FREE SPEECH ORIGINALISM

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The "originalist" view of constitutional law is the view that in determining how constitutional language is applied, the judiciary functions best when adhering, without significant deviation, from the "original" meaning of the language.[1] In the opinion of its adherents, originalism provides the only reasonable lens through which to interpret the Constitution's texts, given other alternative methods rely too much on the personal views of judges or impermissibly blur the line too far between unelected judge and legislator. This appeal towards greater objectivity is powerful, and it largely explains why originalism continues to maintain such strong support across the ideological spectrum, including among multiple members on the United States Supreme Court.[2]

When applying a strict originalist view to the First Amendment's free speech clause, the failure to strike down the Sedition Acts under the First Amendment and other categorical restrictions made during

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[1] *See* André Leduc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JUR. REV. 263, 268 (2015); *see also* Edwin Meese III, *The Attorney General's View of the Supreme Court: Towards a Jurisprudence of Original Intention,* 45 PUB. ADMIN. REV., (SPECIAL ISSUE) 701, 703–04 (Nov. 1985) ("The Constitution said what it meant and meant what it said. Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution.").

[2] The phrase "We are all originalists" seems to have become a catchphrase of sorts. *See Kagan: We Are All Originalists*, BLT: THE BLOG OF LEGAL TIMES (June 29, 2010), http://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html. While originalism could rightly be said to have its roots in conservatism, there are many notable examples of self-identified "liberal originalists" including Akhil Reed Amar. *See* James Ryerson, *'America's Constitution': A Liberal Originalist,* N.Y. TIMES (Nov. 6, 2005) http://www.nytimes.com/2005/11/06/books/review/americas-constitution-a-liberal-originalist.html (reviewing AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, (2006)); *see also* Randy Barnett, *Larry Solum on "Originalism in Constitutional Time"*, WASH. POST: THE VOLOKH CONSPIRACY (Apr. 8, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/08/larry-solum-on-originalism-in-constitutional-time/?utm_term=.3b7b45206b5c; *Living Originalism: Reviews*, HARV. UNIV. PRESS (last visited Sept. 4, 2017), http://www.hup.harvard.edu/catalog.php?isbn=9780674416925&content=reviews.

the pre-modern era, appear as convincing evidence of original intent for expansive and heavy-handed restraints on speech.[3] Consequently, the modern era of free speech jurisprudence, beginning with Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*,[4] appears to break with original intent because of the era's expansive view of protection.[5]

This article will break with this conventional wisdom by drawing upon a common variable between the pre-modern and modern era periods of free speech jurisprudence: an evidence-based, procedural test of the effects of speech. If viewed through the lens of this test, first established by the Founders,[6] the highly restrictive jurisprudence of the eighteenth and nineteenth centuries and the expanse of protections of the modern era become a progression compatible, and without significant deviation, from original constitutional intent.[7] Moreover, this article will demonstrate that if the evidence-based test was applied today in accordance with its original intent as a limiting principle on government authority,[8] the protection of speech would not only be broader than it currently exists, but significantly *deeper* as well.

From the beginning, the Founders established substantive and procedural protections to ensure that disfavored speech actually caused non-speculative harm.[9] The commitment to an evidence test is demonstrated by the swift political blowback and legal amending during and after the passage of the Sedition Act.[10] In what has been

[3] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 43 (2004); *see also* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2195 (2015).

[4] Abrams v. United States, 250 U.S. 616 (1919).

[5] *See id.* at 629–30 (1919) (Holmes, J., dissenting) ("I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.").

[6] *See* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. OF PA. L. REV. 737, 737 (1977); see *Abrams*, 250 U.S. at 623–24); STONE; *supra* note 3, at 42.

[7] *See Alien and Sedition Acts*, LIBR. OF CONGRESS, https://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last updated Apr. 25, 2017); Emerson, *supra* note 6, at 739; David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1207–08, 1215 (1983).

[8] *See* CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON, AND THE MISFITS WHO SAVED FREE SPEECH 81 (2015) (discussing the involvement of juries rather than judges in fact-finding); *Abrams*, 250 U.S. at 619 (citations omitted).

[9] *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1383–84 (2006)

[10] *See, e.g.*, Mark A. Garber, *Antebellum Perspectives on Free Speech*, 10 WM. & MARY BILL OF RTS. J., 779, 784 (2002) (reviewing MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); *Alien and Sedition Acts*, *supra* note 7.

traditionally understood as expansions in free speech protections starting with Justice Holmes in more modern times are actually better understood as a consistent legal test applied to increasingly reliable information about the demonstrable effects of speech.[11] In other words, the gradual increase in free speech protections has been dependent upon increases in evidence and science, rather than changes in free speech policy, and this is precisely what the Founders intended.[12]

Part I examines the underlying theory of free speech in the founding era as well as documenting the struggle between the Founders over how such a theory was to be applied in American society. Part II traces the development of the evidence-based test during the Nineteenth Century "pre-modern" era. Part III details the struggle over the modern application of the evidence-based test beginning with Justice Holmes' dissent in Abrams. Part IV reveals how the modern struggle ultimately led to a subversion of evidence-based reasoning for categorical and value-based analysis. Part V outlines what an evidence-based test in the 21st Century should look like, and how it may be satisfied.

I. ORIGINAL FREE SPEECH, IN THEORY AND PRACTICE

When describing Founder intent behind the First Amendment, Benjamin Franklin acknowledged that few Founders had any "distinct Ideas of its Nature and Extent."[13] Therefore, it is not surprising that debate over the essence of the Amendment's free speech guarantee began as soon as some Founders proposed establishing limits. The first successful limit to the free speech clause passed by Congress was the Sedition Act of 1798.[14] The Sedition Act made it a crime to publish or speak out against the government of the United States, the Congress, or the president, "with the intent to bring them into contempt or disrepute."[15] The legislative and public dispute over the Sedition Act of 1798 encompassed every facet of the original free speech debate and pitted nearly every Founder against one another over the intent behind the free speech guarantee.[16] The

[11] *See Abrams*, 250 U.S. at 628 (Holmes J., dissenting).

[12] *Cf.* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 344–45, 353–54 (2017).

[13] STONE, *supra* note 3, at 42.

[14] *See Alien and Sedition Acts*, *supra* note 7; see, e.g., Garber, *supra* note 9, at 781–82.; STONE, *supra* note 3, at 36.

[15] STONE, *supra* note 3, at 12.

[16] *See id.* at 36, 37.

debate surrounding the Act provides an understanding of the Founders' intent behind the First Amendment's free speech guarantee.

The Founders' disagreement over the Sedition Act was influenced by each opposing political side's vision of the role of government and faith in the citizenry at large.[17] Many Federalists, including John Adams and Alexander Hamilton, believed government must be superior to the people, and that government censure against the effects of the people's expression was necessary to maintain such superiority.[18] During the legislative debates over the Sedition Act, Congressman Harrison Gray Otis led the Federalist view.[19] Otis argued the free speech guarantee came directly from English common law, meant only to protect citizens from prior restraint, and not intended to abolish the government's ability to restrict or prohibit the undesirable effects of speech.[20] To the Federalist, the Sedition Act was necessary to protect the government, and ultimately the people, from "false and malicious attacks" that threatened the stability of the country in a time of war.[21] At the end of the legislative debate, the Federalist view won the day, by a narrow, straight party vote, and on July 14, 1798, President John Adams signed the Sedition Acts into law.[22]

In opposition to the Federalists, including Founders such as James Madison and Thomas Jefferson, were those who believed government was, in all ways, subservient to the will of the people, who, consequently, must possess the inherent right to speak without the

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[17] *See* Zechariah Chafee Jr., *Freedom of Speech in War Time,* 32 HARV. L. REV. 932, 947 (1919).

[18] *See id.*; STONE, *supr*a note 3, at 43.

[19] *See id.* at 39–40.

[20] *See id.* at 40.

[21] *Id.* at 39–40.

[22] *See id.* at 43. In many ways, Adams' decision to sign the Acts into law and push for their passage was a betrayal of the views on free speech that he once advocated so strongly for. *See* SLACK, *supra* note 8, at 91. Charles Slack says of Adams' decision to sign the Sedition Acts into law that it "rises to the level of tragedy because it represents a stark, personal betrayal of his deepest held beliefs, one of those moments when a great man under pressure contradicts his conscience." *Id.* Adams' decision could at the same time, however, be seen as simply self-serving and not at all surprising. *See June 18, 1798: Adams Passes First of Alien and Sedition Acts*, ON THIS DAY HISTORY (2009), http://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts. The hypocrisy on this issue during the founding era (like today), is legion. *See* Eugene Volokh, *How the Federalists Tried to Renew the Sedition Act in 1801, When They Knew it Would Benefit Their Democratic-Republican Adversaries*, WASH. POST: THE VOLOKH CONSPIRACY (June 18, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/18/how-the-federalists-tried-to-renew-the-sedition-act-in-1801-when-they-knew-it-would-benefit-their-democratic-republican-adversaries/?utm_term=.eaf8b34a946f.

threat of government interference.[23] In response to the Sedition Acts, Madison, the primary author of the Constitution, publicly condemned the arguments justifying its passage.[24] Writing to the Virginia Legislature, Madison stated, "[i]t would seem a mockery, . . . to say that no law should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."[25] Moreover, according to Madison, the fundamental difference between the newly established American system, from the English one, was the latter's legal deference to "superior[]" monarchial rulers.[26] The Federalist approach justifying the Sedition Acts was anathema to Madison's view that, in the United States "'a greater freedom of animadversion' is essential because government officials are responsible to their constituents, who may quite properly bring them 'into contempt or disrepute' if they fail to live up to their trusts."[27] Ultimately, Madison argued, the Sedition Acts were unconstitutional because they undermined "the responsibility of public servants and public measures to the people and embraced the 'exploded doctrine that the administrators of the Government are the masters, and not the servants, of the people."[28]

The dispute over the issues debated by Madison and the Federalists remains unsettled.[29] However, this article does not attempt to determine which interpretation best captures original intent. For one thing, as Benjamin Franklin and others acknowledged, it would be impossible to make such a determination given the open-ended framework behind the free speech clause's text.[30] Acknowledging a wide range of ambiguity however, does not

[23] *See* STONE, *supra* note 3, at 43, 44.

