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Rights Speech

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Freedom of expression has a complex and dynamic relationship with a number of other constitutional rights, including abortion, the right to bear arms, equal protection, the franchise, and religious liberty. This Article discusses one aspect of that relationship. It critically analyzes the regulation of "rights speech" — communications about or concerning the recognition, scope, or exercise of constitutional rights. As illustrative examples, the Article focuses on regulation of speech about abortion and the Second Amendment right to bear arms. Governments frequently manage, structure, and limit how individuals discuss constitutional rights. For example, laws and regulations compel physicians to convey information to their patients about abortion and its effects, restrict abortion speech near clinics, limit public and press access to gun records, and ban state-funded lobbying relating to gun control. The Article classifies rights speech as an important subcategory of political speech; demonstrates how rights speech regulations, which are rooted in political conflicts about underlying rights, affect constitutional rights discourse; identifies the effects of rights speech regulation on expressive and non-expressive constitutional rights; and discusses how the First Amendment might more effectively mediate disputes regarding constitutional rights.

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INTRODUCTION

First Amendment expressive rights intersect with other constitutional rights in a variety of interesting and important ways. Expressive liberties can facilitate, conflict, combine, and sometimes undermine the exercise of other constitutional rights.[1] This Article examines an important, but largely overlooked, facet of the relationship between expressive and non-expressive liberties. It focuses on the regulation of "rights speech," which is defined as speech about or concerning the recognition, scope, or exercise of a constitutional right. In basic terms, the Article examines the right to discuss and debate constitutional rights.[2]

The Article focuses on the regulation of rights speech in two substantive areas — the right to abortion and the Second Amendment right to bear arms.[3] Regulation of abortion speech is commonplace, and

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[1] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (holding that privacy interest in contents of private conversation gave way to public interest in dissemination of information of public concern); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840-42 (1995) (holding provision of student funds to Christian publication did not violate Establishment Clause); Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding limits on campaign speech near polls); Emp't Div. of the Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881-82 (1990) (recognizing "hybrid" free speech and free exercise rights); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976) (noting that free press and fair trial rights sometimes clash, and that press has an obligation to safeguard the fairness of trial proceedings); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (observing that freedom of speech is an "indispensable condition" for the exercise of other rights).

[2] This subject is distinct from, but not wholly unrelated to, debates concerning the manner in which Americans discuss constitutional rights. Unlike commentators concerned with the social ramifications of constitutional rights discourse, this Article focuses on an antecedent legal question — namely, the extent to which government may regulate communications regarding constitutional rights. *How* individuals choose to exercise their right to debate public policies and constitutional rights is a separate question. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-75 (1993) (discussing the negative effects of a political discourse based on individualism rather than collective concerns); Joseph Blocher, Gun Rights Talk (2014) (unpublished manuscript) (draft on file with author) [hereinafter Gun Rights Talk] (analyzing effects of recognition of Second Amendment right to bear arms on political discourse concerning gun rights).

[3] The examples are merely illustrative. Indeed, perhaps the best-known examples of what the Article refers to as rights speech regulation occurred during the Civil Rights Movement. Restrictions on speech, press, and assembly chilled and suppressed advocacy and expressive association relating to the constitutional right to racial equality. Supreme Court decisions protecting public protests, assembly, press, and association were instrumental in creating the breathing space needed to debate and ultimately advance racial equality. *See* Cox v. Louisiana, 379 U.S. 536, 545 (1965) (invalidating conviction of leader of group wishing to protest racial segregation); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (establishing high burden for public

frequently the subject of constitutional litigation. For example, the Supreme Court recently invalidated a Massachusetts law that prohibited most speech and other expressive activities within thirty-five feet of abortion clinics.[4] Other examples include laws compelling physicians to communicate information about abortion to female patients and injunctions banning the display of abortion imagery.[5] Regulation of arms speech is a more recent phenomenon, in part because the right to bear arms was only recently recognized by the Supreme Court in *District of Columbia v. Heller*.[6] However, governments and officials have already restricted arms speech in a number of different respects, including providing privacy protections for arms owners, banning publicly funded gun control advocacy, and restricting research about the effects of gun ownership.[7]

Rights speech addresses the recognition, scope, and enjoyment of individual liberties. This expression goes to the heart of democratic self-governance in the sense that it implicates the content and scope of limits on state power. Rights speech regulations affect, often in negative ways, a special subcategory of political speech.[8] Whether or not they are content-based, such regulations limit the ability of private individuals to discuss and debate constitutional rights. Rights speech regulations may also affect the exercise of non-expressive constitutional rights.[9] For

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official libel plaintiffs in case involving criticism of actions taken by southern officials against civil rights activists); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (invalidating breach of peace convictions against civil rights protesters); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (holding that Alabama order requiring NAACP to disclose its membership list violated the group's First Amendment right of association).

[4] *See* McCullen v. Coakley, 134 S. Ct. 2518, 2525 (2014). The Massachusetts law permitted clinic employees and other individuals to engage in speech within the buffer zones. *Id.* at 2533.

[5] For examples and discussion of abortion speech regulation, see *infra* Part I.A.

[6] 554 U.S. 570, 592 (2008) (recognizing Second Amendment right to bear arms). Contrast this with abortion rights, which were constitutionally recognized in 1973. *See* Roe v. Wade, 410 U.S. 113, 153 (1973). Of course, discussion of abortion rights and the right to bear arms long preceded the Supreme Court's decisions in *Roe* and *Heller*. However, most laws restricting abortion and arms speech post-date the Court's decisions. Thus, the Article focuses on post-*Roe* and post-*Heller* regulations.

[7] For examples and discussion of arms speech regulation, see *infra* Part I.B.

[8] Government speech about constitutional rights may also substantially affect constitutional liberties. The subject of governmental rights speech is largely beyond the scope of this Article, which focuses on official regulation of private speech.

[9] Throughout the Article, I use the terms "expressive" and "non-expressive" to refer to rights. The distinction is somewhat artificial. Many constitutional rights have expressive elements or components. For example, equality, religious liberty, and exercise of the franchise all have expressive components or aspects. However, for

these and other reasons explored in the Article, rights speech regulations ought rarely to be enacted and, if enacted, ought to be viewed skeptically by courts.

Part I of the Article identifies and describes a number of abortion speech and arms speech regulations. Regulation of rights speech is pervasive, occurs at all levels of governance, and affects the discussion of constitutional rights locally, nationally, and even internationally. As the discussion shows, rights speech regulations implicate a number of First Amendment doctrines, principles, and concepts. Although they raise important constitutional questions, rights speech regulations are rooted primarily in political calculations and issue advocacy.[10] Restrictions on abortion speech and arms speech are the products of ongoing political conflicts regarding the legitimacy and scope of two highly contested rights. Rights speech regulations have been used as a means of regulating the scope and exercise of non-expressive rights and influencing public perception regarding the recognition and legitimacy of constitutional rights to abortion and arms possession.

Part II connects rights speech regulation to a broader conception of constitutional rights discourse and addresses its effects on expressive and non-expressive liberties. As abortion and the right to bear arms demonstrate, the status and scope of rights are contested in an ongoing and dynamic rights discourse. Regulation of rights speech can undermine self-government with respect to constitutional rights, skew constitutional discourse, diminish governmental transparency, and interfere with individual autonomy. Further, some rights speech regulations may interfere with the autonomous exercise of non-expressive rights. Finally, short of actual interference, rights speech regulations can produce an officially sanctioned ranking or hierarchy of constitutional rights. Within limits not clearly defined, governments may sometimes discourage the exercise of constitutional rights through official communications.[11] However, the Article argues that they ought to interfere as little as possible with public deliberation concerning the appropriateness and legitimacy of constitutional limits on government

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purposes of analyzing rights speech and its relationship to other rights, the distinction is both meaningful and manageable.

[10] *See infra* Part I.C.

[11] *See, e.g.*, Pleasant Grove v. Summum, 555 U.S. 460, 481 (2009) (holding government speech is not limited by Free Speech Clause); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (finding state may take a position favoring childbirth over abortion). *But see* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 692 (2013) (positing that government speech regarding constitutional rights, including the right to abortion, is subject to First Amendment free speech constraints under a principle of "government nonendorsement").

power. If there is to be a ranking or hierarchy of constitutional rights, it ought to result from open, robust, and largely unfettered public debate.

Part III concludes by critically examining the First Amendment's role as a mechanism for mediating debates about constitutional rights. Although frequently relied upon to serve this function, First Amendment mediation faces several challenges. Among the principal obstacles are the political expediency of rights speech regulation, First Amendment doctrinal limitations, and judicial biases regarding rights.[12] While these problems cannot be entirely eliminated, they can be ameliorated to some degree. Part III closes with some examples of more effective First Amendment mediation.

I. REGULATION OF RIGHTS SPEECH

This Part identifies and discusses various examples of rights speech regulation in the areas of abortion and arms possession. The aim is to demonstrate that regulation of rights speech in these areas is both broad and deep. Regulations affect speech in a variety of contexts — physicians' offices, public sidewalks, the Internet, public schools, and foreign nations. They cut across doctrinal areas and concerns, including compulsory speech, regulation of public protest, and limits on speech subsidies. Although on first glance they appear to be regulations of speech, many of the regulations are rooted firmly in abortion and Second Amendment politics. In short, regulation of speech about abortion and arms is often a means of regulating the underlying rights themselves.

A. Abortion Speech

Reproductive rights and freedom of speech have always been closely related. Governments have sought in various ways to regulate communications regarding reproductive rights and abortion. Here I examine five of the most prominent regulatory contexts: compulsory physician speech, government funding conditions, protest and other forms of public contention, image bans, and restrictions on student

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[12] *See generally* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49 (2000) (discussing difficulties in determining "whether the government action is content based or content neutral"); Lee Epstein, Christopher M. Parker & Jeffrey Segal, Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment (2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572 (discussing whether judges favor litigants who share similar political or ideological commitments).

speech. The Section begins with a bit of background concerning the structuring of abortion rights discourse. It then discusses various contemporary examples of abortion speech regulation.

1. Structuring Abortion Discourse — Compulsory Disclosures

The First Amendment and reproductive rights have long intersected. Although today the connection is rarely discussed, reproductive rights in the United States are firmly rooted in the First Amendment's expressive guarantees.

Early laws prohibited the use of the mails and other channels to deliver basic information about contraception.[13] Eventually, governmental contractions of available knowledge regarding contraception were thought to raise serious First Amendment concerns. In *Griswold v. Connecticut*,[14] the Supreme Court for the first time recognized that spouses had a right to access information about contraceptive devices and services within the marital relationship. Freedom of speech and intimate association were central to the Court's initial recognition of the right to contraception.[15]

Connecticut's ban on the use of contraceptive devices had interfered, said the Court, with physicians' ability to convey information about contraception to spouses. The Court rested its decision in part on the principle that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[16] Thus, *Griswold* might itself be described as a "rights speech" case. The law under attack regulated the communication of information relating to a then-contested right — the fundamental right of privacy in intimate affairs. It prohibited physicians from talking to their patients about one means of exercising this right.

However, in subsequent cases involving reproductive rights, the Court did not expressly cite or discuss the First Amendment's free speech or association guarantees. Rights to birth control and abortion were textually and conceptually relocated. In *Roe v. Wade*,[17] the Court concluded that the abortion right was located either in the Fourteenth

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[13] *See* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society — From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 745-60 (1992) (discussing nineteenth century laws relating to indecent materials, including materials discussing contraception).

[14] 381 U.S. 479 (1965).

[15] *See id.* at 482-83 (discussing importance of free speech, press, and association rights to contraceptive rights).

[16] *Id.* at 484.

[17] 410 U.S. 113 (1973).

Amendment's Due Process Clause or in the Ninth Amendment's reservation of rights not otherwise enumerated in the Constitution.[18] The Court did not mention the First Amendment.

Between *Roe v. Wade* and *Planned Parenthood v. Casey*[19] — which retained *Roe*'s basic premise that there was a right to abortion, but abandoned the trimester approach and re-calibrated the state's interests in the abortion decision — the Court invalidated some state regulations relating to the provision of information to women seeking abortions. For example, the Court voided a provision mandating a detailed set of guidelines regarding information the attending physician had to convey to the woman regarding the development of the fetus, the date of possible viability, and the complications that might result from an abortion.[20]

Although the laws forced physicians to communicate certain information to their patients, the Court did not ground its decision in First Amendment compelled speech concerns. Rather, it concluded that the requirement was "designed not to inform the woman's consent but rather to persuade her to withhold it altogether."[21] The Court also invalidated certain reporting requirements that compelled disclosure by health care facilities of the identities of physicians and pregnant women, reasoning that these laws also chilled the freedom to have an abortion — again, without indicating whether they also violated the facilities' freedom not to speak.[22] In sum, in post-*Roe* challenges to abortion laws, the First Amendment did not play an important mediating role. Indeed, it largely disappeared from view.

After *Roe*, the Court decided that state and federal governments were not required to fund or otherwise support access to abortion services.[23] Additionally, it clarified that governments were entitled to make a "value judgment" that childbirth was preferable to abortion, through the allocation of public funds and by other means.[24] These decisions effectively set the stage for *Casey*, in which the Court established a new

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[18] *Id.* at 153.

[19] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[20] City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444-45 (1983) (invalidating information and informed consent provisions).

[21] *Id.* at 444.

[22] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 766 (1986), *overruled by Casey*, 505 U.S. 833.

[23] *See* Harris v. McRae, 448 U.S. 297, 315 (1980) (rejecting challenges to the Hyde Amendment, which barred payments even for most medically necessary abortions); Maher v. Roe, 432 U.S. 464, 480 (1977) (upholding denial of Medicaid funds for abortion services).

[24] *Maher*, 432 U.S. at 474.

framework for structuring abortion discourse. Under this framework, government is permitted to seek to *persuade* women not to exercise their constitutional right to choose to terminate a pregnancy, so long as it does not *coerce* women or otherwise unduly interfere with the abortion decision.[25]

Applying this framework in *Casey*, the Court upheld a Pennsylvania requirement that compelled physicians, within twenty-four hours of performing an abortion, to inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child."[26] The Court overruled its prior precedents invalidating similar compulsory disclosures. It reasoned that the state was entitled "to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."[27] The Court also rejected, in a brief paragraph, the physicians' claim that the informational requirements compelled speech in violation of the First Amendment.[28] The Court concluded that the state had the power to compel professional speech pursuant to its authority to license the practice of medicine.[29] This was the sole reference to the First Amendment in the *Casey* opinions.

After *Casey*, free speech principles would perform a very different function. Under *Casey*'s framework, with regard to the dialogue between pregnant women considering abortion and physicians, the government was permitted to: (1) take steps "to ensure that this choice is thoughtful and informed;" (2) "enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term;" and (3) enact a "reasonable framework for a woman to make a decision that has such profound and lasting meaning."[30]

As one commentator observed, *Casey* articulated a framework by which the state could "structure the woman's decisionmaking process" and "open up the expressive channels of speech to the pregnant woman while she is engaged in deliberation about her choice."[31] In other words,

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[25] *Casey*, 505 U.S. at 877-78.

[26] *Id.* at 881.

[27] *Id.* at 883.

[28] *Id.* at 884.

[29] *Id.* (rejecting compelled speech claim).

[30] *Id.* at 872.

[31] Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking*

the Court sought a partial resolution of the divisive abortion controversy in a very traditional First Amendment mechanism — more speech. However, in this case the Court authorized and encouraged speech espousing or indicating a negative view with regard to the exercise of abortion rights. As it indicated in *Casey*, the Court was effectively "granting leeway to the government to voice its own opposition to abortion."[32]

Within this structured discourse, the government is permitted to conscript a woman's physician to deliver truthful and non-misleading information in order to further its interests in, and to convey its positions regarding, potential life and maternal informed consent. So long as it does not deprive a woman of her actual choice, the government may seek to "persuade her to choose childbirth over abortion."[33] Moreover, the government is permitted to enact a "structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn."[34] In a subsequent case involving late-term abortions, the Court emphasized that the government was entitled through laws and regulations to express "respect for the dignity of human life" and to "use its voice and its regulatory authority to show its profound respect for the life within the woman."[35]

Since *Casey*, many governments have enacted measures that structure conversations between women and their physicians regarding abortion.[36] Indeed, one of the most important and contested aspects of the abortion debate has concerned the extent to which laws may require that doctors impart information to women who are considering exercising their right to choose. States have participated in this persuasive endeavor by requiring, typically under the rubric of

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Process, 4 WM. & MARY BILL RTS. J. 787, 802 (1996).

[32] *Id.* at 791.

[33] *See id.* at 790, 803 (suggesting that the *Casey* joint opinion contains elements of three models — autonomy and informed consent, dialogical, and government speech).

[34] *Id.* at 803.

[35] Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

[36] For commentary on compulsory abortion speech, see Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014) [hereinafter *Compelled Disclosures*], Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2389 (2013), Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 959-62 (2007), and Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 399-400 (2008).

"informed consent," that doctors convey specific information about abortion to their patients.

States have structured doctor-patient discourse regarding abortion in various ways. Some state laws impose detailed scripts on physicians. For example, South Dakota has required that abortion providers tell patients that abortion will "terminate the life of a whole, separate, unique, living human being" and that "the pregnant woman has an existing relationship with that unborn human being."[37] The doctor must also explain "all known medical risks" of abortion, including the "increased risk of suicide ideation and suicide."[38] Federal courts have upheld both the "human being" and suicide advisory scripts.[39]

Other state laws, sometimes referred to as "speech and display," require that an ultrasound be displayed to the woman and that doctors provide a detailed description of the image (including information about limbs, vital organs, position in the uterus, etc.).[40] Women can sometimes refuse to view the sonogram itself, but they must generally be informed of the sonogram results and must sign an informed consent certifying that they have received the information. The speech and display laws are an outgrowth of *Casey*'s structured discourse framework, in which the state is empowered to provide truthful and non-misleading information in an effort to persuade women not to choose abortion.[41] These regulations change both the tenor and terms of communications regarding abortion. Thus far, however, most courts have treated them as legitimate aspects of informed consent rather than compulsion of official speech.[42]

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[37] S.D. CODIFIED LAWS § 34-23A-10.1(1)(b), (c) (2011).

