/AIDS status. *See* Katharine Gelber & Luke McNamara, *The Effects of Civil Hate Speech Laws: Lessons from Australia*, 49 L. & Soc'y Rev. 631, 634 (2015) (cataloging a chronology of Australian hate speech laws).

America have enacted laws that do the same.[208] Indeed, "the United States . . . is one of the few advanced nations that do not have a law that criminalizes racist hate speech targeting groups of people that are identifiable by race or ethnicity."[209]

Many scholars believe the United States is correct to protect hate speech.[210] Their arguments are often grounded in Aristotelian policy arguments. For example, some scholars contend that hate speech should be unregulated because "truth ultimately will triumph in an unrestricted marketplace."[211] Others suggest that hate speech regulations "contravene the necessary preconditions of the ideal of deliberative self-determination" and thereby undermine democratic self-governance.[212] And others argue that hate speech, though unpleasant, is *not* low-value speech, because it provides a "safety valve[] through which irascible tempers might legally blow off steam."[213] None of these scholars endorse the content of hate speech—they do not claim that it is pleasant, uplifting, or enlightening. But because they assess

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208 Canada prescribes criminal punishments for "everyone who, by communicating statements, . . . willfully promotes hatred against any identifiable group," Criminal Code, R.S.C. 1985, c C-46 319(2), (2.1) (Can.), or "willfully promotes antisemitism by condoning, denying or downplaying the Holocaust."

209 Kotani, *supra* note 206, at 604; *see also* Eric Heinze, *Even-Handedness and the Politics of Human Rights*, 21 HARV. HUM. RTS. J. 7, 43 (2008) (describing hate speech bans in other countries); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2347–48 (1989) (explaining that "the United States [is] alone among the major common-law jurisdictions in its complete tolerance of [hate] speech").

210 *See, e.g.*, Ronald Dworkin, *The Coming Battles Over Free Speech*, N.Y. REV. BOOKS, (1992) https://www.nybooks.com/articles/1992/06/11/the-coming-battles-over-free-speech [https://perma.cc/F6R3-4LST] (discussing arguments that defend First Amendment rights via Justice Brennan and the landmark *Sullivan* case); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 494 (supporting the nonregulation of racist expression); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 322 (1991) (same); NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 8–9 (2018) (arguing that governments should not be permitted to suppress speech because of a disturbing message); Marcus Schulzke, *The Social Benefits of Protecting Hate Speech and Exposing Sources of Prejudice*, 22 RES PUBLICA 225, 225 (2016) (reasoning that hate speech may expose people's harmful attitudes); David Goldberger, *Protecting Speech We Hate*, 32 LITIG. 40, 40 (2006).

211 Strossen, *supra* note 210, at 535.

212 Post, *supra* note 210, at 327 (responding to arguments in favor of hate speech restrictions and suggesting that most hate speech regulations undermine self-governance).

213 Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936); *see also* Beauharnais v. Illinois, 343 U.S. 250, 286–87 (1952) (Douglas, J., dissenting) ("Intemperate speech is a distinctive characteristic of man. Hot-heads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time.").

speech regulations through Aristotelian frames, they insist that society is best off when the government does not regulate hateful messages.[214]

For now, these Aristotelian policy justifications seem to have won the day: The Court has never created a hate speech exception, and it does not appear poised to do so anytime soon. But if the law on hate speech is settled, the academic conversation is anything but. Though the Court has clearly adopted a civil libertarian position with respect to hate speech, many scholars still insist that hate speech does not deserve constitutional protection.[215] And though they do not always say so explicitly, these scholars often use constitutive, not Aristotelian, considerations to advocate for hate speech restrictions.[216]

In the remainder of this Section, we draw on this existing work by arguing that a constitutive framework favors the creation of a hate speech exception. We also briefly explore what a constitutive rhetoric-inspired hate speech exception might look like in practice.

2. The Constitutive Fix: A Hate Speech Exception

For the sake of discussion, let's accept the Aristotelian arguments offered by Dworkin, Post, Strossen, and others.[217] Let's assume that open, unrestricted debate is necessary for democratic legitimacy, even if that debate occasionally includes hateful messages. Let's assume that hate speech is an essential, though noxious, part of the marketplace of ideas. And let's accept that hate speech might allow speakers to

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214 *See, e.g.*, Strossen, *supra* note 210, at 494 (arguing that "equality values may be promoted most effectively by not regulating certain hate speech and [held back] by regulating it").

215 *See, e.g.*, John C. Knechtle, *When to Regulate Hate Speech*, 110 Penn St. L. Rev. 539, 543 (2006) ("[A]t a minimum, hate speech that threatens unlawful harm or incites to violence may be proscribed."); Andrew Reid, *Does Regulating Speech Undermine Democratic Legitimacy? A Cautious 'No'*, 26 Res Publica 181, 181 (2020) ("[I]n some cases the harmful effects of hateful speech on the democratic process outweigh those of restriction."); Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 San Diego L. Rev. 817, 820 (2001) (stating that hate speech on the internet "should be prohibited"); Alexander Tsesis, *Regulating Intimidating Speech*, 41 Harv. J. on Legis. 389, 389 (2004) (refuting the argument that "the First Amendment does not allow hate speech regulation"); Scott J. Catlin, *A Proposal for Regulating Hate Speech in the United States: Balancing Rights under the International Covenant on Civil and Political Rights*, Note, 69 Notre Dame L. Rev. 771, 771 (1994) (seeking an "approach to regulating hate speech").

216 *See, e.g.*, Jeremy Waldron, The Harm in Hate Speech 33 (2012) (asserting that environments that allow hate speech are distorted and polluted); David W. Seitz & Amanda Berardi Tennant, *Constitutive Rhetoric in the Age of Neoliberalism*, *in* Rhetoric in Neoliberalism 109–10 (Kim Hong Nguyen ed., 2017) (using constitutive rhetoric to argue that hate speech laws are necessary to prevent harmful impacts on social environments); Matsuda, *supra* note 209, at 2324.

217 *See supra* notes 210–14 and accompanying text.

articulate their values, priorities, and identities.[218] If these, and only these, arguments are correct, it makes sense that hate speech should enjoy full constitutional protection. After all, we would not want to suppress a form of expression that, though ugly, serves important policy functions.

But these Aristotelian arguments only capture part of the picture. In addition to whatever Aristotelian functions it might serve, hate speech also has significant constitutive effects. And unlike its Aristotelian effects, these constitutive consequences are hard to justify. For example, hate speech may be an important part of the marketplace of ideas, but it also *creates* and *reinforces* a marketplace where certain lives are denigrated, devalued, and debased. It may enhance deliberation and contribute to democratic legitimacy, but it also constitutes a democratic culture that does not value or treat all lives equally. Hate speech might facilitate self-expression and personal autonomy, but in doing so, it jeopardizes the well-being of its victims by signaling that society does not care about their lives or their well-being. And if hate speech contributes to the search for truth, it also conveys the "truth" that certain humans—because of their race, religion, or gender—do not deserve dignity.

Jeremy Waldron, a vocal defender of hate speech restrictions, has warned against some of these constitutive consequences. According to Waldron, hate speech "disfigure[s] our social environment by [communicating] that . . . members of [certain social] group[s] are not worthy of equal citizenship."[219] It "create[s] a collective identity"[220] for both speakers and victims—the former as dominant and superior, the latter as lacking "basic dignity and social standing."[221] And it "produc[es]"—in a toxic, harmful way—"the very identity and character" of the society in which it circulates.[222] Though Waldron does not explicitly adopt the language of the constitutive rhetorical model, his concerns reflect constitutive considerations. Regardless of the ideas hate speech communicates, Waldron recognizes that hate speech creates a "social environment" where "lives [cannot] be led, . . . children [cannot] be brought up, [and] . . . hopes [cannot] be maintained."[223] Hate speech is thus problematic not because it offends, necessarily, but because it establishes and perpetuates an intolerable political and social climate.

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218 *See, e.g.*, WALDRON, *supra* note 216, at 161 (arguing that speech—including hate speech—is essential to self-autonomy and self-disclosure).

219 *Id.* at 33.