[24] *Id.* at 44.

[25] *Id.* at 45.

[26] *Id.* This deference was shown by Madison through the evolution of English common law, which deemed its country's rulers superior to the people. *Id.* A deference that technically (if not practically) still exists to this day. *See Is the Queen Really Above the Law?*, ROYAL CENTRAL (Jan. 5, 2013), http://royalcentral.co.uk/uk/thequeen/is-the-queen-really-above-the-law-1625 ("To make it absolutely clear: The Queen (or the reigning Monarch) is above the law. It has been like this for centuries and remains true and practicable today. However, the important thing is that Her Majesty doesn't test this prerogative.").

[27] STONE, *supra* note 3, at 45.

[28] *Id.*

[29] *See id.* at 41.

[30] *See id.* at 41, 42. Professor Eugene Volokh has stated free speech at the time of the founders appeared as though "half the country read the constitutional guarantee one way, and the other half, the other way." Eugene Volokh, *Freedom of Speech and of the Press*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION, (http://www.heritage.org/constitution/#!/amendments/1/essays/140/freedom-of-speech-and-of-the-press) (last visited Oct. 13, 2017). From the numerous scholarly attempts to discern, the "true" meaning of the First Amendment's guarantee of the freedom of speech the only common theme that has emerged is an eventual

preclude the struggle over the Sedition Acts from offering fundamental principles as a basis for a concrete, free speech legal doctrine.

Regardless of whether one finds the Federalist or Madison's more Info-Libertarian interpretation[31] more convincing, two principles emerge from the Sedition Acts debate that apply to free speech legal doctrine. First, it has long been common knowledge to scholars that all forms of speech maintain some level of guaranteed protection from prior restraint.[32] Secondly, as the next section will demonstrate, any restriction that seeks to censor speech because of the danger it imposes to society must include an evidence-based test of the link between the speech and the danger asserted.[33] The reason only these two principles survive with any certainty, is that they were the only premises both sides of the debate generally agreed on.[34]

A. Claiborne's Compromise

During the formal debate in Congress, Thomas Claiborne of Virginia introduced an amendment to empower juries sitting on Sedition Acts cases to determine: (1) whether the speech in question was true, (2) was issued by malice to endanger the government, or (3) was merely an opinion.[35] In other words, in order to convict, juries used a requirement of falsity and of subjective malice as indicators of danger.[36] In fact, the first public challenge made to the Federalists over the Sedition Act was to prove the harms they were claiming to be defending against were in fact real.[37] Crucial to the original

admission of futility. *See, e.g.*, STONE, *supra* note 3, at 42; LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION ix (1st ed. 1963). ("[T]he free speech guarantee is] in large measure a lucky political accident."); *see also* SLACK, *supra* note 8, at 103 (describing the search for founder intent as a quest for the "holy grail"). My own description of the struggle would be something akin to Kafka's depiction of the land surveyor's infinite struggle to contact the official Klamm. *See* Peter Goldman, *The Meaning of Meaning in Kafka's* The Castle, 15 ANTHROPOETICS: J. GENERATIVE ANTHROPOLOGY, no. 2, 2010, at 14. If nothing else, what the debate over the Sedition Acts should demonstrate to us is that the framers had no common understanding of the "true" meaning of the constitutional guarantee of free speech. *See* STONE, *supra* note 3, at 42.

[31] *See* Bambauer & Bambauer, *supra* note 12, at 340; see STONE, *supra* note 3, at 44–45.

[32] *See* Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 190 (2004).

[33] *See* Lakier, *supra* note 3, at 2181; s*ee also* Bambauer & Bambauer, *supra* note 12, at 370.

[34] *See* STONE, *supra* note 3, at 38–39; *see also* Volokh, *supra* note 30.

[35] *See* SLACK, *supra* note 8, at 81, 88–89.

[36] *See* Chafee, *supra* note 17, at 952.

[37] GEOFFREY STONE, WAR AND LIBERTY, AN AMERICAN DILEMMA: 1790 TO THE PRESENT 7, 9 (2007). In such a time of revolution, and the potential for war with several belligerent European countries, it was not difficult to raise the spectator of harm that could result from seditious

analysis is that the Claiborne amendment passed with the overwhelming *support* of Federalists in a 67-15 vote.[38] The Claiborne amendment was an evidence-based inquiry clearly intended to satisfy Republican objections,[39] yet those who voted for the Amendment, or accepted the Federalist view, understood that an evidence-based test significantly deepened the protection in most cases.[40] President Adams himself said of the proposed procedure during the Sedition Acts debate "'it would be safest to admit evidence to the jury of the truth of accusations, and if the jury found them true and that they were published for the public good, they would readily acquit.'"[41]

Federalist support of the Claiborne amendment demonstrates that although not all Founders agreed about the scope of the speech guarantee, some kind of evidence-based test of the effects of the speech was needed in order to ensure a measured degree of constitutional fairness.[42] The onus to prove, and not merely allege injury, is one of the core founding principles of due process.[43] For example, in his *Lectures on Law* (1790-91), James Wilson, who later became a Justice of the U.S. Supreme Court, said:

> Every wanton, or causeless, or unnecessary act of authority, exerted or authorized, or encouraged by the legislature over

falsehood against the government. *Id.* at 7. However, conceding possible identifiable harm, even directly from speech, did not end the depth of protection even under the narrower Federalist view. *See* Thomas G. West, *Free Speech in the American Founding and in Modern Liberalism*, *in* FREEDOM OF SPEECH 332 (Ellen Frankel et al. eds., 2004); Chafee *supra* note 17, at 948. As Congressman Albert Gallatin (Republican) illustrated during the debate of the Claiborne Amendment, even after proving seditious harm resulted in a Sedition Acts case, it would still seem impossible to ever adequately prove to a jury that an "opinion [of government action] was true". *See* STONE, *supra* note 37, at 10–11.

[38] *See* SLACK, *supra* note 8, at 81.

[39] *See id.*; STONE, *supra* note 37, at 10–11.

[40] SLACK, *supra* note 8, at 88; STONE, *supra* note 3, at 43–44; *see also*, JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874, at 732–3 (1833) (noting that while Justice Story's treatise would fundamentally adopt the Federalist view, he made clear that the government could not, impose criminal penalties on the publication of true statements made without malice). Having to prove motive, purpose, and the truth of an opinion, makes things exceedingly more difficult than a straight cause and attenuated effect standard of liability. *See* STONE, *supra* note 3, at, 43–44. However, as Geoffrey Stone points out, these consolations would not help much with politically biased prosecutions overseen by biased Federalist judges and juries. *See Id.* at 44. The protections offered by the Claiborne Amendment are wholly dependent on being applied objectively, i.e. only if the justice system remains blind. *See id.*

[41] *See* West, *supra* note 37, at 334. It is important to note that judicial invalidation was not established until *after* the Sedition Acts had expired. Once judicial invalidation was established, the evidence-based test became not only a necessary inquiry by a jury, but also an inherent original standard to free speech protection that must satisfy judicial originalist scrutiny. See, Marbury v. Madison, 5 U.S. 137, 177, 178 (1803).

[42] *See id.* at 311, 332; STONE, *supra* note 3, at 42–44; SLACK, *supra* note 8, at 88.

[43] West, *supra* note 37, at 343.

> the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, of right, entitled to liberty, personal as well as mental, in the highest possible degree which can consist with the safety and welfare of the state.[44]

It is unsurprising then, that founding fathers of multiple political stripes at least agreed on an evidence-based limiting principle on the government's ability to restrict speech.[45]

When the Sedition Acts expired in 1801, the law had become a political disaster for the Federalists.[46] Due in large part to the backlash resulting from their association with the Acts, the Federalists lost not only the presidential election of 1800, but also the majority of seats in both the House and Senate.[47] In fact, the Federalists would never again hold a majority in any legislative branch of the federal government, and, within a few short years, the party would cease to exist entirely.[48] Despite these political losses, however, the Federalist view of the free speech guarantee was destined to win over the minds of most American judges once judicial invalidation was established in the early Nineteenth Century.[49] Certainly, the Federalist view became the dominant legal theory following Justice Joseph Story's 1833 treatise on constitutional law.[50] In his highly influential work, Justice Story endorsed the Federalist argument made during the Sedition Acts debate, stating that although the government could not deny citizens their right to engage in expression, "Every freeman [was nonetheless obliged to] take the consequences of his own temerity."[51]

Although Justice Story's reasoning offers a large measure of credibility to the constitutionality of the Sedition Acts, the fact that the Sedition Acts were passed and expired before judicial invalidation was established underscores the futility of any attempt to conclusively determine their constitutionality.[52] Justice Holmes, when dissenting in *Abrams*, offered his differing opinion from Justice Story on whether the Sedition Acts ran afoul of the constitution,

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[44] *Id.* at 320.

[45] *See id.* at 332; SLACK, *supra* note 8, at 81.

[46] *See* STONE, *supra* note 37, at 16.

[47] *See* SLACK, *supra* note 8, at 233

[48] *Id.*

[49] *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177, 178 (1803).

[50] *See, e.g.*, David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1388–89 (1998).

[51] STORY, *supra* note 39, at 736.

