

The Economic-Liberty Approach of the First Amendment: A Story of *American Booksellers v. Hudnut*

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ABSTRACT

What role did the pornography wars play in shifting First Amendment jurisprudence toward an economic liberty justification? In the 1980s, feminists split on the issue of pornography. Culminating in the case American Booksellers Association v. Hudnut, radical feminists defended an anti-pornography statute while an opposing faction, called pro-sex feminists, denounced the regulation. Despite their split, both factions argued on grounds of equality. Radicals argued pornography undermined sex equality while pro-sex feminists argued that pornography enhanced equality. Though both sides were committed to the value of sex equality, the Seventh Circuit ultimately disregarded these concerns altogether. Instead, Judge Easterbrook, writing for the court, used pro-sex feminists' additional theory of autonomy to push a similar yet distinct idea of liberty. Invoking the lionized "marketplace of ideas" rhetoric to promote the liberty notion, Judge Easterbrook helped to expand the First Amendment and, ultimately, to undermine its egalitarian notions. Judge Easterbrook's opinion has since been used in a way that pro-sex feminists did not intend: to shift the "marketplace of ideas" towards an economic liberty approach, eventually resulting in the case Citizens United v. Federal Election Commission.

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INTRODUCTION

In 1985, the Seventh Circuit held in *American Booksellers Association, Inc. v. Hudnut*¹ that an anti-pornography statute violated the First Amendment.² Virtually overnight, the case extinguished a cultural debate that had been raging since the mid-1960s.³ Whether pornography was protected speech had been a central question for feminists,⁴ politicians,⁵ and academics⁶ during the “Culture Wars”⁷ that bled into larger clashes over economics, sexuality, and power.⁸ Providing a definitive answer—that pornography was protected speech—*Hudnut* brought the violent crescendo of disagreement over pornography to an abrupt halt.⁹ Instantly, scholars catapulted the case to canonical status, teaching it in law schools and citing it in articles for the

¹ 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

² *Id.* at 334.

³ See LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 6 (1995). Jurisprudential finality came when the Supreme Court, in an unusual move, summarily affirmed the opinion, vesting Easterbrook’s words with the precedential weight of the nation’s highest court. Al Kamen, *Supreme Court Strikes Down Anti-Smut Law*, WASH. POST, Feb. 25, 1986, at A1.

⁴ See Elizabeth Wilson, *The Context of ‘Between Pleasure and Danger’: The Barnard Conference on Sexuality*, 13 FEMINIST REV. 35, 36 (1983).

⁵ See generally Richard Funston, *Pornography and Politics: The Court, the Constitution, and the Commission*, 24 W. POL. Q. 635 (1971); Kara Lindaman & Donald P. Haider-Markel, *Issue Evolution, Political Parties, and the Culture Wars*, 55 POL. RES. Q. 91 (2002); see also Mathew C. Moen, *The Political Agenda of Ronald Reagan: A Content Analysis of the State of the Union Messages*, 18 PRESIDENTIAL STUD. Q. 775, 782–83 (1988) (listing pornography as one issue of importance in President Reagan’s speeches).

⁶ Compare Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, with Geoffrey R. Stone, Comment, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461 (1986).

⁷ DUGGAN & HUNTER, *supra* note 3, at 5–11.

⁸ See *id.* at 1.

⁹ See Geoffrey R. Stone, *American Booksellers Association v. Hudnut: The Government Must Leave to the People the Evaluation of Ideas*, 77 U. CHI. L. REV. 1219, 1226 (2010) [hereinafter Stone, *The Government Must Leave*].

proposition that speech restrictions must be content-neutral.¹⁰ However, *Citizens United v. Federal Election Commission*¹¹ has recently revealed a further significance: *Hudnut* stands not only as a hallmark case of content-neutrality but also as an inaugural site for the libertarian shift in First Amendment jurisprudence.¹²

Over the past thirty years, scholars and courts have increasingly justified free speech under a theory of liberty, most recently exhibited in *Citizens United*.¹³ Previously, scholars believed egalitarian concerns drove First Amendment jurisprudence.¹⁴ However, this justification has largely subsided in the courts and in academia in favor of a libertarian rationale.¹⁵ Ironically, *Hudnut*, a case feminists brought because of equality concerns, has acted as a leading precedent for the now dominant “economic liberty approach.”¹⁶

In essence, this Article is about the symbolic role *Hudnut* played in the transformation of the First Amendment into a chiefly libertarian right. To be clear, *Hudnut* is by no means the sole factor that shifted the First Amendment.¹⁷ In fact, many academics do not even believe that the Amendment is driven by an economic liberty approach.¹⁸ Moreover, even among the camp of academics that acknowledge and support the libertarian conception of the Amendment, only Charles Fried has recognized *Hudnut* as playing a chief

¹⁰ See, e.g., Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL OF RTS. J., 647, 650–51 (2001–2002) (citing *Hudnut* as a key example of content neutrality); Lynn Mills Eckert, *Incoherence of the Zoning Approach to Regulating Pornography: The Exclusion of Gender and a Call for Category Refinement in Free Speech Doctrine*, 4 GEO. J. GENDER & L. 863, 863 (2002); Richard H. Fallon, *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 16 n.82 (1994). For a general discussion on content neutrality, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 12 (2d ed. 1988); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000).

¹¹ 130 S. Ct. 876 (2010).

¹² See Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y. REV. 217, 218, 225 (2010) (claiming that *Citizens United* is a “relatively limited doctrinal change” from previous jurisprudence).

¹³ *Id.*; see also Joshua Cohen, *Citizens United v. Democracy?*, Lecture at The Edmond J. Safra Center for Ethics at Harvard University (March 10, 2011).

¹⁴ See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28, 43 (1975).

¹⁵ *Citizens United*, 130 S. Ct. at 921.

¹⁶ This term, “economic liberty approach,” will be explained in further detail below. I use it, however, as short hand for the notion that the First Amendment’s purpose has been expanded to protect a wider scope of speech, including economic activity, keeping government regulation at bay.

¹⁷ The libertarian approach can be marked in an arc of cases growing over time. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); see generally Leonard W. Levy, *Liberty and the First Amendment: 1790–1800*, 68 AM. HIS. REV. 22 (1962).

¹⁸ ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 10–12 (2012).

role in this arc.¹⁹ This Article, however, takes this position as a starting point: Though there may not be a clear causal connection between *Hudnut* and the rise of the economic liberty approach, the case seems to be playing a principal role that is under-explored. This Article reveals the untold story of how *Hudnut* came to be a North Star in the economic liberty constellation, despite feminist intentions.

Three factors propelled *Hudnut* to this prominent position within the libertarian arc of First Amendment cases. First was Easterbrook's innovative libertarian use of the "marketplace of ideas" rhetoric.²⁰ Prior to *Hudnut*, courts used the marketplace of ideas locution to protect *political* speech in order to enable egalitarian self-governance among citizens.²¹ However, Judge Easterbrook invoked the marketplace of ideas adage to protect *expressive* speech, in line with libertarian ideals.

Second, *Hudnut*'s consequence resulted from surprising feminist coalitions.²² In the 1980s, at the height of the Sexual Revolution, feminists divided on the subject of pornography. Radical feminists, such as Catharine MacKinnon and Andrea Dworkin, argued for an end to pornography. Conversely, an opposing coterie of feminists, later dubbed "pro-sex," adamantly supported the practice of pornography. To advance their respective causes, both sets of feminists united with unlikely political forces.²³ Radical feminists found tacit support from the moral right who wished to quash pornography for religious reasons.²⁴ Pro-sex feminists turned to both pornographers and staunch free speech academics, who endorsed pornography for economic reasons and libertarian ideals, respectively.²⁵ In the end, these strange sets of bedfellows catapulted the case onto highly publicized ground and simultaneously worked against feminist efforts on both sides.

Third, *Hudnut*'s influential position emerges from its contradistinction: It undermines the equality approach while simultaneously buttressing libertarian values on a largely equality issue. Radical feminists MacKinnon and Dworkin, who drafted the legislation at issue in *Hudnut*, argued that pornog-

¹⁹ Professor Charles Fried intimated *Hudnut*'s significance in a recent brief for a campaign finance case coming out of the Ninth Circuit. Brief of Charles Fried as Amicus Curiae Supporting Respondents, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (Nos. 10-238 and 10-239).

²⁰ The "marketplace of ideas" locution is mythically powerful within free speech jurisprudence. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2-3 ("Scholars and jurists frequently have used the image of the 'marketplace of ideas' to explain and justify the [F]irst [A]mendment freedoms of speech and press.")

²¹ *Compare* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), with *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²² See Stone, *The Government Must Leave*, *supra* note 9, at 1220-21.

²³ See *id.*

²⁴ See *id.*

²⁵ ANDREA DWORKIN, *Pornography is a Civil Rights Issue for Women*, in *LETTERS FROM A WAR ZONE*, 276, 280-82 (1988) (discussing various actors in the pro-pornography lobby and their respective motivations).

raphy silenced women and therefore resulted in sex inequality.²⁶ Pro-sex feminists, such as Carol Vance, Gayle Rubin, and Nadine Strossen, replied that pornography was empowering to women because it encouraged women to *fantasize*, enabling female equality.²⁷ Although the means were different, the goals were identical.²⁸ Equality was key. However, despite both camps' fundamental concerns with equality, Judge Easterbrook, influenced by the Chicago School of Economics, ultimately obfuscated equality concerns to establish a purely libertarian right.²⁹

This Article will delve further into these three factors to ultimately show how *Hudnut* helped expand the First Amendment to an economic liberty approach. To do so, this Article will move chronologically. Section I will focus on the period prior to *Hudnut*, explaining the origin and development of the "marketplace of ideas" terminology in First Amendment jurisprudence. Section II will discuss the *Hudnut* case itself, starting with the feminist sex wars and culminating in the canonical opinion by Judge Easterbrook. Section III will then focus on *Hudnut*'s impact on First Amendment doctrine, in cases such as *Citizens United*. In essence, this Article is not about how the First Amendment changed pornography. Instead, it is about how pornography changed the First Amendment.

²⁶ Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 9, 13 (1985). For a version of the ordinance, see Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, app. A at 24–28 (1985) [hereinafter Dworkin, *Against the Male Flood*].

²⁷ See *infra* Section II.B.2 (explaining that pro-sex feminists argued for equality and autonomy).

²⁸ Compare Dworkin, *Against the Male Flood*, *supra* note 26, at 20 ("Feminists have wanted equality. Radicals and reformists have different ideas of what equality would be, but it has been the wisdom of feminism to value equality as a political goal with social integrity and complex meaning."), with Brief for the Feminist Anti-Censorship Taskforce as Amicus Curiae Supporting Respondents, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), reprinted in Nan D. Hunter & Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et. al.*, in *American Booksellers Association v. Hudnut*, 21 U. MICH. J.L. REFORM 69, 102–05, 123–35 (1987–1988) [hereinafter Hunter & Law, FACT Brief] (arguing for protection of pornography in order to promote equality). However, it should be noted that pro-sex feminists were also deeply committed to promoting autonomy in ways that conflicted with radical feminists' notions of equality.

²⁹ Despite "accept[ing] the premises of this legislation . . . [that] [t]he 'bigotry and contempt [pornography] produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights,'" Easterbrook ignored equality concerns in favor of liberty, setting a precedent that would render future equality claims mostly futile under the Amendment. See *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985) (quoting INDIANAPOLIS, IND., CODE § 16-1(a)(2) (1984)).

I. THE FIRST AMENDMENT: BEFORE *HUDNUT*A. *Truth, Equality, and Liberty: The “Marketplace of Ideas”*

Compared to other bodies of law, First Amendment jurisprudence is relatively nascent, having existed for less than a century.³⁰ However, in that short time, the jurisprudence has evolved significantly. Since the early twentieth century, American courts have *in seriatim* identified three main theories for why we protect free speech: truth,³¹ egalitarian self-governance,³² and self-expression.³³ To engineer and legitimate each of these three competing visions of the First Amendment,³⁴ judges have relied on the “marketplace of ideas” axiom.³⁵ Therefore, as the reasoning behind the Amendment has changed, so has the meaning of “the marketplace.”³⁶ The axiom has thus had at least three interpretations. In addition, in the past thirty years, the chestnut has taken on yet another, less-recognized connotation. Under this interpretation, speech is protected for the purpose of preserving economic liberty, a concept at odds with the previous three

³⁰ Judges first began developing First Amendment theory in the 1920s in response to growing anarchist beliefs. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 523 (1977).

³¹ The truth-seeking justification understands speech as having an epistemic force. In other words, humans can attain some knowledge of truth through the free exchange of ideas. Ingber, *supra* note 20, at 3–4.

³² The egalitarian notion of self-governance understands speech as favoring the participation of traditionally disadvantaged groups in politics. See Karst, *supra* note 14, at 23; Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144 (2010) (“[I]n this view, the value of equality is prior to the value of speech, politically disadvantaged speech prevails over regulation but regulation promoting political equality prevails over speech.”).

³³ Under the liberty/self-expression approach, the “prime social value of free speech” is to allow citizens to express their “human spirit” free from government restraint. Ingber, *supra* note 20, at 78; see also THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4–7* (1966) [hereinafter EMERSON, *TOWARD A GENERAL THEORY*] (explaining that self-fulfillment is the main purpose of the Amendment); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 82 (1974) (“[T]he First Amendment rests more fundamentally on the moral liberties of expression, conscience and thought; these liberties are fundamental conditions of the integrity and competence of a person in mastering his life”); Sullivan, *supra* note 32, at 145 (“[T]he First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas.”).

³⁴ U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech.”).

³⁵ Ingber, *supra* note 20, at 2–3.

³⁶ *Id.* at 5–6; see also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1–2; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) (“[T]he Court has been unwilling to confine the [F]irst [A]mendment to a single value or even to a few values. In recent years, the [F]irst [A]mendment literature has exploded with commentary finding [F]irst [A]mendment values involving liberty, self-realization, autonomy, the marketplace of ideas, equality, self-government, checking government, and more.”).

conceptions.³⁷ Sections A and B will delve into the circuitous path of the various justifications and the changing meaning of the “marketplace of ideas” axiom.

1. *The Marketplace Enables Truth*

The “marketplace of ideas” metaphor, coined by English philosopher John Milton in 1644,³⁸ and later used by John Stuart Mill, was initially meant as a call for truth.³⁹ Milton believed that, just as conducting an experiment dispelled certain hypotheses, protecting free speech in the marketplace of ideas dispelled falsehoods.⁴⁰ Justice Holmes first imported this classic interpretation of the “marketplace of ideas” into American jurisprudence in his 1919 dissent in *Abrams v. United States*:⁴¹

[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁴²

Holmes’ dissent, which First Amendment scholars classify as “the origin of all judicial efforts to theorize the First Amendment,”⁴³ assumed that “a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth.”⁴⁴ Over time, other judges adopted Holmes’ view,⁴⁵ until eventually the Supreme Court definitively held that “the purpose of the First Amendment [is] to preserve an uninhibited marketplace of

³⁷ Charles Fried, *On Judgment*, Justice Anthony Kennedy Lecture at Lewis and Clark Law School (Sept. 23, 2010) (explaining that the success of this approach has been largely due to gaining logical control over the staple adage). See generally Sullivan, *supra* note 32 (discussing the notion that the First Amendment’s equality and liberty conceptions are at odds); Cohen, *supra* note 13.

³⁸ JOHN MILTON, *Areopagitica*, in 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 (E. Sirluck ed., 1959).

³⁹ See JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 13–48 (R. McCallum ed., 1948); see also, e.g., *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (“The metaphor is honored; Milton’s *Areopagitica* and John Stewart [sic] Mill’s *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position.”); Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433, 453 (2004).

⁴⁰ MILTON, *supra* note 38 (“Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”).

⁴¹ 250 U.S. 616 (1919).

⁴² *Id.* at 630.

⁴³ Post, *supra* note 18, at xii.

⁴⁴ Ingber, *supra* note 20, at 3.

⁴⁵ Judge Learned Hand wrote, “[T]ruth is] to be gathered out of a multitude of tongues, [rather] than through any kind of authoritative selection.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945). Representing this perspective was also Justice Douglas in his eloquent dissent in *Dennis v. United States*, 341 U.S. 494, 584 (1951) (“When ideas compete in the market for acceptance, full and free discussion exposes

ideas in which truth will ultimately prevail.”⁴⁶ However, the “truth” interpretation of the First Amendment was short-lived, as academics began to point out internal contradictions.⁴⁷ Eventually, there was room for a new justification.

2. *The Marketplace Enables Egalitarian Democracy*

During World War II and through the Cold War, courts developed a new justification for the First Amendment that promoted egalitarian self-governance.⁴⁸ Under this second theory, the marketplace of ideas was not an experimental site meant for *truth-seeking*, but a public forum meant to aid egalitarian *democracy*.⁴⁹ This notion stemmed from the idea that a marketplace would guarantee an equal chance for all views to be heard.⁵⁰ Citizens apprised of all angles on the political issue would yield a mighty electorate. This notion of the marketplace of ideas therefore promised to create strong democratic government, because each citizen’s vote would be meaningful.

This self-governance theory stems as far back as Aristotle, who claimed that a citizen’s highest calling was participating in one’s own government.⁵¹ In the nineteenth-century, Jeremy Bentham,⁵² the English philosopher, and James Madison,⁵³ the principal author of the Constitution, further developed Aristotle’s self-governance theory in their writings. However, it was not un-

the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions.”)

⁴⁶ *Red Lion Broad. Co. v. Fed. Comm. Comm’n*, 395 U.S. 367, 390 (1969).

⁴⁷ See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–46 (1989); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–34 (1982); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 897 (2002) (finding that the truth interpretation of the “marketplace of ideas theory is fundamentally unsound both normatively and descriptively”); Blasi, *supra* note 36, at 15–17; Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 4, 12–13 (1996); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 348–50 (1991). *Contra* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“The most influential argument supporting the constitutional commitment to freedom of speech is the contention that speech is valuable because it leads to the discovery of truth.”).

⁴⁸ POST, *supra* note 18, at 52–55.

⁴⁹ ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 33 (1979). Meiklejohn observed that within First Amendment jurisprudence there is an “equality of status in the field of ideas.” *Id.* at 27; see also Ingber, *supra* note 20 at 3–4.

