CREATIVE JURISPRUDENCE: THE PARADOX OF FREE SPEECH ABSOLUTISM

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INTRODUCTION

Governments often seek to restrict speech on the basis of its content, navigating the ever-complex terrain between constitutional freedoms and regulatory interests. While the United States judiciary has historically endeavored to balance competing constitutional questions and government interests when scrutinizing content-based speech regulations, recent trends signify a troubling shift. The judiciary has recently embraced what this Article refers to as free speech absolutism, whereby it sidesteps the longstanding, intricate process of balancing constitutional values and public interests, in favor of an unequivocal endorsement of speech rights. This simplified judicial strategy proceeds first with an acknowledgment of the paramount importance of free speech, then shuns any form of judicial scrutiny or balancing test, instead ruling categorically in favor of speech-claimants. Such a shift represents a departure from traditional First Amendment jurisprudence, effectively ignoring tests that weigh the right to free expression against other critical constitutional values, including equality, equal protection, and nondiscrimination.

This Article critically examines the choices by the judiciary, specifically the United States Supreme Court in *303 Creative v. Elenis*, to adopt this free speech absolutist position. It documents the evolution of this trend, critiques its underpinnings, and proposes refinements that, if implemented, would help ensure the Court's approach to content-based speech regulation is principled, sighted for valid government interests, and attuned to a necessary consideration of the broader spectrum of constitutional values. By doing so, it seeks to reinvigorate a more balanced and comprehensive judicial methodology that recognizes the multifaceted nature of constitutional rights and the importance of their equitable application.

I. THE SUPREME COURT CASE OF *303 CREATIVE V. ELENIS*

In *303 Creative*, the Supreme Court evaluated whether the state of Colorado's Anti-Discrimination Act ("CADA" or the "Act") could constitutionally compel a graphic designer to create content for weddings espousing beliefs the designer herself did not endorse. The Court answered in the negative, and in doing so, diverged from its long-held jurisprudential path in adjudicating free speech cases. Historically, the Court has employed some

level of scrutiny—often strict scrutiny or occasionally, a somewhat less stringent standard—to evaluate content-based speech regulations.[1] Eschewing scrutiny altogether, the *303 Creative* Court instead adopted a form of free speech absolutism. To do so, the Court fashioned a free speech hierarchy, where it endorsed a exceptionless[2] prioritization of free speech rights over *any* conflicting government interest.[3] This approach is not without consequence; it may undermine the weight of government interests, including those of nondiscrimination and equal protection, potentially positioning them as invariably subversive to free speech rights.[4] Also as a result, free speech and other constitutional rights may stand in a strictly ordered relationship in any situation of conflict;[5] according to the *303 Creative* Court, the content or message of one's speech supremely outweighs all other constitutional considerations, no matter how severely impaired the latter may be.[6]

The contrast between the Supreme Court's treatment of *303 Creative* and that of the United States Court of Appeals for the Tenth Circuit is stark. The Tenth Circuit applied strict scrutiny

1. *303 Creative*'s majority opinion is problematic for many reasons—questions of the role of antidiscrimination statutes, ripeness, standing, and democratic backsliding remain. Indeed, "in a free and democratic society, there can be no social castes." 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2343 (2023) (Sotomayor, J., dissenting). This Article's examination of the Court's reasoning, however, focuses narrowly on the refusal to weigh compelling state interests and the constitutional hierarchy created therein. *See generally id.* The relevant strict scrutiny and other balancing test cases include, *inter alia*, Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Snyder v. Phelps, 562 U.S. 443 (2011); Tinker v. Des Moines Ind. Commun. Sch. Dist. 393 U.S. 503 (1969); Wooley v. Maynard, 430 U.S. 705 (1977); Reno v. Am. C.L. Union, 521 U.S. 844, 870 (1997); Brown v. Entertainment Merch. Ass'n, 564 U.S. 786 (2011); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991); National Socialist Party v. Skokie, 432 U.S. 43 (1977) (per curiam); Riley v. Nat'l Fed. of Blind, 487 U.S. 781 (1988); Counterman v. Colorado, 143 S. Ct. 2106 (2023).

2. *See infra* Part IV.

3. *See 303 Creative*, 143 S. Ct. at 2315 (pontificating that there is "no question" of which must prevail when a state accommodations law affects a constitutional right).

4. *See infra* Parts III–IV.

5. The Court here sets aside an analysis of traditionally unprotected speech—for example, forgery, blackmail, obscenity, prohibitable libel, ransom or kidnapping notes, and true threats. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–69 (2010) (listing traditionally categorically unprotected speech categories).

6. *See infra* Part III. *303 Creative* involved a content- or viewpoint-based restriction on speech, as distinct from a content- or viewpoint-neutral restriction. The former calls for scrutiny more restrictive than the latter. For this view, *see, e.g.*, Leslie Gielow Jacobs, *Clarifying the Content-Based/Content-Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 599 (2002).

to the Act,[7] necessitating that Colorado demonstrate a compelling interest for the regulation[8] and that the regulation was narrowly tailored to achieve that interest effectively.[9] In contrast, the Supreme Court analysis largely avoided this or any similar nuanced legal analysis in favor of a largely rhetorical proclamation about the overriding nature of the Free Speech Clause.[10] The Court extolled "the principle that the government may not interfere with 'an uninhibited marketplace of ideas,'"[11] asserting that government regulations must not "invade[] the sphere of intellect and spirit which . . . is the purpose of the First Amendment . . . to reserve from all official control."[12]

Interestingly, in *303 Creative*, the Court made a lonely acknowledgement that bristled with its holding: that governments in the United States do in fact "have a 'compelling interest' in eliminating discrimination in places of public accommodation."[13] This concession strongly implies an understanding aligned with previous Court jurisprudence: that nondiscrimination principles do hold significant value within the constitutional framework, especially in contexts that concern public access and equality. However, this acknowledgment is incongruent with the Court's subsequent actions—or rather, its inactions. Despite recognizing the compelling nature of nondiscrimination interests, the Court refrained from engaging in any substantive analysis

7. *See* 303 Creative LLC v. Elenis, 6 F.4th 1160, 1178–79 (10th Cir. 2021), rev'd, 600 U.S. 570 (2023) ("Whether viewed as compelling speech or as a content-based restriction, the Accommodation Clause must satisfy strict scrutiny . . . Colorado must show a compelling interest, and [CADA] must be narrowly tailored to satisfy that interest . . . Here, Colorado has a compelling interest in protecting both the dignity interests of members of marginalized groups and their material interests in accessing the commercial marketplace.").

8. *See id.*

9. The Tenth Circuit not only applied strict scrutiny to CADA, it held that Colorado's interests in protecting marginalized groups was both compelling and narrowly tailored. *See id.*

10. In fact, the Supreme Court's only mentions of government interests in 303 Creative were made either in reference to lower courts' application of strict scrutiny or in concession that governments in the United States have a "compelling interest" in eliminating public accommodations discrimination. *See* 303 Creative, 143 S. Ct. at 2310, 2314.