[52] *Compare* The Sedition Act of 1798, ch. 74, § 4, 1 Stat. 596, 597 ("*And be it further enacted*, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer . . . ."), *with Marbury*, 5 U.S. at 177–78.

stating:

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.[53]

Whatever the constitutional validity at the time, the Sedition Acts, due to the Claiborne amendment, incorporated an original norm that placed more constraints on government restriction than are appreciated today.[54] A complete understanding of what the Sedition Acts say about the original meaning of the First Amendment must reckon with the Acts as amended by the Federalists themselves—the Founders least concerned with censorship.[55] The understanding that original constitutional limits on speech were established based primarily through a test of the effects of speech on human behavior[56] has important implications because constitutional free speech protection then becomes intrinsically related to the depth of human understanding of the origin of undesirable human behavior and expression.[57]

Since the nation's founding, free speech protections have steadily increased over time.[58] This gradual increase, however, has been dependent upon the increases in evidence and science, rather than changes in free speech policy.[59] During the pre-modern, pre-Darwin period, judges and juries alike were constrained by a lack of scientific knowledge from determining accurately what guided human behavior.[60] What the next part of this article will demonstrate, however, is that while a limitation of knowledge fully accounts for the shallow depth of free speech protection of the pre-modern era, Nineteenth century case law encourages increasing the depth of free speech protection as new findings regarding the origins of human behavior are discovered.

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

[54] *See, e.g.*, Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 1004 (2008) (discussing the restrictions on prosecuting for inciting violence in a crowd).

[55] *See id.* at 790, 794, 806.

[56] *See* Joseph Russomanno, *Cause and Effect: The Free Speech Transformation as Scientific Revolution*, 20 COMM. L. & POL'Y 213, 220 (2015).

[57] *See id.*

[58] *See id.* at 215–16.

[59] *See id.* at 258.

[60] *Cf.* MARK C. SMITH, SOCIAL SCIENCE IN THE CRUCIBLE 13 (1994).

II. THE EVIDENCE-BASED TEST IN NINETEENTH CENTURY PRE-MODERN FREE SPEECH CASES

Throughout American history, the public at large, scholars, and the judiciary's reaction towards sudden, troubling, shifts in great amounts of First Amendment coverage and the strength of protection has been of pronounced skepticism.[61] The fear that undesirable speakers will cause undesirable events is steadfast for large sections of the population, even to this day.[62] Equally steadfast, is the general belief that speakers should be held accountable for any undesirable effects that result.[63] The fear and skepticism towards increased protection has long enabled the denial of First Amendment coverage from what courts have labeled broad categories of "low-value" speech.[64] In the Pre-modern era, courts routinely assigned lessened First Amendment protections to speech they viewed as offensive, lewd, or blasphemous.[65] This traditional, restrictive view of obscenity is due to pre-modern courts routinely interpreting broad constitutional authority to punish the effects of "indecency or corrupt morality."[66] Moreover, pre-modern courts also found broad definitions of obscenity constitutionally acceptable.[67]

After finding significant discretion for restricting broad and loosely defined categories of speech, this is where the originalist-minded inquiry into pre-modern case law has typically ended.[68] Recently,

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[61] *See* Russomanno, *supra* note 56, at 233, 237, 238.

[62] *See* Merrit Kennedy, *After Ann Coulter Speech Cancellation, Protesters Rally at Berkeley*, NPR (Apr. 27, 2017), http://www.npr.org/sections/thetwo-way/2017/04/27/525898344/after-ann-coulter-speech-cancellation-protesters-rally-at-berkeley (noting that fear led to the cancellation of speeches due to the threat of violence); Dara Lind, *Why the ACLU Is Adjusting Its Approach to "Free Speech" After Charlottesville*, VOX (Aug. 21, 2017), https://www.vox.com/2017/8/20/16167870/aclu-hate-speech-nazis-charlottesville; *see* John Sepulvado & Don Clyde, *S.F. Right-Wing Rally Canceled as Bay Area Officials Push Back Against Fringe-Right Rallies*, KQED NEWS (Aug. 26, 2017), https://ww2.kqed.org/news/2017/08/25/one-right-wing-rally-canceled-as-bay-area-officials-push-back-against-fringe-right-rallies/.

[63] Jim McLaughlin & Rob Schmidt, McLaughin & Associates, Report Presentation at Yale University: National Undergraduate Study, at 16 (Oct. 26, 2015) (presentation available at https://www.dropbox.com/s/sfmpoeytvqc3cl2/NATL%20College%2010-25-15%20Presentation.pdf?dl=0). In a recent poll, 72 percent of college students agreed with the following statement: "Any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive should be subject to disciplinary action." *Id.*

[64] *See* Lakier, *supra* note 3 at 2173–74.

[65] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

[66] Donna I. Dennis, *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 LAW & SOC. INQUIRY 369, 383 (2002).

[67] *See id.*

[68] Morse v. Frederick, 551 U.S. 393, 411 (2007) (Thomas, J., concurring) ("If students in

however, there has been a correction of the traditional view that broad categories of speech received no protection since the founding.[69] Strikingly, this traditional view of categorical denial of protection was demonstrated to have been established without an adequate basis of evidence.[70] By making clear that "First Amendment scholars have not paid a great deal of attention to the pre-twentieth-century case law dealing with freedom of speech and press[,]" Professor Lakier has demonstrated that general assumptions regarding the pre-modern era are in need of significant review.[71] Yet, even this useful correction by Lakier is not entirely adequate to explain the original meaning of the First Amendment.

Absent from the analysis is the historical importance placed on an evidence-based test to determine direct harm. In failing to analyze the requirement for an evidence-based inquiry in the historical record, contemporary courts and scholars have erroneously limited the potential breadth and depth of the free speech guarantee,[72] even at the time of the Founders.[73] In fact, early courts did not forget the Claiborne amendment's evidence-based compromise.[74] An examination of early free speech cases demonstrates that the evidence-based test of direct harm was the single most important procedural mechanism by which the depth of free speech protection

public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not."). For Justice Thomas therefore, all it took to settle the case was one historical fact regarding an entire category of speech or speakers. *Id.* The idea that the government should have to prove the harm it was contending resulted from the speech in the case before him *specifically,* no matter which category the speech or speaker fell in, can be completely left out of the analysis. *See id*. at 403–05 (citations omitted). This standard advocated for by Justice Thomas in his concurrence in *Morse* is far less of a burden than the one put on those charged under the Sedition Act of 1798, where proof of harm was a requirement in *each case* even for a category of speech determined by Congress to be a very threat to the country itself. *See* STONE, *supra* note 3, at 37–39; *see also* Christina Bohannan, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1090 (2010) (implying that that an originalist standard such as the one employed by Justice Thomas towards free speech, on its face, betrays the very principle of free speech originalism as established by the Founders where proof of harm was an embedded requirement for even the most dangerous categories of speech).

[69] *See*, Lakier *supra* note 3, at 2168.

[70] *Id.* at 2177 ("There is little historical evidence . . . to back up the Court's claim that the categories of low-value speech we recognize as such today constituted, in the eighteenth and nineteenth centuries, well-defined and narrowly limited exceptions to the ordinary constitutional rules.").

[71] *See id.*

[72] *See id*. at 2212.

[73] *See* STONE, *supra* note 3, at 37–39.

[74] *See, e.g.*, Lakier, *supra* note 3, at 2179–80 (discussing 19th century case law dealing with questions of free speech).

in any individual case was determined and maintained.[75]

During cases involving obscenity for example, in most jurisdictions, "the government had to prove, not merely allege," to the satisfaction of a jury, not a judge, whether the speech amounted to a direct threat to a functioning society in order to maintain criminal sanction.[76] As a result of requiring this level of proof—which limited individual government officials' power to regulate speech—"relatively few obscenity convictions" for the time period were ever obtained.[77] Despite the lack of obscenity convictions during the pre-modern period, many scholars are still left unconvinced of an original free speech doctrines ability to offer significant depth of protection, with some even calling the Claiborne evidence-based compromise a "hollow victory."[78]

Admittedly, this is because the level of protection that existed at the time of early free speech cases was, despite the implementation of the evidence-based test within the courts, severely more restrictive than today.[79] Fixating the level of protection the evidence-based test

[75] *Id.* at 2180–81. ("Even William Blackstone, the figure primarily associated with the view that the guarantee of press freedom operated exclusively as a bar on prior restraints, agreed that government could only criminally punish speech when it constituted what he called a 'public vice'—that is, when it posed a public threat of some kind to civil society."). Under this kind of threat claim, the government throughout the 19th Century possessed the burden of proof under an original, Claiborne/Sedition Act, framework of the free speech guarantee. *See id.* at 2179–81.

[76] *Id.* at 2188.

[77] *Id.* at 2188–89 ("In 1868, for example, Republicans in the New York Senate were forced to remove from a new municipal obscenity bill a provision that authorized magistrates to issue warrants directing police officials to search and destroy materials the magistrate summarily declared to be 'obscene and indecent' after the provision generated intense opposition among the Democratic minority and the Democratic-leaning press. Critics argued that the proposed provision would undermine both due process and freedom of the press. An editorial in the Sunday Mercury, for example, described the provision, as evidence of 'Radical despotism' and noted that the law would empower. any magistrate or any policeman . . . [who] finds a paper with an advertisement in it that he thinks is not sufficiently refined for his pure imagination—[to] seize the same and transmit specimens of it to the District- Attorney's office, and forthwith destroy the remainder thereof; in other words, destroy the entire edition of the paper . . . without complaint or process of law.").

[78] *See*, SLACK, *supra* note 8, at 81. No blame can be placed for such a description of the Claiborne Amendment. For many years it was indeed hollow, as the evidentiary standard could not overcome the politics, bias, and speculative assumptions that plagued the pre-modern era. As Part III will illustrate, however, it was only after the public and the judiciary began to demand that knowledge be acquired only from more logical, objective standards, that the Claiborne compromise began to work in the role for which it was originally intended.