⁵⁰ POST, *supra* note 18, at 52–55.

⁵¹ Aristotle wrote, “man is by nature a political animal,” meaning that man’s highest calling was to participate in government. Not just expressing political ideas, but executing them as an active electorate is what gave man purpose. See ARISTOTLE, 1 HISTORIA ANIMALIUM 15 (A.L. Peck trans., 1955). Cf. R. G. Mulgan, *Aristotle’s Doctrine That Man is a Political Animal*, 102 HERMES 438–39 (1974) (noting Aristotle’s argument is more complicated than the oft-used quotation suggests).

⁵² Jeremy Bentham, *Essay on Political Tactics*, in 2 THE WORKS OF JEREMY BENTHAM 312 (John Bowring ed., 1843) (“In an assembly elected by the people, and renewed from time to time, publicity is absolutely necessary to enable the electors to act from knowledge.”).

⁵³ Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Gillard Hunt ed., 1910).

til 1927 that a Supreme Court Justice imported the republican theory into First Amendment jurisprudence.⁵⁴ Justice Brandeis argued for the expression of all ideas, even dissident ones, in order to maintain a healthy American body politic.⁵⁵

In the wake of World War I, the Court adopted Brandeis's approach. In other words, the commitment to protecting dissident speech became especially appealing as the United States tried to claim superiority over fascist and communist regimes that suppressed speech.⁵⁶ The Court extolled that, unlike its foreign counterparts, the United States revered all speech, no matter how unpopular.⁵⁷ For example, Justice Jackson intimated in *West Virginia State Board of Education v. Barnette*⁵⁸ that promoting political dissidence in the marketplace was *the* fundamental American characteristic that distinguished it from Nazi Germany.⁵⁹

Credited with creating a juridical formulation of this theory, Alexander Meiklejohn⁶⁰ argued that judges should elevate political speech above all other classifications of speech to promote egalitarian democracy.⁶¹ Addi-

⁵⁴ Justice Brandeis was an influential proponent of the democratic vision and introduced it in a concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁵⁵ *Id.* (“Those who won our independence by revolution were not cowards. They did not fear political change. . . . [W]ith confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion Such, in my opinion, is the command of the Constitution.”).

⁵⁶ Geoffrey Stone, *Free Speech in World War II: “When Are You Going to Indict the Seditonists?”*, 2 INT’L J. CONST. L. 334, 367 (2004). For a World War II-era case incorporating the Brandeis view, see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

⁵⁷ For example, as early as 1940, on the brink of America’s entry into World War II, the Supreme Court invoked the “market of public opinion” in *Thornhill v. Alabama* to highlight America’s commitment to a free range of political ideas. 310 U.S. 88, 95 (1940) (“Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.”).

⁵⁸ 319 U.S. 624 (1943) (holding constitutional a citizen’s right to decline from saluting the flag).

⁵⁹ *Id.* at 642 (“But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”).

⁶⁰ MEIKLEJOHN, *supra* note 49. Robert Bork is the other leading advocate of this position. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971) (“[P]rotected speech should consist of speech concerned with governmental behavior [P]olitical speech . . . does not cover scientific, educational, commercial or literary expressions as such.”).

⁶¹ See MEIKLEJOHN, *supra* note 49. Many attorneys also took up this theory. See, e.g., Floyd Abrams, *BBC Event: Free to Speak*, THE BRIAN LEHRER SHOW (Jan. 1, 2008), <http://www.wnyc.org/shows/bl/2008/jan/01/bbc-event-free-to-speak/> (“I’m not an absolutist . . . but I think there are a few areas in which free speech should be as absolute as the law can possibly make it. The prime one is with respect to criticism of government itself. *That is the core, the starting place for freedom of expression in this country and around the world . . . the general principle that you can criticize the government, that you can say anything, anything at all critical of the government is the first principle of free speech from which everything else comes.*”) (emphasis added).

tionally, under this approach, Meiklejohn argued, the government should ensure that all *political* ideas be voiced at equal decibels so that listeners could easily compare and select their preferred values.⁶² Employing this theory in law, judges silenced superfluous categories of speech such as commercial speech,⁶³ obscenity,⁶⁴ and hate speech,⁶⁵ leaving political discourse easily audible for the electorate.⁶⁶ In essence, this line-drawing process carved out certain “low-value categories” of speech, known as the *Chaplinsky* categories, and subjected them to government regulation.⁶⁷

One such category was commercial speech. In 1942, the Supreme Court in *Valentine v. Chrestensen*⁶⁸ held that the First Amendment did not protect “commercial” speech.⁶⁹ This doctrine was based on the idea that commercial speech did not aid the *political* listener.⁷⁰ Unlike political speech, courts didn’t consider advertisements to contribute to the political discourse. Instead, in line with post-Lochnerian jurisprudence, courts found the government could regulate these types of commercial speech just as it could regulate child labor, minimum wages, and maximum hours.⁷¹ Later, the Court extended this formulation to campaign finance cases, holding that

⁶² “What is essential is not that everyone shall speak, but that everything worth saying shall be said.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

⁶³ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁶⁴ *Miller v. California*, 413 U.S. 15 (1973).

⁶⁵ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁶⁶ Vestiges of limited speech still exist today. Many bodies of law that could be protected as speech require government regulation. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (sexual harassment); *Lowe v. SEC*, 472 U.S. 181 (1985) (securities regulation); *Dennis v. United States*, 341 U.S. 494 (1951) (conspiracy); *Debs v. United States*, 249 U.S. 211 (1919) (military recruitment); *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001) (copyright); *L.A. Alliance for Survival v. City of Los Angeles*, 224 F.3d 1076 (9th Cir. 2000) (panhandling). Even Justice Scalia has affirmed that the First Amendment right to free speech is not absolute, despite some textualist interpretations suggesting otherwise. Instead, he has admitted, “it is the very *product* of an interest-balancing by the people.” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

⁶⁷ “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances 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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁶⁸ 316 U.S. 52.

⁶⁹ *Id.* at 54.

⁷⁰ See *Oxycal Labs., Inc. v. Jeffers*, 909 F. Supp. 719, 723–24 (S.D. Cal. 1995) (finding commercial speech that is found to be false or misleading is afforded no First Amendment protection because a listener “has little interest in receiving false, misleading, or deceptive commercial information”) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 432 (1993)) (internal quotation marks omitted).

⁷¹ See generally Thomas Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

campaign expenditures could also be regulated.⁷² Therefore, commercial speech, campaign finance, and obscenity came to be considered “second-tier” categories of speech under the post-War egalitarian concept of the marketplace of ideas.⁷³

3. *The Marketplace Enables Liberty*

By the 1970s, roots of a third “liberty” vision of the marketplace of ideas disrupted the longstanding egalitarian theory.⁷⁴ This new vision was rooted in the Chicago School laissez-faire economics movement led by academics such as Richard Epstein, Milton Friedman, and Friedrich A. Hayek, influenced by thinkers such as Adam Smith and Ayn Rand.⁷⁵ Judges aligning with these thinkers refashioned the meaning of “the marketplace of ideas” away from notions of democracy toward a literal conception of the market.⁷⁶ Under this theory, the purpose of the First Amendment was not to facilitate egalitarian self-governance, but to facilitate the liberty of rational actors in the market eventually guaranteeing much broader free speech protection.⁷⁷

Previously excluded categories such as commercial and campaign finance speech were now protected under the First Amendment.⁷⁸ For example, in 1976, at the height of this trend, the Supreme Court decided to protect commercial speech, disrupting the longstanding doctrine of *Chaplinsky* cate-

⁷² See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (upholding a restriction on corporate speech based on the notion that “[c]orporate wealth can unfairly influence elections”), *overruled by Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

⁷³ See Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301–02 (1992).

⁷⁴ The economic liberty approach, I argue, got its constitutional foothold in the 1970s. However, vestiges of the liberty approach date as far back as 1925. See generally *Gitlow v. New York*, 268 U.S. 652 (1925). Scholars noticed more occurrences of the liberty approach after World War II as fears of fascism fueled a newfound respect for liberty. See CATHARINE MACKINNON, *ONLY WORDS* 105–06 (1993) (highlighting that the libertarian notion of free speech first arose after World War II in response to fascism); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 3, 11–13, 34–46 (1996) (stating that no thorough historical account exists as to the emergence of free speech as a particularly important constitutional and cultural concept in twentieth-century America, but offering a preliminary hypothesis for that emergence and gesturing to World War II as a turning point); see generally G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996) (recognizing the period after World War I through World War II as the beginning of the libertarian free speech model).

⁷⁵ Robert Edward Brown, *Capitalism in the Classroom*, 11 CHANGE 25, 28 (1979) (“A general consensus would place the heart of the new economics’ academic conservatism at the University of Chicago . . .”); see generally BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975).

⁷⁶ As Frederick Schauer powerfully argues, “Facing the increasing constitutional . . . weakness of arguments from economic libertarianism, economic libertarians turned their attention to the First Amendment.” Frederick Schauer, *First Amendment Opportunism* 5 (Harvard Univ., John F. Kennedy Sch. of Gov’t Working Paper No. 00-011, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253832.

⁷⁷ *Id.*

⁷⁸ *Id.*

gories.⁷⁹ The Court intimated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*⁸⁰ that liberty required commercial and political speech be given equal protection.⁸¹ *Virginia State Board of Pharmacy* not only upset *stare decisis* but also disrupted the earlier theoretical understandings of the First Amendment.⁸² Promoting economic liberty, not political self-governance, became the pronounced purpose of the First Amendment.⁸³ In other words, society's "strong interest in the free flow of commercial information" drove the opinion.⁸⁴ Overall, the Court highlighted three liberty concerns: liberty of the consumer,⁸⁵ liberty of corporate actors,⁸⁶ and liberty of the overall economy.⁸⁷

That same year, the Court also endorsed the liberty vision in *Buckley v. Valeo*,⁸⁸ striking down Congress' egalitarian-motivated campaign finance legislation,⁸⁹ the Federal Elections Campaign Act.⁹⁰ The legislation, in line

⁷⁹ It is notable that the free-speech absolutist Justice Black, an extreme believer in categorical protection of speech, did not believe that commercial speech was protected under the First Amendment, joining the Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) and in *Breard v. City of Alexandria*, 341 U.S. 622 (1951). In *Breard*, Black wrote that the First Amendment does not apply to "a 'merchant' who goes from door to door 'selling pots.'" 341 U.S. at 650 n.* (Black, J., dissenting).

⁸⁰ 425 U.S. 748 (1976).

⁸¹ *Id.* at 770. In the case, the Virginia legislature prohibited corporations from advertising lower prices of pharmaceuticals to benefit local pharmacies. Virginian pharmacists could not compete with corporate prices so they "enlisted the state board of pharmacy in their economic battles with large chain pharmacies" and got the legislature to pass a regulation. Schauer, *First Amendment Opportunism*, *supra* note 76, at 6.

⁸² Compare Jackson & Jeffries, *supra* note 71, with Leonard W. Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIS. REV. 22, 32 (1962) (explaining that the liberty vision of the Amendment had a long-standing tradition).

⁸³ Schauer *supra* note 76, at 6-9.

⁸⁴ *Va. State Bd. of Pharmacy*, 425 U.S. at 764.

⁸⁵ *Id.* at 763 ("[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); see also Ben A. Franklin, *Woman's Drive for Drug-Price Ads Ends Victoriously After 2½ Years*, [Speech to Times, p. 12] N.Y. TIMES, May 25, 1976.

⁸⁶ *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (recognizing protection despite disclaiming the corporation's interest as "purely economic").

⁸⁷ *Id.* at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."). This last liberty concern was perhaps the most important. Lurking in the shadows of this opinion was the popular conception growing in America that capitalism was king, a defining factor of American culture that required First Amendment protection for America's global economic dominance. Just as democracy thirty years earlier was the key to America's rhetorical success during the World War, America's economy was now the crucial trait in juxtaposition to communism. As a *Wall Street Journal* article reported, "[n]o doubt the High Court was strongly influenced in its Monday decision by studies which estimate consumer costs to range from \$130 million to \$380 million because of the barriers that 30 states have erected against prescription advertising." *Elevating 'Commercial Speech'*, WALL ST. J., May 27, 1976, at 22.

⁸⁸ 424 U.S. 1 (1976).

⁸⁹ Ingber, *supra* note 20, at 65 ("With FECA, Congress attempted to reform the marketplace by limiting the influence of advantaged individuals or groups during federal election campaigns. FECA appeared to foster 'equal' access for both viewpoints and individuals

with Meiklejohnian thought, tried to equalize disparities between campaign contributions, but the Court held the reform unconstitutional and determined that money spent to influence elections is constitutionally protected speech and therefore cannot be regulated.⁹¹ In deciding *Buckley*, the Court prioritized economic liberty over egalitarian democracy when it wrote that just because the case involved “[t]he expenditure of money,” this did not “reduce the exacting scrutiny required by the First Amendment.”⁹² The focus was now on the liberty of the speaker rather than the political listeners’ equal opportunity to hear various views. As securing economic liberty became “an independent constitutional value” under the commercial speech and campaign finance doctrines,⁹³ the boundaries between the excluded categories and all other protected speech began to disappear.

Central to endorsing this economic liberty approach in *Virginia Board of Pharmacy* and *Buckley* was the Court’s “no-drown out” theory, a rebuke to economists’ recent “drown out” theory.⁹⁴ The “no-drown out” theory proposed that in a free marketplace, an entity is always capable of expressing its views because no one can be drowned out.⁹⁵ But this notion sat in tension with the recent conclusions made by economists who found that, within any marketplace, market failures (including silencing or drowning-out) existed.⁹⁶ The “drown out” theory, for example, found that a market over-infused with a particular type of advertising could silence or drown out less-represented commodities.

Whether scholars or judges endorsed the “drown out” theory or “no-drown out” theory depended on which conception of the First Amendment they held. Supporters of the egalitarian vision of the First Amendment, concerned with the listener, argued that the “drown out” theory mandated that the market be regulated to fix distortions.⁹⁷ But proponents of the libertarian approach, concerned with the liberty of the speaker, argued that any amount of regulation would be an unjustifiable restraint on speech.⁹⁸ And so the “no-drown out” theory was born;⁹⁹ Justices holding this view concluded that the marketplace of ideas cannot be regulated.¹⁰⁰ For example, in *Buckley*, the Court held that the statute regulating independent expenditures could not be

whereas the fairness doctrine assures ‘adequate’ presentation for varied viewpoints.”); *see also Buckley*, 424 U.S. at 16 (“[T]he Act . . . is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups.”).

⁹⁰ *Buckley*, 424 U.S. at 16.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Post, *supra* note 18, at 39–40.

⁹⁴ See Brief of Charles Fried, *supra* note 19, at 23.

⁹⁵ *Id.*

⁹⁶ See Blasi, *supra* note 36, at 6–7.

⁹⁷ See Brief of Charles Fried, *supra* note 19.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976); *see generally* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

upheld simply because of its interest in “maximizing the effectiveness of the less intrusive contribution limitations.”¹⁰¹ In other words, correcting market distortions was not the prerogative of the First Amendment.

In the wake of *Virginia State Board of Pharmacy* and *Buckley*, scholars concerned with the growing economic liberty approach began to attack the Court’s new marketplace of ideas approach to the First Amendment.¹⁰² Prominent in the backlash, law school professors Thomas Jackson and John Jeffries¹⁰³ argued that the Court had inappropriately replaced the First Amendment’s political justification with an economic liberty reasoning.¹⁰⁴ Although acknowledging that “[t]he nation plainly has an interest in promoting allocative efficiency in the economy as a whole,” they contended “that interest lies at the heart of the federal antitrust laws,” not the First Amendment.¹⁰⁵ Instead, they argued the Amendment should be driven by egalitarian values that did not allow for the drown out of important political ideas.¹⁰⁶ Opposing Jackson and Jeffries, some courts and scholars defended the new economic liberty approach,¹⁰⁷ but even proponents agreed that the new vision of the “marketplace of ideas” was incongruous with previous case law.¹⁰⁸

¹⁰¹ *Buckley*, 424 U.S. at 44–45.

¹⁰² See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting) (“There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.”); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 976 (1978) (“Emotional or ‘irrational’ appeals have great impact”); Harry H. Wellington, *On Freedom of Expression*, 88 *YALE L.J.* 1105, 1130 (1979) (“It is naive to think that truth will *always* prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of men.”).

¹⁰³ John Jeffries wrote his Ph.D. dissertation providing historical background tracing censorship from the Old Testament to contemporary controversies and concluded that the harm generated by pornographic materials is not significant enough to warrant the legal punishments presently employed. John Jeffries, *Legal Censorship of Obscene Publication: Search for a Censoring Standard* (1968) (unpublished Ph.D. dissertation, Indiana University) (on file with author).

¹⁰⁴ Jackson & Jeffries, *supra* note 71, at 17 (“While an unrestrained flow of commercial advertising may be essential to the efficient functioning of a free market economy, neither commercial advertising nor a free market economy is essential to informed political decision-making.”); see also *id.* at 18 (arguing that price advertising is simply not political speech and “is neither more nor less significant than a host of other market activities that legislatures concededly may regulate”).

¹⁰⁵ *Id.* at 28.

¹⁰⁶ *Id.* at 30.

¹⁰⁷ Post, *supra* note 18, at 41 (arguing that commercial speech “serves the value of democratic competence”); see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977) (commercial speech protected because it often addresses “significant issues of the day”); see generally Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. REV.* 1 (2000).

¹⁰⁸ Compare Jackson & Jeffries, *supra* note 71, at 18 n.59 (“The Court has failed to justify the inclusion of commercial speech within the scope of the [F]irst [A]mendment, we do not agree that the Court should simply cast around for a new reason instead of rejecting the incorporation.”), with *The Supreme Court, 1976 Term—Leading Cases*, 91 *HARV. L. REV.* 200, 207 (1977) (“The problem seems to be that pure commercial speech does not fit readily into the Court’s recent analysis which emphasizes the [F]irst [A]mendment’s contribution to political

Beyond believing that the egalitarian political approach was superior,¹⁰⁹ Jackson and Jeffries were concerned that profit-making seemed to be the primary ideological purpose of the economic liberty approach.¹¹⁰ Unlike ideas about political self-governance, the economic liberty approach lacked moral force. As scholar Frederick Schauer has noted, Jackson and Jeffries distinguished it as “a doctrinally weak constitutional argument for economic libertarianism” blanketed “in the more doctrinally and socially robust language of the First Amendment.”¹¹¹ Facing this fierce criticism of lacking normative grounding, the economic liberty approach required stronger theoretical support. The emerging theory of self-expression would soon flourish in feminism and other areas of academia to fill the void and form a fourth vision of the First Amendment: self-expression.