11. *Id.* at 2311 (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)). Note also the rhetorical insulation of non-interference with the marketplace of ideas, without any accompanying reference to state interests which have historically been weighed against such interferences. *See id.*

12. *Id.* (quoting *Barnette*, 319 U.S. at 642). The Court seems willing to stop short of including commercial speech in its propagation of absolutist free speech rights. *See, e.g.*, Florida Bar Ass'n v. Went For It, Inc. 515 U.S. 618 (1995).

13. *Id.* at 2314 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

regarding how these interests might be accommodated or balanced against free speech claims; the Court performed no inquiry into the tailoring, narrow or otherwise, of the state interest to the scope of CADA.[14]

The Court's withheld scrutiny of the Act and Colorado's nondiscrimination interests reveals a critical gap in the *303 Creative* analysis that ultimately manufactured, rather than resolved, constitutional tension. The Court declared that "[w]hen a state public accommodation law and the Constitution collide, there can be no question which must prevail," a conclusory assertion suggesting that even narrowly tailored regulations supported by compelling government interests are subordinate to this and perhaps other cherry-picked clauses in the Constitution.[15] By setting aside a wealth of precedent applying strict scrutiny to content-based free speech controversies,[16] the Court instead relied rather heavily on scarce case law that highlighted "severe intrusion[s]"[17] on free expressive association,[18] concluding that public accommodation laws simply cannot be "applied to expressive activity."[19] While the Court differentiated free speech absolutism as inapplicable to regulations that merely incidentally compel speech[20] and applicable to those "telling people what they must say,"[21] in the end, the Court held free speech rights invariably superior to government regulations requiring individuals to express ideas they do not agree with,[22] accommodate others' views,[23] alter the expressive content of their message,[24] or amend their chosen form of expression in any other way.[25]

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14. *See id.* at 2314–15.

15. *Id.* at 2315 (emphasis added).

16. *See* the authorities cited *supra* note 1.

17. *303 Creative*, 143 S. Ct. at 2315 (quoting Boy Scouts of America v. Dale, 530 U.S. 640, 659 (2000)).

18. *Id.*

19. The Court here declares that such laws cannot "compel speech," but its analysis here is really getting at a more broad proclamation: rights afforded by the Constitution cannot be questioned when they "collide" with public accommodations laws. *Id.* (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 558, 571, 578 (1995)).

20. *Id.* at 2317. We here set aside the question of whether incidental restrictions on speech coincide with content neutral-restrictions on speech. We also elect not to evaluate whether an incidental restriction on speech could have a grossly disproportionate impact on some viewpoints, but not others.

21. *Id.*

22. *Id.* at 2318 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943)).

23. *See id.*

24. *See id.*

25. *See id.* at 2317.

The *303 Creative* Court's stance implies absolutism ebbed only by the Court's own construal of the types of speech deserving such protection. The Court has no issue, for instance, with governments compelling certain commercial speech of "purely factual and uncontroversial information."[26] However, upon a constructive threshold of "significance,"[27] the Court jumps from permissive content-based regulations to free speech absolutism without so much a mention of compelling government interests or contemplation of judicial scrutiny.[28] Thus incidental, or else less than substantial, burdens on speech may be deemed permissible—while direct burdens on speech may avoid scrutiny no matter the underlying interest.[29]

The Court here lands itself in a paradoxical quagmire, characterized by its uncompromising, hierarchical preference of protected speech over *any* governmental interest.[30] By dismissing traditional mechanisms of judicial scrutiny in favor of blurrily sketched absolutism, the Court invites critical examinations of its methodology inevitably extending beyond the First Amendment to consider the implications for other essential rights. The ensuing analysis engages with these considerations, aiming to reconcile the Court's recent jurisprudential deviation with the broader spectrum of constitutional rights and values.[31]

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26. *Id.* (citing Riley v. Nat'l Fed. of Blind, 487 U.S. 781, 795–96 (1988)); *see also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

27. *303 Creative*, 143 S. Ct. at 2318 ("a significant issue of personal conviction"); *id.* (referring to the Act as implicating "a question of political and religious significance"); *id.* at 2321 (deeming CADA as a regulation mandating speech that denies petitioner's "conscience about a matter of major significance").

28. *See id.* at 2318 (referring to the subject matter of the speech at issue as "a question of political and religious significance").

29. *See id.* ("Colorado does not seek to impose an incidental burden on speech.").

30. *See supra* notes 22–25 and accompanying text.

31. Thus we here set aside a number of other important issues raised, if only implicitly, by *303 Creative*. For cogent, but contrasting, overviews of the broader implications of the Court's ruling, see Andrew Koppelman, *Why Gorsuch's Opinion in '303 Creative' Is So Dangerous*, THE AM. PROSPECT (July 12, 2023), https://prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous [https://perma.cc/R6AZ-PE7D]; more optimistically, see Dale Carpenter, *How to Read 303 Creative v. Elenis*, REASON (July 3, 2023), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis [https://perma.cc/W7FH-X6U6]. These discussions jointly raise the question of whether the product or service in question must be (1) expressive of the seller's own message, and (2) sufficiently customized by the seller. *See* Koppelman, *supra*. Taking another approach, Professor Carpenter relies on both the expressiveness and the customization requirements, beyond the distinction between message and customer status, to limit the adverse impact of the case on non-discrimination interests. *See* Carpenter, *supra*. The question remains as to why there should be an independent requirement that

II. ON THE STATUS AND STRENGTH OF FIRST AMENDMENT RIGHTS

A. Unintended Tensions of Absolutism

The notion of freedom of speech and press as constitutionally "preferred" freedoms under the First Amendment has long cornered American jurisprudence.[32] Traditionally, however, "preferred" and "absolutely preferred" each contain distinct meanings. To be preferred is to warrant a particularly robust form of protection, often implemented through the application of strict scrutiny,[33] aggressive enforcement,[34] or another form of

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the seller's message, in the product or service itself, must be speaker-customized at all. Courts do not ordinarily concern themselves with the customization or non-customization of, say, speaker-expressive messages. Suppose a seller refuses a customer on the sole grounds that the customer's use of the seller's non-customized product would undermine the seller's position on a social issue, or perhaps mislead those who would see their signature in that context. What, then, would be missing from a viable "compelled speech" claim? Elsewhere, does the law care about, say, any distinction between customized and non-customized election campaign literature? Also problematic is the distinction between the speaker's expression manifesting in the product or service itself, as distinct from any message that the speaker conveys by merely transacting with the particular buyer in the particular context without expressive messaging in the service or product. *See* Carpenter, *supra*, at 3. Consider, for example, Shirley Chisholm's 1968 decision to visit the hospitalized George Wallace. *See 1972: Shirley Chisholm Visits Her Opponent George Wallace in the Hospital*, HISTORY.COM, https://www.history.com/this-day-in-history/shirley-chisholm-visits-opponent-george-wallace-in-hospital [https://perma.cc/V2BB-7S8K] (last visited Mar. 29, 2024). Consider also a store's conspicuous welcoming of a previously excluded class of customers apart from any possible later transaction. A new policy of non-discrimination may send an important symbolic message, as may a photograph of the transacting parties shaking hands, quite apart from the product or service exchanged. And finally, there remains the widely litigated problem of what counts, in these contexts, as sufficiently expressive speech, or as sufficiently expressive conduct, in the first place. For background, *see* R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010). The sufficient expressiveness of the petitioner's proposed transaction, which should largely be a question of law for the courts, was stipulated to in *303 Creative*. *See 303 Creative*, 143 S. Ct. at 2309–10, 2319.

32. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (as distinct from essentially economic or property rights).

33. *See, e.g.*, J. Michael Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 40 S.D. L. REV. 307, 330 (2000); Jud Matthews & Alec Stone Sweet, *All Things in Proportion? American Rights Review, and the Problem of Balancing*, 60 EMORY L.J. 797, 825 (2011).

34. Ken I. Kersch, *Bringing It All Back Home*, 28 CONST. COMMENT. 407, 417 (2013); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 379 (1993) ("In cases involving preferred rights, judicial review is aggressive and unapologetic."). Descriptors like these imply distinctly non-deferential judicial review.

heightened judicial inquiry.[35] Such interpretations underscore the judiciary's recognition of the importance of preferred constitutional rights, assigning them a degree of priority that necessitates careful consideration before any governmental restriction can be justified.

Not even the strictest of the above standards of review suggests methodology like that employed by the Court in *303 Creative*. Such a posture, even if applied in a circumscribed manner, presents a complex challenge: it raises the prospect of conflicts not only with government interests and the Constitution, but also within competing "preferred" constitutional values and even the fabric of the First Amendment itself. After all, prioritizing speech interests may not only impact other parts of the Constitution like the Fourth Amendment[36] and the broader spectrum of fundamental privacy interests,[37] it may also create the potential to undermine rights to petition[38] and the freedom of the press.[39] And even more problematically, a new constitutional question emerges: how does free speech absolutism affect

35. Stephen M. Feldman, *Unenumerated Rights in Different Democratic Regimes*, 9 PA. J. CONST. L. 47, 96 n.307 (2006); *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1419 (1986).

36. *See, e.g.*, Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales*, 63 N.Y.U. L. REV. 1173, 1240–41 (1988) ("the rationale . . . for according a special status to First Amendment liberties . . . is equally applicable to the Fourth Amendment").

37. *See* Howard Gilman, *Regime Politics, Jurisprudential Regimes and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 117–18 (2006); David N. Mayer, *The Myth of Laissez-Faire Constitutionalism: Liberty of Contract in the Lochner Era*, 36 HASTINGS CONST. L. Q. 217, 284 (2009).

38. Generally, courts have thought the various First Amendment speech-related rights to be largely inseparable in their underlying logic and applicability. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 485 (1985). The McDonald Court concluded that "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Id.* Thus it has been said that "[t]he First Amendment protects an individual's right to petition . . . but that right is not absolute." Real Estate Bar Ass'n v. Nat'l Real Estate Info. Servs., 608 F.3d 110, 124 n.8 (1st Cir. 2010); *see also* Ryan LLC v. Lew, 934 F. Supp. 2d 159, 173 (D.D.C. 2013) (citing Real Estate Bar). In the context of the Petition Clause rights of public employees, the Court has observed that in light of the government's countervailing interests, "it would be surprising if Petition Clause claims by public employees were not limited as necessary to protect the employer's functions and responsibilities." Borough of Duryea, Pa. v. Guarneri, 564 U.S. 379, 392 (2011).

39. Despite the preferred status of press freedoms, those freedoms are, again, hardly absolute in any meaningful sense. *See, e.g.*, Brazenburg v. Hayes, 408 U.S. 665 (1972); New York Times v. Sullivan, 376 U.S. 254 (1964); *see also* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (holding in favor of permissibility of warranted third-party search of newsroom for evidence of crime).

significant yet opposing free speech arguments made by two parties on opposite sides of a controversy?

Indeed, a more fundamental problem of free speech absolutism extends beyond the judiciary's responsibility to balance the value of free speech against state interests or other constitutional principles. Rather it arises when there are substantial and competing free speech arguments made by opposing parties[40]—a scenario often encountered in litigation, particularly that involving electoral campaign regulations.[41] Of course, this itself is not a new problem; free speech interests appear on opposing sides of many cases for all judges. But judges avoiding absolutist analyses do not face the paradoxes of logically accommodating uncompromisingly conflicting absolutes.

This contradiction highlights a critical aspect of the longtime debate regarding constitutional absolutism that is now significant to contemporary discourse. More than sixty years ago, Justice Hugo Black classically underscored the complexity of navigating constitutional absolutist waters by observing that the Bill of Rights contains "absolutes" intentionally embedded by the Framers to serve as unequivocal prohibitions.[42] Perhaps not unintentionally, Justice Black referred to "absolute"

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40. *See* Fiss, *supra* note 35, at 1419; *see also* R. George Wright, *Why Free Speech Cases Are As Hard (and As Easy) As They Are*, 68 TENN. L. REV. 335, 336, (2001) ("[F]ree speech cases really amount to a battle between . . . free speech values on both sides of the case because the . . . interests in favor of restricting speech may, paradoxically, be re-characterized [as] one or more of the standard free speech values themselves.").

41. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Nixon v. Shrink Missouri Government PAC, 528 U.S. 277 (2000); MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY (2001); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (2001). In the campaign finance context, the real problem how to optimize free speech values overall. The question can be framed as whether or not some degree of resource and opportunity equalization in an unequal society would, overall, enhance or reduce overall freedom of speech. Free speech absolutism itself has nothing to offer in this and all similar tradeoff contexts.

42. Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) (emphasis in the original). *See id.* at 874–77 (citing James Madison on absolute press freedom, and rejecting the balancing of absolute rights against any government interests). For a sympathetic account of Justice Black's conclusions by a leading constitutional theorist, *see* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961). Professor Meiklejohn argues in particular 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." *Id.* at 257; *see also* Matthew H. Kramer, *Freedom of Expression as Self Restraint*, 48 PHIL. & SOC. CRITICISM 473, 473 (2022) (commenting on the obligation to "refrain from penalizing any communicative activities qua communicative activities").

constitutional rights in the plural, alluding (purposefully or otherwise) to the intricate challenge of adjudicating cases where multiple "absolute" rights are purportedly at odds. Consider the inescapable fallacy that follows: litigants who are required to show that one absolute right cannot be invoked by the opposing party, while simultaneously arguing for an absolute right, perhaps even the *same* right, in their own argument. This in turn leads to the paradox: how absolute rights can possibly coexist or take precedence in litigation while remaining "absolute."