[79] *See, e.g.*, Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 398 (Pa. 1824) (upholding restriction on protected speech that transgressed dominant norms of public piety); Kurt L. Tash, *The Second Adoption of The Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106, 1120–21 (discussing how the only proof required in *Updegraph* was that of norms of public piety). The stated reason was that the Court felt calling into question the truth of holy scriptures threatened to undermine "those religious

offers in one given era of history to another, however, is a principle that stands in direct contrast with original intent.[80] In one of the rare instances the Continental Congress issued a statement discussing the intent behind the free speech, free press clause, it was said to promote "the *advancement* of truth, science, morality, and the arts in general."[81] If the free speech guarantee was not to remain fixed but intended to be a broad, loosely defined "endless expression of a civilization,"[82] it defies originalist logic for the evidence-based procedural test, and the findings that it produces, not to advance as well.[83]

Examining the jurisprudence of the pre-modern era reveals that nearly every case regarding obscenity, indecency, or offense to societal norms was justified by the judiciary on a belief that such restrictions were necessary to maintain human behavior within the confines of a well-ordered society so that constitutionally demanded government functions could operate.[84] Given that the evidence-based test of the pre-modern era was based on the best possible understanding of the underlying causes of human behavior at the time,[85] it is entirely unsurprising, and in fact even constitutionally acceptable (for the time), that courts of the nineteenth and early twentieth centuries permitted more restrictions than they otherwise

and moral restraints, without the aid of which mere legislative provisions [aimed at keeping order] would prove ineffectual." *Updegraph*, 11 Serg. & Rawle at 406. This was, what people at the time would have considered at least, plenty of rational evidence to back up such a claim. *Id.* at 405. Only after the passage of time and the underlying causes of human behavior were better understood, could serious flaws in such an argument be brought to light. Russomanno, *supra* note 56, at 258. Correcting such a long past, well-intentioned error is precisely one of the stated purposes of the free speech guarantee. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[80] *See* West, *supra* note 37, at 315 n.9 ("For the founders, freedom of speech is neither a matter of history nor of opinion, but is a constitutionalized natural right that can be understood only in light of political philosophy. They wrestled with questions like whether seditious libel laws are compatible with the First Amendment precisely because they rejected the view that history or opinion could decide the question of what is right.").

[81] *See* 1 CONTINENTAL CONGRESS ADDRESS TO THE INHABITANTS OF QUEBEC (1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 443 (Worthington C. Ford et al. eds., 1904) (emphasis added).

[82] *See* Chafee, *supra* note 17, at 954.

[83] *Cf. id.* at 954, 955 ("The provisions of the constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil.").

[84] *See* Lakier, *supra* note 3, at 2194 ("[I]t was widely believed that only by punishing what eighteenth- as well as nineteenth-century jurists tended to describe simply as 'licentiousness'—namely, speech 'inconsistent with the peace and safety of th[e] state'—could the government ensure the long-term stability, and popularity, of the system of free expression itself.").

[85] *See, e.g.*, Christina E. Wells, *Eternally Vigilant: Free Speech in the Modern Era*, 101 MICH. L. REV. 1566, 1585–86 (2003) ("[T]he clear-and-present-danger test [must be understood as] grounded in human nature.").

would today.[86] Nothing from the original analysis of the guarantee demands that the conclusions derived from the evidence-based test, or simple knowledge itself, was to remain fixed decade after decade, century after century.[87] In fact, the stated original intent of the Continental Congress reveals that just the opposite is true, and that advancement of society's beliefs was the ultimate goal.[88]

As Part I demonstrated, as soon as limits on the guarantee were proposed, the Founders quickly realized the futility in fixed definitions. The agreed-upon compromise to the fluid nature of determining the effects of speech was a test that could be based on evidence in order to better detect the direct threat to safety the government was contending it was protecting the public from.[89] Therefore, when applying original intent to pre-modern free speech cases, severe restrictions on the effects of speech in the past must be viewed through the lens of the best available evidence of human behavior at the time.[90] If the credibility of that evidence is called into question because it was based on mere speculation and conjecture about human behavior, or due to the discovery of new evidence later, nothing from the originalist view prevents a correction by later courts.[91]

Understandably, given the lack of knowledge of the pre-modern era, the period is rife with cases that presumed, or indeed contained no tangible evidence at all, of the negative effects of speech.[92] What the next part will demonstrate, however, is that as our basic understanding of the origin of human behavior and the natural world increased over time, cases determined based on speculative assertions were to become less common as they increasingly became harder for courts to justify in the face of new evidence detailing the origins of human behavior. Therefore, when viewed from an

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[86] *See, e.g.*, David Yassky, *Eras of the First Amendment,* 91 COLUM. L. REV. 1699, 1700 (1991).

[87] *See e.g.*, Wells, *supra* note 85, at 1576.

[88] *See* Chafee, *supra* note 17, at 956 ("[The] true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern.").

[89] *See* SLACK, *supra* note 8, at 81; Wells, *supra* note 85, at 1585–85; *cf.* Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 394 (Pa. 1824) ("[S]uch expression only becomes criminal when it interferes with the order of government, or disturbs the peace of society.").

[90] *See, e.g.*, Joseph Russomanno, *supra* note 56, at 258 (writing that the social sciences influenced the free speech movement).

[91] Peter J. Smith, *The Marshall Court and the Originalist's Dilemma,* 90 MINN. L. REV. 612, 635–36 (2006).

[92] *See* Chafee, *supra* note 17, at 945 ("Nearly every free speech decision, outside such hotly litigated portions as privilege and fair comment in defamation, appears to have been decided largely by intuition.").

evidence-based lens, the development of the modern free speech era does not amount to some "decisive break" with original intent.[93] Rather, the expansion of protections becomes the inevitable result of the intended goal of the guarantee to be guided by evidence of direct threats to society and essential government functions.

III. MODERN APPLICATION OF THE MATERIAL EVIDENCE-BASED TEST: CLAIBORNE'S COMPROMISE GAINS ORIGINAL TEETH

"The essential question is not, who is judge of the criminality of an utterance, but what is the test of its criminality."[94]

The elements leading to the founding compromise of the evidence-based test during the Sedition Acts mirrored, almost entirely, those later made in the early twentieth century over the Espionage Act.[95] Similar to the Sedition Act, the Espionage Act made it a crime to speak of condemnation towards the United States government.[96] Even more striking is that both periods—at the founding and during World War I—saw a bargain struck between opposing political views that embraced the evidence-based test.[97] The compromise that emerged from the opposing views towards the Espionage Act, heightened by wartime hysteria, was an evidence-based test intended to ensure only speech that produced an imminent threat to the public welfare or the government, was restricted.[98]

The roles of the individuals who helped shape the modern era of free speech doctrine are well-documented.[99] The logic used behind Holmes' "marketplace" concept was influenced directly by the

[93] See SLACK, supra note 8, at 103.

[94] Chafee, *supra* note 17, at 948.

[95] *See* Bambauer & Bambauer, *supra* note 12, at 344; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 UNIV. CHI. L. REV. 335, 336 (2003); *see also* Russomanno, *supra* note 56, at 241–42, 243.

[96] *See* Chafee J, *supra* note 17, at 948–49; Stone, *supra* note 95, at 336; *see also* Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 944 (2009) (["President Woodrow Wilson said that] disloyalty 'was not a subject on which there was room for . . . debate,' for disloyal individuals 'had sacrificed their right to civil liberties.'").

[97] *Cf.* STONE, *supra* note 3 at 37, 38–39; Russomanno, *supra* note 56, at 241–43, 246; Russomanno, *supra* note 56, at 246.

[98] *See* Abrams v. United States, 250 U.S. 616, 626–27 (1919) (Holmes, J., dissenting) Although a dissent, Holmes' views would later be incorporated into the courts jurisprudence. *See* Russomanno, *supra* note 56, at 246 ("If Hand had picked up the baton and passed it to Holmes and the Supreme Court, Justice Louis Brandeis must be credited with advancing it toward the finish line where supporters of free speech no longer wrote in dissent. Not only had Brandeis joined Holmes in dissent in *Abrams*, he accepted the mantle of leadership in the free speech revolution with the opinions he authored throughout the 1920s.").

[99] *See, e.g.*, Russomanno, *supra* note 56, at 242.

scientific advancements made by Charles Darwin,[100] which had by that time, fundamentally altered human understanding of the origins of our species' behavior.[101] Through evidence provided by Darwin's works, Holmes came to understand that human expression and ideas advance like evolution itself, independent of singular human purpose, yet completely dependent upon the environment in which they are formed.[102] This meant the key was not simply to have a certain desired "marketplace" that could accurately assess value, but to ensure that only "competition" itself was promoted so that human expression could naturally adapt to the long casual chain of demands of the human environment.[103]

Despite the evidence-based conclusions behind it, many at the time (just like today[104]) found Holmes' clear and present danger test as something of a paradigm shift from original intent.[105] The perception of such a decisive break was largely because the clear and present danger test was likely to abolish "censorship on the basis of morality" if left in place.[106] In practice, the Supreme Court would use the test to overturn the conviction of a defendant who had "highly offended" a dominant religious norm of the day.[107]

The abandonment of criminally regulated social norms shocked many, even those within Holmes' inner circle,[108] if for nothing else that it had been generally agreed upon to be necessary for the safety of the public for so long.[109] Regardless of the perception of those

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[100] *Id.* at 244–45.

[101] *See id.* ("[T]he hallmark of Holmes's opinion was its 'Darwinist invocation' of the marketplace metaphor. While Holmes never used the phrase 'marketplace of ideas'—instead using 'competition of the market'—he placed marketplace theory clearly within the paradigm of First Amendment doctrine and its development.").