[38] *Id.* § 34-23A-10.1(1)(e)(ii) (2011).

[39] *See* Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds II*), 686 F.3d 889, 906 (8th Cir. 2012) (en banc); Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds I*), 530 F.3d 724, 738 (8th Cir. 2008) (en banc) (vacating preliminary injunction); Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health, 794 F. Supp. 2d 892, 916, 918 (S.D. Ind. 2011) (upholding requirement that physicians inform abortion patients that "human physical life begins when a human ovum is fertilized by a human sperm").

[40] *E.g.*, LA. REV. STAT. ANN. § 40:1299.35.2(D)(2)(a) (2012); N.C. GEN. STAT. ANN. § 90-21.85(a)(2), (a)(4) (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(C), (D) (West 2011).

[41] *See* Post, *supra* note 36, at 944.

[42] *See, e.g.*, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577 (5th Cir. 2012) (rejecting compelled speech claim brought by physicians); *Rounds I*, 530 F.3d at 735 (same). *But see* Stuart v. Loomis, No. 1:11-CV-804, 2014 WL 186310, at *12-14 (M.D.N.C. Jan. 17, 2014) (invalidating North Carolina ultrasound narration law on compulsory speech grounds).

In the context of *Casey*'s structured discourse, note that governments are not encouraging freedom of speech in order to *facilitate* the exercise of a constitutional right. Rather, in many cases governments are compelling physician speech in an effort to dissuade or prevent women from exercising the right. Under *Casey*, so long as the speech delivered by intermediary physicians does not present a "substantial obstacle" to the right to procure an abortion, it is a permissible regulation of both abortion and free speech. In this context, governmental regulation of rights speech and the government's participation in rights discourse have fundamentally altered the nature of the conversation between women and physicians.

In physicians' offices, where the abortion right is likely to be discussed intimately and with immediacy, the government is essentially entitled to weigh in on the exercise of the abortion right and to encourage women to bear children. In the structured discourse of abortion rights this is typically accomplished through physician intermediaries who are compelled to convey substantive information about abortion and its effects to their patients. The fact that the government is to some extent a participant in the conversation complicates First Amendment analysis.[43] However, the structuring of rights discourse in this context takes place at the level of face-to-face interactions between women and their chosen physicians. The state is thus not directly communicating its official disfavor of abortion and abortion rights. Rather, it is actively structuring the nature and substance of the conversation between private parties.

Governments have also compelled abortion speech in another context, again on the supposed ground that women ought to have what the state views as relevant information about reproductive choice. Some municipalities have required that health care facilities providing counseling to pregnant women clearly and prominently disclose, in advertisements and other materials, that they do not provide abortion services or referrals and do not have qualified medical personnel on site to perform abortion services.[44] Some of these ordinances require that pregnancy centers indicate that abortion and contraception services are available elsewhere and that patients should consult a qualified medical professional to discuss all of their options.[45]

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[43] *See* discussion *infra* Part I.A.2.

[44] *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1339-43 (discussing measures compelling pregnancy centers to convey information about abortion services).

[45] *Id.*

Local governments have argued that these mandatory disclosures combat misleading advertising by so-called "crisis pregnancy centers."[46] In some cases, the centers appear to provide full counseling and other services for pregnant women when, in fact, they are not actually equipped to provide abortion counseling or contraceptive services.[47] Indeed, some crisis pregnancy centers essentially operate as pro-life organizations; their principal mission is to persuade women to choose childbirth over abortion.[48]

In contrast to the cases reviewing script and speech and display laws, courts have generally subjected compulsory disclosures by pregnancy centers to a demanding level of scrutiny.[49] Some courts have invalidated the disclosure provisions, in part on the ground that they force the regulated facilities to convey a particular viewpoint regarding abortion that they do not espouse — namely, that contraception and abortion services represent viable options for pregnant women.[50] As some judges have observed, municipal laws do not require similar disclosures and disclaimers regarding childbirth and adoption services by abortion providers.[51] Assessed from this perspective, municipal "informed consent" laws may skew debate in a way that suggests abortion is a favored — or at least a viable — course of action.

Compulsory disclosure laws, whether of the informed consent or pregnancy center varieties, are part of the ongoing contest over abortion discourse and abortion rights. By compelling physicians to convey

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[46] *Id.*

[47] *Id.* at 1340-41.

[48] *Id.*

[49] *Id.* at 1343.

[50] *See* Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233, 249-50 (2d Cir. 2014) (invalidating pregnancy center services disclosure provision under strict and intermediate scrutiny); Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt. (*Greater Balt. Ctr. I*), 683 F.3d 539, 555 (4th Cir. 2012) (invalidating mandatory pregnancy center disclosures under strict scrutiny); Centro Tepeyac v. Montgomery Cnty., 683 F.3d 591, 594 (4th Cir. 2012), *aff'd en banc*, 722 F.3d 184 (4th Cir. 2013). *But see* Fargo Women's Health Org., Inc. v. Larson, 381 N.W.2d 176, 182 (N.D. 1986) (upholding mandatory disclosures under commercial speech standard). The panel decision in *Greater Baltimore Center* was vacated by grant of rehearing en banc. *See* Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Balt. (*Greater Balt. Ctr. II*), No. 11-1185, 2012 WL 7855859, at *1 (4th Cir. Aug. 15, 2012). The full Fourth Circuit subsequently held that the matter should be returned to the district court for discovery. *See* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt. (*Greater Balt. Ctr. III*), 721 F.3d 264, 291 (4th Cir. 2013).

[51] *See Greater Balt. Ctr. III*, 721 F.3d at 294 (Wilkinson, J., dissenting) (observing that ordinance "compels groups that oppose abortion to utter a government-authored message without requiring any comparable disclosure — or indeed any disclosure at all — from abortion providers").

certain information and perspectives, governments can profoundly affect conversations regarding abortion. Local governments that compel pregnancy centers to make statements about abortion services are similarly engaged in the regulation of abortion speech.[52] They compel facilities to communicate with their patients about reproductive options, but typically do not require that abortion clinics provide information about adoption or pregnancy services.

2. Subsidy Restrictions and Government Abortion Speech

Governments also influence abortion rights discourse through the power of the purse and official communications. Government's actions as subsidizer and speaker can have significant effects on private rights speech and public rights discourse.

There is no requirement that taxpayer funds be provided, even for medically necessary abortions.[53] Nor, of course, is the government required to financially support pro-choice or pro-life advocacy. The power of the purse can significantly affect rights speech in the abortion area. As efforts to defund Planned Parenthood show, denial of funds could be used to effectively suppress abortion advocacy.[54] Organizations that receive federal or state funding for reproductive services, including abortion, spend some of those funds on communications relating to their services.

The Supreme Court has held that governments can effectively silence fund recipients who wish to discuss abortion rights with their patients. In *Rust v. Sullivan*, the Court held that the federal government could prohibit physicians working at federally-funded family planning projects from engaging in abortion counseling or advocacy while using program funds.[55] The regulations required that if asked about abortion services, physicians at federally funded projects should respond that the facility did not consider abortion an appropriate method of family

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[52] *See Evergreen Ass'n*, 740 F.3d at 249 (observing that pregnancy center services disclosure provision affects "public debate over the morality and efficacy of contraception and abortion" and "alters the centers' political speech by mandating the manner in which the discussion of these issues begins").

[53] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326-27 (1980) (holding that federal law denying subsidy for medically necessary abortions did not violate the Fifth Amendment's Due Process Clause).

[54] *See* Planned Parenthood of Kan. & Mid-Mo. v. Moser, 747 F.3d 814, 838-40 (10th Cir. 2014) (rejecting claim that state denial of funding constituted unconstitutional punishment for exercise of free speech and associational rights).

[55] *See* Rust v. Sullivan, 500 U.S. 173, 196 (1991).

planning.[56] The Court upheld the regulations on the ground that when it spends federal funds, the government is allowed to limit activities, including speech activities, to the scope of the funded project.[57] Lower courts have upheld a similar regulation with regard to the funding of *international* family planning projects, thus effectively allowing the federal government to extend the geographic scope of abortion speech restrictions.[58]

Conditional funding authority enhances governments' ability to influence private discourse by restricting and compelling physician speech. Thus, officials are able to distribute funding in a manner that favors a particular point of view regarding abortion rights. Just as government may seek to persuade women through compelled informed consent requirements not to procure an abortion, it may alter abortion rights discourse by preventing physicians at funded institutions from communicating with their patients about abortion, or compelling them to state that abortion is not considered an appropriate method of family planning. The spending power is also used in other ways to influence abortion discourse. For example, federal laws and regulations have prohibited the use of federal funds for the purpose of litigating abortion cases.[59]

Governments may also expend funds to communicate directly about constitutional rights, including abortion. Although the *Rust* decision itself did not explicitly mention governmental speech, subsequent Supreme Court precedents have interpreted *Rust* to stand for the principle that when the government speaks, it is not required to maintain viewpoint neutrality with regard to the constitutional right to abortion.[60] *Casey* suggests that governments are entitled to communicate disfavor of abortion and abortion rights. Thus, for example, governments can use public service announcements to convey pro- or anti-abortion speech.

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[56] *Id.* at 180.

[57] *See id.* at 175.

[58] *See* DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 287 (2d Cir. 1989) (upholding government's refusal to fund abortion speech by international organizations); *see also* Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 592-608 (2007).

[59] *See* Legal Services Corporation Act (LSCA) § 1007(b), 42 U.S.C. § 2996f(b) (2012).

[60] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (recognizing that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

The Supreme Court has indicated that when the government speaks about abortion or other rights, it may be excused from complying with the First Amendment's content-neutrality requirement.[61] However, this does not necessarily mean that governments may communicate about rights without regard for constitutional limits. The use of public funds to speak directly about abortion raises interesting questions about governmental participation in rights speech. However, the primary concern of this Article is not governmental speech but governmental regulation of private rights speech. Governmental power in this context is subject to First Amendment and other constitutional limits.

State governmental funding of specialty license plates that convey messages about abortion illustrate the basic distinction between regulation of private rights speech and governmental communications regarding constitutional rights. Courts have generally rejected the argument that pro-life messages, when communicated on government-issued license plates, are a form of government speech insulated from review under the Free Speech Clause.[62] More commonly, courts have treated the license plate programs as limited public forums in which governments must maintain viewpoint neutrality with regard to abortion rights.[63] Under this framework, some courts have invalidated viewpoint-based restrictions on pro-choice messages.[64] Others have held that states may ban the subject of abortion from license plates

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[61] *See* Pleasant Grove v. Summum, 555 U.S. 460, 481 (2009) (holding government speech is not limited by the Free Speech Clause). *But see* Tebbe, *supra* note 11, at 650 (observing that nonendorsement principle "cuts across multiple provisions — including equal protection, due process, and free speech itself"). The issue of possible constitutional constraints on government speech is one that has garnered significant scholarly attention of late. Some scholars have discussed potential equal protection limits on certain forms of governmental expression. *See, e.g.*, Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1293-98 (2011) (discussing equal protection and its relation to expressive harms and social meaning); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13 (2000) ("[I]n order to treat people with equal concern, the government may not express, in words or deeds, that it values some of us more than others."); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 194-97 (2012) (proposing approaches under which governmental speech can be analyzed under equal protection guarantees).

[62] *But see* ACLU of Tenn. v. Bredesen, 441 F.3d 370, 375 (6th Cir. 2006) (holding that "Choose Life" plates constituted government speech).

[63] *See, e.g.*, Choose Life Ill., Inc. v. White, 547 F.3d 853, 864-65 (7th Cir. 2008) (treating specialty license plates as non-public forum); ACLU of N.C. v. Conti, 912 F. Supp. 2d 363, 372 n.4 (E.D.N.C. 2012) (applying forum doctrine).

[64] *See Conti*, 912 F. Supp. 2d at 375 (invalidating North Carolina law that allowed pro-life but not pro-choice plates).

altogether.[65] Finally, some states have been required to issue pro-life license plates as part of a general program under which specialty plates are authorized.[66] The license plate controversy is an illustrative example of the problems that arise when governments seek to regulate private abortion speech.

3. Abortion Advocacy and Public Contention

Governments regulate abortion discourse in a variety of public forums and political contexts. Most notably, they restrict public protests at or near health care facilities and in other public places (i.e., streets, sidewalks, and neighborhoods). Whether or not this is their specific purpose, such restrictions can prevent abortion opponents from conveying pro-life messages through protests, pickets, and sidewalk counseling.[67] In addition, civil and criminal laws may restrict other forms of public contention regarding abortion rights.

In response to violence at health care facilities that provide abortion services, state and federal governments enacted various laws that restrict on-site abortion protests.[68] Courts have also imposed injunctions that restrict some expressive activity near clinics.[69] These laws and injunctions contain an array of specific provisions limiting the time, place, and manner of public speech and contention near health care facilities. In recent years, these restrictions have taken the form of regulatory buffers, bubbles, and free speech zones.[70] From the government's perspective, these regulatory mechanisms preserve access to clinics and protect patients and health care providers from physical and psychological harassment. However, from the perspective of those subject to the bubbles, buffers, and zones, the regulations interfere with the ability to convey anti-abortion messages.

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[65] *See Choose Life Ill.*, 547 F.3d at 866 (stating that state could ban subject of abortion entirely from license plates).

[66] *E.g.*, Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 972-73 (9th Cir. 2008) (holding agency violated rights of anti-abortion group by denying pro-life plate).

[67] *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2527 (2014) (discussing limitations placed on sidewalk counseling and handbilling near abortion clinics).

[68] *See* JOSHUA C. WILSON, THE STREET POLITICS OF ABORTION: SPEECH, VIOLENCE, AND AMERICA'S CULTURE WARS 1-2 (2013) (discussing history of anti-abortion activism and pro-choice proponents' responses).

[69] *Id.* at 2-3.

[70] *See* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 118-21 (2009) (discussing abortion clinic buffer zones and bubbles); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 598-601 (2006) (same).

On several occasions, the Supreme Court has reviewed judicial injunctions and laws imposing limits on abortion speech at or near health care facilities providing abortion services.[71] Recently, in *McCullen v. Coakley*, the Court invalidated a Massachusetts law that established a thirty-five-foot buffer zone around all abortion clinics in the state.[72] The specific provisions in these cases are too numerous and diverse to assess in any detail. A few general observations will convey the nature and importance of abortion speech regulations in this context.

First, at all levels of government, there has been an increase of regulatory zoning at or near abortion clinics.[73] Governments have sought in various ways to restrain or control abortion speech, in particular the speech of sidewalk counselors who hope to dissuade women from obtaining abortions.[74] The preferred approach, as evidenced by the Massachusetts law struck down in *McCullen*, has been to channel abortion speech by displacing its communicators.[75] In this context, some may see a rights conflict between abortion and the freedom of speech. Insofar as physical access is at issue, speech and abortion may be in conflict. However, many regulations go beyond what is necessary to merely ensure physical access to clinic facilities. Indeed, the *McCullen* Court based its invalidation of the Massachusetts law on the state's failure to tailor the buffer zone to the state's interests in patient access and safety.[76] Thus, in many cases, it is more appropriate to view these measures not as raising a conflict between abortion and speech rights but rather as regulations of abortion speech. The regulations have the purpose or effect of altering discourse about the legitimacy and exercise of a fundamental constitutional right.

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[71] *See* Hill v. Colorado, 530 U.S. 703, 724-25 (2000) (upholding a Colorado state law regulating abortion counseling); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997) (upholding provisions of an injunction securing unimpeded physical access to clinics); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (holding that governmental interests justified some provisions of an injunction entered to protect access to health care facilities and the well-being of patients).

[72] *McCullen*, 134 S. Ct. at 2537.

[73] ZICK, *supra* note 70, at 118-21.

[74] *Id.* at 136-39.

[75] *McCullen*, 134 S. Ct. at 2527 ("The buffer zones have displaced petitioners from their previous positions outside the clinics."); *see also* ZICK, *supra* note 70, at 129-40; Zick, *supra* note 70, at 598-601 (discussing proliferation of "buffer zones" and "bubbles" at or near abortion clinics).

[76] *McCullen*, 134 S. Ct. at 2537 ("The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests.").

Second, although laws and injunctions regulating abortion speech have generally been treated by courts as content-neutral, many commentators and some Supreme Court Justices have charged that the provisions discriminate based on both subject matter and viewpoint.[77] In *Hill v. Colorado*,[78] for example, the Supreme Court upheld a Colorado law that forbade any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[79] The language of the law and the circumstances of its passage strongly suggested that legislators had the speech of sidewalk counselors specifically in mind. As Justice Scalia observed in dissent:

> What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.[80]

Justice Kennedy, who also dissented in *Hill*, expressed similar concerns:

> The liberty of a society is measured in part by what its citizens are free to discuss among themselves. Colorado's scheme of disfavored-speech zones on public streets and sidewalks, and the Court's opinion validating them, are antithetical to our entire First Amendment tradition. To say that one citizen can approach another to ask the time or the weather forecast or the directions to Main Street but not to initiate discussion on one of the most basic moral and political issues in all of

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[77] *See, e.g.*, Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado, *the Vanishing Public Forum and the Need for an Objective Discrimination Test*, 51 AM. U. L. REV. 179, 199 (2001) (arguing that "the majority fell head over heels for the seductive Colorado statute"); Laurence Tribe, Response, *Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 750 (2001) ("I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.").