220 Seitz & Tennant, *supra* note 216, at 109.

221 WALDRON, *supra* note 216, at 93.

222 Maurice Charland, *Constitutive Rhetoric*, *in* OXFORD ENCYCLOPEDIA OF RHETORIC (2006).

223 WALDRON, *supra* note 216, at 33.

Mari Matsuda, another defender of hate speech restrictions, similarly emphasizes hate speech's pernicious constitutive effects. Contra scholars who claim that hate speech yields positive Aristotelian results,[224] Matsuda argues that hate speech has negative persuasive consequences: It leads victims to "quit jobs, forgo education, leave their homes, avoid certain public places," and so on.[225] But Matsuda also argues that hate speech has dangerous constitutive effects, because it defines victims' identities and social statuses in unequal and intolerable ways. Hate speech "plant[s racial inferiority] in our minds as an idea that may hold some truth . . . no matter how much both victims and well-meaning dominant-group members resist it."[226] It "distances . . . dominant-group members from the victims, making it harder to achieve a sense of common humanity."[227] And though the ideas hate speech communicates might be "improbable and abhorrent," they "*interfer[e] with our perception* and interaction" with others in society "because [they are] presented repeatedly."[228] In short, Matsuda recognizes that hate speech—like all speech—has constitutive effects and is "productive of the very categories by which the world, and indeed the self, are understood."[229] Specifically, it produces a world of separation and distrust, a society where certain "selves" are disparaged, denigrated, and devalued. For Matsuda, these unacceptable constitutive effects outweigh any possible "truth value" of hate speech.[230] Because of this, Matsuda advocates for regulation of hate speech messages.[231]

Some foreign hate speech laws are similarly grounded in constitutive concerns. In the United Kingdom, for example, speakers may not use "abusive or insulting words" that are intended or likely to "stir up racial hatred."[232] The prohibition is not linked to any conduct or action—it does not target speech that is deliberately offensive or that is likely to persuade people to commit bad actions (breach the peace,

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224 *See supra* notes 210–14 and accompanying text.

225 Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story 24 (1993).

226 *Id.* at 25.

227 *Id.*

228 *Id.* at 25–26 (emphasis added).

229 Charland, *supra* note 97.

230 In Matsuda's words, "If the harm of racist hate messages is significant, and the truth value marginal, the doctrinal space for regulation of such speech becomes a possibility." Matsuda, *supra* note 225, at 26.

231 *See id.* For another defense of hate speech restrictions that is rooted in constitutive concerns, see Chris Bousquet, *Words that Harm: Defending the Dignity Approach to Hate Speech Regulation*, 35 Canadian J.L. & Juris. 31 (2022) (arguing that "hate speakers possess a kind of authority that confers upon their utterances significant influence over targets' dignity").

232 Public Order Act of 1986, c. 64 § 18 (UK 1986).

commit genocide, etc.). Instead, it targets hate speech's power to create and reinforce hateful feelings and worldviews. In Germany, the Criminal Code similarly prohibits any speech that "incites hatred" or "assaults the human dignity of others" on the basis of race, ethnicity, or religion. This wording reflects a concern for hate speech's constitutive effects: It prohibits hate speech not because of its communicative potential, but because of its constitutive power to create (hatred, animosity, etc.) and destroy (dignity, mutual respect, etc.). These examples illustrate how the constitutive framework often leads political societies to punish hate speech—not because of its persuasive effects, but because of the culture, values, and relationships it creates.

In short, the constitutive rhetorical approach provides strong support for the notion that hate speech should be regulated and/or punished. But what might this look like in the United States? As explained above, the United States Supreme Court has never treated hate speech as a category of unprotected speech. It has also been extremely reluctant to create new exceptions to First Amendment protection,[233] insisting that it will only recognize new categories of unprotected speech where there is "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[234] A constitutive lens might make American courts more friendly toward hate speech restrictions. But it would not change decades of First Amendment precedent which make it difficult—if not impossible—to change or regulate protected speech categories.

One way—though perhaps the most far-fetched—to address the constitutive implications of hate speech would be to identify a "tradition of proscription" for hate speech in America.[235] In both *United States v.*

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233 *See, e.g.*, United States v. Stevens, 559 U.S. 460, 472 (2010) (refusing to create a new First Amendment exception for depictions of animal cruelty); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (declining to recognize a new exception for violent video games sold to minors).

234 *Brown*, 564 U.S. at 792. In an earlier case, *United States v. Stevens*, the government urged the Court to recognize a categorical exception to First Amendment protection for depictions of animal cruelty, arguing that all new "claim[s] of categorical exclusion should be considered under a simple balancing test . . . balancing the value of the speech against its societal costs." 559 U.S. at 470. The Court rejected the government's balancing test as "startling and dangerous." *Id.* It also declined to recognize the government's proposed exception because, though "the prohibition of animal cruelty itself has a long history in American law . . . [there is no] similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment." *Id.* at 469. In *Brown*, the Court likewise refused to recognize an exception for violent video games sold to minors, because it found no tradition of restrictions on violent speech to minors. *Brown*, 564 U.S. at 795 (noting that "California's argument [for the proposed exception] would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence").

235 *Brown*, 564 U.S. at 792.

Stevens and *Brown v. Entertainment Merchants Association*, the Court refused to recognize new categories of unprotected speech (depictions of animal cruelty and violent video games sold to minors, respectively) because it found no "American tradition" of regulating those types of expression.[236] But the Court also acknowledged that "[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[237] If legal researchers could demonstrate that hate speech is one such category, a new exception might be in order. The task would be daunting: America is, after all, one of the only developed countries that has no known history of general hate speech laws.[238] But if America has *any* history of prohibitions on speech that attacks or debases on the basis of race, religion, or gender,[239] that history might support the creation of a more general hate speech exception.

A second, more feasible, way to address the constitutive effects of hate speech would be to redefine the scope of an *existing* First Amendment exception to include hate speech. Though the Supreme Court has been reluctant to recognize new exceptions to First Amendment protection, it has occasionally allowed legislatures to broaden the boundaries of existing unprotected categories. For example, in *Ginsberg v. New York*, the Court upheld a New York law that prohibited selling "to a minor . . . any picture which depicts nudity and which is harmful to minors" or "any magazine which contains such pictures and which, taken as a whole, is harmful to minors."[240] Though the statute prohibited material that technically did not qualify as unprotected obscenity (the forbidden materials—depictions of nudity harmful to minors—were "not obscene for adults" under the then-governing *Roth* standard),[241] the Court upheld the law because it "simply *adjust[ed]* the definition of obscenity to social realities."[242] In *Brown*, by contrast, the Court struck down a California law prohibiting the sale of violent video games to minors because the statute did not "adjust the boundaries of an existing category of unprotected speech" but instead "wishe[d] to create a wholly new category of content-based regulation."[243]

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236 *See supra* note 234 and accompanying text.

237 *Stevens*, 559 U.S. at 407; *Brown*, 564 U.S. at 792.

238 *See supra* Section III.A.1.

239 At the time of this writing, we were unable to identify any laws that might establish the history of proscription necessary to establish a new category of unprotected speech.

240 Ginsberg v. New York, 390 U.S. 629, 633 (1968) (alterations in original).

241 *Id.* at 634–35. The *Ginsberg* Court applied *Roth*, which was later replaced by the *Miller* standard. *See* Miller v. California, 413 U.S. 15, 39 (1973) (announcing the contemporary rule for obscenity).

242 *Ginsberg*, 390 U.S. at 638 (emphasis added).

243 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794 (2011).

Constitutive courts might adopt this framework to address hate speech. Rather than recognize an entirely new exception, they could redefine the boundaries of an existing exception to include speech that offends or debases on the basis of gender, race, or similar characteristics. For example, courts could redefine the existing fighting words exception[244] to reflect the "social realit[y]"[245] that today, much of the speech that qualifies as constitutionally unprotected fighting words is speech that attacks a listener's race, gender, or religion. We discuss this possibility in greater detail in the next Section.[246] Courts could also adjust the definition of IIED—an exception hinted at, though not formally recognized, in *Snyder v. Phelps*—to reflect the fact that racist and sexist speech is often the language that is *most* "extreme," "outrageous," and likely to result in "severe emotional distress."[247] Modifications like these would be consistent with *Ginsberg*'s rule that legislatures can make—and courts can approve—"adjust[ments] [to] the definition of [existing First Amendment exceptions]" to reflect new "social realities."[248] They might thus allow courts to uphold hate speech restrictions without taking on the formidable (and perhaps impossible) task of recognizing a new hate speech exception.

