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# TWO DEGREES OF SPEECH PROTECTION: FREE SPEECH THROUGH THE PRISM OF AGRICULTURAL DISPARAGEMENT LAWS

Howard M. Wasserman\*

*In the wake of a 1989 national television broadcast reporting the alleged cancer risk of a chemical applied to apples on trees, many states passed agricultural product disparagement (APD) statutes. These statutes grant civil causes of action to the growers and sellers of perishable food products, against anyone who speaks negatively or disparagingly, without basis in scientific evidence, about the product's safety. In this Article, Howard M. Wasserman explores the interplay between the APD statutes and the First Amendment. First, Mr. Wasserman discusses the three categories of restrictions on the freedom of speech, focusing primarily on private civil tort actions for the redress of harms caused by expressive actions. Next, he addresses two lines of protection against these First Amendment restrictions: (1) a combination of substantive law and procedural protections that courts have developed since the Supreme Court's 1964 New York Times v. Sullivan decision; and (2) the use of exacting judicial scrutiny for laws, such as APD statutes, that entail content discrimination. Finally, the Article concludes that the APD statutes contravene free speech protections and should be struck down as unconstitutional violations of the First Amendment.*

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## INTRODUCTION

Oprah Winfrey emerged from the courthouse in Amarillo, Texas, to a throng of reporters. A jury in the United States District Court for the Northern District of Texas had found in her favor in a lawsuit brought against Winfrey, her production company, and one of her show's guests by a group of Texas cattlemen. The jury found the defendants not liable for harm to the cattle industry from statements made on the show discussing the threat of Mad Cow Disease to the country's beef supply.<sup>1</sup>

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<sup>1</sup> See Sam Howe Verhovek, *Turf Was Cattlemen's, But Jury Was Winfrey's*, N.Y. TIMES, Feb. 27, 1998, at A10; see also David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL BUS. L.J. 191, 217-21 (1998) [hereinafter Bederman, *Twilight*] (describing the facts and result of Winfrey's case).

Winfrey told the crowd outside the courthouse that “free speech not only lives, it rocks!”<sup>2</sup> Consider that reaction the 1990s version of “dancing in the streets.”<sup>3</sup>

The victory in the case really belonged to Winfrey, who not only won the case but generated sympathy and a public relations bonanza for herself.<sup>4</sup> It is much more difficult to frame this as a victory for free speech. Winfrey had been sued, in part, under a Texas law prohibiting the false disparagement of perishable food products,<sup>5</sup> one of the so-called “food libel” or “veggie libel” laws that have been passed in several states.<sup>6</sup> Agricultural product disparagement statutes<sup>7</sup> provide civil causes of action to any person or company in an industry that grows, sells, or otherwise deals in an agricultural or perishable food product, against any speaker who makes a disparaging or negative statement about the healthfulness or safety of that product for human consumption, if that statement is not based on “reasonable and reliable scientific inquiry, facts, or data.”<sup>8</sup> The suit against Winfrey was the first civil action brought under one of these statutes and appeared likely to become a constitutional test case.<sup>9</sup> The constitutional test never developed, however, because the trial judge held that, with no actual knowledge of falsity, the statute was not applicable to the facts of the case and granted judgment as a matter of law on the APD claim.<sup>10</sup>

Critically, the court never reached the question of whether this APD statute—and by extension others—was or could be constitutional. Thus, even after Winfrey won before the jury, the statute remained on the books in Texas and in other states with

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<sup>2</sup> Verhovek, *supra* note 1, at A10 (quoting Oprah Winfrey).

<sup>3</sup> See Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 221 n.125 [hereinafter Kalven, *Central Meaning*] (describing the reaction of Alexander Meiklejohn, who called the Supreme Court’s decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), “an occasion for dancing in the streets”).

<sup>4</sup> See Verhovek, *supra* note 1, at A10; see also Bederman, *Twilight*, *supra* note 1, at 223 (describing the publicity Winfrey received); Richard Roeper, *Texas Lovefest; Oprah Overwhelmed Court of Public Opinion*, DALLAS MORNING NEWS, Feb. 28, 1998, at 31A; *infra* notes 95-100 and accompanying text.

<sup>5</sup> See TEX. CIV. PRAC. & REM. CODE §§ 96.001-96.003 (West 1999).

<sup>6</sup> Bederman, *Twilight*, *supra* note 1, at 194-95; David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 144-49 (1997) [hereinafter Bederman et al., *Banana*].

<sup>7</sup> For the sake of simplicity, this Article will refer to these statutes as “APD statutes” throughout this Article.

<sup>8</sup> TEX. CIV. PRAC. & REM. CODE §§ 96.002(2), 96.003 (West 1999); see also *infra* notes 67-70 and accompanying text.

<sup>9</sup> See Bederman, *Twilight*, *supra* note 1, at 217; Kevin A. Isern, *When is Speech No Longer Protected by the First Amendment: A Plaintiff’s Perspective of Agricultural Disparagement Laws*, 10 DEPAUL BUS. L.J. 233, 256-57 (1998); see also *infra* notes 90-100 and accompanying text.

<sup>10</sup> See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862-63 (N.D. Tex. 1998).

no judicial analysis yet made of its constitutionality. This Article will consider these constitutional questions. In doing so, it will examine the evolution and theoretical underpinnings of numerous fundamental principles of free expression and consider how and why they apply to render these statutes unconstitutional, both as written and in basic concept. Because APD statutes raise so many and varied free speech problems and issues, they provide a particularly good prism through which to view, consider, and apply these theoretical questions.

## I. ORIGINS AND DETAILS OF AGRICULTURAL DISPARAGEMENT STATUTES

APD statutes are a recent legal development whose origins can be traced with some ease. Most states passed these laws in the wake of a 1989 broadcast of CBS' *60 Minutes* entitled "A is for Apple," which discussed the alleged cancer risk caused by a chemical applied to apples on trees.<sup>11</sup> A federal class-action lawsuit for common law business disparagement by apple growers in Washington followed the broadcast, but ultimately failed.<sup>12</sup> One commentator thus accurately described these statutes as an attempt by agribusiness and grower interests "to achieve by statute what had eluded them under the common law: the creation of a tailor-made cause of action for agricultural disparagement."<sup>13</sup> Two lawsuits of note have been brought under these statutes; one of these, the lawsuit by Texas cattle ranchers against television talk show host Oprah Winfrey, focused public attention and scrutiny on these statutes. No court, however, has addressed directly the many constitutional concerns with these statutes.

### A. *The Auvil Litigation*

#### 1. The Background

On February 26, 1989, the CBS newsmagazine *60 Minutes* aired a report entitled "A Is For Apple," a piece discussing the risk of cancer caused by the chemical daminozide, or Alar, which was sprayed on apples to make them look better and stay

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<sup>11</sup> See *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 930, 937 (E.D. Wash. 1992) (Appendix) [hereinafter *Auvil I*] (transcript of broadcast).

<sup>12</sup> See *Auvil v. CBS "60 Minutes"*, 836 F. Supp. 740, 741 (E.D. Wash. 1993) [hereinafter *Auvil II*] (granting summary judgment in favor of broadcaster), *aff'd*, 67 F.3d 816 (9th Cir. 1995) (per curiam); see also Bederman, *Twilight*, *supra* note 1, at 192 (tracing the move to restrict speech about food safety to the failed lawsuit); Megan W. Semple, Note, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 410-11 (1996) (detailing the background of the *Auvil* case).

<sup>13</sup> Bederman et al., *Banana*, *supra* note 6, at 144.

on trees longer.<sup>14</sup> The broadcast called the chemical “[t]he most potent cancer-causing agent in our food supply,” one that placed children most at risk.<sup>15</sup>

The *60 Minutes* story focused on the findings of a report by the National Resources Defense Counsel (NRDC), entitled “Intolerable Risk: Pesticides in Our Children’s Food,” that asserted that the risk of cancer from Alar and seven other pesticides was approximately 250 times the amount the Environmental Protection Agency (EPA) considered an acceptable level of risk.<sup>16</sup> The broadcast quoted Dr. John Graef, a professor of pediatrics at Harvard Medical School, saying, in part, “by and large, the basis of the report is sound [and] the principles it’s based on are very sound, which is that children . . . are at significant risk.”<sup>17</sup>

The broadcast then focused on the legal, regulatory, and political issues and difficulties regarding Alar that faced EPA and government officials and the apple industry. In the broadcast, EPA officials acknowledged the unacceptable risk of cancer from Alar and agreed that Alar was a problem, that it should come off the market, and that it no longer should be used on apples.<sup>18</sup> Agency officials, however, appeared to believe they should follow normal procedures in canceling the manufacturer’s license rather than employing an accelerated suspension procedure.<sup>19</sup> The program also revealed disagreements among government officials and advocates as to whether Alar qualified as an “imminent hazard” demanding immediate removal from the market through special expedited procedures.<sup>20</sup> The broadcast next revealed disagreements between executive and legislative branch officials about whether federal law, which made it more difficult to take a chemical off the market once it had been approved, was to blame for the EPA’s slow response.<sup>21</sup> Finally, there was discussion of the practical difficulties facing government agencies in tracking Alar,

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<sup>14</sup> See *Auvil I*, 800 F. Supp. at 930.

<sup>15</sup> *Id.* at 937 (Appendix). Children were claimed to be more at risk because they drink so much apple juice. See *id.* at 938 (Appendix).

<sup>16</sup> See *id.* at 938 (Appendix).

<sup>17</sup> *Id.* at 939 (Appendix) (quoting Dr. John Graef).

<sup>18</sup> See *id.* at 938, 940 (Appendix) (quoting Dr. Jack Moore of the EPA: “[W]e aren’t debating whether or not there’s a problem here.”); see also Semple, *supra* note 12, at 408-09 (describing EPA plans and efforts over several years to remove Alar from the market).

<sup>19</sup> See *Auvil I*, 800 F. Supp. at 940 (Appendix) (quoting Dr. Moore: “What we’re debating is the pace by which one should get it off the market.”).

<sup>20</sup> Compare *id.* (Appendix) (quoting Dr. Moore: “[T]he data that we have in hand is not sufficiently provocative to allow us to make [a] suspension finding.”) with *id.* (Appendix) (quoting Janet Hathaway of the NRDC: “If EPA doesn’t think that the most potent cancer-causing chemical in our food supply is grounds enough to declare an imminent hazard and remove it from food, well, I don’t know what kind of risk it takes, then, to declare a chemical an imminent hazard.”).

<sup>21</sup> Compare *id.* at 938 (Appendix) (statements of Dr. Moore suggesting the need to change the statutes to avoid lawsuits) with *id.* (Appendix) (statements of Rep. Jerry Sikorksy suggesting that the EPA has sufficient statutory authority to act to remove Alar).

including its use on products grown outside the United States, false claims by domestic manufacturers stating that they do not use the chemical, and the general impossibility of determining whether particular apples had been treated with the chemical.<sup>22</sup>

Following the report, sales, demand, and prices of apples dropped worldwide.<sup>23</sup> Growers and others dependent upon apple production sustained losses mounting perhaps as high as \$75 million, in addition to many growers being forced into bankruptcy or losing their homes and livelihoods as “[e]ntire communities dependent upon the apple market were thrown into depression.”<sup>24</sup> These financial consequences occurred despite efforts by the U.S. Department of Agriculture (USDA), EPA, and the Food and Drug Administration (FDA) to respond to and contest the findings of the NRDC report and to stabilize the market and support growers by purchasing \$15 million worth of apples and reimbursing industry members for their losses.<sup>25</sup> The apple industry also responded with its own efforts to discredit the NRDC findings through a public relations campaign and the enlistment of congressional support for its position.<sup>26</sup>

## 2. *Auvil I*

When these efforts failed, a class of 4700 apple growers in the State of Washington turned to the courts, filing suit in state court in Washington against *60 Minutes*, CBS, three local CBS affiliates, and the NRDC.<sup>27</sup> In the first opinion in the case, the district court denied a motion to dismiss or for summary judgment by CBS;<sup>28</sup> in doing so, it analyzed some key First Amendment issues.

First, the court examined the distinction between disparagement and defamation, the purpose of the latter being to protect the plaintiff's personal reputation and character, the purpose of the former being to protect the plaintiff's economic interests.<sup>29</sup> The court held, however, that disparagement also is “subject to the same

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<sup>22</sup> See *id.* at 939-40, 941 (Appendix).

<sup>23</sup> See *id.* at 930; see also Semple, *supra* note 12, at 409 (describing consumer reaction to the broadcast, including school systems in several large cities banning apples from cafeterias).

<sup>24</sup> *Auvil I*, 800 F. Supp. at 930-31. Industry members placed the losses higher, around \$100 million. See Semple, *supra* note 12, at 410 n.54.

<sup>25</sup> See Semple, *supra* note 12, at 409-10 & nn.50-51, 53 (describing government efforts to stabilize the market and support the industry).

<sup>26</sup> See *id.* at 410-11 & n.52 (describing efforts by members of the apple industry).

<sup>27</sup> The case was removed to federal court, pursuant to 28 U.S.C. § 1441 (1994); the local affiliates were granted summary judgment and a motion to remand to state court was denied. See *Auvil I*, 800 F. Supp. at 932.

<sup>28</sup> See *id.* at 937.

<sup>29</sup> See *id.* at 932-33.

First Amendment requirements that govern actions for defamation.”<sup>30</sup> Thus, these plaintiffs, like defamation plaintiffs, had to prove that the objectionable statements in the *60 Minutes* broadcast were false and made with actual malice.<sup>31</sup>

Second, the plaintiffs bore the burden of showing that the false statements were directed at them, or in the disparagement context, at their particular products, that the statements were “of and concerning” these plaintiffs.<sup>32</sup> The court found, however, that

[t]he broadcast was clearly “of and concerning” daminozide-laced apples. More broadly yet, it was “of and concerning” all apples whether treated with Alar or not. To the extent that identification of growers is relevant at all, every apple grower in the country was identified. Their products were identified as dangerous regardless of whether the fruit had been exposed to Alar.<sup>33</sup>

This broad conception of the “of and concerning” requirement allowed the case to go forward.<sup>34</sup>

### 3. *Auvil II*

In its final opinion and order, the district court granted summary judgment to CBS on the grounds that the plaintiffs would be unable to carry their burden of showing that any of the objectionable statements was demonstrably false or made with actual malice, as required by the First Amendment.<sup>35</sup> Moreover, the court stated that where the evidence of falsity was ambiguous or in uncertain balance, “we believe that the Constitution requires us to tip [the balance] in favor of protecting true speech.”<sup>36</sup> The court focused on the truth or falsity of three distinct statements in the

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<sup>30</sup> *Id.* at 933 (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990)).

<sup>31</sup> *See Auvil I*, 800 F. Supp. at 936 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)). Actual malice is defined as knowledge of falsity or reckless disregard for the truth of a statement. *See New York Times*, 376 U.S. at 280.

<sup>32</sup> *Auvil I*, 800 F. Supp. at 933 (citing *Barger v. Playboy Enters., Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), *aff'd*, 732 F.2d 163 (9th Cir. 1984)).

<sup>33</sup> *Auvil I*, 800 F. Supp. at 935; *see id.* at 934-35 (describing a hypothetical interview between Ed Bradley of CBS and lead plaintiff Grady Auvil to demonstrate the broad reach of identification in the story).

<sup>34</sup> *See* discussion *infra* notes 199-216 and accompanying text.

<sup>35</sup> *See Auvil II*, 836 F. Supp. 740, 742 (E.D. Wash. 1993).

<sup>36</sup> *Id.* (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)); *see id.* at 743 (“[T]he [Supreme] Court has affirmed that ‘[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.’” (quoting *Hepps*, 475 U.S. at 778, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974))); *infra* notes 348-54 and accompanying text.

broadcast:<sup>37</sup> none could be proven false; all were about an issue that mattered; and all had to be protected.<sup>38</sup>

#### 4. *Auvil* on Appeal

On appeal, the Ninth Circuit affirmed.<sup>39</sup> The court examined whether there were any genuine issues for trial that could get the case before a jury and concluded that there were not.<sup>40</sup> The court reviewed factual assertions on two separate subjects. The first was whether Alar had cancer-causing potential. The plaintiffs attempted to argue that the statements could be found false because there had been no studies testing the relationship between human ingestion of Alar and the incidence of cancer in humans.<sup>41</sup> The court rejected this argument, holding that animal laboratory tests are a legitimate means of assessing cancer risk to humans.<sup>42</sup> The second subject was whether Alar placed children at greater risk of contracting cancer. The plaintiffs attempted to argue that no scientific study had been conducted specifically on the cancer risks to children from the use of the pesticides.<sup>43</sup> The court held that the growers had provided no affirmative evidence that Alar does not pose a risk to children, thus failing to disprove the broadcast's assertion that children were more at risk because they ingested more apple juice and therefore more daminozide.<sup>44</sup> The Ninth Circuit's conclusion that the CBS broadcast should be protected in the absence of evidence of the falsity of the statements reflects the position that "scientific uncertainty over food safety risks should thus be construed in favor of openness and free speech, and should not be made actionable."<sup>45</sup>

#### B. *Legislative Response*

APD statutes have appeared in several states, many in the wake of the *60 Minutes* broadcast, and most after the apple growers' loss in federal court.<sup>46</sup> The

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<sup>37</sup> The three statements were: 1) "daminozide is the most potent cancer-causing agent in our food supply;" 2) "daminozide poses an imminent hazard and an unacceptable risk;" and 3) "daminozide is most harmful to children." *Auvil II*, 836 F. Supp. at 742.

<sup>38</sup> See *id.* at 743.

<sup>39</sup> See *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 818 (9th Cir. 1995) (per curiam).

<sup>40</sup> See *id.* at 820.

<sup>41</sup> See *id.* at 820-21.

<sup>42</sup> See *id.* at 821.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 821-22 (stating that the fact that no studies had been conducted specifically on children "does nothing to disprove the conclusion that, if children consume more of a carcinogenic substance than do adults, they are at higher risk for contracting cancer").

<sup>45</sup> Bederman et al., *Banana*, *supra* note 6, at 143.

<sup>46</sup> See, e.g., ALA. CODE §§ 6-5-620-625 (1993) (added 1993); ARIZ. REV. STAT. § 3-113 (1998) (added in 1995); FLA. STAT. ch. 865.065 (1994) (effective Oct. 1, 1995); GA. CODE



laws provide private causes of action against false, disparaging speech about a generic perishable agricultural product or industry generally. The laws are so similar in form, content, and function as to leave little doubt that the legislatures of the several states sought the identical end of protecting the whole of agribusiness in their states by creating a new private right of action to go beyond ordinary product disparagement, under which the apple growers' class action had failed.<sup>47</sup>

### 1. Governmental Interests

Looking at the statements of legislative purpose in several states, the statutes appear intended to serve some or all of three purposes: (1) protection of the pecuniary and business interests of the producers, growers, and sellers of perishable agricultural products; (2) protection of the public from unreliable scientific information about the products it uses; and (3) protection of the state economy as a whole, with the concomitant protection of the public. The legislative findings of these statutes are couched in strong language about protecting the public well being, with the pecuniary interests of industry members obviously de-emphasized. For example, the Ohio legislature found that "the dissemination in this state of false information about the safety of Ohio's food supply would be extremely detrimental to Ohio's economy, the welfare of the consuming public, and the producers of agricultural and aquacultural food products."<sup>48</sup> Some statutes define disparagement in terms of a prohibition on speech that misleads the public with false information by casting doubt on the safety of food to the consuming public.<sup>49</sup> Other statutes emphasize the importance of a vital agricultural economy to the public well being, not to the agricultural industries.<sup>50</sup>

Of course, the statutes only provide the cause of action to some or all of the producers, marketers, or sellers of a particular agricultural product, not to the general citizenry that the statutes supposedly are intended to protect. In part, this might be

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ANN. §§ 2-16-1-4 (1997) (enacted 1993; effective July 1, 1993); IDAHO CODE §§ 6-2001-2003 (1998) (added 1992); LA. REV. STAT. ANN. §§ 4501-4504 (West 1998) (added 1991); MISS. CODE ANN. §§ 69-1-251-257 (1996) (effective from and after July 1, 1994); OHIO REV. CODE ANN. § 2307.81 (Anderson 1996) (added 1996, effective May 8, 1996); OKLA. STAT. tit. 2 §§ 3010-3012 (1997) (added 1995, effective July 1, 1995); TEX. CIV. PRAC. & REM. CODE §§ 96.001-004 (West 1996) (added 1995, effective Sept. 1, 1995).

<sup>47</sup> See Bederman et al., *Banana*, *supra* note 6, at 194-95.

<sup>48</sup> OHIO REV. CODE § 2307.81(A).

<sup>49</sup> See LA. REV. STAT. ANN. § 4502(1); OKLA. STAT. tit. 2 § 3011(1).

<sup>50</sup> See, e.g., GA. CODE ANN. § 2-16-1 (stating "that it is imperative to protect the vitality of the agricultural . . . economy for the citizens of this state"); LA. REV. STAT. ANN. § 4501 (stating that "it is beneficial to the citizens of this state to protect the vitality of the agricultural and aquacultural economy"); OHIO REV. CODE ANN. § 2307.81(A) (stating the purpose "to benefit all the citizens of this state and protect the vitality of the agricultural and aquacultural economy").

a product of the requirement of standing—no individual who is not an industry member is likely to be able to show specific injury as a result of false statements about a product or industry. In general, the political branches cannot provide individuals access to the courts as a way to protect the “undifferentiated public interest.”<sup>51</sup> Moreover, legislatures commonly attempt to serve the public interest by providing private actions for damages under statutes, on the theory that in bringing private civil actions, individual plaintiffs serve as “private attorneys general,” helping to enforce the statute and to further public policy.<sup>52</sup>

APD statutes, however, represent an unusual application of the private attorney general principle. Rarely has it been suggested that the general public, or anyone other than the identifiable, targeted individual, company, or product, is the true beneficiary of defamation or disparagement law or that defamation law is intended to protect the general public welfare.<sup>53</sup> Instead, defamation and ordinary disparagement seek to protect the interests—reputational or pecuniary—of the individual plaintiffs.<sup>54</sup> Since APD statutes represent statutory extensions of these common law causes of action, we can conclude that their true purpose is to serve

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<sup>51</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992); see also *Allen v. Wright*, 468 U.S. 737, 750-52 (1984) (holding that generalized grievances are not enough to grant standing under Article III of the Constitution).

<sup>52</sup> See Robert R.M. Verchick, *Critical Space Theory: Keeping Local Geography in American and European Environmental Law*, 73 TUL. L. REV. 739, 775-76 (1999) (describing citizen-suit provisions as “designed to enlist citizens as “private attorneys general” . . . to supplement governmental enforcement.” (quoting ROBERT W. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 1077 (2d ed. 1996))); see also *Texas State Teachers Ass’n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (holding that prevailing plaintiffs were entitled to attorneys’ fees when their success vindicated the First Amendment rights of a large segment of society, governmental policies had been changed, and the plaintiffs therefore had served the role of a private attorney general).

<sup>53</sup> See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992). But see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (Rehnquist, J., for the Court) (suggesting that the defamation cause of action in part protects the general public from being misled by false statements of fact). Neither the Court nor commentators have pursued this notion subsequently.

<sup>54</sup> See Paul A. LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM & MARY L. REV. 779, 783 (1984) (“The nature of the wrongful conduct in current defamation law is firmly grounded in the reputational interest of the victim.”); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 691 (1986) (“The common law of slander and libel is designed to effectuate society’s ‘pervasive and strong interest in preventing and redressing attacks upon reputation.’” (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966))); see also *Auvil I*, 800 F. Supp. 928, 932-33 (E.D. Wash. 1992) (comparing the laws of disparagement and defamation).

those same reputational and pecuniary interests far more than to serve any public interest in preventing the deception of the consuming public.

This conclusion is bolstered further by the expansive scope of who is able to sue under these statutes. In several states, the laws protect not only the grower of agricultural products, but the "entire chain from grower to consumer."<sup>55</sup> Potential plaintiffs include not only small, independent growers, but also shipping companies, distributors, and supermarkets. Other states protect "the person who grows or produces" perishable food products,<sup>56</sup> ambiguous language that likely could include, at a minimum, growers and those who process agricultural products into some final product for sale, such as a company that markets and sells canned or frozen fruits and vegetables. The broad scope of who in and around the agricultural industry may obtain damages suggests that it is their financial interests that are paramount, not the interests of the general public.

## 2. Elements of the Statutes

Aside from the governmental interests to be served by the laws, several elements of APD statutes influence the question of their constitutional validity. This Article will focus on three of these elements in turn.<sup>57</sup>

### a. *Fault*

Fault refers to the defendant's degree of awareness or culpability as to the falsehood of the particular factual assertions at issue.<sup>58</sup> In ordinary defamation cases, the Supreme Court has made clear that, at a minimum, states may not impose liability upon a defendant without some fault,<sup>59</sup> and some plaintiffs can recover only if the defendant knew her statements were false or if she recklessly disregarded the truth or falsity of the statements.<sup>60</sup> APD statutes run the gamut, from possible simple

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<sup>55</sup> GA. CODE ANN. § 2-16-2(3); *see also* ALA. CODE § 6-5-622 (1993) (granting cause of action to "[a]ny person who produces, markets, or sells a perishable product or commodity"); OHIO REV. CODE ANN. § 2307.81(B)(4) ("'Produce' means a person who grows, raises, produces, distributes, or sells a perishable agricultural or aquacultural food product.").

<sup>56</sup> *See, e.g.*, ARIZ. REV. STAT. § 3-113(E)(3) (1998).