[102] *Id.* at 226–27.

[103] *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best *test* of truth is the power of the thought to get itself accepted in the *competition* of the market, and that truth is the only ground upon which their wishes safely can be carried out.") (emphasis added).

[104] Many originalists, for example, have argued that many forms of expression should be left to the mercy of the democratic process and not receive the level of First Amendment protection that has resulted in the modern era. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) ("Freedom of non-political speech rests . . . upon the enlightenment of society and its elected representatives.").

[105] *See* Russomanno, *supra* note 56, at 231; *Abrams*, 250 U.S. at 627–28 (Holmes, J., dissenting).

[106] Laura M. Weinrib, *The Sex Side of Civil Liberties: United States v. Dennett and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 385 (2012).

[107] Cantwell v. Connecticut, 310 U.S. 296, 309, 311 (1940).

[108] Weinrib, *supra* note 106, at 363–64.

[109] Lakier, *supra* note 3, at 2202–03 ("Some vestiges of the nineteenth-century conception that, in order to preserve liberty, the government had to rout out licentiousness, remained very much alive in the New Deal period—even among those most ardently committed to the new

around Holmes however, objective, evidence-based scrutiny was beginning to have a stronger hold over more and more Americans.[110] Holmes' view echoed the public sentiment that the dominant social norms by which the effects of speech had been widely restricted in the past, was premised on the whims or personal feelings of those in power and often in direct contradiction of the people who desired change.[111] Accordingly, Holmes believed these norms were often inhibiting the advancement of good government and society.[112] Although the clear and present danger test did not bar all theoretical punishment due to an injury of social norms, Holmes' test of such regulation was the same as the Claiborne Amendment: prove it.[113]

A. Justice Brandeis Breaks from Originalism

Holmes' call for an evidence-based, clear and present danger test, however, was not incorporated by the courts entirely. Instead, what developed was a

> 'reconciliation' [of sorts] between the democratic and libertarian values promoted by the Court's clear and present danger line of cases and the other values (morality, public

conception of freedom of speech.").

[110] Russomanno, s*upra* note 56, at 216–218 ("While social science was founded in the late nineteenth century, and the 1920s and 1930s were key decades in its history in the United States, the early twentieth century years that were bracketed by these periods were crucial in its development. Positivism—a view at its extreme that demands that knowledge is acquired only from the logical, objective evaluation of empirical data—had surfaced and gained acceptance in the natural sciences. Observers and researchers of social phenomena adopted a similar approach, particularly in response to a nineteenth-century breakdown in local authority. According to Mark Smith: Communities no longer accepted the opinions of local elites without question, and national bodies of expertise were still developing. Scientists, lawyers, and doctors were turning to a culture of professionalization as part of a strategy to win social acceptance of their authority in limited areas of expertise. In turn, social scientists adopted scientific methods in part to acquire credibility and achieve respect and acceptance, especially desirable given the rise of the natural sciences and the scientific method. Charles Darwin's works in the mid-to-late nineteenth century were influential, and beyond the scientific community. William James, an adherent of Darwinism, not only influenced psychology and philosophy, but also along with others that included John Dewey and Charles Peirce, established the philosophical approach of pragmatism. In the late nineteenth century, Peirce outlined an objectively verifiable method of hypothesis testing—the 'scientific method' that prevails today.").

[111] *See* Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) ("Congress certainly cannot forbid all effort to change the mind of the country.").

[112] *See* Oliver Wendell Holmes, *Natural Law,* 32 HARV. L. REV. 40, 40–41 (1918) ("We have been cock-sure of many things that were not so. . . . Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.").

[113] *See Abrams*, 250 U.S. at 626 (Holmes, J., dissenting) ("But to make the conduct criminal that statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.' It seems to me that no such intent is proved.").

> order, civility) that the regulation of speech had traditionally promoted and that an unconstrained application of the clear and present danger standard appeared to threaten.[114]

Such conciliation was possible only through the brilliance of Justice Louis Brandeis, who developed his own construction of the First Amendment's free speech clause that emphasized the crucial function of certain forms of speech in democracy at the same time Justice Holmes formed his clear and present danger standard.[115] Through this conciliation of the two standards, Justice Brandeis was able to convince a majority of the court that Holmes' test provided proof of a crucial link between tolerance of dissent and preservation of social order.[116]

There remained a crucial difference, however, between Holmes' evidence-based test and Brandeis' political participation/functional justification theory that made up the other half of the reconciliation.[117] In order to set "the standard by which to determine when a [clear and present] danger shall be deemed clear[,]" Justice Brandeis was the first on the Court to draw specific corollaries between Holmes' clear and present danger test and Founder intent.[118] Unfortunately, the courageous confidence in liberty of the Founders, as described by Brandeis, flew in the face of the undeniable passage of the Sedition Act and the highly restrictive jurisprudence of the nineteenth century.[119] Much of what separates Brandeis' functional justification theory from the evidence-based test articulated in *Abrams*, therefore, can be found in the compatibility, or lack thereof, between the two with Founder intent.[120]

While he found the "factual experience characteristic" of Holmes

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[114] *See* Lakier, *supra* note 3, at 2203.

[115] *See* Russomanno, *supra* note 56, at 246 ("Justice Brandeis, much more than Justice Holmes, developed a judicial construction of the First Amendment that emphasized the crucial function of free speech in democratic governance. In a remarkable series of opinions from 1920 through 1927, Brandeis, relying extensively on Chafee's scholarship, elaborated and expanded the protective innovations of Holmes' dissent in *Abrams* without adopting Holmes' lingering Social Darwinism. Unlike the aloof Holmes, detached from and often contemptuous of human efforts to change society, Brandeis was an activist who combined genuine humanitarianism with a firm belief in individual dignity.").

[116] *See*, Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 635–36 (1999).

[117] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[118] *Id.* at 374–77 (Brandeis, J., concurring).

[119] *See id.* at 375–76 (Brandeis, J., concurring); *see also* Christopher P. Keleher, Comment, *Double Standards: The Suppression of Abortion Protestors' Free Speech Rights*, 51 DEPAUL L. REV. 825, 828 (2002).

[120] *See* Dennis v. United States, 341 U.S. 494, 508, 580 (1951) (quoting Bridges v. California, 314 U.S. 252, 263 (1941)).

test to be excellently suited for the advancement of ever changing free speech needs in American society,[121] Justice Brandeis placed much less emphasis on competition and evidence, and more on human efforts to change society, directing the primary aim of his theory at proving the value of specific speech for democracy.[122] The test in *Abrams* however, which Holmes never significantly deviated from, was more in keeping with the essence of original intent because it relied on an evidence-based test similar to the Claiborne compromise, which came out of the Sedition Acts era.[123] Justice Holmes was seeking to adopt an advancement of the original evidence-based method, which demanded proof as to whether the harmful effects of speech the government was contending in each case *actually* existed.[124]

Linking the constitutional status of different kinds of speech to a positive value judgment as Brandeis had done, however, was never an agreed-upon premise of the free speech clause.[125] By incorporating this positive value judgment over the new evidence-based test set by Holmes, Brandeis cast a long shadow of doubt resulting in the perception of a "decisive break" from Founder intent.[126] It is only by restoring the evidence-based-test to its proper role that this doubt can be removed and the evolution of the free speech doctrine can rightfully be seen as a natural progression of founding constitutional principles.[127]

In the years following the "reconciliation" by Brandeis, the impact of this "bad history" and doubt would be slight on the advancement of free speech protections.[128] Because the Court was generous with

[121] Bobertz, *supra* note 116, at 635–36.

[122] *Id.* at 647 ("His efforts to attribute his own and his generation's justifications for free speech to a mythical 'they' was not a sign of ignorance but of ingenuity. It would be one thing to advance reasons for protecting dissent based on the exigencies of the moment; it was quite another to relocate these rationales in the minds of omnipotent lawgivers, long dead yet imbued with an aura of mystical prescience. If Brandeis gave us bad history, at least it was bad history serving the cause of social order and promoting a revitalized ideology of American democracy. In *Whitney*, we see Brandeis not only as the brilliant judge, but as the progressive social engineer.").

[123] *See* Abrams v. United States, 250 U.S. 616, 619 (1919) (citations omitted).

[124] *See id.* at 629 (Holmes, J., dissenting) ("To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.")

[125] *See* Lakier, *supra* note 3, at 2197, 2225.

[126] *Id.* at 2199.

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

[128] For example, the value judgment test indisputably led to the narrowing of traditional nineteenth century definitions of speech. *See* Roth v. United States, 354 U.S. 476, 486–87 (1957); *see also* Russomanno, *supra* note 56, at 246; Bobertz, *supra* note 116, at 647.

the range of values relevant to the First Amendment and the tests it employed in each context, the value-based doctrine appeared to fit in well with the complex needs of society.[129] Yet as more and more time passes, it becomes clearer that the decision to subjugate the role of the evidence-based test to an assessment of categorical value caused a lengthy stagnation in the "advancement of truth, science, morality, and the arts in general."[130]

IV. HOW AN EVIDENCE-BASED STANDARD STRENGTHENS MODERN SPEECH PROTECTIONS AND ELIMINATES CATEGORIZATION STAGNATION

"[A] long habit of not thinking a thing WRONG, gives it a superficial appearance of being RIGHT, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason."[131]

A persistent fear of removing morality-based censorship completely is the confusion over what a free speech guarantee would even look like without morality-based standards.[132] Scholars have generally disfavored abandoning modern era normative, value-based categorizations because of the deficiencies of the alternatives and the perceived dangers of allowing certain forms of speech to be free from censorship.[133] If the modern era of free speech doctrine were to be abandoned, goes the argument, the only viable alternative appears to be a "return to something like the nineteenth-century model of speech regulation"[134] where courts had considerable more discretion to regulate speech.[135] However, as Part II discussed, returning to the nineteenth century evidence-based model should not bring about the same shallow depth of free speech protection. In fact, if the evidence-

[129] *See* 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).