Finally, American courts could continue treating hate speech as protected but hold that hate speech restrictions satisfy strict scrutiny. Under existing First Amendment law, restrictions on protected speech are unconstitutional unless they are narrowly tailored to promote a compelling governmental interest.[249] In theory, courts could hold that hate speech restrictions satisfy this exacting standard. Though the Supreme Court has held that shielding listeners from offense is not a compelling governmental interest,[250] it has recognized a compelling

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244 Fighting words is a category of unprotected speech that includes "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

245 *Ginsberg*, 390 U.S. at 638.

246 *See infra* Section III.B.

247 Snyder v. Phelps, 562 U.S. 443, 451 (2011). For a discussion of the *Snyder* holding, see *supra* note 202 and accompanying text.

248 *Ginsberg*, 390 U.S. at 638.

249 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (noting that "because the [challenged] Act imposes a restriction on the content of protected speech, it is invalid unless [the state] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling governmental interest and is narrowly drawn to serve that interest").

250 *See, e.g.*, Cohen v. California, 403 U.S. 15, 24–25 (1971) (holding that the First Amendment protects "even offensive utterance" and identifying no compelling interest that would permit the state to punish a man who wore the words "Fuck the Draft" into a courthouse); Texas v. Johnson, 491 U.S. 397, 397–98 (1989) ("Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace.").

interest in preserving "the right [of members of groups that have historically been subjected to discrimination] to live in peace."[251] Hate speech restrictions arguably advance that interest. Courts might also find that hate speech regulations satisfy strict scrutiny's narrow tailoring requirement. The Supreme Court has acknowledged that "words are often chosen as much for their emotive as their cognitive force," and it has said that it "cannot sanction the view that the Constitution . . . has little or no regard for that emotive function."[252] If this is true, then a law prohibiting hate speech might in fact be necessary to root out the unique constitutive and emotive harms that hate speech inflicts. Though the Court has not yet invoked this rationale to uphold a speech restriction,[253] it could, conceivably, use similar logic to conclude that hate speech restrictions are the least restrictive means—perhaps even the *only* means—to prevent the constitutive harms of hateful expression.

These solutions are not perfect. To create a hate speech exception, courts or legislatures would first have to uncover a yet-unidentified history of hate speech proscription. To redefine an existing exception, they would need to determine just how far legislatures should be allowed to "adjust" under *Ginsberg*—a task for which existing case law provides very little guidance. And to uphold a hate speech restriction under strict scrutiny, they would have to somehow distinguish *R.A.V. v. City of St. Paul*, which held that a statute prohibiting symbols, appellations, and characterizations that "arouse[] anger, alarm, or resentment . . . on the basis of race, color, creed, religion, or gender" was not narrowly tailored to the government's compelling interest.[254] But if American courts want to take seriously the idea that language—especially hateful language—functions constitutively, they ought to explore these options.

B. Fighting Words

1. The Current Doctrine

The fighting words doctrine is a well-established exception to First Amendment protection. It covers speech that "tend[s] to incite an immediate breach of the peace" by provoking a fight.[255] To fall within the fighting words exception, words must be a "personally abusive epithet[] which, when addressed to the ordinary citizen, [is], as a matter

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251 R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

252 *Cohen*, 403 U.S. at 26.

253 In *Cohen*, the Court referenced the emotive effect of language to *overturn* a speaker's punishment. *See id.*

254 *R.A.V.*, 505 U.S. at 396 (noting that "an ordinance not limited to the favored topics . . . would have precisely the same beneficial effect").

255 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

of common knowledge, inherently likely to provoke violent reaction."[256] Fighting words must also be "directed to the person of the hearer" and must be likely to be interpreted as a "direct personal insult."[257]

The fighting words doctrine is explicitly and exclusively animated by Aristotelian rhetorical concerns.[258] Indeed, the very definition of fighting words focuses narrowly on persuasive effects: It prohibits words that are likely to incite, through persuasive effect, a breach of the peace or violent reaction. The Supreme Court also invoked Aristotelian policy considerations in the core cases that established and refined the fighting words doctrine. In *Chaplinsky v. New Hampshire*,[259] for example, the Court upheld the conviction of a man who had called a city official a "God damned racketeer" and a "damned Fascist,"[260] reasoning that the man's speech was "no essential part of any exposition of ideas" (marketplace theory), was "of . . . slight social value as a step to truth" (search for truth), and that "any benefit that may be derived from [it was] clearly outweighed by the social interest in order and morality" (low-value speech).[261] The Court also observed that the phrases "God damned racketeer" and "damned Fascist" were especially "likely to provoke the average person to retaliation"[262] or to persuade individuals to "cause a breach of the peace."[263] These Aristotelian concerns led the Court to uphold the man's conviction: Because words like "God damned racketeer" had no positive Aristotelian effects, they could be punished without "rais[ing] any Constitutional problem."[264]

The Court similarly relied on Aristotelian reasoning in *Cohen v. California*.[265] In that case, a man was arrested for wearing a jacket that said "Fuck the Draft" into a courthouse.[266] The Supreme Court reversed the man's conviction, finding that the fighting words exception did not apply. The Court noted that the man's jacket was not "directed at the person of the hearer"[267] and was therefore unlikely to "provoke a

256 Cohen v. California, 403 U.S. 15, 20 (1971).

257 *Id.*

258 *See* Gard, *supra* note 196, at 534 ("Subsequent Supreme Court cases demonstrate that . . . the sole justification for the prohibition of fighting words is their perceived propensity to *cause* [i.e. persuade someone to engage in] responsive violence") (emphasis added).

259 *Chaplinsky*, 403 U.S. at 20.

260 *Id.* at 569, 574.

261 *Id.* at 572.

262 In fact, the Court determined that Chaplinsky's epithets were *so* offensive that it found it "unnecessary" to address any argument to the contrary. *Id.* at 574.

263 *Id.* at 573.

264 *Id.* at 572.

265 Cohen v. California, 403 U.S. 15 (1971).

266 *Id.* at 16.

267 *Id.* at 20.

given group to hostile reaction."[268] The jacket also could not reasonably be interpreted as "a direct personal insult"[269] and therefore did not "violently arouse[]" any onlookers.[270] In short, the jacket lacked the dangerous Aristotelian effects that were present in *Chaplinsky*: It did not communicate a message that was likely to persuade individuals to respond violently. Because of this, the jacket was not unprotected fighting words.

Since *Chaplinsky* and *Cohen*, the Court has consistently justified the fighting words doctrine using Aristotelian logic.[271] But the Supreme Court has not relied on fighting words as a basis for a conviction since it first announced the doctrine in 1942.[272] This dearth of cases has led many

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268 *Id.*

269 *Id.*

270 *Id.*

271 *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (finding constitutional the restriction of fighting words because there are other, more tolerable ways to express emotionally charged messages—i.e., without interference to the marketplace of ideas).