<sup>57</sup> For detailed examinations of all the substantive elements of all the APD statutes that have been passed, *see* Bederman et al., *Banana*, *supra* note 6, at 145-49; Bederman, *Twilight*, *supra* note 1, at 195-201.

<sup>58</sup> *Cf.* *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979) (stating that liability is limited to instances where the requisite degree of culpability for falsehood is present).

<sup>59</sup> *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

<sup>60</sup> *See id.* at 342.

negligence,<sup>61</sup> to actual knowledge of falsehood,<sup>62</sup> to intent,<sup>63</sup> to an undefined standard that could be interpreted to mean strict liability or liability without fault.<sup>64</sup>

#### b. *Key Statutory Terms*

There are three key terms in these statutes: "disparagement;" "food products;" and "falsehood." The speech at issue must fall within these statutory definitions for a plaintiff to prevail; the broader the definitions, the more speech that becomes actionable, and the greater the potential First Amendment problems.

First, the statutes use similar language in defining the protected products: food, generally agricultural or aquacultural, "sold or distributed in a form that will perish or decay beyond marketability within a period of time."<sup>65</sup> Second, the definitions of disparagement are the same in both language and effect: "dissemination to the public in any manner of any false information that a perishable agricultural or aquacultural product is not safe for human consumption."<sup>66</sup>

Third, the statutes all define falsehood by reference to "reasonable and reliable scientific inquiry, facts, or data."<sup>67</sup> This aspect of the APD statutes most clearly

<sup>61</sup> See, e.g., LA. REV. STAT. ANN. § 4502(1) (West 1998) ("knows or should have known"); OHIO REV. CODE ANN. § 2307.81(C) (Anderson 1996) ("knew or should have known"); OKLA. STAT. tit. 2 § 3012 (1995) ("knows or should have known").

<sup>62</sup> See, e.g., MISS. CODE ANN. § 69-1-253(a) (1996); TEX. CIV. PRAC. & REM. CODE § 96.002(a)(2) (West 1996).

<sup>63</sup> See, e.g., ARIZ. REV. STAT. §§ 3-113(A), (B) (1998) (punishing "malicious public dissemination" and "intentional[ ] disseminat[ion]"); FLA. STAT. ch. 865.065(2)(a) (1994) ("willful or malicious dissemination"); GA. CODE ANN. § 2-16-2(1) (1997) ("willful or malicious dissemination"); IDAHO CODE § 6-2002(1)(c) (1998); S.D. CODIFIED LAWS § 20-10A-3 (Michie 1995) ("intent to harm").

<sup>64</sup> See ALA. CODE § 6-5-623 (1993); see also Bederman, *Twilight*, *supra* note 1, at 198 (suggesting that Alabama imposed strict liability).

<sup>65</sup> S.D. CODIFIED LAWS § 20-10A-1(1); see also ARIZ. REV. STAT. § 3-113(E)(2) ("reasonable period of time"); FLA. STAT. ch. 865.065(2)(b) (same); GA. CODE ANN. § 2-16-2(1) (same); LA. REV. STAT. ANN. § 4502(2) (same); OHIO REV. CODE ANN. § 2307.81(B)(3) (same); OKLA. STAT. tit. 2 § 3011(2) (same); TEX. CIV. PRAC. & REM. CODE § 96.001 ("limited period of time").

<sup>66</sup> OHIO REV. CODE ANN. § 2307.81(B)(1); see *id.* § 2307.81(B)(2) (requiring that speech must "directly indicate[ ]" that the product is not safe for human consumption); see also ALA. CODE § 6-5-621(1) ("[D]issemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption."); GA. CODE ANN. § 2-16-2(1) (same); S.D. CODIFIED LAWS § 20-10A-1(1) ("[D]issemination in any manner to the public of any information . . . that states or implies that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public.").

<sup>67</sup> ALA. CODE § 6-5-621(1); GA. CODE ANN. § 2-16-2(1); LA. REV. STAT. ANN. § 4502(1); TEX. CIV. PRAC. & REM. CODE § 96.003; see also OKLA. STAT. tit. 2 § 3012

reflects a legislative intent to undo the result of *Auvil*.<sup>68</sup> The court in *Auvil* stated that it was "not the function of the judiciary to grade the social or artistic merits of speech" and that the "skills which go with law and lawyering do not readily lend themselves to critiquing studies such as this in any event."<sup>69</sup> Yet that is precisely what the finder of fact must do to render a decision in an action under an APD statute—evaluate the NRDC report and conclusively determine its scientific merits. If a fact-finder decides that the NRDC report about the health effects of Alar was unreliable, or more problematically, less reliable than contrary evidence presented by the plaintiff in litigation, then the *60 Minutes* broadcast is deemed false and the broadcaster is liable for damages under the statute.<sup>70</sup>

Similarly, the statutes would appear to allow a plaintiff to prevail by convincing a jury that the scientific evidence was unreasonable if it relied only on animal testing or only on testing on adults, but not children. None of the statutes requires the plaintiff to provide affirmative scientific evidence to show the absence of a health risk; it apparently is sufficient to poke holes in the scientific evidence underlying the defendant's initial speech. The Ninth Circuit in *Auvil*, however, explicitly rejected this idea, holding instead that the growers could not prevail when they had not provided evidence that Alar did not pose a risk to children.<sup>71</sup>

### C. *Statutes in Action*

#### 1. Oprah's On: The First Case

Ironically, given the valid concern that these laws can and will be used to silence the weak, economically poor voices of individuals and not-for-profit advocacy groups,<sup>72</sup> the defendant in the first lawsuit brought under an APD statute was television talk-show host Oprah Winfrey, one of the richest, best-known, and most charismatic television personalities. Winfrey and her production company were sued under the Texas statute<sup>73</sup> along with Howard Lyman, a guest on her show who was

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("reliable scientific facts and scientific data").

<sup>68</sup> See Bederman et al., *Banana*, *supra* note 6, at 144 (arguing that APD statutes provide a tailor-made cause of action designed to give grower interests what had eluded them under the common law).

<sup>69</sup> *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 941, 942 (E.D. Wash. 1992) (second opinion dismissing several defendants from the lawsuit).

<sup>70</sup> See discussion *infra* notes 368-82 and accompanying text.

<sup>71</sup> See *Auvil v. CBS "60 Minutes"*, 67 F.3d 816, 821 (9th Cir. 1995); see also *supra* notes 39-45 and accompanying text.

<sup>72</sup> See Bederman et al., *Banana*, *supra* note 6, at 151.

<sup>73</sup> See TEX. CIV. PRAC. & REM. CODE §§ 96.001-.004 (West 1996).

a former cattle rancher turned vegetarian activist and who is a vocal critic of the beef and cattle industries and their practices.<sup>74</sup>

The lawsuit arose out of a show entitled "Dangerous Food," which included a segment on Bovine Spongiform Encephalopathy (BSE) or "Mad Cow Disease," a degenerative brain disease in cattle that had been linked to a particular, fatal human disorder.<sup>75</sup> Evidence suggested that Mad Cow Disease was caused by giving live cattle feed made from the carcasses of dead cows and that the disease was transferred to humans through the consumption of beef.<sup>76</sup> The matter became a public controversy with the announcement of an outbreak of the disease in cattle in Great Britain that led to the slaughter of millions of head of cattle in that country and to a prohibition on exports to other countries.<sup>77</sup> Winfrey's broadcast in April of 1996 was shown amid a flurry of American media stories and reports about Mad Cow Disease.<sup>78</sup> In the months before, during, and after the broadcast, there was a series of actions by various agencies of the federal government, including congressional hearings, a voluntary ban on the use of cattle feeds containing cattle parts announced by the USDA and the National Cattlemen's Beef Association (NCBA), an international conference to deal with the issue, and a proposed FDA rule banning the use of ruminant feed with ruminant animals.<sup>79</sup> Winfrey's broadcast included a segment considering whether an outbreak of the disease could occur in the United States; it featured, among others, Lyman, a representative of the USDA, a representative of the NCBA, and a neurologist. The final, edited piece that aired, however, focused more on Lyman's comments and less on what the other guests said.<sup>80</sup>

Lyman's comments on the show reflected his general belief that there was a common practice in the American beef industry of giving ruminant feed to ruminant animals, that much of that feed is made from cows who have died suddenly, and that even one cow with Mad Cow Disease fed to other animals could potentially infect

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<sup>74</sup> See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 861 (N.D. Tex. 1998). See generally HOWARD LYMAN, MAD COWBOY (1997).

<sup>75</sup> See *Texas Beef Group*, 11 F. Supp. 2d at 860-61.

<sup>76</sup> See *id.* at 860. The formal term for such a practice was giving ruminant feed to ruminants. See *id.* Ruminants are animals with split hooves and multiple stomachs and which chew cud, such as cows. See *id.*

<sup>77</sup> See *id.* at 860-61.

<sup>78</sup> See *id.* at 861.

<sup>79</sup> See *id.* at 860-61; *id.* at 865-66 (Appendix A) (narrative of stipulated facts, describing various government activities regarding mad cow disease). The final rule banning ruminant-to-ruminant feed became effective in August 1997. See *id.* at 866 (Appendix A).

<sup>80</sup> See *id.* at 861; Isern, *supra* note 9, at 245-46. One of the plaintiffs' attorneys in the case suggested that producers intentionally edited the show to present only one uncontradicted side of the issue even though the truth was at their fingertips. See Isern, *supra* note 9, at 257; see also *Texas Beef Group*, 11 F. Supp. 2d at 861.

thousands of people.<sup>81</sup> That was a risk Lyman said he was unwilling to take and he asked why the United States would not follow the English lead and cease “feeding cows to cows.”<sup>82</sup> Counter-speech presented in the final broadcast included statements by a representative of the NCBA that “[w]e’re doing everything we need to do” to keep this from happening and that, “based on science,” there was no Mad Cow Disease in the United States.<sup>83</sup> He acknowledged, however, that there was a “limited amount” of feeding cattle to cattle.<sup>84</sup> A Department of Agriculture representative added, “I think it’s an issue that we need to be on top of at all times, but there’s no evidence at all that we have this [disease] in the United States.”<sup>85</sup>

One focus of the lawsuit was the following exchange between Winfrey and Lyman:

**Winfrey:** You said this disease could make AIDS look like the common cold?

**Mr. Lyman:** Absolutely.

**Winfrey:** That’s an extreme statement, you know.

**Mr. Lyman:** Absolutely. And what we’re looking at right now is we’re following exactly the same path that they followed in England: ten years of dealing with it as public relations rather than doing something substantial about it.<sup>86</sup>

Later, in the most oft-repeated statement from the broadcast, Winfrey said, “It has just stopped me cold from eating another burger. I’m stopped.”<sup>87</sup>

The lawsuit followed several months later, claiming that Lyman was a lobbyist with an agenda and that Winfrey and her producers had edited out information that would have calmed the hysteria caused by Lyman’s comments.<sup>88</sup> It is important to note that the broadcast never mentioned the State of Texas or any other state, never mentioned any of the individual plaintiffs, and never mentioned any specific

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<sup>81</sup> See *Texas Beef Group*, 11 F. Supp. 2d at 861; *id.* at 869 (Appendix B) (transcript of *Oprah* broadcast) (statement of Howard Lyman) (“14 percent of all cows by volume are ground up, turned into feed and fed back to other animals.”). Lyman claimed that he based his statements on USDA statistics, “not something we’re making up.” *Id.* (Appendix B) (statement of Howard Lyman).

<sup>82</sup> *Id.* at 870-71 (Appendix B) (statement of Lyman).

<sup>83</sup> *Id.* at 870 (Appendix B) (statements of Dr. Gary Weber of the NCBA).

<sup>84</sup> *Id.* (Appendix B) (statement of Dr. Weber).

<sup>85</sup> *Id.* (Appendix B) (statement of Dr. William Hueston of the USDA).

<sup>86</sup> *Id.* at 869 (Appendix B).

<sup>87</sup> *Id.* at 869 (Appendix B) (statement of Oprah Winfrey); see also Isern, *supra* note 9, at 244-45 (pointing to approximately eight actionable statements or exchanges made during the broadcast).

<sup>88</sup> See *Texas Beef Group*, 11 F. Supp. 2d at 862.

operations, practices, or products of a particular individual or company.<sup>89</sup> This was, in other words, precisely the type of speech that would not have been actionable under common law principles but became actionable under an APD statute.

The case went to trial in the United States District Court for the Northern District of Texas in Amarillo; at the close of the plaintiffs' case, the judge granted the defendants judgment as a matter of law on the APD claim.<sup>90</sup> The district court first held that the speech in question dealt with a matter of public concern, stating:

"[T]he issue of whether the feeding practices of American cattlemen . . . contributed to a danger that BSE . . . could occur in the United States, cannot be considered as anything other than a matter of legitimate public concern. It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat."<sup>91</sup>

The court granted judgment on two grounds relating to the scope and meaning of the statutory language. First, live cattle were not perishable products as defined under the statute because they would not perish or decay beyond marketability.<sup>92</sup> Second, the court held that the Texas law imposed a requirement that a defendant "knew" the speech was false, but there was "no evidence by which a reasonable juror could conclude that the Defendants had actual knowledge of the falsity, if any, of the statements made."<sup>93</sup> The case went to the jury only on the business disparagement claim; the jury returned a verdict in favor of Winfrey and the other defendants, finding that "none of [them] published a false, disparaging statement that was 'of and concerning' the plaintiffs' cattle."<sup>94</sup>

Because of Winfrey's presence as a defendant, this case received national media coverage and extraordinary publicity.<sup>95</sup> She turned the trial into a high-profile spectacle and a public relations bonanza, during which she taped her nationally

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<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at 858.

<sup>91</sup> *See id.* at 862.

<sup>92</sup> *See id.* at 863 (holding that cattle still are marketable although they may be less profitable). *But see* Isern, *supra* note 9, at 251 (discussing the legislative history of the Texas law and arguing that it was intended to apply to agricultural products before they were harvested as well as after harvest, which would include live cattle). For purposes of constitutional analysis, this Article will proceed as if Mr. Isern is correct and the statute was intended to protect cattle.

<sup>93</sup> *Texas Beef Group*, 11 F. Supp. 2d at 863; *see also* Isern, *supra* note 9, at 255 (noting that the statute went beyond the strictest First Amendment standards in imposing an actual knowledge requirement).

<sup>94</sup> Isern, *supra* note 9, at 248-49.

<sup>95</sup> *See* Bederman, *Twilight*, *supra* note 1, at 223.



syndicated talk show in front of large audiences in Amarillo and responded to large, supportive crowds as she entered and left the courthouse every day.<sup>96</sup> Winfrey cast herself as a sympathetic character and added to the luster of her celebrity.<sup>97</sup> The case also provided fodder for late-night talk shows.<sup>98</sup> Winfrey did not cast herself, however, as a free speech martyr during the trial and the case never developed into a test of the constitutionality of these laws. The First Amendment, however, was not entirely forgotten. Emerging from the courthouse following the jury verdict in her favor, Winfrey declared that “free speech not only lives, it rocks!”<sup>99</sup> There is no word on whether she was seen dancing in the streets.<sup>100</sup> As a doctrinal matter, the constitutional question remains open and the case cannot be regarded as a victory for free speech.<sup>101</sup>

## 2. Additional Constitutional Questions

A second lawsuit was brought by a group of emu ranchers against Honda Motor Company arising from a television commercial for the Honda Civic.<sup>102</sup> In the ad, a young man named Joe drives his Civic to meet with several fictional, somewhat dubious, potential employers about career opportunities in such fields as aluminum siding sales, owning a hot dog stand in the middle of nowhere, and selling plastics, which “last forever.”<sup>103</sup> He then talks with a real estate developer, who tells him “Joe,

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<sup>96</sup> See Verhovek, *supra* note 1, at A10; see also Roeper, *supra* note 4, at 31A.

<sup>97</sup> See Verhovek, *supra* note 1, at A10 (describing Winfrey taping a week of her program at Amarillo’s Little Theater); see also Roeper, *supra* note 4, at 31A (describing Winfrey’s activities, including dancing with actor Patrick Swayze, being serenaded by singer Clint Black, and trying on a 13-carat diamond supplied by a Texas oilman).

<sup>98</sup> Consider the following from Jay Leno: “Can you imagine how stupid we would look to the rest of the world if we let O.J. [Simpson] and Louise Woodward go free but threw Oprah in jail for insulting a cheeseburger?” *The Tonight Show* (NBC television broadcast, 1998), reprinted in “Laugh Lines Punch Lines”, L.A. TIMES, Mar. 3, 1998, at E3.

<sup>99</sup> Verhovek, *supra* note 1, at A10 (quoting Oprah Winfrey).

<sup>100</sup> See Kalven, *Central Meaning*, *supra* note 3, at 221 n.125 (describing the reaction of Alexander Meiklejohn, who called the *New York Times* decision “an occasion for dancing in the streets”).

<sup>101</sup> See Bederman, *Twilight*, *supra* note 1, at 222 (noting that Winfrey’s case was not decided on any question of constitutional principle); Stephen Durchslag, *Limitations on Commercial Speech: Emu Ranchers v. American Honda Corporation*, 10 DEPAUL BUS. L.J. 179, 181 (1998) (arguing that the judge in the Winfrey case upheld the constitutionality of the Texas statute without explanation, making this a still-undeveloped area of law). But see Isern, *supra* note 9, at 256-57 (arguing that the Texas statute withstood constitutional scrutiny as well as enormous publicity).

<sup>102</sup> See Durchslag, *supra* note 101, at 179 (discussing the lawsuit by emu ranchers against Honda).

<sup>103</sup> Bederman, *Twilight*, *supra* note 1, at 224; Durchslag, *supra* note 101, at 179.

let's not call it a pyramid scheme."<sup>104</sup> Just after that, Joe goes to an emu ranch, where he and the rancher observe a pen of grazing emus and the rancher says, "Emu, Joe, it's the pork of the future."<sup>105</sup>

A group of ranchers brought suit, also in the Northern District of Texas,<sup>106</sup> under the Texas statute. This case presents an additional issue not present in *Texas Beef Group*, in that the commercial was plainly intended to be humorous and satirical and not a serious statement about emu ranching. The Supreme Court has made clear that parody, farce, satire, and other humor is entitled to full constitutional protection.<sup>107</sup> This case illustrates how an APD statute could be used to subject a speaker to a lawsuit and a possible award of damages for such humor or parody, a result that makes these statutes constitutionally suspect as applied.<sup>108</sup>

Following the *Texas Beef Group* verdict, one lawyer suggested that her victory was not a First Amendment victory because APD statutes remain on the books and, as the emu case shows, live to be used again.<sup>109</sup> No court has taken a hard look at the myriad of First Amendment problems inherent in these laws. This Article will take that hard look.

## II. FREEDOM OF SPEECH: THREE CATEGORIES OF RESTRICTIONS, TWO LINES OF PROTECTION

The First Amendment right to free expression is triggered in three distinct ways by three distinct types of restriction. Category One, by far the most common restriction, consists of laws or executive actions that impose civil, criminal, or administrative penalties on individuals for their expressive actions. Free speech protections are utilized either in affirmative efforts by would-be speakers to enjoin the enforcement or use of such laws<sup>110</sup> or as defenses in criminal, civil, or administrative

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<sup>104</sup> Bederman, *Twilight*, *supra* note 1, at 224.

<sup>105</sup> *Id.*; Durchslag, *supra* note 101, at 179. The emu rancher in the commercial is a toothless, old man who is an actual emu rancher. See Bederman, *Twilight*, *supra* note 1, at 224; Durchslag, *supra* note 101, at 180.

<sup>106</sup> Professor Bederman called that district the "veggie libel litigation center of the nation." Bederman, *Twilight*, *supra* note 1, at 224-25.

<sup>107</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46, 53-54 (1988); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974).

<sup>108</sup> See discussion *infra* notes 357-67 and accompanying text.

<sup>109</sup> See Verhovek, *supra* note 1, at A10 (quoting Ronald Collins, director of the food-libel law project of the Center for Science in the Public Interest, a non-profit national consumer group).

<sup>110</sup> See, e.g., *Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636, 639-40 (1999) (enjoining enforcement of state regulations of initiative-petition process); *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (enjoining enforcement of federal law criminalizing the dissemination of indecent material on the Internet); *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (enjoining enforcement of city ordinance prohibiting the display of political

actions brought under those laws against speakers by the government.<sup>111</sup> These protections take the form of various fundamental free speech principles, including, for our purposes: (1) a prohibition on content discrimination (i.e., restrictions or burdens upon speech based upon the substantive content of the speech at issue or the message it conveys);<sup>112</sup> (2) a recognition that the First Amendment affords the broadest protection to political expression in order to assure that the interchange of political and social ideas remains unfettered<sup>113</sup> and that any limitations on such political expression will be subject to exacting judicial scrutiny;<sup>114</sup> (3) a prohibition against the government declaring substantive truth and restricting the speech it deems false;<sup>115</sup> and (4) an acknowledgment that the governmental response to speech it does not like is counter-speech, not enforced silence.<sup>116</sup> Courts apply these principles in judicial review, in which restrictions on speech are subject to exacting scrutiny and must be narrowly tailored to serve a compelling or substantial governmental interest, a standard that often results in the invalidation of such statutes.<sup>117</sup>

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signs on private residential property).

<sup>111</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (reversing criminal conviction for burning a cross under law prohibiting hate speech); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (reversing a conviction under a statute that criminalized burning an American flag as a form of protest); *FCC v. Pacifica Found.*, 438 U.S. 726, 742 (1978) (addressing, but rejecting, a First Amendment challenge to an administrative warning imposed on a radio broadcaster for an indecent broadcast); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (reversing a conviction under a law requiring individuals to display the state motto on their license plates); *Cohen v. California*, 403 U.S. 15, 16-17 (1971) (reversing a conviction for disturbing the peace against an individual for wearing a jacket with the message, "Fuck the Draft").

<sup>112</sup> See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991); see also *infra* notes 255-321 and accompanying text.

<sup>113</sup> See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam)); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255; see also *infra* notes 322-41 and accompanying text.

<sup>114</sup> See *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

<sup>115</sup> See Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY BILL RTS. J. 507, 546-47 (1995) [hereinafter Curtis, *Monkey Trials*]; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 5 (1995); see also *infra* notes 342-90 and accompanying text.

<sup>116</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also *infra* notes 391-413 and accompanying text.

<sup>117</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 879 (1997); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (stating the standard for regulations based on the content of speech); Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1528-29 (1995) (describing the various formulations of the strict scrutiny standard); see also MARTIN H. REDISH, *FREEDOM OF*

Category Two consists of restrictions in which the government restrains or burdens the speech of a specific individual or organization prior to its dissemination, such as through court injunctions or through licensing schemes in which a speaker must obtain a permit prior to being able to exercise his or her right to speak.<sup>118</sup> Such a prior restraint “bear[s] a heavy presumption against its constitutional validity”<sup>119</sup> and in some views, requires “governmental allegation[s] and proof that publication must inevitably, directly, and immediately cause the occurrence of an event” such as endangerment of troops.<sup>120</sup> Such licensing laws also may not confer boundless discretion on the executive officials assigned to issue the licenses.<sup>121</sup>

Category Three, which is central to this Article, is comprised of private civil tort actions for damages, in which the alleged harm to an individual private plaintiff has been caused by a defendant’s expressive actions. The government generally is not a party to the case. Rather, the case is brought against a speaker by a private party under a statutory or common law right created and maintained by the three branches of government.<sup>122</sup> Category Three is a fairly recent constitutional development, traceable to *New York Times Co. v. Sullivan*, in which the Supreme Court, for the first time, recognized that the fear of damage awards in a private civil action was as inhibiting of free expression as the fear of direct governmental prosecution under a

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EXPRESSION: A CRITICAL ANALYSIS 118-19 (1984) (arguing that the standard is effectively incapable of compliance and results in most laws being struck down as free speech violations).

<sup>118</sup> See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992) (striking down a county ordinance that gave an administrator unbridled discretion in determining the amount of fees to be charged for parade permits); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (reversing a lower-court injunction prohibiting a newspaper from publishing the Pentagon Papers); *Near v. Minnesota*, 283 U.S. 697, 722-23 (1931) (striking down a state law permitting the injunction of scandal-mongering newspapers).

<sup>119</sup> *New York Times*, 403 U.S. at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

<sup>120</sup> *New York Times*, 403 U.S. at 726-27 (Brennan, J., concurring).

<sup>121</sup> See *Forsyth County*, 505 U.S. at 132-33 (stating that the First Amendment requires “narrowly drawn, reasonable and definite standards” . . . guiding the hand of the . . . administrator” (citation omitted)).

<sup>122</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (holding that the exercise of state power in providing a private cause of action against speech implicates the First Amendment); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 225 & n.50 (1987) (arguing that the state action in such cases “arise[s] from judicial interpretation and application of substantive and procedural rules and the enforcement of judgments”).

criminal statute.<sup>123</sup> The Court in *New York Times* thus "switched the orbit of libel law from far out frozen darkness to the sunny warmth of the first amendment."<sup>124</sup>

Category Three restrictions are subject to two distinct lines of First Amendment protections. The first line of protection is a mixture of substantive and procedural rules that must attach to and be applied in the litigation of these actions. The private causes of action (and the laws that provide them) exist, but the manner in which the cases are litigated—the manner in which legal and factual questions are resolved—is restricted in certain ways so as to protect and preserve free speech interests.<sup>125</sup> *New York Times* established the first of these requirements in defamation cases<sup>126</sup> and the Court has added to these protections<sup>127</sup> and extended them to other tort actions over the last thirty-plus years.<sup>128</sup> The second line of protection invokes those same

<sup>123</sup> See *New York Times*, 376 U.S. at 277; *id.* at 300 (Goldberg, J., concurring in the result) (warning of the chilling effect of civil damages on free speech); Kalven, *Central Meaning*, *supra* note 3, at 203 (describing the Court's concern with the inhibiting effects of tort damages on free speech).