[78] Hill v. Colorado, 530 U.S. 703, 725 (2000).

[79] COLO. REV. STAT. § 18-9-122(3) (1999).

[80] *Hill*, 530 U.S. at 720 (Scalia, J., dissenting) (citation omitted).

> contemporary discourse, a question touching profound ideas in philosophy and theology, is an astonishing view of the First Amendment.[81]

Some commentators have echoed these complaints and have accused the Court of developing an abortion speech jurisprudence under which pro-life advocacy is disfavored.[82]

McCullen did not fully resolve the concerns of some Justices that, as Justice Scalia put it, "an abridged edition of the First Amendment" applies to anti-abortion speech.[83] Indeed, the unanimity of the judgment invalidating Massachusetts' buffer zone law masked an important rift among the Justices. The concurring Justices argued that *Hill* ought to be expressly overruled and that the Massachusetts law was a content-based regulation of speech.[84] Despite the apparent victory for abortion sidewalk counselors, Justice Scalia characterized the Court's opinion this way: "Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents."[85] Note that here, in contrast to the informed consent/compulsory speech context, the Court stands accused of allowing the state to alter abortion rights discourse by discriminating against *pro-life* advocacy.

Third, although they have generally ensured physical access to clinics and reduced some forms of harassment, government restrictions on abortion speech near clinics have done little to reduce public contention concerning abortion rights. With regard to abortion discourse, clinics and the areas surrounding them remain contested public places. *McCullen* is not likely to change this fact. The Court described the Massachusetts law as "truly exceptional" in the sense that no other state has enacted a similar restriction.[86] Thus, *McCullen* is not likely to have any significant impact on abortion clinic protests and other speech. The continued conflict should come as little surprise. Abortion rights are a topic of perpetual social and political conflict, and clinic facilities are a unique location where members of the public may address women

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[81] *Id.* at 768 (Kennedy, J., dissenting).

[82] *See, e.g.*, Raskin & LeBlanc, *supra* note 77, at 202 (arguing that *Hill* "allows political forces with state power to tilt the market in speech to favor reproduction of their hegemony").

[83] McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring).

[84] *See id.* at 2543-46 (arguing that the Massachusetts law is content-based and that *Hill* should be overruled).

[85] *Id.* at 2541.

[86] *Id.* at 2537 (majority opinion).

personally, directly, and proximately concerning the exercise of the abortion right.[87]

Bubbles and buffers are just a few of the means governments have used to regulate public contention regarding abortion rights. In *Frisby v. Schultz*, the Supreme Court upheld a local ordinance prohibiting abortion protesters from engaging in what it labeled "focused picketing" (essentially, maintaining a continuous presence) outside an abortion provider's residence.[88] Thus, although abortion opponents were permitted to march along the streets and sidewalks of the residential neighborhood, they were barred from focusing their protest on the residence of an abortion provider. Many local governments have enacted residential zoning measures, some of which go beyond the prohibition on targeted picketing upheld in *Frisby*.[89]

Abortion protesters also face potential liability under state anti-stalking and harassment laws, and under the federal Freedom of Access to Clinic Entrances Act ("FACE").[90] As its name suggests, FACE is primarily concerned with preserving physical access to health care facilities. However, the Act also prohibits the intentional communication of threats against abortion service providers.[91] In a case that garnered significant public attention, the full Ninth Circuit upheld a substantial civil verdict against abortion opponents under FACE's threat provision.[92] Abortion opponents had circulated posters and other materials designating certain providers as "guilty of crimes against humanity," and operated a website called the "Nuremberg Files" on which the names, addresses and other information regarding abortion providers were posted.[93] The distribution of these materials occurred after another anti-abortion group had circulated similar materials.[94] In some instances, distribution of the posters was followed by the murders of the named abortion providers.[95]

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[87] *See generally*, ZICK, *supra* note 70, at 136-39 (discussing the interplay of the privacy/captivity principle at abortion clinics and funeral grounds).

[88] *See* Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[89] *See* ZICK, *supra* note 70, at 122-24 (discussing residential free speech zoning).

[90] 18 U.S.C. § 248 (2012). The Supreme Court did reject the attempted application of federal racketeering laws to abortion protesters. *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405 (2003).

[91] *See* 18 U.S.C. § 248(a).

[92] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1086 (9th Cir. 2002) (en banc).

[93] *Id.* at 1062.

[94] *See id.* at 1064-65.

[95] *See id.* at 1066.

This pattern of activity appeared to significantly influence the majority's threats analysis. A sharply divided court held that while mere advocacy of violence against abortion providers was protected speech, the First Amendment did not protect the implied threats communicated to or about the specific abortion providers through the posters and website.[96] Although the speakers made no explicit threat against any of the physicians, the majority concluded that an implicit threat of violence, communicated in the context of the murders of physicians after the distribution of similar materials, sufficed to support liability.[97] The dissenters argued that the majority had interpreted and applied FACE to suppress political speech relating to abortion rights.[98] According to the dissenting judges, in the absence of any actual or intended threat, the anti-abortion speech was fully protected by the First Amendment.[99] They warned that upholding the verdict would chill abortion-related and other forms of political advocacy.[100]

In sum, state and federal governments have enacted and enforced a variety of measures that channel, alter, or punish communications regarding abortion and abortion rights. Buffers, bubbles and speech zones near health care facilities that provide abortion services, and in residential areas, are designed to channel or exclude contentious anti-abortion expression. The application of these laws to abortion advocacy and pro-life communications may also chill or suppress political speech regarding abortion.

4. Displays of Abortion Imagery

The effects of abortion on potential life, women, and society-at-large are central to discourse regarding abortion and the constitutional right to abortion. Indeed, particularly in recent years, public debate regarding abortion has focused on the physical and psychological effects associated with exercising the abortion right. As discussed earlier, governments are generally allowed to convey official moral convictions to women as they consider whether to bear a child.[101] Laws and regulations increasingly seek to influence private and public perceptions regarding the effects of the abortion procedure.

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96 *See id.* at 1079-80.

97 *See id.* at 1086.

98 *See id.* at 1088 (Reinhardt, J., dissenting); *id.* at 1092-95 (Kozinski, J., dissenting).

99 *Id.* at 1092 (Kozinski, J., dissenting).

100 *Id.* at 1100.

101 *See supra* Part I.A.1.

Sidewalk counselors and residential picketers seek to convey moral and physical concerns regarding abortion. So, too, do other speakers — although sometimes they do so in cruder, more graphic, and far less polite ways. For instance, some abortion opponents have displayed graphic images of aborted fetuses in public places. These images have appeared on signs, on vehicles, and in literature distributed to the public.

Officials have sought to limit or ban the display of these graphic communications near churches, schools, and in other places. Courts have split on whether restrictions on so-called "gruesome" or "graphic" displays violate the First Amendment's free speech guarantee.[102] The justifications advanced in favor of abortion image restrictions include traffic concerns, public safety, and the protection of minors.[103] Courts have also upheld restrictions on certain kinds of graphic expression

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[102] *Compare* Lefemine v. Wideman, 672 F.3d 292, 297 (4th Cir. 2012) (finding that requiring anti-abortion protestors to remove signs displaying images of aborted fetuses entirely or be cited for breach of the peace was not narrowly tailored to state interest of preventing children from seeing signs from the main road), *vacated*, 133 S. Ct. 9 (2012), United States v. Marcavage, 609 F.3d 264, 283 (3d Cir. 2010) (invalidating limits on the display of aborted fetuses), Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't, 533 F.3d 780, 793 (9th Cir. 2008) (holding that police officers violated the free speech rights of a truck driver displaying graphic images of aborted fetuses when they told driver to move the truck away from school grounds), Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807, 825-26 (6th Cir. 2007) (holding that the detention of abortion protesters for displaying images of aborted fetuses was unlawful), Swagler v. Sheridan, 837 F. Supp. 2d 509, 517, 527-29 (D. Md. 2011) (invalidating a restriction on the display of aborted fetuses), *and* World Wide St. Preachers' Fellowship v. City of Owensboro, 342 F. Supp. 2d 634, 641 (W.D. Ky. 2004) (finding that citing anti-abortion protestors for disorderly conduct after they displayed signs with images of aborted fetuses at a street concert and at a public park were not narrowly tailored to interest of protecting children), *with* Frye v. Kan. City Mo. Police Dep't, 375 F.3d 785, 792 (8th Cir. 2004) (holding that a restriction allowing demonstrators to display signs further from a busy road were narrowly tailored to serve a compelling interest in public safety), Tatton v. City of Cuyahoga Falls, 116 F. Supp. 2d 928, 934 (N.D. Ohio 2000) (finding that officers who had ordered protester to cease displaying images of aborted fetuses were entitled to qualified immunity against free speech claims), St. John's Church in the Wilderness v. Scott, 296 P.3d 273, 283-85 (Colo. App. 2012) (upholding an injunctive provision banning protesters from displaying signs with images of aborted fetuses near a church), *and* Operation Save Am. v. City of Jackson, 275 P.3d 438, 461 (Wyo. 2012) (suggesting that injunction against display of images of aborted fetuses might be valid if there was sufficient evidence regarding injury or potential injury such as irreparable harm to children).

[103] *See Ctr. for Bio-Ethical Reform*, 533 F.3d at 790 (rejecting the government's asserted interest in protecting children from graphic abortion imagery); *Swagler*, 837 F. Supp. 2d at 528-29 (rejecting the government's asserted interest in traffic safety).

directed toward abortion providers, including use of words like "baby killer" and "murder."[104]

Municipalities have also sometimes adopted policies that effectively bar abortion advocacy from transit and other public properties. Government can limit expression in limited or non-public forums, so long as the restrictions are reasonable and viewpoint-neutral.[105] Some municipalities have limited access to their transit advertising spaces to commercial expression, and others have expressly banned "political" speech. Under such restrictions, advocacy relating to abortion (not to mention other constitutional rights) is excluded from public properties.[106]

Courts generally uphold such restrictions as reasonable regulations in non-public forums. They reason that the restrictions are adequately justified by the government's desire to avoid the administrative problems that might arise from accepting political advertisements, as well as concerns about subjecting captive passengers to political propaganda.[107] Thus, in its capacity as proprietor of public properties, government can decide to exclude rights speech and other political expression from public places under its management and control.

Along with public protests and other forms of public contention, distributing graphic information and communicating anti-abortion advocacy to public audiences are part of an ongoing contest for the hearts and minds of the public. It remains somewhat unclear whether and to what extent governments can alter abortion rights discourse by eliminating, displacing, or rejecting graphic abortion speech and abortion advocacy in public places.

5. Abortion Speech in Schools

Finally, abortion speech has produced conflicts in the context of public schools, both at lower educational levels and in the university

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[104] *See* Bering v. SHARE, 721 P.2d 918, 935-38 (Wash. 1986) (upholding injunction against abortion protesters' referring to abortion providers as "murderers" and to babies being "killed"). *But see* Cannon v. City & Cnty. of Denver, 998 F.2d 867, 874 (10th Cir. 1993) (invalidating governmental efforts to suppress use of words like "killing place" and "murder" near abortion clinics); Lewis v. City of Tulsa, 775 P.2d 821, 823-24 (Okla. Crim. App. 1989) (finding that the uses of the phrase "abortion is murder" did not rise to the level of words or conduct that showed an immediate breach of the peace).

[105] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 & n.7 (1983).

[106] *See, e.g.*, Children of the Rosary v. City of Phoenix, 154 F.3d 972, 978 (9th Cir. 1998) (upholding rejection of pro-life advertisement from city transit spaces).

[107] *See id.* at 979.

setting. Public schools must navigate a delicate balance between respecting students' speech rights and pursuing pedagogical and other educational missions. As a general matter, school officials are not permitted to discriminate against speech on the basis of viewpoint or to suppress speech merely because it may offend.[108] However, they may punish students for inappropriate school-sponsored expression, restrict discussion of controversial topics in connection with curricular programs, and prohibit speech that may cause disruption in classrooms and elsewhere on school grounds.[109] The authority of public college and university officials to restrict abortion speech is somewhat less certain, in part owing to the lesser interests in protecting more mature audiences and the different pedagogical mission of colleges and universities. The Supreme Court has not yet indicated what standards are applicable to student speech in the college and university settings.

Abortion is, of course, a delicate topic — particularly for students in the elementary, middle, and perhaps even the early high school years. Although school officials presumably cannot suppress all abortion speech, they have significant latitude under the standards mentioned above to restrict such speech during school hours and on school property.

Pursuant to their authority to restrict the communication of explicit information and to prevent disruption, some public school officials have prohibited the distribution of abortion-related materials, the wearing of clothing items that communicate pro-life and pro-choice messages, and conversations regarding abortion and abortion rights within the school and classroom settings. In lower grades, courts have upheld such restrictions on grounds that might suggest that abortion speech, even when conveyed as part of a silent protest or by other peaceful and non-disruptive means, is considered inappropriate for the school setting.[110]

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[108] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510-11 (1969).

[109] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); *Tinker*, 393 U.S. at 509 (1969).

[110] *See, e.g.*, Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 34 (10th Cir. 2013) (upholding restriction on distribution of rubber fetus dolls, owing primarily to the disruption caused); M.A.L. *ex rel.* M.L. v. Kinsland, 543 F.3d 841, 847-48 (6th Cir. 2008) (upholding restrictions on distribution of handbills and other communications during "Pro-Life Day of Silent Solidarity"); Hennessy v. City of Melrose, 194 F.3d 237, 247 (1st Cir. 1999) (upholding dismissal of student from teacher certification program based in part on speech made to other teachers regarding abortion); Heinkel *ex rel.* Heinkel v. Sch. Bd. of Lee Cnty., Fla., No. 2:04-CV-184-FTM33SPC, 2005 WL 1571077, at *7 (M.D. Fla. July 1, 2005) (upholding school's restriction on student distribution of literature addressing alternatives to abortion because distribution was not part of the curriculum and, given the divisive nature of the topic, the school could reasonably

However, at the high school level courts have invalidated some restrictions on abortion speech.[111]

Some officials on college campuses have restricted the distribution or display of pro-life materials, sometimes based solely on their controversial content.[112] In some cases, officials have adopted and applied speech restrictions in an effort to restrict the content of students' anti-abortion messages.[113] Occasional disputes regarding the topic of abortion have also occurred within university classrooms. For example, in one reported case a student alleged that a speech class instructor violated her free speech rights when he refused to allow her to research, write about, and give a speech concerning abortion. A federal district court ruled that the teacher acted within his discretion in regulating the content and nature of classroom discussion.[114]

In sum, government officials working in public schools and universities often encounter situations in which students and teachers alike seek to address the subjects of abortion and abortion rights. In these contexts, abortion speech is regulated pursuant to First Amendment standards (disruption, curricular control, etc.) that are highly specific to schools and universities. Whatever their origin or nature, all of these regulations are properly viewed as regulations of abortion speech — speech about or concerning the right to abortion.

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assume that distribution would create a material and substantial disruption in school activities), *aff'd in part, rev'd in part, and remanded*, 194 F. App'x 604 (11th Cir. 2006); Ward v. Hickey, 781 F. Supp. 63, 76 (D. Mass. 1990) (rejecting high school teacher's claim that her termination, based in part on the discussion of abortion in biology class, violated free speech rights).

111 *See* C.H. v. Bridgeton Bd. of Educ., No. 09-5815 (RBK/JS), 2010 WL 1644612, at *8 (D.N.J. Apr. 22, 2010) (holding that school failed to show that student's wearing of black and red tape armband that said "Life" would substantially disrupt or interfere with work of the school); Raker v. Frederick Cty. Pub. Sch., 470 F. Supp. 2d 634, 640 (W.D. Va. 2007) (invalidating restrictions on distribution of pro-life handbills during instructional hours); K.D. *ex rel.* Dibble v. Fillmore Cent. Sch. Dist., No. 05-CV-0336(E), 2005 WL 2175166, at *7 (W.D.N.Y. Sept. 6, 2005) (holding that disciplining of student for wearing pro-life t-shirt violated First Amendment).

112 *See, e.g.*, Rock for Life–UMBC v. Hrabowski, 594 F. Supp. 2d 598, 607 (D. Md. 2009) (challenging, on free speech and equal protection grounds, university restrictions on the use of campus facilities for poster display concerning abortion).

113 *See, e.g.*, Orin v. Barclay, 272 F.3d 1207, 1214-16 (9th Cir. 2001) (striking down a college policy that prohibited an abortion protestor from using religious terms in speech).

114 *See* O'Neal v. Falcon, 668 F. Supp. 2d 979, 985-87 (W.D. Tex. 2009) (finding that a teacher's decision not to allow students in speech class to discuss abortion did not constitute a First Amendment violation).

B. Arms Speech

Unlike the abortion right, the Second Amendment's individual right to bear arms was only recognized by the Supreme Court in 2008.[115] Although the Court's decision may have settled some basic questions with regard to the source and existence of the right to bear arms, robust public discourse continues regarding matters of scope (i.e., where and what kind of weapons may be possessed) and the safety implications of the right to bear arms. In the Second Amendment context, rights speech regulations have focused primarily on the privacy interests of rights-holders and, more generally, on protecting those rights-holders from perceived public and private forms of harassment.

1. Access to Public Records

Ever since the right to bear arms was formally recognized, First Amendment interests in access to information and Second Amendment rights have intersected in problematic ways. One significant area of intersection has been the enactment of restrictions on access to public records relating to firearms possession.