Justice Black's position, while highlighting the Framers' intent for certain inalienable rights, also beckons a careful consideration of how these absolutes interact and potentially conflict within the fabric of American jurisprudence; perhaps, clearly defining what counts as speech, or as abridgment, could serve as a mitigative strategy in lowering risks of such conflict.[43] Narrowing these and other definitions could, in some cases, safeguard against unworkable outcomes that absolutism might engender. However, narrowing would still fail to eliminate the challenges faced by absolutism itself, affecting almost exclusively the frequency of conflicts, not their substantive outcomes.

B. The Allure of Absolutism

The absolutism fashioned by the *303 Creative* Court does not itself call for the constitutional hierarchy contemplated by this Article—whether freedom of speech outranks freedom of the press, free exercise of religion, the Establishment Clause, the right to a fair trial,[44] or the Equal Protection Clause, to name a few. It instead grants exceptionless preference to the constitutional right in question against any conflicting government interest,[45] failing to account for downstream effects on

43. *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (characterizing appellant's wearing of a jacket which read "Fuck the Draft" as conduct rather than speech); Tinker v. Des Moines Indep. Commun. Sch. Dist., 393 U.S. 503 515, 517 (1969) (Black, J., dissenting) (questioning whether demonstrative political armbands worn by students in school is protected by the First Amendment); *see also* Wright, *supra* note 40; Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535 (2015) (discussing Black and Meiklejohn).

44. Consider the Court's apparent willingness to balance speech and press rights of newspapers or legal counsel against a criminal defendant's constitutional right to a fair trial. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1969).

45. Free speech cases are typically formulated not in terms of any conflict of rights, but rather conflict between speech and a purported compelling interest. *See, e.g.*, relatively rare overriding of speech rights in Holder v. Humanitarian Law

constitutional principles. But absolutism too fails to adequately address even its intended consequence, particularly when considering the intertwined nature of constitutional rights and their related public interests. The *303 Creative* Court highlights this practical dilemma by evaluating the government's compelling interest in preventing discrimination—a principle that, while not directly enumerated as a right, is inseparable from the constitutional right to equal protection under the law.[46] The reality of the indivisible relationship between Colorado's interests in passing CADA and its citizenry's constitutional right to equal protection illustrates how public interests often embody or reflect underlying constitutional rights, making it difficult or impossible to disentangle the two and categorize a state interest as separate from a constitutional protection.[47]

In the context of vital public interests and individual rights, *303 Creative* was not the first instance of tension between free speech absolutism and strict scrutiny. In *American Booksellers v. Hudnut*,[48] an Indianapolis ordinance prohibited certain verbal or pictorial forms of "graphic[,] sexually explicit subordination of women."[49] Writing for the United States Court of Appeals for the Seventh Circuit, Judge Frank Easterbrook held the ordinance unconstitutionally restricted speech based on its content[50] or viewpoint,[51] thereby infringing on protections afforded to non-obscene speech under the Constitution.

In doing so, Judge Easterbrook declined to apply strict scrutiny[52] and embraced absolutism, declaring that "[t]he Constitution *forbids* the state to declare one perspective right and silence

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Project, 561 U.S. 1 (2010); *see also* Burson v. Freeman, 504 U.S. 191 (1992) (upholding a one-hundred foot no-campaigning zone around entrances to polling places on the basis of not only voting rights, but the broader public interest in conducting elections with integrity, reliability, and to avoid corruption).

46. *See supra* note 6 and accompanying text.

47. For a related discussion, *see* MATTHEW H. KRAMER, N.E. SIMMONDS & HILLEL STEINER, A DEBATE OVER RIGHTS (2000).

48. Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). Only Chief Justice Burger, Justice Rehnquist, and Justice O'Connor thought the case was close enough that oral argument would have been helpful. *See id.* The Supreme Court majority evidently believed otherwise. *See id.* For a valuable response to *Am. Booksellers*, along with broader commentary, *see* C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1184–85 (1994).

49. *Am. Booksellers*, 771 F. 2d at 324.

50. *See id.* at 325.

51. *See id.*

52. *See id.*

opponents."[53] Judge Easterbrook then went further, quoting Justice Robert Jackson: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[54]

This invocation was not mere rhetorical flourish intended only to emphasize the fundamental importance of free speech; it was a flat refusal to weigh government interests. And despite accepting the merits of the government's claimed interest,[55] Judge Easterbrook snubbed application of any sort of scrutiny, writing that "[o]ne of the things that separates our society from [totalitarian governance] is our *absolute* right to propagate opinions that the government finds wrong or even hateful."[56]

The *303 Creative* Court evidently agrees, and its position, while flawed, is not entirely meritless. The appeal of free speech absolutism lies in its simplicity and the clarity it can bring to complex free speech litigation.[57] Strict scrutiny is a test susceptible to erratic, subjective judicial interpretation,[58] while an absolutist rule, with clear boundaries and exceptions, can mitigate some of these challenges by providing a more predictable standard. If the rigidity of an absolutist approach counterbalances other systemic deficiencies—such as the potential for judicial overreach or inconsistency in the application of strict scrutiny—it could represent a pragmatic, albeit imperfect, solution. Thus, the concept of speech absolutism as a "second best" solution

53. *Id.* (emphasis added). In fact, the ordinance "silenced" particular viewpoint expression in no real, meaningful way. Ideas concerning intimate relationships could readily be expressed under the ordinance in any fashion that merely avoided the "*graphic sexually explicit* subordination of women." *Id.* at 324 (emphasis added). Any and all non-obscene, non-defamatory means of expressing one's message remained entirely open.

54. *Id.* at 327 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

55. Judge Easterbrook wrote "we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to . . . lower pay at work, insult and injury at home, battery and rape on the streets." He then conceded the resulting sex discrimination, aggressive acts, and, explicitly, harm to "women's opportunities for equality and rights of all kinds." *Id.* at 329.

56. *Id.* at 328 (emphasis added).

57. *See, e.g.*, Sonja R. West, *The Problem With Free Press Absolutism*, 50 NEW ENG. L. REV. 191, 196 (2016).

58. *See, e.g.*, R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 65 FLA. L. REV. 759 (2020).

acknowledges the inherent limitations and trade-offs in crafting legal doctrines to govern free expression.[59]

Further support for absolutism, or at least the societal conditions supporting its employment, can be found in Professor Vincent Blasi's First Amendment philosophy work.[60] Blasi advocates for a robust interpretation of First Amendment protections, particularly emphasizing its critical role during periods of heightened intolerance towards dissenting views and unorthodox ideas. This perspective suggests that the First Amendment's protections should be the most vigorous in the "worst of times," serving as a bulwark against the erosion of democratic principles and the suppression of dissent.[61]

This thought carries unavoidable concerns, however. While absolutism in free speech theoretically aims to provide unwavering protection against governmental overreach, applying such an uncompromising stance in line with Blasi's theory might not necessarily yield the optimal balance between protecting speech and other societal values. The precautionary principles, risk aversion strategies, and the absolutist interpretations of maximin (maximize the minimum) or leximin (lexicographically maximize the minimum) social choices highlight a critical tension: the potential for free speech absolutism to overlook or undervalue other important rights and interests. Furthermore, the invocation of Blasi's "pathological perspective"[62]—preparing for the worst-case scenario to ensure First Amendment rights—might inadvertently deprioritize or neglect the everyday application and balancing of rights that are equally foundational to a democratic society.[63] To illustrate this, we now turn to a more

59. For background, *see* R. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956).

60. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

61. *Id. But see* Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618 (1987); George Christie, *Why the First Amendment Should Not Be Viewed From the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683. Consider the difficult question of whether even well-intentioned governments tend to overweight rather speculative safety and security risks in times of unusual stress and anxiety. One basic problem is that, precautionary, risk-averse, and "leximin" or "maximin" strategies do not generally maximize welfare, or overall value, over time. *See infra* Part IV. Another problem, is that other, occasionally conflicting values, such as equality or equal protection, may seem equally, if not more, constitutionally valuable. *See infra* Part IV.