[130] *See* Barry P. McDonald, *Government Regulation or other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1001 (2005).

[131] J. JACKSON OWESNBY, THE UNITED STATES DECLARATION OF INDEPENDENCE (REVISITED) 478 (3rd ed.2010) (quoting from Thomas Paine's *Common Sense*).

[132] *See* Bambauer & Bambauer, *supra* note 12, at 365.

[133] *See, e.g.*, *id.*; see also, Laura Beth Nielsen, Op-Ed, *The Case for Restricting Hate Speech*, L.A. TIMES (June 21, 2017), http://www.latimes.com/opinion/op-ed/la-oe-nielsen-free-speech-hate-20170621-story.html ("Hate speech is doing something. It results in tangible harms that are serious in and of themselves and that collectively amount to the harm of subordination. The harm of perpetuating discrimination. The harm of creating inequality.").

[134] Lakier, *supra* note 3, at 2231.

[135] *See id.*

based standard of the founding era and nineteenth century were applied today, free speech protection would be significantly deeper for three reasons.[136]

A. The Evidence-Based Test as a Safety Valve

First, the dominant view of eighteenth century courts that morality-based censorship was essential for social order and good government was long ago discredited by clear and compelling evidence.[137] The passage of time has given incredible new insight into the adaptive reasons behind human behaviors, cognitions, emotions, and perceptions.[138] Most importantly, scientific, evidence-based analysis has exposed the root causes of some of the darker, more damaging aspects of modern human behavioral phenomena including pathological gambling,[139] compulsive buying,[140] pornographic addiction,[141] and eating disorders.[142] Therefore, it should be clear to scholars, the advancement of human knowledge of our own behavior has had an ever-increasing relevance in analyzing the effects of speech.

In fact, even by the mid-twentieth century, evidence had been steadily growing under what became known as the Safety Valve Theory, which argued that morality-based censorship was actually *escalating* undesirable behavior.[143] By that time, many scholars had become convinced that removing morality-based repression of speech actually furthered the "avoidance of class conflict, the protection of private property, and the perpetuation of free markets."[144] Eventually, this Safety Valve Theory was to gain widespread

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[136] *See infra* Parts IV A, B, C.

[137] *See* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 226 (1920) ("Nothing adds more to men's hatred for government than its refusal to let them talk, especially if they are the type of person anarchists are, to whom talking a little wildly is the greatest joy of life. Besides, suppression of their mere words shows a fear of them, which only encourages them to greater activity in secret. A widespread belief is aroused that the government would not be so anxious to silence its critics unless what they have been saying is true. A wise and salutary neglect of talk, coupled with vigorous measures against plans for actual violence and a general endeavor to end discontent, is the best legal policy toward anarchy and criminal syndicalism.").

[138] *See* GAD SAAD, THE EVOLUTIONARY BASIS FOR CONSUMPTION 58 (2007).

[139] *See id.* at 249.

[140] *See id.* at 261.

[141] *See id.* at 232–33.

[142] *See id.* at 243.

[143] *See* Bobertz, *supra* note 116, at 609–10. Recent efforts of the time to ruthlessly stamp out dissent provided a lot of evidence that such tactics only embolden and more radicalized dissidents. *See* CHAFEE, *supra* note 137, at 226.

[144] *See* Bobertz, *supra* note 116, at 614.

acceptance, first convincing both Holmes and Brandeis,[145] as well as eventually, a majority of the Court.[146] Additionally, by this time, psychoanalysis was beginning to provide sound rational basis for curtailing destructive human behaviors, cognitions, emotions, and perceptions outside of traditional morality-based reasoning.[147] Just as this new biological and sociological evidence was producing significant results, however, a doubt interrupted the process.

The distrust revolved around whether the evidence-based conclusions produced by the Safety Valve line of cases could fully account for the historical application of the free speech guarantee.[148] As Part III demonstrated, reconciling this question resulted in the abandonment of an evidence-based test of direct threats from broad categories of speech, in favor of categorical, normative or purpose-based analysis.[149]

Consequently, the traditional procedural mechanism by which free speech protection was respected in the courts was severely devalued or simply left out of the analysis altogether by the creation of broad categories of speech deemed "low-value."[150] If the evidence-based test was reestablished, there is every reason to conclude that increasing depth of protection would be desirable based on the same evidentiary conclusions regarding human behavior found under the Safety Valve Theory in the mid-twentieth century.[151]

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[145] Holmes and Brandeis agreed that enough evidence proved that suppression of communists in Russia, and in their own societies had only seemed to provoke more fires. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (J., Holmes dissenting) ("To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . .").

[146] *See* Bobertz, *supra* note 116, at 614.

[147] *See, e.g.*, SIGMUND FREUD, THE FUTURE OF AN ILLUSION 40 (James Strachey ed., 1961). ("[W]hen civilization laid down the commandment that man shall not kill the neighbour whom he hates or who is in his way or whose property he covets, this was clearly done in the interest of man's communal existence, which would not otherwise be practicable. . . . Insecurity of life, which is an equal danger for everyone, now unites men into a society which prohibits the individual from killing."); *see also* RONALD LINDSAY, THE NECESSITY OF SECULARISM: WHY GOD CAN'T TELL US WHAT TO DO 65 (1st ed. 2014) (expanding on secular, purely functional-based concepts of law and justice in contemporary times).

[148] *See* Bobertz, *supra* note 116, at 610–12.

[149] In achieving his conciliation, Brandeis did it without evidence that prohibitions of this kind were producing such enhancements of the public discourse. Removing or deemphasizing the evidence-based standard was the only way such morality-based censorship, based solely on opinion and conjecture, could be maintained.

[150] *See* Lakier, *supra* note 3, at 2173–74.

[151] *See* Bobertz, *supra* note 116, at 614.

B. The Evidence-Based Test as a Refutation of Conjecture-Based Censorship

Second, requiring the government to be usefully pressed to provide material evidence will eliminate routine justifications for censorship of speech based on mere speculation and conjecture, resulting in an increase of the depth of free speech protection significantly.[152] For example, "the insistence on direct and material evidence became a vital component within commercial speech analysis, creating a formidable barrier to government restrictions against commercial speakers."[153] Because this standard has been supplanted in the noncommercial speech categorical based doctrine however,[154] speculative assertions made by the government about the negative effects of noncommercial speech or speakers go unchecked.[155] Additionally, given the level of discretion in construing relevant categories, we have seen courts engage in the manipulation of desired results rather than decisions based on constitutional free speech principles.[156]

C. The Evidence-Based Test Prevents Stagnation

Finally, one of the primary weaknesses of categorization analysis is the effects of that classification remain static for the conceivable future of the speech in question.[157] Therefore, a certain form of speech can become a victim of having the "value" of the category (in terms of the evidence test for harm) trapped within the evidence from the time when the category was created.[158] What's more, less important speech that comes under analysis later can be essentially elevated over other types of supposedly more valued speech that is beholden to old rules and a long history of exceptions.[159] The result

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[152] *See* Tyler Broker, *First Amendment Speculation and Conjecture,* 51 GONZ. L. REV. 561, 569–72 (2016).

[153] *Id.* at 564.

[154] *See id.* at 566.

[155] *See id.* at 566–67.

[156] *See* Lakier, *supra* note 3, at 2217 ("That the Court could construe the relevant category in this way—that it could, in other words, determine the terms of the analysis, and in so doing, determine its result—suggests how manipulable the *Stevens* test can be, given the failure of the historical record to clearly demarcate categories of lowvalue speech that need not be created, merely discovered. Nor is this the only example of serious ambiguity in the Court's delimitation of the categories.").

[157] *See id.* at 2174–75.

[158] *See id.*

[159] *See* Broker, *supra* note 152, at 567–68 ("Because the line of cases treating speech at public schools predates the commercial speech doctrine, the Court did not incorporate the tough 'no

is that the opinions, and perhaps more importantly, the evidentiary conclusions of certain categories of speech become stagnant and incredibly difficult to challenge the longer time passes.[160] The founding constitutional principle of time advancing our society's fighting faiths is flipped on its head. Under the current originalist doctrine, the passage of time actually hinders the advancement of "'truth, science, morality, and arts in general'" that the free speech protection was originally intended to promote.[161] It is only by re-elevating the material evidence-based test that this stagnation can be prevented and the free speech guarantee can function as a tool for advancement as originally intended.[162]

If proving that greater depth is possible or arguably desirable under an originalist view the more time passes, the question of the effects of increasing depth should be explored. During the century of expansion beginning with *Abrams*, we have seen rapid expansion of free speech guarantee protection along with categorical distinctions.[163] In accordance with increasing free speech protection, the United States entered into a new era of peace and prosperity.[164] Statistics relating to crime, violence, and deaths in war, among our population witnessed universally sharp decreases.[165] Equally encouraging, is that in the last hundred years of modern free-speech-guaranteed expansion, capitalism yielded tremendous societal and government benefits.[166] When capitalism has seemed to work best is when the stability and ability for innovation within society are at

speculation' rule into its core. *Frederick* shows that the Court continues to act in a path-dependent way rather than reworking parts of the noncommercial speech doctrine to require concrete evidence of harm.").

[160] *See* Lakier, *supra* note 3, at 2214.

[161] *Id*. at 2198.

[162] *See* Broker, *supra* note 152, at 569–572.

[163] *See* Lakier, *supra* note 3, at 2198–2202.