In one high-profile controversy, the editors of a New York newspaper received death threats and other negative reactions after they published an interactive map containing the names and addresses of pistol permit-holders in a few upstate towns.[116] Gun owners and defenders of Second Amendment rights argue that information regarding arms sales and possession relates to a private matter, can be used to harass gun owners, and may affect the safety of gun owners who could be targeted by criminals.[117] The issue has become more pressing in a digital era, now that once-obscure public records can be aggregated and published with relative ease. The New York newspaper, which obtained the information from public records, defended its free press and free speech rights to report on what it considered to be a matter of great public concern.[118]

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[115] *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[116] J. David Goodman, *Newspaper that Put Gun Permit Map Online Hires Armed Guards*, N.Y. TIMES (Jan. 2, 2013), http://www.nytimes.com/2013/01/03/nyregion/putnam-officials-keep-gun-permit-records-from-journal-news.html; Jack Mirkinson, *Journal News Gun Map Leads to Death Threats, White Powder Scares for Journalists*, HUFFINGTON POST (Jan. 7, 2013, 8:02 AM), http://www.huffingtonpost.com/2013/01/07/journal-news-gun-map-death-threats-white-powder_n_2424136.html.

[117] *See* Kelsey M. Swanson, *The Right to Know: An Approach to Gun Licenses and Public Access to Government Records*, 56 UCLA L. REV. 1579, 1623-25 (2009) (addressing arguments against disclosure of gun records).

[118] *See* Goodman, *supra* note 116.

Responding to many constituents' complaints, New York lawmakers proposed that the state's laws be amended to protect the privacy of gun permit and ownership information.[119] In other words, legislators proposed to limit the distribution of information relating to constituents' exercise of Second Amendment rights. Several other states have recently enacted or amended freedom of information and public records laws to ensure that records relating to gun ownership and possession remain private.[120] Louisiana has gone further, enacting legislation that would make it a crime for any newspaper, blogger, or other person to publicly identify any applicant for a concealed gun permit.[121] Today, in most states, access to gun permit records is strictly limited or prohibited — in Louisiana, publication may result in criminal conviction.[122]

These public access restrictions are a form of rights speech regulation. They prevent the press and the public from learning about the exercise of Second Amendment rights, and limit the free flow of information about the effects of this exercise. Public record restrictions may have a substantial effect on arms speech and public discourse concerning Second Amendment rights.

2. Doctor-Patient Communications: "Docs v. Glocks"

In addition to public records laws, lawmakers have turned to other measures to protect the privacy interests of arms owners and possessors. In 2011, Florida enacted the Firearm Owners' Privacy Act.[123] The Act was passed, at the urging of the National Rifle Association ("NRA"), after some Floridians complained that their physicians had engaged in political inquiries regarding arms possession. It prohibits doctors from asking patients about gun ownership unless they consider the information to be "relevant to the patient's medical care or safety, or the

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[119] *See* Aaron Mackey, *In Wake of Journal News Publishing Gun Permit Holder Maps, Nation Sees Push to Limit Access to Gun Records*, NEWS MEDIA & THE LAW, Winter 2013, at 4, *available at* http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2013/wake-journal-news-publishin.

[120] *See* Jim Malewitz, *Lawmakers Move Swiftly to Block Release of Gun Permit Records*, STATELINE (Mar. 7, 2013), http://www.pewstates.org/projects/stateline/headlines/lawmakers-move-swiftly-to-block-release-of-gun-permit-records-85899457096 (discussing recent enactments in Maine, Virginia, Arkansas, and Mississippi).

[121] *See New Louisiana Law Related to Gun Owners Outrages First Amendment Advocates*, FOXNEWS.COM (June 28, 2013), http://www.foxnews.com/us/2013/06/28/new-louisiana-law-related-to-gun-owners-outrages-first-amendment-advocates.

[122] *See id.*

[123] Firearm Owners' Privacy Act, ch. 2011-112, 2011 Fla. Laws 1776 (2011) (codified at FLA. STAT. §§ 381.026, 395.1055, 456.072, 790.338 (2011)).

safety of others."[124] The Act also prohibits recording such information in medical records when the physician knows such information is "not relevant to the patient's medical care or safety, or the safety of others."[125] The law provides that physicians "may not discriminate" against gun owners and "should refrain from unnecessarily harassing" them during an examination, although it protects the physician's right to choose his or her patients.[126] Violation of the law can result in a $10,000 fine and loss of a medical license.[127]

A group of physicians challenged the constitutionality of the law, arguing that it was common practice to ask about gun possession in oral communications and on safety questionnaires distributed to patients regarding their home environment. In what became known as the "Docs v. Glocks" case, a district court invalidated the law as a content-based restriction on free speech.[128]

The district court held that the state lacked a compelling interest for imposing the ban.[129] Among other proffered compelling interests, it rejected the argument that imposing the ban was necessary to protect patients' Second Amendment rights and their privacy with regard to gun ownership.[130] The court found that the Second Amendment right was not implicated, since the law did not interfere with the exercise of the right to possess firearms.[131] Patients' privacy rights were also not implicated, according to the court, since the medical records were themselves protected from disclosure.[132] In sum, the district court concluded that the law singled out just one subject matter — gun ownership — in a manner that chilled doctor-patient communications.[133]

The U.S. Court of Appeals for the Eleventh Circuit reversed.[134] It held that the Florida act's provisions were "a valid regulation of professional

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[124] *Id.* § 790.338(2).

[125] *Id.* § 790.338(1).

[126] *Id.* § 790.338(5)-(6).

[127] *Id.* § 456.072(2)(b), (d).

[128] Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1267 (S.D. Fla. 2012), *rev'd in part, vacated in part sub nom.* Wollschlaeger v. Governor of Fla., No. 12-14009, 2014 WL 3695296 (11th Cir. July 25, 2014).

[129] *Wollschlaeger*, 880 F. Supp. 2d at 1264.

[130] *Id.* at 1264-65.

[131] *Id.* at 1264.

[132] *Id.* at 1266.

[133] *Id.* at 1267.

[134] Wollschlager v. Governor of Fla., No. 12-14009, 2014 WL 3695296, at *13 (11th Cir. July 25, 2014).

conduct that has only an incidental effect on physician speech."[135] The court drew a distinction between physician speech to the public on matters of public concern, which is fully protected by the First Amendment, and physician speech that takes place in the private setting of her office or the examination room, to which professional standards apply and First Amendment protection is limited.[136] Although the court conceded that "firearm safety may be a matter of public concern," it concluded that "the privacy of a physician's examination room is not an appropriate forum for unrestricted debate on such matters."[137] It interpreted the law to permit physicians to counsel patients regarding firearms safety so long as they did not "demand[] answers" from patients regarding firearms ownership or engage in other types of harassment.[138] In sum, the court concluded that the law "merely circumscribes the unnecessary collection of patient information on one of many potential sensitive topics" and does so "as a means of protecting a patient's ability to receive effective medical treatment without compromising the patient's privacy with regard to matters unrelated to healthcare."[139]

In dissent, Judge Wilson concluded that the law restricted physician speech on a matter of public concern — "speech that ranges from potentially lifesaving medical information conveyed from doctor to patient, to political discussions between private citizens, to conversations between people who enjoy speaking freely with each other about a host of irrelevant topics" — and could not meet the requirements of heightened scrutiny that are applied to content-based speech restrictions.[140] Judge Wilson concluded that the Act would chill physician-patient speech on gun ownership and firearms safety.[141] Firearm safety, he observed, clearly "qualifies as a public concern" under the First Amendment.[142] The Act, he said, was a viewpoint-discriminatory measure that sought "to silence firearm-safety messages that were perceived as political attacks and as part of a political agenda *against* firearm ownership."[143] According to Judge Wilson, the Act's

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135 *Id.*

136 *Id.*

137 *Id.* at *17.

138 *Id.* at *20.

139 *Id.* at *10.

140 *Id.* at *25 (Wilson, J., dissenting); *see id.* at *47-57 (applying intermediate scrutiny and rejecting proffered state interests).

141 *Id.* at *28.

142 *Id.* at *31.

143 *Id.* (internal quotations omitted).

purpose was to silence physician speech that appeared to cause gun owners to second-guess the merits of keeping arms in the home.[144] With regard to Florida's purported interests in protecting gun-owners' Second Amendment rights, Judge Wilson responded: "That we have a right to do something does not mean we have a right to be free from questioning about that right or from suggestions of other people . . . who may tell us that exercising a particular right in a particular way is a bad idea."[145]

3. Government Subsidies and Arms Speech

State and national governments have used the power of the purse to alter or restrict communication and the free flow of information regarding gun possession and gun rights. Governments have also restricted speech relating to Second Amendment rights in some public forums. As explained below, the public forum restrictions do not expressly target arms speech; however, as in the abortion context, some regulations are likely to have a disparate effect on its communication.

A few states have expressly prohibited the use of state funds to engage in lobbying regarding Second Amendment rights. Kansas, which generally provides robust protection for Second Amendment rights, recently enacted a law that prohibits any state employee, municipality, or school district from using taxpayer funds to lobby in support of or against gun control.[146] The Kansas law also provides that local governments cannot create "publicity or propaganda" materials, such as "any kit, pamphlet, booklet, publication, electronic communication, radio, television or video presentation" related to gun control.[147]

The Kansas law restricts spending in a manner that prohibits public advocacy on a matter of critical public concern. Although the law is content-neutral on its face, in that it purports to restrict spending on either pro- or anti-gun control measures, the NRA actively lobbied for the provision and the bill was actually known during legislative deliberations as "the NRA bill."[148] Indeed, after the bill was signed into law, the governor's spokeswoman said, "Governor Brownback signed the bill because Kansans do not support spending taxpayer dollars on

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144 *Id.* at *36.

145 *Id.* at *54.

146 *See* KAN. STAT. ANN. § 75-6705 (2014).

147 *Id.*

148 *See* John Hanna, *NRA-Backed Kansas Law Seeks to Limit Gun-Control Lobbying*, HUFFINGTON POST (June 5, 2013, 9:49 PM), http://www.huffingtonpost.com/2013/06/05/nra-kansas-gun-control_n_3393363.html.

legislation limiting gun rights; Kansas is a strong pro–Second Amendment state."[149] State legislatures can pass strong protections for the right to bear arms. It is a different matter, however, to condition funding on local officials' silence regarding gun laws. This is so even though it is the state's money that is subject to the condition. Laws like the Kansas funding restriction protect Second Amendment rights by shielding those rights from one aspect of public debate. They limit local officials' ability to engage in rights speech concerning arms.

The federal government has also used its power of the purse to restrict the flow of information regarding the exercise and effects of Second Amendment rights. For example, for many years the government decreased or banned funding for scientific research concerning the safety implications of firearms possession. A provision in the budget for the Centers for Disease Control ("CDC") states, "[N]one of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention may be used to advocate or promote gun control."[150] Similar language appears in the budget for the National Institute of Health and other federal health agencies.[151]

The NRA and other gun rights proponents actively support these restrictions on the ground that federally funded research has produced anti-gun rights propaganda and advocacy.[152] However, scientists, educators, and others argue that the budgetary restrictions hamper scientific research and public debate regarding gun possession and control.[153] President Obama recently signed an executive order that permits the CDC to conduct some limited research on gun safety.[154]

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[149] S.H. Blannelberry, *Kansas Gov. Sam Brownback Signs Law Prohibiting Government Lobbying on Gun Control*, GUNS.COM (June 6, 2013), http://www.guns.com/2013/06/06/kansas-gov-sam-brownback-signs-law-prohibiting-government-lobbying-on-gun-control; *see also* John Celock, *Kansas Governor Signs 'Strictest Second Amendment Protection Law' in Nation*, HUFFINGTON POST (Apr. 17, 2013, 6:52 PM), http://www.huffingtonpost.com/2013/04/17/kansas-gun-bill_n_3103488.html.

[150] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-244 (1996); *see also* Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Science on Gun Research*, 309 J. AM. MED. ASS'N 549, 549 (2013).

[151] *See* Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 218, 125 Stat. 786, 1085 (2011); Kellermann & Rivara, *supra* note 150, at 550.

[152] *See* Paul D. Thacker, *How Congress Blocked Research on Gun Violence*, SLATE (Dec. 19, 2012, 5:38 PM), http://www.slate.com/articles/health_and_science/science/2012/12/gun_violence_research_nra_and_congress_blocked_gun_control_studies_at_cdc.html.

[153] *See* Kellermann & Rivara, *supra* note 150, at 550.

[154] Memorandum on Engaging in Public Health Research on the Causes and Prevention of Gun Violence, 78 Fed. Reg. 4295, 4295 (Jan. 16, 2013), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201300021/pdf/DCPD-201300021.pdf; *see also* Chris Molina, *A Private Sector Solution to a Public Problem*, 41 HASTINGS CONST. L.Q.

However, the agency still operates under congressional spending restrictions and may also be chilled from gathering information about gun safety by the prospect of further funding cuts.

Governmental control over other forms of subsidy can also affect arms speech and Second Amendment discourse. When governments make public properties available for the communication of information and ideas, they provide a form of subsidy. As in the abortion context, regulations affecting speech in these public forums may disparately affect arms advocacy. In many public places, government is allowed to restrict access and speech based on subject matter but not viewpoint. Municipal regulations sometimes limit public forum communications to speech that officials consider non-controversial. For example, Phoenix, Arizona allows commercial advertisements in its public transit spaces, but prohibits all "political" advertisements.[155] Pursuant to this policy, the city recently removed fifty bus shelter advertisements that stated "Guns Save Lives" and that praised the state for allowing people to carry concealed weapons without a permit.[156]

Governments at the state and national level have used their power over public funds to limit arms speech. They have thereby restricted communications from gun-control lobbying to scientific research on the effects of arms possession. Further, because it is inherently political, rights speech is subject to exclusion under public forum policies that broadly sweep political communications from public spaces. There, too, there has been a diminution of public arms discourse.

4. The Second Amendment in Schools

Public debate concerning gun rights and gun control has reached public elementary and high schools, as well as some colleges and universities. Under the student speech precedents described earlier, school officials can, even in the absence of a school policy, prohibit the display of violent, threatening, or plainly offensive images and messages as they relate to guns or other arms.[157] They can also discipline students

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421, 428 (2014); Brad Plumer, *Gun Research is Allowed Again. So What Will We Find Out?*, WASH. POST (Jan. 17, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/gun-research-is-allowed-again-so-what-will-we-find-out/.

155 Fernanda Santos, *Case over Gun-Safety Ads Fosters Unlikely Alliance*, N.Y. TIMES (Dec. 3, 2013), http://www.nytimes.com/2013/12/04/us/case-over-gun-safety-ads-fosters-unlikely-alliance.html.

156 *Id.*

157 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509-11 (1969).

for communicating messages relating to weapons that are likely to disrupt the school and its learning environment.[158]

Owing to recent mass killings on school premises, officials have been keenly sensitive to the potential disruption and safety concerns associated with arms speech in the schools. In elementary schools, where the risk of disruption is relatively high and the topic obviously very sensitive, student gun speech has sometimes been subject to strict limits. For example, in several instances students have been disciplined for merely wearing NRA t-shirts and for other forms of gun rights advocacy.[159] Further, some schools have adopted and enforced broad policies banning *any* depictions of weapons or violence.[160] Student advocacy has not been the only arms speech affected by these safety concerns. On occasion, members of the public have been arrested simply for making statements about gun safety in the schools.[161]

On college campuses, shootings at Virginia Tech University and elsewhere have focused attention on the issue of concealed carry and other gun rights issues. Students on both sides of the Second Amendment debate have participated in campus protests and other expressive activities. Here, too, school officials have tended to err on the side of restricting Second Amendment rights advocacy. Indeed, some gun rights advocates view the current environment on some American college and university campuses as broadly prohibitive.[162]

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158 *Id.*

159 *See, e.g.*, Kevin Dolak, *W.Va. Teen Arrested After 'Almost Inciting Riot' Wearing NRA Shirt to School*, ABCNEWS.COM (Apr. 22, 2013), http://abcnews.go.com/US/west-virginia-teen-arrested-wearing-nra-shirt-school/story?id=19017896 (reporting on disciplinary action taken against student who wore gun speech t-shirt to school); *OC Student Ordered to Remove NRA T-Shirt Because It Promotes Gun Violence*, CBS L.A. (Oct. 2, 2013, 11:19 PM), http://losangeles.cbslocal.com/2013/10/02/oc-high-school-student-ordered-to-remove-nra-t-shirt-because-it-promotes-gun-violence/ (same).

160 *See* Newsom *ex rel.* Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 259-61 (4th Cir. 2003) (holding that policy banning any depiction of weapons, enforced against student while he was wearing an NRA hunting t-shirt, was unconstitutionally overbroad).

161 *See* Eugene Volokh, *Yelling "Toy Guns" on a Crowded Facebook Page*, VOLOKH CONSPIRACY (Nov. 1, 2013, 12:57 PM), http://www.volokh.com/2013/11/01/yelling-toy-guns-crowded-facebook-page/ (discussing arrest of adult man who suggested he would bring toy guns into a school to demonstrate lax security).

162 *See, e.g.*, Kelley Beaucar Vlahos, *Some Colleges Bar Even Talking About Right to Bear Arms, Gun Advocates Say*, FOXNEWS.COM (June 4, 2009), http://www.foxnews.com/story/2009/06/04/some-colleges-bar-even-talking-about-right-to-bear-arms-gun-advocates-say/ ("Many gun-rights advocates are arguing that college campuses, which are supposed to be open to diversity of thought, provocative dialogue, politics and protest, are hardly bastions of free speech when it comes to discussing firearms.").