272 *See* Gard, *supra* note 196, at 534 ("In the almost forty years since *Chaplinsky* was decided, the Court has not upheld a single conviction for fighting words."); *see also* Texas v. Johnson, 491 U.S. 397, 409 (1989) (finding that flag burning, however offensive to some, was a "generalized expression of dissatisfaction with the policies of the Federal Government," and not a "direct personal insult or an invitation to exchange fisticuffs," as fighting words doctrine requires); Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940) (holding that a Jehovah's Witness who played a phonograph sharply attacking Catholicism to people he encountered in the street did not breach the peace); Terminiello v. Chicago, 337 U.S. 1, 3, 5 (1949) (quoting the trial court and holding unconstitutional a jury instruction that defined a "breach of the peace" as any "misbehavior which violates the public peace and decorum" and "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."); Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 124, 137 (1992) (declaring an "ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order" unconstitutional); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (overturning the convictions of Black students who protested against racial discrimination because peaceful expression of unpopular views does not constitute fighting words, even if such expression leads to counterprotests); *Cohen*, 403 U.S. at 21–23 (holding that donning a shirt with the words "Fuck the Draft" in a courthouse corridor did not constitute fighting words in part because the words were not directed at anyone and people could have averted their eyes if they were offended). Though the United States Supreme Court has not invoked the fighting words doctrine for many years, lower courts continue to rely on the doctrine as articulated in *Chaplinsky*. Occasionally, appellate courts identify speech that qualifies as constitutionally unprotected fighting words. *See, e.g.*, State v. Liebenguth, 250 A.3d 1, 22 (Conn. 2020) (finding that a racial epithet used to demean and anger a police officer amounted to constitutionally unprotected fighting words). But more often, lower courts, similar to the Supreme Court, conclude that speech falls short of the *Chaplinsky*/*Cohen* standard. *See, e.g.*, Purtell v. Mason, 527 F.3d 615, 625–26 (7th Cir. 2008) (holding that a family engaged in a neighborhood feud did not engage in fighting words when it displayed decorative tombstones describing its neighbors' deaths); United States v. Poocha, 259 F.3d 1077, 1082 (9th Cir. 2001) (holding that yelling "fuck you" at a police officer did not qualify as fighting words); Woods v. Eubanks, 25 F.4th 414, 425 (6th Cir. 2022) (holding that profanities like "fucking flyboy" directed at police officers were not fighting words);

scholars to argue that the fighting words doctrine is "moribund"[273] and that, though *Chaplinsky* remains good law, "a majority of the United States Supreme Court has gradually concluded that fighting words . . . are a protected form of speech . . . ."[274] A few Supreme Court justices have suggested the same: As early as 1972, for example, Justice Blackmun and Chief Justice Burger lamented that "the [Supreme] Court, despite its protestations to the contrary, is merely paying lip service to [the fighting words doctrine articulated in] *Chaplinsky*."[275] More recently, many scholars have proposed revisions to the doctrine that might make fighting words a more meaningful First Amendment exception.[276] But despite these efforts and critiques, the fighting words doctrine remains the same as it has been since *Chaplinsky* and *Cohen*: Unless speech is likely to have the persuasive, Aristotelian effect of provoking a violent reaction, it does not qualify as unprotected fighting words.

2. The Constitutive Fix: A Revitalized Fighting Words Doctrine

If the current fighting words doctrine is "moribund,"[277] that may be because the exception is too narrowly focused on Aristotelian effects. In contemporary America, many (if not most) insulting epithets are exchanged virtually, not face-to-face. This decreases the likelihood that any given insult will "incite an immediate breach of the peace" by provoking a fight, as *Chaplinsky* requires.[278] In addition, most individuals

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Cannon v. City and County of Denver, 998 F.2d 867, 873–74 (10th Cir. 1993) (holding that signs reading "the killing place" carried outside an abortion clinic did not qualify as fighting words); Buffkins v. City of Omaha, 922 F.2d 465, 472 (8th Cir. 1990) (holding that calling a police officer an "asshole" did not qualify as fighting words). *But see* State v. Robinson, 82 P.3d 27, 31 (Mont. 2003) (holding that the words "fucking pig" and "fuck off asshole" directed at a police officer qualified as fighting words).

273 Gard, *supra* note 196, at 535.

274 Thomas F. Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 Ky. L.J. 1, 1–2 (1975); *see also* Burton Caine, *The Trouble with Fighting Words:* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 Marq. L. Rev. 441, 444 (2004) (arguing that the doctrine is "plagued with vague language"); Gard, *supra* note 196, at 533 (arguing that the doctrine includes "unnecessary dicta that has served to bedevil [F]irst [A]mendment jurisprudence").

275 Gooding v. Wilson, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting).

276 *See, e.g.*, Michael J. Mannheimer, *Fighting Words Doctrine*, 93 Colum. L. Rev. 1527, 1527–28 (1993) (discussing multiple interpretations of the constitutional effects of *Chaplinsky*'s version of fighting words); Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. Chi. L. Rev. 385, 387 (2005) (proposing a situation-based requirement for determining whether speech constitutes unprotected fighting words).

277 Gard, *supra* note 196, at 535.

278 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See, e.g.*, Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 745 (9th Cir. 2021) (holding that hiring protesters, organizing leafletting, hiring a van to drive around with a message on its side, and publishing emails online to "openly and vigorously [] mak[e] the public aware" of one's views does not constitute a

today do not interpret offensive language as "an invitation to exchange fisticuffs."[279] Though American society is by no means peaceful, "norms of nonviolence are [so] entrenched" that most people "don't have to fear being harassed or assaulted in response" to their speech.[280] And when listeners *do* respond violently, they often do so through verbal, rather than physical, aggression. It is little wonder, then, that few contemporary utterances qualify as unprotected fighting words: As the Connecticut Supreme Court recently observed, "due to changing social norms, public discourse has become coarser . . . such that today, there are fewer combinations of words and circumstances that are likely to fit within the fighting words exception."[281] Put differently, most of the offensive speech exchanged in today's marketplace of ideas does not (and perhaps cannot, because of its virtual form and contemporary cultural norms) have the persuasive, Aristotelian effect of provoking a violent response.

Courts could address this dilemma by abolishing the fighting words doctrine altogether. Indeed, many scholars have urged just that.[282] But because courts may be reluctant to abandon such a well-known exception, they could instead breathe new life into the fighting words doctrine using the constitutive rhetorical approach.

One way courts might revitalize the fighting words doctrine is by refashioning the rule to more explicitly address constitutive concerns. As currently construed, the fighting words doctrine applies only to words that are likely to have violent persuasive effects. Indeed, as Professor Gard has noted, "the sole justification for the prohibition of fighting words" seems to be "their perceived propensity to *cause* [i.e., persuade

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true threat under the First Amendment in part because "[i]n general, emails and tweets, when published on the 'vast democratic forums of the Internet,' fall squarely within the protection of the First Amendment.") (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) and Packingham v. North Carolina, 582 U.S. 98, 104 (2017) (internal citation omitted)); C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270, 1277 (10th Cir. 2022) (holding that a school violated a student's First Amendment rights when it expelled him for making an offensive and anti-Semitic post on social media in part because the "speech would generally receive First Amendment protection because it does not constitute a true threat, fighting words, or obscenity").

279 Texas v. Johnson, 491 U.S. 397, 409 (1989).

280 Stephen Pinker, The Better Angels of Our Nature 128 (2011).

281 State v. Liebenguth, 250 A.3d 1, 12 (Conn. 2020) (quoting State v. Parnoff, 186 A.3d 640, 657 (2018) (Eveleigh, J., concurring in part and dissenting in part) (internal citation omitted)).

282 *See* Gard, *supra* note 196, at 531 (advocating for "abandonment of the [fighting words] doctrine and recognition of fighting words as expression deserving of first amendment protection"); Caine, *supra* note 274, at 445 ("In short, the fighting words doctrine was ill-conceived, is in disarray, and poses a potent danger to speech that should command premier protection. Accordingly, *Chaplinsky* should be overruled, and 'fighting words' returned to the protection of the First Amendment . . . .").

someone to engage in] responsive violence."[283] But *Chaplinsky* does not necessarily require such a narrow Aristotelian focus. Though the *Chaplinsky* Court's analysis drew heavily on Aristotelian considerations, the Court defined fighting words more broadly as "those which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace."[284] The second part of this definition ("tend to incite an immediate breach of the peace") emphasizes the Aristotelian effects of fighting words—namely, their tendency to persuade people to violence. But the first part ("by their very utterance inflict injury") suggests that fighting words cause injury the very moment they are spoken, and that they might have harmful effects independent of and prior to persuasion. This first, constitutive formulation has been largely overlooked in subsequent caselaw. Indeed, some scholars have called it "unnecessary dicta that . . . bedevil[s] [F]irst [A]mendment jurisprudence."[285] But the *Chaplinsky* opinion undeniably defines fighting words in a way that incorporates *both* Aristotelian and constitutive concerns.

There are good reasons to take *Chaplinsky*'s complete definition of fighting words seriously. The full definition—which references both Aristotelian and constitutive considerations—is in fact the *only* formal definition of fighting words that *Chaplinsky* provided. And though the *Chaplinsky* Court did not invoke the constitutive half of its definition in its analysis (it only considered whether Chaplinsky's language was likely to provoke a breach of the peace), it also never indicated that fighting words should always be assessed through an Aristotelian lens. Many of the Court's subsequent fighting words decisions either cite the full *Chaplinsky* definition or provide no definition at all,[286] and in other

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283 Gard, *supra* note 196, at 534.