62. *Id. See infra* Parts III, IV.

63. For background, *see, e.g.*, Robert M. O'Neil, *Rights in Conflict: The First Amendment's Third Century*, 65 L. & CONTEMP. PROBS. 7, 7 (2002) (noting the

explicit examination of these considerations on other important non-First Amendment constitutional rights.

III. ABSOLUTISM AND OTHER CONSTITUTIONAL RIGHTS

A. The Free Exercise of Religion

Contemporary consensus, bridging both conservative and progressive Justices, is that the free exercise of religion should be governed by non-absolutist standards.[64] Disputes among the Justices in these cases touch on many issues, but opinions converge on strict scrutiny as the appropriate test for resolving relevant disputes within the realm of free exercise cases.[65]

To this point, the Court in *Employment Division v. Smith*[66] held that Free Exercise Clause rights are not protected in cases in which the regulatory burden reflects a neutral principle of general applicability.[67] Similar cases of non-neutrality or lack of general applicability of the regulation, strict scrutiny, as opposed to some absolutist protection, is also applied.[68] Historically, the Court has invoked strict scrutiny in evaluating substantial burdens on the free exercise of religion, rounding out the conclusion that strict scrutiny remains its most protective stance

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"tensions between free expression" and "other basic human liberties" like privacy, civility, and equality); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 51, 96–97 (2009) (free speech versus civil rights); Richard Delgado, *About Your Masthead: A Preliminary Inquiry*, 39 HARV. C.R.-C.L. L. REV. 1, 3–4 (2004) (noting that "free speech absolutism" causes the real, unminimized, aggregate harmful consequences thereof to be borne largely by minorities). Placing the consequences of intentionally harassing speech for any one single targeted individual on one side of the balance, against the entire value over time of free speech in general, or the public interest therein, is plainly skewed and patently arbitrary. For background, *see* R. George Wright, *The Scope of Compelling Government Interests*, 98 NOTRE DAME L. REV. REFLECTION 146 (2023). For a more thoughtful approach, *see* Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 676 (7th Cir. 2008) (requiring "a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity"). Judge Posner therein, however, refers to a conflict between speech rights and the school or public interest, but not to any rights of offended or targeted students.

64. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

65. *Id.*

66. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872 (1990).

67. *Cf. Fulton*, 141 S. Ct. at 1876.

68. *See id.* at 1877.

towards religious rights.[69] The standard is not invariably fatal in fact, implying that a regulation can withstand strict scrutiny if it is the least restrictive means to achieve a compelling governmental interest.[70]

B. The Second Amendment

There is certainly an explicit constitutional prohibition on the infringement of Second Amendment rights, so it is not unreasonable to question whether these rights should be interpreted in absolutist terms.[71] However, the Second Amendment itself contains no language suggesting the scope of its protected rights is exceptionless.[72] And indeed, as Justice Antonin Scalia wrote for the majority in *District of Columbia v. Heller*,[73] "nothing in our opinion should be taken to cast doubt on long standing prohibitions"[74] on the possession of firearms by particular classes of persons or in particular context or circumstances. Justice Scalia explicitly acknowledged exceptions to the Second Amendment rights, such as prohibitions against firearm possession by felons,[75] individuals adjudicated as mentally ill,[76] and the regulation of firearms in "sensitive places" like schools and government buildings.[77] These acknowledgments serve to highlight that, even within the framework of recognizing an individual's

69. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). Among more recent cases, *see, e.g.*, Tandon v. Newsom, 593 U.S. 61, 62–63 (2021) (per curium); Espinoza v. Montana Dept of Revenue, 140 S. Ct. 2246, 2255 (2020).

70. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982); Gillette v. Unites States, 401 U.S. 437 (1971). Under the Free Speech Clause, *see* the strict scrutiny cases cited *supra* note 48.

71. *See* U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms shall not be infringed.").

72. *See id.*

73. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

74. *Id.*

75. *See id.*

76. *See id.* Of course, the proper scope of the exceptions must be determined through case law, based on a reading of the relevant history and tradition.

77. *See id.* Whether "sensitive places" can encompass all of a large public university campus is contested. *See* Wade v. Univ. of Michigan, 2023 WL 4670440 (Mich. Ct. App. July 20, 2023) (holding that a school is a sensitive place where firearms could be prohibited consistent with the Second Amendment). The recent *Bruen* case offers specific examples of legislative assemblies, polling places, and courthouses. *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 29 (2022). For whether controlled-substance users may be barred from possessing firearms, *see* United States v. Daniels, 2023 WL 50191317 (5th Cir. Aug. 9, 2023); *see also* Range v. Attorney General, 69 F.4th 96 (3d Cir. 2023) (holding that food stamp fraud is not grounds to deprive a citizen Second Amendment protection).

right to bear arms, that right is subject to reasonable limitations.

C. The Fourth Amendment

The Fourth Amendment, similar to the Second, eschews absolutist language by *not* categorically prohibiting all searches and seizures, but rather only those deemed "unreasonable."[78] Thus, protection exists only to the extent that it prohibits actions deemed unreasonable, making its absoluteness somewhat tautological. Therefore, to assess reasonableness, the courts must more specifically look to balance the government purpose behind the search or seizure "against the invasion" of that search or seizure on individual privacy.[79] Such an evaluation inherently demands a consideration of all relevant factors, embodying a flexible approach rather than a rigid, exceptionless rule. The acknowledgment of exceptions and the requirement for reasonableness underscore a judiciary considering the evolving norms and expectations of society.[80]

D. The Fifth Amendment

Rights afforded under Fifth Amendment, similar to those previously discussed, do not adhere to an absolutist interpretation, including the right to procedural due process.[81] While we can stipulate that everyone who has been genuinely deprived of, say, a recognized property interest is entitled to a hearing,[82] this formalistic recognition does not itself establish rights unconditional in any meaningful sense. Courts addressing procedural due process cases instead perform a balancing test[83] weighing the claimant's interest[84] against that of the government.[85] The Takings Clause within the Fifth Amendment presents, perhaps, a stronger case for absolutism by negating the infringement of

78. *See* U.S. CONST. amend. IV, as discussed in Florida v. Jardines, 569 U.S. 1, 5 (2013).

79. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

80. *See, e.g.*, City of Ontario v. Quon, 560 U.S. 746, 760 (2010); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); United States v. Jenkins, 46 F.3d 447, 451 (5th Cir. 1995).

81. *See* U.S. CONST. amend. V, as well as U.S. CONST. amend. XIV, sec. 1.

82. *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); *see also* Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

83. *See Eldridge*, 424 U.S. at 335.

84. *See id.*

85. *See id.*

rights through the provision of just compensation for government-taken property.[86] But the Takings Clause is unique in textually specifying that compensation for a taking is not a remedy for a constitutional violation, but rather a preventative measure against a violation occurring at all.[87] Likewise, there are recognized limitations on the criteria establishing constitutionally relevant property rights, indicating that even the Takings Clause's closer nexus with absolutism is bounded by certain criteria and exceptions.[88]

E. The Sixth and Seventh Amendments

While the Supreme Court has affirmed that individuals facing felony charges in state courts possess an "unconditional and absolute right to a lawyer,"[89] and similarly, an absolute right to a trial by jury,[90] the expansion of the modern administrative state introduces notable exceptions to these rights.[91] It is thus feasible for individuals to incur fines or lose benefits without the guarantee of a jury trial or the provision of paid legal counsel, underscoring the complexity of applying constitutional rights truly within the framework of absolutism.

F. The Eighth Amendment

The Eighth Amendment 's prohibition of "cruel and unusual punishments" appears facially absolute.[92] However, it is absolute only in the technical, if trivial, sense—no court is likely to

86. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

87. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017–29 (1992); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 491–92 (1987) (holding that no compensation is owed in cases of injurious uses of property); Miller v. Schoene, 276 U.S. 272, 280 (1928); Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (noting restrictions against the injurious use of property regarding community health, welfare, and safety interests is not a taking).

88. *See* the authorities cited *id.*

89. Boyd v. Dutton, 405 U.S. 1, 2 (1972) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)); *see also* Kansas v. Ventris, 556 U.S. 586, 590 (2009).

90. *See, e.g.*, Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry, 393 U.S. 558 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Sullivan v. LTV Aerospace and Defense Co., 82 F.3d 1251, 1257–59 (2d Cir. 1997).

91. Mark I. Greenberg, *The Right to Jury Trial in Non-Article III Courts and Administrative Agencies after Grandfinanciera v. Nordberg*, 1990 U. CHI. LEGAL F. 15.

92. U.S. CONST. amend. VIII; Wilson v. Seiter, 501 U.S. 294, 296–97 (1991); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

find a punishment cruel or a fine excessive and still deem it legally acceptable under any judicial test, including strict scrutiny.[93] The problem, though, is that Eighth Amendment cases do not begin and end with normative language such as "cruel" or "excessive." Instead, Eighth Amendment case law is, at a substantive level, characterized by deeper evaluations of the government actor's intent,[94] reasonableness of conduct,[95] necessity of conduct,[96] and, most importantly, explicit questions of proportionality.[97] These inquiries, particularly the latter, naturally balance competing interests, revealing the formal absolutism of Eighth Amendment rights to be less rigid upon practical examination.

Exploring absolute constitutional rights beyond the Bill of Rights may seem appealing, but the potential for finding unequivocal absolutism is limited. The complexities inherent in constitutional rights suggest a broader, more nuanced approach to constitutional interpretation is both necessary and more constructive. This approach, especially in relation to freedom of speech, acknowledges the need for balancing rights with other moral and constitutional considerations, moving beyond the pursuit of absolutism to a more flexible, context-sensitive understanding of constitutional protections.

IV. ABSOLUTISM, LEXICAL ORDERING, AND MERE DEFEASIBLE PRIORITY

A. The Broad Shortcomings of Absolutism

Within the broader legal and moral discourse, there are certainly past and present defenders of various forms of exceptionless or absolute moral rights and rules. Thomas Aquinas, for instance, posited that certain norms, like the Ten

93. *See* Meiklejohn, *supra* note 42, at 247 (discussing Justice Hugo Black's views).

94. *See, e.g.*, *Wilson*, 501 U.S. at 297; Helling v. McKinney, 509 U.S. 25, 35 (1993).

95. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 832 (1994); *Helling*, 509 U.S. at 31–32; Hudson v. Palmer, 468 U.S. 517, 526–27 (1984).

96. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 737 (2002); Whitley v. Albers, 475 U.S. 312, 319 (1986); Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981).

97. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 489 (2012) (prohibiting mandatory non-parole in juvenile homicide cases); Graham v. Florida, 560 U.S. 48, 60–61 (2010) (prohibiting non-homicide juvenile life sentences); Roper v. Simmons, 543 U.S. 551, 560 (2005).

Commandments, are immutable and must never be breached.[98] Similarly, Pope John XXIII, in a widely read Encyclical, emphasized the sacrosanct nature of individual rights and duties as intrinsic to human nature, underscoring their universality and inviolability.[99] And more recently, Professor Christopher Tollefsen has argued that moral absolutes are crucial for safeguarding human well-being, and "should [not] be suspended even when upholding them might bring about grave consequences."[100]

However, rigidity almost always raises significant practical concerns. While a rule might generally be deemed necessary for human well-being, its inflexible application could paradoxically undermine the same. Even those who supposedly uphold an absolute rule against, say, deliberate lies[101] commonly adopt reasonable qualifications and exceptions to such a rule.[102]

In addition to being constitutionally constrained by the First Amendment itself, it is not surprising that even those proponents of moral or rights absolutism tend to recognize substantive exceptions thereto. For example, Professor Charles Fried argues that lying is not merely a generally bad thing whose badness might occasionally be outweighed,[103] but simply one of "the things you must not do."[104] Yet seemingly in the same breath, Professor Fried concedes[105] in his condemnation the need to account for "extreme cases,"[106] avoid "fanaticism,"[107] and avert "catastrophic"[108] outcomes. Fried's acknowledgment of "limits"[109] to his otherwise absolutist view thus underscores

98. CHRISTOPHER KACZOR, PROPORTIONALISM AND THE NATURAL LAW TRADITION 184 (reprt. ed. 2010).

99. POPE JOHN XXIII, PACEM IN TERRIS: ENCYCLICAL ON ESTABLISHING UNIVERSAL PEACE IN TRUTH, JUSTICE, CHARITY, AND LIBERTY, para. 11 (Apr. 11, 1963).

100. Christopher O. Tollefsen, *Moral Absolutes and the Moral Life*, PUB. DISCOURSE (Nov. 21, 2011), https://www.thepublicdiscourse.com/2011/11/4294 [https://perma.cc/9B6D-CU8K]; *see also* Patrick Hawley, *Moral Absolutism Defended*, 105 J. PHIL. 273 (2008).

