

A TEMPORARY BAN ON PORNOGRAPHY: A FIRST AMENDMENT-FRIENDLY STRIDE TOWARD GENDER EQUALITY

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[I]f true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to . . . [m]aterials portraying women . . . as objects for sexual exploitation and abuse.¹

I. THE FRAMEWORK

Previous attempts to protect women and their enjoyment of constitutional liberties from the detrimental effects of pornography as it exists today have failed for various reasons, including insufficient public support, male-dominated financial and political power, and failed legislative attempts because of judicial review that is reliant on established but less evolved constitutional case law.² With the benefits of the evolution of constitutional law,³ changes in the status of women,⁴ changes in the composi-

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¹ *Butler v. Her Majesty The Queen*, 1 S.C.R. 452 (1992) (Can.) (emphasis added).

² See discussion *infra* Part I B–C.

³ Specifically, the issuance of the Supreme Court's opinion in *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (citing impermissible historic discrimination against women by state governments as justification in upholding as constitutional the Family and Medical Leave Act (applicable to public and private employers), which was designed to attack workplace discrimination based on gender role stereotypes).

⁴ One specific, potentially significant, change is the confirmation of Elena Kagan to the position of Associate Justice of the United States Supreme Court, because former Dean Kagan is one of the few academics who has expressed support for the idea of regulation of (or restrictions on) pornography that are justified by harm to women. See Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 873–74, 877, 897–98 (1993).

tion of the Supreme Court, and modernization of public sentiment, a renewed and less intrusive effort should be made to curtail the harm of pornography to women.⁵

A. PORNOGRAPHY HARMS ALL WOMEN

It is established in law that pornography is harmful to women.⁶ As it has in the past, it continues to contribute to gender inequality today.⁷

⁵ “There seems to be a growing willingness of judges to write about the history of sexism and discrimination against women. . . . [O]nce judges are sensitized to issues of subordination, power and privilege, they can include those ideas in their written opinions and legal reasoning.” LESLIE BENDER & DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 599 (1995). “It is, of course, important to inquire whether current law is correct, especially in light of the fact that free speech doctrine sometimes changes rapidly.” Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 840 (1993) [hereinafter *Words, Conduct, Caste*]. See also Courtenay W. Daum, *Feminism and Pornography in the Twenty-First Century: The Internet’s Impact on the Feminist Pornography Debate*, 30 WOMEN’S RTS. L. REP. 543, 543–44 (2009) (“The absence of a feminist perspective . . . on pornography in the twenty-first century is notable considering that the advent of the Internet and the proliferation of pornography on the Internet have raised numerous new questions about . . . the implications for women’s interests and equality. The relative silence of anti-pornography . . . feminists . . . [is] problematic.”).

⁶ See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (“[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.”); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (finding that, in a context of male dominance, pornographic photographs of women constitute sexual harassment) (“[Pornography] creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they subvert their identities to the sexual stereotypes prevalent in that environment.”); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (“[T]he intent to discriminate on the basis of sex in cases involving . . . pornographic materials . . . is implicit, and thus should be recognized as a matter of course.”); *Patane v. Clark*, 508 F.3d 106, 113–14 (2d Cir. 2007) (finding the presence of pornography in the workplace can alter the terms and conditions of employment for women in the workplace such that it constitutes gender discrimination in violation of Title VII). Cf. Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 411 (1991) (“[*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986),] recognized that an environment that fosters the degradation of women hinders a female employee’s productivity, self-image, and ability to advance, as well as erodes her professional image in the eyes of co-workers.”).

In adopting an anti-pornography ordinance, the Indianapolis City-County Council found that “[p]ornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women.” Indianapolis & Marion County, Ind., Ordinance 24, § 16-1(a)(2) (May 1, 1984), amended by Indianapolis & Marion County, Ind., Ordinance 35, § 16-

1(a)(2) (June 15, 1984) (quoted in Horton, *supra*, at 433). It also found that “[p]ornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women’s opportunities for equality of rights in employment, education, property rights, public accommodations and public services; create public harassment and private denigration. . . .” *Id.* at § 1 (quoted in Edward A. Carr, *Feminism, Pornography, and the First Amendment: An Obscenity-Based Analysis of Proposed Antipornography Laws*, 34 UCLA L. REV. 1265 n.23 (1987)). The court reviewing and striking down the ordinance stated that pornography is “harmful . . . and inimical to and inconsistent with enlightened approaches to equality.” *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316, 1327 (S.D. Ind. 1984). Further, it accepted as true the legislative finding that pornography causes sex discrimination and “conditions society to subordinate women.” *Id.* at 1330, 1335.