B. *The Marketplace Enables Self-Expression*

During the 1970s, around the time of *Virginia State Board of Pharmacy* and *Buckley*, scholars began to develop a new First Amendment theory. Under this approach, courts protected speech to promote self-expression.¹¹² Proponents of this idea such as Thomas Emerson,¹¹³ C. Edwin Baker,¹¹⁴ and Tim Scanlon¹¹⁵ considered speech to be “much like one’s own body or per-

dialogue and the operation of democratic institutions. Yet in both *Virginia State Board* and *Bates* the Court seemed to be trying to force commercial speech into this mold . . .”). See also Thomas Merrill, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 216 n.75 (1976) (“The Court’s ruling that the microeconomic functions performed by commercial speech constitute interests protected by the [F]irst [A]mendment is a novel addition [to First Amendment analysis].”). Even supporters of the economic liberty approach admitted it was a detour from previous cases. See, e.g., Shiffrin, *supra* note 36, at 1227 (“It was strange indeed for the Court to suggest that the [F]irst [A]mendment has been Chicago-school economics traveling incognito for all these years.”). For the Court’s inconsistency with this approach, see generally *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (deciding commercial billboards could be outlawed even if political billboards could not), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (holding commercial speech occupies a lower place in the First Amendment hierarchy than other noncommercial expression just two years after *Virginia Board of Pharmacy*).

¹⁰⁹ Michael Sandel has inveighed against a liberty-driven marketplace idea, in the context of general citizenry:

According to the republican conception of citizenship, to be free is to share in self-rule. This is more than a matter of voting in elections and registering my preferences or interests. On the republican conception of citizenship, to be free is to participate in shaping the forces that govern the collective destiny According to this view, to participate in politics is not just a means to securing a regime that enables people to seek their own ends; it is also an essential ingredient of the good life.

Michael Sandel, *What Money Can’t Buy: The Moral Limits of Markets*, in 21 TANNER LECTURES ON HUMAN VALUES, 89, 108–09 (Grethe B. Peterson ed. 2000).

¹¹⁰ Jackson & Jeffries, *supra* note 71, at 17.

¹¹¹ Schauer, *First Amendment Opportunism*, *supra* note 76, at 7.

¹¹² *Id.*

¹¹³ THOMAS EMERSON, TOWARD A GENERAL THEORY, *supra* note 33, at 7–8.

¹¹⁴ Baker, *supra* note 102, at 964–90.

¹¹⁵ See generally Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

sonal property.”¹¹⁶ Expressive speech was therefore a romantic exercise of “self-actualization.”¹¹⁷ Under this notion, protecting speech meant protecting “one of the most basic prerogatives of personal *liberty*.”¹¹⁸ Similar to the economic *liberty* approach—but with strong normative grounding—the self-expression theory promoted the related but distinct notion of *autonomy*.

Like the truth and egalitarian justifications, this argument had ideological power that the economic liberty approach lacked. In 1963, Professor Emerson formidably argued in his canonical article, *Toward a General Theory of the First Amendment*,¹¹⁹ that “expression is an integral part of . . . the affirmation of self.”¹²⁰ Therefore protecting *expressive* speech meant protecting the “dignity of man . . . man’s essential nature.”¹²¹ Whether accurate or not, this reasoning had moral power. Arguing that expression enhanced autonomy was a powerful justification, just what the economic liberty approach lacked. To fill the void of the economic liberty approach, economic liberty scholars would conflate the values in both approaches. More explicitly, scholars would fuse *liberty* (in the economic liberty approach) with *autonomy* (in the self-expression approach) to provide the economic liberty approach with the moral justification.

Ironically, Emerson and his cadre created the self-expression theory in part to undermine the economic liberty approach.¹²² Central to Emerson’s theory was the notion that speech should not be protected extensively: “[H]ere the scope of the liberty is more limited than that warranted by the first model”¹²³ Emerson and his colleagues explicitly underscored that commercial speech should not be protected:¹²⁴ “[C]ommercial speech has

¹¹⁶ Paul G. Stern, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 YALE L.J. 925, 927 (1990); Wellington, *supra* note 102, at 1108–20.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (emphasis added); see also Baker, *supra* note 102, at 991 (arguing that speech is protected to caste citizens as “equal rational and autonomous moral beings”); Scanlon, *supra* note 115, at 214.

¹¹⁹ Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) [hereinafter Emerson, *Toward a General Theory of the First Amendment*]; see also THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) [hereinafter EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*].

¹²⁰ Emerson, *Toward a General Theory of the First Amendment*, *supra* note 119, at 879.

¹²¹ *Id.*

¹²² Baker most powerfully argued that the First Amendment is concerned with self-expression and that commercial speech is not recognized as self-expression because it is dictated by the search for profits. See C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 14–18 (1976) [hereinafter Baker, *Commercial Speech*].

¹²³ Stern, *supra* note 116, at 927.

¹²⁴ Baker, *Commercial Speech*, *supra* note 122, at 3 (“[C]ommercial speech is not a manifestation of individual freedom or choice Therefore, profit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the [F]irst [A]mendment.”).

no apparent connection with the idea of individual self-fulfillment.”¹²⁵ This distinction was more than just a profound departure from the economic liberty approach; it entirely unraveled it.¹²⁶ Cases such as *Virginia State Board of Pharmacy* and *Buckley* could not be justified under Emersonian thought because economic speech was not a corporal expression of individuality. However, feminists followed on the heels of Emerson and provided the necessary theory to justify the economic liberty approach on self-expression grounds.

C. *The Sex Wars: A Feminist Debate*

In the 1980s, radical feminists Catharine MacKinnon and Andrea Dworkin launched a campaign against pornography.¹²⁷ The two revolutionaries authored an “ordinance [that] declared pornography to be a form of sex discrimination.”¹²⁸ In 1984, the Indianapolis city council adopted the ordinance.¹²⁹ Despite radicals’ initial success, fellow feminists—later known as pro-sex feminists—fomented a backlash movement countering that pornography should be protected as self-expression.¹³⁰ Drawing on ideas from Emerson and feminist debates of the day, pro-sex feminists developed an idea of self-expression that would initially protect pornography and eventually give legs to the economic liberty approach by classifying nearly all speech as *expressive* speech. This section will explain how feminist theories percolated from pornography debates of the 1970s and extended the self-expression theory to provide a justification for the economic liberty approach.

Prior to the 1980s, courts declined to protect obscenity, a *Chaplinsky* category, under the First Amendment.¹³¹ American courts endorsed 17th century Puritan standards of morality¹³² and censored “obscene” materials.¹³³

¹²⁵ Jackson & Jeffries, *supra* note 71, at 14 (“[T]he concept of a [F]irst [A]mendment right of personal autonomy in matters of belief and expression stops short of a seller hawking his wares.”).

¹²⁶ *Id.* at 15 (“Thus, whatever its other effects, governmental regulation of commercial speech does not invade the concept of a [F]irst [A]mendment right of personal fulfillment through self-expression. Judicial abrogation of legislative control over commercial speech cannot be justified on this ground.”).

¹²⁷ Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 698 (2002).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at n.324; see also DUGGAN & HUNTER, *supra* note 3, at 5–11.

¹³¹ See, e.g., *United States v. Kennerly*, 209 F. 119 (S.D.N.Y. 1913) (opinion by Hand, J.) (focusing on “the average conscience of the time” or community standards to find that a social hygiene novel was correctly prohibited from society as a matter of vice).

¹³² FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 8–30 (1976).

¹³³ The standard for this developed from the nineteenth-century English obscenity case, *Regina v. Hicklin*, [1868] L.R. 3 Q.B. 360, 371 (holding that intent was irrelevant as long as the work was obscene and stating further that “the test of obscenity is . . . to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall”).

As with commercial speech, these courts valued obscene speech less than political speech.¹³⁴ In the early 20th century, American courts became so stringent with respect to obscenity that they banned now classics, such as John Cleland's *Fanny Hill* and Henry Miller's *Tropic of Cancer*, under the infamous Comstock Act.¹³⁵ Only a single court during this period even dared to question whether judicial "comstockery" violated the First Amendment,¹³⁶ yet even this court decided the Act prevailed because of a "common sense of decency."¹³⁷ For the next century, courts remained staunchly committed to suppressing obscenity according to community standards.¹³⁸

However, during the countercultural movement of the 1970s,¹³⁹ the obscenity doctrine began to unravel.¹⁴⁰ The Sexual Revolution, a grassroots movement led by feminists and other groups, called for liberation from traditional constraints on female sexuality such as monogamy and heterosexuality.¹⁴¹ In addition to these constructs, feminists were especially concerned with the obscenity doctrine.¹⁴² "Obscene" materials, they claimed, were forms of self-expression¹⁴³ that freed citizens from the shackles of Puritani-

¹³⁴ See generally SCHAUER, *supra* note 132.

¹³⁵ *Id.*; see also, e.g., *People v. Dial Press*, 48 N.Y.S.2d 480 (N.Y. Magis. Ct. 1944) (*Lady Chatterley's Lover* by D.H. Lawrence); *People v. Friede*, 233 N.Y.S. 565 (N.Y. Magis. Ct. 1929) (*The Well of Loneliness* by Radclyffe Hall); *People v. Seltzer*, 203 N.Y.S. 809 (N.Y. Sup. Ct. 1924) (*Casanova's Homecoming* by Arthur Schnitzler). But see *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933) (finding *Ulysses* not obscene because it lacked pornographic intent, not relying on the *Hicklin* test).

¹³⁶ *United States v. Harmon*, 45 F. 414 (D. Kan. 1891), *rev'd on other grounds*, 50 F. 921 (C.C.D. Kan. 1892).

¹³⁷ *Id.* at 416.

¹³⁸ In 1956, the Court began its slow turn toward recognizing obscenity as having some First Amendment protection. In deciding the landmark case, *Roth v. United States*, 354 U.S. 476 (1957), the Court rejected the *Hicklin* standard for obscenity, requiring a more stringent definition, as material whose "dominant theme . . . taken as a whole appeals to prurient interest" to the "average person, applying contemporary community standards." *Id.* at 489. Only materials meeting this standard could be banned. Thereafter, the Court was left to decide what fell into this unprotected category. For the next sixteen years the Supreme Court struggled to create coherency in trying to define what was obscene. Frustrated with the definitional task, Justice Potter Stewart coined the most infamous standard in the history of the Supreme Court, identifying pornography as, "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Following *Jacobellis*, as the pornography industry grew, the Court's task became even harder, embarking on the now disreputable process of so-called "Redrugging," named after *Redrup v. New York*, 386 U.S. 767 (1967). Redrugging allowed for summary reversals, without opinion, of convictions for obscene materials where at least five Justices, according to their individualized tests, found the materials to be protected speech. In practice, *Redrugging* led to the installment of a movie theatre in the basement of the Supreme Court, where Justices would screen the videos—before drawing the line. In the thirty-one cases decided during this time, the resulting policy of the Supreme Court was that only hard-core pornography was to be banned. Within six years, this process would be entirely discarded by the Court in *Miller v. California*: "The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." 413 U.S. 15, 23 n.3 (1973).

¹³⁹ DUGGAN & HUNTER, *supra* note 3, at 5.

¹⁴⁰ *Miller*, 413 U.S. at 22.

¹⁴¹ *Id.*; see also DUGGAN & HUNTER, *supra* note 3.

¹⁴² DUGGAN & HUNTER, *supra* note 3, at 5.

¹⁴³ *Id.*

cal morality and created a path for equality.¹⁴⁴ Attacking legal structures, feminists called for the repeal of the Comstock Act in regards to contraception in *Griswold v. Connecticut*,¹⁴⁵ the legalization of abortion in *Roe v. Wade*,¹⁴⁶ and the eradication of the obscenity doctrine in *Miller v. California*.¹⁴⁷

Influenced by the politics of the “sexual revolution,”¹⁴⁸ the Justices agreed in *Miller* that the obscenity doctrine must change. In contrast to the former doctrine, the Court in *Miller* held that *some* sexually explicit material must be protected under the First Amendment.¹⁴⁹ To justify this protection, the Court referred to the *expressive* nature of the marketplace of ideas.¹⁵⁰ For example, Chief Justice Burger, writing for the Court stated, “[the First Amendment] was fashioned to assure unfettered *interchange of ideas*,”¹⁵¹ including works with any “literary, artistic, political, or scientific value, regardless of whether government or a majority” approve.¹⁵² In other words, speech with *any* expressive value, even if sexual or commercial, had to be protected.¹⁵³

In addition to changes being made in the law, larger social, economic, and political shifts around pornography also began to unfold. *Playboy*, *Penthouse*, and *Hustler* had become prevailing forces in society.¹⁵⁴ Pornography

¹⁴⁴ *Id.*

¹⁴⁵ 381 U.S. 479 (1965).

¹⁴⁶ 410 U.S. 113 (1973).

¹⁴⁷ 413 U.S. 15 (1973).

¹⁴⁸ *Id.* at 36 (“One can concede that the ‘sexual revolution’ of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation.”).

¹⁴⁹ *Id.* at 39. The Court created a three-part test to determine what previously obscene material would now be constitutionally protected speech. It considered: (1) “[C]ontemporary community standards”; (2) if the work “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and (3) whether it “lacks serious literary, artistic, political or scientific value.” *Id.* at 24. Reflecting the new social mores of the Revolution, the third factor endorsed the self-expression theory as an important First Amendment element.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 34.

¹⁵² *Id.*

¹⁵³ The Court distinguished between pornography made for commercial gain and pornography not for sale: “[T]he public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.” *Id.* at 35. “To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.” *Id.* at 34. Although providing some protection to non-commercial pornography, the Court did not go as far as to completely discard the categories of obscene or commercial speech. The Court held that the states’ “harsh hand of censorship of ideas” was allowed when pornography was “commercial.” *Id.* at 35–36. Therefore, “repression” or “regulation of commercial exploitation of human interest in sex” was still viable. *Id.* at 36.

¹⁵⁴ GAIL DINES, *PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY* 10 (2010). By 1959, *Playboy* had a monthly circulation of one million. In its heyday of the late 1960s and early 1970s, *Playboy* was an enormous company, with sales of over \$200 million and more than five thousand employees.

studios in California had become permanent institutions.¹⁵⁵ Definitively, a pornography industry had been born. In response, a federal anti-pornography campaign began to take shape. President Nixon launched a commission to research the negative effects of pornography.¹⁵⁶ Moralizing right-wing pundits picked up the banishment of pornography as their cause.¹⁵⁷ But it was radical feminists who led the most effective offensive.¹⁵⁸

Radical feminists mobilized against the pornography industry in the name of gender equality.¹⁵⁹ Their sex equality theory was instrumental to their success. Unlike prior censorship movements such as “comstockery” and then-contemporary right-wing movements, equality rather than morality was their motivation.¹⁶⁰ For example, the radical group Women Against Pornography advocated for the “censorship of films, books, and magazines” that were “*degrading to women.*”¹⁶¹ Matriarchs of the feminist movement such as Susan Brownmiller, Robin Morgan, Adrienne Rich, and Gloria Steinem were all members of the anti-pornography coterie. But it was MacKinnon and Dworkin who surfaced as leaders and defined sex equality as the key element.

Meeting in 1977, the two distinguished the key point of their cause: Although regulating obscenity for “mere prurience” reasons was dangerous, regulating pornography to halt the “subordination of women” was necessary to achieve equality.¹⁶² For the latter proposition, MacKinnon, in particular, developed the formidable new sex equality theory. In her theory, MacKinnon defined “pornography,” as *the* site where “all of the abuses that women had to struggle” occur.¹⁶³ She argued that it is where rape, battery, sexual harassment, prostitution, and other sexual inequalities occur.¹⁶⁴ But more important than defining what pornography is, MacKinnon defined what it does. “What pornography *does* goes beyond its content: It eroticizes hierar-

¹⁵⁵ *Id.* at 1–30.

¹⁵⁶ Richard Nixon, *Statement About the Report of the Commission on Obscenity and Pornography*, THE AMERICAN PRESIDENCY PROJECT (Oct. 24, 1970), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2759#axzz1VDX9VsW3>.

¹⁵⁷ “Since the election of Ronald Reagan and the growth of the New Right as a force in national politics, the fundamentalist right wing in Indianapolis has been strengthened. Consequently, public morality campaigns of various sorts have appeared with confident vigor.” DUGGAN & HUNTER, *supra* note 3, at 30.

¹⁵⁸ DINES, *supra* note 154, at 2.

¹⁵⁹ ANDREA DWORKIN, INTERCOURSE XXI (1987) (explaining how, in 1979, Women Against Pornography (WAP) was formed in New York by some of these feminists in order to advocate for education about and protest against pornography).

¹⁶⁰ The moral arguments focused on preserving “the purity of the community . . . for the salvation and welfare of the ‘consumer.’” Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963).

¹⁶¹ DUGGAN & HUNTER, *supra* note 3, at 30.

¹⁶² Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 298 (1988). Additionally, they believed that pornography hurt women not just as individuals but as members of a “group.” CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148 (1987).

¹⁶³ MacKinnon, *supra* note 26, at 16–17.

¹⁶⁴ *Id.*

chy, it sexualizes inequality. It makes dominance and submission sex.”¹⁶⁵ In other words, pornography causes, promotes, and perpetuates sex inequality.