<sup>124</sup> William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution"*, 25 WM. & MARY L. REV. 793, 793 (1984); see also Kalven, *Central Meaning*, *supra* note 3, at 191 (describing *New York Times* as a rare instance of measuring the common law of defamation by constitutional standards); LeBel, *supra* note 54, at 779 (arguing that "first amendment considerations dominated ground previously occupied by the tort law of defamation").

<sup>125</sup> See Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 291 (1990) (describing the decline of the "strong conceptual separation between matters of procedure and substantive law in the development of the constitutionalization" of tort law); Matheson, *supra* note 122, at 221 (arguing that the Court sought to protect the First Amendment and defamation defendants through a mixture of substantive law and special procedures); see also *infra* notes 132-252 and accompanying text.

<sup>126</sup> See *New York Times*, 376 U.S. at 279-80 (holding that public officials only may recover damages for defamation if they prove that statements at issue were false and made with "actual malice"); *id.* at 285-86 (requiring that this be proven by clear and convincing evidence); *id.* at 284-85 (holding that the Court should conduct an independent review of the record to determine whether actual malice was proven).

<sup>127</sup> See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (holding that a plaintiff bears the burden of proving falsity and fault where speech is on a matter of public concern); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 514 (holding that an appellate court must conduct an independent review of the record to determine actual malice where a judge made findings); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163 (1967) (separate opinion of Warren, C.J.) (applying an actual malice standard to public figures as well as to public officials).

<sup>128</sup> See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress); *Bose Corp.*, 466 U.S. at 487 (product disparagement); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 474 (1975) (public disclosure of private embarrassing facts); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (false light invasion of privacy); see also *infra* notes 140-49 and accompanying text.

fundamental principles that protect free speech against Category One restrictions. Category Three restrictions must conform to those principles and, in many cases, these principles require the conclusion that a Category Three restriction is *per se* unconstitutional, aside from how the case would be litigated.<sup>129</sup>

The presence of two lines of free speech protection in Category Three is justified by the nature of Category Three restrictions. On one hand, these restrictions involve private civil litigation; thus free speech protection must in part take the form of constitutional controls and limits on the litigation process itself, apart from any substantive concerns.<sup>130</sup> At the same time, Category Three restrictions are, at bottom, limitations on the right to free speech and thus are subject to the limitations of the same fundamental substantive free speech principles that attach to Category One restrictions.<sup>131</sup>

APD statutes plainly are Category Three restrictions on speech in that the statutes provide private causes of action to non-governmental private plaintiffs for damages against speakers for their speech, with the resulting chilling effect on free speech that triggers the protections of the First Amendment. The statutes therefore are subject to the two distinct lines of free speech protections; this Article will argue that these laws violate both lines of defense. First, APD statutes are invalid as written because they lack the first line of protection, the substantive and procedural rules that attach to the litigation process and limit the threat the process itself poses to free speech. The statutes also are rendered invalid by the second line of protection, because the basic concept of APD statutes is inconsistent with the fundamental principles of free expression that form this second line of defense. Thus, even if the statutes somehow were redrafted to include the litigation protections, the underlying principle of APD statutes suffers from unresolvable constitutional infirmities.

### III. FIRST LINE OF PROTECTION: FIRST AMENDMENT AND PRIVATE TORT ACTIONS

The first line of free speech protection against Category Three restrictions arises from the limitations that *New York Times v. Sullivan*<sup>132</sup> and its progeny impose on private tort damage actions. Underlying the imposition of constitutional requirements on tort law and the recognition of Category Three restrictions was the Supreme Court's understanding that the threat to free expression posed by a private tort

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<sup>129</sup> See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 539-41 (1989) (applying strict scrutiny and striking down as a content-based restriction a state law creating a cause of action for invasion of privacy); see also *supra* notes 110-17 and accompanying text.

<sup>130</sup> See Halpern, *supra* note 125, at 293 (arguing that the logical place for protection against restrictions on speech from civil actions was in the procedural aspects of the litigation process); see also *infra* notes 132-252 and accompanying text.

<sup>131</sup> See *infra* notes 253-444 and accompanying text.

<sup>132</sup> 376 U.S. 254 (1964).

lawsuit for damages was as grave as the threat posed by direct criminal prosecution.<sup>133</sup> Such awards, or the threat of such awards, impose a chilling effect on speech.<sup>134</sup>

The first line of protection consists of a mixture of substantive law and special procedural protections designed to preserve the free speech rights of civil defendants.<sup>135</sup> The hybrid nature of these protections makes sense. The state action in Category Three arises from executive, legislative, and judicial creation and enforcement of substantive and procedural laws and rules that can be used by private parties in civil litigation against individuals for their expressive activities.<sup>136</sup> The primary danger to free speech in all Category Three cases is the cost of litigation itself and the risk of error therein, in which a verdict in favor of the plaintiff produces a greater cost to the value of free expression than a similar error in favor of the defendant.<sup>137</sup> In this situation, "substance and procedure are inexorably entwined."<sup>138</sup> A stringent substantive requirement alone may not be sufficient to protect First Amendment values; instead, it must be supplemented by procedures that will reduce the risk of error in the litigation process or give the First Amendment the benefit of any errors in that process.<sup>139</sup> Thus, the first and primary line of protection against

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<sup>133</sup> See *id.* at 277 ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."); Kalven, *Central Meaning*, *supra* note 3, at 203 (describing the Court's concern with the "inhibiting" effect of tort damages on free speech); see also *Rosenblatt v. Baer*, 383 U.S. 75, 95 (1966) (Black, J., joined by Douglas, J., concurring and dissenting) ("To be faithful to the First Amendment's guarantees, this Court should free private critics of public agents from fear of libel judgments for money just as it has freed critics from fear of pains and penalties inflicted by government.").

<sup>134</sup> See *New York Times*, 376 U.S. at 278 (warning of the "pall of fear and timidity imposed upon those who would give voice to public criticism"); *id.* at 300 (Goldberg, J., concurring in the result); Kalven, *Central Meaning*, *supra* note 3, at 203 (describing damage awards as "impos[ing] a kind of 'self-censorship' on speakers in the public forum").

<sup>135</sup> See Halpern, *supra* note 125, at 291 (describing the decline of the "strong conceptual separation between matters of procedure and substantive law in the development of the constitutionalization" of tort law); Matheson, *supra* note 122, at 226 (arguing for the need to "embrace procedures that secure and enforce these constitutional values").

<sup>136</sup> See Matheson, *supra* note 122, at 225 (noting that the state action in defamation cases "arise[s] from judicial interpretation and application of substantive and procedural rules and the enforcement of judgments"); see also *New York Times*, 376 U.S. at 265 ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

<sup>137</sup> See Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 864-65 (1984); see also *New York Times*, 376 U.S. at 279 (noting the deterring effect on a would-be speaker because of doubt about his ability to prove the truth of his statement and the cost of doing so).

<sup>138</sup> Matheson, *supra* note 122, at 232.

<sup>139</sup> See Halpern, *supra* note 125, at 293 ("[T]he logical place for the common law to give

Category Three restrictions involves constitutional limitations on the civil litigation process itself and on the manner in which the relevant legal and factual issues are addressed and answered in the course of that litigation.

A preliminary question is whether the special substantive and procedural protections established for defamation by *New York Times* must apply to APD statutes. This is a question that must be answered in the affirmative. These laws are basic, albeit statutory rather than common law, examples of Category Three restrictions on speech. APD statutes create private causes of action sounding in tort, in which the alleged damages result from an individual's expressive activity.<sup>140</sup> The threat of civil liability and damages under these statutes chills and inhibits the exercise of free expression exactly as does common law defamation and imposes the same "pall of fear and timidity" on those who "would give voice to public criticism."<sup>141</sup> APD statutes create the identical threat to free expression and thus must be subject to the same constitutional limitations that apply to defamation and other common law tort actions to which the Supreme Court has extended these or similar protections.<sup>142</sup>

Especially noteworthy is the Court's extension of *New York Times* to the tort of intentional infliction of emotional distress.<sup>143</sup> The Court in *Hustler* was very conscious of the fact that it confronted a unique application of Category Three protections.<sup>144</sup> The plaintiff argued that truth or falsity was constitutionally irrelevant in an intentional infliction case, which focused instead on whether the speech was intended to injure the plaintiff and whether the plaintiff had suffered emotional harm as a result of some outrageous speech, regardless of falsity.<sup>145</sup> In rejecting this view, the Court actually altered the substantive requirements of the tort of intentional infliction by placing on public figures and public officials the additional burden of showing that a particular publication contained a false statement of fact made with actual malice. By contrast, application of *New York Times* standards to APD statutes would not require any such alteration of the substantive law itself. These statutes,

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way to first amendment considerations" is procedural, "rather than the substantive essence of the tort."); Kalven, *Central Meaning*, *supra* note 3, at 212 (suggesting that the Court in *New York Times* sought to protect speakers from the risk of failures of proof in litigation); Matheson, *supra* note 122, at 226 ("[T]he first amendment has been an especially potent source of special constitutional procedure.").

<sup>140</sup> See discussion *supra* notes 122-24 and accompanying text.

<sup>141</sup> *New York Times*, 376 U.S. at 277-78.

<sup>142</sup> See cases cited *supra* note 128; see also *supra* notes 125-32 and accompanying text.

<sup>143</sup> See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

<sup>144</sup> See *id.* (insisting that this case was not merely a "blind application" of *New York Times*). But see *id.* at 57 (White, J., concurring in the judgment) (arguing that *New York Times* "has little to do with this case").

<sup>145</sup> See *id.* at 52; *id.* at 53 ("It is the intent to cause injury that is the gravamen of the tort.").



like ordinary defamation, necessarily focus on the truth or falsity of the speech at issue.<sup>146</sup> Thus, the application of these protections to APD statutes is more obvious and more substantively consistent than was their application to intentional infliction in *Hustler*.

Second, the plaintiff in *Hustler* brought claims for both defamation and intentional infliction; the jury rejected the former but awarded damages on the latter.<sup>147</sup> The extension of constitutional protections to the intentional infliction claim thus was necessary to prevent intentional infliction from becoming an end-run for public figures around the heightened constitutional requirements of defamation. However, APD statutes are, per se, an end-run around ordinary tort principles; they were created precisely to supplant the ordinary product disparagement laws that had not permitted the apple growers to recover damages against CBS in *Auvil*.<sup>148</sup> If *New York Times* protections somehow did not attach to APD statutes, an apple grower or beef producer certainly would sue under an available APD statute rather than under defamation or ordinary product disparagement. Thus, as in *Hustler*, the First Amendment demands that these substantive and procedural protections extend to the newly created laws in order to prevent tort shopping and to ensure the continued vitality of free speech principles. It is *New York Times* as we have come to understand it, not *New York Times* limited to its facts, that provides the basis for questioning the constitutionality of APD statutes imposing civil liability for scientifically false statements about an agricultural product generally.<sup>149</sup> This Subpart focuses on three key substantive and procedural protections, considering their theoretical bases and their application to APD statutes.

#### A. Actual Malice Rule

The primary substantive protection is derived directly from *New York Times*, which provided the “federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>150</sup> In other words, it must be a conscious falsehood.

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<sup>146</sup> See Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 274-75 (1978) [hereinafter Schauer, *Language*] (“[T]he determination of truth or falsity in matters of fact now marks the interface between speech that is constitutionally protected and speech that is not.”).

<sup>147</sup> See *Hustler*, 485 U.S. at 49.

<sup>148</sup> See Bederman et al., *Banana*, *supra* note 6, at 144 (arguing that APD statutes provide a “tailor-made cause of action” to supplant the common law that had proven unavailing to apple growers); *supra* notes 46-47 and accompanying text.

<sup>149</sup> See Halpern, *supra* note 125, at 275.

<sup>150</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

The actual malice rule is designed to prevent defamation lawsuits from being used to limit public discussion of public affairs and public officials.<sup>151</sup> The plaintiff in *New York Times* was the elected police commissioner of Montgomery, Alabama, and the speech at issue was an editorial advertisement that described the alleged conduct of Montgomery police in attempting to control and restrict the activities of students and activists in the civil rights movement.<sup>152</sup> The Alabama defamation law appeared to have been used to punish the newspaper for its support of the civil rights movement through speech about a public issue with which the government and a majority of the local populace did not agree.<sup>153</sup> The Court sought a rule that would ensure that "debate on public issues should be uninhibited, robust, and wide-open."<sup>154</sup> *New York Times* was, silently, an incorporation of Alexander Meiklejohn's free speech theories that "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents."<sup>155</sup> Writing three years prior to *New York Times*, Meiklejohn wrote:

If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good if a citizen attacks, by words of disapproval and condemnation, the policies of the government, or even the structure of the Constitution.<sup>156</sup>

The first line of protection imposed on Category Three restrictions is a product of the Meiklejohn theory that the First Amendment is a tool of democratic self-government, protecting those thoughts and communications by which the people govern and that influence the way they understand, pass judgment upon, and implement decisions relating to governance.<sup>157</sup>

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<sup>151</sup> See *id.* at 282 (viewing the new rule as protection for the "citizen-critic"); see also Kalven, *Central Meaning*, *supra* note 3, at 220 (arguing that the Court was trying to eliminate a rule that could limit criticism on public affairs); Matheson, *supra* note 122, at 238 (describing the Court's concern that "fear of litigation costs . . . 'must inevitably cause publishers to steer . . . wider of the unlawful zone . . . and thus creates the danger that legitimate utterances will be penalized'").

<sup>152</sup> See *New York Times*, 376 U.S. at 256-59.

<sup>153</sup> See Kalven, *Central Meaning*, *supra* note 3, at 200.

<sup>154</sup> *New York Times*, 376 U.S. at 270.

<sup>155</sup> Meiklejohn, *supra* note 113, at 257; see also Kalven, *Central Meaning*, *supra* note 3, at 209 & n.76 (arguing that the Court incorporated Meiklejohn's democratic thesis).

<sup>156</sup> Meiklejohn, *supra* note 113, at 259.

<sup>157</sup> See *id.* at 255; see also *id.* at 256-57 (listing four categories of speech that are protected because they relate to a citizen's ability to cast a ballot).

The Court had, in fact, created a rule of general applicability that was not so limited, but that easily could be shifted in focus from public official to public position to public interest or concern generally; this was a move the Court made slowly. A split majority of the Court first expanded the actual malice rule to public figure plaintiffs, individuals who, although not holding public office, are "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."<sup>158</sup> Chief Justice Warren emphasized the blurring of distinctions between government and the private sector and the blending of positions and power to create powerful individuals who do not necessarily hold public office.<sup>159</sup>

A later extension brought the actual malice rule into all situations in which statements concerned issues of public or general interest.<sup>160</sup> In Justice Brennan's view, "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."<sup>161</sup> It was a natural and short extension from public official to public position to public interests or concerns.<sup>162</sup> It also was a completely consistent extension of the Meiklejohnian origins of free speech protections in Category Three cases. If, as Meiklejohn argued, the focus of the First Amendment is on the "public issues" which citizens must judge, then it truly is irrelevant whether the person involved with a public issue is famous or anonymous.<sup>163</sup> The question of whether some speech should be constitutionally protected and not subject to damage awards logically should turn on the nature and context of the speech itself.

This logical extension, however, was short-lived. Instead, the Court adopted a tort-based standard that focused on the nature of the person bringing the defamation action rather than the nature and context of the speech.<sup>164</sup> The Court drew a distinction between public and private figures, holding that, while it was established that the actual malice standard applies where the plaintiff is a public official or public

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<sup>158</sup> *Curtis Publ'g Co. v. Butts*, *Associated Press v. Walker*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result). Four justices concurred in the relevant portions of the Chief Justice's opinion. *See id.* at 170 (Black, J., joined by Douglas, J., concurring in the result in *Walker* and dissenting in *Butts*); *id.* at 172 (Brennan, J., joined by White, J., concurring in the result in *Walker* and dissenting in *Butts*); *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974) (accepting this extension of *New York Times* as settled law).

<sup>159</sup> *See Butts*, 388 U.S. at 163-64 (Warren, C.J., concurring in the result).

<sup>160</sup> *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (plurality opinion of Brennan, J., joined by Warren, C.J., and Blackmun, J.).

<sup>161</sup> *Id.* at 43 (plurality opinion of Brennan, J.).

<sup>162</sup> *See Halpern*, *supra* note 125, at 287 (describing the "slight shift in focus" from public position to public interest).

<sup>163</sup> *See Rosenbloom*, 403 U.S. at 44.

<sup>164</sup> *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); Halpern, *supra* note 125, at 282-83.

figure,<sup>165</sup> states could set a lower standard where the plaintiff is a private individual, even as low as negligence as to the truth or falsity of the statements.<sup>166</sup> This distinction was based on the greater ability of public officials and figures to exercise "self-help" in counteracting falsehoods or correcting errors through their greater access to effective channels of communication.<sup>167</sup> That ability to respond and to challenge criticism and false statements through counter-speech means public figures need less recourse to the civil justice system—with the corresponding chill on free speech—in order to protect their reputational interests. Speech critical of public figures receives greater protection;<sup>168</sup> thus, those public figures face a greater hurdle to civil recovery that would chill such speech.

Given the establishment and extension of the actual malice requirement, the next question is whether the First Amendment commands that the requirement should attach to APD statutes and their application in particular cases. The answer is generally yes, based upon either of two approaches.

As a normative matter, the better approach would be to return to *Rosenbloom* and require actual malice in all cases under APD statutes that touch on a matter of public concern, which is to say, virtually all cases under APD statutes. Indeed, it would be difficult to imagine a situation in which comments or statements about the safety of food products and the health of the public consuming those products would not constitute speech of public interest or concern.<sup>169</sup> Food safety is an issue that strikes at the heart of the individual's ability to make the smallest life-affecting decisions and choices. The public unquestionably has an interest in receiving publications, ideas, information, and opinions from the NRDC, Ralph Nader, the Public Interest Research Group, or Upton Sinclair (and the media reports about those publications) and materials that describe and expose potential conditions, hazards, and dangers affecting the safety of the products that the public purchases and consumes.<sup>170</sup>

APD statutes may be the vehicle through which to return to a more constitutional focus in applying the actual malice rule to Category Three restrictions. As already

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<sup>165</sup> See *Gertz*, 418 U.S. at 343 ("We think that these decisions are correct.").

<sup>166</sup> See *id.* at 345-46.

<sup>167</sup> See *id.* at 344. But see *id.* at 344 n.9 ("Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehoods.").

<sup>168</sup> See Meiklejohn, *supra* note 113, at 259.

<sup>169</sup> See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Texas 1998) ("It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat."); *Bederman et al., Banana*, *supra* note 6, at 151 ("Food safety is a matter of grave public concern.").

<sup>170</sup> Obviously, the public also needs information, ideas, and opinions from producers, growers, the food industries, and others on the opposite side of the debate. However, their speech is not threatened by these statutes, thus it is beyond this point. See *infra* notes 267-76 and accompanying text.

noted, the constitutional rule of *Rosenbloom* is the more natural extension of the Meiklejohnian theories underlying *New York Times* in that it determines the constitutionality of expression by looking to the nature and context of that expression, rather than the nature of the plaintiff.<sup>171</sup> Further, the issue of whether speech is on a matter of public or general concern has not dropped entirely out of the doctrinal equation. Even private-figure plaintiffs bear the burden of proving that speech on a matter of public concern is false.<sup>172</sup> Thus, it is not a long leap to include it in considering APD statutes.

Moreover, the *Rosenbloom* test is more appropriate for APD statutes because those statutes target speech directed at a public issue as a whole, such as food industry practices and product safety, rather than at any individual plaintiff. Indeed, no particular individual defendant need be mentioned or identified under these laws to maintain a cause of action.<sup>173</sup> Because defamation and ordinary product disparagement seek to vindicate private rights and to restore individual reputational interests,<sup>174</sup> it perhaps is not incoherent to look to the status of the plaintiff. The avowed purpose of most APD statutes, however, is to protect the economy, the public, and entire industries.<sup>175</sup> The statutes establish a cause of action geared more towards "generalized 'public' frauds, deceptions, and defamation," lacking any pointed connection to any individual grower or producer by name or description, something that the First Amendment ordinarily precludes.<sup>176</sup> With speech that could raise a cause of action under APD statutes, the "public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct."<sup>177</sup> The import of the status of the plaintiff is limited or irrelevant under APD statutes; a focus on the nature of the speech at issue is more appropriate.

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<sup>171</sup> See *supra* notes 160-63 and accompanying text.

<sup>172</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986).

<sup>173</sup> See *Texas Beef Group*, 11 F. Supp. 2d at 862 (noting that the Winfrey broadcast did not mention any of the plaintiffs or the State of Texas).

<sup>174</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (noting the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation); see also *Fried*, *supra* note 53, at 238 (noting that defamation vindicates private rights by private individuals); *LeBel*, *supra* note 54, at 783 (arguing that defamation is "firmly grounded in the reputational interest of the victim"); *Meiklejohn*, *supra* note 113, at 259 (describing common law libel as permitting the person injured in reputation or property to sue for damages); *Post*, *supra* note 54, at 691 (arguing that defamation is "designed to effectuate society's 'pervasive and strong interest in preventing and redressing attacks upon reputation'" (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966))).

<sup>175</sup> See *supra* notes 48-50 and accompanying text.

<sup>176</sup> *Fried*, *supra* note 53, at 238; see also *infra* notes 286-90 and accompanying text.

<sup>177</sup> *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (plurality opinion of Brennan, J.).

Finally, the speech targeted and prohibited by APD statutes is the type of pure, core political speech that the Supreme Court has held to be at the heart of the protections afforded by the First Amendment.<sup>178</sup> Consider, for example, the South Dakota statute, which prohibits statements suggesting “that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public.”<sup>179</sup> Such generally accepted industry and management practices as, for example, the use of pesticides on apples or of particular animal feeds, often are suggested, required, approved, and monitored by the government. Criticism of those practices thus becomes indistinguishable from, and indeed becomes criticism of, the government policies that approve and condone those practices and efforts to change those policies. Further, one commentator has argued, “Science, business, and technology often play far more active roles in changing the world than politicians.”<sup>180</sup> It is arguable that, because a cause of action under an APD statute could lie against such a direct attack on governmental policies or on issues that so impact and change society, these statutes are per se invalid.<sup>181</sup> At the very least, this fact demands that the most speech-protective substantive fault standard apply in virtually all actions brought under the statutes.

Second, even a straightforward doctrinal application of *Gertz* would appear to demand the actual malice standard in virtually all cases, because most, if not all, plaintiffs likely to bring actions under APD statutes properly may be regarded as public figures. As previously noted, potential plaintiffs under various APD statutes include everyone from growers all the way up the chain of production and sale.<sup>182</sup> Thus, one group of potential plaintiffs would be corporate entities involved in growing or distributing agricultural products, processing grown products into final products for sale, or operating stores selling those products. Such plaintiffs could be large corporations such as Tyson or Green Giant or Dole or Pathmark, corporations that “command at least the same name recognition” as most individual public figures

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<sup>178</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (“Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam))); see also Meiklejohn, *supra* note 113, at 255 (arguing that it is the receipt of information that provides voters with the ability to cast a ballot and engage in self-government that is at the center of the First Amendment).

<sup>179</sup> S.D. CODIFIED LAWS § 20-10A-1(2) (Michie 1999). The law, in turn, defines generally accepted practices as “agronomic and animal husbandry procedures used in the production of agricultural goods including tillage options, fertilizers, crop protection practices for crop production, and the feeding, transporting, housing, and health practices for livestock.” *Id.* § 20-10A-1(3).

<sup>180</sup> Curtis, *Monkey Trials*, *supra* note 115, at 541.

<sup>181</sup> See *infra* notes 327-41 and accompanying text.

<sup>182</sup> See *supra* notes 51-56 and accompanying text.

and thus should be considered public figures subject to the actual malice requirement for *New York Times* purposes.<sup>183</sup>

One commentator has suggested the need for case-by-case analysis of any corporation's status, looking to factors such as corporate assets, number of employees, public stock offerings, multi-state incorporation, interstate and international sales and marketing, and the number and locale of business operations.<sup>184</sup> Larger corporations, such as those named above, also enjoy the increased access to channels of communication for rebutting defamatory falsehood that is central to the public-figure inquiry.<sup>185</sup> This public figure status can be geographically limited; for example, a meat-packing company employing 350 people in a small community certainly could be a public figure with reference to statements made in a local speech or a local newspaper.<sup>186</sup> The local nature of this suggested rule is important as applied to APD statutes, which were intended to protect local entities through local causes of action. Finally, with regard to the speech at issue in APD statutory actions—statements about the safety and fitness for human consumption of food products—the normal business operations of advertising and marketing by a corporation, large or small, may constitute a “voluntary thrusting into the subject matter” of the speech alleged to have violated the statute.<sup>187</sup> Using any of these factors, corporate growers, producers, distributors, and sellers, large and small, generally should be viewed as public figures required to prove actual malice under APD statutes.

The same is true if the lawsuit is brought by a trade group of growers or producers. As a general matter, an entire industry cannot successfully sue under ordinary defamation law.<sup>188</sup> APD statutes, however, are intended to eliminate this general rule and to protect entire industries of growers, producers, distributors, sellers, and anyone else connected with agricultural products.<sup>189</sup> An association of industry members and actors is, therefore, a likely plaintiff and should be subject to

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<sup>183</sup> See Patricia Nassif Fetzer, *The Corporate Defamation Plaintiff as First Amendment “Public Figure”*: *Nailing the Jellyfish*, 68 IOWA L. REV. 35, 85 (1982); Norman Redlich, *The Publicly Held Corporation as Defamation Plaintiff*, 39 ST. LOUIS U. L.J. 1167, 1172-73 (1995) (arguing that a corporation can become a household name and thus become an all-purpose public figure); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 489 (1984) (accepting a district court's determination that the plaintiff corporation was a public figure).