284 Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

285 Gard, *supra* note 196, at 533.

286 Since *Chaplinsky*, the Supreme Court has addressed the merits of thirteen fighting words cases. In six, the Court did not cite any part of *Chaplinsky*'s definition but concluded that defendants' speech did not qualify as fighting words. *See* Edwards v. South Carolina, 372 U.S. 229, 236 (1963) (holding, without any analysis, that "the record is barren of any evidence of fighting words" (internal citations omitted)); Cox v. Lousiana, 379 U.S. 536, 551 (1965) (holding, without any discussion, that the record did not present "any evidence here of 'fighting words'" (citations omitted)); Norwell v. City of Cincinnati, 414 U.S. 14, 16 (1973) (holding, without analysis, that "it is clear that there was no abusive language or fighting words"); Hess v. Indiana, 414 U.S. 105, 107–08 (1973) (holding that the defendant's speech did not qualify as fighting words because it was not "directed to any person or group in particular" and, although offended, the hearer "stated he did not interpret the expression as being directed personally at him, and the evidence is clear that the appellant had his back to the sheriff at the time"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (holding, without analysis, that the challenged speech "contains none of the indicia of . . . 'fighting' words, which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (internal citation omitted)); Mahanoy Area Sch. Dist. v.

contexts—when listing examples of unprotected speech, for example—the Court continues to cite both parts of the *Chaplinsky* definition.[287] Further, the Court's complete definition—"those [words] which by their very utterance inflict injury *or* tend to incite an immediate breach of the peace"—is disjunctive, not conjunctive. The *Chaplinsky* Court's failure to apply the constitutive part of its definition is not, then, necessarily proof that its constitutive concerns were "unnecessary dicta."[288] Rather, its focus on the Aristotelian aspects of the definition shows that the Court knew how to apply a disjunctive rule: If Chaplinsky's words easily satisfied the Aristotelian component, the Court did not need to consider or analyze the constitutive alternative.

In short, *Chaplinsky* itself lays the foundation for a constitutively-informed fighting words doctrine. Because of this, courts could faithfully use the *Chaplinsky* precedent to broaden the exception's narrow, Aristotelian-focused scope. Courts could, for example, allow punishment of language that might persuade people to fight *and* of language that constitutes a culture of violence. They could also punish words that celebrate or praise violence, even if those words are not likely to provoke a violent reaction. Expanding the scope of the fighting

B.L., 594 U.S. 180, 191 (2021) (holding, without analysis, that the defendant's speech "did not amount to fighting words"). In four cases, the Court applied only the "breach of peace" half of the *Chaplinsky* definition. *See* Street v. New York, 394 U.S. 576, 592 (1969) ("[W]e cannot say that appellant's remarks were so inherently inflammatory as to come within that small class of 'fighting words' which are likely to provoke the average person to retaliation, and thereby cause a breach of the peace . . . ." (internal citation omitted)); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) ("Clearly the [challenged speech] was not within that small class of 'fighting words' that, under *Chaplinsky* . . . are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace . . . .'" (citation omitted)); Cohen v. California, 403 U.S. 15, 20 (1971) (holding that an expletive word on a person's jacket was not an example of "so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"); Texas v. Johnson, 491 U.S. 397, 409 (1989) ("Nor does Johnson's expressive conduct fall within that small class of 'fighting words' that are likely to provoke the average person to retaliation . . . ."). Finally, in three cases, the Court held that the challenged ordinance was either overbroad or vague when compared to the full *Chaplinsky* definition but did not assess the specific defendants' speech. *See* Gooding v. Wilson, 405 U.S. 518, 524–25 (1972) (holding that the challenged statute is unconstitutionally vague and overbroad when compared to the full *Chaplinsky* definition); Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (same); City of Houston v. Hill, 482 U.S. 451, 451–52 (1987) (same); *see also* Rosenfeld v. New Jersey, 408 U.S. 901, 901, 906–07 (1972) (vacating and remanding for reconsideration in light of *Gooding*); Karlan v. City of Cincinnati, 416 U.S. 924, 924, 928 (1974) (remanding for reconsideration in light of *Gooding* and *Lewis*); Lucas v. Arkansas, 416 U.S. 919, 919 (1974) (remanding for reconsideration in light of *Lewis*).

287 *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988) (listing "fighting words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace"—as proof that "not all speech is of equal First Amendment importance" (internal citations omitted)).

288 Gard, *supra* note 196, at 533.

words doctrine to reflect these constitutive considerations would be consistent with the constitutive language in *Chaplinsky*'s full, original definition.

Courts might also cite the full *Chaplinsky* definition to allow punishment of hate speech, a possibility we discussed in the previous section.[289] Some courts have done this already. In *Gilles v. Davis*, for example, the Third Circuit found that a speaker used unprotected fighting words when he said, "Do you lay down with dogs?" and "Are you a bestiality lover?" to a lesbian woman.[290] And in *State v. Liebenguth*, the Connecticut Supreme Court held that a man used fighting words when he directed several racial slurs at a parking attendant.[291] These and similar epithets are quintessential examples of hate speech: They denigrate on the basis of race, religion, gender, or comparable characteristics. But because hate speech is constitutionally protected, these courts classified and punished this speech as proscribable fighting words instead. This phenomenon suggests that some courts might view the fighting words doctrine as an "unofficial" hate speech exception—a roundabout way to proscribe otherwise-protected hate speech.[292]

Interestingly, but perhaps unsurprisingly, the courts that treat hate speech as fighting words often justify their conclusions using constitutive rhetorical principles. In *In re Spivey*, for example, the Supreme Court of North Carolina cited the entire *Chaplinsky* definition—including its reference to words "which by their very utterance inflict injury"—to conclude that the N-word "clearly falls within the category of [fighting words]."[293] And in *Liebenguth*, the Connecticut Supreme Court endorsed Richard Delgado's constitutive concern that racial epithets "injure[] the dignity and self-regard of the person to whom [they are] addressed, communicating the message that distinctions of race are distinctions

289 *See supra* Section III.B.2.

290 427 F.3d 197, 205 (3d Cir. 2005).

291 250 A.3d 1, 22 (Conn. 2020). Many other state courts have likewise found that racial epithets qualify as fighting words. *See In re* John M., 36 P.3d 772, 776 (Ariz. Ct. App. 2001) (finding fighting words where a passenger in a car yelled "fuck you, you god damn n— —" at an African-American woman); Bailey v. State, 972 S.W.2d 239, 245 (Ark. 1998) (finding that the words "fuck you, n— —, and fuck you, too" directed at two police officers qualified as fighting words); *In re* Spivey, 480 S.E.2d 693, 699 (N.C. 1997) ("No fact is more generally known than that a white man who calls a black man [the N-word] within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate.").

292 Courts often use constitutive considerations to justify their application of the fighting words doctrine to hate speech. In *Bailey v. State*, the Arkansas Supreme Court also cited the entire *Chaplinsky* rule to conclude that directing expletives—including the N-word—at two police officers constituted fighting words. *Bailey*, 972 S.W.2d at 245.

293 480 S.E.2d at 698.

of merit, dignity, status, and personhood."[294] These examples suggest that the fighting words doctrine might be a useful vehicle for judges and courts that are concerned about the constitutive effects of hate speech.[295]

Courts could continue shoehorning these constitutive concerns into the traditional fighting words framework and analysis—they could apply the *Chaplinsky* rule (either partial or complete) to classify hate speech as fighting words. But they could also redefine the fighting words doctrine so that it clearly and explicitly encompasses hate speech.[296] As mentioned above, *Ginsberg v. New York* held that legislatures may "adjust[] the definition of [constitutionally unprotected obscenity] to social realities."[297] And in contemporary America, the "social reality" is that, though few people respond to speech with violence,[298] all recognize that hate speech like the N-word is among "the most hateful and inflammatory [language] in the contemporary American lexicon."[299] Adjusting the traditional fighting words doctrine to explicitly encompass

294 *Liebenguth*, 250 A.3d at 22 (quoting Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 Harv. C.R. C.L. L. Rev. 133, 135–136 (1982)).