Even more avant-garde than her sex equality theory was MacKinnon’s liberty theory under the First Amendment.¹⁶⁶ MacKinnon theorized that pornography systemically silenced or *drowned out* women.¹⁶⁷ In other words, pornography limited female liberty. Therefore, eradicating pornography would liberate rather than limit speech, giving women the room to voice their real sexual desires.¹⁶⁸ In step with First Amendment market theories,¹⁶⁹ MacKinnon exhorted that pornography was a market failure, silencing women just as hate speech silenced racial minorities.¹⁷⁰ The panacea, Dworkin and MacKinnon suggested, was an ordinance that aimed to eliminate pornography.¹⁷¹

By late 1983, at the request of the Minneapolis City Council, the two began to draft such an ordinance.¹⁷² The ordinance declared that “pornography” was “explicit subordination of women, whether in pictures or words.”¹⁷³ This broad definition was accompanied by civil sanctions that could be levied against anyone who produced or distributed pornography.¹⁷⁴ The ordinance had an expansive reach. In the following years, Cambridge, Los Angeles, and Minneapolis all considered versions of the statute.¹⁷⁵ But it was the version adopted in 1984 by the Indianapolis City Council¹⁷⁶ that became the issue in *Hudnut*.

¹⁶⁵ *Id.* at 18.

¹⁶⁶ The Brian Lehrer Show Interview with Catharine MacKinnon, Scholar (Jan. 1, 2008) (“In my view, expression should be more meaningfully free than it is now which also means being less legally protected when it does real harm Allowing pornography’s victims to sue civilly for discrimination rather than protecting the product and instrument of their violation as speech, as it is now, would promote sex equality and more speech by those who are now silenced by sexual abuse.”).

¹⁶⁷ MACKINNON, *supra* note 26.

¹⁶⁸ Post, *supra* note 162, at 298; *see also* CATHARINE A. MACKINNON & ANDREA DWORKIN, *IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS* 3 (1997).

¹⁶⁹ Blasi, *supra* note 36, at 6–7.

¹⁷⁰ MacKinnon, *supra* note 26, at 4; *see also* The Brian Lehrer Show, *supra* note 166 (“To put this in a wider context, internationally, hate speech is criminal when proven to incite genocide and to constitute persecution.”).

¹⁷¹ MACKINNON & DWORKIN, *supra* note 168, at 8 (“As the ordinance would in court, the hearings brought pornography out of a half-lit underground into the public light of day. The hearings freed previously suppressed speech. So would the ordinance.”).

¹⁷² The academics had caught the attention of the Minneapolis council when they together taught a course on pornography at the University of Minnesota Law School that year. DWORKIN, *supra* note 159, at xxi (1987). *See generally* Organizing Against Pornography: An Inventory of Its Organizational Records at the Minnesota Historical Society, MINNESOTA HISTORICAL SOCIETY, <http://www.mnhs.org/library/findaids/00183.xml#a0> (last accessed Oct. 16, 2011).

¹⁷³ *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (quoting INDIANAPOLIS, IND., CODE § 16-3(q) (1984)).

¹⁷⁴ *Id.*

¹⁷⁵ DUGGAN & HUNTER, *supra* note 3, at 65.

¹⁷⁶ *Id.* at 65.

The MacKinnon-Dworkin statute created an immediate rupture in society. Neighboring states hotly disagreed over adopting the law.¹⁷⁷ Academics fiercely debated its constitutionality.¹⁷⁸ The ordinance even created a strident political division among conservatives.¹⁷⁹ Moral conservatives defended the statute in their crusade against prurience, while conservative libertarians lambasted its limitations on liberty.¹⁸⁰ However, the sharpest divide created by the legislation was the seismic rift that erupted among feminists: “[W]ithin the National Organization for Women, among lesbian-feminists, and among various feminist scholars, a heated, intense and rancorous debate ensued.”¹⁸¹

In the 1980s, an “acrimonious split developed in the feminist movement after antipornography feminists began drafting and campaigning for legislation.”¹⁸² In response to anti-pornography radicals, the counter-faction of pro-sex feminists mobilized against the ordinance.¹⁸³ Initially, pro-sex feminists opposed radicals for casting pornography as the “central engine of women’s oppression.”¹⁸⁴ However, their larger contention was that an anti-pornography statute harkened back to retrograde Puritan tactics.¹⁸⁵ MacKinnon and Dworkin advocated for the categorical removal of pornography because sex was *the* site of female disempowerment.¹⁸⁶ Pro-sex feminists, in turn, argued that this removal of sex amounted to censorship similar to the Comstock Act.¹⁸⁷ And just as the Comstock Act undermined women’s autonomy, so would the removal of pornography. Pro-sex feminists therefore

¹⁷⁷ After the Minneapolis City Council passed the law in 1983, Mayor Donald Fraser, a liberal Democrat, promptly vetoed the ordinance. The following year, the Indianapolis City Council and their mayor, William Hudnut, a conservative Republican and minister, approved the statute. NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* 77–79 (2000).

¹⁷⁸ Stone, *The Government Must Leave*, *supra* note 9, at 1221.

¹⁷⁹ *Id.* at 1220–21.

¹⁸⁰ *Id.*

¹⁸¹ DUGGAN & HUNTER, *supra* note 3, at 68–69.

¹⁸² *Id.* at 68.

¹⁸³ For a then-contemporary account of the feminist split, prior to which feminists were a bonded front, see Ellen Willis, *Radical Feminism and Feminist Radicalism*, 9 *SOC. TEXT* 91, 115–16 (1984) (“Our opposition has generated a fierce intramovement debate on the significance of sexuality for feminist politics. The sex debate has recapitulated the old division between those radical feminists who emphasized women’s right to equal sexual pleasure and those who viewed sex primarily in negative terms, as an instrument of sexist exploitation and abuse. But contemporary ‘pro-sex’ feminists (as the dissidents have been labeled) are also doing something new—placing a specifically feminist commitment to women’s sexual autonomy in the context of a more general sexual radicalism.”). For an explanation of today’s distinction between radical, liberal, and pro-sex feminists’ perspectives on pornography, see Wendy McElroy, *A Feminist Defense of Pornography*, 17 *FREE INQUIRY MAG.* 1 (1997).

¹⁸⁴ STROSSEN, *supra* note 177, at 73–74 (“[A]ntiporn groups and leaders were becoming grandiose and overstated [P]ornography was now . . . the major socializer of men, the chief agent of violence against women.”).

¹⁸⁵ *See id.* at 75–79.

¹⁸⁶ MacKinnon, *supra* note 26, at 16–17. In contrast, although pro-sex feminists admitted that pornography could be harmful to women, they were unwilling to advocate its removal from the discourse. Hunter & Law, *FACT Brief*, *supra* note 28, at 12–13.

¹⁸⁷ Hunter & Law, *FACT Brief*, *supra* note 28, at 12–13.

came to call MacKinnon's ordinance "anti-sex" (hence the term "pro-sex" feminist), complaining that it abrogated women's equality *and* self-expression.¹⁸⁸

Reflecting on history, pro-sex feminists had well-founded reasons to believe that radical notions were wrong. Historically, treating sex as a "special case" often led to female repression. Past persecution of feminists like Margaret Sanger and battles over divorce were clear harbingers of what happened when society eradicated sex from public discourse.¹⁸⁹ For more recent examples, pro-sex feminists pointed to the failed Equal Rights Amendment ("ERA") and the abortion wars.¹⁹⁰ Throughout history, women had been repeatedly disempowered through suppression of sex. Upsettingly, the City of Indianapolis risked the same destructive policy. In justifying their ordinance, the City held that pornography needed to be eradicated since "women, like children, need 'special protection.'" ¹⁹¹ Pro-sex feminists argued that this ordinance would repeat the mistakes of history and further disempower women by distancing them from their own bodies.¹⁹² This they held to be especially true since "sexuality," they maintained, was their "political power."¹⁹³ In order for women to achieve equality and political representation, sexual expression needed awakening, rather than banishment.¹⁹⁴ Pro-sex feminists were therefore convinced pornography should not be silenced but empowered.¹⁹⁵

¹⁸⁸ See generally Heather Love, *Diary of a Conference on Sexuality, 1982*, 17 GLQ: J. LESBIAN & GAY STUD. 49 (2010) (discussing the Barnard conference on sexuality of April 1982, organized by pro-sex feminists).

¹⁸⁹ SUSAN SONTAG, *Pornographic Imagination*, in STYLES OF RADICAL WILL 35, 46 (1969); see also THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, INC., *WOMEN AND THEIR BODIES* (1st ed., later titled *OUR BODIES, OURSELVES*) 18 (1970) ("To make sex special, different, better, more important is to disown our bodies.").

¹⁹⁰ The relationship between the anti-ERA and anti-abortion movements and the anti-pornography movement was unmistakable. DUGGAN & HUNTER, *supra* note 3, at 46 ("In Suffolk, the [anti-pornography] law was advanced by a conservative, anti-ERA, male legislator who wished to 'restore ladies to what they used to be.'"); STROSSEN, *supra* note 177, at 78 (explaining that Phyllis Schlafly, leader of the Stop ERA movement, endorsed the Indianapolis ordinance on the belief that it supported traditional notions of sex and family). In these circumstances and in the campaign against abortion, traditionalists kept women's sexuality tied solely to the domestic sphere, in their roles as mothers and wives. Distanced from their individual sexual desires, women were kept isolated from politics. "[R]estriction and regulation of sexual expression is a form of political repression aimed at sexual minorities" DUGGAN & HUNTER, *supra* note 3, at 5.

¹⁹¹ DUGGAN & HUNTER, *supra* note 3, at 60 ("Children are incapable of consenting to engage in pornographic conduct, even absent physical coercion and therefore require special protection By the same token, the physical and psychological well-being of women ought to be afforded comparable protection." (quoting Indianapolis's brief)).

¹⁹² E-mail from Carole Vance, Professor, Columbia Univ., to author (Apr. 4, 2011, 11:06 EST) (on file with author).

¹⁹³ DUGGAN & HUNTER, *supra* note 3, at 5.

¹⁹⁴ *Id.* ("What the right wing wishes to eliminate is our power to invent and represent ourselves, and to define and redefine our politics. They know our public sexual expression is political . . . the path of access to public discourse and political representation.").

¹⁹⁵ See *id.* at 40-42.

Pro-sex feminists argued that pornography or *fantasy* should be categorically protected. This was the argument that would become central to the economic liberty approach of the First Amendment. Pro-sex feminists believed not only that censorship harmed women but also that pornography liberated women.¹⁹⁶ Ratcheting up the stakes, pro-sex feminists went beyond negation of MacKinnon's claim to instead advocate the opposite position.¹⁹⁷ They argued that open access to pornography would free women from the shackles of sex restrictions and make them "courageous, self-reliant," and "confiden[t]."¹⁹⁸ Pornography "is potentially liberating for all women in that it allows them to view themselves as sexual creatures."¹⁹⁹ To make this argument, pro-sex feminists developed a theory that *fantasy* empowered women.²⁰⁰

Fantasy, they argued, gave women autonomy over their bodies.²⁰¹ Scholars such as Carole S. Vance, Susan Sontag, Gayle Rubin, and Ann Snitow argued that women had been disconnected from their sexuality,²⁰² and that *fantasy* was key in reclaiming it.²⁰³ "Fantasies tell us something about the reality we're in—who we'd like to be," wrote the Boston Women's Health Collective in their formative book, *Our Bodies, Ourselves*.²⁰⁴ In 1983, pro-sex feminists presented these theories at the Barnard conference,

¹⁹⁶ *Id.* at 55–61.

¹⁹⁷ *Id.*

¹⁹⁸ STROSSEN, *supra* note 177, at 48 ("Rejecting the pro-censorship faction's emphasis on women as victims in need of governmental protection through censorship, anti-censorship feminists are willing to trust our own voices—as well as those of our anti-pornography sister feminists—to effectively counter misogynist expression, including misogynist sexual expression. Ironically, the feminist pro-censorship faction apparently does not view women as capable of such self-help, but instead sees us as helpless.").

¹⁹⁹ Narelle Lydeamore, *Pornography and Power*, in FEMINIST ALLIANCES 133, 136 (Lynda Burns ed., 2006).

²⁰⁰ See Dubois Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 31 (C. Vance ed., 1984); Snitow, Stansell & Thompson, *Introduction*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 9 (A. Snitow, C. Stansell & S. Thompson eds., 1983). See generally Nan D. Hunter, *The Pornography Debate in Context: A Chronology of Sexuality, Media & Violence Issues in Feminism*, in CAUGHT LOOKING: FEMINISM, PORNOGRAPHY AND CENSORSHIP (Kate Ellis et al. eds., 1986) (articulating a chronology of the pro-sex feminist movement); ELLEN WILLIS, *Feminism, Moralism, and Pornography*, in BEGINNING TO SEE THE LIGHT (1981).

²⁰¹ DUGGAN & HUNTER, *supra* note 3.

²⁰² See Gordon, *supra* note 200, at 31; Snitow, Stansell & Thompson, *supra* note 200, at 9.

²⁰³ See Hunter & Law, FACT Brief, *supra* note 28; SUSAN SONTAG, *The Imagination of Disaster*, in AGAINST INTERPRETATION 209, 224–25 (1961); see also SUSAN SONTAG, STYLES OF RADICAL WILL 58 (2002) ("What pornographic literature does is precisely to drive a wedge between one's existence as a full human being and one's existence as a sexual being Insofar as strong sexual feeling does involve an obsessive degree of attention, it encompasses experiences in which a person can feel he is losing his 'self.'").

²⁰⁴ BOSTON WOMEN'S HEALTH COLLECTIVE, *supra* note 189, at 30 ("[W]ho we'd . . . rather be in bed with, what we'd rather be doing, what we'd rather be feeling. Taking responsibility for them does not mean name calling or self-hate; it merely means accepting our feelings and then trying to understand them.").

“Towards a Politics of Sexuality.”²⁰⁵ The conference, picketed by radicals, was a key moment in the schism between feminists.²⁰⁶ It illuminated that the notion of *autonomy* is what divided feminists.²⁰⁷ Pro-sex feminists argued that if women used pornography to fantasize it would enable their autonomy. Radicals argued that it was impossible to gain autonomy this way because all pornography was corrupted by patriarchy. Living in a male-dominated world, women’s fantasies about sex were actually fantasies about abuse.²⁰⁸ Their sense of autonomy was therefore false.²⁰⁹

Pro-sex feminists, on the other hand, believed fantasizing always enabled autonomy.²¹⁰ Even the most extreme images that “magnif[ied] misogyny” required protection because they enabled women’s autonomy by allowing them to decide which of the “many, often anomalous, characteristics” of pornography were “legitimizing.”²¹¹ And since these fantasies were

²⁰⁵ Wilson, *supra* note 4, at 35.

²⁰⁶ JANE F. GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE RE-WRITING OF AMERICAN SEXUAL THOUGHT, 1920 TO 1982*, at 151–53, 183–93 (2001).

²⁰⁷ DUGGAN & HUNTER, *supra* note 3, at 22 (“Conference planners hope to avoid the polarization that has already occurred on the West Coast, and structure the Conference theme around ‘pleasure and danger.’ More than eight hundred women attend. WAP stages a protest wearing T-shirts . . . ‘Against S/M’ . . . [and] also circulates leaflets criticizing selected participants Barnard College officials confiscate the *Diary of the Conference* produced by conference organizers. The Helena Rubinstein Foundation withdraws its funding from future conferences Reporting of the conference and letters to the editor condemning or extolling it are printed for months in *off our backs*.”).

²⁰⁸ “*The Sexes: Really Socking It to Women*,” *TIME*, Feb. 7, 1977, available at, <http://www.time.com/time/magazine/article/0,9171,914772,00.html#ixzz1WZUzuMvy> (“Some scholars think that fantasies of abuse appeal to many women. A 1974 survey indicates that perhaps half of American women have sexual fantasies of being overpowered by men and forced to surrender. And some analysts report that strong, independent women often produce masochistic fantasies as a compensation for succeeding in a man’s world. ‘There has been a great rise, in women’s sexual fantasies, of perceiving themselves as victimized,’ says Psychiatrist Ruth Tiffany Barnhouse. ‘If you pursue your independence in an antagonistic way, you will make up for it in your fantasies.’”).

²⁰⁹ The assumptions “that the law of the [F]irst [A]mendment makes about adults—that adults are autonomous, self-defining, freely-acting, *equal* individuals—are exactly those qualities which pornography systematically denies and undermines for women.” MacKinnon, *supra* note 26, at 36.

²¹⁰ “Even violent ‘pornography,’ including that depicting or describing scenes of ravishment, may convey liberating messages to feminist women.” Nadine Strossen, *A Feminist Critique of ‘The’ Feminist Critique of Pornography*, 79 *VA. L. REV.* 1099, 1133–34 (1993).

²¹¹ DUGGAN & HUNTER, *supra* note 3, at 56 (“[Pornography] magnifies the misogyny present in the culture and exaggerates the fantasy of male power . . . however . . . the existence of pornography has served to flout conventional sexual mores, to ridicule sexual hypocrisy and to underscore the importance of sexual needs. Pornography carries many messages other than woman-hating; it advocates sexual adventure, sex outside of marriage, sex for no reason other than pleasure, casual sex, anonymous sex, group sex, voyeuristic sex, illegal sex, public sex. Some of these ideas appeal to women reading or seeing pornography, who may interpret some images as legitimating their own sense of sexual urgency or desire to be sexually aggressive.”).

This was reminiscent of Carole S. Vance’s observation that, “The hallmark of sexuality is its complexity: its multiple meanings, sensations, and connections.” Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in *PLEASURE AND DANGER*, *supra* note 200, at 5.

mere thoughts and not reality²¹² a ban on them or *any other expressive* speech, would amount to an Orwellian invasion on private thought.²¹³ This was the key point for the pro-sex feminists and eventually the economic liberty approach. The government had no right to determine what was or was not low-value speech; what was or was not expressive.²¹⁴ It could not control ideas. This was for the autonomous individual to determine and express.

Eventually, this argument would be expanded into the economic liberty approach. For example, in the context of commercial speech cases, whether advertising was deemed expressive was not for the government to determine.²¹⁵ The same held true for campaign contributions and racially bigoted speech.²¹⁶ Liberty required the expression of these forms of speech no mat-

²¹² NANCY FRIDAY, *FORBIDDEN FLOWERS: MORE WOMEN'S SEXUAL FANTASIES* (1975) [hereinafter FRIDAY, *FORBIDDEN FLOWERS*]; NANCY FRIDAY, *MY SECRET GARDEN: WOMEN'S SECRET FANTASIES* (1973) [hereinafter FRIDAY, *MY SECRET GARDEN*].