<sup>184</sup> See Fetzer, *supra* note 183, at 85.

<sup>185</sup> See Redlich, *supra* note 183, at 1173; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

<sup>186</sup> See Fetzer, *supra* note 183, at 85.

<sup>187</sup> *Id.* at 85-86; see also *Gertz*, 418 U.S. at 351.

<sup>188</sup> See *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 381 (S.D.N.Y. 1980); Fried, *supra* note 53, at 238 (arguing that the defamation must be adequately pointed and the group sufficiently small in order to bring the action).

<sup>189</sup> See *supra* notes 51-56 and accompanying text.

public figure status under the same analysis that imposes that status on a corporation.<sup>190</sup> Of key import to the analysis of a trade group is the fact that most such associations form precisely to thrust themselves to the forefront of public attention and to inject the industry's voice into the debate about industry practices and food product safety, whether through advertising, lobbying, or presenting the industry position to the public.<sup>191</sup> Trade associations exist precisely to enhance the powers of individual growers and producers by enabling them to speak with one unified, more-powerful voice.<sup>192</sup> This essential purpose makes the actual malice requirement more constitutionally appropriate as applied to industry trade groups.

The answer is somewhat less clear when an individual grower or producer brings suit under a statute. Some, but certainly not all, growers may achieve pervasive fame and notoriety, particularly within the local agricultural community; others may, through their conduct or speech, have injected themselves into the controversy or debate about the safety and fitness for consumption of food products so as to qualify for public figure status.<sup>193</sup> A single grower or a few growers also could bring a class action on behalf of hundreds or thousands of growers.<sup>194</sup> Arguably, individual plaintiffs representing a class of disparaged producers should be treated the same as a trade association.<sup>195</sup> A class action presents a unique situation in that, in a class of hundreds or thousands of industry members or entities involved in the chain of production, it is possible that the class could consist of both private and public figures. In such a situation, the weighted balancing in favor of protecting the greatest amount of speech demands that the most protective fault standard, actual malice, apply to the entire class.<sup>196</sup>

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<sup>190</sup> See *supra* notes 182-86 and accompanying text.

<sup>191</sup> See *Whelan*, 492 F. Supp. at 382; see also *Semple*, *supra* note 12, at 433 & n.248 (describing the actions by the International Apple Institute in the wake of the *60 Minutes* broadcast about Alar).

<sup>192</sup> See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 140-41 (Henry Reeve trans., 1862); see also Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 252-53 (1998) (describing the role of associations in enabling individuals to self-realize through expression with a unified voice).

<sup>193</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (describing the two bases on which individuals may become public figures).

<sup>194</sup> See *Auvil I*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (involving a class action on behalf of 4700 Washington apple growers).

<sup>195</sup> See *Whelan*, 492 F. Supp. at 382; see also *supra* notes 188-92 and accompanying text.

<sup>196</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (demanding expanded protection if "freedoms of expression are to have the 'breathing space' that they . . . 'need to survive'" (citations omitted)); see also REDISH, *supra* note 117, at 55 (arguing that the First Amendment requires courts to balance interests "with a thumb on the scale in favor of speech"); Michael Kent Curtis, *"Free Speech" and its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 427 (1996) [hereinafter Curtis, *Discontents*] (arguing that courts view their role as



Under either approach, the *New York Times* standard immediately will invalidate as unconstitutional, in many or virtually all cases, those statutes that would permit recovery for mere negligence, when the speaker "should have known" that some statement was false or that impose no fault requirement.<sup>197</sup> Several statutes will survive, however, including the Texas law, which requires that the defendant know that his or her speech is false.<sup>198</sup>

#### B. "Of and Concerning" Requirement

The second substantive requirement is that the speech at issue must be made specifically of and concerning the particular plaintiff, that there must be a clear link between the particular plaintiff and the language in question, and that the statements in question reasonably must be read as accusing the plaintiff of some personal involvement in improper acts.<sup>199</sup> On one level, this amounts to nothing more than the basic legal proposition that a civil plaintiff cannot recover in a particular case unless he has been harmed; if the speech in question does not identify and accuse the particular plaintiff of some improper conduct, his reputation has not been harmed and there is no basis for him to recover damages.

At another level, this is a strong substantive requirement that restricts the types of civil action that government can constitutionally make available. In *Rosenblatt v. Baer*,<sup>200</sup> the Court expressly rejected a jury award that had been based "upon a finding merely that [the plaintiff] was one of a small group acting for an organ of

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applying broad protection for free speech); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 180 (1990) (discussing the need to overprotect speech to provide a buffer zone) [hereinafter Smolla, *Rethinking*].

As a procedural matter, it is possible that a class consisting of both private and public figures, requiring the application of differing legal standards, could not be maintained because the claims of the representative plaintiffs would not necessarily be typical of the class. See FED. R. CIV. P. 23(a)(3) (requiring that the "claims or defenses of the representative parties are typical of the claims or defenses of the class"). A court could attempt to designate sub-classes of private and public figures. See FED. R. CIV. P. 23(c)(4)(B). However, the necessary inquiry into the status of 4700 plaintiffs would be burdensome, impracticable and could result in a court declining to designate the class.

<sup>197</sup> See *supra* notes 61 & 64 and accompanying text; see also Bederman, *Twilight*, *supra* note 1, at 197-98.

<sup>198</sup> See *supra* note 62 and accompanying text; see also, e.g., TEX. CIV. PRAC. & REM. CODE § 96.002(2) (West 1999); Isern, *supra* note 9, at 255 (arguing that the Texas statute imposes a higher fault standard than is constitutionally required).

<sup>199</sup> See *New York Times*, 376 U.S. at 288-89; Kalven, *Central Meaning*, *supra* note 3, at 209-10 (noting that the inadequate linking between the plaintiff and the speech was an alternative ground for judgment in that case).

<sup>200</sup> 383 U.S. 75 (1966).

government, only some of whom were implicated, but all of whom were tinged with suspicion.”<sup>201</sup> Allowing speech that happened to create “indiscriminate suspicion” on the members of a group responsible for particular conduct to be actionable would be tantamount to a demand for individual recovery based on libel of the government generally.<sup>202</sup> *Rosenblatt* essentially is a rejection of the notion of libel of the government.<sup>203</sup> Instead, government officials can recover only for targeted, pointed statements at a particular, identified individual. This principle never has been extended beyond criticism of government. It has been suggested, however, that business and the science and technology that affect business truly play a more active role in changing the world than do politicians and government.<sup>204</sup> It follows that the free speech guarantee of the right to make generalized criticisms of government with impunity also guarantees the right to make generalized criticisms of business, industry, and products with impunity.

The normative return to the *Rosenbloom* focus on the nature and context of the speech urged by this Article logically carries with it an extension of *Rosenblatt* to all matters of public concern or interest. Thus, there can be no recovery by an unnamed individual for the defamation or disparagement of an entire group that is involved in some matter of public concern. In other words, one member of a group acting on some issue of public concern should not recover for statements that tinge all members with suspicion, but do not implicate the complaining member directly.<sup>205</sup> Individual members of a particular industry, such as beef producers or apple growers, may not bring an action for speech that questions the safety of the product or the practices of the industry as a whole unless the speech somehow directly implicates the particular members of the industry bringing the action. In order to be actionable, speech must not only be false and spoken with actual malice, but also targeted or pointed at a named or identified individual or company beyond a mere tinge of suspicion by virtue of involvement in a particular industry. APD statutes violate this rule by permitting unidentified industry members to recover for speech about the industry as a whole.<sup>206</sup>

This strong “of and concerning” principle parallels defamation’s focus on the reputational interests of the plaintiff and its balance with free speech interests.<sup>207</sup>

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<sup>201</sup> *Id.* at 82.

<sup>202</sup> *See id.* at 83.

<sup>203</sup> *See* Kalven, *Central Meaning*, *supra* note 3, at 205 (“[D]efamation of the government is an impossible notion for a democracy.”).

<sup>204</sup> *See* Curtis, *Monkey Trials*, *supra* note 115, at 541; *see also* Curtis Publ’g Co. v. Butts, *Associated Press v. Walker*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result) (noting the power of non-governmental actors in affecting public questions).

<sup>205</sup> *See supra* notes 200-01 and accompanying text.

<sup>206</sup> *See* *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Texas 1998) (noting that the speech at issue in the lawsuit did not mention the State of Texas or any of the plaintiffs).

<sup>207</sup> *See supra* notes 54 & 174 and accompanying text.

The First Amendment, however, precludes punishment for “generalized ‘public’ frauds, deceptions, and defamations” that relate simply to some public issue or policy concern.<sup>208</sup> Instead, the grossest misstatements or deceptions about a generalized public issue are immune from legal sanction unless they defame or disparage particular individuals.<sup>209</sup> The safety and fitness for consumption of agricultural products, the industries growing and processing those products, and the government policies related to the products would be such generalized public issues or concerns.

A constitutional command that speech be targeted and pointed in order to be civilly actionable therefore precludes laws such as APD statutes that provide a cause of action against general criticism of a product and issues related to that product absent the connection to some specific, identified person or company.

APD statutes intentionally were drafted without this “of and concerning” element precisely to permit individual growers, producers, or sellers to recover for such generalized statements about a generic product or industry. The underlying purpose of the statutes is to enable any member of the industry, solely by virtue of being part of the industry, to recover his or her pecuniary losses that are traceable to some statements relating to the industry or its products. The statutes reflect the assumption that a false general statement about an agricultural product or industry necessarily implicates all members of that industry and harms the business interests of each member, regardless of whether the particular company is identified by name or description. The statutes further reflect the assumption that the mere tinge of suspicion should be enough to permit any individual industry member to recover its losses for criticism of the generic product.<sup>210</sup>

This argument proves too much. A statement may be false as to the particular industry member bringing the case, but true as to other industry members or as to the industry generally. However, the harm to the individual plaintiff will be the same, regardless of the broader truth of the speech at issue. For example, Howard Lyman’s statements about “common practices” in the cattle industry in the use of ruminant feeds and the likelihood of an outbreak of Mad Cow Disease in the United States may have been true as to some cattle ranchers, but not as to any of the particular Texas

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<sup>208</sup> Fried, *supra* note 53, at 238; Meiklejohn, *supra* note 113, at 259 (arguing that the First Amendment protects a citizen’s verbal attacks on the policies of the government); *see also* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 352-53 n.16 (1995) (“A public question clearly cannot be the victim of character assassination.” (quoting *People v. White*, 596 N.E.2d 1284, 1288 (Ill. 1987))).

<sup>209</sup> *See* Fried, *supra* note 53, at 238; *see also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (plurality opinion of Brennan, J.) (suggesting that the public’s primary focus is in the public event, not the individual).

<sup>210</sup> *See* Auvil I, 800 F. Supp. 928, 935 (E.D. Wash. 1992) (holding that every apple grower in the country was identified because their products were identified as dangerous, regardless of whether or not the fruit had been exposed to Alar); *supra* note 33 and accompanying text.

cattlemen who brought the lawsuit against Oprah Winfrey.<sup>211</sup> Yet, the Texas cattlemen bringing the suit would have suffered the same business losses, regardless of whether the statements were true or false as to them. Moreover, none of the statutes clearly indicates at what level speech must be false for a plaintiff to recover. The legislatures may have intended for the plaintiff's burden to be merely to show that the plaintiff alone does not engage in the practices in question and that the speech is therefore false as to the plaintiff, in which case the "of and concerning" requirement has been eliminated completely. However, even if a plaintiff prevailed only when he or she could prove that the speech at issue was false as to every single member of the industry, this creates a burdensome case for a speaker to defend against, one probably requiring the case to go to trial.<sup>212</sup>

Perhaps anticipating this problem, Idaho provided in its statute that the speech "must be clearly directed at a particular plaintiff's product" and that a statement regarding a generic group of products cannot provide the basis for a cause of action.<sup>213</sup> A court could superimpose such a requirement by refusing to permit a plaintiff to recover unless the statements could "reasonably be read" as accusing the particular growers or industry members bringing the suit of personal involvement in the practices in question, which is the applicable standard in ordinary defamation.<sup>214</sup> This requirement essentially would turn the "of and concerning" issue into a question for the jury. The district court in *Winfrey* did not address this constitutionally significant issue in what actually was the quintessential APD case, in which the speech did not mention or describe any of the particular plaintiffs or the State of Texas, but simply made a general broad statement about the industry and some practices within some parts of that industry.<sup>215</sup>

Most importantly, imposing this targeting requirement would involve a fundamental rewrite and change in the very nature of these statutes. The absence of targeting is no accident or drafting error. The legislatures intended these laws to be much broader, to enable all industry members to recover for all statements about the product or the industry generally and as a whole when those statements were false and negative. To now require a particular plaintiff to have been identified would eliminate that which the statutes were designed and intended to accomplish. Not to require such identification, however, is a constitutional deficiency.

The acuteness of the "of and concerning" problem is illustrated best in the Honda case. Even assuming, *arguendo*, that the satirical comments about emu farming were

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<sup>211</sup> See *supra* note 89 and accompanying text.

<sup>212</sup> Cf. Matheson, *supra* note 122, at 239 (arguing that "*New York Times* did little to reduce the cost of defending" against claims against speech because the protections "provided limited protection until both parties incurred the full expense of trial, and often of appeal as well").

<sup>213</sup> IDAHO CODE § 6-2003(4) (1998).

<sup>214</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 288-89 (1964).

<sup>215</sup> See *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 862 (N.D. Texas 1998).

factually derogatory, the sole party injured was the emu farmer who actually was shown and featured in the commercial.<sup>216</sup> The fact that any and all emu farmers should have a statutory cause of action against individuals whose speech targeting one individual (who presumably consented to being in the commercial) demonstrates the breadth of these statutes that cannot be narrowed or controlled without changing their fundamental concept.

### C. *Independent Appellate Review*

The development of the doctrine in Category Three cases brought with it a vital procedural change—the role of primary protector of free speech has shifted from juries to judges, particularly appellate judges.<sup>217</sup> The general view now is that giving juries more decisional power would inflict a “crippling blow” on free speech because juries would uphold more and greater restrictions.<sup>218</sup>

The Court in *New York Times* first asserted the need for appellate courts to review independently the evidence in tort actions in which free speech concerns are implicated:

This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across “the line between speech unconditionally guaranteed and speech which may legitimately be regulated.”<sup>219</sup>

The Court reaffirmed this requirement twenty years later, holding that appellate judges “must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.”<sup>220</sup> This proposition is true whether the determination at trial was made by judge or jury<sup>221</sup> and whether it was in state or

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<sup>216</sup> See discussion *supra* notes 102-05 and accompanying text.

<sup>217</sup> See Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 765 (1986) [hereinafter Schauer, *People*] (“We no longer view juries as primary or even important protectors of free speech. On the contrary, much of contemporary first amendment doctrine, theory, and commentary is devoted to protecting speech *from* the jury.”).

<sup>218</sup> See *id.* at 765.

<sup>219</sup> *New York Times*, 376 U.S. at 285 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). The Court exercised independent review of the evidence both as to actual malice, *see id.* at 285-86, and as to whether the statements were “of and concerning” the plaintiff, *id.* at 288.

<sup>220</sup> *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984) (product disparagement case); *see also* Halpern, *supra* note 125, at 292.

<sup>221</sup> See *Bose*, 466 U.S. at 501 (“[T]he rule of independent review assigns to judges a

federal court.<sup>222</sup> The Court in *Bose*, even more explicitly than in *New York Times*, grounded this procedural rule in the need to maximize the amount of constitutionally protected speech and to “be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.”<sup>223</sup> The limits of any category of unprotected speech necessarily turn on special facts—whether the statements were true, whether the defendant spoke with actual malice, whether the statements targeted the plaintiff—having constitutional significance and demanding the protections of heightened judicial scrutiny on review.<sup>224</sup> Such questions are too important and “too vulnerable to be left to the trier of fact,” but rather require that “an appellate fence in the form of unbounded independent review must be erected to protect first amendment values.”<sup>225</sup>

The application of independent review in First Amendment cases is an extension and application of the long-standing constitutional fact doctrine, under which appellate courts independently review those facts on which courts’ jurisdiction or parties’ constitutional rights turn.<sup>226</sup> One commentator has explained this independent review in constitutional cases before the Supreme Court as an aspect of case-by-case development of constitutional norms, in which the Court can best establish and elaborate on such norms when it “has power to consider fully a series of closely

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constitutional responsibility that cannot be delegated to the trier of fact, whether the fact-finding function be performed in the particular case by a jury or by a trial judge.”); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230 (1985) (arguing that, under *Bose*, appellate judges “may not defer to the first amendment law application conclusions of even inferior article III judges”). *Bose* involved a bench trial, in which findings of fact ordinarily would be reviewed under a “clearly erroneous” standard, rather than *de novo*. See *Bose*, 466 U.S. at 498; see also FED. R. CIV. P. 52(a).

<sup>222</sup> See *Bose*, 466 U.S. at 499 (“[S]urely it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts.”).

<sup>223</sup> *Id.* at 505; see also *New York Times*, 376 U.S. at 285 (requiring independent review of the record “so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression”); see also Monaghan, *supra* note 221, at 242 (describing the duty of the appellate court to scrutinize the record and to ensure that the evidence yields the characterization of the speech imposed by the lower court); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1021 (1996) (“Independent review is required . . . precisely to determine whether or not the speech falls within the unprotected category.”).

<sup>224</sup> See *Bose*, 466 U.S. at 505; Halpern, *supra* note 125, at 293 (“[C]onstitutional issues create a ‘constitutional fact’ treated as ‘law’ for purposes of appellate review.”).

<sup>225</sup> Halpern, *supra* note 125, at 293; see also Monaghan, *supra* note 221, at 242 (discussing the Court’s view “of the duty of appellate judges to decide independently whether the facts are sufficient to show that the speech is unprotected”).

<sup>226</sup> See Monaghan, *supra* note 221, at 247; *id.* at 247-63 (tracing the origins and development of constitutional fact review).

related situations involving a claim of constitutional privilege.”<sup>227</sup> While the First Amendment, perhaps, does not necessarily demand such independent review in all cases,<sup>228</sup> the fact-intensive nature of cases brought under Category Three restrictions specially warrants these additional layers of *de novo* review in order to narrow the range of speech that might be subject to an award of damages.<sup>229</sup>

None of the APD statutes mentions or refers to independent appellate review. However, given that the same factual determinations—falsity, actual malice, “of and concerning”—are as necessary under APD statutes as in defamation, these factual determinations should be subject to the same heightened appellate scrutiny. The fact that APD statutes are Category Three restrictions on speech commands that the additional layers of *de novo* review are constitutionally warranted under the statutes.<sup>230</sup> The absence of provision for such review under the statutes is a constitutional deficiency that an appellate court would have to impose and implement in reviewing APD statute cases in order to save the constitutionality of the laws.

This view of judges as the primary protectors of free speech is not without controversy.<sup>231</sup> Professor Schauer argues that the current view of the relationship between jury power and free speech is “strikingly different” from the view that prevailed in colonial times and at the time of the First Amendment’s ratification.<sup>232</sup> He points out that the paradigmatic colonial free speech case is that of John Peter Zenger, the publisher of a New York newspaper who criticized the governor of New York and was tried in 1735 on charges of seditious libel.<sup>233</sup> Zenger was acquitted, largely on the strong advocacy of his lawyer and a jury verdict that, in effect, nullified the law of libel as it was understood at that time.<sup>234</sup>

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<sup>227</sup> *Id.* at 273.

<sup>228</sup> Compare *id.* at 270 with Volokh, *supra* note 223, at 1019-21 (discussing the extension of independent review to other First Amendment issues).

<sup>229</sup> See Monaghan, *supra* note 221, at 269-70 (“Perhaps in defamation cases there is such an intractable problem of confusing falsity with malice that layers of *de novo* appellate review are warranted.”).

<sup>230</sup> Cf. Halpern, *supra* note 125, at 292; Monaghan, *supra* note 221, at 269.

<sup>231</sup> See Halpern, *supra* note 125, at 294 (suggesting that the Court in *Bose* overreacted as to the scope of appellate review); Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 316 (1984) (arguing that no serious incidents of repression of speech were influenced significantly by judicial enforcement of the First Amendment).

<sup>232</sup> Schauer, *People*, *supra* note 217, at 764.

<sup>233</sup> See *id.* at 761-62.

<sup>234</sup> See *id.* at 761-63. According to Professor Schauer, the role of the jury at that time was to determine factual issues such as whether the statements in question were published, but it was for the judge to determine the seditiousness or libelousness of the publication. Because Zenger had not argued that he had not published the statements in question, none of the issues should have reached the jury. The fact that the issues did reach the jury, and that Zenger prevailed, represented a victory of jury over judge and a victory for the people over the king. See *id.* at 762-63. For details of the Zenger trial, see *id.* at 761 n.1 (listing

Zenger's case is regarded as the first victory for free speech and a free press. Professor Schauer's point is that it was a victory brought about by a jury seeking to protect freedom of speech, not by a judge:

At the time of the Zenger trial, this access to jury determination of the issues would have alleviated concerns about the freedom of the press because the determination was being made by the people rather than an unaccountable sovereign. . . . Now, however, the presence of the jury is not seen as the safeguard, [but] many perceive the freedom of speech and press to be in jeopardy, with the principle of free criticism of government hanging by a thread.<sup>235</sup>

Professor Akhil Reed Amar attributes this shift to a reliance on judges instead of juries as a product of the Fourteenth Amendment and its impact on the theoretical understanding of the First Amendment and freedom of speech. Beyond the obvious result of incorporation of First Amendment protections against state and local governments,<sup>236</sup> Professor Amar argues:

[O]riginal First Amendment reflected, first and foremost, a desire to protect relatively popular speech critical of unpopular government policies—the kind of speech, for example, that the 1798 Sedition Act sought to stifle. The Fourteenth Amendment shifted this center of gravity toward protection of even unpopular, eccentric, “offensive” speech, and of speech critical not simply of governmental policies, but also of prevailing social norms.<sup>237</sup>

In this new paradigm, protection of popular speech against an unpopular sovereign, something a jury of the people likely would do, is not enough. Free speech now requires protection of unpopular speech from popular, majoritarian institutions that

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sources).

<sup>235</sup> *Id.* at 767; *see also id.* at 768 (arguing that this change in perception reflects a larger concern about popular control).

<sup>236</sup> *See* *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming that freedom of expression is “among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the states”).

<sup>237</sup> Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 152-53 (1992); *see also id.* at 153 (describing the “subtle differences” between Founding and Reconstruction visions of free speech).



are wont to dislike and to attempt to ban or punish some speech.<sup>238</sup> Indeed, Professor Schauer concedes that the short-term impact of greater reliance on juries and majorities for free speech protection likely, although not inevitably, would be more restrictions on speech.<sup>239</sup>

Professor Amar agrees that Zenger was the paradigmatic speaker under the First Amendment as originally framed, a popular publisher who wanted to get to a local jury likely sympathetic to his anti-government message. However, the paradigmatic speaker under the Fourteenth Amendment becomes the political or cultural outsider whose speech challenges the social orthodoxy of dominant public opinion and the government policies that reflect that dominant public opinion; he likely does not want to face a local jury unsympathetic to a message that goes against prevailing public opinion.<sup>240</sup> Beginning with Zenger, Professor Amar traces this evolution of free speech tradition by looking at certain watershed cases through the scope of whether the First or Fourteenth Amendment dominated the particular case. First was *New York Times*, in which the speech at issue was critical of local government and local policies and thus contrary to prevailing local sentiment, although largely popular nationally.<sup>241</sup> Next was *Texas v. Johnson*,<sup>242</sup> in which the antigovernment message and the manner of expressing the message were antisocial and unpopular both locally and nationally.<sup>243</sup> The last step in this evolution was *R.A.V. v. City of St. Paul*,<sup>244</sup> involving speech, burning a cross, that plainly was provocative and outrageous to widely shared cultural norms of proper behavior, but less obviously directed against government policies.<sup>245</sup> In each of these later cases, a speaker likely would want to

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<sup>238</sup> See Harry Kalven, Jr., *A Commemorative Case Note: Scopes v. State*, 27 U. CHI. L. REV. 505, 516 (1960) [hereinafter Kalven, *Scopes*] (describing classic modern free speech theory as freedom for the "thought that we hate").

<sup>239</sup> See Schauer, *People*, *supra* note 217, at 783.

<sup>240</sup> See Amar, *supra* note 237, at 153; see also STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE*, 86-109 (1990) (describing outside critics as the speakers whom the First Amendment was intended to protect).

<sup>241</sup> See Amar, *supra* note 237, at 153 (describing the case as a "mixed First and Fourteenth Amendment case, with a dash of *McCulloch v. Maryland* thrown in").

<sup>242</sup> 491 U.S. 397 (1989) (striking down a state law prohibiting the burning of an American flag).

<sup>243</sup> See Amar, *supra* note 237, at 153.

<sup>244</sup> 505 U.S. 377 (1992) (striking down an ordinance prohibiting racist fighting words).