295 These examples also provide additional support for our claim that the complete *Chaplinsky* rule has constitutive dimensions: There are, in fact, courts that apply the full *Chaplinsky* definition in fighting words cases, and those courts do not seem to perceive doctrinal tension between their constitutive analyses and the many precedent cases that take a narrower, Aristotelian approach.

296 Courts might, for example, allow punishment both of speech that provokes a violent response and of speech that provokes "a reflexive visceral response." State v. Liebenguth, 186 A.3d 39, 57 (Conn. App. Ct. 2018) (Devlin, J., concurring in part and dissenting in part). This formulation would still be Aristotelian—focused on persuasive, rather than creative, effect—but it would almost certainly encompass hate speech. Courts could also make the fighting words doctrine more explicitly constitutive by holding that it applies to speech that denigrates, degrades, or disparages a person's identity. Because this approach would single out a particular subset of fighting words—namely, fighting words that disparage on the basis of identity—it would have to satisfy the Supreme Court's rules for content-based discrimination within an exception. But if fighting words do, in fact, include words that "by their very utterance inflict injury," and if words like the N-word are among "the most hateful and inflammatory [language] in the contemporary American lexicon," State v. Liebenguth, 250 A.3d 1, 14 (Conn. 2020), the Court could easily find that extending fighting words to hate speech is "content-based discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable." R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992). *But see id.* at 393 (holding that an ordinance singling out hate speech was *not* "content-based discrimination . . . based on the very reasons why the particular class of speech at issue . . . is proscribable").

297 390 U.S. 629, 638 (1968) (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966)).

298 *See* State v. Tracy, 130 A.3d 196, 209 (Vt. 2015) ("[I]n this day and age, the notion that *any* set of words is so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic.").

299 *Liebenguth*, 250 A.3d at 704.

hate speech might allow courts to more effectively respond to these new social realities.

The fighting words doctrine may be "a hopeless anachronism that mimics the macho code of barroom brawls."[300] But if courts care to preserve it, a constitutive rhetorical approach might help. Though the current fighting words doctrine mostly reflects persuasive, Aristotelian concerns, the original fighting rules definition articulated in *Chaplinsky* has an undeniable constitutive dimension. Acknowledging that constitutive component might help courts apply the fighting words doctrine in ways that better reflect and respond to today's (relatively) nonviolent cultural norms. A constitutive approach might also help courts more effectively restrict hate speech—something that many judges have attempted to do through roundabout applications of the traditional, Aristotelian fighting words doctrine. Neither of these possibilities will appeal to free-speech absolutists, because both open the door to more speech regulation. But for those who want the law to be clean and clear, who want First Amendment exceptions to function as actual exceptions, or who are concerned about the many harms that are not captured by the narrower, Aristotelian-focused fighting words doctrine, these constitutive "fixes" might be effective.

C. Nonconsensual Pornography

1. The Current Doctrine

"Nonconsensual pornography" is the "distribution of sexually graphic images of individuals without their consent."[301] In all cases, nonconsensual pornography involves "personal images of one's body that are intended to be private."[302] And it includes "images originally obtained without consent . . . [as well as] images originally obtained with consent."[303] Though the Supreme Court has exempted some forms of pornography from First Amendment protection,[304] it has never recognized a categorical exception for all pornographic material. Because of this, most pornography—including nonconsensual pornography—is constitutionally protected. Pornography may lose its constitutional

300 Kathleen M. Sullivan, *The First Amendment Wars*, 207 New Republic 35, 40 (1992).

301 State v. Katz, 179 N.E.3d 431, 448 (Ind. 2022); *see also* State v. Casillas, 952 N.W.2d 629, 641 (Minn. 2020); Danielle K. Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014) (offering a similar definition).

302 People v. Austin, 155 N.E.3d 439, 462 (Ill. 2019) (quoting State v. Culver, 918 N.W.2d 103, 110 (Wis. Ct. App. 2018)).

303 *Id.* at 451.

304 *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (restricting pornography that visually depicts children below the age of majority performing sexual acts).

protection if it falls under the Court's obscenity doctrine[305]—that is, if it "appeals to the prurient interest," "depicts or describes, in a patently offensive way, sexual conduct," and "lacks serious literary, artistic, political, or scientific value."[306] If not, pornography remains protected, and laws restricting it must satisfy strict scrutiny.[307]

Today, at least 43 states and the District of Columbia have passed laws prohibiting nonconsensual pornography, many of which have been challenged on First Amendment grounds.[308] The courts that have addressed the issue—primarily state courts[309]—have uniformly concluded that nonconsensual pornography is *not* unprotected obscenity.[310] Though these courts have recognized that nonconsensual pornography "can cause public degradation," "may haunt victims throughout their lives," and is "overwhelmingly targeted at women," they have also reasoned that its primary purpose is generally "to shame the subject, not arouse the viewer."[311] Most have thus concluded that nonconsensual pornography is not "obscene," because it does not appeal to the prurient interest, as required by *Miller*.[312]

Because courts have generally concluded that nonconsensual pornography receives full First Amendment protection, they apply strict scrutiny when assessing nonconsensual pornography restrictions.[313] But even applying this rigorous standard, many courts have upheld nonconsensual pornography regulations. Though strict scrutiny is often said to be "fatal in fact,"[314] state courts have consistently recognized a compelling government interest in protecting individual privacy—particularly in nonconsensual pornography cases, where "the privacy

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305 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002) (noting that, as "a general rule, pornography can be banned only if obscene").

306 Miller v. California, 413 U.S. 15, 24 (1973).

307 *See id.* Some courts have also placed nonconsensual pornography laws under the umbrella of content-neutral restrictions, thus analyzing the restrictions under intermediate scrutiny. *See Austin*, 155 N.E.3d at 466.

308 *Austin*, 155 N.E.3d at 462; *see also infra* Section II.A (detailing several instances where the Supreme Court invalidated laws on constitutive grounds).

309 Because most nonconsensual pornography cases involve two in-state parties where the plaintiff is suing under state law, these cases are rarely litigated in federal court.

310 In fact, we know of no cases where a court categorized nonconsensual pornography as "obscene" under the *Miller* standard. *See, e.g.*, State v. Katz, 179 N.E.3d 431, 452 (Ind. 2022); State v. Casillas, 952 N.W.2d 629, 638–39 (Minn. 2020).

311 State v. VanBuren, 214 A.3d 791, 795, 801 (Vt. 2019).

312 *Id.* at 801.

313 Though courts have uniformly upheld such restrictions, they have not always done so unanimously. *See, e.g.*, *id.* at 816 (Skoglund, J., dissenting) (arguing that state governments do not have a compelling interest in restricting nonconsensual pornography).

314 Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

interest is substantial and the invasion occurs in an intolerable manner."[315] Courts have also held that laws against nonconsensual pornography are narrowly tailored so long as the laws "precisely define[]" nonconsensual pornography and impose criminal sanctions only where the distributor "*knowingly* discloses the images without the victim's consent."[316] And even where laws are facially broad, courts have offered narrowing constructions that allow them to uphold the law.[317]

In conducting these strict scrutiny analyses, courts often cite constitutive concerns. They reason that the "profound personal violation" of sharing intimate images without consent invokes "extreme emotional distress,"[318] creates "feelings of low self-esteem or worthlessness," and isolates victims from society.[319] They also note that nonconsensual pornography "cause[s] public degradation,"[320] increases loneliness,[321] and strips victims of bodily autonomy by permitting others to share intimate images without consent.[322] These outcomes cause significant harm to victims' psyches, confidence, and emotional health. They change the way victims view and value themselves, and they alter victims' positions—either actual or perceived—within society. They also alter our social climate by signaling that society does not value the emotional health, safety, or privacy of its citizens. These powerful constitutive concerns often work in tandem with Aristotelian considerations (i.e., the minimal value of nonconsensual pornography in the marketplace of ideas) that also weigh in favor of restriction. Courts' recognition of and concern for the constitutive effects of nonconsensual pornography thus provide a firm ground for identifying a compelling governmental interest in protecting victims based on privacy, health, and safety.