²¹³ See FRIDAY, *FORBIDDEN FLOWERS* *supra* note 212, at ix (“[Y]ou can also see the way that pornography lends itself as a form, in fairly mobile ways, to local necessities for expression of what’s routinely muzzled from other public forums. Like pornography of the past, from Boccaccio to Reblais to Sade, it gets appropriated as a form of speech and deployed around subjects and issues that are the most ‘unspeakable,’ the most buried, but also the most politically and culturally significant . . . if we’ve learned anything from the artistic avant-garde . . . it’s that administering shocks to the bourgeois sensibility looks . . . like an important cultural project. Savor those shocks.”). See LAURA KIPNIS, *BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA X* (1998) (“If public policy and policing procedures are enacted on the basis of the most simplistic assumptions about the role of fantasy in the human psyche (that fantasy is synonymous with intent, for instance), this imperils a basic form of freedom, as the available modes of political expression.”); see also *Am. Book-sellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (stating ordinance was “thought control”).

²¹⁴ See, e.g., Carol Vance et al., *False Promises: Feminist Antipornography Legislation, in CAUGHT LOOKING*, *supra* note 200, at 72, 73 (“How can feminists be entrusting the patriarchal state with the task of legally distinguishing between permissible and impermissible sexual images?”).

²¹⁵ However, advertising was a main concern of pro-sex feminists. This was the contradiction/complication within pro-sex feminist arguments. At the same time that they advocated for free and open self-expression, including corporate forms of pornographic speech, they recognized that corporate America had greatly influenced the female body. For example as a founder of *Our Bodies, Ourselves* wrote:

Of course there was corporate control, if only through advertising. The use of the female body of a certain type for car ads, the use of cosmetic ads to make us feel we had to buy certain products or remodel our bodies to fit a certain type, and hair dyes etc. Not to mention the control exercised by drug companies with the estrogen products.

E-mail from Founder, Boston Women’s Health Book Collective, to author (Sept. 13, 2011, 17:57 EST) (on file with author). Yet, pro-sex feminists tacitly aligned with corporate interests more concerned with the task at issue, freedom of sexual expression, and to halt radicals from censoring sexuality. As Leonore Tiefer, now a leader of the movement to distance female sexuality from corporate influences, explained, “I was involved in the pro-porn, anti-censorship arm of the debate. We were less focused on corporate intrusions at the time than those of the anti-porn feminists.” E-mail from Leonore Tiefer, Assoc. Clinical Prof. of Psychiatry at New York Univ., to author (Sept. 14, 2011, 17:53 EST) (on file with author).

²¹⁶ Jerome A. Barron, *Access Reconsidered*, 76 GEO. WASH. L. REV. 826, 827 (2008) (“Therefore, legal intervention was needed ‘if novel and unpopular ideas [were] to be assured

ter how cruel, disturbing, or “low-value” they were generally considered to be. Ruling otherwise risked that some “high-value” speech could be regulated by the government. Preventing dystopia was therefore primary. It was this autonomy/liberty combined with the expression/fantasy rationalization of the free market that *Hudnut* subsumed in 1984, forever changing the First Amendment.

II. AMERICAN BOOKSELLERS ASSOCIATION V. HUDNUT

In 1986, the Supreme Court, through an unusual procedure, summarily affirmed the unconstitutionality of the Indianapolis ordinance, in effect endorsing pro-sex reasoning.²¹⁷ *American Booksellers v. Hudnut* remains infamous today for its practical effect—opening the floodgates for the now established pornography industry and effectively ending a decade-long war among feminists.²¹⁸ However, the Circuit opinion has a greater but lesser-known significance, having crystallized that liberty wins over equality within First Amendment jurisprudence. Judge Easterbrook, writing for the Seventh Circuit, not only shifted the “marketplace of ideas” concept toward a liberty focus, as had been done in *Miller* and *Virginia State Board of Pharmacy*, but he also infused it with moral force from pro-sex notions of fantasy and autonomy. This added gravitas was Easterbrook’s contribution—an unintended consequence of feminist discourse.

A. Feminists Join Unlikely Forces on Both Sides

In the years preceding the trial, feminists on both sides created unlikely coalitions that affected the case in a powerful way.²¹⁹ By escalating the public attention surrounding the case, the coalitions made Judge Easterbrook’s opinion appear especially decisive.²²⁰ Though they deny that an alliance was made, MacKinnon and Dworkin have been highly criticized for getting into bed with the moral right both in the Indianapolis legislature²²¹ and within

a forum.’”); see also Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

²¹⁷ Am. Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986). Although a summary affirmance procedure never endorses any reasoning, only the outcome of a case, the Court’s use of the summary affirmance procedure in this case was seen as extremely unusual and signaled a rejection of the Dworkin/MacKinnon argument. See, e.g., ANDREA DWORKIN & CATHARINE A. MACKINNON, *Civil Rights and Speech, in PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY* (1988); see also Stone, *The Government Must Leave*, *supra* note 9, at 1226 (“The United States Supreme Court summarily affirmed Judge Easterbrook’s decision in *Hudnut*, essentially putting to rest the Dworkin and MacKinnon argument for laws prohibiting ‘pornography.’”).

²¹⁸ See Stone, *The Government Must Leave*, *supra* note 9, at 1226.

²¹⁹ Lydeamore, *supra* note 199, at 133.

²²⁰ *Id.*

²²¹ MACKINNON & DWORKIN, IN HARM’S WAY, *supra* note 168, at 8.

national politics.²²² Whether they in fact formed a coalition, or whether their similar interests simply overlapped to give an appearance of one, the alliance helped transform pornography into a pet issue for America's growing right-wing.²²³ Despite criticizing radicals' coalition, pro-sex feminists acted similarly. Tacitly siding with the corporate powerbrokers of the pornography industry²²⁴ and Chicago-school libertarians, pro-sex feminists concerned with female empowerment thrust the case into the limelight only to have their concerns subsumed by their allies' ancillary interests.²²⁵ Moreover, both sides' rhetoric was appropriated into their "allies'" causes.

First, and most infamous, was the implicit coalition that formed between radical feminists and conservative fundamentalists.²²⁶ The coalition with the right-wing arose after 1969, when the Supreme Court held in *Stanley v. Georgia*²²⁷ that pornography could be lawfully viewed in the privacy of one's own home. *Stanley* initiated the moral right's core concern: If pornography surfaced in American domestic life, it threatened to disturb the sanctimonious family unit. Soon after their initiative was born, *Stanley* gave rise to the President's Commission on Obscenity and Pornography of Presidents Johnson and Nixon.²²⁸

By the 1980s, as the industry grew, the moral right's worries increased.²²⁹ Mainstays in the right-wing branch launched a grassroots campaign in opposition to pornography.²³⁰ Jesse Helms, Phyllis Schlafly, and Donald Wildmon spoke out against the medium.²³¹ Most notably, President

²²² WENDY MCELROY, XXX: A WOMAN'S RIGHT TO PORNOGRAPHY 92 (1995) ("Dworkin and MacKinnon orchestrated the public hearings at which the ordinance was aired. They called only the witnesses they wished to hear from.").

²²³ Lydeamore, *supra* note 199.

²²⁴ Interview with Sylvia A. Law, Professor, New York Univ. Law School (Mar. 23, 2010). Law mentioned that the main concern was denying the government the right to judge which speech should be protected. Therefore, by default, corporations had a large ability to affect speech. That said, Law continued, in getting the FACT brief signed it was important to get signatures from "all sides of the pro-sex perspective" including those supporting pro-sex pornographers in the industry. A conversation with pro-sex feminist, activist, and author Alix Shulman revealed a similar note: "We were certainly against government deciding [what speech should be protected], which I guess le[ft] the field to corporate sponsors. But did we support them? Maybe by default, but not in principle." E-mail from Alix Kates Shulman, Writer, to author (Sept. 14, 2011, 01:03 EST) (on file with author). See also DUGGAN & HUNTER, *supra* note 3.

²²⁵ ANDREA DWORKIN, PORNOGRAPHY—MEN POSSESSING WOMEN, at xxxi, 29, 137 (1981).

²²⁶ For a then-contemporary report of the strange coalition, see E.R. Shipp, *A Feminist Offensive Against Exploitation*, N.Y. TIMES, June 10, 1984, at E2 ("An unusual coalition of radical feminists and conservative women politicians in Minneapolis and Indianapolis is leading a novel campaign against pornography.").

²²⁷ 394 U.S. 557 (1969).

²²⁸ Following *Stanley*, President Lyndon B. Johnson, followed by President Richard Nixon, organized the President's Commission on Obscenity and Pornography. The Commission found that the harms potentially caused by pornography were inconclusive. See Nixon, *supra* note 156.

²²⁹ DUGGAN & HUNTER, *supra* note 3, at 30–33.

²³⁰ *Id.*

²³¹ *Id.*

Ronald Reagan appointed Attorney General Edwin Meese, who became known as the principle anti-pornography crusader of the 1980s.²³² Despite the right wing's wish to distance itself from feminists and despite MacKinnon and Dworkin's consistent admonition of these groups, both inevitably reinforced each other through their overlapping goals.²³³

Pro-sex criticisms of this partnership were two-fold.²³⁴ First, they believed the coalition threatened not only the future of pornography, but also other feminist causes like "sexual expression" and reproductive rights.²³⁵ "The Mackinnon/Dworkin bill has contributed to a moral crusade that is threatening to expand to other places on a wider scale."²³⁶ Historically, such "symbolic campaigns" with "the help of conservative allies" had "the effect of worsening the condition."²³⁷ However, the second principal criticism of MacKinnon and Dworkin was that they provided right-wing organizations

²³² In 1986, Meese established the Attorney General's Commission on Pornography. Later called the Meese Commission, it convicted twenty out of fifty producers and suppliers of obscene materials.

The most effective technique . . . was "multiple-district prosecution." The [Commission] would coordinate with local prosecutors to charge a single mail-order company in as many as four jurisdictions simultaneously, making a court fight prohibitively expensive. Rather than match resources with the federal government, many defendants chose to settle. Under a law passed in 1988, prosecutors could dictate a dollar amount, known as a "liquidated forfeiture"—in essence, a fine. Under the new law, [a series of cases in the early 1990s] alone took in \$23 million, bankrupting several adult firms. Those who went to court usually fared no better.

Nicholas Confessore, *Porn and Politics in the Digital Age*, FRONTLINE, available at, <http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/politics.html>.

²³³ STROSSEN, *supra* note 177, at 91–94 ("The National Coalition Against Pornography undertook this well-publicized campaign under the slogan 'Enough is Enough.' Although the program's leaders were mostly conservative women with ties to such right-wing organizations as Phyllis Schlafly's Eagle Forum and Beverly LaHaye's Concerned Women for America, the group's promotional materials, including billboards throughout the Midwest prominently featuring quotes from Andrea Dworkin."). Pro-sex feminists complained that the conservatives' "first smart move" was to hire MacKinnon, who "wears tailored suits and gold jewelry; her hair is neatly pulled back into a bun," as a consultant for the Indianapolis legislation. DUGGAN & HUNTER, *supra* note 3, at 33. The connection between the two groups was most visible at the ordinance hearings where MacKinnon and Dworkin served as experts next to right-wing supporters. See MACKINNON & DWORKIN, *supra* note 168, at ix–xii (listing participants such as Sharon Warwick, Rick Osborne, Bill Neiman, Jeffrey Mason, Gloria Allred, Carl Faber, and Sally Fisk).

²³⁴ Lydeamore, *supra* note 199, at 133; see also DUGGAN & HUNTER, *supra* note 3, at 35–39 (Now that the passage of the law is fait accompli and cities around the country await Judge Barker's decision on its constitutionality, it is worth asking the obvious question: what the hell happened in Indianapolis? Radical feminists allied with the Moral Majority? . . . Catharine MacKinnon joined with the right-wing in invoking the power of the state against the sexual representation. In so doing she and her supporters have helped spur a moral crusade that is already beyond the control of feminists—antiporn or otherwise. And that moral crusade can only be dangerous to the interests of feminists everywhere, and to the future of women's rights to free expression.").

²³⁵ DUGGAN & HUNTER, *supra* note 3, at 5, 32.

²³⁶ *Id.* at 39.

²³⁷ DUGGAN & HUNTER, *supra* note 3, at 38 (memorializing previous nineteenth- and twentieth-century feminist campaigns including laws against prostitution and raising the age of consent in which "conservatives ultimately exercised more power in determining how laws . . .

with rhetorically powerful feminist sound bites such as “pornography degrades women and contributes to an inequality.”²³⁸ In essence, they were castigated for allowing right-wing fundamentalists to appropriate the jargon of equality allowing them to enforce moral bans veiled under a concern for women’s rights.

However, pro-sex feminists made similar compromises without incurring nearly as much criticism.²³⁹ In June 1984, an hour after the Mayor of Indianapolis signed the anti-pornography ordinance into law, a large group of commercially interested plaintiffs immediately filed suit in federal court. This group included: the American Booksellers Association, Inc., which made up about 5,200 bookstores and chains; the Association for American Publishers; an Indianapolis seller and renter of videocassettes, Video Shack; the Council for Periodical Distributors, Inc.; and others.²⁴⁰ As reported by the *Washington Post*, *Hudnut* was being “closely watched” as an “\$8 billion-a-year pornography industry” sat in the balance.²⁴¹ Judge Sarah Evans Barker,²⁴² the presiding district court judge, acknowledged these pecuniary interests: “[This o]rdinance interferes with the free flow of constitutionally protected books, periodicals, motion pictures, and television programs across state lines.”²⁴³

would finally affect women’s lives [having] more power than feminists then imagined,” and creating devastating backlash on women).

²³⁸ STROSSEN, *supra* note 177, at 91.

²³⁹ “If the discussion of sexuality surrounding the anti-porn law in Indianapolis had resulted in increased awareness of feminist issues, in the increased visibility and social/political power of feminists, or in the enhanced ability of feminists on both sides of the issue to define and control the terms of debate, perhaps it could have been useful. But it did not.” DUGGAN & HUNTER, *supra* note 3, at 41–42.

²⁴⁰ Stuart Taylor, Jr., *Pornography Foes Lose New Weapon in Supreme Court*, N.Y. TIMES, Feb. 25, 1986, at A1. Plaintiffs also included Koch News Company, National Association of College Stores, Inc., Omega Satellite Products Co., and Kelly Bentley, an Indianapolis resident. *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984).

²⁴¹ Kamen, *supra* note 3.

²⁴² Judge Barker had been nominated to the bench earlier that year by President Reagan. See Mason King, *Leading Questions: Sarah Evans Barker Won’t Stop*, INDIANAPOLIS BUS. J., Mar. 9, 2011, <http://www.ibj.com/leading-questions-judge-sarah-evans-barker-wont-slow-down/PARAMS/article/25787> (speaking about what expectations she felt as a conservative judge after Reagan’s nomination: “I didn’t want to be measured against girl judges or Republicans”).

²⁴³ *Hudnut*, 598 F. Supp. at 1328. Judge Barker would decide a parallel case almost ten years later on mixed economic grounds. See *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008). In *Big Hat*, Judge Barker struck down an Indiana law requiring bookstores and other retailers that sell even a single “sexually explicit” item to register it with the state and pay a \$250 license fee. She emphasized the commercial chilling effect the ordinance would have on merchants:

Clearly, a vast array of merchants and materials is implicated by the reach of this statute as written. A romance novel sold at a drugstore, a magazine offering sex advice in a grocery store checkout line, an R-rated DVD sold by a video rental shop, a collection of old *Playboy* magazines sold by a widow at a garage sale—all incidents of unquestionably lawful, nonobscene, nonpornographic material being sold to adults—would appear to necessitate registration under the statute.

See id. at 998.

It was these commercial groups, publishers, distributors, pornographers, and other commercial actors with whom the pro-sex feminists aligned.²⁴⁴ But it must be made clear that pro-sex feminists were in no way motivated by, or intent on, benefiting these *commercial* interests, just as radical feminists were in no way intent on promoting right-wing, moralistic causes. In fact, just as MacKinnon denounced the Right's commitment to prurience, pro-sex feminists criticized commercial forces for harming women.²⁴⁵ Yet, pro-sex feminists effectively endorsed commercial actors by default. In other words, by advocating for the government to take its hands off free speech, pro-sex feminists left the field open to commercial actors.²⁴⁶ Soon after, pro-sex language of autonomy and expression would also be usurped to bring First Amendment jurisprudence in line with these commercial interests.

²⁴⁴ E-mail from Alix Shulman, *supra* note 224:

I should add that many of us were/are writers and not against publishers: we needed and relied on them, and we wanted them to publish whatever we had to say, including about sex. I didn't think of my publisher (at the time Knopf) as a corporation, though of course it was, but just as a publisher I was very lucky to have publishing my novels.

Very often the criticism from radical feminists was that pro-sex feminists aligned themselves with pornography powerbrokers like *Playboy*. Although that may have been, many pro-sex feminists also saw such actors as sexist: "[N]early all porn is sexist in that it is the product of a male imagination and aimed at a male market." WILLIS, *supra* note 200, at 221. Those coalitions may or may not have existed, but the more real and more obvious corporate alliance (although still somewhat by default) was pro-sex feminists' association with publishing houses and distributors.

²⁴⁵ See BOSTON WOMEN'S HEALTH COLLECTIVE, *supra* note 189, at 18; Interview with Sylvia A. Law, *supra* note 224; see also Hunter & Law, FACT Brief, *supra* note 28, at 101:

The far more pervasive commercial images depict[] women as primarily concerned with the whiteness of their wash, the softness of their toilet tissue, and whether the lines of their panties show when wearing tight slacks Commercial images, available to the most impressionable young children during prime time, depict women as people interested in inconsequential matters who are incapable of taking significant, serious roles in societal decision-making.

See also WILLIS, *Feminism, Moralism, and Pornography*, *supra* note 200, at 227:

Picketing an antiwoman movie, defacing an exploitative billboard, or boycotting a record company to protest its misogynist album covers conveys one kind of message, mass marches against pornography quite another. Similarly, there is a difference between telling the neighborhood news dealer why it pisses us off to have *Penthouse* shoved in our faces and choosing as a prime target every right-thinking politician's symbol of big-city sin. Times Square.