<sup>245</sup> See Amar, *supra* note 237, at 153. The same idea of First Amendment protection for such plainly outrageous and provocative speech, apart from government policies, also informs the decision in *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (refusing to permit damages for speech not directed at a non-government public figure based on its outrageousness).

avoid having a local jury pass judgment on the content and merit of his speech.<sup>246</sup> Ultimately, this shift to judicial primacy might be best explained as the theoretical concern for tyranny of the majority as to constitutional liberties triumphing over the notion that in a society in which the people are considered sovereign, free speech is more likely to be accepted if it is perceived as our choice.<sup>247</sup>

The speech that would be at issue in an action under an APD statute fits within any of these later cases, necessitating the protections of an independent judge. Most criticism of an agricultural industry certainly would be unpopular locally and even nationally among those who support and depend on a particular industry. Criticism of the use of pesticides by apple growers and producers likely is as unpopular in Yakima, Washington, as criticism of the chief of police for actions against civil rights demonstrators in Birmingham, Alabama, in 1964. The same is true of criticism of the beef industry in Texas. Like someone who has burned a flag or a cross, none of these defendants would be content to place his or her fate in the hands of a jury of ordinary citizens in Texas or Washington. The speech itself is not necessarily anti-government, but it does challenge shared prevailing societal norms.

Moreover, the line between speech that challenges social norms and speech that challenges government policy is not particularly clear. Rather, public policy informs social norms and vice-versa. APD statutes exist as a product of government efforts to implement and enforce dominant community views of agricultural industries and the ways in which those communities believe people should be able to criticize these industries.<sup>248</sup> The First Amendment, as informed by the Fourteenth, is equally applicable to protect speech that runs counter to such dominant community mores as it is to protect speech that runs counter to government policy.<sup>249</sup> More importantly, discussion and criticism of dominant industry practices is indistinguishable from discussion and criticism of the government policies that establish, monitor, approve, and condone those practices and often must be the driving force behind changes to those practices.<sup>250</sup> Criticism of agricultural products and industries, the speech targeted by APD statutes, plainly can be seen as directed against government policy and conduct as such, thus bringing cases under those statutes more within the *New*

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<sup>246</sup> See Amar, *supra* note 237, at 153 (arguing that a defendant charged with burning an American flag would not be content to place his fate in the hands of a jury of ordinary citizens).

<sup>247</sup> Compare Amar, *supra* note 237, at 153 n.161 with Schauer, *People*, *supra* note 217, at 779, 783.

<sup>248</sup> Cf. Amar, *supra* note 237, at 153 (stating that the anti-hate speech ordinance in *R.A.V.* arguably was a product of government serving as "an honest agent of dominant community morality").

<sup>249</sup> See *id.* (noting that it was the censorial excesses of the dominant community morality that the Fourteenth Amendment was designed to curb).

<sup>250</sup> See *supra* notes 178-81 and accompanying text; *infra* notes 327-41 and accompanying text.

*York Times* or *Johnson* paradigms, again requiring judicial protection from local juries.

Of course, it was a jury verdict in her favor that caused Oprah Winfrey to declare that the First Amendment “lives” and “rocks.”<sup>251</sup> The fact that a jury in Texas would find in Winfrey’s favor in a case involving her criticisms of beef industry conditions and practices perhaps indicates that the concern for tyranny of the majority is overstated and that Professor Schauer is correct that valuing some popular decisionmaking with respect to free speech will not eradicate the right.<sup>252</sup> Without diminishing the importance of that verdict, it must be emphasized that Winfrey’s case was exceptional in many ways. Foremost is the broad fame, popularity, and celebrity that Winfrey enjoys goes well beyond what most speakers, especially most non-media speakers, possess. Although anti-cattlemen speech certainly is unpopular in Texas, Oprah Winfrey is not. Winfrey owned the City of Amarillo during her time there and it is not unreasonable to believe that might have influenced the verdict. It is far less certain that Howard Lyman would have fared as well alone in Amarillo or that CBS and *60 Minutes* would have enjoyed a similar reception from the public or from a jury had the *Auvil* case gone to trial in Washington. Most likely, Winfrey instead is the exception that proves the rule that a greater judicial role is necessary for the types of cases that APD statutes will create.

#### IV. SECOND LINE OF PROTECTION: FIRST AMENDMENT PRINCIPLES IN CATEGORY THREE

Constitutional analysis of APD statutes cannot end only with consideration of the first line of free speech defense, the procedural and substantive protections established for Category Three cases. Rather, it must take a broader view and consider that Category Three cases are, at bottom, restrictions on the right of free expression and thus command the application of both the fundamental First Amendment principles and the exacting judicial scrutiny that applies to Category One restrictions.<sup>253</sup> This is the second line of free speech protection for Category Three laws, such as APD statutes.<sup>254</sup> This Part considers several of these principles in turn and how they render the basic concept of APD statutes unconstitutional.

##### A. *Content Discrimination*

Perhaps the central principle in free speech doctrine is the prohibition on content discrimination, meaning restrictions or burdens on speech based on the substantive

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<sup>251</sup> See *supra* notes 1-2 and accompanying text.

<sup>252</sup> See Schauer, *People*, *supra* note 217, at 783.

<sup>253</sup> See discussion *supra* notes 112-17 and accompanying text.

<sup>254</sup> See discussion *supra* note 129 and accompanying text.

content of the speech at issue or the message it conveys.<sup>255</sup> The constitutional significance of a distinction between content-based and content-neutral regulations has developed over the course of many years, but it only recently has taken its position of prominence and pervasiveness in the First Amendment.<sup>256</sup> It also has been the subject of a great deal of scholarly discussion and debate, both as to its theoretical importance and its underlying theoretical rationale.<sup>257</sup>

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<sup>255</sup> See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-42 (1994) ("[T]he First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals."); *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment); *Police Dep't of the City of Chicago 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."); see also Williams, *supra* note 112, at 616.

<sup>256</sup> See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) [hereinafter Stone, *Content*] (describing the content distinction as the Burger Court's foremost contribution to First Amendment analysis and the most pervasively employed doctrine); Williams, *supra* note 112, at 617 (noting the "growing focus on content discrimination as the central concern of the first amendment").

<sup>257</sup> See Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962) (interview with Justice Black) (Justice Black arguing that the text of the First Amendment says "no law" and means that elected government should not tell the people what they should believe); Alan Howard, *City of Ladue v. Gilleo: Content Discrimination and the Right to Participate in Public Debate*, 14 ST. LOUIS U. PUB. L. REV. 349, 353 (1995) (arguing that government can interfere with the marketplace of political ideas by discriminating against certain speakers or ideas); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 13-14 n.62 ("The Court's policy against inquiring into the truth of a belief at issue under the first amendment reflects the Court's dislike for content regulation."); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 30 (1975) (discussing the centrality of equality as the explanation for the prohibition of content censorship); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 281 (1991) (tying the prohibition on content discrimination to the concept of epistemological humility); Stone, *Content*, *supra* note 256, at 198-99 (describing the distorting effect and "mutilat[ion of] the thinking process of the community" from the elimination of particular ideas, viewpoints, or items of information); *id.* at 212-13 (arguing that the content distinction is an aspect of the antipaternalistic understanding of the First Amendment, prohibiting government from restricting particular views because it does not trust citizens to make wise or desirable choices if exposed to those ideas); Geoffrey R. Stone, Comment, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 461 (1986) [hereinafter Stone, *Viewpoint*] (arguing that content-based regulations distort the search for truth, block meaningful self-governance, and frustrate individual self-fulfillment); see also Williams, *supra* note 112, at 666-95 (discussing how various free speech theorists and theories approach the problem of content discrimination).

The content distinction has developed as a continuum focusing on the category of speech at which a law is aimed and how biased that category is. At the most biased end is viewpoint discrimination, which involves restrictions on only one view of a particular subject while others on that subject remain untouched. In the middle of the spectrum is subject-matter discrimination, in which the government silences all views on a given subject. At the far end is content-neutral regulation, which applies to all speech, regardless of subject matter or viewpoint.<sup>258</sup> Along this continuum are several sub-issues that help to inform the distinctions, particularly as applied to APD statutes. Other commentators have recognized a content discrimination issue underlying APD statutes that could render them unconstitutional.<sup>259</sup> Although that conclusion generally is correct, the issue is more nuanced and more detailed. Thus, we must examine the issues along this continuum to understand the many ways in which APD statutes are content-discriminatory.

### 1. Viewpoint Discrimination

Viewpoint discrimination, the most biased end of the continuum, may be understood as “an egregious form of content discrimination.”<sup>260</sup> Analysis of subject-matter-discriminatory laws generally has been done through a balancing test.<sup>261</sup> For viewpoint discriminatory regulations, however, the Court has employed stronger, more absolutist language to suggest that the more blatant violation of the First Amendment from laws targeting particular views or voices on a single subject might be virtually *per se* unconstitutional.<sup>262</sup> This special, heightened intolerance for

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*But see* REDISH, *supra* note 117, at 102 (arguing that content- and viewpoint-neutral regulations reduce the total quantity of available speech and are thus no more benign than content-based regulations); Williams, *supra* note 112, at 664 (questioning the justification for the conclusion that it is worse to silence some people based on the content of their speech than to silence everyone).

<sup>258</sup> See Williams, *supra* note 112, at 655.

<sup>259</sup> See Bederman et al., *Banana*, *supra* note 6, at 156-57; Bederman, *Twilight*, *supra* note 1, at 209-10.

<sup>260</sup> *Rosenberger*, 515 U.S. at 829.

<sup>261</sup> See *Burson v. Freeman*, 504 U.S. 191, 197-98 (1992) (stating that a law prohibiting speech on a particular topic must serve a compelling interest and be narrowly drawn to serve that end); *Simon & Schuster v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (same); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); see also *Edwards & Berman*, *supra* note 117, at 1528-29. *But see Burson*, 504 U.S. at 211-12 (Kennedy, J., concurring) (rejecting such a balancing approach for content-based laws). As a practical matter, of course, few such regulations survive this balancing test. See REDISH, *supra* note 117, at 119; Stone, *Content*, *supra* note 256, at 196.

<sup>262</sup> See Stone, *Viewpoint*, *supra* note 257, at 475 (“[A]lthough the Court has never expressly held that such restrictions are *per se* unconstitutional, one might fairly read that lesson into the actual record of the Court’s decisions.”); see also, e.g., *Rosenberger*, 515 U.S. at 829 (“The government must abstain from regulating speech when the specific

viewpoint discriminatory laws makes sense. Commentators have suggested several theoretical underpinnings for the content distinction.<sup>263</sup> Regardless of which of these rationales one adopts, it is especially threatened by a law that targets only one voice among several on one particular subject. The breach of the equality principle, the distortion and interference with the public thinking process, the breach of the requirement of epistemological skepticism, and the interference with the democratic process all are exacerbated when regulations target only one viewpoint on a particular subject matter.<sup>264</sup> Moreover, viewpoint discrimination poses the unique risk of creating a government-prescribed orthodoxy about some particular issue.<sup>265</sup>

Commentators are correct that APD statutes are subject-matter discriminatory, the subject being the healthfulness and safety of agricultural products and the processes and practices through which those products are grown, produced, and sold.<sup>266</sup> However, of greater constitutional concern is the fact that the statutes are viewpoint discriminatory within that subject matter. APD statutes provide a cause of action against only one side of the subject matter—against statements that cast

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motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (describing the greater constitutional problems of a statute that, in practical operation, goes beyond “mere” content discrimination to actual viewpoint discrimination); cf. Cahn, *supra* note 257, at 559 (interview with Justice Black) (“[F]reedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write.”); Redish & Lippman, *supra* note 257; at 281 (“[G]overnment is prohibited from regulating or suppressing speech on the basis of disagreement with or dislike of the viewpoint being expressed.”).

<sup>263</sup> See sources cited *supra* note 257.

<sup>264</sup> See Stone, *Viewpoint*, *supra* note 257, at 464 (“The risk of improper motivation is especially high in the context of viewpoint-based restrictions, for in considering the enactment of such laws, government officials are especially likely to be affected, consciously or unconsciously, by their own sympathy or hostility to the particular views sought to be restricted.”); see also Redish & Lippman, *supra* note 257, at 282 (“[A]t least in its theoretically pure state, the principle disallowing viewpoint regulation stands as the cornerstone of our democratic theory.”).

<sup>265</sup> See *West Virginia 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.”); see also Cahn, *supra* note 257, at 554 (interview with Justice Black) (arguing that government may not tell people what they should believe or say); Meiklejohn, *supra* note 113, at 257 (arguing that an individual “may not be told what he shall or shall not believe”); Stone, *Viewpoint*, *supra* note 257, at 464 (“[G]overnment may not restrict speech because it disapproves of a particular message. In a democratic society, it is for the people and not the government to decide what ideas are ‘good’ or ‘bad.’”).

<sup>266</sup> See Bederman et al., *Banana*, *supra* note 6, at 156-57; Bederman, *Twilight*, *supra* note 1, at 209-10.

doubt on the safety of agricultural products and are not based on reasonable and reliable scientific inquiry, facts, and data.<sup>267</sup> The statutes do not provide a similar cause of action against speech on the other side of that subject—statements suggesting that those same agricultural products are perfectly healthful and safe for human consumption, even if those statements equally lack any basis in reasonable and reliable scientific inquiry.

For example, the NRDC and CBS could face civil damages under APD statutes if a jury determined that the reports about the dangers of Alar were not based on reasonable science; however, the apple growers, industry groups, and their supporters face no such risk for equally scientifically unreasonable statements made in response. The industry and its supporters remain unrestricted by the statutes and thus remain free to claim that Alar-treated apples are perfectly safe and pose no cancer risk, no matter how lacking in scientific support such statements might be.<sup>268</sup> Similarly, while Howard Lyman's statements on the *Oprah Winfrey Show* about the risks of an outbreak of Mad Cow Disease in the United States due to the beef industry practices might have subjected him and the show to civil damages if such statements were found to be scientifically unsupported, industry representatives responding to him on the same program or elsewhere, no matter how scientifically unsupported their responses, would not have been subject to damages. It is patently incorrect to defend APD statutes as being "specifically aimed at preventing people from telling lies about agricultural products."<sup>269</sup> The statutes are aimed specifically at preventing people from making false statements that criticize agricultural products or the practices related to those products; the statutes do absolutely nothing to prevent people from making equally false statements about agricultural products, so long as those statements are in praise, support, and reassurance of the healthfulness and safety of the products and practices.<sup>270</sup>

This is the essence of viewpoint discrimination. Speech critical of a product or industry is burdened while speech favorable to that product or an industry is not so burdened. The likely result of such a scheme is the imposition of government-prescribed orthodoxy about the safety of agricultural products and industries, as only

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<sup>267</sup> See *supra* notes 67-70 and accompanying text.

<sup>268</sup> The maker of Alar declined to be interviewed by CBS, although it issued a statement calling any cancer risk "negligible." See *Auvil I*, 800 F. Supp. 928, 938 (E.D. Wash. 1992) (Appendix). That statement, no matter how scientifically unreasonable it might be, would not be subject to any judicial or jury scrutiny under an APD statute, nor would anything said on the broadcast on behalf of the maker.

<sup>269</sup> Isern, *supra* note 9, at 257.

<sup>270</sup> See Curtis, *Monkey Trials*, *supra* note 115, at 537 (arguing that certain viewpoints are favored over others because the scientists who believe there is little scientific risk in Alar will be safe in making bland, unequivocal assurances of safety, while a scientist reaching the opposite conclusion must express himself or herself in a much more guarded fashion or risk a civil lawsuit).

one side of the debate would feel free to speak. The state can neither impose a greater burden on one side of the debate nor can it provide greater protection to one side, because to do so would provide less protection to the speech on the other side. This proposition is true even if the speech on both sides is equally false. Government cannot permit the agricultural industries and their supporters full and free range in their scientific statements supporting and defending their products and practices while demanding scientific precision from speech criticizing or opposing the conduct and practices of that industry.<sup>271</sup> In Justice Scalia's words, government has no "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."<sup>272</sup> Imposing a greater burden on one side of the debate is precisely what APD statutes do.

The prohibition on viewpoint discrimination applies to Category Three restrictions just as it applies to Category One direct government burdens on speech.<sup>273</sup> One also cannot avoid the viewpoint discriminatory nature of APD statutes by arguing that they target only speech that causes a specific, narrowly defined harm due to its communicative impact. The statutes do not simply burden all speech regarding agricultural products that may cause the harm of a downturn in demand and price; they burden only scientifically unreasonable speech that questions or criticizes industry practices and products, which then, in turn, causes such a downturn. Such legislation is directed at a particular point of view and cannot be defended as "merely" harm-based.<sup>274</sup> The prohibition on such viewpoint discrimination also applies even when all the speech in question falls outside the realm of constitutional protection.<sup>275</sup> Thus, it is unavailing for these statutes' apologists to argue that the statutes target only unprotected false statements.<sup>276</sup> APD statutes are impermissibly viewpoint discriminatory because they target only false statements on one side of the debate about an agricultural product or industry. If we seriously consider the

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<sup>271</sup> Cf. *Schacht v. United States*, 398 U.S. 58, 63 (1970) ("[A law] which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment.").

<sup>272</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (Scalia, J., for the Court).

<sup>273</sup> See *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 326 (7th Cir. 1985) (striking down a city ordinance that provided a private cause of action against publishers of pornography to any victim of conduct traceable to pornographic speech), *aff'd*, 475 U.S. 1001 (1986); Stone, *Viewpoint*, *supra* note 257, at 467 (arguing that harm-based statutes providing private causes of action are "functionally indistinguishable from expressly viewpoint-based restrictions").

<sup>274</sup> See Stone, *Viewpoint*, *supra* note 257, at 467 (rejecting a similar argument with regard to the anti-pornography legislation struck down in *Hudnut*).

<sup>275</sup> See *R.A.V.*, 505 U.S. at 387 (holding that the First Amendment imposes a content-discrimination limitation, even upon a state's prohibition on a proscribable category of speech, such as fighting words).

<sup>276</sup> See Isern, *supra* note 9, at 257 (arguing that speakers will prevail in defamation actions if their speech is "honest and truthful").



suggestion from the Court and from commentators that viewpoint discrimination is per se unconstitutional, the very concept of APD statutes necessarily fails First Amendment scrutiny.

The viewpoint discriminatory nature of APD statutes raises several concerns. First, this argument could prove too much and render unconstitutional, all common law defamation actions, as equally viewpoint discriminatory, at least for public figures or on matters of public concern.<sup>277</sup> A defamation action will succeed only if the speech in question is both false and negative or damaging to the plaintiff's reputation; speech that is false but positive or that serves to enhance the plaintiff's standing or reputation would not support a claim for defamation.<sup>278</sup> If APD statutes are impermissibly viewpoint discriminatory, it follows that common law defamation is as well.

The first, most glib, response is that defamation is indeed viewpoint discriminatory and that private actions for damages should be barred by the First Amendment, at least where the speech is on a matter of public or general concern. This conclusion is neither new nor necessarily radical.<sup>279</sup> There were strong absolutist arguments in the early years of the *New York Times* regime, most notably from Justices Black and Douglas, that common law defamation for speech on a matter of public concern was fundamentally inconsistent with First Amendment protections of press and political speech.<sup>280</sup> Commentators have agreed that such an

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<sup>277</sup> See discussion *supra* notes 150-63 and accompanying text.

<sup>278</sup> For example, supporters of a candidate for public office may claim falsely that the candidate does not drink and always has been faithful to his wife; opponents may not falsely (or at least with knowledge or reckless disregard of that falsity) claim that the candidate often is drunk while working and has been having an affair with an aide. The latter statements would be actionable in a defamation action, but not the former.

One of the ironies of *New York Times* was that Sullivan's reputation was not harmed, and likely was enhanced in the eyes of an Alabama audience, by allegations that his officers took a hard line against civil rights demonstrators in the heat of the civil rights controversy. See Kalven, *Central Meaning*, *supra* note 3, at 197; see also *supra* notes 151-53 and accompanying text.

<sup>279</sup> See Halpern, *supra* note 125, at 315 ("Simplification is a vital consideration. Of course, the simplest solution is Justice Black's: the inconsistency between the first amendment and an action for defamation cannot be reconciled or compromised, and, therefore, the action cannot be maintained.").

<sup>280</sup> See, e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 171-72 (1967) (Black, J., joined by Douglas, J., concurring in the result in *Walker*, and dissenting in *Butts*) (urging the Court to "give the First Amendment its natural and obvious meaning" and to "adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments"); *Rosenblatt v. Baer*, 383 U.S. 75, 95 (1966) (Black, J., joined by Douglas, J., concurring and dissenting) ("To be faithful to the First Amendment's guarantees, this Court should free private critics of public agents from fear of libel judgments for money just as it has freed critics from fear of pains and penalties inflicted by government."); *New York Times v. Sullivan*, 376 U.S. 254, 297

absolutist approach would eliminate much of the current confusion and uncertainty in defamation law.<sup>281</sup> Instead, as Justice Douglas argued, "continued recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech" a diluted protection.<sup>282</sup> These absolutist arguments generally have focused on the centrality of the discussion of public affairs and public figures to First Amendment protections<sup>283</sup> and on the chilling effect posed by the risk of being sued and losing.<sup>284</sup> On the other hand, the prominence of the content distinction as a central First Amendment precept and the virtually per se unconstitutionality of viewpoint discriminatory laws are recent doctrinal developments.<sup>285</sup> This development simply provides a new theoretical and doctrinal basis to support the absolute protection from Category Three restrictions suggested by Justices Black and Douglas. Category Three restrictions, such as defamation and APD statutes, are constitutionally impermissible for the additional reason that they are viewpoint discriminatory.

This argument as to APD statutes, however, does not require the upending of thirty years of reasonably settled First Amendment law as to defamation. We simply must recognize the constitutional line between false, negative speech in discussions about an entire subject matter or issue of public concern, on the one hand, and false, negative speech about a particular, identified, targeted individual or company, on the

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(1964) (Black, J., joined by Douglas, J., concurring) ("An unconditional right to say what one pleases about public affairs is what I consider the minimum guarantee of the First Amendment."); *see also* Cahn, *supra* note 257, at 557 (interview with Justice Black) (Justice Black arguing that the First Amendment, as originally ratified, intended that there should be no libel or defamation law).

<sup>281</sup> *See* Halpern, *supra* note 125, at 315 (arguing that Justice Black's absolute preclusion "might well be better than the present chaos"); Matheson, *supra* note 122, at 232 (suggesting that the "[t]otal vindication of the substantive value of free expression may require the elimination of this risk of error by providing absolute protection for defamatory falsehoods"); *see also* RODNEY A. SMOLLA, *SUING THE PRESS* 238 (1986) ("Almost everyone these days seems dissatisfied with the current state of the American law of libel.").

<sup>282</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 358 (1974) (Douglas, J., dissenting).

<sup>283</sup> *See New York Times*, 376 U.S. at 296-97 (Black, J., joined by Douglas, J., concurring) ("[F]reedom to discuss public affairs and public officials is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion."); *id.* at 298-99 (Goldberg, J., joined by Douglas, J., concurring in the result) ("The theory of our Constitution is that every citizen may speak his mind . . . on matters of public concern.").

<sup>284</sup> *See id.* at 300-01 (Goldberg, J., joined by Douglas, J., concurring in the result) (describing the chilling effect of restrictive libel laws on First Amendment freedoms); Kalven, *Central Meaning*, *supra* note 3, at 219-20 (arguing that the same deterrence and self-censorship that flows from the requirement of the citizen-critic to prove truth also flows from the risk involved in proving necessary malice).

<sup>285</sup> *See supra* notes 255-65 and accompanying text.

other.<sup>286</sup> The viewpoint discriminatory impact of ordinary defamation arguably may be explained and defended in the latter situation as necessary to the balance between free speech and individual reputation subject to direct attack that is the crux of defamation.<sup>287</sup> As Professor Fried argues, however, this governmental interest does not extend to punishing even the grossest falsehoods about public matters and issues generally; in that circumstance, the public must be left to sort out for itself that which it chooses to accept as true without interference from government.<sup>288</sup> Absent this concern for individual reputation, the requirement of viewpoint neutrality predominates, prohibiting laws that punish or otherwise burden speech with which the government or the dominant segment of society disagrees or disapproves.<sup>289</sup> APD statutes target only scientifically unreasonable speech that criticizes or presents a negative view of a generic agricultural product or a general industry and its practices; by their nature, they do not require any connection to a particular individual or company which would trigger a concern for individual reputational interests.<sup>290</sup> Thus, the tort of ordinary defamation, with its requirement that the target of a statement be reasonably identifiable, survives, while causes of action under APD statutes, expressly drawn without that requirement, violate the viewpoint discrimination principle.

Another possible argument on this issue is that APD statutes are not viewpoint discriminatory but rather represent an attempt to level the free speech playing field. Claims about the health benefits of products on labels and in advertising historically have been subject to regulation by the federal government.<sup>291</sup> Members of food-

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<sup>286</sup> See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (plurality opinion of Brennan, J.) (emphasizing that the public concern is with the conduct or issue rather than with the participant); see also *supra* notes 173-77 and accompanying text.

<sup>287</sup> See *supra* note 174 and accompanying text.

<sup>288</sup> See Fried, *supra* note 53, at 238-39; see also *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988) (“[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.” (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945))); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 137 (1989) (arguing that a government deciding what ideas to suppress is bound to be affected by dominant opinion and its desire to preserve its own power); *infra* notes 348-54 and accompanying text.

<sup>289</sup> See *supra* notes 262-65 and accompanying text.

<sup>290</sup> See *supra* notes 205-15 and accompanying text.