The Canadian Supreme Court held that pornographic images contain “degrading or dehumanizing materials plac[ing] women . . . in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings.” It also held that obscenity (which was interpreted to include pornography) “wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentations.” Note, *Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*, 106 HARV. L. REV. 1075, 1081 (1993) [*hereinafter Comparative Perspective*] (citing *Butler v. Her Majesty The Queen*, [1992] 1 S.C.R. 452, 479, 501 (Can.)).

U.S. governmental agencies determined that pornography is harmful to women. The Attorney General’s Commission on Pornography reached the conclusion that pornography “systematically violates human rights with apparent impunity.” ATT’Y GEN. COMM’N ON PORNOGRAPHY, U.S. DEP’T OF JUSTICE, FINAL REPORT 755 (1986). The same has been determined by Canada’s governmental agencies. *See, e.g.*, STANDING COMM. ON JUSTICE AND LEGAL AFFAIRS, REPORT ON PORNOGRAPHY 18:4 (1978).

It has also been established in science that pornography is harmful to women. *See, e.g.*, Marilyn J. Maag, Comment, *The Indianapolis Pornography Ordinance: Does the Right to Free Speech Outweigh Pornography’s Harm to Women?*, 54 U. CIN. L. REV. 249 nn.21–31 (1985) (citing to numerous studies (and commentary on those studies) concerning the harmful effects of pornography on women, including the causal link between exposure to pornography and men’s attitudes toward women). There is an “immense body of evidence compiled by researchers which indicates that pornography directly and indirectly causes serious harm to women.” Elise Dinolfo, *The First Amendment: Free Speech or Ticket to Abuse?*, 4 SETON HALL CONST. L.J. 621, 622 (1994). *See also* Edward Donnerstein, *Pornography and the First Amendment: What Does the Social Science Research Say?*, 4 LAW & INEQ. 17, 18 (1986); Doug McKenzie-Mohr & Mark P. Zanna, *Treating Women as Sex Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography*, 16 PERSP. & SOC. PSYCH. BULL. 296 (1990).

⁷ *See, e.g.*, Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J. L. & FEMINISM 123, 141 (1992) (“[I]n masculinist society, sexuality does not exist separate from the gender hierarchy, it is the gender hierarchy.”); PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS DAMAGING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* 34 (2005) (“Pornography is a kind of male utopia that men are keen to protect.”). Catharine MacKinnon has identified three ways in which pornography harms women: (1) “women are subordinated and devalued in a society infused with pornographic images and expression;” (2) “women are coerced (either overtly or through their position of inequality and powerlessness) into making pornography;” and (3) “women are victimized by sexual crimes committed by men who are incited by pornography to commit rape and other act of violence.” Kent Greenfield, *Our Conflicting Judgments About Pornography*, 43 AM. U. L. REV. 1197 (1994) (citing CATHARINE MACKINNON, *ONLY WORDS* 15, 18–20, 25 (1993) [*he-*

Through its imagery and production, pornography designs and defines the role of women as servants to the sexual desires of men.⁸ At the very least, pornography today perpetuates the subordination of women and precludes achievement of the otherwise widely supported goal of gender equality.⁹

reinafter ONLY WORDS]); ATT'Y GEN. COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, *supra* note 6, at 334 (finding that substantial exposure to pornography—even non-violent pornography—leads to increases in non-violent forms of subordination of and discrimination against women).

⁸ See, e.g., *Comparative Perspective*, *supra* note 6, at 1078 (“Pornography may also harm women by thrusting upon them insulting and degrading views of their societal roles and their sexuality Pornography instills fear and humiliation in countless women, [who] . . . far more often than men, are likely to identify with the subjects used in the production of the materials.”); Dinolfo, *supra* note 6, at 625 (“There are generally three types of harm resulting from pornography: harm to the participants in the production of pornography, harm to the victims of sex crimes related to the perpetrators’ exposure to pornography, and *harm to society in general caused by social conditioning which enhances sexual discrimination, subordination, and degradation of women.*”) (emphasis added); Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: “No Empirical Evidence?”*, 53 OHIO ST. L.J. 1041, 1048 (1992) (“[P]ornography is a *per se* harm, namely that of being derogatorily constructed as passive, hypersexual, masochistic, a sexual plaything, and so on.”).