For more on pro-sex feminists' stance on commercial forces, see Taylor, *supra* note 240.

²⁴⁶ "We were certainly against government deciding, which I guess leaves the field to corporate sponsors." E-mail from Alix Shulman, *supra* note 224.

B. The Amici Briefs: Feminists on Both Sides

On May 1, 1984, plaintiffs²⁴⁷ brought suit in the United States District Court for the Southern District of Indiana. On November 19, 1984, Federal District Judge Sarah Evans Barker decided to permanently enjoin the ordinance, declaring it unconstitutional.²⁴⁸ Without recognizing the nuances, Judge Barker explained that MacKinnon advocated for *equality* under the Equal Protection Clause, while pro-sex feminists advocated for *liberty* under the First Amendment.²⁴⁹ Barker held that liberty trumped equality interests.²⁵⁰ However, *both* feminist contingents had employed equality and liberty claims. Unfortunately, following Judge Barker's opinion, both camps prioritized the liberty claims in their amicus briefs: Radicals highlighted their "drown out" argument, and pro-sex feminists highlighted autonomy claims,²⁵¹ leaving the equality concerns to be easily obfuscated by Judge Easterbrook.

1. Amicus Curiae Brief of Andrea Dworkin

In support of the ordinance, Andrea Dworkin submitted a powerful amicus brief to the Seventh Circuit²⁵² denouncing Judge Barker's opinion and formulating ideas that she would later repeat in her oeuvre of books and articles.²⁵³ Her brief addressed both liberty and equality arguments, but began with a general point about speech. Dworkin's universal point was that

²⁴⁷ For a full list of plaintiffs, see *supra* note 240.

²⁴⁸ *Hudnut*, 598 F. Supp. at 1318.

²⁴⁹ *See id.* at 1333.

²⁵⁰ *Id.* ("[T]he First Amendment gives primacy to free speech and any other state interest (such as the interest of sex based equality under law) must be so compelling as to be fundamental; only then can it be deemed to outweigh the interest of free speech. This Court finds no legal authority or public policy argument which justifies so broad an incursion into First Amendment freedoms as to allow that which defendants attempt to advance here.").

²⁵¹ MACKINNON & DWORKIN, *supra* note 168, at 318 ("The absolute, fixed, towering importance of the First Amendment and the absolute, fixed insignificance of sex discrimination and of equality interests in Judge Barker's decision is a direct consequence of how late women came into this legal system as real citizens. Equality must be the legal priority for any group excluded from constitutional protections for so long and stigmatized as inferior. Yet the historical worthlessness of women—which is why our interests are not as old as this country—undermines any claim we make to having rights that must be taken as fundamental: equality for women is seen as trivial, faddish. The First Amendment, by contrast, is fundamental—a behemoth characterized by longevity, constancy, and familiarity. Because women have been silenced and because women have been second-class, our equality claims are seen as intrinsically inferior. The opposite should be the case. Those whom the law has helped to keep out by enforcing conditions of inferiority, servitude, and debasement should, by virtue of that involuntary but intensely destructive exclusion, have the court's full attention when asserting any equality claim.").

²⁵² Andrea Dworkin, Brief for Andrea Dworkin as Amicus Curiae Supporting Petitioners, *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, (7th Cir. 1985) (No. 84-3147), reprinted in MACKINNON & DWORKIN, *supra* note 168, at 310–20 [hereinafter Dworkin, Amicus Curiae Hudnut Brief].

²⁵³ *See, e.g.*, Dworkin, *Against the Male Flood*, *supra* note 26, at 1.

pornography was neither speech nor fantasy; rather, “it is indisputably action.”²⁵⁴ She continued, “actions immortalized in pornography are not ideas, thoughts, or fantasies.”²⁵⁵ Pornography—as action, not speech—could therefore be regulated. For those unconvinced by this argument, Dworkin continued to her arguments on liberty and equality.

Dworkin began with MacKinnon’s groundbreaking liberty point, stating that pornography silenced women.²⁵⁶ “The real exclusion of women from public discourse has allowed men to accumulate speech as a resource of power; and with that power, men have articulated values and furthered practices that have continued to debase women and to justify that debasement.”²⁵⁷ In other words, men had a monopoly over the marketplace of ideas, and their pornographic speech *drowned out* female voices.²⁵⁸ This was an obstruction of liberty, claimed Dworkin.

Finally, perhaps realizing its futility with the court, Dworkin argued that pornography perpetuated sex inequality. Just as “segregation creates racial inferiority,” Dworkin argued, “so does pornography subordinate women.”²⁵⁹ Women, just like African Americans, needed protection.²⁶⁰ Therefore, under the Fourteenth Amendment, their victimization required that equality concerns trump liberty concerns.²⁶¹

2. *Brief Amici Curiae of FACT*

Among the many pro-sex organizations that formed in response to Dworkin and MacKinnon in the years following the ordinance,²⁶² none was more important than the Feminist Anti-Censorship Taskforce (FACT).²⁶³ FACT, formed by feminists Carol Vance and Gayle Rubin “to oppose the ordinance on feminist grounds,” was the epicenter of the pro-sex strategizing campaign.²⁶⁴ In 1984, the organization hired two young attorneys to represent them in *Hudnut*: Nan Hunter and Sylvia Law.²⁶⁵ Their amicus brief,

²⁵⁴ Dworkin, Amicus Curiae Hudnut Brief, *supra* note 252, at 310.

²⁵⁵ *Id.*; see also *id.* (“The vocabulary of ‘sexual fantasy,’ often applied to pornography as a genre, is in fact the language of prostitution, where the act that the man wants done and pays to get done is consistently referred to as his ‘fantasy,’ as if it never happens in the real world. He goes to a prostitute and pays her money so that she will do what he tells her to do, and it is this act that is called ‘fantasy.’”).

²⁵⁶ See MACKINNON, *supra* note 74, at 105–06.

²⁵⁷ Dworkin, Amicus Curiae Hudnut Brief, *supra* note 252, at 319; see also *id.* (“If equality interests can never matter against [F]irst [A]mendment challenges, then speech becomes an intolerable instrument of dispossession, not a safeguard of human liberty.”).

²⁵⁸ *Id.*

²⁵⁹ Dworkin, Amicus Curiae Hudnut Brief, *supra* note 254.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² These organizations included: Feminists Against Censorship; Feminists for Free Speech; and the National Coalition Against Censorship’s Working Group on Women, Censorship and “Pornography.”

²⁶³ Lydeamore, *supra* note 199, at 133.

²⁶⁴ DUGGAN & HUNTER, *supra* note 3, at 22.

²⁶⁵ *Id.*

co-signed by the Women's Legal Defense Fund and eighty individual feminists, would become one of the most influential feminist "manifestos" ever written.²⁶⁶ Like Dworkin, Hunter and Law strategically prioritized their liberty "self-expression" argument.²⁶⁷

To begin, Law and Hunter made four speech arguments. First, they argued that the ordinance was overinclusive. "The sweep of the ordinance is breathtaking,"²⁶⁸ a fault of the expansive definition of pornography as all "subordinating" materials.²⁶⁹ Second, the statute was underinclusive for not reaching commercial images equally degrading to women.²⁷⁰ Third, countering Dworkin, they stated, "[t]o equate pornography with conduct . . . requires a 'certain slight of hand' to be incorporated as a doctrine of law."²⁷¹ In essence, they postured, pornography is not conduct, but speech. With this distinction, they argued, pornography could not be regulated.

However, it was the liberty justification, as anticipated by Dworkin, that was most powerful. Melding the pro-sex autonomy and fantasy theories with Thomas Emerson's self-expression theory,²⁷² Law and Hunter argued that the marketplace required protection of pornography, because it was an expression central to women's empowerment.²⁷³ In essence, de facto censor-

²⁶⁶ It was intended not only to persuade the court to find the Indianapolis ordinance unconstitutional but also to serve as an "organizing device among feminists." DUGGAN & HUNTER, *supra* note 3, at 6, 239. In order to achieve this status, the authors partially recruited and partially accepted a total of eighty august signatories including the Women's Legal Defense Fund, Adrienne Rich, Barbara Smith, Kate Millet, Gayle Rubin, Carolyn Heilbrun, Susan Estrich, Betty Friedan, and Thomas Emerson.

²⁶⁷ *Id.*

²⁶⁸ Hunter & Law, FACT Brief, *supra* note 28, at 101.

²⁶⁹ Defined as the "graphic sexually explicit subordination of women, whether in pictures or in words." INDIANAPOLIS, IND., CODE § 16-3(q) (1984).

²⁷⁰ Hunter & Law, FACT Brief, *supra* note 28, at 101 ("The far more pervasive commercial images depicting women as primarily concerned with the whiteness of their wash, the softness of their toilet tissue, and whether the lines of their panties show when wearing tight slacks. Commercial images, available to the most impressionable young children during prime time, depict women as people interested in inconsequential matters who are incapable of taking significant, serious roles in societal decision-making.").

²⁷¹ *Id.* at 106. However, they admit as follows:

Words and images do influence what people think, how they feel, and what they do, both positively and negatively. Thus pornography may have such influence. But the connection between fantasy or symbolic representation and actions in the real world is not direct or linear. Sexual imagery is not so simple to assess.

Id.

²⁷² Emerson was not only a signatory to the FACT brief but also greatly influenced it. In comparing the article he wrote, a year before the brief, to the brief itself, similar verbiages are so undeniable that one cannot help but consider that the authors had been influenced by his message. Compare Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130, 131 (1984) ("The sweep of the Indianapolis Ordinance is breathtaking."), with Hunter & Law, FACT Brief, *supra* note 28, at 101 ("[T]he sweep of the ordinance is breathtaking.").

²⁷³ Hunter & Law, FACT Brief, *supra* note 28, at 102.

ship of pornography meant de jure constraints on women's autonomy.²⁷⁴ Hunter and Law wrote that the ordinance, like most laws in history, abrogated women's sociopolitical power, thereby denying female liberty: "[The Indianapolis ordinance] allows little room for women to openly express certain sexual desires . . . it implies that individual women are incapable of choosing for themselves what they consider to be enjoyable, sexually arousing material without being degraded or humiliated."²⁷⁵ As if lifting a line straight from Thomas Emerson, one of the more than fifty signatories to the brief,²⁷⁶ they wrote that an open marketplace of ideas was justified by "the need for people to communicate to express self identity and determine how to live their lives."²⁷⁷ In essence, the "free exchange of *ideas*" was required to protect pornography in order to protect women's autonomy, even if that sometimes meant expressing the subordination of women.²⁷⁸

Going one step further than Emerson, however, Hunter and Law argued that fantasies were not just about autonomy or expression but also politics: "Sexual speech is political."²⁷⁹ Citing to fantasy texts in the pro-sex canon,²⁸⁰ they wrote, "[r]ich fantasy imagery . . . enhances our human potential and is highly relevant to our decision-making as citizens on a wide range of social and ethical issues."²⁸¹ Self-expression therefore enabled not only autonomy but also political equality.²⁸²

Hunter and Law's liberty argument organically dovetailed with their equality argument. The ordinance, they argued, unconstitutionally discriminated on the basis of sex. By censoring pornography, which they classified as political speech, and treating women as a "special class," the ordinance amounted to sex discrimination. Assuming that women needed protection

²⁷⁴ *Id.* ("The Indianapolis ordinance is squarely within the tradition of the sexual double standard. It allows little room for women to openly express certain sexual desires and resurrects the notion that sexually explicit materials are subordinating and degrading to women.").

²⁷⁵ *Id.*

²⁷⁶ Emerson also wrote an article arguing that the ordinance was overbroad. See Emerson, *supra* note 272.

²⁷⁷ Hunter & Law, FACT Brief, *supra* note 28, at 120.

²⁷⁸ *Id.* For the larger idea that the market can manipulate preferences, see generally Jon D. Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

²⁷⁹ Hunter & Law, FACT Brief, *supra* note 28, at 119 ("One core insight of modern feminism is that the personal is political."); see also McElroy, *supra* note 222, at 1 (importing the feminist adage, "the personal is political" pro-sex feminists wrote, "[p]ornography benefits women, both personally and politically").

²⁸⁰ Hunter & Law, FACT Brief, *supra* note 28, at 121 (citing Willis, *Feminism, Moralism, and Pornography*, *supra* note 200); FRIDAY, FORBIDDEN FLOWERS, *supra* note 212.

²⁸¹ Hunter & Law, FACT Brief, *supra* note 28, at 120.

²⁸² *Id.* at 120 ("Depictions of ways of living and acting that are radically different from our own can enlarge the range of human possibilities open to us and help us grasp the potentialities of human behavior, both good and bad."). Here, pro-sex feminists were concerned, in a Meiklejohnian sense, about the listeners (women) not just the libertarian speaker (pornography), endorsing an equality vision of the Amendment—a fundamental contradiction in their interpretation.

from pornography's victimization was among the "assumptions [that] reinforce and perpetuate central sexist stereotypes; they weaken, rather than enhance, women's struggles to free themselves of archaic notions of gender roles."²⁸³ The brief argued that pornography, although "problematic for women," could nonetheless "be experienced as affirming of women's desires and of women's equality."²⁸⁴ In essence, equality meant giving women the choice to fantasize about whatever they wanted, even if it appeared to afflict women. Therefore, pro-sex feminists' revocation of the ordinance had equality at the forefront.

Although it came first, the liberty argument was to some extent secondary. Recognizing the tactical salience of the First Amendment claim, Hunter and Law felt hard-pressed to put it first. "We had to bring the First Amendment into it, because it had teeth, so much more demanding than equality standards," Law later confessed.²⁸⁵ Historical precedent also suggested that the freedom of speech/liberty argument would prevail over the equality argument.²⁸⁶ "Especially at that time, following *Washington v. Davis*, it is hard to imagine that this law could have been struck down solely on equality grounds."²⁸⁷ However, the co-author admitted: "The more creative part was the equality section It was what gave Easterbrook the courage to write such an audacious opinion."²⁸⁸ In fact, direct passages on autonomy from the FACT brief could be seen throughout Easterbrook's opinion²⁸⁹ while the equality arguments, central to feminists on both sides, were entirely missing. Liberty became the "guiding star" of the opinion,²⁹⁰ despite equality being the engine of the case.

²⁸³ *Id.* at 122.

²⁸⁴ *Id.* at 121. Moreover, rather than targeting discrimination in jobs, education, public accommodation or real property, the ordinance only impacted "images," and "the ordinance," they continued, "also reinforces sexist stereotypes of men." *Id.* at 126.

²⁸⁵ Interview with Sylvia A. Law, *supra* note 224.

²⁸⁶ Joan Bertin explained:

You have to understand the times. In 1976, the Supreme Court defanged the equal protection clause in *Washington v. Davis*. Use of the equal protection clause became a dicey proposition after that. That's why *Roe* wasn't argued on equal protection grounds. There has only been one case that has been successful with an equal protection ground, in recent history, and that's *Bush v. Gore*. Even in [the] *Citizens United* case the Court didn't even consider the equality argument.

Interview with Joan Bertin, Exec. Dir., Nat'l Coal. Against Censorship, (Mar. 25, 2011) (on file with author).

²⁸⁷ *Id.*

²⁸⁸ Interview with Sylvia A. Law, *supra* note 224.

²⁸⁹ Pro-sex feminists acknowledged that Judge Easterbrook had endorsed their autonomy argument. DUGGAN & HUNTER, *supra* note 3, at 294 n.1 ("The opinion discusses concrete examples illustrating the difficulty of distinguishing images that liberate women from those that subordinate them. It addresses the relationship between images, ideas and behavior, and the distinction between fantasy and reality, in terms that are unusually rich and thoughtful for a judicial opinion.").

²⁹⁰ After Easterbrook's opinion, it became well understood in First Amendment law that government may not restrict speech in order to enhance the relative voice of others under the liberty approach. Stone, *The Government Must Leave*, *supra* note 9, at 1219. Rather, the First

C. *The Easterbrook Opinion*

Appealed in 1985 to the Seventh Circuit, *Hudnut* and its amicus briefs finally met Judge Easterbrook. The Judge, a former professor at the University of Chicago, had just been appointed to the bench several months earlier, in 1984, by President Ronald Reagan. Soon after replacing his tweed coat with a black silk robe, the newly-appointed judge “confronted one of the most controversial constitutional issues of the day.”²⁹¹ On August 27, 1985, Judge Easterbrook, writing for a unanimous three-judge panel, issued a *tour de force* opinion²⁹² upholding Judge Barker’s decision, that not only gave finality to an acerbic feud among feminists but also set in motion the new liberty trend.

In a series of four steps, Judge Easterbrook found the ordinance unconstitutional under the First Amendment. First, Judge Easterbrook altogether ignored the Equal Protection Clause claims. Although noting equality concerns existed in both feminist briefs,²⁹³ he quickly dismissed them: “We do not try to balance the arguments . . . such as this.”²⁹⁴ Therefore, unlike Judge Barker who found speech concerns outweighed equality concerns, Judge Easterbrook stated at the outset that the court would not balance *these interests*. Instead, he immediately moved on to what “constitutionally” was the heart of the matter: “[T]he ordinance discriminates on the ground of the content of the speech.”²⁹⁵

Before moving onto content-neutrality, Judge Easterbrook first accepted MacKinnon’s subordination argument, but only to prove that pornography is powerful speech. Judge Easterbrook disagreed with the pro-sex notion that pornography empowered women and “accept[ed] the premises” of MacKinnon’s legislation that “pornography affects thoughts” and “tend[s] to perpetuate subordination”²⁹⁶ because pornography does not only “persuade” people but more importantly it “change[s] them.”²⁹⁷ However,

Amendment protected “the widest possible dissemination of information from diverse and antagonistic sources, and . . . assure[d] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

²⁹¹ Stone, *The Government Must Leave*, *supra* note 9, at 1219.

²⁹² “When the Times writes Easterbrook’s obituary, *Hudnut* will undoubtedly be front and center.” Interview with Sylvia A. Law, *supra* note 224.

²⁹³ “[F]eminists have entered this case as amici on both sides.” *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 328–29; *see also id.* at 329 (“The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, ‘pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].’” (quoting INDIANAPOLIS, IND., CODE § 16-1(a)(2) (1984))).

²⁹⁷ *Id.* at 328.