<sup>291</sup> See Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1436 (1990) [hereinafter, Redish, *Product*] (describing the regulatory authority of the Federal Trade Commission, FDA, and state agencies over product health claims); John M. Blim, Comment, *Free Speech and Health Claims Under the Nutritional Labeling and Education Act of 1990: Applying a Rehabilitated Central Hudson Test for Commercial Speech*, 88 NW. U. L. REV. 733, 737-42 (1994) (providing an overview of regulations governing product health claims and the restrictions they place on producers).

product industries already are prohibited from making claims about their products that are not supported by what the government recognizes as, and has found to be, significant reliable scientific agreement, in some cases regardless of the truth of the particular claim.<sup>292</sup> Thus, the argument would go, APD statutes prohibit critics of an agricultural product or industry from making scientifically unsupported claims against the healthfulness or safety of food products, just as government regulators already prohibit members of the food product industry from making such claims in support of the healthfulness or safety of their products. In fact, the standards applicable to all these statutes are similar, in that they all look to the existence of reasonable scientific support and agreement.<sup>293</sup> Therefore, APD statutes are not themselves viewpoint discriminatory; rather they form, together with FDA and other regulations on product advertising, a comprehensive, viewpoint-neutral whole that prohibits either industry members or industry critics from making scientifically unsupported statements about agricultural products.

This argument fails on several levels. First, if the regulations on product advertising and labeling are indeed viewpoint discriminatory, an acceptable response has never been to prohibit even more speech in an equally viewpoint discriminatory manner on the other side. Government cannot justify viewpoint discrimination by restricting more speech by more speakers so as to create an equality of silence.<sup>294</sup> To do so reduces the total amount of available speech and thus violates the First Amendment in its own right.

Second, this argument fails as a doctrinal matter because it entirely ignores the distinction between commercial and noncommercial speech and the reduced level of protection that the former receives.<sup>295</sup> Accepting for the moment that reduced protection for commercial speech is theoretically justified,<sup>296</sup> it certainly has never

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<sup>292</sup> See, e.g., 21 U.S.C. § 343 (1994) (defining when a food or drug will be considered misbranded); 15 U.S.C. § 52 (prohibiting false advertisements); 15 U.S.C. § 45 (prohibiting unfair or deceptive trade practices); see also Blim, *supra* note 291, at 742.

<sup>293</sup> Compare Blim, *supra* note 291, at 739 and 21 U.S.C. § 343 with, e.g., TEX. CIV. PRAC. & REM. CODE § 96.003 (West 1996).

<sup>294</sup> See REDISH, *supra* note 117, at 111-12 (rejecting a focus on equality that could be satisfied if the government restricts enough speech by enough groups); Howard, *supra* note 257, at 361 ("The appropriate remedy is to remove the distortion [of the content-based law], not to eliminate public debate itself.").

<sup>295</sup> See *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993) ("The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

<sup>296</sup> But see Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553, 553 (1997) [hereinafter Redish, *Demise*] (arguing that commercial speech should receive full constitutional protection); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 594-95 (1996) [hereinafter Redish, *Tobacco*] (rejecting several rationales for according lesser protection to commercial speech).

been applied outside the very narrow context of "speech which does no more than propose a commercial transaction."<sup>297</sup> In fact, the distinction between commercial and political speech turns precisely on this disparate treatment of false or misleading speech—proscribable in the former context but not in the latter.<sup>298</sup> However, restrictions on commercial advertising have never been extended and applied to broader social or political speech, even where the speaker and the content of the message are the same.<sup>299</sup> FDA and Federal Trade Commission (FTC) regulations on product advertisements and labels do not and should not apply to speech by a producer, grower, or other industry member that is designed only to influence or change public opinion and public policy in the broader debate about an issue such as the safety of practices in the beef industry or the health risks of Alar.<sup>300</sup> Further, those restrictions certainly do not and should not apply to speech by non-members of the industry who simply speak out in support of the industry's position.

Thus, the idea of evening out the public debate is simply wrong. APD statutes target political speech and disparaging statements in the public debate about food safety; commercial speech regulations have dropped out. Apple growers and their supporters remain unrestricted and not subject to suit as to what they say about the safety of Alar-treated apples during the discussion of the issue on *60 Minutes*, just as cattle ranchers remain unrestricted and not subject to suit as to what they say about the risk of Mad Cow Disease during a discussion on *Oprah*. Only speakers opposing or criticizing those products and practices face the chilling risk of a civil lawsuit. Therefore, APD statutes stand alone in restricting only scientifically unsupported statements that suggest a product is unsafe; the industry and its supporters remain free to make the converse claims with no threat of lawsuit or damages.

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<sup>297</sup> *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983) (citations and internal quotation marks omitted); Redish, *Demise*, *supra* note 296, at 566-67.

<sup>298</sup> See Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 802 (1998).

<sup>299</sup> See Danny J. Boggs, *A Differing View on Viewpoint Discrimination*, 1993 U. CHI. LEGAL F. 45, 48 (arguing that prohibitions on cigarette advertising "say[ ] nothing about, for example, a program analyzing scientific studies from the tobacco industry's point of view"); Redish, *Demise*, *supra* note 296, at 578 ("The operation of commercial enterprises and the quality of their products and services give rise to inescapable social and political implications.").

<sup>300</sup> See Redish, *Demise*, *supra* note 296, at 566-67 (noting that the definition of commercial speech provides full protection to Ralph Nader to criticize the safety of the Corvair and to Chevrolet to respond if its statements do more than promote the commercial sale of the car); Redish, *Product*, *supra* note 291, at 1456 (arguing that protection for scientific and health claims about a product should be the same, regardless of whether the speaker is the producer or someone else); see also Boggs, *supra* note 299, at 47 (arguing that the gambling industry could run general advertisements asserting that gambling is wholesome entertainment).

Moreover, commentators have suggested that, while the people might be willing to delegate to government the power to make expert declarations as to the correctness of food labels, medicine claims, and commercial advertising, they are much more reluctant to permit government to prevent, or by extension to provide for punishment of, publication of scientific papers based on what government determines or deems to be false or unreliable data or scientific evidence.<sup>301</sup> Critics of the commercial speech distinction have warned that the risk of the government's power to restrict certain statements in commercial advertisements would lay the groundwork for the suppression of similar statements in a different context.<sup>302</sup> The "leveling" argument is the clearest example of this, by which commercial speech restrictions on product health claims are used to justify broader, political speech restrictions about product health and safety, such as APD statutes. Worse, the statutes do so in a viewpoint discriminatory manner, by targeting one side of the public debate and leaving the other side unfettered.

Finally, as a theoretical matter, it is significant that the gap between commercial and non-commercial speech has narrowed in recent years.<sup>303</sup> If the Court has indeed collapsed the distinction between these two categories of speech, it certainly has not done so by importing into the social and political realm the types of regulations on scientific speech that have applied to commercial speech and that only could have been justified by reference to the supposedly unique nature of commercial speech.<sup>304</sup>

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<sup>301</sup> See Fried, *supra* note 53, at 239; Schauer, *Language*, *supra* note 146, at 298 (arguing that the application of commercial speech prohibitions to politically oriented scientific speech by scientists suggests a substantial danger to First Amendment principles); see also Redish, *Product*, *supra* note 291, at 1456 (arguing that full protection for scientific statements by neutral scientists should mean full protection for scientific statements by manufacturers).

<sup>302</sup> See Redish, *Product*, *supra* note 291, at 1457-58 (describing but rejecting the argument that equating commercial and political speech will result in a reduction of protection for the latter); see also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627, 648-49 (1990) (arguing that gambling advertisements cannot endanger the welfare of citizens any more than speech by the Ku Klux Klan endangers the welfare of minority groups and thus the approach to the latter should be the same as the approach to the former).

<sup>303</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (plurality opinion of Stevens, J., joined by Kennedy, J., and Ginsburg, J.) ("Regulations that suppress the truth are no less troubling because they target [commercial speech]."); *id.* at 522 (Thomas, J., concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (rejecting the bare assertion that the "low value" of commercial speech justified selective and categorical regulation of such speech); see also Redish, *Demise*, *supra* note 296, at 555 (arguing that the Court appears to have rejected the "step child" status of commercial speech).

<sup>304</sup> See *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425

Rather, the Court seemingly has raised the level of commercial speech protection.<sup>305</sup> Reducing the freedom of scientific speech in the political context, as APD statutes do, runs precisely counter to this trend.

## 2. Underinclusiveness

When a law discriminates based on the subject matter of speech, the statute must be the least restrictive means to serve a compelling government interest.<sup>306</sup> This narrow tailoring requirement, while obviously prohibiting laws that restrict too much speech, also invalidates laws that restrict too little speech or that are underinclusive by providing exemptions for some statements.<sup>307</sup> When a law designed to serve some governmental interest makes exemptions and thus leaves unregulated speech that implicates that same governmental interest, it “may effectively undercut the asserted importance of the government interest said to support the restriction.”<sup>308</sup> The heightened scrutiny applied to subject matter-based laws means that a law cannot be said to protect a compelling interest if it leaves unregulated speech that “leaves appreciable damage to that supposedly vital interest unprohibited.”<sup>309</sup> One commentator on APD statutes hinted at the underinclusiveness problem by arguing that “the Constitution prohibits [government] from creating tort remedies restricted

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U.S. 748, 771-72 n.24 (1974) (describing the “commonsense differences” between commercial and noncommercial speech, notably the greater objectivity and hardiness of commercial speech); see also *Discovery Network*, 507 U.S. at 430 (striking down regulation on commercial speech when the asserted governmental interests are unrelated to those differences).

<sup>305</sup> Redish, *Demise*, *supra* note 296, at 555 (arguing that the current trend is that the Court is beginning to advocate openly full First Amendment protection for commercial speech).

<sup>306</sup> See, e.g., *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (holding that the government may regulate speech on the basis of content when such regulation is necessary to serve a compelling state interest and is narrowly tailored to that interest); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); Edwards & Berman, *supra* note 117, at 1528-29 (describing the various formulations of the strict scrutiny standard).

<sup>307</sup> See *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (holding that a state must demonstrate a commitment to advancing a compelling interest by applying its prohibition evenhandedly).

<sup>308</sup> Stone, *Content*, *supra* note 256, at 206; see also *City of Ladue*, 512 U.S. at 52-53 (stating that exemptions “may diminish the credibility of the government’s rationale for restricting speech in the first place”); Stone, *Content*, *supra* note 256, at 206 (arguing that legislation’s rationale loses force when the government creates an exemption).

<sup>309</sup> *Florida Star*, 491 U.S. at 542 (Scalia, J., concurring in part and concurring in the judgment).

to agricultural products.”<sup>310</sup> This conclusion is correct, but the issue requires much closer analysis.

States that have passed APD statutes have provided causes of action only to industries that deal with perishable agricultural and aquacultural products, but not to other industries, such as the automobile industry or the nuclear energy industry.<sup>311</sup> The states likely would justify this distinction by differences between the industries. All APD statutes define an agricultural food product by reference to whether the product is sold or distributed “in a form that will perish or decay beyond marketability within a reasonable period of time.”<sup>312</sup> The theory appears to be that a month-long downturn in the sale of apples due to negative speech results not only in the loss of one month of sales, but also in the spoilage and loss of the apples themselves; the grower or producer will not have the opportunity to recoup the lost sales. By contrast, a one-month drop in auto sales will not necessarily result in the spoilage of the cars themselves, which may be sold at a later time. This distinction would be constitutionally acceptable under the Equal Protection Clause of the Fourteenth Amendment, in which disparate treatment, if it is not based on race, gender, or some other suspect class or on fundamental rights, demands only a rational relationship between the disparity and the governmental interest.<sup>313</sup> Thus, if an automobile manufacturer were to bring an Equal Protection challenge to the fact that the apple industry receives the protection of a private cause of action against generally negative speech while the auto industry does not, the spoilage distinction

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<sup>310</sup> Bederman et al., *Banana*, *supra* note 6, at 156; *see also* Bederman, *Twilight*, *supra* note 1, at 209-10.

<sup>311</sup> *See supra* notes 65-71 and accompanying text. Moreover, the State of Texas apparently was unsuccessful in providing the cause of action to its cattle ranching industry. *See Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 863 (N.D. Texas 1998) (holding that cattle are not covered under Texas APD statutes). *But see* Isern, *supra* note 9, at 252 (arguing that the legislative history supports the conclusion that cattle are protected under the Texas statute).

<sup>312</sup> OHIO REV. CODE ANN. § 2307.81(B)(3) (Anderson 1996); *see also, e.g.*, S.D. CODIFIED LAWS § 20-10A-1(1) (Michie 1995) (“perish or decay beyond marketability within a period of time”); TEX. CIV. PRAC. & REM. CODE § 96.001 (West 1996) (“perish or decay beyond marketability within a limited period of time”); *supra* note 65 and accompanying text.

<sup>313</sup> *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”).



would be reasonable and the statute likely would survive constitutional scrutiny as economic regulation with a plainly rational basis.<sup>314</sup>

Much more is required when speech is concerned.<sup>315</sup> As discussed previously, states generally have asserted three interests in support of APD statutes: (1) protection of the pecuniary and business interests of the producers, growers, and sellers of perishable agricultural products; (2) protection of the public from unreliable scientific information about the products it uses; and (3) protection of the state economy as a whole, with the concomitant protection of the public.<sup>316</sup>

Regarding protection of the public from false or unreliable information, this rationale certainly is not a concern that could be limited to perishable products. Even conceding, *arguendo*, the propriety of such a paternalistic interest,<sup>317</sup> false and disparaging speech about a non-perishable industry—for example, nuclear power—is equally as harmful to the public as is false disparaging speech about the apple industry: both deal with products or services that are consumed and used by the public; in either industry, unsafe products or unsafe operating procedures pose potentially catastrophic public health and safety consequences; and the public is as susceptible to being fooled by false statements regarding either one. Negative, scientifically-unsupported statements about either industry likely would cause people to fear for their safety and to disassociate themselves from use of either product or service, the very result APD statutes appear designed to avoid. If people cannot be trusted to evaluate rationally the speech they hear about apples because of a concern that they will believe false speech and therefore avoid the product, then they cannot be trusted to evaluate rationally the speech about nuclear power based upon that same concern. If a private cause of action is justified as to the former industry, it is justified as to the latter. Thus, the distinctions drawn between agricultural and other products fail and that failure undercuts the asserted governmental interest.

The same result occurs if we focus on the third interest—protection of the state economy and, indirectly, the public. The statewide economic impact of a downturn in a particular industry does not turn, in any way, on whether the product in question will decay beyond marketability. It is likely, for example, that a downturn in the Oklahoma oil industry would have at least as broad an impact as a downturn in the Oklahoma wheat industry. However, speech about the former industry is not subject to the statute, although it certainly implicates the same governmental interest. Again,

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<sup>314</sup> See *Williamson v. Lee Optical Co. of Okla.*, 348 U.S. 483, 488-89 (1955) (rejecting an Equal Protection Clause challenge to a law that required a prescription from either a licensed ophthalmologist or optometrist for the fitting of lenses or the duplication of lenses).

<sup>315</sup> See Nat Stern, *Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 609 (1990) (“[M]ere government belief in the appropriateness of particular means, adequate in other spheres of regulation, suffers diminished credibility when speech is restricted.”).

<sup>316</sup> See *supra* notes 48-50 and accompanying text.

<sup>317</sup> See *infra* notes 419-20 and accompanying text.

the distinction fails, the failure undercuts the asserted governmental interest, and the underinclusiveness is fatal to APD statutes.

It is important to note that states could not remedy the constitutional underinclusiveness or “too little speech” problem by broadening the statutes to cover more industries.<sup>318</sup> Rather, if the states were to expand APD statutes to prohibit disparagement of all general products and industries, the laws almost certainly would be held to prohibit too much speech.<sup>319</sup> This might be understood as the “Catch-22” of the First Amendment—the narrow-tailoring requirement for content-discriminatory laws demands a regulatory precision that often is impossible to achieve.<sup>320</sup> However, the First Amendment balancing between free expression and government interests, strongly weighted in favor of speech, commands this result.<sup>321</sup>

### B. Centrality of Political Speech

There is a strain in free speech theory and doctrine that places at the core of free speech protection the “activities of thought and communication by which we ‘govern.’”<sup>322</sup> This approach arises from the democratic form of government, which

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<sup>318</sup> See Howard, *supra* note 257, at 360.

<sup>319</sup> See *id.*; see also *City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994) (stating that removing exemptions to prohibit more speech would not save a regulation of speech). Such a broad prohibition, while not underinclusive, would violate the First Amendment on the other points discussed in this Article. See *supra* notes 260-305 and accompanying text; *infra* notes 322-444 and accompanying text.

<sup>320</sup> See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (noting the precision that the First Amendment requires when a statute regulates the content of speech); see also REDISH, *supra* note 117, at 119 (noting that strict scrutiny often is a standard incapable of compliance); Stone, *Content*, *supra* note 256, at 196 (“[I]n assessing the constitutionality of content-based restrictions on high value expression, the Court employs a standard that approaches absolute protection.”).

<sup>321</sup> See REDISH, *supra* note 117, at 55 (“The point, however, is to balance with a ‘thumb on the scales’ in favor of speech.”); Curtis, *Discontents*, *supra* note 196, at 427 (arguing that a court is more speech-protective if it views its job as applying broad free speech protections rather than balancing whether particular speech should be suppressed); Stone, *Content*, *supra* note 256, at 196 (arguing that the Court employs not a traditional balancing approach but a far more speech-protective analysis in dealing with high value speech).

<sup>322</sup> Meiklejohn, *supra* note 113, at 255; see also *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (“The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (internal quotation marks and citation omitted)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); Cahn, *supra* note 257, at 559 (interview with Justice Black) (Justice Black agreeing that one basic purpose of the First Amendment was the protection of political speech); Kalven, *Central Meaning*, *supra* note 3, at 209 (arguing that the rejection of seditious libel in *New York Times* reflects the central function of free speech on public issues in American democracy).

can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express. . . . [I]t is these activities, in all their diversity, whose freedom fills up "the scope of the First Amendment." These are the activities to whose freedom it gives its unqualified protection.<sup>323</sup>

Several theorists have argued that such political speech represents the sum total of protected speech.<sup>324</sup>

The more common approach, both theoretically and doctrinally, suggests that political speech does not exhaust the scope of free speech protection, although the First Amendment "affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>325</sup> Any limitations on such political expression will be subject to exacting scrutiny.<sup>326</sup>

Much of the speech targeted and restricted by APD statutes is precisely the type of pure, core political speech that is at the heart of free expression. As a general proposition, much scientific speech is politically relevant.<sup>327</sup> Consider, for example,

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<sup>323</sup> Meiklejohn, *supra* note 113, at 255; *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) ("Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution." (internal quotation marks and citations omitted)).

<sup>324</sup> *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-28 (1971) (arguing that the sole purpose of protecting free speech is to aid the political process and that no other form of expression falls within that protection); Meiklejohn, *supra* note 113, at 259 (arguing that speech that has no relation to the business of governing is not protected by the First Amendment). Professor Meiklejohn softened his stance and extended protection to "many forms of thought and expression within the range of human communications" from which the voter acquires and develops the ability to govern, including education, science, philosophy, literature, and the arts. Meiklejohn, *supra* note 113, at 256-57. *But see* Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 317 (1978) (criticizing as limitless the Meiklejohnian extension of what can be called political).

<sup>325</sup> McIntyre, 514 U.S. at 346 (internal quotation marks and citation omitted); *see also* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); REDISH, *supra* note 117, at 22 (acknowledging the need for protection of free speech to aid in making political judgments, as well as in making other decisions); Meiklejohn, *supra* note 113, at 257 ("Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents.").

<sup>326</sup> *See Meyer*, 486 U.S. at 420.

<sup>327</sup> *See* Curtis, *Monkey Trials*, *supra* note 115, at 541 (stating that a great deal of

the South Dakota statute, which makes actionable speech suggesting "that generally accepted agricultural and management practices makes agricultural food products unsafe for consumption by the public."<sup>328</sup> Such generally accepted practices often are suggested, approved, monitored, regulated, and even required by the government. Criticism of those practices thus becomes indistinguishable from, and indeed becomes criticism of, the government policies that regulate, condone, and require those practices. In other words, a cause of action under an APD statute could lie against an individual or organization who directly "attacks, by words of disapproval and condemnation, the policies of the government."<sup>329</sup> The idea that criticism of government policies or proposed government policies could provide the basis for a civil cause of action is entirely inconsistent with the modern system of free expression.<sup>330</sup>

The *60 Minutes* broadcast about the use of Alar, featuring comments from public officials, issue activists, and medical experts, may be viewed less as an attack on the apple industry than as a criticism of the EPA, the FDA, and Congress for their failure to act more quickly and more effectively in the face of strong scientific evidence about the cancer risk from Alar and to initiate cancellation proceedings to remove Alar from the market.<sup>331</sup> Similarly, the "Dangerous Foods" program on *Oprah* was broadcast amid an ongoing controversy about Mad Cow Disease and actions by various government agencies to address the problem, including, following the broadcast, the recommendation and announcement of bans on the use of ruminant-derived feeds.<sup>332</sup>

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scientific speech is politically relevant); Meiklejohn, *supra* note 113, at 257 (describing the role of science in "creating knowledge and understanding of men and their world").

<sup>328</sup> S.D. CODIFIED LAWS § 20-10A-1(2) (Michie 1995); *see also supra* notes 178-81 and accompanying text.

<sup>329</sup> Meiklejohn, *supra* note 113, at 259.

<sup>330</sup> *See McIntyre*, 514 U.S. at 352-53 n.16 (1995) (rejecting the notion that a public policy question could be the victim of character assassination); *New York Times*, 376 U.S. at 269 ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."); *id.* at 296 (Black, J., joined by Douglas, J., concurring) (arguing that the First Amendment leaves the people free to discuss public affairs with impunity); Kalven, *Central Meaning*, *supra* note 3, at 209 ("The touchstone of the First Amendment has become the abolition of seditious libel . . ."); Meiklejohn, *supra* note 113, at 259 (arguing that criticism of public policies must be protected by the First Amendment); *supra* notes 200-08 and accompanying text.

<sup>331</sup> *See supra* notes 14-22 and accompanying text; *see also, e.g.*, Auvil I, 800 F. Supp. 928, 940 (E.D. Wash. 1992) (Appendix) (quoting Dr. Hathaway: "They have the opportunity to suspend the use of the chemical today . . . [a]nd they're not doing it."); *id.* at 938 (Appendix) (statement of Rep. Sikorsky, expressing frustration with the EPA's refusal to pull Alar off the market); Semple, *supra* note 12, at 408-09 (describing studies of Alar and EPA plans to initiate cancellation proceedings in the period leading up to the CBS broadcast).

<sup>332</sup> *See Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 860-61 (N.D. Tex. 1998); *id.* at 865-66 (Appendix A).

The show also included discussions of the risks of an outbreak in the United States and comments from government officials, as well as discussions of industry practices.<sup>333</sup> Government policy and conduct were at least partly at issue in both broadcasts; to make that speech actionable is to target impermissibly the criticism of government and government policies.

Moreover, one cannot ignore the fact that such speech often leads to shifts in public opinion, public behavior, and, when government finally acts, public policy. The FDA removed Alar from the market in the wake of the *60 Minutes* broadcast and the discussion of the cancer risks.<sup>334</sup> Arguably, the broadcast hastened this process and compelled action from a government that often is too slow to act; the scientific ideas were disseminated, the public responded by boycotting the product, and the product was removed from the market, all while some scientists suggested that the prevailing wisdom actually understated the health risks of Alar.<sup>335</sup> The FDA similarly jump-started the administrative process regarding the use of ruminant-based feed following the *Oprah* broadcast and ultimately issued a ban on the use of such feed.<sup>336</sup> The most famous example of the power of speech about food industry safety practices to change public opinion and public policy is Upton Sinclair's *The Jungle*.<sup>337</sup> That novel, in depicting the plight of immigrant workers, described in vivid detail the conditions and practices in the Chicago meat packing plants, including the use of tubercular beef and poisoned rats in meat production and workers falling into vats of lard.<sup>338</sup> The description of industry practices unleashed a storm of public outrage. President Theodore Roosevelt stopped eating meat as a symbolic gesture.<sup>339</sup> The novel is widely credited with providing the decisive push for passage of the Pure Food and Drug Act of 1906, only six months after publication.<sup>340</sup> The point is that criticism of food products and industries contains a necessary political component that brings it within the central core of free speech protection and entitles it to the highest constitutional protection.<sup>341</sup> A statute that potentially makes such criticism actionable is, at its root, violative of free expression.

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<sup>333</sup> See *id.* at 870 (Appendix B) (statements of Dr. William Hueston of the USDA); *id.* (Appendix B) (comments of Howard Lyman on industry practices); see also *supra* notes 80-86 and accompanying text.

<sup>334</sup> See *Auvil I*, 800 F. Supp. at 930.

<sup>335</sup> See Curtis, *Monkey Trials*, *supra* note 115, at 592.

<sup>336</sup> See *Texas Beef Group*, 11 F. Supp. 2d at 865-66 (Appendix A) (stipulating in the findings of fact).

<sup>337</sup> UPTON SINCLAIR, *THE JUNGLE* (1906).

<sup>338</sup> See *id.* at 135.

<sup>339</sup> See NATHAN MILLER, *THEODORE ROOSEVELT: A LIFE* 460 (1992).

<sup>340</sup> See MICHAEL EMERY & EDWIN EMERY, *THE PRESS AND AMERICA* 263-64 (6th ed. 1988); Curtis, *Monkey Trials*, *supra* note 115, at 559.

<sup>341</sup> Cf. *Texas Beef Group*, 11 F. Supp. 2d at 862 ("It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.").

### C. *The Role of Truth in First Amendment Theory*

The Supreme Court's two broad pronouncements about the role of truth have wound themselves into the fabric of free speech theory and jurisprudence. The first is Justice Holmes' aphorism in dissent in *Abrams v. United States*:<sup>342</sup>

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>343</sup>

Second, and logically related, is the Court's statement in *Gertz v. Robert Welch, Inc.*:<sup>344</sup> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."<sup>345</sup> Together, these statements form what should be two connected, ironclad rules: first, the government should be prohibited from declaring truth; and second, the individual's right to pursue truth should be unencumbered.<sup>346</sup> This Article focuses on the first of these rules.<sup>347</sup>

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<sup>342</sup> 250 U.S. 616 (1919).