There is some anecdotal evidence supporting this view. In several cases, college and university officials have sought to ban or restrict student advocacy for concealed carry rights.[163] For example, officials at Tarrant County College prohibited wearing empty holsters in public campus areas — including in the school's "free speech zone" — as part of a nationwide protest focusing on concealed carry rights on campuses.[164] Administrators limited the speakers' advocacy to a display on the front porch of the student center. A spokesperson for Tarrant College defended the restrictions on the ground that the holster protest would be "disruptive to the campus environment."[165] In Pennsylvania, Community College of Allegheny County officials initially prohibited distribution of promotional material for the group "Students for Concealed Carry on Campus," but later relented under pressure from free speech activists.[166] Some schools have also denied recognition to student groups advocating concealed carry and other gun rights on campus.[167]

Debates about Second Amendment rights occur in a wide array of venues and contexts, including in elementary schools and places of higher education. In these formative places, school administrators have the dual responsibility of pursuing their pedagogical missions and preserving, if not facilitating, students' speech rights. However, in the wake of recent shootings at public schools and on college campuses, gun speech has often been treated as presumptively threatening to school safety and order.

C. Rights Speech and Rights Regulation

Thus far, we have seen that abortion speech and arms speech regulation is common and cuts across a variety of First Amendment doctrinal areas. This Section emphasizes the cultural and political context in which these regulations have been adopted. Abortion speech

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163 *See Colleges Accused of Trampling Gun Supporters' Protest Rights*, FIRST AMENDMENT CTR. (May 31, 2009), http://www.firstamendmentcenter.org/colleges-accused-of-trampling-gun-supporters-protest-rights [hereinafter *Colleges Accused*].

164 *See* Smith v. Tarrant Cnty. Coll. Dist., 694 F. Supp. 2d 610, 614, 631-32 (N.D. Tex. 2010) (holding that a policy barring students from wearing empty holsters in the classroom and hallways violated the Free Speech Clause).

165 *See Colleges Accused*, *supra* note 163.

166 *See First Amendment Rights Trampled by Pittsburgh College After Student Advocates for Concealed Carry of Firearms on Campus*, FIRE (May 27, 2009), http://www.thefire.org/first-amendment-rights-trampled-by-pittsburgh-college-after-student-advocates-for-concealed-carry-of-firearms-on-campus/.

167 *Id.*

and arms speech regulations are products of political advocacy about contested constitutional rights. Although they purport to restrict communications and information flow, they are often adopted as a means of influencing the scope, exercise, and legitimacy of the underlying non-expressive rights.

1. Speech and Abortion Rights

The constitutional right to abortion has been subject to countless regulations and legal restrictions. Many of these restrictions affect the exercise and scope of abortion rights. Many abortion speech regulations — in particular, those that compel and restrict communications about abortion — are effectively means of abortion regulation. Although characterized as protecting women, public safety, and other interests, many abortion speech regulations seek to undermine or buttress the legitimacy of the constitutional right to abortion itself.

The nature and substance of abortion speech regulations have changed along with the socio-legal status of the abortion right. Prior to *Casey*, the Supreme Court held that governmental persuasion was inherently coercive and had no place in the intimate setting of doctors' offices.[168] As discussed earlier, *Casey* initiated a new era in abortion regulation in general, and abortion speech regulation in particular.[169] The decision effectively invited government to structure the dialog between doctors and their female patients.

Since *Casey*, legislatures have adopted increasingly intrusive regulations affecting conversations between doctors and patients.[170] In essence, the purpose of these regulations is to dissuade women from exercising their right to choose by conveying information about the fetus and its development. Pro-choice activists and lawmakers have opposed the proliferation of abortion restrictions, including rights speech regulations, on the ground that they are designed to deter exercise of the abortion right. Some municipal authorities have responded to what they view as deceptive practices by pregnancy centers by mandating that the centers state abortion is an option available to women elsewhere.

Rights speech regulations seek to influence not merely the exercise of the abortion right, but also its legitimacy. Compulsory display and disclosure laws are designed, in part, to change the terms of social and

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[168] *See* City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444 (1983).

[169] *See supra* Part I.A.1.

[170] *See id.*

political debate concerning abortion. After *Casey*, a decision that weakened but did not discard *Roe*, abortion opponents focused more intently on winning the hearts and minds of pregnant women and the public at large. This effort has included enactment of a variety of regulations, including compelled disclosure laws, whose purpose is to convince women that abortion is physically and psychologically harmful to them.[171]

Abortion speech has been caught in these political crosshairs. Opponents of abortion rights have targeted speech as a mechanism for undermining both the exercise and legitimacy of the abortion right itself. Abortion rights supporters have opposed rights speech regulations, and enacted disclosure laws of their own, in an effort to support women's choice. Thus far, anti-abortion activists have generally won the political fight concerning compulsory disclosure. *Casey* and other decisions allow governments wide latitude to regulate professional-patient communications concerning abortion.

The intersection between rights speech and the constitutional right to abortion has also been evident in more public arenas. Particularly after *Roe*, the political conflict regarding abortion literally spilled into the streets. Some abortion protests and other forms of contention have been tumultuous and violent.[172] Public contention and conflict over abortion prompted the enactment of national and local laws focused on protecting women's access to abortion services.[173]

This time, it was abortion rights supporters who resorted to rights speech regulation in an effort to support the exercise and legitimacy of a right to choose. Pro-choice advocates successfully pressed for limitations on both the manner and content of anti-abortion speech. Backed by Supreme Court precedents upholding restrictions on abortion protests, they secured numerous legislative and municipal limitations on public protests and other forms of abortion advocacy. Buffer zones and bubbles near abortion clinics are emblematic of a broad political agenda that also includes civil lawsuits, public abortion imagery bans, and other restrictions on abortion speech in public places.[174] These same political battle lines appear to have been drawn on some college campuses as well.[175]

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171 *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1707-09 (2008).

172 *See generally* WILSON, *supra* note 68 (discussing the conflict that has occurred at or near abortion clinics).

173 *See supra* Part I.A.3.

174 *See supra* Part I.A.3–4.

175 *See supra* Part I.A.5.

Although regulations affecting abortion protests and other public forms of pro-life advocacy originated as responses to violence and obstruction affecting the exercise of the abortion right, over time they morphed into a more expansive set of restrictions on the right to communicate with women in public places. *McCullen* recently invalidated one particularly restrictive state law.[176] However, after *McCullen*, officials retain plenty of latitude in terms of restricting abortion speech near health care facilities.

In sum, pro-choice advocates have largely been successful in translating their political agenda into limitations on contentious and other forms of speech near abortion facilities, as well as imposing civil liability on speakers who engage in threatening anti-abortion advocacy.[177] They have been somewhat less successful in restricting the display of abortion imagery and limiting public debate on campuses and in other public places.

In response to significant social and political pressure, and largely with the acquiescence of courts, governments have substantially structured private and public abortion discourse. Pro-life advocates have successfully pressed for compelled discourse in an effort to alter the terms of debate. Pro-choice advocates have supported limits on public contention, in an effort to protect women from what they consider to be aggressive and harassing forms of abortion advocacy. Although speech is the nominal target of the regulations discussed in Part I, in many instances the true purpose of compelling or restricting abortion rights speech has been to influence both the exercise and legitimacy of the constitutional right to abortion.

2. Speech and Second Amendment Rights

Relative to the abortion right, the individual right to bear arms has not been officially recognized for very long. Thus, it has been subject to far fewer regulations than the abortion right. Although some opponents continue to debate the legitimacy of the right recognized in *Heller*, discourse regarding Second Amendment rights now focuses primarily on the scope of the right and, in particular, the extent to which its exercise can or ought to be restricted. In other words, post-*Heller* debate

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[176] *See* McCullen v. Coakley, 134 S. Ct. 2518, 2522 (2014).

[177] As a result, an odd dichotomy exists with regard to abortion speech: on the one hand, owing to display-type laws, women must be presented with state-approved information that may dissuade them from exercising the abortion right, but on the other hand, women are entitled to a measure of privacy and repose on public streets.

has largely shifted from the question of the right's legitimacy to issues of its exercise and scope.[178]

Arms speech regulations are an underappreciated aspect of the ongoing political conflict over gun control. To some opponents of robust Second Amendment rights, arms are dangerous instruments that impact public health and safety. By contrast, arms advocates contend that the safety implications of arms possession are overstated — often as part of an effort to undermine the robust exercise of Second Amendment rights.

As in the abortion context, social and political conflict has concentrated to some degree on the regulation of speech about the underlying right. In the arms context, proponents of Second Amendment rights have focused, in particular, on limiting access to information about the exercise of Second Amendment rights. Many recent enactments have shielded gun owners from inquiries regarding the exercise of Second Amendment rights and restricted the free flow of information regarding the public health and safety concerns associated with exercise of Second Amendment rights.[179]

Florida's Firearm Owners' Privacy Act, which was invalidated by a district court but upheld on appeal, is an example of the manner in which speech regulation has been used to protect Second Amendment rights. Enacted at the behest of the NRA, the law barred physician-initiated inquiries regarding gun possession.[180] Like abortion disclosure laws, Florida's law seeks to structure conversations between physicians and patients — this time in an effort to support and protect an underlying constitutional right.[181]

Florida's law is part of a still-developing legal tapestry that limits information flow about arms possession. Amendments to state and local

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[178] The shift is evident in various respects, from political debate to academic discussions regarding the Second Amendment. For example, some scholars have sought to draw lessons regarding the regulation of arms possession from doctrines concerning the regulation of free speech. *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009) (comparing the categorical and balancing approaches in the areas of speech regulation and gun control); Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012) (arguing that First Amendment theory and doctrine do not support a robust right to bear arms). This doctrinal borrowing is yet another aspect of the relationship between expressive and non-expressive rights.

[179] The majority of gun speech restrictions address or are directed to the gun control debate. Limits on gun speech in schools are grounded in special concerns relating to student safety, and appear to be largely the product of recent mass shootings on school properties. *See supra* Part I.B.4.

[180] *See supra* Part I.B.2.

[181] *See supra* Part I.A.1.

public records laws, as well as funding limits on scientific research concerning gun possession and its health effects, have reduced the amount of information available to the press and public regarding exercise of Second Amendment rights.[182] As discussed earlier, Kansas has even enacted a direct ban on all local lobbying with regard to gun control, if the lobbying is supported by state funds.[183]

The political calculations behind arms speech regulations are relatively straightforward. Despite its recognition by the Supreme Court, Second Amendment supporters apparently still view the newly recognized right to bear arms as politically and legally vulnerable. The Supreme Court has not established a standard of review for Second Amendment claims, and has suggested that the right to arms possession is not absolute.[184] Moreover, it seems that many gun owners believe the Democratic Party and the current presidential administration are seeking to undermine Second Amendment rights through gun control measures. Further, in the wake of mass shootings, national and state gun control proposals have gained some popular and legislative support.

During a time of legal and political uncertainty, activists and lawmakers have sought to support and protect Second Amendment rights by restricting access to information about the exercise of those rights. Like abortion proponents, they have sensed that the right they support is under siege and accordingly pressed for legislative protections.[185] Increasingly, those protections have taken the form of restrictions on rights speech.

Unlike abortion opponents, Second Amendment opponents and skeptics have not generally resorted to speech regulation. Only on college campuses, where fear of mass killings hits very close to home, have officials actively restricted arms advocacy. Again, the political calculations are obvious. The current political environment does not support enactment of anti-arms measures, either generally or with regard to arms speech. Second Amendment rights have quickly become entrenched in American legal, political, and social discourse. Debate concerning the Second Amendment has hardened, such that the mere invocation of the right to bear arms can prevent passage of most gun

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182 *See supra* Part I.B.2-3.

183 *See supra* Part I.B.3.

184 *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (noting the right to bear arms is not "unlimited").

185 Here I am not making any claim about the abortion-gun analogy, but merely recognizing that it exists. My primary interest is in tracing the impetus, rather than the necessity, of rights speech regulations.

control measures — including measures regulating arms speech.[186] Powerful lobbying groups, including the NRA, would undoubtedly line up in opposition to measures requiring, for example, that arms purchasers be informed of the possible health and safety effects of their decision to exercise Second Amendment rights. Charges of interference with Second Amendment rights will deter most, if not all, public officials from enacting laws designed to dissuade individuals from purchasing or possessing arms.[187]

In sum, abortion speech and arms speech regulations are rooted in a similar social-political-legal dynamic. Speech about these rights has been restricted, altered, or suppressed as part of official agendas to undermine or protect abortion and the right to bear arms. Activists and lawmakers on both sides of these issues have seized upon regulation of rights discourse as a means of influencing the scope, exercise, and legitimacy of contested constitutional rights.

II. THE EXPRESSIVE AND NON-EXPRESSIVE EFFECTS OF RIGHTS SPEECH REGULATION

Rights speech is part of an expansive and wide-ranging public discourse about constitutional rights. Constitutional rights discourse is a dynamic and ongoing part of the democratic process. This Part provides various reasons for viewing and treating governmental regulation of rights speech with special skepticism. These reasons relate to the nature of constitutional rights discourse, the expressive harms that may flow from rights speech regulation, and the possible negative effects of rights speech regulation on non-expressive liberties.

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[186] *See* Blocher, Gun Rights Talk, *supra* note 2, at 6-14 (noting that gun rights talk has become entrenched and hardened such that reforms are not likely to gain support).

[187] It may also be worth noting that in contrast to *Casey*, the Supreme Court in *Heller* and *McDonald* did not focus significant attention on the public health and safety concerns relating to arms possession and use. Nor did the Court recognize any governmental interest in persuading individuals *not* to exercise their Second Amendment rights. In contrast to *Casey*, the Court did not signal to governments that they were authorized to structure conversations between, for example, potential gun purchasers and licensed sellers of arms. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (suggesting that governments may "create a structural mechanism by which . . . [they] may express profound respect for the life of the unborn . . . "). To be sure, the Court recognized that there would likely be some limits on the right to bear and possess weapons. *See Heller*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). However, it did not suggest that the right to bear arms — which it concluded was firmly rooted in constitutional text and history — was subject to the kinds of dissuasive or disclosure laws that are now common in the abortion context.

A. Constitutional Rights Discourse

As the history and evolution of rights such as equality and privacy demonstrate, constitutional rights are not debated and recognized within relatively short time spans.[188] In general, there is a period prior to recognition or formalization in which private and public debate occurs. This debate covers a range of issues, including the propriety of recognition, strategies with respect to supporting or defeating the right in question, comparisons to other rights, and the substance and scope of the right. The process by which the Bill of Rights was ratified confirms these basic features of constitutional discourse — although in a somewhat more formal setting than is typical.

Of course, constitutional rights discourse does not simply cease upon recognition of a constitutional right. Rather, it continues throughout the lifespan of the right. The First Amendment is illustrative — even today the scope of its various guarantees remains a matter of serious debate. As the discussion in Part I shows, discourse about constitutional rights is continuous and perpetually unsettled.[189]

As the abortion right demonstrates perhaps most clearly, recognition of a constitutional right may stir debate and exacerbate social and political conflicts.[190] Over time, arguments about constitutional rights ebb and flow. In response to social, political, and legal forces, strategies and forums shift.[191] During the course of debate, governments structure, channel, restrict, and sometimes even seek to suppress constitutional rights discourse. Through the dynamic of rights discourse, the substantive meaning of constitutional rights can change

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[188] *See generally* DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994) (tracing the evolution of the right to privacy and its relation to the right to obtain an abortion); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (analyzing the progression of the right to racial equality).

[189] *See generally* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION (2001) (arguing that constitutional rights and principles remain unsettled, and extolling the virtues of this unsettlement).

[190] *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 Yale L.J. 2028 (2011) (surveying arguments concerning *Roe*'s effect on social and political discourse regarding abortion rights).

[191] For accounts of the shifting arguments relating to abortion, see generally Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008), noting the recent shift toward protection of women as a justification for abortion restrictions, and Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281 (2009), discussing the ways that *Roe* changed the nature of the debate concerning abortion rights.

over time.[192] As people debate and consider constitutional rights, some of those rights may grow in stature or scope while others may be cut back, diminished, or perhaps even repealed.

Restrictions on rights speech that precede recognition of a constitutional right affect the public's ability to hear rights claims, debate their merits, and grant or deny recognition. As importantly, *post*-recognition restrictions limit debates concerning the status, character, and scope of constitutional rights. Further, they may forestall or prevent reconsideration by the people, their elected representatives, and courts of decisions to grant formal recognition to a constitutional right.

The free flow of information about constitutional rights is critical to the public's understanding of the framework of government and, in particular, the limits of official power. Maintaining open and robust discourse about constitutional rights allows citizens to decide for themselves whether to recognize a constitutional right, how much support the right merits, and how to balance a particular right's societal benefits and costs.

The people are not the only beneficiaries of open and robust constitutional discourse. Legislators and judges also benefit, as they consider whether and how to legally formalize, enforce, or facilitate constitutional rights and how to adjudicate constitutional rights claims in constantly changing social and political conditions. The feedback produced by rights speech is critically important to representative processes and official decision-making.

Discourse about constitutional rights is an important part of our nation's heritage, culture, and laws. In the United States, constitutional rights are among the most frequently and passionately debated issues of public concern.[193] As illustrated in Part I, discourse regarding the status, scope, and exercise of constitutional rights occurs in traditional public forums, legislative offices, courts, professional settings, in schools, near homes, and in digital forums. Although it is not discussed in such terms, "rights speech" is socially, politically, and legally pervasive.

Some commentators have complained that the manner and extent of "rights talk" in the United States have serious negative effects on our political discourse.[194] This is an important criticism, not to be lightly

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[192] *See generally* JACK M. BALKIN, LIVING ORIGINALISM (2011) (providing a general account of how constitutional meaning is debated and changes over time).

[193] Some view this as a not-altogether-positive characteristic of American political discourse. *See, e.g.*, GLENDON, *supra* note 2 (lamenting the individualism of "rights talk").

[194] *See generally id.* (arguing that framing discourse in terms of rights can produce negative democratic and societal effects).

dismissed. However, this Article's primary concern is not with rights *talk* — what people say when they talk about rights or even how they express their claims — but with rights *speech*. The Article's principal concern is with the constitutional right to engage in a discourse about rights without unjustified governmental interference. *How* speakers choose to exercise this right may indeed affect the character of political and constitutional discourse. However, the premise of this Article is that individuals should generally make this particular decision free from governmental interference.