[164] *Cf.* STEVEN PINKER, THE BETTER ANGLES OF OUR NATURE 64 (1st ed. 2011). In his exhaustive study of violence not just in American society but throughout the world Pinker offers immensely valuable insight into the causes of human behavior which can be related to America post free-speech protection. *Id.* ("Do you think that city living, with its anonymity, crowding, immigrants, and jumble of cultures and classes, is a breeding ground for violence? What about the wrenching social changes brought on by capitalism and the industrial revolution? Is it your conviction that small-town life, centered on church, tradition, and fear of God, is our best bulwark against murder and mayhem? Well, think again. As Europe became more urban, cosmopolitan, commercial, industrialized, and secular, it got safer and safer.").

[165] Steven Pinker, *Has the Decline of Violence Reversed since The Better Angels of Our Nature was Written?*, HARVARD U., https://stevenpinker.com/has-decline-violence-reversed-better-angels-our-nature-was-written (last visited Oct. 2, 2017).

[166] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 474, 475, 476 (Arthur Goldhammer trans., Editions du Seuil 2013). Piketty demonstrates that modern economic growth is due largely to the diffusion of knowledge, technological innovation, and the relative stability after the chaos of the first and second world wars. *Id.* at 476.

their respective heights.[167] The political differences in contemporary times also appear centered around how best to operate capitalism, and the concept of free markets, most effectively.[168] What the next part will seek to illustrate is that in the future, the "avoidance of class conflict, the protection of private property, and the perpetuation of free markets" is best achieved when the free speech protection is procedurally tied to a *neutral* and deep evidentiary standard.[169]

V. WHAT A TWENTY-FIRST CENTURY EVIDENCE-BASED TEST SHOULD LOOK LIKE AND HOW IT CAN BE SATISFIED

> When one has lived for quite a long time in a particular [culture] and has often [striven] to discover what its origins were . . . one sometimes also feels tempted to take a glance in the other direction and to ask what further fate lies before it and what transformations it is destined to undergo. But one soon finds that the value of such an enquiry is diminished from the outset by several [considerations]. . . . [I]n general people experience their present naively, as it were, without being able to form an estimate of its contents; they have first to put themselves at a distance from it—the present, that is to say, must have become the past—before [one] can yield points of vantage from which to [gauge] the future.[170]

Those who have argued for greater depth in free speech protection have repeatedly stressed that the benefits are difficult to foresee.[171] As we have seen, the fear of such unpredictability is precisely the reason many continue to advocate for defined, static boundaries.[172] In seeking only to establish a link between the effects of speech on human behavior, evidence-based analysis can satisfy both sides of this debate.[173] The requirement of proof of harm was the original

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[167] *See id.* at 511.

[168] *See, e.g.*, Thomas Piketty, *Thomas Piketty on the Rise of Bernie Sanders: The US Enters a New Political Era*, THE GUARDIAN, (Feb. 16, 2016) https://www.theguardian.com/us-news/commentisfree/2016/feb/16/thomas-piketty-bernie-sanders-us-election-2016. Here Piketty goes into detail regarding the opposing political ideologies of our times and how they are centered on economics. *Id.*

[169] *See* Bobertz, *supra* note 116, at 613.

[170] FREUD, *supra* note 147, at 5.

[171] *See, e.g.*, Bambauer, *supra* note 12, at 339, 362–63.

[172] *See id.* at 364–66.

[173] Some may wonder whether judges will view evidence in a biased way—accepting inadequate evidence if they have strong instincts that the speech is immoral (and perhaps dangerous). *See Id.* at 370, 372–73. For example, in *Brown v. Entertainment Merchants Association*, the case could have gone either way depending on whether the court was willing to accept the bad social science that claimed the games cause people to become violent. 564

compromise between Founders who valued unpredictability of outcomes resulting from speech, and those who wanted to maintain some level of security.[174] Applying this common variable to each period of free speech crisis—some form of a procedural evidence-based test of the effects of speech—as the appropriate method to detect threats and limits of the constitutional guarantee of speech has powerful implications regarding a 21st Century free speech doctrine. However, rather than focusing on the procedural similarity, the superficial difference in the level of protection that emerged from each period has dominated the discussion.[175] This Article will not make the same error and now turns to what an evidence-based procedure should look like in the Twenty First Century.

Central to the Claiborne Compromise and Holmes' clear and present danger line of cases is the founding concern over tyrannical government power.[176] History has only reaffirmed the suspicion towards government claims of harms alleged to result from speech and it is essential that such skepticism continue. To be clear, this skepticism would be imprudent to maintain that certain forms of speech cannot lead to undesirable outcomes.[177] Rather, the skepticism must continue to focus on the inadequacies of arguments made by the government that regulation or censorship should shift from direct regulation of specific acts that cause harm, to indirect regulation of speech that could, may, or probably cause harm.[178] A

U.S. 786, 804–05 (2011) (citing Chaplinsky v. New Hampshire, 215 U.S. 568, 571–72 (1942); Church of Lukumi Babulu Aye, Inc. v. Hileah, 508 U.S. 520, 546 (1993)). The obvious point to be made here, and worth insisting on a third time, is that the evidence-based test, like any other test, is wholly dependent on a neutral and capable judiciary. *See, e.g.*, *Brown*, 564 U.S. at 804–05.

[174] *See Brown*, 564 U.S. at 799–800.

[175] *Cf. id.* at 828–29, 830, 832–33 (Thomas, J., dissenting) (citations omitted) (discussing the changes in children's free speech protections over historical periods).

[176] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 625, 626 (1919).

[177] Acknowledging that bad outcomes may result creates somewhat of a paradox for free speech purists. "If words don't matter, then democracy is a joke, because democracy depends entirely on making arguments—not for killing, but for voting. Only a fool would argue that words can move people to vote but not to kill." Jonah Goldberg, *Free Speech Isn't Always a Tool of* Virtue, NATIONAL REVIEW (June 21, 2017), http://www.nationalreview.com/article/448793/free-speech-tool-good-evil. However, one can resolve this paradox in more simplistic terms than many might believe. "In a free society, people have a moral responsibility for what they say, while at the same time a free society requires legal responsibility only for what they actually do." *Id.*

[178] *See, e.g.*, Bambauer & Bambauer, *supra* note 12, at 393. Here the Bambauers explain why such skepticism is warranted as a rule generally and they provide extensive modern evidence to support it. *See e.g.*, *id.* at 336–37, 393. Ultimately they conclude "Critics of the modern First Amendment have unwittingly repeated history. Information frequently appears terrifying; only the speakers vary. Past threats have included speech from Communists, anarchists, union organizers, civil-rights activists, doctors providing abortions, Jehovah's

powerful source of this skepticism is the failures of the courts to apply indirect censorship of speech in the past.[179] Equally as powerful is the evidence that direct regulation is more transparent and accountable, and thus, more desirable than indirect regulation.[180] Therefore, the twenty-first century evidence-based test should reflect an Info-Libertarianism standard of favoring direct regulation as opposed to indirect.[181]

The maintenance for such a standard must be based entirely on real world evidence, established over the test of time, and fortunately, the evidence is quite clear.[182] A host of assessment problems[183] including false causation, tautologies, and discounted benefits, as well as structural complications such as collective action problems, public choice issues, and governmental self-promotion, have plagued First Amendment law as a result of attempts at indirect regulation.[184] Direct regulation of behavior or acts does not suffer from such deficiencies making it the more effective approach towards regulating undesirable outcomes, and a twenty-first century evidence-based test should reflect that evidence-based conclusion.

Currently, however, free speech originalism appears "predicated on the paradoxical position that we should respect the Founders by rejecting their own understanding" of the free speech clause they themselves compromised on.[185] The result is cases where no alleged

Witnesses, and a cavalcade of others. Time proved those fears unfounded. It will show the apocalyptic predictions about recent First Amendment law to be more Chicken Little than Cassandra." *Id.* at 393.

[179] *See* Lakier, *supra* note 3, at 2204 n.172 ("But it was not only with respect to obscenity that the Court proved incapable for many years of coming up with a definition that provided litigants with predictable rules; the Court's fighting words jurisprudence in the 1940s and 1950s was similarly muddled and contentious.").

[180] *See* Bambauer & Bambauer, *supra* note 12, at 363–64 ("Finally, direct regulation is more transparent, leading to greater political and moral accountability. Direct regulation forces the legislature or executive to reveal, and confront directly, its end goal. The Vermont statute in Sorrell could pretend to be protecting privacy when its real reason was to cabin drug prices. Disguising price controls as privacy protections likely limited both the regime's efficacy and political opposition to it (because of the lesser efficacy). Straightforward rules limiting drug prices or doctors' prescribing options would be more likely to cut costs but would also have to run the gamut of the political process, complete with opposition by doctors and pharmaceutical companies. Debates about the best way to optimize health costs and drug innovation would receive their full airing. Structuring the law as a ban on information disguised the stakes and scattered its burdens.").

[181] *See generally*, Bambauer & Bambauer, *supra* note 11.

[182] Part I of this article explicitly stated that during the Sedition Acts debate James Madison put forth a vision for the free speech guarantee that largely reflected an Information-Libertarian standard but that this Article would not take sides as to whether that standard "best captured original intent" and it does not do so now.

[183] Bambauer & Bambauer, *supra* note 12, at 366.

[184] *Id.* at 363, 370, 375, 377, 378, 380, 382, 386.

[185] *See* Ronald A. Lindsay, *Scalia and Originalism: May They Rest in Peace*, HUFF POST: THE

harm resulting from the speech is proven or demonstrated, yet the government is nevertheless given broad authority to censor based on nothing more than the category of the speaker or the speech.[186] Such a result is in principle anathema to the Founders' compromise and centuries of free speech jurisprudence.[187] It is not enough, however, to form a clear view of a twenty-first century evidence-based standard by analyzing the deficiencies of the current jurisprudence and how such deficiencies may be corrected. Therefore, in order to establish a complete viewpoint, this Article now turns to how an ideal evidence-based standard applied today can be satisfied.