<sup>343</sup> *Id.* at 630 (Holmes, J., dissenting). One commentator has suggested that this marketplace metaphor has been virtually canonized. See Marshall, *supra* note 115, at 1.

<sup>344</sup> 418 U.S. 323 (1974).

<sup>345</sup> *Id.* at 339-40. For several years, this statement was believed to create a strong fact/opinion distinction in First Amendment law, with the latter receiving absolute protection. See Stern, *supra* note 315, at 595 (describing the fact/opinion distinction as "one of the most controversial but persistent shibboleths of contemporary first amendment doctrine"). But see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (holding that the dispositive question is whether a particular statement of opinion contains within it some factual assertion that a reasonable fact-finder could find is provable as true or false).

<sup>346</sup> See Marshall, *supra* note 115, at 5.

<sup>347</sup> The second rule, the idea of a search for truth in the marketplace of ideas as a central free speech rationale, has been widely criticized. See REDISH, *supra* note 117, at 46 (arguing that the search for truth rationale creates a danger that someone will decide that he has attained knowledge of truth and is justified in shutting off all contrary expression); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 953-57 (1997) (criticizing the four implicit assumptions of the marketplace idea); Ingber, *supra* note 257, at 5 (describing the real-world conditions that interfere with the effective operation of the marketplace of ideas); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 468 (arguing that the marketplace of ideas permits racism and racist ideas to thrive); Marshall, *supra* note 115, at 2 (describing the argument that objective or transcendent truth is unknowable). But see

"[C]lassic free speech theory is really a defense of the risk of permitting a false doctrine to circulate—it is, as we all now know, freedom for 'the thought that we hate.'"<sup>348</sup> The most obvious means of effectuating that defense is to restrict the ability of government to declare what ideas, thoughts, and statements are true or not true.<sup>349</sup> This restriction is best understood and explained as a by-product of the "abiding skepticism of contemporary first amendment epistemology."<sup>350</sup> This epistemological skepticism commands that there be strong doubt about "the ability of institutional decisionmakers, such as juries, judges, law enforcement officials, or university faculties, to separate true facts from false facts and is even more suspicious of the spurious surgical precision with which such institutional decisionmakers often purport to distinguish fact from opinion."<sup>351</sup>

This has been accomplished by establishing a constitutional jurisprudence that deliberately overprotects actually or potentially false speech in order to provide a buffer zone of safety for truth and to provide breathing space by protecting some inevitably false statements.<sup>352</sup> Given this doctrinal and theoretical commitment to

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*id.* at 4 ("The value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself.").

<sup>348</sup> Kalven, *Scopes*, *supra* note 238, at 516 (emphasis in original); *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

<sup>349</sup> *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); Cahn, *supra* note 257, at 554 (interview with Justice Black) (Justice Black arguing that government "should not tell the people . . . what they should believe"); Meiklejohn, *supra* note 113, at 257 ("[H]e may not be told what he shall or shall not believe.").

<sup>350</sup> Smolla, *Rethinking*, *supra* note 196, at 180.

<sup>351</sup> *Id.* This is a common theme in free speech theory. *See* Fried, *supra* note 53, at 239 (arguing that government cannot be trusted to enforce a view of truth about itself); Marshall, *supra* note 115, at 20 ("There is little evidence . . . to believe that the political processes are an appropriate vehicle from which to discover truth."); Redish & Lippman, *supra* note 257, at 282 (arguing that giving government the power to regulate the truth of particular viewpoints would be "inherently boundless"); Schauer, *Language*, *supra* note 146, at 270 ("[E]ven assuming that some absolute truth can be found in any area of inquiry . . . the political state may be an especially unsuitable body to make the determination of what is true and what is false."); Stern, *supra* note 315, at 611 ("Epistemic considerations and first amendment values together confine severely the category of expression that the state can treat as susceptible to official demonstrations of truth or falsity.").

<sup>352</sup> *See* Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988); New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964); *see also* Kalven, *Central Meaning*, *supra* note 3, at 213 (arguing that the breadth of First Amendment protection reflects a strategy that requires that speech be overprotected in order to assure that it is not underprotected); Smolla, *Rethinking*, *supra* note 196, at 180 (discussing the need to deliberately overprotect

err on the side of protecting more speech, it becomes entirely unavailing to declare blithely that people “who speak out against agriculture have not one worry in the world as long as their speech is honest and truthful.”<sup>353</sup> That approach is far too simplistic. First and foremost, at worst, almost all speech remains protected so long as it is not a conscious falsehood or spoken with actual malice as to its falsity.<sup>354</sup> Further, not every apparent falsehood falls outside the scope of First Amendment protection.

The range of actionable false speech has been limited in several respects as an aspect of that overprotection. First, as previously described, the speech not only must be false, but it also must be knowingly or consciously false, at least when the plaintiff is a public figure or, in the better theoretical approach, when the speech is on a matter of public concern.<sup>355</sup> So long as, in the fact-finder’s mind, the speaker reasonably believed in the truth of his statements, however false, they may not have a basis for recovery. Second, as previously argued and applied to APD statutes, there is theoretical justification for a strong requirement that the falsehood be targeted at a specific, identified individual or company.<sup>356</sup>

A third manner in which the amount of actionable speech has been narrowed reflects the imprecision and ambiguity inherent in the use of language.<sup>357</sup> As Professor Schauer suggests, “[I]gnoring the inherent subjectivity and imprecision of language may lead to a constitutionally impermissible evaluation of the truth of normative or judgmental statements in the guise of examining factual truth.”<sup>358</sup> In recognition of this, there is complete protection for statements that cannot “reasonably [be] interpreted as stating actual facts.”<sup>359</sup> As such, protection exists for parody and satire<sup>360</sup> and for hyperbole and exaggeration.<sup>361</sup> Such protection

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false speech to provide a buffer zone for true speech); *id.* at 182 (arguing that “government must build into its classification system devices that are overprotective”); Stern, *supra* note 315, at 611 (arguing that extreme skepticism and humility err on the side of nonactionability of speech and deny the state the opportunity to pass judgment on the truth of some speech).

<sup>353</sup> Isern, *supra* note 9, at 257.

<sup>354</sup> See *supra* notes 150-63 and accompanying text.

<sup>355</sup> See *supra* notes 150-68 and accompanying text.

<sup>356</sup> See *supra* notes 199-216 and accompanying text.

<sup>357</sup> See *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) (“A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”); see also Schauer, *Language*, *supra* note 146, at 268 (“What we express as truth turns on the use of language in every case, although with differing degrees of inference, value judgment, and ambiguity.”).

<sup>358</sup> Schauer, *Language*, *supra* note 146, at 281.

<sup>359</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)) (alteration in original).

<sup>360</sup> See *Hustler Magazine*, 485 U.S. at 53-54.

<sup>361</sup> See *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S.



recognizes that the choice of words is part and parcel of the message.<sup>362</sup> Thus, a person may choose to protest the execution of an innocent person by referring to the public officials who carried out the execution as murderers; such a statement could not and would not be understood as suggesting that the official is liable legally for the crime of murder.<sup>363</sup>

The problem with APD statutes in this respect is their potential for use—and actual use in litigation—against such satire and hyperbole or exaggeration. The Honda commercial plainly was intended to be a humorous and satirical statement about the search of a twenty-something for a job in off-beat industries and careers, his susceptibility to unscrupulous employers, and perhaps about emu farming as an unusual career choice.<sup>364</sup> It could not be interpreted as stating any actual facts about emus, emu farming, or any particular emu farmers and thus should receive the full protection accorded to satire by *Hustler*.<sup>365</sup> Similarly, Howard Lyman's suggestion that Mad Cow Disease could "make AIDS look like the common cold" or Winfrey's statement about being stopped from eating another hamburger,<sup>366</sup> appear as much as anything to be hyperbole or exaggeration, meaning intentional overstatement as a sharp, effective way to make a point. Clearly, Lyman was not comparing AIDS to the common cold in any truthful, accurate, or scientific sense, and no reasonable listener could think otherwise. The fact that the makers of such statements have been haled into court under an APD statute, regardless of the outcomes of the cases, illustrates the danger that the statutes impose on free speech principles.<sup>367</sup>

Fourth, commentators have emphasized distinctions between doctrinal or theoretical truth, on the one hand, and factual truth on the other. It has been suggested that statements sit along a spectrum from pure reports of direct

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264, 283 (1974) (noting the license that a speaker possesses "to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point"); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (holding that use of the word blackmail was "no more than rhetorical hyperbole, a vigorous epithet" used by those who disagreed with the plaintiff). *But see* Schauer, *Language*, *supra* note 146, at 263-65 (describing the story of Harry Canter, who was convicted and jailed for criminal libel for using the word "murderer" in a hyperbolic description of the public officials who had carried out the executions of Nicola Sacco and Bartolomeo Vanzetti in the 1920s).

<sup>362</sup> See Schauer, *Language*, *supra* note 146, at 280; *see also* *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

<sup>363</sup> See Schauer, *Language*, *supra* note 146, at 264.

<sup>364</sup> See *supra* notes 102-05 and accompanying text.

<sup>365</sup> See *Bederman, Twilight*, *supra* note 1, at 224-25; *Durchslag*, *supra* note 101, at 179-80.

<sup>366</sup> *Texas Beef Group v. Winfrey*, 11 F. Supp. 2d 858, 869 (N.D. Tex. 1998) (Appendix B); *see also supra* notes 86-87 and accompanying text.

<sup>367</sup> See *supra* notes 88-109 and accompanying text.

observation of physical objects or occurrences to statements that express solely the normative judgments of the speakers; verification is more difficult the farther one gets from the former end of the spectrum.<sup>368</sup> Professor Monaghan describes the difference: "Fact identification . . . is a case-specific inquiry into what happened here. . . . Such assertions, for example, generally respond to inquiries about who, when, what, and where."<sup>369</sup> This situation is to be distinguished from those in which the "facts" are constructed from statistical data or otherwise derived from some complex set of inferences:

The "facts" themselves—value of the investment, costs of service, value of service, rate of return—are abstract. They are derived from a mass of statistical data which is in turn abstract, the result of a sophisticated classification of the underlying data. If the annual rate of depreciation of assets of a billion-dollar corporation is a "fact," it is nevertheless a very different kind of fact from the bigness of Cyrano's nose.<sup>370</sup>

The closer speech gets to theoretical doctrine and the more it is based upon such underlying data and classification of data, the less susceptible it can be to the same sort of verification as direct observation and, therefore, the less it should be susceptible to damage awards in a civil action.<sup>371</sup> Scientific speech falls far towards the theoretical end of this spectrum. Arguably, it is easier, and thus poses less constitutional danger, to permit a jury to inquire into and to declare as true purely factual statements than to permit a jury to inquire into statements that necessarily turn on underlying scientific inferences and data. For example, jury determination as to whether the mayor in fact did accept bribes is more proper than a similar determination as to the risk of cancer from the use of Alar in apples or the risk of an outbreak of Mad Cow Disease from common practices in the beef industry.

This proposition is especially true for science and statements of scientific theory. There long has been a general reluctance to permit the government to prohibit or punish the publication of a scientific paper based on false, unreliable, or fabricated data.<sup>372</sup> In Justice Harlan's words, "Any nation which counts the Scopes trial as part

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<sup>368</sup> See Schauer, *Language*, *supra* note 146, at 276 & 279.

<sup>369</sup> Monaghan, *supra* note 221, at 235.

<sup>370</sup> *Id.* at 236-37 (quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 646 (1965)).

<sup>371</sup> See Curtis, *Monkey Trials*, *supra* note 115, at 569 ("A test that works well for an accusation that a person has lied under oath may function poorly in the more complex world of hypothesis and critical discussion."); Schauer, *Language*, *supra* note 146, at 278 (arguing that the statement that cigarettes are unhealthy is not entirely theoretical but is less susceptible to verification than the existence of a particular 1957 Ford).

<sup>372</sup> See Curtis, *Monkey Trials*, *supra* note 115, at 546-47 (discussing Thomas Jefferson's suggestion, citing the example of Galileo, that government should not declare scientific

of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."<sup>373</sup> This is not to say that we never can distinguish between scientific truth and falsity for purposes of a jury verdict. The scientific evidence on some issues—such as that the earth is round and not flat—is so overwhelming that the counter position cannot be taken seriously. It is important to note, however, that the government never has banned the contrary message.<sup>374</sup> In general, science provides the paradigmatic examples of the need for governmental epistemological skepticism, as many new scientific theories initially were met with contempt, ridicule, and rejection by the great weight of governmental and scientific authority then later came to be accepted.<sup>375</sup> Galileo, Copernicus, and other scientists were criticized and often silenced by the prevailing political and religious powers at the time but ultimately were proven correct.<sup>376</sup>

The paradox of APD statutes is that the more reasonable and persuasive the scientific speech and the scientific basis for the speech, the more likely it will be the subject of litigation and the more likely the speech will be subject to the chill of a potential damage award. Speech that obviously could be established as false is least likely to persuade, least likely to be believed by the public, least likely to cause a drop in business, and thus least likely to form the basis of a lawsuit targeting the speaker for damages. For example, the insistence of the Flat Earth Society that all globes and maps present a false view of the world, if accepted widely enough, would result in economic harm to the business of Rand-McNally. In any lawsuit, however, the falsity of those statements generally would not be the subject of much scientific controversy and a jury readily could conclude that the statements were false. This, of course, is precisely why the speech of the Flat Earth Society is unlikely to be

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truth); Fried, *supra* note 53, at 239 (noting the debate over cold fusion).

<sup>373</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part); see also Redish, *Product*, *supra* note 291, at 1434-35 (arguing that most people would "recoil at the creation of such a governmentally imposed 'Big Brother' of scientific inquiry").

<sup>374</sup> See, e.g., Greenawalt, *supra* note 288, at 136 (arguing that all smokers now believe the message as to the health risks of smoking, although the government never has forbidden the competing message).

<sup>375</sup> See Curtis, *Monkey Trials*, *supra* note 115, at 577; Redish, *Product*, *supra* note 291, at 1435 ("[H]istory teaches us that scientific or moral advances may at some future point make those beliefs appear either silly or monstrous.").

<sup>376</sup> See Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 779 (1994) (pointing to Galileo as the most common example of state rejection of new scientific theories); Curtis, *Monkey Trials*, *supra* note 115, at 546-47; Peter Huber, *Junk Science in the Courtroom*, 26 VAL. L. REV. 723, 739 (1992) ("[T]he views of the establishment are sometimes wrong, in science and medicine as in law."); Ingber, *supra* note 257, at 25 n.125 (discussing the initial criticisms of Galileo, Copernicus, and Giordano Bruno); Redish, *Product*, *supra* note 291, at 1443 (discussing the initial rejection of various scientific and medical theories that later came to be accepted as correct).

believed by the public and is thus unlikely to cause any harm to Rand-McNally that might precipitate the lawsuit in the first instance.

By contrast, scientific theories and statements that are strong enough and persuasive enough for acceptance by the general public are effective in influencing public behavior with regard to agricultural products are the statements that likely will be the subject of lawsuits under APD statutes. The existence of greater scientific controversy, with strong competing theories on both sides, means that a lay jury could go either way in its determination of truth or falsity and could award damages (and thus impose a chill) on some perfectly valid scientific ideas and conclusions.<sup>377</sup> The result is that the very power and persuasiveness of certain scientific speech would form the basis for that speech being subjected to the chill of a civil action and effectively receiving less protection under the First Amendment. The notion that the more effective and more persuasive the speech, the more likely it will be actionable stands free speech on its head.<sup>378</sup> Rather, it is those statements that may be most effective and most persuasive in the public debate for which we should be most reluctant to create a legal mechanism that might conclusively declare truth and subject divergent views to damages, particularly because of the changing nature of what is accepted scientifically.

There also is a prevailing notion that it "is not the function of the judiciary to grade the social or artistic merits of speech."<sup>379</sup> The use of a jury determination of scientific truth is inconsistent with that notion. As a practical matter, ordinary people, that is, those who would sit on a jury in an APD case, likely will accept as accurate a scientific view that is widely agreed upon among scientists and that is accepted and promoted by government, and perhaps subject to liability any scientific speech that departs from that prevailing approach.<sup>380</sup> Government unquestionably has

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<sup>377</sup> This is because, as a practical matter, a jury is likely to base its reasonableness determination on whether it finds the arguments of the plaintiff to be more reasonable or likely than those of the defendant, rather than on the reasonableness of the defendant's speech standing alone. Consider, for example, that the "A is for Apple" broadcast included comments from Dr. John Graef, a medical professor at Harvard, who vouched for the soundness of the report's approach and conclusions. See *Auvil I*, 800 F. Supp. 928, 939 (E.D. Wash. 1992) (Appendix); see also *supra* notes 14-22 and accompanying text. The jury, however, still could find against the broadcaster and impose damages if the jurors believe the scientific conclusions of the competing expert to be more reasonable than Dr. Graef's, regardless of Dr. Graef's qualifications and the reasonableness of his conclusions standing alone.

<sup>378</sup> See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) (arguing that government may not restrict speech because it fears that the speech will persuade those who hear it to do something of which the government disapproves).

<sup>379</sup> *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 941, 942 (E.D. Wash. 1992) (second opinion and order dismissing certain defendants for lack of standing).

<sup>380</sup> See Huber, *supra* note 376, at 745 (discussing the reliance of government agencies

the power to accept and even promote, mainly through public education, a particular scientific message or approach.<sup>381</sup> It does not follow that government has the power to prohibit or punish or facilitate the punishment of competing views in the broader realm. Ultimately, APD statutes require the judicial system to apply and enforce prevailing scientific consensus in determining what constitutes responsible science and what science justifiably may be foreclosed. APD statutes present the additional irony that a jury of non-expert lay people is given the power to determine scientific truth or falsity in the name of protecting the lay public as a whole from being fooled by false statements about food safety, resulting in hysteria and overreaction to perceived danger.<sup>382</sup>

One commentator has argued correctly that APD statutes can be understood as part of a backlash against, and a further attempt to control, so-called "junk science".<sup>383</sup> The most prominent prior effort has been limitations on what expert scientific evidence is admissible in court.<sup>384</sup> Trial judges are empowered, and indeed required, to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."<sup>385</sup> This necessarily demands an inquiry by the trial judge into such issues as whether the particular scientific methodologies and conclusions have been tested, whether they have been subjected to peer review and publication, the known or potential rate of error, and whether the scientific speech in question has achieved "general acceptance" in the scientific community.<sup>386</sup> Thus, a court will consider, in part, the agreement of scientists in determining scientific merit and whether scientific statements are reasonable enough to be admitted into evidence.

However, the category of admissible evidence in a judicial proceeding never has been thought to be coextensive with the category of protected speech under the First Amendment. The fact that some science is not acceptable as evidence in litigation

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on prevailing scientific views); Kalven, *Scopes*, *supra* note 238, at 517 (discussing the impact on the marketplace of ideas from government endorsement of a particular viewpoint).

<sup>381</sup> See Kalven, *Scopes*, *supra* note 238, at 516 (describing doctrines that a government may refuse to teach in public schools); see also Semple, *supra* note 12, at 409-10 & nn.50, 53 (describing government statements in support of the safety of apples after the Alar broadcast).

<sup>382</sup> See Curtis, *Monkey Trials*, *supra* note 115, at 592.

<sup>383</sup> See Bederman, *Twilight*, *supra* note 1, at 230.

<sup>384</sup> See Huber, *supra* note 376, at 736 ("The more recent trend appears to be toward reaffirming stricter standards against evidence from the fringes of the scientific community.").

<sup>385</sup> *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 592-93 (1993); see also *FED. R. EVID.* 702; *General Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997) (describing the gatekeeper role of the trial judge in screening scientific evidence).

<sup>386</sup> See *Daubert*, 509 U.S. at 593-94.

does not mean that the government should have the power to ban or otherwise make that speech actionable when made outside the courtroom. Nor does it mean that the judicial system should be permitted to screen, evaluate, and pass judgment on the reliability or general acceptance of scientific speech in the broader public debate. The litigation process itself is a "bounded institution," in which we "approve (and even require) regulations designed to limit [certain] speech opportunities . . . in order to advance the optimal performance of the institution" and enable it to function properly.<sup>387</sup> Litigation already survives amid other restrictions, imposed by the judge, on what can be said during the litigation process. For example, evidence must be relevant and its relevancy cannot be outweighed by the danger of unfair prejudice.<sup>388</sup> Judicial gatekeeping with respect to science is simply an extension of a trial judge's ordinary functions in that bounded institution.

The same oversight and control cannot and does not apply to statements made in the broader public debate, in the so-called marketplace of ideas. There are no requirements that speech in the public forum must be relevant or non-prejudicial in order to be constitutionally protected. No one ever has suggested that the flow of information in litigation necessarily should be uninhibited, robust, and wide-open; however, there is general agreement that public debate, especially on matters of public concern, should be.<sup>389</sup> Thus, the principles that tolerate restrictions on the use of science in the courtroom should not tolerate restrictions on the use of science outside the courtroom. Perhaps the NRDC report about the cancer risk of Alar would not be reliable enough for evidentiary purposes in federal court; however, that should in no way affect whether the NRDC should be able to publish the report or whether CBS should be able to discuss the report without the fear of civil liability because the scientific position runs counter to any prevailing consensus.<sup>390</sup>

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<sup>387</sup> Neuborne, *supra* note 298, at 799.

<sup>388</sup> See, e.g., FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."); FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

<sup>389</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); see also *supra* notes 154-56 and accompanying text.

<sup>390</sup> See Greenawalt, *supra* note 288, at 137 ("By far the simplest way to assure freedom of scientific communication within the community of experts is to have a general regime of free speech for science.").

D. *The Remedy to be Applied . . .*

One of the central icons of any highly speech-protective theory originates in *Whitney v. California*<sup>391</sup> with Justice Brandeis' concurring opinion.<sup>392</sup> In oft-quoted words, he wrote:

Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . There must be reasonable ground to believe that the danger apprehended is imminent. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.<sup>393</sup>

The impact of the Brandeis approach is seen best in the modern test for determining when speech becomes a proscribable incitement to unlawful action, which looks to whether there is a high degree of temporal imminence between the speech and the unlawful conduct and a high degree of likelihood that the unlawful conduct will occur.<sup>394</sup>

However, the Brandeis principle of "more speech" has been interpreted and applied much more broadly, not only to incitement but also to other categories of

<sup>391</sup> 274 U.S. 357 (1927).

<sup>392</sup> See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (arguing that the opinion articulates a strong principle of freedom of speech and is "arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment"); Strauss, *supra* note 378, at 348 (arguing that the Brandeis approach "has exerted a powerful hold on first amendment rhetoric").

<sup>393</sup> *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); see also *id.* at 375-76 ("Those who won our independence . . . knew . . . that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form."); *id.* at 376 ("To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."); Blasi, *supra* note 392, at 668-70 (highlighting the three key paragraphs of the opinion).

<sup>394</sup> See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that a state can only forbid speech "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); see Ingber, *supra* note 257, at 22 n.100 (describing how the Court has revised and reapplied the "clear and present danger" test suggested by Justices Brandeis and Holmes).

speech.<sup>395</sup> It has formed the basis for a general rule that noxious doctrine is to be overcome by wisdom, creativity, and confidence, qualities best developed through discussion and education and through counter-speech, by the government and by private actors, not through "lazy and impatient" reliance on suppression or measures that chill free speech.<sup>396</sup> Rather, "it is incumbent upon the defenders of good ideas to learn how to influence public opinion even more skillfully."<sup>397</sup>

The influence of the Brandeis principle has created a scheme in which, other than in exceptional circumstances, any potential damage resulting from speech or from people's reaction to speech is to be countered by responsive speech, by the government and by those on the other side of the debate on that issue, designed to influence public opinion and alleviate the potential harm. By contrast, laws such as APD statutes are designed to short-circuit that process by suppressing speech that might cause the harm in question if believed and thus eliminating any need for counter-speech. The Brandeis' principle necessarily rejects the concept of APD statutes. The evils that APD statutes seek to remedy are the fooling or the manipulation of the public and the economic consequences to agricultural industries that might result from people being persuaded by scientifically unreliable statements about the healthfulness and safety of the products and industries.<sup>398</sup> It is unlikely, however, that any economic downturn would happen so quickly or so immediately after some allegedly unreliable scientific speech that there will not be time for counter-speech, education, and discussion. Thus, even those commentators who impose a time restriction would recognize that the harm to the agricultural industries is not so temporally imminent as to render counter-speech ineffectual.

Government clearly possesses the time, power, ability, and resources to counter criticisms of agricultural products and industries by supplying corrected or missing information or simply speaking out in support of the industry and urging the public

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<sup>395</sup> See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (plurality opinion) (applying Brandeis' principle to commercial speech); *Linmark Assocs., Inc. v. Willingsboro*, 431 U.S. 85, 97 (1977) (same).

<sup>396</sup> See Blasi, *supra* note 392, at 674-75; Redish, *Tobacco*, *supra* note 296, at 606 ("[I]t has been well accepted that the answer to supposedly harmful speech is not governmental suppression, but rather more speech."); Strauss, *supra* note 378, at 347 ("There is no need to suppress persuasive speech because the government can simply counteract the effects of such speech with its own answering speech."). Some commentators have placed a time element on this principle. See Curtis, *Discontents*, *supra* note 196, at 433 ("[S]peech is not to be suppressed where there is an opportunity for counter-speech before the feared evil occurs."); cf. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that the First Amendment "'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through . . . authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.))).