B. Expressive Rights and Values

The First Amendment plays a central role in ensuring that constitutional discourse is free, fair, and open. Free speech, press, and other rights limit the extent and degree of governmental regulation of rights discourse. At a bare minimum, the First Amendment prohibits government from broadly suppressing communications relating to constitutional rights. It also limits the extent to which government can compel speech about individual rights.[195] In more general terms, the First Amendment protects a vital public interest in making decisions about the recognition and scope of constitutional rights.[196]

Speech about constitutional rights is a distinct and uniquely important subcategory of political expression.[197] Thus, whenever speech about or concerning constitutional rights is the subject or object of regulation, judicial and other officials ought to be particularly sensitive to First Amendment values and concerns.

To be clear, this is not an argument for "double-counting" in terms of First Amendment protection. Indeed, one of my central claims is that officials and courts often fail to see laws restricting rights speech as limits on political expression and constitutional discourse. Were they to do so, the protection afforded political speech would appropriately apply. In part, then, what this Article proposes is a clarification of what "counts" as political speech and why rights speech is properly considered a subcategory of core First Amendment activity.

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[195] *See supra* Part I.A.1.

[196] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-25 (1960) (discussing the self-government and democratic values associated with freedom of speech).

[197] *See, e.g.*, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2030 (2003) (observing that "the First Amendment ensures that all Americans can express their beliefs about the Constitution").

As a class or category, rights speech can lay special claim to First Amendment protection. By their nature, rights speech regulations directly implicate core First Amendment expressive values. Regulation of what individuals can say regarding a constitutional right, or the manner in which a constitutional right can be discussed, strikes at the very heart of First Amendment concerns relating to self-governance and debate on matters of public concern.[198] The ability to discuss whether — and, if so, to what extent — a political community should recognize constitutional rights is vitally important to self-governance. Through discourse about rights, people convey information about and collectively decide upon fundamental limits on government's authority.

Rights speech is part of a collective endeavor to identify and enforce formal limits on governmental authority. As Robert Post has argued, "[T]he First Amendment safeguards public discourse not merely because it informs government decision-making, but also because it enables a culturally heterogeneous society to forge a common democratic will."[199] Many rights speech regulations affect public discourse regarding the formation of this "common democratic will" concerning constitutional rights.[200] Some of these regulations interfere with and displace democratic processes by dictating, altering, or suppressing rights discourse.

Many of the regulations discussed in Part I threaten or offend collective self-governance values. For example, regulations depriving the public and the press of information relating to firearms possession limit the public's ability to present and fully consider constitutional rights claims.

Legally classifying gun ownership and possession records as "private" raises significant First Amendment freedom of press and freedom of speech concerns. Information regarding firearms sales, permitting, and possession are matters of significant public concern.[201] In some instances, the press and private individuals have used this information to report on governmental mistakes and abuses in weapons permitting processes.[202] Newspapers have used aggregate statistics to report that some permits were issued to felons.[203] These statistics could also show

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198 *See generally* MEIKELJOHN, *supra* note 196 (discussing democratic values associated with freedom of speech).

199 ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 166 (1995).

200 *Id.* at 166-67.

201 *See* Swanson, *supra* note 117, at 1619-20.

202 Mackey, *supra* note 119, at 4.

203 *Id.*

that mentally incompetent persons and others who should not possess permits have nevertheless obtained them. Disclosure of permit information could also help the public evaluate "whether licensees are disproportionately committing crimes, and if so, which crimes."[204] Gun permit and possession information is also relevant to debates concerning alleged links between high-crime areas and the presence of firearms and the possible deterrence value of weapons in the home. The information may also be relevant to safety concerns; for example, parents may want to know whether the occupants of a home their child regularly visits have weapons on the premises.

To be sure, in certain respects it may seem that treating gun records as private is consistent with the treatment of information regarding the exercise of other constitutional rights. In the abortion context, women's medical records and identifying information are generally protected from disclosure.[205] In the First Amendment context, possession of legally obscene materials is protected; as well, under some circumstances associational privacy and the right to anonymous speech protect the identity of individuals from public disclosure.[206]

However, in the arms-possession context, there would seem to be stronger First Amendment concerns in terms of public access. These include the need for governmental oversight to ensure that individuals who are not legally entitled to exercise Second Amendment rights are not allowed to do so; transparency concerns about the permitting process itself; public safety concerns; and the press' interest in reporting on newsworthy items.[207] Moreover, concerns that disclosure of the information will chill the exercise of Second Amendment rights seem somewhat weaker than claims that forced disclosure of women's medical records, associational membership lists, or speaker identity will chill the exercise of abortion, expressive association, or free speech rights. In many jurisdictions, gun ownership has become quite common and has gained a considerable measure of public acceptance.[208]

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[204] Swanson, *supra* note 117, at 1622.

[205] *See, e.g.*, Nw. Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 928-29 (7th Cir. 2004) (quashing subpoena seeking abortion records, including names of patients).

[206] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) ("The freedom to publish anonymously extends beyond the literary realm."); Stanley v. Georgia, 394 U.S. 557, 559 (1969) ("[M]ere private possession of obscene matter cannot constitutionally be made a crime."); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

[207] *See* Swanson, *supra* note 117, at 1621-23 (discussing oversight functions that are facilitated by public access to gun records).

[208] *See id.* at 1624 (arguing that it is unlikely in the United States that stigma or other

Whenever governments limit otherwise lawful speech regarding constitutional rights, they affect the public's ability to determine for itself the metes and bounds of constitutional limitations on government. This is true whether the laws restrict pro- or anti-rights discourse. Laws and regulations that preclude citizens from discussing whether and how to recognize constitutional rights, or from fully debating the effect of recognition and exercise of those rights, significantly undermine democratic legitimacy.

In addition to their negative effects on self-governance, some rights speech regulations directly interfere with the exchange of ideas in various speech marketplaces.[209] Abortion image bans and the imposition of civil liability for anti-abortion speech suppress and chill communication regarding the exercise of abortion rights.[210] These restrictions prevent speakers from conveying moral and other objections to the continued recognition and exercise of a contested right.

Similarly, restrictions on lobbying, scientific research, and information that relates to the public health and safety effects of gun possession deprive the press and public of information regarding the possible health and safety effects related to Second Amendment rights.[211] School policies that suppress any discussion of Second Amendment issues on the ground that such discourse is inherently threatening or disruptive also skew constitutional debate in a formative marketplace.[212] Even limited public forum regulations, which are often considered to be neutral with regard to the content of expression, frequently remove rights speech from public spaces that could readily accommodate constitutional discourse.[213]

As scholars have recognized, rights speech regulations that *compel* speech about or concerning constitutional rights raise additional and unique marketplace-related concerns.[214] Compulsory rights speech affects the nature and substance of discourse regarding the recognition and exercise of constitutional rights. For example, laws that compel physicians to communicate detailed information to their patients about

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privacy harms will be associated with gun ownership).

[209] Regarding the relationship between free speech and the search for truth, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and JOHN STUART MILL, ON LIBERTY 15-16 (1947).

[210] *See supra* Part I.A.3-4.

[211] *See supra* Part I.B.3.

[212] *See supra* Part I.B.4.

[213] *See supra* Part I.A.4.

[214] *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1292-98. *But see* Keighley, *supra* note 36, at 2370-71 (arguing that marketplace theory has little purchase in the context of physician-patient discussions).

abortion's negative effects can seriously distort abortion rights discourse.[215]

The Supreme Court's First Amendment analysis of compelled physician disclosures has been far too casual. It is a fundamental and longstanding First Amendment principle that government is prohibited from compelling persons to adopt and convey official messages or beliefs.[216] Governments cannot "force citizens to confess by word or act" beliefs not their own, or to communicate support for official policies.[217] To be sure, there are contexts in which government can use its regulatory power to compel a person to convey information. In the commercial speech context, for example, the government can require certain product disclosures.[218] However, viewpoint-based compulsory speech regulations are subject to heightened judicial scrutiny.

As some commentators have observed, abortion-related informed consent regulations, including those that adopt a specific viewpoint regarding exercise of the abortion right, have been treated exceptionally under this framework.[219] The regulations have generally not been subject to heightened scrutiny — even where they clearly convey a viewpoint favoring childbirth over abortion.[220] Rather, governments have been granted wide leeway to adopt laws and regulations so long as they are reasonably related to persuading women not to procure an abortion.

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[215] *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1326-34.

[216] *See* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that the state cannot prevent a Jehovah's Witness from covering "Live Free or Die" motto on state license plate); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[217] *Barnette*, 319 U.S. at 642.

[218] *See* Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (upholding mandatory disclosures for lawyers with regard to costs of litigation); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (articulating general standard governing review of commercial speech restrictions).

[219] *See* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1190-94 (2014) (discussing courts' failure to apply strict scrutiny to physicians' compelled speech in the abortion disclosure context); Corbin, *Compelled Disclosures*, *supra* note 36, at 1289-91 (discussing judicial review of abortion informed consent laws); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 6 (2012) (describing the treatment of informed consent laws as "abortion exceptionalism"); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1724 (1995) (criticizing the Supreme Court's analysis of free speech issues in abortion cases).

[220] Corbin, *Compelled Disclosures*, *supra* note 36, at 1289-91.

From the government's perspective, discourse regarding abortion must include all truthful and non-misleading information about the woman's exercise of the right to procure an abortion. However, the abortion script and speech and display laws raise serious and overlooked compelled speech concerns.[221] Caroline Corbin has persuasively argued that these laws chill physicians' speech, in part owing to confusion regarding whether health care providers are permitted to express their own views or must instead endorse the state's position.[222] Some laws may also require the communication of false or misleading information concerning abortion and its effects, including the relationship between abortion and suicide.[223] Moreover, the physician scripts do not typically convey that the information is being mandated by the state itself, which raises the possibility that the listener will not understand the true identity of the actual speaker or the originator of the pro-life message that is being conveyed. In all of these and other respects, state compulsory disclosure laws risk distorting conversations between doctor and patient.[224]

Again, this skewing and manipulation of marketplaces works in more than one direction. Measures compelling pregnancy centers to indicate to their patrons and to the public at large that abortion and birth control are, from their own perspective, viable options for women alter constitutional discourse by forcing a point of view on the centers' operators.[225] Compulsory rights speech regulations may give the false impression that private speakers believe abortion to be harmful to women, or that abortion is a viable and appropriate option in terms of women's reproductive care. Audiences are thus given false or skewed information regarding private speakers' perspectives on the exercise of the abortion right.

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[221] *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1324-38 (arguing that disclosure laws violate compelled speech principles); Keighley, *supra* note 36, at 2389 (arguing that mandatory ultrasound laws "commandeer" physicians and force them to convey official ideology).

[222] Corbin, *Compelled Disclosures*, *supra* note 36, at 1293-94, 1326; *see also* Zita Lazzarini, *Perspective: South Dakota's Abortion Script — Threatening the Physician-Patient Relationship*, 359 NEW ENG. J. MED. 2189, 2191 (2008) (arguing that the complex certification requirements "effectively prevent[] [physicians] from dissociating themselves from the compelled speech").

[223] *See* Lazzarini, *supra* note 222, at 2191.

[224] *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1312-14 (discussing the distortive effects of mandatory disclosure laws).

[225] *See supra* Part I.A.2.

Some regulations of abortion and arms speech are also detrimental to speakers' self-autonomy and self-fulfillment.[226] As just discussed, some compulsory disclosure requirements commandeer physicians and compel them to communicate certain messages regarding abortion and abortion rights.[227] By compelling communication of information that is intended to persuade women to choose pregnancy over abortion, the state might interfere with a woman's autonomous decision-making process.[228] In this regard, Professor Corbin argues that the state script and display laws are paternalistic and manipulative.[229] In First Amendment terms, she asserts that they are "insulting to decisional autonomy."[230] As Corbin argues, "For no other medical procedure does the state force patients to hear the moral ramifications of their decision and the state's disapproval of one option. Free speech principles are abandoned and the state permitted to lecture a captive audience on its moral position only when women decide to terminate an unwanted pregnancy."[231] Corbin and others also criticize both the states' uses of emotive appeals and its manipulation of cognitive heuristics to "persuade" women not to procure an abortion.[232]

Moreover, insofar as physicians are not permitted to express their own views regarding abortion rights and services, their autonomy as speakers is compromised. Similarly, restrictions on information flow, lobbying, and scientific research can also negatively affect the personal autonomy of both speakers and audiences. The First Amendment establishes "an arena of public discourse" within which autonomous individuals can freely embrace or reject constitutional rights and values.[233] Official structuring of constitutional rights discourse interferes with this process.

Finally, rights speech regulations can also undermine First Amendment values relating to transparency and the free flow of information. As the Supreme Court has observed, "the First

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226 *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (discussing autonomy-based justifications for freedom of speech).

227 *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1334-35; Keighley, *supra* note 36, at 2389.

228 *See* Keighley, *supra* note 36, at 2389; *see also* Sanger, *supra* note 36, at 360 ("Mandatory ultrasound disrupts the law's traditional respect for privacy, bodily integrity, and decisional autonomy in matters of such intimacy as reproduction, pregnancy, and family formation. It is harassment masquerading as knowledge.").

229 Corbin, *Compelled Disclosures*, *supra* note 36, at 1335-38.

230 *Id.* at 1337.

231 *Id.*

232 *Id.* at 1295-98.

233 POST, *supra* note 199, at 278.

Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[234] Gun speech regulations that prohibit lobbying or scientific research regarding gun possession similarly limit governmental transparency and the free flow of information regarding the exercise of Second Amendment rights.[235] Limitations on access to gun permits and other information relating to the right to bear arms implicates freedom of speech and freedom of press interests. Access to information and transparency allows speakers and journalists to engage in a form of constitutional oversight.[236]

In sum, many rights speech regulations limit, alter, and structure constitutional rights discourse in ways that threaten a number of First Amendment values. They strike at core First Amendment concerns including self-governance, political community, the search for truth, autonomy, the free flow of information, and freedom of the press.

C. Non-Expressive Rights

As Justice Cardozo observed, freedom of speech is "the indispensable condition[] of nearly every other form of freedom."[237] Owing to the close relationship between First Amendment expressive rights and other constitutional rights, regulation of rights speech can also negatively affect non-expressive rights.

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234 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

235 *See supra* Part I.B.3.

236 *See supra* Part I.B.1; *see also* Swanson, *supra* note 117, at 1623-26. Of course, there are limits to transparency and oversight with regard to constitutional rights. Although government can compel the reporting of general information about abortion services, the personal identifying details of women are protected. Gun owners are in essence seeking the same kind of privacy protection. Although the comparison is not necessary to my analysis, some might be concerned about a double-standard. However, with regard to abortion, medical records are generally private. Further, the nature of the abortion procedure itself counsels in favor of granting privacy protection to women regarding the medical procedure. Finally, concerns about harassment of women who seek abortions are unfortunately real. Gun possession, by contrast, does not relate to longstanding privacy concerns, is not an intimate activity (particularly insofar as concealed public possession is concerned), and does not appear to be associated with real concerns of public harassment. Given that one's possession of a firearm could lead to localized harm — for example, injury to children in the neighborhood or local crime — privacy concerns may need to give way to public health and safety concerns. In sum, a degree of citizen oversight may be appropriate with regard to the individual exercise of Second Amendment rights.

237 Palko v. Connecticut, 302 U.S. 319, 327 (1937).

Speech regulations can negatively affect the exercise of non-expressive rights in two ways. First, in extreme cases, rights speech regulations can violate or significantly burden non-expressive rights. Second, through the regulation of rights speech, governments can create a de facto hierarchy or ranking of constitutional rights that enhances or diminishes the status or recognition of certain rights.[238]

In the abortion context, regulations that purport to frame or structure a woman's informed consent might cross the line from persuasion to coercion.[239] Regulations that compel communications about abortion and its effects may create a substantial obstacle to the exercise of abortion rights.[240] A similar concern would arise were governments to compel sellers of arms to convey information to owners, their families, and the public regarding the safety and public health concerns associated with arms possession. At some point, compulsory disclosures, by imposing substantial obstacles to arms possession or coercing arms purchasers, will interfere with the Second Amendment right to bear arms.

The concern regarding non-expressive effects extends beyond abortion and the right to bear arms. Some constitutional rights are inextricably intertwined with freedom of speech. For example, restrictions on speech about or concerning religion — prayer, proselytizing, or ceremonial activities — can implicate both free speech and free exercise concerns.[241] Similarly, speech restrictions may violate both expressive rights and the right to vote.[242] In these circumstances,

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[238] Governments may also create this hierarchy through their official communications and expressive laws. *See* sources cited *supra* note 11. However, this Article focuses on the effects of governmental regulation of private speech.

[239] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992); *see also* Sanger, *supra* note 36, at 360-61 ("[W]hen or to what extent may the state persuade a person not to exercise a constitutional right?").

[240] This may also be the case where the government itself, rather than some intermediary, is the speaker. *See* Tebbe, *supra* note 11, at 692 (arguing that due process and free speech constraints may limit some government speech that disparages the right to abortion).

[241] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (invalidating mandatory flag salute for schoolchildren, in case brought by Jehovah's Witnesses); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (addressing incendiary speech regarding religion). The intersection of religious liberties and freedom of speech raises other issues, including whether special protections for religious freedom violate free speech neutrality rules. *See generally* Alan Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 UC DAVIS L. REV. 605 (1999) (discussing the intersection of state religious liberty laws and First Amendment free speech doctrine).

[242] *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30 (1968) (invalidating restriction on grounds that it violated plaintiffs' First Amendment right to "cast their votes

speech rights and other constitutional rights are so closely intertwined that a violation of one is, ipso facto, a violation of the other.