In short, nonconsensual pornography presents an unusual legal phenomenon. Courts unanimously recognize nonconsensual pornography as constitutionally protected speech. And yet courts also uniformly permit its restriction under strict scrutiny because they believe the government has a compelling interest in preventing the constitutive harms of nonconsensual pornography, and because nonconsensual pornography restrictions are generally narrowly tailored to further that

315 *Ex parte* Fairchild-Porche, 638 S.W.3d 770, 783 (Tex. App. 2021).

316 *VanBuren*, 214 A.3d at 812 (emphasis added).

317 *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 120 (1990) (upholding a facially overbroad statute because it had been narrowly construed by the state supreme court); Broadwick v. Oklahoma, 413 U.S. 601, 613 (1973) (observing that "[f]acial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute").

318 *VanBuren*, 214 A.3d at 810.

319 People v. Austin, 155 N.E.3d 439, 461 (Ill. 2019).

320 *VanBuren*, 214 A.3d at 795.

321 State v. Casillas, 952 N.W.2d 629, 642 (Minn. 2020).

322 *Id.* at 641.

compelling interest. This odd result has prompted some state courts to conclude that nonconsensual pornography laws "seem[] to be a strong candidate for categorical exclusion from full First Amendment protections."[323] Many scholars have likewise urged the Supreme Court to provide a clearer approach for analyzing restrictions on nonconsensual pornography.[324]

2. The Constitutive Fix: A Unified Approach

The Supreme Court has not given any indication that it plans to clarify or change the First Amendment's application to nonconsensual pornography. But if the Court *does* choose to intervene—as many scholars and lower courts have requested[325]—it has at least three options: 1) group nonconsensual pornography within an existing category of unprotected speech, 2) create a new First Amendment exception for nonconsensual pornography, or 3) continue analyzing nonconsensual pornography laws using strict scrutiny. Regardless of which option it pursues, adopting a constitutive rhetorical framework would help the Court craft a clearer, more cohesive approach to nonconsensual pornography.

First, the Court could adjust the existing obscenity doctrine so that it includes nonconsensual pornography. The obscenity doctrine is animated in part by concern for the potential communicative and persuasive effects of obscene speech (its tendency to persuade people to engage in antisocial behavior, its effects on minors, etc.). But courts have occasionally acknowledged that obscenity implicates constitutive concerns, as well. For example, the Supreme Court has noted that obscenity jeopardizes values "central to family life [and] community welfare"[326] and has the power to distort "key relationship[s] of human existence."[327] It has also noted that taken in the aggregate, obscenity "[has] a tendency to exert a corrupting or debasing impact" on society at large.[328] As we explained above, these same constitutive concerns regularly appear in nonconsensual pornography cases. This

323 *VanBuren*, 214 A.3d at 807.

324 *See, e.g.*, Andrew Koppleman, *Revenge Pornography and First Amendment Exceptions*, 65 Emory L.J. 661, 692 (2016) (critiquing the Court's resistance to creating additional free speech exceptions); Citron & Franks, *supra* note 301, at 384 (highlighting Eugene Volokh's argument that nonconsensual pornography fits in the Court's obscenity exception).

325 *See, e.g.*, State v. Katz, 179 N.E.3d 431, 453–54 (Ind. 2022) (leaving it to the Supeme Court to designate nonconsensual pornography under the First Amendment); People v. Austin, 155 N.E.3d 439, 455 (Ill. 2019) (refusing to recognize a new categorical First Amendment exception until the Supreme Court addresses the question head-on).

326 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

327 *Id.*

328 *Id.*

overlap suggests that nonconsensual pornography might be a natural and appropriate extension of the obscenity category. The Court has approved similar, minor adjustments to existing doctrines where those changes reflect contemporary "social realities."[329] If nonconsensual pornography is the latest "social reality" to implicate obscenity's underlying constitutive concerns, then including nonconsensual pornography within the obscenity exception might be a permissible adjustment.

Second, the Court could invoke constitutive concerns to conclusively establish nonconsensual pornography as a new category of unprotected speech. The problem, of course, is that the standard for identifying new categories is as difficult as it is clear: A party must provide "persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription."[330] Though this bar is high, some lower courts have held that there is a "persuasive case that United States legal history supports the notion that states can regulate expression that invades individual privacy without running afoul of the First Amendment."[331] If the Supreme Court shares lower courts' concerns with the constitutive effects of nonconsensual pornography, it should engage more deeply with the history of nonconsensual pornography to see whether that history supports the creation of a new category of unprotected speech.

Finally, the Court could set in stone the lower courts' current approach—that is, it could continue to treat nonconsensual pornography as protected speech but hold that restrictions satisfy strict scrutiny. As lower courts have demonstrated, constitutive considerations bolster the conclusion that states have a compelling interest in protecting both public health and safety and individual privacy. By expressly extending the analysis of nonconsensual pornography restrictions beyond Aristotelian concerns, the Court could provide clearer instruction to lower courts on how to reason through such cases.

These proposed solutions are not perfect, but they illustrate how a constitutive framework might help the Court make sense of the protected-but-unprotected oddity that is nonconsensual pornography. Every court that has addressed nonconsensual pornography has expressed concern about the significant negative effects—both Aristotelian and constitutive—of that speech. If the Supreme Court did the same (either by addressing nonconsensual pornography within an existing exception, creating a new exception, or solidifying the strict

329 *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968).
330 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011).
331 State v. VanBuren, 214 A.3d 791, 802 (Vt. 2019).

scrutiny approach), it might provide a more cohesive, unified approach to nonconsensual pornography under the First Amendment.

IV
Implications and Limitations

Historically, American courts have used familiar, Aristotelian policy considerations to analyze novel free speech issues. But as the foregoing discussion has shown, the Aristotelian approach sometimes falls short. The Supreme Court's Aristotelian focus has made it particularly challenging for courts to address the problem of hate speech. It has made the fighting words doctrine all but obsolete. And it has produced odd, incoherent outcomes for new problems like nonconsensual pornography.

In this Article, we have argued that courts could and should use constitutive rhetorical theory to fill in these Aristotelian gaps. Unlike Aristotelian rhetorical theory, the constitutive approach is attentive to the ways words create and transform values, cultures, and identities. It could thus help courts identify and respond to problems that are speech-induced but unrelated to persuasion. Our analysis has considered how this approach might function in the areas of hate speech, fighting words, and nonconsensual pornography, specifically. It has also identified several ways that constitutive rhetorical theory could supplement or enhance the Aristotelian approach to provide much-needed clarity, coherence, and consistency in those areas.

Our analysis illustrates the power and potential of the constitutive rhetorical approach, but it is not without limitations. To start, our approach will not appeal to free speech absolutists. In each of the examples we have discussed, the constitutive rhetorical approach has led to additional speech restrictions, not additional speech protections. We do not think this will necessarily be the case each time the constitutive approach is applied—indeed, in *Cohen v. California*, the Supreme Court cited constitutive concerns to overturn a speech conviction.[332] But if courts begin to acknowledge new dimensions and effects of speech, they may very well begin to restrict new types of speech as a result. The constitutive rhetorical approach may thus concern readers who favor fewer governmental intrusions on speech.

Second, the constitutive rhetorical approach will not necessarily lead to predictable or consistent results. Even if judges agree that constitutive rhetorical effects matter, they could easily disagree about what those constitutive effects are in any given case. For example, one

[332] *See supra* note 250–53 and accompanying text.

constitutively-oriented judge might see hate speech as degrading and denigrating victims; another might think hate speech reaffirms values like freedom, self-expression, and individual autonomy. Of course, these same criticisms apply equally to the Aristotelian policy considerations: Judges often disagree about which speech has value, which speech contributes to the search for truth, which speech undermines self-government, and so on. But if readers are looking for sure, predictable outcomes, the constitutive approach may disappoint.