101. *See, e.g.*, Sean Coyle, *Natural Law Theory, "New" and Old*, 68 AM. J. JURIS. 33, 56–57 (2023) (discussing the work of philosopher John Finnis).

102. *See* R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131, 1137–44 (2011).

103. *See* CHARLES FRIED, RIGHT AND WRONG 9 (1978).

104. *Id.*

105. *See id.* at 10–11.

106. *Id.* at 10.

107. *Id.*

108. *Id.*

109. *Id.* at 11.

the practical and ethical complexities inherent in applying absolute moral rules, especially when contemplating morality's place within a legal context.[110]

The critique of genuine absolutism, both within constitutional jurisprudence and broader ethical discussions, often centers on its inflexibility and potential for producing outcomes that conflict with practical and moral intuition. A proposed solution is to limit risks by "retain[ing] maximal stringency while reducing scope through the addition of exceptive clauses."[111] An obvious reply to this strategy, though, is to argue that exceptions-incorporation essentially dilutes the very essence of absolutism, transforming it into a framework that, though it seeks to mitigate risks, ends up compromising on its definitional principles. A narrow range of exceptionless rights, surrounded by what are clearly exceptions, gives not the best of both worlds, or even a defensible "second best,"[112] but conceptual inconsistency and even sheer incoherence.

B. Lexicality

Absolutism in constitutional law and elsewhere can be compared to the general decision-making process of lexicality,[113] where certain goods, rights, or values are considered categorically superior to others, such that even minimal amounts of a higher-ranked good would take precedence over any quantity of a lesser good.[114] In its most stringent form,[115] lexicality embodies a form of absolutism by positing a value, such as liberty or equality, as an unequivocal priority that supersedes other considerations.[116] To accommodate more than one value, lexical ordering requires that we "satisfy the highest or primary value as much as we can and resort to the secondary value only to break any ties that might arise under the application of the primary value."[117]

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110. *Id.*

111. Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209, 224–25 (1995); see also Hugo Black's approach, as referred to *supra* note 42.

112. *See supra* note 59 and accompanying text.

113. For a useful account incorporating helpful sub-categories, *see Value Lexicality*, SIMON KNUTSSON (Nov. 22, 2016), https://www.simonknutsson.com/value-lexicality [https://perma.cc/2P8Z-L33P].

114. *See id.*

115. *See id.*

116. *See id.*

117. Bruce Chapman, *Chance, Reason, and the Rule of Law*, 50 U. TORONTO L.J. 469, 480 (2000).

Thus, as in *303 Creative*, the application of lexicality suggests that the right to free speech could be considered to surpass the rights to equal protection or nondiscrimination,[118] following the logic that even minimal amounts of a higher-ranked good (free speech) would prevail over any amount of a lower-ranked good (equal protection or nondiscrimination).[119] This notion echoes philosopher W.D. Ross' argument for "infinite superiority" of certain virtues over others, calling for the inference that no increase in a lesser-valued good could compensate for a loss in a higher virtue.[120]

Indeed, whether there should be such a hierarchy, rigid or otherwise, among widely recognized human rights has been vigorously debated.[121] Defenders of lexical ordering in policy decision-making commonly look to the classic theories of John Rawls,[122] whose framework views lexical ordering of rights as a general alternative to weighing and balancing of rights.[123] Analogous thinking permeates the Court's reasoning in *303 Creative*.[124] But unlike the Court, even Rawls acknowledges the need for exceptions to strict ordering in certain circumstances, recognizing that practical realities may necessitate deviations from rigid principles.[125]

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118. *See supra* notes 3–7 and accompanying text.

119. *See* Gustaf Arrhenius, *Superiority in Value*, 123 PHIL. STUD. 97, 100 (2005) (citing the philosopher James Griffin).

120. W.D. ROSS, THE RIGHT AND THE GOOD 151 (Philip Stratton-Lake ed., 2002) (1930). For discussion, *see* Noah M. Lemos, *Higher Goods and the Myth of Tithonus*, 90 J. PHIL. 482, 483 (1993).

121. *See, e.g.*, Tom Farer, *The Hierarchy of Human Rights*, 8 AM. U. INT'L L. REV. 115 (1992); Eckhart Klein, *Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy?*, 41 ISR. L. REV. 477 (2009); Theodor Meron, *On a Hierarchy of International Rights*, 80 AM. J. INT'L L. 1 (1986); Dinah Shelton, *Hierarchy of Norms and Human Rights: Of Trumps and Winners*, 65 SASK. L. REV. 301 (2002). In particular, the absolute prohibition of torture is one candidate for absolutism. *See, e.g.*, Jamie Mayerfield, *In Defense of the Absolute Prohibition of Torture*, 22 PUB. AFF. Q. 109 (2008); Nigel S. Rodley, *The Prohibition of Torture: Absolute Means Absolute*, 34 DENV. J. INT'L L. & POL'Y 145 (2006).

122. *See* JOHN RAWLS, A THEORY OF JUSTICE 37–40, 72 (rev. ed. 1999) (1971).

123. *See id.* at 37–38. From among the large literature, *see* Saguiv A. Hadari, *Value Tradeoff*, 50 J. POLITICS 655, 664 (1998); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2148–56 (1990).

124. *See* notes 3–5 and accompanying text. Again, what to do when the hierarchically superior value appears in substantial measure on both sides of the adversary case requires further development.

125. *See, e.g.*, Brian Barry, *John Rawls and the Priority of Liberty*, 2 PHIL. & PUB. AFF. 274, 276 (1973); Richard Craswell, *Law and Incommensurability*, 146 U. PA. L. REV. 1419, 1457 (1998). Thus, for example, at very low levels of economic

Resistance to framing any constitutional right with an absolute lexical priority is well-founded, supported by Professor William Galston's assertion that "[t]here are no strict lexical orderings, even in theory, among basic values."[126] Neither absolutism nor lexical ordering satisfactorily handle navigating severe trade-offs and extreme scenarios where constitutional rights may conflict.[127] It thus follows that characterizing more than one constitutional right as "fundamental" opens the door to controversial conflicts if fundamental rights cannot be weighed against other considerations.[128] The potential for conflict among rights deemed "fundamental" is a feature, not a bug; it underscores not a deficiency in ethical or constitutional frameworks,[129] but rather reflects adaptability required to account for "the richness of human dignity, and the constant conflict between its components."[130]

C. Practical Alternatives to the Absolutist Paradox

This Article thus concludes that that no single constitutional right, including the right to free speech, should be positioned to unequivocally override others, nor should government interests be denied scrutiny in favor of categorical dismissal. If courts agree, they are tasked with developing further guidance on how to proceed balancing the weight of constitutional rights and state interests. One potential avenue could involve a form of rights-based utilitarianism, where the objective would be to optimize overall rights fulfillment.[131] However, this approach, while aiming for a comprehensive balance, might still fall short

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well-being overall, boosting the collective well-being may justify limited incursions into higher ranked values.

126. William A. Galston, *What Value Pluralism Means for Legal-Constitutional Orders*, 46 SAN DIEGO L. REV. 803, 808–09 (2009).