Judge Easterbrook continued, “this simply demonstrates the power of pornography as speech.”²⁹⁸ In essence, Judge Easterbrook accepted MacKinnon’s argument only to undermine it with his principle of content-neutrality.

After proving pornography was speech, Judge Easterbrook used pro-sex notions of autonomy and his own ideas about content-neutrality to support the idea that pornography should be protected. Having accepted that pornography subjugated women, Judge Easterbrook still held the ordinance unlawful because it dictated a vision of the good life. In other words, the ordinance was not content-neutral. He explained that under the statute, “speech that portrays women in positions of equality is lawful,” whereas “speech that ‘subordinates’ women . . . is forbidden.”²⁹⁹ As if pulling lines straight from the FACT brief,³⁰⁰ he wrote that the ordinance therefore established an “approved” view of women.³⁰¹ Further, it established an approved view “of how they may react to sexual encounters, of how the sexes may relate to each other.”³⁰² He continued, “[t]hose who espouse the approved view may use sexual images; those who do not, may not.”³⁰³ The ordinance enforced pre-ordained notions of appropriate sexuality and therefore was not neutral.

For Judge Easterbrook and pro-sex feminists, this invasion of autonomy was a cardinal sin.³⁰⁴ Judge Easterbrook declared that the government “may not ordain preferred viewpoints The Constitution forbids [government] to declare one perspective right and silence opponents.”³⁰⁵ He continued:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox

²⁹⁸ *Id.* at 329; *see also id.* at 325 (“Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce’s *Ulysses* to Homer’s *Iliad*; both depict women as submissive objects for conquest and domination.”).

²⁹⁹ *Id.* at 328.

³⁰⁰ *See* Stone, *The Government Must Leave*, *supra* note 9, at 1226; D. KELLY WEISBERG, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 129 n.1 (1996); Hunter & Law, FACT Brief, *supra* note 28.

³⁰¹ *Hudnut*, 771 F.2d at 328.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *See* Mary Kay Blakely, *Is One Woman’s Sexuality Another Woman’s Pornography?*, Ms., Apr. 1985, at 40 (“[T]his law winds up doing a very traditional cultural operation There are a number of familiar themes: that sex degrades women but not men; that men are raving beasts; that sex is dangerous for women; that sexuality is male and not female; that women are victims, not sexual agents; that men inflict sex on women; that penetration is equivalent to submission; and that heterosexuality—and not the institution of heterosexuality—is sexist. What appeared novel is really the reappearance of a very traditional concern that explicit sexuality *itself* constitutes the degradation of women.”).

³⁰⁵ *Hudnut*, 771 F.2d at 325.

in politics, nationalism, religion, or other matters of opinion
Under the *First Amendment* the government must leave to the people the evaluation of ideas A pernicious belief may prevail.³⁰⁶

In other words, invading autonomy was prohibited, making content-neutrality king.

Fourth, to give content-neutrality wings, and to overcome MacKinnon's silencing argument, Judge Easterbrook invoked the "no-drown out theory" and pro-sex "self-expression" theory. MacKinnon's silencing argument posed that in a "society of gender inequality" where the "speech of the powerful impresses its view upon the world" the powerless (women) become silenced by the powerful (pornographers).³⁰⁷ MacKinnon explained that this market failure existed because pornographers' superior access to the media drowned out women.³⁰⁸

Judge Easterbrook's response was earth-shattering. Although acknowledging problems of inequality, he claimed that speech never silenced. He admitted that the "marketplace of ideas" was imperfect and sometimes allowed good ideas to "fail,"³⁰⁹ but he maintained that this did not mean that the First Amendment had failed; it had not silenced. The First Amendment's only concern was to make sure that the government did not intrude on anyone's liberty to speak. Therefore, pornography did not silence women. Only the government could drown out women by regulating speech. In essence, Judge Easterbrook denounced the claim that speech is "unanswerable" in a "marketplace of ideas."³¹⁰ This "no-drown out" notion would later be imported into Supreme Court cases like *Citizens United*.³¹¹

Without a silencing effect, the First Amendment's only concern was to make sure the government did not intrude on anyone's liberty to express herself:

³⁰⁶ *Id.* at 327–28 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

³⁰⁷ MACKINNON, *supra* note 162, at 155.

³⁰⁸ Stone, *The Government Must Leave*, *supra* note 9, at 1224 (citing Judith Baat-Ada (Reisman), *Freedom of Speech as Mythology, or "Quill Pen and Parchment Thinking" in an Electronic Environment*, 8 N.Y.U. REV. L. & SOC. CHANGE 271, 278 (1979) (arguing that pornographers—and not their opponents—should be attacked as censors because they "effectively den[y] meaningful access" to women or "forc[e] us to experience their environment . . . and shap[e] our attitudes with their own warped portrayals"))).

³⁰⁹ Stone, *The Government Must Leave*, *supra* note 9, at 1225. Stone characterizes Easterbrook's position on the marketplace of ideas as follows:

The "marketplace of ideas" is not perfect and speech need not be "effectively unanswerable" to be protected by the First Amendment. To the contrary, "[a]t any time, some speech is ahead in the game; the more numerous speakers" may prevail regardless of the merits of their position. Some speakers with good ideas fail because "few people believe their positions." But "[t]his does not mean that freedom of speech has failed" or that the government may intervene to "fix" the market by deciding that some ideas are better than others.

Id.

³¹⁰ *Id.*

³¹¹ See *infra* Section III.B.

The ideas of the Klan may be propagated. Communists may speak freely The Nazi Party may march through a city with a large Jewish population People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because “above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas”³¹²

Any other policy, according to Judge Easterbrook, would allow government to abrogate *self-expression*, and that would amount to “thought control.”³¹³ This is where Judge Easterbrook incorporated pro-sex “self-expression” theory. To ensure liberty of self-expression, he claimed, was therefore the mandate of the First Amendment. So protecting all and any speakers, including corporate forces, became law.³¹⁴

In 1986, the United States Supreme Court summarily affirmed *Hudnut*, which killed any hope of a successful anti-pornography statute.³¹⁵ Two years later, another federal court struck down a different version of the MacKinnon-Dworkin legislation.³¹⁶ Shortly after, legislatures around the country revoked similar ordinances until none were left.³¹⁷ Writing a decade after *Hudnut*, MacKinnon stated the ordinance was a dead letter, “not now actively under consideration anywhere.”³¹⁸ Today, this remains the case.³¹⁹ MacKinnon maintains that efforts have in part failed because of existing

³¹² *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (quoting *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972)).

³¹³ *Id.* This powerful Orwellian concern of thought control answered the City’s argument that pornography should not be protected because it was “low value” speech. Easterbrook immediately rejected the notion of “low value” *Chaplinsky* categorization by stating that there is no “false idea.” Any speech that “influences social relations and politics” is protected. This formulation, he concluded, “precludes a characterization of the speech as low value.” *Id.* at 331. Rejecting the long-standing doctrine of categories was based on the idea that governments and those in power are those most likely to abuse the *Chaplinsky* exceptions in order to exclude unpopular speech unfairly. Instead of being limited to pornography, it would inevitably open a door to government regulation of much less harmful ideas. This notion was central to pro-sex feminist ideas. See Willis, *Feminism, Moralism, and Pornography*, *supra* note 200, at 226 (“Brownmiller insists that the First Amendment was designed to protect political dissent, not expressions of woman-hating violence. But to make such a distinction is to defeat the amendment’s purpose, since it implicitly cedes to the government the right to define ‘political.’”).

³¹⁴ Taylor, *supra* note 240 (“But today’s decision reaffirms that such speech, pornographic or not, is not protected by the First Amendment from any blanket effort by governments to suppress it”) (emphasis added).

³¹⁵ STROSSEN, *supra* note 177, at 81.

³¹⁶ *Id.* The following year, in 1989, the Ninth Circuit also rejected Andrea Dworkin’s argument that pornography was unconstitutional. See *id.*

³¹⁷ *Id.*

³¹⁸ Catharine A. MacKinnon, *Speech, Equality, and Harm: The Case Against Pornography*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 303 (Laura J. Lederer & Richard Delgado eds., 1995).

³¹⁹ Stone, *The Government Must Leave*, *supra* note 9, at 1226.

marketplace distortions, most notably the growth of corporate wealth.³²⁰ The single most potent barrier to overcoming this failure, she added, is *Hudnut*.³²¹

III. THE FIRST AMENDMENT: AFTER *HUDNUT*

Following the 1980s, societal structures began to shift. Perhaps the most visible transformation in our world was the prominent rise of corporations.³²² Related was the vast expansion of First Amendment doctrine. Cases, such as *Hudnut*, restricted government regulation and granted speakers more protection, mobilizing corporate forces with the authority of the First Amendment.³²³ Infused with a liberty approach, the post-*Hudnut*

³²⁰ *Id.* (describing “the power of the pornographers and their front people, including press, lawyers, and academics”) (citing MacKinnon, *supra* note 318, at 303).

³²¹ *Id.* The FACT Brief can be said to be the major force behind *Hudnut*. See D. KELLY WEISBERG, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK AND REPRODUCTION 129 n.1 (1996); Hunter & Law, *FACT Brief*, *supra* note 28, at 69 n.1 (“It appears that the Feminist Anti-Censorship Taskforce (FACT) analysis had some influence on Judge Easterbrook’s approach to the constitutional issues presented.”).

³²² This included a vibrant adult entertainment industry. Prior to *Hudnut*, in 1985, pornography was a cottage business valued at no more than several million dollars. Just ten years after *Hudnut*, the industry doubled in size. DINES, *supra* note 154; Gore Vidal, *On Pornography*, N.Y. REV. OF BOOKS, March 31, 1966 (In the 1920s, “pornography was a small cottage industry among the grinding mills of literature” and continued as a relatively meager business through the 1980s, obscured by backdoors in Times Square and red curtains at local Blockbusters.). In an interview, pro-sex feminist Joan Bertin, Executive Director of the National Coalition against Censorship, said, “the [Easterbrook] opinion definitely opened up business opportunities that did not exist before. And there were people ready to capitalize on that It provided employment generated tax revenues—things that politicians love.” Interview with Joan Bertin, *supra* note 286. Besides *Hudnut*, a perfect storm of three factors stimulated the change within the industry: technology, politics, and the law. For example, technological advancements, such as the VCR, DVD player, and, most recently, the Internet, all allowed for ease in accessibility and creation of pornography, giving a well-documented boost to the industry’s growth. Second, shifts in political structures had a serious hand in changing access to pornography. In the 1980s, under President Ronald Reagan, U.S. Attorney General Edwin Meese convicted twenty out of fifty producers and suppliers of obscene materials. However, beginning in 1993, under President Bill Clinton, the Department of Justice “all but halted obscenity prosecutions.” Jason Krause, *The End of the Net Porn Wars*, ABA JOURNAL (Feb. 1, 2008 11:01 AM), http://www.abajournal.com/magazine/article/the_end_of_the_net_porn_wars/. Beyond technology and politics, however, legal changes were most potent. Coming on the heels of the Supreme Court’s affirmation of *Hudnut*, the California Supreme Court in 1988 decided in *People v. Freeman* that production of pornographic films could not be prosecuted under the state’s criminal prostitution statutes. 758 P.2d 1128 (Cal. 1988). Following *Freeman*, reports on the industry all highlight its incredible growth in the past twenty-five years. In 1986, after the Supreme Court’s affirmance of *Hudnut*, *The Washington Post* reported that adult entertainment was valued at approximately \$8 billion. Kamen, *supra* note 3. However, sources today have calculated it to be as high as \$14 billion. DINES, *supra* note 154; *American Porn*, PBS FRONTLINE (2002), <http://www.pbs.org/wgbh/pages/frontline/shows/porn/> (last visited Oct. 28, 2011). This healthy growth is no surprise, given that 150 new titles appear every week, or about 10,000 titles a year. *Id.*

³²³ Ritu Birla, *Performativity Between Logos and Nomos: Law Temporality and the “Non-Economic Analysis of Power,”* 21 COLUM. J. GENDER & L. 90, 110–11 (2011). In the last two hundred years, the church/state distinction lost some of its salience. Michel Foucault, *THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION*, 41 (Robert Hurley, trans., Pantheon Books 1st ed. 1978). Taking its place has been the unclear corporation/state distinction, which has informed the discourse of sex and speech in general.

Amendment began to protect three categories of previously excluded speech: hate speech,³²⁴ commercial speech, and campaign contributions. The section below will focus on the latter two, by analyzing two monumental Supreme Court cases, *44 Liquormart, Inc. v. Rhode Island*³²⁵ and *Citizens United v. Federal Election Commission*,³²⁶ in relation to *Hudnut*. In doing so, this section will show how both cases' endorsement of *Hudnut*'s economic liberty approach expanded the commercial speech and campaign finance doctrines, respectively.³²⁷

A. *Commercial Speech: 44 Liquormart, Inc. v. Rhode Island*

As discussed in Section I, the Supreme Court, in 1976, held in *Virginia State Board of Pharmacy*³²⁸ that commercial speech was protected under the First Amendment.³²⁹ Following *Virginia State Board of Pharmacy*, academics such as Archibald Cox,³³⁰ Thomas Emerson,³³¹ John Jeffries,³³² Thomas

³²⁴ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–96 (1992). In 1992, six years after the Supreme Court summarily affirmed *Hudnut*, the Court, adopting the reasoning of *Hudnut*, declared an ordinance unconstitutional in *R.A.V.* Akin to the ordinance in *Hudnut*, the St. Paul ordinance prohibited hate speech based on race, color, creed, religion, or gender that was likely to arouse “anger, alarm or resentment.” *Id.* at 413. *Cf.* INDIANAPOLIS, IND., CODE § 16-3(q) (1984) (penalizing “scenarios of degradation, injury, abasement, torture, shown as filthy or inferior . . . conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display”). Like the Indianapolis ordinance, the St. Paul ordinance quite understandably tried to correct hateful behavior. However, the St. Paul ordinance was also rejected. Justice Scalia, writing for the Court, ultimately adopted Judge Easterbrook’s reasoning in *Hudnut*, writing, “[c]ontent-based regulations are presumptively invalid.” *R.A.V.*, 505 U.S. at 382. For an explanation of how Scalia used the rationale of *Hudnut*, see Stone, *The Government Must Leave*, *supra* note 9. Scalia’s full endorsement and extension of *Hudnut* points to an interesting underlying theme of this paper: Ideas can spread, change, and reconfigure themselves into law as they move from the public, to academia, and back. Just as pro-sex ideas, generated in activist groups and then legal communities, eventually percolated into Judge Easterbrook’s opinion, *Hudnut* similarly further infused itself back into academia and before the Court. For example, Justice Scalia, the author of *R.A.V.*, like Easterbrook, was also a member of the faculty of the University of Chicago Law School when *Hudnut* was being hotly debated. “All of this came together in March 1993 when the [Chicago] Law School hosted a major conference on ‘Speech, Equality and Harm,’ which included a broad range of speakers, including Andrea Dworkin, then-Visiting Professor Catharine MacKinnon, Cass Sunstein, Elena Kagan, Mary Brecker, and [Geoffrey Stone] among many others.” Stone, *The Government Must Leave*, *supra* note 9, at 1237.

³²⁵ 517 U.S. 484 (1996).

³²⁶ 130 S. Ct. 876 (2010).

³²⁷ In anticipation, many scholars tried to debunk the myth of the market. See TRIBE, *supra* note 10, at 786 (“Especially when the wealthy have more access to the most potent media of communication than the poor, how can we be sure that ‘free trade in ideas’ is likely to generate truth?”); BAKER, *supra* note 47, at 1–24; Ingber, *supra* note 20, at 6–50; Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1148–65 (1993).

³²⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

³²⁹ *Id.* (arguably supporting a theory similar to *Hudnut*’s, that the line between commercial and political speech is difficult if not impossible to draw and even false ideas need protection).

³³⁰ Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 28–29, 33 (1980); *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

Jackson,³³³ Frederick Schauer,³³⁴ and C. Edwin Baker³³⁵ advocated for a return to the initial rule propounded in *Valentine v. Christensen*, that commercial speech could be stringently regulated.³³⁶ These academics remained understandably hopeful for a return to the past; just two years after *Virginia State Board of Pharmacy*, the Court reaffirmed that commercial speech was “low-value” speech.³³⁷ Moreover, in 1980, the Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Services Commission* noted that a substantial government interest could justify the suppression of commercial speech.³³⁸ However, the *Hudnut* opinion helped reverse the trend of *Central Hudson* to find commercial speech could not be heavily regulated.

Hudnut undermined the two main arguments for returning to the *Valentine* pro-regulation schema. The first argument, that political speech should be privileged over commercial speech, was based on a line-drawing distinction. But this distinction unraveled with the logic of *Hudnut*. In *Hudnut*, Judge Easterbrook explained that line-drawing between political speech and other types of speech was a difficult task that should not be left to the government.³³⁹ For example, he wrote that pornography, like “political expression,” is “cultural stimuli.”³⁴⁰ Drawing the line between these forms and others like religious ceremonies, commercial advertising, humor, poetry, and frightening movies is nearly impossible.³⁴¹ Accordingly, it was not for the government to determine.

The second argument for returning to a pro-regulation schema was that commercial speech is not expressive and therefore could be regulated.³⁴²

³³¹ EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, *supra* note 119, at 311; Emerson, *Toward a General Theory of the First Amendment*, *supra* note 119, at 948 n.93.

³³² Jackson & Jeffries, *supra* note 71, at 40–41.

³³³ *Id.*

³³⁴ SCHAUER, *supra* note 47, at 103–04.

³³⁵ Baker, *Commercial Speech*, *supra* note 122.

³³⁶ *Id.* (citing 316 U.S. 52 (1942)).

³³⁷ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978). Two years later, the Court repeated this holding. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (finding that commercial billboards could be outlawed even if political billboards were not banned).

³³⁸ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

³³⁹ See *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985). Cf. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764–65 (1976) (“Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not . . . [N]o line between publicly “interesting” or “important” commercial advertising and the opposite kind could ever be drawn.”).

³⁴⁰ *Hudnut*, 771 F.2d at 330, 564.

³⁴¹ *Id.* (asserting that to hold the opposite—to draw a distinction between different types of speech—would leave “the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us”).