Restrictions on speech concerning homosexuality provide yet another example. Such restrictions may negatively affect equal protection by impeding recognition or enjoyment of equal personhood. For example, during the 1990s gay service members argued (unsuccessfully) that the military's "Don't Ask, Don't Tell" policy denied them both freedom of speech and equality by prohibiting identity speech regarding sexual orientation.[243] Laws that restrict the free flow of information about homosexuality, or impose other limits on debate about sexual orientation, have a negative effect on the recognition and enjoyment of constitutional equality rights. Thus, again, governments can regulate private speech in a manner that denies full recognition and enjoyment of other constitutional rights.

Even if there is no actual or effective denial of the underlying non-expressive right, rights speech regulations can produce a de facto ranking or hierarchy of constitutional rights that undermines some constitutional rights. The power and ability to regulate private speech about constitutional rights includes the power to affect not just the legal recognition and exercise of rights but also their social, political, and constitutional status. Through official acts regulating speech, officials can undermine (or enhance) certain constitutional rights.

The harm in this instance is not solely to a particular constitutional right, but also to the democratic process itself. In this sense, the harm is related to some of the expressive values discussed in the previous section. Let us assume that governments are generally entitled to form

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effectively").

[243] *See* 10 U.S.C. § 654(b) (2010). Congress repealed this policy. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(b), (f), 124 Stat. 3515, 3516 (2010) (codified at 10 U.S.C. § 654 (2011)) (providing for repeal sixty days after report by Secretary of Defense and certification by the President and military officials). While some lower courts concluded that the policy violated the First Amendment, appeals courts uniformly rejected this argument on the ground that the law operated merely as a presumption of unlawful conduct rather than a proscription on expression. *See* Cook v. Gates, 528 F.3d 42, 63 (1st Cir. 2008); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915, 931-32 (4th Cir. 1996) (en banc); Able v. United States, 88 F.3d 1280, 1296-97 (2d Cir. 1996); Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996). For critical commentary on the free speech effect of the military's policy and critiques on the military's arguments, see WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET Ch. 5 (1999). For examples of the scope of the restriction, including application to conversations with family members, sessions with chaplains and psychotherapists, and public statements, see Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1644-50 (2004).

and express particular viewpoints with regard to the legitimacy and scope of constitutional rights — even rights that have been officially recognized by courts.[244] Even so, they are required to remain neutral with regard to private speech regarding constitutional rights.[245] Insofar as they structure constitutional rights discourse in a manner that favors certain rights over others, rights speech regulations offend neutrality principles by discriminating against or in favor of speech about substantive rights.

For example, it is no secret that certain abortion speech regulations are intended to convey an official message of disapproval regarding exercise of the abortion right. *Casey* invited such regulations when it permitted the government to structure private discourse about abortion in the context of the doctor-patient relationship. In this context, note that regulation of private discourse about constitutional rights speech signals official disapproval of the abortion right in a way that devalues or de-legitimizes that right.

In contrast, proponents have defended many recent restrictions on the free flow of information concerning arms possession on the ground that the right to bear arms deserves special constitutional protection. Insofar as this protection takes the form of limits on the free flow of truthful information about gun possession, individuals are deprived of information that is relevant to individual and collective decision-making about Second Amendment rights. Some laws seem to be designed, at least in part, to shield arms-bearers from information and communications that might challenge the scope and legitimacy of their constitutional rights.[246]

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[244] This does not mean that there are no limits on governmental rights speech. *See generally* Tebbe, *supra* note 11 (arguing that governmental rights speech is subject to free speech, equality, anti-establishment, and due process limits).

[245] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 416 (1989) (emphasizing content-neutrality principle and explaining that "the government may not prohibit expression simply because it disagrees with its message . . ."); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[246] *See, e.g.*, Wollschlaeger v. Governor of Fla., No. 12-14009, 2014 WL 3695296, at *53-54 (11th Cir. July 25, 2014) (Wilson, J., dissenting) (concluding that state law protecting patients from inquiries about exercise of Second Amendment rights violates the free speech rights of physicians and patients). To be sure, women have also been shielded from some negative communications regarding abortion. *See supra* Part I.A.3 (discussing public protests at abortion clinics). As discussed earlier, these restrictions on rights speech are troublesome. However, limited protections for women seeking to exercise the right to choose are different in character from efforts to broadly protect the private exercise of Second Amendment rights by suppressing information flow about

It may be difficult to recognize or appreciate the harm to the democratic process in these instances. After all, as noted, we are assuming that governments may take positions on contested rights and may enact laws that lead to restrictions on rights. Different constitutional rights may call for distinct forms of protection, and officials can take relevant distinctions into account. They can also take actions to protect or facilitate the exercise of constitutional rights.

With regard to rights speech, however, the problem is not simply that some rights are favored over others or receive greater legal protection relative to others. Rather, the defect is that rights are preferred or disfavored by means of restrictions on private speech activities. Rights speech regulations are fundamentally different, in a democratic sense, from official communications or expressive laws. They are a far less direct and less transparent means of affecting the status and legitimacy of constitutional rights.[247] They establish a hierarchy of rights not through direct legislation or official communication, which can generally be attributed to government and thus challenged in appropriate political forums, but through a variety of limitations on speech or press.

If there is to be a ranking or hierarchy of constitutional rights, it ought to be the product of open and robust public debate. Governments are obligated to permit, and indeed arguably have a duty to facilitate robust deliberation about constitutional rights.[248] The right to abortion ought not to be disfavored, nor Second Amendment rights privileged, as a result of limits on private speech about those rights. The ranking of constitutional rights is not the province of government. It is the prerogative of individuals and communities, who rely upon open channels of communication and robust freedoms of speech and press in order to determine the legitimacy and scope of constitutional rights.[249]

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gun possession and gun safety. In legislatures across the nation, it appears to be the case that abortion has become a disfavored right, while arms possession has gained both status and stature as a constitutional right. *See supra* Part I.C.

[247] I am assuming here some level of transparency in government speech. Of course, insofar as the message is not readily attributable to the government, or is not readily discernible, process defects will be present.

[248] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (observing that a principal "function of free speech under our system of government is to invite dispute").

[249] *See* POST, *supra* note 199, at 166 (discussing the process of forming political community through expression).

III. THE FIRST AMENDMENT AS MEDIATING MECHANISM

As the discussion thus far shows, the First Amendment generally functions as a kind of mediating mechanism with regard to ideological and constitutional disputes. Ideally, expressive guarantees permit competing factions to engage in robust debate concerning the recognition, scope, and exercise of constitutional rights, while protecting against manipulation of constitutional discourse. If the First Amendment is to continue to perform this vital mediating function, it is imperative that rights speech regulations be subject to appropriate scrutiny.[250] This final Part discusses the primary challenges to effective First Amendment mediation, which are rooted in political culture, flawed free speech doctrines, and judicial biases. These impediments cannot be entirely overcome. However, we can reduce both their frequency and effects. Part III concludes with some examples of First Amendment mediation that is responsive to these concerns and to the negative consequences of rights speech regulation discussed in Part II.

A. Challenges to Effective Mediation

First Amendment mediation faces many challenges. Chief among these are the current political culture, which treats speech as a means of rights regulation, the limitations of certain First Amendment doctrines, and judicial biases regarding rights speech.

1. Political Expediency

As discussed in Part I, many restrictions on rights speech are indirect attempts to regulate non-expressive rights.[251] The political goal is to undermine or facilitate the right to abortion or the right to bear arms by structuring or manipulating discourse about these rights.

In far too many cases, First Amendment concerns have been sacrificed to political expediency. Although it is difficult to confirm, Part I suggests that legislators and other officials have regulated rights speech without much concern for maintaining a robust and open

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[250] *See* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt. (*Greater Balt. Ctr. III*), 721 F.3d 264, 297 (4th Cir. 2013) (en banc) (Wilkinson, J., dissenting) (warning in a case involving compulsory speech by pregnancy centers that "the First Amendment will . . . cease[] to function as a neutral arbiter of our nation's ideological disputes, but will instead . . . become a tool to serve the policy predilections of the judges who happen to be applying it in any given case"); Raskin & LeBlanc, *supra* note 77, at 199 (arguing that abortion speech regulations are skewed against abortion rights opponents).

[251] *See supra* Part I.C.

constitutional discourse about constitutional rights. In a political conflict over contested constitutional rights, speech and discourse have been collateral damage.

To some extent, lawmakers can hardly be faulted for considering free speech to be at best a secondary concern. Supreme Court decisions like *Casey* provide little reason to be concerned with the free speech implications of laws compelling disclosures or manipulating rights discourse.[252]

However, officials have an independent responsibility to foster and protect constitutional rights discourse.[253] Public officials can use the First Amendment as a mediating mechanism, absent judicial intervention. Expressive values can guide officials' consideration of measures relating to public disclosures, information flow, and transparency with regard to exercise of constitutional rights. Relying on those guidelines, officials can create opportunities for the free exchange of information concerning rights, support research concerning the exercise of rights, and maintain a neutral posture regarding private speech about constitutional rights. They can, in short, rely on disclosure and debate to determine the scope and exercise of constitutional rights such as abortion and the right to bear arms.

Given the discussion in Part I, this suggestion is obviously based on a certain degree of optimism regarding public officials' ability to attend to First Amendment and other constitutional concerns. In some circumstances, this optimism will undoubtedly be misplaced. Thus, as discussed below, we will also need meaningful judicial review of rights speech regulations.[254] However, elected officials can at least aspire to a more neutral mediation of constitutional rights discourse. With regard to private speech about constitutional rights, they ought to focus on creating the conditions for fair and effective democratic deliberation.

2. Doctrinal Limitations

Part II argued that governmental regulation of rights speech poses unique threats to constitutional discourse and, in some circumstances, the enjoyment of non-expressive rights. Judicial enforcement of First Amendment rights and values could reduce these threats. Unfortunately, however, First Amendment doctrines tend to exacerbate

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[252] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (dismissing, casually, physicians' First Amendment claim).

[253] *See* U.S. CONST. art. VI, cl. 3 (requiring state and local officials to take an oath to support the Constitution).

[254] *See infra* Part III.A.3.

both the expressive and non-expressive harms associated with rights speech regulation.

Some First Amendment free speech doctrines suffer from a form of near-sightedness that makes it difficult to recognize the inherent dangers of rights speech regulation. The speech-conduct distinction is an example. There is a legitimate concern in First Amendment doctrine and scholarship that an infinite array of conduct or action not be transformed into protected expression.[255] However, there is also a countervailing concern that conduct properly deemed expressive not be entirely removed from the First Amendment's protective domain.[256]

With regard to rights speech, under the guise of regulating professional conduct, governments have essentially compelled physician speech regarding abortion. In *Casey*, the Supreme Court summarily concluded, contrary to its own prior holdings, that such regulations implicate the Free Speech Clause only minimally if at all.[257] Similarly, the Eleventh Circuit upheld Florida's restrictions on physician inquiries relating to guns on the ground that they regulated professional conduct rather than expression.[258] In essence, these decisions conclude that where there is no "speech" involved, the First Amendment has nothing to mediate.

Further, heightened review of viewpoint-based compulsory speech regulations has not been meaningfully or consistently applied to rights speech regulations. As commentators have observed, in many cases compulsory abortion speech has not been subject to the same strict limitations as other forms of compulsory communication.[259] Inconsistent application of the presumption against compelled communication permits governments to skew and manipulate constitutional rights discourse.[260] It allows regulators in some cases to

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[255] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 17 (1970) (arguing that while expression could not be controlled by government, conduct usually can be restricted).

[256] *See, e.g.*, Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("A constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak.").

[257] *Casey*, 505 U.S. at 884.

[258] *See supra* notes 134–39 and accompanying text.

[259] *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1289-91.

[260] *See id.* at 1304 (arguing that "government manipulates audiences when it compels false or misleading speech" and also when it "compels speech without making it clear that the message represents the government's viewpoint and not the compelled speaker's").

force a dialog that otherwise would not occur, or to alter the specific content of a discourse about rights that ought to be dictated by the participants themselves. Here, again, First Amendment doctrine, at least as presently understood, fails to recognize that what is being regulated is not merely the provision of information about a medical procedure but dialog about a fundamental constitutional right.

In general, the principle of content neutrality poses distinct challenges to effective First Amendment mediation of rights speech claims. I have argued that even if the government is not generally required to remain neutral with regard to constitutional rights, it must be neutral with regard to private expression about those rights. However, this mediating principle has not prevented enactment of laws that discriminate against rights speech based on its content, or measures that otherwise limit discourse regarding constitutional rights.[261] Kansas's NRA-backed gun control lobbying ban has been defended as a neutral spending restriction — even though the governor expressly based his support on a defense of Second Amendment rights.[262] Moreover, the claimed neutrality of this kind of restriction hardly eliminates free speech concerns. Indeed, it arguably *exacerbates* such concerns by prohibiting *all* lobbying for or against gun control measures. Federal and state bans on publicly-funded research concerning gun ownership and possession similarly survive scrutiny under traditional content neutrality principles — again, despite the fact that the restrictions operate to deny funds to researchers primarily on the ground that they might generate anti-gun results that could be used to support gun control measures.[263]

One might expect public officials to rather imperfectly toe the content-neutrality line. However, courts have been notably imperfect too. Perhaps the most glaring example of this problem is the abortion speech restriction upheld in *Hill v. Colorado*.[264] The law prohibited speakers from approaching audiences without their consent "for the

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[261] *See supra* note 123 and accompanying text (discussing Florida's Firearm Owner's Privacy Act); *supra* notes 146–149 and accompanying text (discussing Kansas's law prohibiting lobbying about gun control with state funds).

[262] *See supra* Part I.B.3.

[263] *See supra* Part I.B.3. Of course, the content-neutrality principle is not the only, or even the most severe, problem in some of these examples. The unconstitutional conditions doctrine, which permits governments to withhold funding so long as it does not discriminate based on viewpoint or impose a penalty, permits discrimination based on subject matter. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (explaining that government may limit funding based on subject matter or speaker in some cases, but may not engage in viewpoint discrimination).

[264] 530 U.S. 703 (2000).

purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . ."[265] It strains credulity to characterize this enactment as content-neutral. Indeed, if the Colorado law meets the definition of content-neutrality then governments are presumably free to disfavor rights speech in other contexts as well. They may, for example, prohibit a speaker from approaching an armed individual without his consent for the purpose of "engaging in oral protest."[266]

As these examples show, the content-neutrality principle often fails to expose the inherent bias in rights speech regulations. For instance, measures that impose certain disclosure requirements on pregnancy centers, but not abortion providers, are not formally neutral in application or effect. Similarly, some regulations of speech in limited public forums may disproportionately, if not intentionally, disfavor speech about abortion, arms, and other controversial subjects. Regulations that exclude all "political" speech from public forums disproportionately suppress speech about and concerning topics such as abortion, arms possession, gay equality, and religion. Finally, measures intended to protect audiences from information about abortion's effects, or to shield students from abortion or gun rights advocacy, often restrict communications because of the effects they have on their intended audiences. This concern flouts First Amendment neutrality principles.

Of course, the problems with the content neutrality principle are hardly unique to rights speech regulation. Many scholars, and more than a few judges, have derided the content-neutrality principle both as conceptualized and applied.[267] However, the neutrality principle's

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[265] COLO. REV. STAT. § 18-9-122(3) (1999).

[266] To be sure, the speaker's approach may be unwise or even perilous.

[267] Regarding the complexity of the content neutrality principle, see generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (endeavoring to explain and clarify the principle). For criticisms of the theory and application of the content neutrality principle, see generally Chemerinsky, *supra* note 12, at 50 (arguing that the Court has "erred" in various respects in "developing the principle of content neutrality"), Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142 (1981) (arguing that the distinction between content-based and content-neutral laws ought to be collapsed), and Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982) (stating that, "a broad content neutrality rule is indefensible"). There are detractors on the Supreme Court as well. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2542 (2014) (Scalia, J., concurring) (taking issue with the plurality's conclusion that the Massachusetts abortion clinic buffer zone law is content-neutral); R.A.V. v. City of St. Paul, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (arguing that "our entire First Amendment jurisprudence creates a regime based on the content of speech").

opaqueness and manipulability raise distinct concerns insofar as review of rights speech regulation is concerned. Content neutrality establishes an edifice of legitimacy for regulations that in actuality skew, alter, and manipulate rights discourse. Speakers may be forced to communicate ideas that are not their own, denied the opportunity to convey core beliefs or opinions, or deprived of information that is relevant to debates about the legitimacy, scope, or exercise of constitutional rights. In sum, the existing content neutrality regime, as applied to constitutional rights discourse, may imperil the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[268]

The challenge to First Amendment mediation of rights speech runs deeper than these doctrinal and conceptual deficiencies. More generally, there is a problem of perspective. Courts decide the cases before them, and regulators tend to tackle problems incrementally. On their face, many of the measures discussed in Part I seem to regulate neutrally, impact speech minimally (if at all), or present as otherwise necessary limits on rights speech. As integral parts of a much wider and deeper constitutional discourse, however, each limitation allows government to alter and skew debates about constitutional rights to some degree. Free speech doctrines do not — and, at least as currently conceptualized and enforced, often cannot — connect rights speech regulations to the context of constitutional discourse. This problem of perspective leads to doctrinal nearsightedness. More generally, it blinds courts and legislators to the broader implications of rights speech regulation.

In the narrowest terms, rights speech regulations may seem to regulate professional speech, public protest, advertisements, image displays, or public records. However, *as a class*, rights speech restrictions allow governments to determine not only how or when individuals and groups discuss constitutional rights but also often what they can say about those rights. That is why, *as a class*, such restrictions pose a unique danger to a critical subcategory of political speech and a sub-stratum of fundamental rights. Not all such restrictions are invalid, even when judged by the broader values of free and open constitutional discourse. However, in order to see them for precisely what they are, rights speech restrictions must first be situated within the broader context of constitutional discourse.