127. *See, e.g.*, John William Draper, *Preserving Life By Ranking Rights*, 82 ALB. L. REV. 157, 231 (2018).

128. *See, e.g.*, LORENZO ZUCCA, CONFLICTS OF FUNDAMENTAL RIGHTS AS CONSTITUTIONAL DILEMMAS, IN CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19, 24 (Eva Brems ed. 2008).

129. *See* AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 165 (Daniel Kayros trans., 2015).

130. *Id.*

131. For background, *see* Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYC. PHIL. (rev. ed. Oct. 4, 2023), https://plato.stanford.edu/entries/consequentialism [https://perma.cc/VY3P-Y7H6]; Brad Hooker, *Rule Consequentialism*, STAN. ENCYC. PHIL. (rev. ed. Jan. 15, 2023), https://plato.stanford.edu/entries/consequentialism-rule [https://perma.cc/VX2E-H3LW].

in addressing the depth of individual rights and the moral considerations they entail.

Courts and legal theorists exploring the terrain beyond absolute rights and lexicality might find valuable insights in the concept of prioritarianism, albeit with significant modifications for application within constitutional law.[132] Prioritarianism is anti-absolutist;[133] traditionally, it advocates for prioritizing the welfare of the least well-off[134] without necessarily comparing or drawing relationships between groups.[135] Yet in addressing the complexities of constitutional rights, adopting prioritarianism would require a benign inversion of the latter to effectively weigh and compare competing rights or interests.

In this adapted form of prioritarianism,[136] free speech, while highly valued, would not automatically outweigh all other rights. Instead, it would be recognized as a critical but negotiable right, capable of being balanced against other compelling interests or rights under certain conditions. This approach acknowledges that even high-status rights like free speech may need to be moderated or overridden in instances where competing rights are significantly and adversely impacted.

A hurdle to adoption of this methodology would be how the courts could reasonably determine whether free speech rights should give way, in a given case, to conflicting rights or interests. It might be tempting to think of free speech and nondiscrimination as incommensurable values, not subject to any reasonable comparison. Justice Scalia once articulated the difficulty in

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132. *See, e.g.*, RICHARD J. ARNESON, PRIORITARIANISM (2022); JOHN BROOME, WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME 199 (1991); IWAO HIROSE, EGALITARIANISM 86–87 (2015); Derek Parfit, *Equality and Priority*, 10 RATIO 202, 213 (1997); Larry S. Temkin, *Equality, Priority, or What?*, 19 ECON. & PHIL. 61 (2003); *see also* Derek Parfit, *Another Defense of the Priority View*, 24 UTILITAS 399, 401 (2012).

133. *See* the authorities cited *id.*

134. *See id.*

135. *See id.*

136. At this point, we are borrowing mostly the idea of a defeasible, merely presumptive, or rebuttable priority of speech rights, as prioritarianism itself rejects lexicality. *See, e.g.*, Roger Crisp, *Equality, Priority, and Compassion*, 114 ETHICS 745, (2003). Prioritarianism also seeks to provide more useful guidance than a bare "sufficientarianism," in which the courts would seek to ensure that even the lowest ranked rights were "sufficiently" recognized and accommodated. This seems too much like an uninformative, conclusory, and uncontroversial general goal of all theories of constitutional rights. On genuine moral sufficientarianism, which is more useful in its standard contexts, *see* HARRY FRANKFURT, ON INEQUALITY (2015); GEORGE SHER, EQUALITY FOR INEGALITARIANS (2014); *see also* LIAM SHIELDS, JUST ENOUGH: SUFFICIENCY AS A DEMAND OF JUSTICE (2020).

comparing fundamentally different values, noting that it is akin to trying to decide "whether a particular line is as long as a particular rock is heavy."[137]

True, an advantage of the Supreme Court's *303 Creative* approach is that it simply bypasses incommensurability problems and potential solutions by foregoing comparisons between constitutional values. While its analysis assumes substantial free speech values do not appear on both sides of the case, *303 Creative*'s speech absolutism refrains from engaging in the delicate balancing of constitutional values, simplifying the adjudication process but at the expense of overlooking nuanced conflicts between rights.[138]

However, scenarios exist where speech interests, though significant, are outweighed by more compelling non-discrimination interests. Imagine a case, for example, in which a driver of a passing car vindictively hurls a racial or sexual epithet, with no other message, at a single pedestrian-stranger. Imagine also that precisely this speech activity is then subject to some mild civil or administrative sanction, precisely on the basis of the content of the speech. If we set aside the speech absolutism of *303 Creative*, this scenario prompts the question of whether the individual could express their views through alternative means that do not infringe as heavily upon the rights and interests of others, particularly those concerning non-discrimination and equal protection. This consideration suggests that some situations necessitate a judicial willingness to facilitate trade-offs between important constitutional rights.[139] The objective in such cases is not to undermine the value of free speech but to recognize that its exercise may, in certain contexts, need to be modulated to protect equally vital rights. These trade-offs do not inherently diminish the value of free speech but highlight the complexity of safeguarding multiple fundamental rights within a diverse and pluralistic society.

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137. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). On the theory of value incommensurability, *see, e.g.*, Martin Boot, *Problems of Incommensurability*, 43 SOC. THEORY & PRAC. 313 (2017); Nien-he Hsieh & Henrik Anderson, *Incommensurable Values*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/value-incommensurable (rev. ed. July 14, 2021) (visited Sept. 1, 2023); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

138. *See supra* note 136 and accompanying text.

139. As in the widely discussed Pareto 80-20 rule. *See* Carla Tardi, *The 80-20 Rule (aka Pareto Principle): What It Is, How It Works*, INVESTOPEDIA (Dec. 19, 2023), www.investopedia.com/terms/1/80-20-rule.asp [https://perma.cc/WUT7-7596].

CONCLUSION

The judicial temptation to embrace absolutist constitutional principles, which promise clear-cut, exceptionless rules, often emerges in societies marked by simplicity and homogeneity. The social cost of surrendering to that temptation, however, cannot be overlooked; to be sure, it also exists alongside intense polarization and uncertainty. This Article argues that neither societal characteristic is desirable. Judicial inclinations towards an absolutist framework, particularly in the realm of free speech, neglects the complex, multifaceted nature of legal disputes where governments have compelling interests in regulating the content of some speech, there exist competing constitutional values, or substantial speech interests exist on both sides. Embracing speech absolutism not only introduces paradoxes when speech rights are asserted against each other; it also risks sidelining equally fundamental rights and public interests, such as nondiscrimination and equal protection. Courts, therefore, must face the crucial task of navigating beyond the simplicity of absolutism to address the intricate balance of competing constitutional values underlying the rich complexities of human dignity. This involves a careful consideration of the disproportionate social costs associated with prioritizing one constitutional value to the absolute subversion of others. By acknowledging the legitimacy and importance of diverse rights and interests, the American judiciary must foster a more nuanced, equitable, sustainable form of constitutional jurisprudence.