Third, it is possible that constitutive rhetorical theory places too much trust in judges and other government officials. As Helen Norton has observed, "the First Amendment tradition . . . relies on what many call a negative theory of the Free Speech Clause."[333] Under this theory, "the Constitution protects speech not so much because it is so valuable, but instead because the government is so dangerous in its capacity to abuse its regulatory power."[334] The constitutive rhetorical approach places considerable weight on judges' assessments of what constitutive effects a particular utterance might have. Because of this, the approach might be unappealing to those who distrust the government's ability to make normative judgment calls or who fear that the government will abuse its regulatory power. Again, this concern applies with equal force to other First Amendment policy arguments: The low- or no-value speech approach, for example, requires judges to assess the value of language. And as Frederick Schauer has observed, negative theory itself has limitations: "[It] chooses to minimize the likelihood of . . . mistakes [in judgment] by largely withdrawing the power to judge altogether, [and because it is] [f]earful of the worst, it is willing to sacrifice aspiration for the best."[335] Still, the constitutive rhetorical approach might not appeal to those who adhere to negative theory.

Finally, the constitutive rhetorical approach represents a dramatic departure from what American lawyers and courts have always done: Most judges, lawyers, and First Amendment cases are deeply embedded in the Aristotelian rhetorical tradition. Because of this, it might take some time before the constitutive approach gains any traction. That said, the Supreme Court has occasionally invoked constitutive concerns—albeit tangentially—in its First Amendment cases and elsewhere.[336] Lower

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[333] Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, 22 KNIGHT FIRST AMEND. INST. 1, 3 (2022).

[334] *Id.* For examples of cases where the Supreme Court has invoked negative theory, see *id.* at 4.

[335] Frederick Schauer, *Constitutions of Hope and Fear*, 124 YALE L.J. 528, 558 (2014) (reviewing ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN REFORM AND THE CONSTITUTION (2014)).

[336] *See supra* Part II.

courts have done the same in strict scrutiny analyses of nonconsensual pornography laws.[337] Thus, even if constitutive rhetoric seems novel to lawyers and judges trained in the Aristotelian tradition, it is not, perhaps, as foreign as it appears.

These limitations are mitigated somewhat by the nature of our proposal. We have not suggested and we do not suggest that constitutive rhetoric should be courts' only or primary method for resolving novel free speech questions. Instead, we have simply argued that a constitutive rhetorical approach might enhance and supplement courts' Aristotelian analyses, especially when those analyses fall short. It may not matter, then, that the constitutive rhetorical approach is restriction-friendly or that it yields unpredictable results. If it is just one of several policy considerations courts can consult—and if it supplements, but does not replace, Aristotelian considerations—then it will not always or exclusively carry the day.

Our analysis has important implications for future lawyers, judges, and legal scholars. We have already argued that judges should consider constitutive rhetorical implications when resolving difficult or novel First Amendment questions, and we have provided three illustrative examples (hate speech, fighting words, and nonconsensual pornography) of how this might look in practice. But judges might also use constitutive rhetoric to shore up *existing* First Amendment exceptions. We have identified at least two First Amendment contexts—obscenity[338] and offensive speech[339]—where the Supreme Court has invoked constitutive theory to reinforce its Aristotelian analyses. The constitutive rhetorical approach might provide valuable support for other First Amendment exceptions, as well. Judges should thus use constitutive rhetorical theory not just to restrict *new* types of speech, but also to strengthen and reinforce the Aristotelian exceptions they have already recognized.

Lawyers, too, should familiarize themselves with constitutive rhetoric and its applications. Lawyers play an important role in shaping legal developments. If they regularly invoke constitutive rhetorical considerations in their briefing and oral arguments, judges may be more likely to use those considerations in their own decisions and analyses. Adopting constitutive rhetoric might be a dramatic shift for the American legal system, but lawyers could speed that shift along by

337 *See supra* Section III.C.

338 *See supra* notes 173–78 and accompanying text (discussing Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)); *see also supra* notes 326–29 and accompanying text (identifying constitutive concerns in other obscenity cases).

339 *See supra* notes 163–74 and accompanying text (discussing Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726 (1978)).

deliberately invoking constitutive considerations in their free speech work.

Our argument also opens new avenues for legal research. In the hate speech and nonconsensual pornography contexts, the constitutive rhetorical approach supports the creation of a new First Amendment exception. But the Court will not recognize such exceptions without "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[340] Legal academics who are open to the constitutive rhetorical approach could identify and provide this evidence. Legal scholars might also contemplate other scenarios where constitutive rhetoric could provide legal clarity or cohesion. Does the constitutive rhetorical approach provide any guidance for courts reasoning through new questions about free speech and social media? Might it help universities and workplaces craft speech policies that safeguard the rights and interests of both speakers and listeners? Future legal researchers should consider how the approach we have proposed here might apply to these and other pressing free speech questions.

Conclusion

The First Amendment's free speech protections have never been entirely settled. But in 2024, those protections are particularly "in . . . flux and [in] some peril."[341] The January 6 riot, the rise of AI, escalating debates about K-12 libraries and university campuses, and the hegemony of social media have each introduced a host of new free speech questions and complications. And though America's courts, lawyers, and political leaders have appropriately turned to existing First

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[340] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011); *see also supra* note 234 and accompanying text. In an earlier case, *United States v. Stevens*, the government urged the Court to recognize a categorical exception to First Amendment protection for depictions of animal cruelty, arguing that all new "claim[s] of categorical exclusion should be considered under a simple balancing test . . . balancing the value of the speech against its societal costs." *Id.* The Court rejected the government's balancing test as "startling and dangerous." *Id* at 470. It also declined to recognize the government's proposed exception because, though "the prohibition of animal cruelty itself has a long history in American law, . . . [there is no] similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment." *Id.* at 469. In *Brown*, the Court likewise refused to recognize an exception for violent video games sold to minors, because it found no tradition of restrictions on violent speech to minors. 564 U.S. at 795 (noting that "California's argument [for the proposed exception] would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence").

[341] Conor Friedersdorf, *How October 7 Changed America's Free-Speech Culture*, Atlantic (Jan. 4, 2024), https://www.theatlantic.com/ideas/archive/2024/01/october-7-changed-americas-free-speech-culture-israel-hamas/677011 [https://perma.cc/NSQ6-ARVZ].

Amendment precedent for answers, in many instances, that precedent has come up short.[342]

In this Article, we have proposed constitutive rhetoric as a new policy consideration that might help courts navigate the current "free-speech crisis."[343] The constitutive rhetorical approach emphasizes the ways words "construct[] [our] social universe."[344] It is unlike existing First Amendment policy arguments (marketplace of ideas, search for truth, self-governance, etc.) that focus primarily or exclusively on words' persuasive effects. It is also broader than self-actualization theory, which cares about the creative power of language but primarily focuses on speech's constitutive effects for individuals. Adopting a constitutive rhetorical lens might thus allow courts to recognize and respond to free speech dilemmas that more familiar, Aristotelian policy arguments cannot address.

[342] For example, many commentators have suggested that former Penn president Liz Magill's familiarity with First Amendment law may have actually hurt her performance when she testified before Congress. As one commentator observed, "Worn down by months of relentless external attacks, she was not herself [during the testimony]. Over-prepared and *over-lawyered* given the hostile forum and high stakes, she provided a *legalistic* answer to a moral question, and that was wrong. It made for a dreadful 30-second sound bite . . . ." Stephen Saul, Alan Blinder, Anemona Hartocollis, & Maureen Farrell, *Penn's Leadership Resigns Amid Controversies Over Antisemitism*, N.Y. Times (Dec. 9, 2023), https://www.nytimes.com/2023/12/09/us/university-of-pennsylvania-president-resigns.html[https://perma.cc/694J-HG2W]; *see also* Hailey Fuchs, Daniel Lippman, & Michael Stratford, *Colleges Under Siege Over Israel, Hamas and Antisemitism, Look to PR Giants for Help*, Politico (Jan. 7, 2024), https://www.politico.com/news/2024/01/07/colleges-antisemitism-pr-00134179 [https://perma.cc/9ZWP-7DWP] (describing Ms. Magill's testimony as "lawyerly" and describing several large universities that have hired law firms and PR firms for help navigating the Israel-Hamas crisis).

[343] Greg Lukianoff, *The Latest Victims of the Free-Speech Crisis*, Atlantic (Nov. 28, 2023), https://www.theatlantic.com/ideas/archive/2023/11/pro-palestine-speech-college-campuses/676155 [https://perma.cc/N5SQ-9M62].

[344] White, *supra* note 95, at 692.