A. How a Twenty-First Century Evidence-Based Test of Speech Can Be Satisfied

"The normal test for the suppression of speech in a democratic government . . . is neither the justice of its substance nor the decency and propriety of its temper, but the strong danger that it will cause injurious acts."[188]

In attempting to satisfy an evidence-based inquiry, the primary concern, as it has been for centuries, should be providing sufficient proof that the use of such speech generates a fundamental threat of some kind to the well-being of society.[189] The harm or threat must be sufficiently defined and the statute tailored so as not be overbroad or vague.[190] In most cases, these and other concerns should be insurmountable to an evidence-based test in the twenty-first century. For even if the harm could be narrowly identified and tailored to the regulation, history has provided an abundance of evidence that

BLOG (Feb. 15, 2017), http://www.huffingtonpost.com/ronald-a-lindsay/scalia-and-originalism-may_b_9237446.htmlSee.

[186] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 441 (2007). In *Morse*, the Court censored speech it deemed supported drug use, and stated that the government interest in the case was preventing such drug use in students. *Id.* at 410. However, no evidence was provided that the speech in question caused a disruption with students who began using drugs after seeing the sign, or that such speech actually did increase drug use *period* or even providing any evidence that restricting such speech would decrease drug use. *Id*. at 440. It should be noted and stressed once again, that this was less of an evidentiary standard than was given to those arrested under the Sedition Acts, yet every self-identified originalist on the Court agreed with the majority. *Id*. at 395. Such cases demonstrate that, as applied today, the "alleged objectivity of originalism is a pernicious myth." Lindsay, *supra* note 185.

[187] *See, e.g.*, Bambauer & Bambauer, *supra* note 12, at 340 (noting that the First Amendment instructs courts to be skeptical of increased regulation).

[188] Chafee, *supra* note 17, at 961.

[189] *See id*.

[190] *See id*. at 962–63.

censorship of speech that encourages undesirable outcomes does more harm than good.[191] However, there is one key example from the twentieth century that satisfies all of these concerns, including the skepticism produced under the Safety Valve Theory, which is the standard found in *Ashcroft v. Free Speech Coalition*[192] that involves the context of child pornography.[193] In discussing *Ashcroft*, however, it becomes necessary to discuss first the standard set by the Court in *New York v. Ferber*,[194] and it is in *Ferber* where we find the foundations for how an evidence-based test can be satisfied.[195]

The Court in *Ferber*, relying entirely on exhaustive evidence, found that:

> When a definable class of material, such as that covered by [the New York statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.[196]

Despite the obvious moral repulsiveness of the material, the Court painstakingly went through "the factual situation" before them and sought out the data "relevant and adequate to an informed judgment."[197] In just one footnote alone, eight studies were used to back up the Court's conclusions regarding the harm of the material.[198] What makes the standard in *Ferber* unique is that the Court stated it was not concerned with what was being communicated, but was instead focusing on *how* the material was being made and the damage that resulted from the production itself.[199] Additionally, the Court used evidence derived from several authorities to find that the distribution of such material exacerbates

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[191] This relates to the Safety Valve Theory discussed in Parts III and IV. Enough evidence has emerged to show that government censorship actually perpetuates undesirable outcomes. *Cf.* Britt Christensen, *Why Freedom of Speech Matters*, INSIDESOURCES (Feb. 12, 2015), http://www.insidesources.com/freedom-speech-matters/ (showing that the passage of time has proven this evidence to be correct as the world became safer alongside the time period when we began to, drastically in many cases, loosen restrictions on speech once thought to be incredibly dangerous for society and the government).

[192] Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

[193] *Id.* at 239 (citations omitted).

[194] New York v. Ferber, 458 U.S. 747 (1982).

[195] *See id.* at 764, 768.

[196] *Id.* at 764.

[197] *Id.* at 768.

[198] *Id.* at 758 n.9 (citations omitted).

[199] *See id.* at 756. The stated government interest was in "safeguarding the physical and psychological well-being of a minor." *Id.* at 756–757 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

the child victim's harm directly and continually, and only by censoring the distribution of such materials could the harm be "effectively controlled."[200] In *Ferber*, the Court followed the evidence towards limiting the scope of the censorship to the *direct* harms against children. This emphasis on direct harm must be the standard for a contemporary evidence-based test and, as the Court later clarified in *Ashcroft*, indirect harms are not sufficient to pass First Amendment muster.[201]

In contrast to the expression in *Ferber*, the expression in *Ashcroft* did not depict actual children.[202] Instead, the expression contained virtual characters or actors who look, in many cases, indistinguishable from children.[203] Despite the fact that the expression may be indistinguishable from the acts in *Ferber*, the Court stressed that the material in question "records no crime and creates no victims by its production."[204] The Court acknowledged, however, that the mere existence of such material posed legitimate concerns.[205] For example, the Court recognized the material could lead to actual instances of child abuse by those who would seek to "encourage children to participate in sexual activity[,]"[206] however, the Court pointed out that such a "causal link is contingent and indirect."[207] In fact, the Court expressly rejected the argument made by Congress that the expression encourages unlawful acts and therefore it should be censored,[208] and the insistence on proving direct harm was reaffirmed.[209] The distinguishing criteria for a

[200] *Ferber*, 458 U.S. at 759–60. The Court agreed with the evidence produced by the legislature "that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies." *Id.* This is of course, a factual claim, and thus while its findings may be rightfully respected now, an evidence-based procedure may contradict such a conclusion later on as the origins of pedophilia and other disorders are discovered. *See, e.g.*, Russomanno, *supra* note 56, at 219. In other words, while the Court may accept this conclusion now, nothing prevents a later correction by the use of the same objective, evidence-based procedure. *See id.*

[201] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002).

[202] *See id.* at 241.

[203] *Id.*

[204] *Id.* at 250.

[205] *See id.* at 241.

[206] *Id.*

[207] *Id.* at 250 ("The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.").

[208] *Id.* at 253 ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").

[209] *Id.* at 253–54 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.").

contemporary evidence-based standard must contain a similar demand for direct harm in order to satisfy historical and evidential concerns. *Ferber* presents an example of when such demands for direct harm are satisfied, and *Ashcroft* provides a useful limitation on claims of indirect harms.

CONCLUSION

To some extent, modern freedom of expression and its significant restraint on democratic power carries with it an underlying guilt that such an impressive level of protection is somehow not in keeping with Founder intent.[210] For many originalists, the need to examine, or more accurately stated, project personal interpretations of our country's history becomes the outlet through which that guilt is alleviated.[211] The unfortunate result is that significant amounts of value judgments are projected towards certain forms of speech.[212]

One of the more puzzling aspects of originalist interpretation today is when it is directed at analyzing open-ended language such as "free speech." The idea that the Founders had not intended fixed definitions because of the very nature of the open-ended language itself and instead left tools such as evidence-based procedures or underlying principles to guide us never seems to enter the originalist framework.[213] Instead, what develops from originalism is a paradoxical view that open-ended provisions are to be interpreted only as close-ended. Where the Founders wanted *only* the specific views they were thinking at the time to endure, despite the fact that such a position undermines the very principle of the open-ended language of the provision itself.

Moreover, as scholars such as Ronald Lindsay have pointed out, when the Founders wanted to be specific, with provisions like the presidential age limit, they were not shy in doing so.[214] Thus, the main concern with originalism as applied today, is that because it develops such paradoxical conclusions, there is no basis for claiming that its methods are more objective than others.

This Article has sought to correct this fault in originalism by directing the methods focus more towards the evidence-based procedure established by the Founder's for an open-ended provision

[210] *See* Lindsay, *supra* note 185.
[211] *See id.*
[212] *See id.*
[213] Volokh, *supra* note 30.
[214] Lindsay, *supra* note 185.

like "free speech." Originalism should demand a continual improvement to that founding procedure, guided by evidence, to offset the politics, bias, and speculative assumptions that have prevented it in past eras from functioning as intended. The stated goal of the Founders for the free speech clause was to advance our nation's civilization.[215] In practice, free speech has lived up to this founding goal by making itself central towards acquiring knowledge in any field of human interest. The freedom to present ideas about the nature of society and to be able to freely test those ideas against the general concept of reality has advanced our understanding of our world more so than any other single factor in our species' existence.[216] It would be a tragic irony if the method that was founded primarily to enhance respect for founding concerns in constitutional interpretation—originalism—became the chief instrument in impeding the Founders goals for the Free Speech Clause to advance our American culture.

[215] *See* Volokh, *supra* note 30.

[216] Steven Pinker has summed up this dominant value of free speech exceedingly well stating:

> Free speech was not just central to the development of knowledge in the history of humanity; it may be central to the development of knowledge in any intelligent species. In his brilliant book *The Beginning of Infinity,* the physicist David Deutsch argues that conjecture and refutation is the only way, in principle, that knowledge can be acquired. If he is right, we can rule out that staple of science fiction, the advanced race of extraterrestrials with a higher form of intelligence. There is only one form of intelligence, Deutsch argues, and modern humans have it: a combination of the ability to conjecture hypotheses, which is part of our evolved cognitive makeup, and the willingness to let the world refute them, which is an accomplishment of the scientific revolution and the Enlightenment. If so, the freedom to advance ideas is not just a parochial ideal of *Homo sapiens* on Planet Earth; it is an ideal of all intelligent beings.

Steven Pinker: 3 Reasons Why Free Speech Matters, THE SKEPTICAL LIBERTARIAN: FREE SPEECH (Nov. 7, 2014), http://blog.skepticallibertarian.com/2014/11/07/steven-pinker-3-reasons-why-free-speech-matters/.