³⁴² Shiffrin, *supra* note 36, at 1240. Shiffrin explains Baker’s theory that self-expression is the driving force behind the First Amendment as follows:

[H]e argues . . . that corporate speech, not merely corporate commercial advertising, should ordinarily be excluded from constitutional protection because it is dictated by

However, *Hudnut* also unraveled this rationale.³⁴³ In adopting pro-sex feminist notions about *fantasy*, Easterbrook reinforced the notion that whether speech was expressive was a question left up to the speaker, not the government.³⁴⁴ This logic meant that the market must allow *all* speech with even an iota of *expressive* value to go unregulated. Therefore, *Hudnut* endorsed Emersonian thought while simultaneously expanding it to include commercial speech, which Emerson had explicitly rejected.

Employing this logic in 1996, the Court held in *44 Liquormart, Inc. v. Rhode Island* that banning alcohol advertisements was a violation of the First Amendment.³⁴⁵ Motivating the case was a liberty interest.³⁴⁶ Although the Court did not cite to *Hudnut* in deciding the case, it wove in Judge Easterbrook's newly established marketplace of ideas verbiage to revive the *Virginia State Board of Pharmacy* conception of the commercial speech doctrine. Moreover, *44 Liquormart* explicitly mirrored *Hudnut's* two lines of thought discussed above to find commercial speech should be protected.³⁴⁷

As to the first line-drawing point between political and commercial speech, Justice Stevens echoed Judge Easterbrook's conclusion finding that commercial speech, like pornography, is a "cultural stimul[us]" for which the government cannot proscribe a value.³⁴⁸ He wrote, "[a]dvertising has been a part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market."³⁴⁹ Drawing a strict line between commercial speech and political speech seemed implausible. In addition, Justice Stevens echoed Judge Eas-

the search for profits and is not the freely-chosen expression of the speaker. The domination of profit, which Baker believes is inherent in the market structure of contemporary American capitalism, severs any 'connection between speech and any vision, or attitude, or value of the individual or group engaged in advocacy. Thus the content and form of commercial speech cannot be attributed to individual value allegiances.'

Id.

³⁴³ *Hudnut*, 771 F.2d at 330.

³⁴⁴ *Id.*

³⁴⁵ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

³⁴⁶ *Id.* Justice Thomas's concurring opinion quoted an amicus brief stating as follows:

[T]hat commercial activity and advertising were integral to life in colonial America and that Framers' political philosophy equated liberty and property and did not distinguish between commercial and noncommercial messages. Nor do I believe that the only explanations that the Court has ever advanced for treating "commercial" speech differently from other speech can justify restricting "commercial" speech in order to keep information from legal purchasers so as to thwart what would otherwise be their choices in the marketplace.

Id. at 522–23 (Thomas, J., concurring).

³⁴⁷ *44 Liquormart*, 517 U.S. at 516 (citing *Bigelow v. Virginia*, 421 U.S. 809, 825–26 (1975), for the proposition that "commercial speech was entitled to no First Amendment protection or that it was without value in the marketplace of ideas").

³⁴⁸ *Hudnut*, 771 F.2d at 330.

³⁴⁹ *44 Liquormart*, 517 U.S. at 495.

terbrook's concern over letting the government draw that line.³⁵⁰ Protecting commercial speech meant keeping the thought police at bay.

As to the second notion, that commercial speech is not expressive, Justice Stevens argued that, like pornography, this was for the speaker to determine. In *44 Liquormart*, the government of Rhode Island argued that the alcohol advertisements were not expressive ideas but a "vice," like pornography. As a vice, it warranted regulation. In response, Justice Stevens wrote, such characterizations are "anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market."³⁵¹ In essence, every person may determine which activities—whether enjoying sexual humiliation or indulging in libations—are *self*-expressive. It is not for the government to limit, wrote Justice Stevens.³⁵² Once again, the Court affirmed *Hudnut's* absolute commitment to expression empowering the economic liberty approach.

B. Campaign Finance: *Citizens United v. Federal Election Commission*

The second category of speech that *Hudnut* helped expand was campaign finance. *Hudnut* cited *Buckley v. Valeo* for the proposition that "[t]he Supreme Court has rejected the position that speech must be 'effectively answerable' to be protected by the Constitution."³⁵³ More recently, *Hudnut* helped expand this notion by acting as a precedent for *Citizens United v. Federal Election Commission*,³⁵⁴ the now infamous campaign finance case. Since *Citizens United* was decided, much of the focus on the case has been to vilify the Court for protecting corporate speakers. But critics have overlooked that the *Citizens United* Court simply applied the "no-drown out" theory initially laid out in *Hudnut*.³⁵⁵ *Citizens United* confirmed that speech cannot be silenced or *drowned out* and therefore all speech, including corporate speech, must be protected. This section will therefore explain how *Hud-*

³⁵⁰ *Id.* at 514.

³⁵¹ *Id.*

³⁵² This idea of commercial speech as self-expressive—that, like pornography, it liberates our society and allows for more sexual freedom—was also strongly supported in *Bigelow*. 421 U.S. at 811–14. *Bigelow* struck down an ordinance prohibiting publication that encouraged or promoted the procurement of an abortion. The advertisement announced that "abortions are now legal in New York"; that the Women's Pavilion would help women with unwanted pregnancies obtain "immediate placement in accredited hospitals and clinics at low cost"; and that on a "strictly confidential" basis they would "make all arrangements" and help with information and counseling. *Id.* at 812. In overturning *Bigelow's* conviction, the Court, for the first time, drastically limited the traditional commercial speech doctrine of *Valentine v. Chrestensen*, 316 U.S. 52 (1942). *Id.* at 819–20. Therefore, like obscenity, sexual freedom and expression was at the root of commercial speech being given First Amendment protection.

³⁵³ *Hudnut*, 771 F.2d at 331 (citing *Buckley v. Valeo*, 424 U.S. 1, 39–54 (1976)).

³⁵⁴ 130 S. Ct. 876 (2010).

³⁵⁵ See generally Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953 (2011).

nut reified principles that later percolated into the campaign finance cases, including *Buckley*, and, more recently, *Citizens United*.

In 1976,³⁵⁶ the Court first employed the economic liberty theory within the campaign finance cases in *Buckley v. Valeo*. The Court held in *Buckley* that regulating independent campaign expenditures impermissibly burdened the First Amendment.³⁵⁷ In essence, the Court held that spending money to influence elections is a form of constitutionally protected speech. *Buckley* has been heavily lambasted for equating money with speech,³⁵⁸ but more recently, its criticisms have emphasized that it provided the Court in *Citizens United* with a precedent.³⁵⁹ However, *Hudnut* is largely responsible for not only mainstreaming but extending *Buckley*'s "no-drown out" theory, as it would later be ratified in *Citizens United*.

The "drown out" theory, espoused by MacKinnon and overruled in *Buckley*, held that abundant speech can drown out or unfairly silence the speech of others. However, *Buckley* firmly rejected the notion that speech can drown out or *silence* other speech. Instead, *Buckley* found a "no-drown out" theory existed: In a free marketplace, an entity is always capable of expressing its views. Moreover, siding with the appellants, the Court in *Buckley* found the First Amendment is *not concerned* with balancing the marketplace for equality purposes. Rather, "First Amendment liberty" is concerned with preventing government from restraining or regulating speech.³⁶⁰ As stated succinctly in *Buckley*:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.³⁶¹

In sum, *Buckley* stood for the proposition that the marketplace of ideas does not, and cannot, have a silencing effect. And as long as the government does not restrain speech in any way, the First Amendment's liberty conception is protected. In the context of campaign finance, *Buckley* struck down a regulation that limited campaign contributions. The Court reasoned that even

³⁵⁶ The same term as the *Virginia State Board of Pharmacy* decision.

³⁵⁷ 424 U.S. 1 (1976).

³⁵⁸ Compare J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976), with Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997).

³⁵⁹ See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 383–84 (2009); see generally Richard Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

³⁶⁰ *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

³⁶¹ *Id.* at 48–49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)) (internal quotations marks omitted).

though affluent candidates had significant access to financing their campaigns, their wealth did not prevent other candidates from expressing their own platforms.

In *Hudnut*, Judge Easterbrook cited to *Buckley* for the “no-drown out” theory, but he extended it even further.³⁶² As in *Buckley*, Judge Easterbrook reasoned that pornographic speech would not silence or drown out women. However, Judge Easterbrook went beyond *Buckley* by stating that even if speech silences others the government still cannot regulate the market:

The Supreme Court has rejected the position that speech must be ‘effectively answerable’ to be protected by the Constitution. For example, in *Buckley v. Valeo*, the Court held unconstitutional limitations on expenditures that were neutral with regard to the speakers’ opinions and designed to make it easier for one person to answer another’s speech.³⁶³

He continued that even if women *were* being silenced by pornography, as MacKinnon had argued, the solution was more speech rather than government regulation. Government intervention to create equality was not an option. It was this important step, in addition to *Buckley*, that helped support *Citizens United*.³⁶⁴

In January 2010, the Supreme Court reaffirmed *Buckley* in *Citizens United*, employing *Hudnut*’s more formidable “no-drown out” rationale. Parties on both sides of *Citizens United* discussed the “drown out” theory, proving it played an integral role in the case.³⁶⁵ Theodore Olson, in the Brief for the Appellant, wrote:

³⁶² As noted by Professor Charles Fried, “Never has this ‘drown out’ form of argument been more eloquently rejected than by Judge Easterbrook [sic]” Brief of Charles Fried, *supra* note 19, at 5.

³⁶³ *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985).

³⁶⁴ Following *Buckley*, the Court still questioned whether a “no-drown out” theory was appropriate in the realm of campaign finance cases. For example, in 1990, the Court in *Austin v. Michigan Chamber of Commerce* held that a corporation’s campaign contributions would be restricted because these contributions could unfairly silence others. 494 U.S. 652 (1990). Therefore, it took the reasoning of *Hudnut* that even if speech silenced others the government was still obligated to not interfere, to instill the stronger “no-drown out” theory eventually upheld in *Citizens United*. See *Austin*, 494 U.S. at 660 (upholding a restriction on corporate campaign expenditures based on the notion that “[c]orporate wealth can unfairly influence elections”); see also *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding the Bipartisan Campaign Reform Act of 2002, which *Citizens United* later found partly unconstitutional for restricting speech). Cf. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 789–90 (1978). Despite *Austin* and *McConnell*, the Court did uphold the economic liberty approach endorsed in *Buckley*, citing to it for the proposition that, “[p]reservation of the individual citizen’s confidence in government is equally important . . . [and] the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” *Id.* (quoting *Buckley*, 424 U.S. at 48–49).

³⁶⁵ See Brief for the Michigan Chamber of Commerce as Amicus Curiae Supporting Appellant at 5, *Citizens United v. Federal Elections Commission*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2359476 at *5; Brief for Amicus Curiae Judicial Watch, Inc. Supporting Appellant, at 16–17, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 2365215 at *13;

[The] assertion that the government must police the distorting effects of corporate wealth on the marketplace of ideas was rejected almost verbatim in *Bellotti*, which held that the fear that corporations are wealthy and powerful and their views may drown out other points of view could not justify suppression of corporations' political speech.³⁶⁶

In agreement, the Court held that even if corporate speech is difficult to oppose in the marketplace, and even if it does drown out others, it does not matter because “*equalizing* the relative ability of individuals and groups to influence the outcome of elections” is not an interest of the First Amendment.³⁶⁷ Instead, as Justice Kennedy wrote, the central concern is “liberty,” which is impeded when the government regulates speech:

By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of “destroying the liberty” of some factions is worse than the disease. Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false.³⁶⁸

As with pornography, the First Amendment concern is not to equalize false or corrupting speech, rather the concern lies with the liberty of expression: with whether the “government has muffled . . . significant sectors of the economy.”³⁶⁹

Almost immediately, *Citizens United* created an uproar even within the highest ranks of the country. President Barack Obama publicly denounced the case, calling it, “a major victory for big oil, Wall Street banks, health insurance companies and other powerful interests that . . . *drown out* the voices of everyday Americans.”³⁷⁰ *The New York Times* called *Citizens United* “a sharp doctrinal shift” that would “reshape the way elections were conducted.”³⁷¹ Even former Justice Sandra Day O’Connor tacitly criticized

Supplemental Brief for Amicus Curiae Chamber of Commerce of the United States of America Supporting Appellant at 5, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 2365220 at *7; Brief for Appellant at 30–31, *Citizens United*, 130 S. Ct. 876 (No. 08-205), 2009 WL 61467 at *30–31.

³⁶⁶ Brief for Appellant, *supra* note 365, at 31 (quoting *Bellotti*, 435 U.S. at 789) (internal quotation marks omitted).

³⁶⁷ *Citizens United*, 130 S. Ct. at 904 (citing *Buckley*, 424 U.S. at 48) (emphasis added).

³⁶⁸ *Id.* at 907 (internal citations and quotation marks omitted).

³⁶⁹ *Id.* (quoting *McConnell*, 540 U.S. at 257–58 (2003)).

³⁷⁰ See Mary Hall, *State of the Union Obama Walking in the Footsteps of FDR*, HUFFINGTON POST (Feb. 3, 2010, 3:09 PM), http://www.huffingtonpost.com/mary-hall/state-of-the-union-obama_b_447056.html.

³⁷¹ See Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1.

the opinion.³⁷² However, despite the left's criticism, in many ways *Citizens United* was the logical extension of *Hudnut*, a case that liberals had lauded twenty-five years earlier.³⁷³

Since the *Citizens United* ruling in 2010, two scholars have made a connection between *Hudnut* and *Citizens United*. Professor Charles Fried, writing an amicus brief this year for the campaign finance case *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, cited to *Hudnut* to support the proposition that the equalizing campaign finance bill at issue was unconstitutional.³⁷⁴ In the brief, Professor Fried argued that the campaign finance statute was unconstitutional given the Court's "no-drown out" theory displayed in *Hudnut*.³⁷⁵ Similar to Professor Fried, but in an entirely different academic terrain, Professor Ritu Birla has also noted the ties between the two cases, citing the connection between Judith Butler's *Excitable Speech*, a major pro-sex text in support of *Hudnut*,³⁷⁶ and *Citizens United*.³⁷⁷ Both professors' historical notation of *Hudnut* and *Citizens United* as well as a handful of judicial opinions³⁷⁸ substantiate the idea that the cases have a palpable connection to the liberty strand of First Amendment jurisprudence.

IV. CONCLUSION

This Article argues that the recent rise of the economic liberty approach in the First Amendment has deep roots in First Amendment jurisprudence stemming back to *American Booksellers Association, Inc. v. Hudnut*. In that case, Judge Easterbrook, imbuing the marketplace of ideas rhetoric with ideas of autonomy and self-expression, rather than political equality ideals, helped set the next thirty years of the First Amendment jurisprudence on a new track, resulting in recent contentious cases such as *Citizens United*. In addition to explaining the rise of the economic liberty trend, this Article more generally highlights several powerful notes about American law.

First, the story of *Hudnut* underscores the dominant role the "marketplace of ideas" rhetoric plays in the changing First Amendment. In the history of the Amendment, no other phrase has been more helpful in securing

³⁷² See Adam Liptak, *O'Connor Mildly Criticizes Court's Campaign Finance Decision*, THE CAUCUS, N.Y. TIMES.COM (Jan. 26, 2010, 2:05 PM), <http://thecaucus.blogs.nytimes.com/2010/01/26/oconnor-mildly-criticizes-courts-campaign-finance-decision/>.

³⁷³ See Levitt, *supra* note 12.

³⁷⁴ Brief of Charles Fried, *supra* note 19, at 23.

³⁷⁵ *Id.*

³⁷⁶ See generally JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997).

³⁷⁷ "One potent site for analysis in this vein would be the buttressing of the 'free marketplace of ideas' and the personhood of the corporation, recently enforced, for example, in the United States Supreme Court decision in *Citizens United v. Federal Election Commission*." Birla, *supra* note 323, at 512.

³⁷⁸ See, e.g., *Majors v. Abell*, 361 F.3d 349, 356–57 (7th Cir. 2004) (citing *Hudnut* in support of the proposition that "the function of the [F]irst [A]mendment is to put the regulation of speech off limits to government *even if* regulation is deemed wise"); see also *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

legitimacy for free speech. Within *Hudnut*, this trend is once again underscored. Reflecting on the power of the “marketplace” axiom, this Article asks further: What meaning does the metaphor carry for the Amendment? What void does it fill? Although other scholars such as Frederick Schauer have brought attention to this question,³⁷⁹ given the once again noticeable overall shift in First Amendment doctrine it may be helpful to return to such a discussion.

A second theme in this Article highlights the pyrrhic and generally fickle nature of litigation. In other words, victories in litigation can often quickly turn into losses and vice versa. For example, although pro-sex feminists were deemed to have won the battle over pornography in *Hudnut*, a question remains as to who really won the war. Although successful in the immediate resolution of the case, pro-sexers later came to see their theories used to benefit corporate interests with which they took issue. Moreover, both sets of feminists were driven to make, or at least appear to make, coalitions with unlikely bedfellows that inevitably misconstrued their arguments. That said, this is not a tale of how the resulting law is mistaken, but a descriptive account of the unstable ground of litigation. Such flippable dynamics in litigation are not isolated to this case. This Article does additionally hope to point to some contradictions between the initial intentions held by feminists and the final results in the law, in order to understand that in law-building, unintended consequences are perhaps almost always guaranteed.

Finally, this Article asks whether the economic liberty approach was self-evident from First Amendment precedent or part of a larger social trend. Were the conclusions of cases such as *44 Liquormart* and *Citizens United* obvious progressions from *Hudnut* and earlier cases or simply imprints of a larger trend occurring in Constitutional jurisprudence to recognize negative liberties? If the former, then we are likely to understand the two cases as logically sound and make peace with the current case law. If the latter, we must ask, what are the forces shaping our laws to celebrate negative liberties and are they correct? As stated by historians of the era, “[Law] does not exist in the abstract: [I]t is the alignment of political and cultural forces that gives meaning to issues and law.”³⁸⁰ If we agree, we should ask, what are these forces and should they apply?

³⁷⁹ Schauer, *First Amendment Opportunism*, *supra* note 76.

³⁸⁰ DUGGAN & HUNTER, *supra* note 3, at 41.