<sup>397</sup> Blasi, *supra* note 392, at 675.

<sup>398</sup> See *supra* notes 48-50, 316 and accompanying text.



to maintain faith in the industry and in government policies.<sup>399</sup> This is precisely what has happened in previous controversies.<sup>400</sup> Government also can pursue non-speech responses through policies designed to bolster and support the economic well being of the industry and to stabilize volatile markets.<sup>401</sup> This latter point is crucial. A necessary corollary to the Brandeis principle holds that the availability of policies or options that further some governmental interest without restricting, burdening, or chilling free speech casts serious constitutional doubt on any attempt to burden speech to further that interest.<sup>402</sup> Similarly, members of agricultural industries and industry trade groups can and often will engage in similar counter-speech through strong public relations campaigns designed to bolster public faith in their products and to limit harm to the market and to their economic interests.<sup>403</sup> Again, the burden is on the counter-speakers to learn how to influence public opinion.<sup>404</sup> One commentator has noted that agricultural industries possess political influence along with corporate muscle and access to public opinion.<sup>405</sup> The underlying basis of the Brandeis principle suggests that this power and access renders counter-speech by the industry powerful and potentially effective. This industry influence must be wielded not to lobby for the passage of restrictive laws such as APD statutes, but instead to defend the industry position and to influence opinions, or to attempt to influence opinions, in the public debate.

Moreover, counter-speech often may occur before any potential harm has the chance to occur. Because the news media generally strive to present both sides of an issue, some opportunity for counter-speech often comes alongside the presentation of the initial criticism. For example, the *60 Minutes* broadcast included comments by members of Congress and various executive agencies about Alar, the cancer risk, and

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<sup>399</sup> See Strauss, *supra* note 378, at 364 ("If private speakers attempt to manipulate people by omitting information or counter-arguments, the government can supply what is missing.").

<sup>400</sup> See Semple, *supra* note 12, at 409 & n.50 (describing efforts by the USDA and the EPA to quell public fears about apples by contesting the findings of the NRDC report about Alar); *id.* at 409-10 & n.53 (describing comments by members of the United States Senate supporting the apple industry and calling for executive action).

<sup>401</sup> See *id.* at 409-10 & nn.50-51 (describing governmental efforts to stabilize the apple markets, including purchasing leftover apples and reimbursing the industry for losses).

<sup>402</sup> See 44 *Liquormart Corp. v. Rhode Island*, 517 U.S. 484, 507 (1996) (striking down a ban on alcohol price advertising and focusing on the availability of other, non-speech means of keeping alcohol prices high, such as price controls or taxation that would not involve restrictions on speech).

<sup>403</sup> See Semple, *supra* note 12, at 409-10 & n.52 (describing the public relations campaign by the apple industry in the wake of the *60 Minutes* broadcast). Recall that this counter-speech would not be bound by any requirement that it be based on reasonable and reliable inquiry, facts, and data. See *supra* notes 266-76 and accompanying text.

<sup>404</sup> See Blasi, *supra* note 392, at 675.

<sup>405</sup> See Bederman, *Twilight*, *supra* note 1, at 229.

what the federal government can or should do about it.<sup>406</sup> The corporate maker of Alar declined the opportunity to be interviewed for the broadcast, although the company did issue a statement for the broadcast asserting that the cancer risk, if any, was "negligible."<sup>407</sup> Similarly, the *Oprah* broadcast offered beef industry members unedited rebuttal time on a later program.<sup>408</sup> Perhaps, this is not what Justice Brandeis had in mind. For present purposes, however, the issue is the opportunity for counter-speech by the respective industries within the public debate, not what a particular counter-speaker did or did not do with that opportunity.

There has been in recent years a scholarly departure from the Brandeis principle, owing largely to a lack of faith in the admittedly optimistic belief that counter-speech always defeats false or damaging speech.<sup>409</sup> This criticism yields two questions: first, whether any proposed alternatives cause fewer problems—most supporters of the Brandeis principle answer this in the negative;<sup>410</sup> and second, whether there is someone else who should decide what speech is good for the public to believe or adopt. To the extent that people may choose to believe the anti-industry speech or that any responsive speech from the government or from the industry is unable to influence public opinion, the answer to the second query is that the commitment to free speech entrusts that decision to the individual.<sup>411</sup>

Ultimately, the Brandeis principle is based upon a belief in the power of reason and the ability of individuals to maintain a system of government in which the coercive power of the state is not able to swamp the individual.<sup>412</sup> This belief

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<sup>406</sup> See *supra* notes 18-22 and accompanying text.

<sup>407</sup> See Auvil I, 800 F. Supp. 928, 938 (E.D. Wash. 1992) (Appendix).

<sup>408</sup> See Bederman, *Twilight*, *supra* note 1, at 218.

<sup>409</sup> See Strauss, *supra* note 378, at 347 ("The problem with the 'more speech' approach is that it is not unusual for people to be persuaded to do bad things, and it will not always be possible to talk them out of it."); see also Curtis, *Discontents*, *supra* note 196, at 432-33 (describing scholarly criticisms of the Brandeis' principle as applied to racist and sexist speech).

<sup>410</sup> See Blasi, *supra* note 392, at 677 ("If we abandon the faith that reason matters, we are left with a society governed exclusively by force."); Curtis, *Discontents*, *supra* note 196, at 433.

<sup>411</sup> See *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988) ("In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." (citation and internal quotation marks omitted)); REDISH, *supra* note 117, at 47 (arguing that the concept of individual self-realization underlying both democracy and free speech does not permit external forces to determine what decisions a person should make or to censor the information and opinions the individual should disseminate or receive in making those decisions); Fried, *supra* note 53, at 239 ("The public must be left to sort out the truth for itself."); Meiklejohn, *supra* note 113, at 259 (arguing that the people are presumed competent to judge the truth and wisdom of public policy).

<sup>412</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (describing the Framers' belief in the power of reason as applied through public discussion);

commands that each individual determine what he or she will accept as true in any public debate. Science, perhaps more than any other category of speech, is based on such a belief in the power of reason. In addition, science itself relies on a constant process of speech, more speech, and counter-speech; "scientific journals err on the side of permitting questionable theses to be published, so they may be discussed and checked in the hope of finding something of value."<sup>413</sup> It follows that the Brandeis principle should be applied in an especially stringent manner to scientific speech and to those issues in the public debate, such as the potential health and safety risks from agricultural food products or agricultural industry practices, that rely on scientific inquiry, facts, data, and conclusions. This principle commands that government should permit various scientific ideas to see the light of day and to be subject to challenge by competing ideas and conclusions, including those presented by the government itself.

E. *Where the Logic of APD Statutes Leads or Riding the Slippery Slope*

Professor Schauer suggests that law and the legal system, more than any other decision-making mechanism in society, "have a special responsibility to consider the future" and "to consider the behavior of others who tomorrow will have to apply or interpret today's decisions."<sup>414</sup> In evaluating the constitutionality of APD statutes, it is important not only to consider how these statutes might be interpreted and applied, but also to consider—accepting the validity of the governmental interests asserted in support of the laws—what other logically and linguistically indistinguishable laws might be passed in furtherance of those same interests.

As previously discussed, APD statutes purport to serve three interests: (1) protection of the pecuniary and business interests of the producers, growers, and sellers of agricultural products; (2) protection of the public from deception by unreliable scientific information about the products it uses; and (3) protection of the state economy as a whole.<sup>415</sup> That third interest, of course, extends to protect any industry that affects a state's citizens and economy, which is to say virtually any industry.<sup>416</sup> If a state legislature may create causes of action based on its determination that the dissemination of false information about the safety of food industries would be detrimental to the state's economy and the welfare of the

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Blasi, *supra* note 392, at 677.

<sup>413</sup> Huber, *supra* note 376, at 741 (internal quotation marks omitted); *see id.* at 724 ("Science issues no final judgments; since the time of Galileo, the scientist's most cherished freedom has been his freedom to doubt, to disagree, to question anew, and to reconsider.").

<sup>414</sup> Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 382-83 (1985) [hereinafter Schauer, *Slippery Slopes*].

<sup>415</sup> *See supra* notes 48-50, 316 and accompanying text.

<sup>416</sup> *See supra* notes 317-21 and accompanying text.

consuming public,<sup>417</sup> it could create a similar cause of action based on the same determination about the coal, automobile, nuclear power, or any other industry. If APD statutes are a constitutional means to further this interest as to agricultural industries, it follows that government could and would pass similar statutes to protect other industries and that these statutes could and would be constitutional.<sup>418</sup>

With respect to the second interest, initially it is highly doubtful that government can legitimately assert an interest in deciding for the public what is true and what is false and, in so acting, keep the public from hearing what government determines to be false.<sup>419</sup> Free expression universally rejects such naked paternalism.<sup>420</sup>

Beyond that, if the public can and should be protected from false speech criticizing the food it consumes, then the public can and should be protected from false speech criticizing or questioning any and all issues affecting their public and private lives. This conclusion delegates to government the power to pass other speech-restrictive laws on the model of APD statutes. Consider the following hypothetical statute:

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<sup>417</sup> See, e.g., OHIO REV. CODE ANN. § 2307.81(A) (Anderson 1996); see also *supra* notes 48-50 and accompanying text.

<sup>418</sup> Indeed, as discussed previously, the failure to protect those other industries while protecting agricultural industries renders existing APD statutes underinclusive and thus constitutionally infirm. See *supra* notes 307-21 and accompanying text.

<sup>419</sup> See REDISH, *supra* note 117, at 47 (arguing that if democratic government cannot tell individuals what decisions they can make, then government cannot censor the information with which individuals make those decisions); Curtis, *Monkey Trials*, *supra* note 115, at 592 (arguing that an effort to discourage discussion of technical matters really is an argument for limiting the democratic process); Fried, *supra* note 53, at 239 (arguing that government cannot be trusted to determine truth for the public, but that the public must be left to sort it out for itself); Greenawalt, *supra* note 288, at 137 (“[A] government deciding what historical, political, and moral ideas to suppress is bound to be affected by aims other than the disinterested pursuit of truth.”); Stone, *Content*, *supra* note 256, at 212 (arguing that the understanding of the First Amendment is that ideas and information, even if false, are assumed not to be harmful but instead that people will perceive their own best interests).

<sup>420</sup> See Redish, *Tobacco*, *supra* note 296, at 610 (noting the Court’s rejection of paternalism in commercial speech cases); David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 519 (1988) (discussing the Court’s “widely shared hostility to paternalism”); Stone, *Content*, *supra* note 256, at 212 (“The Court has long embraced an ‘antipaternalistic’ understanding of the first amendment.”); see also *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (searching for an “alternative to this highly paternalistic approach” of banning some speech).

**Public Policy Disparagement Act of 2000 (PPDA)<sup>421</sup>**

*Section One. Findings.* The legislature finds, determines, and declares that the dissemination in this state of false information about the potential sociological, economic, and legal costs, impact, and consequences of proposed public policy would be extremely detrimental to the state's electoral and political processes. Accordingly, it is the intent of the legislature in enacting this section to benefit all citizens of this state and to protect the vitality of the electoral and political processes by providing a cause of action for beneficiaries of proposed public policy to recover damages for the false disparagement of policy proposals.

*Section Two. Definitions.* As used in this section, the following terms shall have the following meanings:

(a) "Disparagement" means dissemination in any manner of any false material information that the disseminator knows or should have known to be false, suggesting negative, dangerous, or undesirable costs, impact, effects, or consequences of any public policy introduced or proposed before the legislative or executive branches of government or directly to the voting public in the form of a referendum or initiative. Information shall be deemed to be false if it is not based upon reasonable and reliable sociological, economic, scientific, social scientific, or legal inquiry, facts, or data.

(b) "Beneficiary" means any person, organization, corporation, partnership, or other entity who would have received or enjoyed a tangible benefit, economic, or otherwise, had some proposed policy been enacted into law or who would have enjoyed or continued to enjoy some tangible benefit had some proposed policy not been enacted into law or who could and would have participated in some conduct or action but is unable to do so due to the results of the debate over the proposed public policy.

(c) "Public policy" means any proposal submitted to the legislative or executive branches of government or directly to the voting public that, if approved, would become civil or criminal law or administrative or

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<sup>421</sup> This hypothetical statute incorporates elements from APD statutes in Georgia, *see* GA. CODE ANN. § 2-16-1 (1997), Louisiana, *see* LA. REV. STAT. ANN. § 4501 (West 1998), Ohio, *see* OHIO REV. CODE ANN. § 2307.81 (Anderson 1996), and South Dakota, *see* S.D. CODIFIED LAWS § 20-10A-1 (Michie 1995).

executive regulations valid to bind or control the conduct of the people of and within this jurisdiction.

*Section Three. Cause of Action.* Any would-be beneficiary of proposed public policy, or association of would-be beneficiaries of proposed public policy, who suffers damage as a result of the passage or defeat of some proposed public policy as a result of another person's disparagement of such proposed public policy, has a cause of action against such person for damages and for any relief a court of competent jurisdiction deems appropriate, including, but not limited to, compensatory and punitive damages, reasonable attorney's fees, and costs of the action.

Imagine that Congress is considering providing a tax cut for corporations. An advocacy group opposed to the bill issues a statement urging its defeat, arguing that paying for such a tax cut would require that Congress cut spending on Medicare in half and would require a tax increase of \$2000 per person against the middle thirty percent of taxpayers. If the bill is defeated, a corporation that would have received the tax break could bring a civil action under the PPDA against that advocacy group and challenge the reasonableness of the economic and social scientific data underlying those statements. If a jury finds the economic bases unreliable or unreasonable, the corporation would be entitled to damages. Alternatively (and to be clear that this law could be applied across the political spectrum), imagine that Congress wants to double the amount of time that a single mother can remain on public assistance. A group opposing such an extension warns of its high cost and the social harms that would result and the bill is defeated. Women who would have received the additional time on public assistance now have a cause of action against their political opponents and an opportunity to recover damages on the ground that these warnings were based on unreasonable economic analysis. A third example would be a failed state ballot referendum to legalize marijuana for medicinal purposes. Those denied the opportunity to sell, prescribe, and use the drug would have a cause of action against those who spoke in opposition to the initiative. The examples are limitless. The PPDA essentially would allow the losing side in any public policy debate to recover damages from their political critics in litigation by convincing a jury that their opponents' speech was unreasonable or simply less reasonable.

This hypothetical statute suffers from most of the constitutional infirmities that should doom APD statutes. Notably, the law lacks the "actual malice" requirement of *New York Times*, as well as any of the substantive and procedural protections that form the first line of protection from Category Three restrictions on speech.<sup>422</sup> The law also violates the principles forming the second line of protection. It is viewpoint discriminatory in that it targets only false statements that criticize or urge rejection

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<sup>422</sup> See *supra* Pt. III.

of some proposed policy. As with APD statutes, only opposition to the enactment of a particular policy is chilled; support for that policy is not.<sup>423</sup> The law explicitly targets political speech, the speech at the core of free speech protection, in an even more blatant and more obvious way than do APD statutes themselves; all speech about existing and proposed public policy becomes a possible target in litigation.<sup>424</sup> The law seeks to punish generalized public deceptions and makes a public policy question a possible victim of character assassination, a result that the First Amendment generally rejects.<sup>425</sup> It also has the general effect of permitting an arm of government to determine political truth and impose tighter control over political debate.<sup>426</sup>

The idea that a state or Congress might attempt to prohibit false political speech in this manner might at first glance appear far-fetched and little more than an attempt to trot-out a parade of horrors. This hypothetical law, however, cannot be dismissed so easily. First, the law would catch much speech that already is actionable under APD statutes, since much of the criticism of agricultural products and industries takes place within the context of the debate over policy decisions about industry practices and whether certain products should be on the market.<sup>427</sup> Allegedly unreliable statements about the cancer risk of Alar, made during discussions of whether to remove that pesticide from the market and whether to prohibit certain industry practices, already have been actionable under existing APD statutes and would be actionable under the PPDA.

Second, the state of Washington actually attempted to prohibit false political speech in just this way, passing a law that made it a violation for a person to sponsor "with actual malice, a political advertisement containing a false statement of material fact."<sup>428</sup> The Washington Supreme Court struck the law down as facially unconstitutional under the First Amendment.<sup>429</sup> The court's reasoning is instructive

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<sup>423</sup> See *supra* notes 267-76 and accompanying text. The PPDA could be made viewpoint-neutral by providing the loser in any public policy debate the right to challenge in court the reasonableness of the speech that their opponents made in that debate. Such a statute would be so overbroad as to never pass First Amendment muster.

<sup>424</sup> See *supra* notes 327-41 and accompanying text.

<sup>425</sup> See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.16 (1995); *Fried, supra* note 53, at 238; *supra* notes 207-09 & 286-90 and accompanying text.

<sup>426</sup> See *supra* notes 342-90 and accompanying text.

<sup>427</sup> See *supra* notes 178-81 & 327-41 and accompanying text.

<sup>428</sup> *State Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 693 (Wash. 1998).

<sup>429</sup> See *id.* at 693. At issue in that case was an administrative action by the state against an advocacy group opposing a state ballot initiative that would have legalized physician-assisted suicide; the group had attempted to distribute a leaflet highlighting, allegedly inaccurately, the absence of procedural safeguards in the law. See *id.* at 693 n.1. The leaflet stated, *inter alia*, that the law contained no reporting requirements, no notification requirements, no protection for depressed patients, and no waiting period. See *id.*

on the constitutionality of APD statutes and reflects many of the arguments made against those statutes. The court first observed that the law was based on the erroneous presupposition that “the State possesses an independent right to determine truth and falsity in political debate.”<sup>430</sup> Rather, “the First Amendment operates to insure the public decides what is true and false with respect to governance.”<sup>431</sup> The court then rejected the reliance on defamation cases to provide a compelling interest in support of the laws, since the concern for individual reputation is absent where the issue involves generalized speech about a generalized public issue.<sup>432</sup> “Ultimately, the State’s claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic.”<sup>433</sup>

That same patronizing and paternalistic interest also is explicit in APD statutes and the hypothetical PPDA; the legislature is acting to protect the public from being fooled by speech that the government deems false or unreasonable and from acting in ways that government deems harmful. In fact, APD statutes and the PPDA are even broader than the Washington law. APD statutes target not only false statements of fact, as does the Washington law, but also statements grounded in theory and data, predictions about potential impact and consequences, and underlying scientific bases for those statements.<sup>434</sup> The reasoning of the court in *Public Disclosure Commission* would invalidate all APD statutes.

The language, logic, and speech targeted by APD statutes are the same as the PPDA. This Article suggests this hypothetical law to illustrate where the logic of APD statutes lead. If the state can burden, by providing a private action for damages, scientifically unsound speech about the health and safety consequences of industry practices, much of which dovetails with discussions of public policy, it can do the same for all statements about the consequences of all public policy. APD statutes reflect the assumption that, faced with information about the safety of the food supply, “the public tends to become hysterical” and overreact.<sup>435</sup> If that is true, however, there is no reason to believe that science is somehow different and that the

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<sup>430</sup> *Id.* at 695 (citing *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964)); *see also id.* at 696 (“The First Amendment exists precisely to protect against laws” that “coerce [ ] silence by force of law and presuppose [ ] the State will ‘separate the truth from the false’ for the citizenry”).

<sup>431</sup> *Id.* at 695 (citing *Meyer v. Grant*, 486 U.S. 414, 419-20 (1988) and *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 791 (1988)); *see also supra* notes 348-51 and accompanying text.

<sup>432</sup> *See Public Disclosure Comm’n*, 957 P.2d at 697; *id.* at 698 (“‘A public question clearly cannot be the victim of character assassination.’” (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 n.16 (1995))); *see supra* note 174 and accompanying text.

<sup>433</sup> *Public Disclosure Comm’n*, 957 P.2d at 698; *see also supra* notes 419-20 and accompanying text.

<sup>434</sup> *See supra* notes 368-82 and accompanying text.

<sup>435</sup> Curtis, *Monkey Trials*, *supra* note 115, at 590.



public will not react equally hysterically when faced with other information relevant to other political and social issues. Thus, government would be justified in passing other, entirely similar laws restricting the democratic process.<sup>436</sup> The PPDA is one such law.

One might object at this point that this simply is "deployment of the shopworn slippery-slope argument."<sup>437</sup> Such an argument suggests that permitting the restriction of some speech, while "seemingly innocuous when taken in isolation, may yet lead to a future host of similar but increasingly pernicious" restrictions.<sup>438</sup> This argument is especially prominent in most highly speech-protective First Amendment theories.<sup>439</sup> This is a product of the general nature of free speech and the immutability of language, the result of which is a difficulty in drawing principled lines among different categories, contexts, and types of speech. To say as to unprotected speech, in Justice Stewart's famous phrase, "I know it when I see it"<sup>440</sup> perhaps works on a visceral level. But Justice Stewart's statement in fact concedes the impossibility of most line drawing. The result, properly, is a general reluctance even to make the attempt and a rejection of any restrictions that would represent the first step down the slope. Laws, such as APD statutes, that logically create or lead to the creation of new unprotected categories of speech that may be subject to damages, generally should be rejected.

Moreover, Professor Schauer suggests that what might appear at first glance to be a slippery slope argument actually is not. He describes on one hand the "[a]rguments from added authority," in which the advocate "cautions against granting jurisdiction for fear that the jurisdiction, once granted, will be available to decide some possible future case in some way admittedly feared by the decision-maker as well as by the maker of the argument."<sup>441</sup> Rather than representing a simple parade of horrors, this argument "asserts only that the grant of jurisdiction increases the likelihood of the feared result."<sup>442</sup>

The hypothetical PPDA properly may be understood as what a legislature could do with the added authority if APD statutes are allowed to stand. The First Amendment never has permitted the testing of abstract, theoretical truth that APD

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<sup>436</sup> See *id.* at 592.

<sup>437</sup> Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 873 (1998).

<sup>438</sup> Schauer, *Slippery Slopes*, *supra* note 414, at 361-62. This argument often is phrased in metaphorical terms, such as "the camel's nose is in the tent," "a foot in the door," "thin edge of the wedge," or the ride down the "slippery slope". *Id.* at 361.

<sup>439</sup> See *id.* at 363 ("Although the First Amendment has no monopoly on slippery slope arguments, these arguments appear commonly in discussions about freedom of speech.").

<sup>440</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating an inability to formulate a principled test to distinguish unprotected obscenity from protected speech).

<sup>441</sup> Schauer, *Slippery Slopes*, *supra* note 414, at 367.

<sup>442</sup> *Id.* at 368.

statutes contemplate, at least not in the political realm and not absent the immediate connection to individual reputation or business interests.<sup>443</sup> APD statutes grant jurisdiction to the court system, acting through a judge or jury as fact-finder, to do just that—to test the truth of scientific speech and use the imposition of damages to chill or remove from the debate scientific speech that it finds unreasonable or unreliable. The PPDA expands that jurisdiction from speech involving science to speech involving social science, granting to the courts the added jurisdiction to evaluate the reasonableness of sociological and economic analysis. APD statutes also paternalistically grant—for the first time outside the narrow realm of commercial speech—jurisdiction to assume that the public cannot discern the truth about public issues for itself and thus to eliminate statements from the debate that government deems false through the threat of civil damages. The PPDA proceeds under that same grant of jurisdiction.

One commentator has argued that slippery slope arguments are vacuous, relying on hypothetical language of what “could” or “may” lead to future restrictions, without providing specific examples.<sup>444</sup> It is, of course, impossible to predict with any certainty, *a priori*, what laws will be passed should the camel’s nose get inside the tent. However, the PPDA is a specific example, logically and linguistically identical, that shows where a court and legislature would be empowered to go if APD statutes somehow could withstand First Amendment scrutiny. That is sufficient to establish this as an additional constitutional deficiency of APD statutes.

### CONCLUSION

Concededly, there is some surface appeal to APD statutes for the simple reason that some farmers can and will suffer real damage from a downturn in the market.<sup>445</sup> It is somewhat harsh (although necessarily incorrect) simply to suggest that such farmers must be sacrificed on the altar of free speech. It is understandable and even tempting for government to want to make some remedy available.

Free speech, however, demands a weighted balance in favor of leaving unchilled and available the greatest amount of speech possible.<sup>446</sup> Much free speech doctrine reflects that weighted balance, taking into consideration the possible consequences of speech but erecting broad protections for it. The procedural and substantive protections of *New York Times* and its progeny that form the first line of protection against Category Three restrictions on speech reflect that balance—the cause of

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<sup>443</sup> See *supra* notes 173-77 & 286-90 and accompanying text.

<sup>444</sup> Delgado, *supra* note 437, at 873-74 & nn.43-48.

<sup>445</sup> See Auvil I, 800 F. Supp. 928, 930-31 (E.D. Wash. 1992) (describing losses to many small growers, including loss of homes and livelihoods); see also *supra* notes 23-26 and accompanying text.

<sup>446</sup> See REDISH, *supra* note 117, at 47, 54-55; Curtis, *Discontents*, *supra* note 196, at 427.

action remains, but the special concerns for speech alter the cause of action.<sup>447</sup> The problem is that APD statutes dispense with most or all of these protections.<sup>448</sup> Similarly, the governmental solution for protecting growers ignores the fundamental free speech principles that form the second line of free speech protection against Category Three restrictions.<sup>449</sup> No matter how superficially worthy the governmental goal, it cannot ignore the commands of a strong commitment to free speech through laws that disregard these principles the way that APD statutes do.

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<sup>447</sup> *See supra* Pt. III.

<sup>448</sup> *See supra* Pt. III.

<sup>449</sup> *See supra* Pt. IV.