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

3. Judicial Biases

With regard to judicial First Amendment mediation, doctrinal concerns are only part of the problem. Judicial bias also affects neutral mediation of rights discourse. As one study has recently noted, in free speech cases jurists have a tendency to be swayed by their own political and other biases.[269] The study concluded that, "[T]he justices' votes tend to reflect their preferences toward the expresser (or expression), and not . . . an underlying taste for the First Amendment qua Amendment."[270] Further, these same researchers found: "In a nutshell, justices are opportunistic free speechers. . . . [T]hey are willing to turn back regulation of expression when the expression conforms to their values and uphold it when the expression and their preferences collide."[271]

Thus, judges may not only fail to situate rights speech restrictions in a broader culture or process of constitutional rights discourse; they may fail even to see beyond the content of the speech or the nature of the speaker involved in a particular case. As a result, decisions relating to restrictions on abortion speech, arms speech, or other rights speech may turn as much or more on judicial biases regarding the underlying rights or the identity of the speakers than on First Amendment principles.

Insofar as First Amendment mediation of constitutional discourse is concerned, doctrinal limitations and judicial biases are significant limitations. As with political expediency, it will not be possible to overcome them entirely. However, by identifying these concerns we can at least begin to address and perhaps minimize some of the primary impediments to First Amendment mediation of constitutional rights discourse.

B. More Effective Mediation — Some Examples

In order for the First Amendment to more effectively mediate the regulation of rights discourse, it is imperative that officials, courts, and constitutional scholars see rights speech regulations for what they are — namely, laws and regulations that regulate, either directly or indirectly, political speech concerning fundamental constitutional rights. This change of perspective does not require that all such regulations be subject to heightened judicial scrutiny. However, it is important that officials and judges recognize that even seemingly

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269 *See* Epstein et al., *supra* note 12, at 2-3.

270 *Id.*

271 *Id.* at 3.

content-neutral restrictions on rights speech can negatively affect constitutional rights discourse. This section discusses a few examples to demonstrate how this change of perspective regarding the regulation of rights speech might facilitate the First Amendment's mediation of rights discourse.

1. De-structuring Abortion Discourse

Officials can start by de-structuring abortion discourse. As noted in Part I, legislatures have sought to compel both abortion providers and pregnancy centers to communicate information to patients regarding reproductive choices.[272] Commentators have criticized these laws on free speech grounds. For example, Robert Post has argued that abortion disclosure laws, such as the script and display laws discussed in Part I, regulate the provision of truthful information on a matter of public concern — namely, the communication of medical advice.[273] On this view, *Casey*'s error was to treat regulation of medical communications as an aspect of state licensure rather than a limit on self-governance and the marketplace of ideas. Caroline Corbin has observed that courts tend to uphold abortion provider compulsory speech measures under a lenient standard of review, while subjecting compulsory speech measures aimed at pregnancy centers to heightened scrutiny.[274] Corbin argues that the courts have it backwards; the autonomy and other concerns in the abortion provider context, she argues, are weightier than those affecting pregnancy center expression.[275] Thus, Corbin thinks judges should subject physician scripts to heightened scrutiny and pregnancy center compelled disclosures to minimal scrutiny.[276]

From a rights speech perspective, the First Amendment concerns are broader and even more serious than Post, Corbin, and other critics have supposed. The free flow of medical or therapeutic information is an important, but relatively narrow, free speech concern. The same can be said for some of the autonomy concerns Corbin identifies. More broadly, in the abortion context compulsory speech laws empower the government to structure discourse about the exercise of a constitutional right. The conversations may occur in a doctor's office, but the contents of these communications do not likely remain there. Rather, these

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272 *See supra* Part I.A.1.

273 Post, *supra* note 36, at 977-78.

274 *See* Corbin, *Compelled Disclosures*, *supra* note 36, at 1289-91.

275 *See id.* at 1351.

276 *Id.*

conversations become part of a broader discourse about abortion and its effects.

This is not to say that the doctor and patient are engaged in legal or political analysis of abortion rights, or public commentary about these issues. However, the conversations contribute to the formation of concrete impressions about abortion and abortion rights, convey information about a fundamental right that is likely to be disseminated beyond the doctor's office, and could ultimately affect the exercise of the abortion right itself. From this perspective, state structuring of abortion rights discourse strikes at the heart of First Amendment prohibitions on interference with discourse about matters of public concern.

In response to Corbin's concern about courts' differential treatment of physician script and pregnancy center enactments, *both* types of enactment are deeply problematic. Compelling pregnancy centers to convey information about abortion services implicates autonomy and marketplace concerns. Municipal ordinances requiring abortion speech are not merely regulations of commercial speech or medical services. Like the informed consent laws, they seek to structure abortion discourse by requiring that centers communicate to patients that abortion is a viable alternative not provided by the facility. Note, however, that no similar requirement is imposed on abortion providers. Once we situate rights speech regulations in the context of a broader abortion discourse, the edifice of content-neutrality starts to collapse. All that remains is an official effort to compel abortion opponents to speak favorably about abortion, while imposing no similar requirement on abortion providers to speak favorably about pregnancy services.

Regulating abortion providers' and pregnancy centers' abortion speech structures the exchange of information about abortion and abortion services in a way that can alter or skew rights discourse. For this reason, in addition to those advanced by other critics,[277] *both* types of regulations ought to be avoided or, if enacted, subjected to heightened scrutiny by courts. Abortion discourse ought to be structured by the participants in debates regarding rights — on their own terms and with their own words and ideas. A de-structuring of private abortion discourse would remove government from the physician's office and the lobby of the pregnancy center. It would permit

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[277] *See, e.g., id.* (discussing marketplace and autonomy objections to compelled disclosures); Keighley, *supra* note 36 (focusing on effect of compelled disclosures on physician and patient autonomy).

individuals to decide for themselves what and how to communicate with regard to the effects, morality, and propriety of abortion.

2. Mediating Public Contention

First Amendment mediation of abortion speech in public forums has been largely unsuccessful. Pro-choice advocates complain of street harassment and interference with women's repose.[278] Pro-life advocates and some commentators charge that legislatures and courts apply special standards that discriminate against or disfavor anti-abortion advocacy.[279] Similarly, pro–Second Amendment advocates have complained about biased enforcement of regulations on campuses and in other public places.[280]

With regard to abortion speech, the pro-life advocates appear to have a valid complaint. As discussed in Part I, under the guise of content neutrality, Supreme Court decisions have authorized legislatures and officials to zone, displace, and restrict anti-abortion advocacy.[281] Courts have also upheld limits on abortion rights speech under the true threats doctrine and allowed limits on the public display of abortion images.[282] Thus, the First Amendment has been mistakenly interpreted to allow officials to mediate public contention regarding abortion by restricting anti-abortion speech.

McCullen v. Coakley is at least a partial corrective. The Court appeared to recognize that the speakers were engaged in a form of rights speech when it observed: "Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them."[283] The Court characterized the expressive activity of sidewalk counselors as a traditional effort to *exchange ideas* about matters of public concern.[284] It

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278 *See, e.g.*, Amanda Marcotte, *Abortion Clinic Workers on Why the Supreme Court Should Uphold Buffer Zones*, SLATE (Jan. 15, 2014, 2:24 PM), http://www.slate.com/blogs/xx_factor/2014/01/15/supreme_court_hears_abortion_clinic_buffer_zone_case_the_judges_should_uphold.html (discussing concerns about protesters harassing and disturbing clinic patients).

279 *See, e.g.*, Raskin & LeBlanc, *supra* note 77, at 221 (arguing that the Court's abortion speech decisions have discriminated against pro-life viewpoint).

280 *See supra* Part I.B.4.

281 *See supra* Part I.A.3.

282 *See supra* Part I.A.4.

283 McCullen v. Coakley, 134 S. Ct. 2518, 2536 (2014).

284 *See id.* (emphasizing that "normal conversation and leafletting on a public sidewalk" have been "more closely associated with the transmission of ideas" than other forms of expression).

also emphasized that this kind of rights discourse can and indeed often does take place on the streets and in other public forums.[285]

Although *McCullen* is a step in the right direction, it does not address broader concerns relating to the management of public contention. The doctrines under which challenges to buffer zones and similar laws are typically adjudicated — public forum; time, place and manner; true threats; etc. — often fail to reveal or connect with broader concerns regarding constitutional rights discourse. These doctrines leave considerable room for troubling regulations concerning abortion advocacy. Recognition that constitutional discourse itself is being regulated may influence both regulatory activity and constitutional adjudication, including judicial interpretation of the First Amendment. Again, *McCullen* provides some evidence that the Supreme Court is beginning to make this connection.

As noted earlier, content neutrality is a particular concern insofar as regulation of abortion speech is concerned.[286] Regulators and courts must ensure that official acts do not operate to favor or disfavor private speech about constitutional rights. Thus, measures restricting protests near abortion clinics, civil lawsuits that impose liability on speakers for anti-abortion advocacy, and restrictions on the display of abortion images all ought to be subject to something like a presumption of invalidity. A similar calculus ought to be applied to limitations on public contention regarding other rights, including the Second Amendment right to bear arms. No "abridged . . . First Amendment" ought to apply, regardless of the constitutional right being debated.[287]

Some enactments are necessary to protect the underlying constitutional right, or to further the state's important interests in safety and order. However, if regulations of public contention and advocacy were to be re-conceptualized as regulations of rights discourse, the calculus leading to their passage and the content of judicial analysis might well be different. The collective interest in free and robust constitutional discourse would be regularly factored into the balance — along with individual rights to safety, privacy, and repose. Typically asserted governmental interests may appear much weaker when viewed in the context of a commitment to uninhibited and robust constitutional rights discourse.

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[285] *See id.* at 2529 ("It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas."). *See generally* ZICK, *supra* note 70 (discussing the prevalence of speech on matters of public concern in public places).

[286] *See supra* Part I.A.3.

[287] *McCullen*, 134 S. Ct. at 2541 (Scalia, J., concurring).

3. Creating Space for Rights Speech

As part of constitutional discourse, rights speech requires adequate breathing space. In particular, it requires public spaces and venues that are open to communication and exchange. Public streets and parks are available for some rights speech activities, including public assemblies and protests. Zoning and other restrictions limit the amount of space for dissent and contention regarding abortion and other issues in these forums. Moreover, officials sometimes manage other public spaces in ways that exclude or disfavor potentially controversial rights speech.

For example, in public schools and on college campuses, officials have all-too-frequently displaced or restricted pro-gun advocacy. In schools, political speech ought to be embraced — even if the message causes some discomfort.[288] Political speech about Second Amendment rights is as entitled to First Amendment protection as other advocacy on matters of public concern. Similarly, at least for more mature student audiences, abortion speech ought to be protected — at least insofar as it conveys a point of view about abortion, life, or choice. As applied by some courts, the disruption standard may eliminate opportunities for young people to engage in constitutional discourse.

Consider also regulation of speech in what are sometimes called limited public forums. These are public properties on which some speech has been permitted, but as to which government maintains some control over both the subject matter and the type of speaker who is allowed access.[289] In such forums, governments may categorically disallow speech that is "political" while allowing the free exchange of "commercial" and other expressive content.[290]

Municipal transit system advertising spaces are a common example. As discussed in Part I, some localities have limited expression in such spaces to "commercial" content and excluded "political" speech.[291] The basic premise is that as the proprietor of the forum property, government may make distinctions that best serve the primary purpose of the forum. Political speech does not serve the primary purpose of

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[288] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students.").

[289] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 46 (1983) (discussing speech in limited public forum); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings v. Martinez, 130 S. Ct. 2971, 2985-86 (2010).

[290] *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (upholding transit system's exclusion of political speech from bus advertisement space).

[291] *See supra* Parts I.A.2, I.B.3.

municipal advertising, which is to raise revenue.[292] It is also said to raise other complications, such as the need to make sometimes tricky managerial distinctions among political speakers.[293]

In truth, the First Amendment is doing little or no actual mediating in these limited public forums. In significant part, this is owing to the nature of the public forum doctrine, which is based almost entirely on property principles and distinctions.[294] Once the property has been categorized as a "limited public forum," free speech concerns recede into the background. To be sure, viewpoint discrimination is still forbidden; but distinctions like the one between political and commercial content are generally considered adequately neutral.[295]

Even accepting public forum doctrine as a (flawed) given, two things are typically missing from managerial and judicial considerations of limited public forum properties. First, there is a very strong likelihood that rights speech will be entirely excluded from such forums, since it is a subcategory of "political" speech. Second, the exclusion of "political" speech is not as viewpoint-neutral as it appears. When regulators fashion limited public forum spaces and exclude "political" content from them, they do not merely seek to exclude campaign advertisements. Rather, what they often hope to avoid are *controversial* subjects — including abortion, gun control, gay equality, and other rights discourse that often relates to deeply held "political" beliefs. As a result, speakers who seek public audiences for the purpose of (typically) altering the status quo with regard to such political matters are denied access to important forums.

The point is not to suggest that disparate impact on certain speech or speakers satisfies the current doctrinal standard for viewpoint discrimination, or that we ought to change the doctrine to so provide. Rather, I am seeking to highlight another context in which First Amendment principles — here, those relating to the public forum doctrine and content-neutrality — fail to successfully mediate rights speech claims. The veneer of neutrality is just that — a façade that permits limitations on core political speech, in particular communications that seek to engage audiences on matters relating to constitutional rights. Governments are not *required* to adopt such

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[292] *Lehman*, 418 U.S. at 303.

[293] *Id.* at 304.

[294] *See* ZICK, *supra* note 70, at 8-12 (criticizing property metaphor and advocating a concept of "expressive place").

[295] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (access barriers to limited public forums must be reasonable and viewpoint-neutral, but may take subject matter of speech into account).

exclusionary policies. Indeed, some appear to have chosen instead to open public properties to political speech, including controversial rights speech.[296]

Public officials ought to view rights speech and constitutional discourse as entirely appropriate activities in places such as municipal buses and trains. Where they decide otherwise, courts ought to take a closer look at the distinctions governmental proprietors are drawing, if only to ensure that they are being consistently applied to all "political" expression.

4. Information Flow and the Right to Bear Arms

As I have previously noted and the public forum example illustrates, judges are not the only ones who could rely on First Amendment principles to create space for rights speech. Lawmakers and regulators can also effectuate this change. To this end, policies that decrease the breathing space available for such discourse, or reduce the flow of information regarding the legitimacy, scope, or exercise of constitutional rights ought to be disfavored.

Many of the arms speech regulations discussed in Part I fit this description. The measures, many of which are permissible under current constitutional doctrines, seek to prevent or prohibit lobbying, disclosures, and scientific research regarding the exercise of Second Amendment rights. As discussed in Part I, officials have based some of these measures on a privacy right or interest that they contend attaches to the exercise of Second Amendment rights.[297] However, it is not clear how, if at all, lawmakers and regulators have taken into account how such measures impact rights discourse. Strong freedom of speech and freedom of press interests support public disclosure and dissemination of at least basic, non-identifying information relating to permitting and possession of weapons. Further, even with respect to personal information, anonymity and privacy interests may well be outweighed by the public's interest in and need for information regarding the exercise of Second Amendment rights.

At the very least, legislators are obligated to place these core First Amendment concerns in the balance when they consider public record limitations and other measures restricting access to information relevant to gun control. Reflecting on First Amendment rights in addition to Second Amendment guarantees may give at least some

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[296] *See, e.g.*, N.Y. Magazine, Inc. v. Metro. Transp. Auth., 136 F.3d 123, 130 (2d Cir. 1998) (holding that city had designated transit spaces as open for political expression).

[297] *See supra* Part I.B.1.

officials pause as they consider limiting the free flow of information and public discourse about the exercise of a recently-recognized and still-developing constitutional right.

CONCLUSION

Rights speech — communications about or concerning the recognition, scope, or exercise of constitutional rights — is an important subcategory of political expression. Indeed, as the communication of ideas about fundamental limits on governmental power, rights speech addresses political and democratic concerns of the highest importance. This Article has focused on speech about abortion and Second Amendment rights as illustrative examples. However, rights speech is a broader category that encompasses speech about any constitutional right — including equality, religious liberty, and the right to vote.

As the examination of abortion speech and arms speech shows, rights speech regulation is pervasive. Government efforts to structure of restrict speech about constitutional rights are often rooted in political agendas concerning the underlying non-expressive rights. Stated differently, speech may be the subject of governmental regulation but not its ultimate object. Regulating speech about abortion, arms possession, and other constitutional rights is a means of affecting the exercise, scope, and legitimacy of constitutional rights.

Playing politics with rights speech is dangerous. Rights speech is part of a broader constitutional discourse. The right to engage in robust and wide-open debate concerning constitutional rights lies at the core of First Amendment self-government and other expressive concerns. The opportunity to discuss the legitimacy, scope, and exercise of constitutional rights, free of unwarranted governmental interference, is crucial to democratic decision-making and political community. These and other expressive concerns are not the only reasons to be wary of rights speech regulations. The regulation of speech about constitutional rights can also negatively affect non-expressive rights — by interfering with their free exercise, or artificially diminishing or strengthening constitutional rights by compelling or prohibiting disclosures regarding their exercise or effects.

Rights speech and constitutional rights discourse ought to be as free as possible from governmental interference, manipulation, or structuring. Traditionally, Americans have looked to the First Amendment to mediate social and political conflicts regarding rights. Political, doctrinal, and institutional challenges render effective mediation increasingly difficult. If the First Amendment is to serve as

an effective mediating mechanism, we will need to first recognize and then begin to address these obstacles.