The reach of pornography’s impact is great, as it is known that pornography is widely viewed by men from all walks of life. U.S. COMM’N ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 128–34 (1970).

Professor Sunstein notes that the term pornography is derived from the Greek word for “writing about whores” and refers to materials that treat women as prostitutes and that focus on the role of women in providing sexual pleasure to men. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595 (1986) [*hereinafter* *Pornography and the First Amendment*].

⁹ *Pornography and the First Amendment*, *supra* note 8, at 601 (“Pornography acts as a filter through which men and women perceive gender roles and relationships between the sexes. . . . [P]ornography undeniably reflects inequality, and through its reinforcing power, helps to perpetuate it.”); Schroeder, *supra* note 7, at 141 (“[Pornography is o]ne of the primary bases of sexual discrimination, of sexual inequality.”). Even the ACLU—known for its opposition to censorship of pornography—acknowledges that “sexually explicit speech glorifying humiliation and violence is fundamentally inconsistent with our national commitment to equality. . . .” Brief for ACLU & Ind. Civil Liberties Union as Amici Curiae, *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984) (No. IP 84-791C).

For example, we know that “ideas about the appropriateness of using force in sexual relations are internalized at an early age: one study of junior high school children found that 20% of the children agreed that a man was entitled to force a woman to have sex if he spent \$10 on her.” Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 199 n.64 (1993) (citing National Coalition Against Sexual Assault News, *Rhode Island Develops Successful Intervention Program for Adolescents*, NCASA NEWS, Sept. 1988, at 26–27).

Pornography today is especially powerful in shaping ideas about women’s roles, given the widespread reach of pornography as a result of the internet. See, e.g., Bridget J. Crawford, *Toward A Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 131–32 (2007) (discussing the wide reach of internet pornography and noting that there were 28,000 sex sites on the internet in 1997 (a number which almost certainly increased), the term sex was the most frequently searched internet term (with

The emergence of the internet as the predominant medium for the distribution and consumption of pornography has only increased the harm to women. Pornography's message is now more widespread, the harms of its production process occur more frequently, and it is difficult to monitor the extent to which *porn actresses* involved in its production have actually consented to such involvement.¹⁰ Even for women who choose to participate in pornography for the compensation, the financial reward is accompanied by a stigma that not only fails to confer the power associated with the most high-paying jobs, but also disempowers them.¹¹

However, the real harm of pornography is that its stigma, disempowerment, and resultant stereotypes are cast on *all* women¹²—even those entirely disassociated from, and perhaps vehemently opposed to, its existence.¹³ Male and female sexuality—as we know them in our culture today—are, at least in large part, a social construct; a caste system.¹⁴ Porno-

pornography being the fourth most frequently searched), and 28% to 39% of workers with internet access logged on to adult-content websites *from their work computers* in January 2001).

¹⁰ Because most internet pornography is created via home video (rather than in a video production studio/company, where one would presume there is a greater level of accountability for what happens) with *actresses* who are anonymous, the danger that these women have been forced, threatened, or coerced to participate without true consent (either because of violence, economic duress, or the influence of substances) is drastically and disturbingly increased. See generally Crawford, *supra* note 9, at 141 (discussing the internet's influence on pornography consumption, distribution, and production).

¹¹ See generally Kirsten Pullen, *Co-Ed Call Girls: The Whore Stigma Is Alive & Well in Madison, Wisconsin*, in JANE SEXES IT UP: TRUE CONFESSIONS OF FEMINIST DESIRE 210 (Merri Lisa Johnson ed., 2002) ("The narratives that emerge from my interviews suggest that some women working as prostitutes are caught between the sexual autonomy and financial independence sex work offers, and the stigma attached to whoring, experiencing a degree of newfound freedom but in a necessarily covert form."); Crawford, *supra* note 9, at 154 n.316–17.

¹² Some argue that "[i]t is critical to differentiate between actual harm and speech advocating this harm." Brennan Neville, *Anti-Pornography Legislation as Content Discrimination Under R.A.V.*, 5-FALL KAN. J.L. & PUB. POL'Y 121, 129 (1995). This academic argument ignores the realities of pornography's speech and its harm to women. See Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 868 (1993).

¹³ "What a woman is, is defined in pornographic terms; this is what pornography does. If the law then looks neutrally on the reality of gender so produced, the harm that has been done will not be perceptible as harm. It becomes just the way things are." Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 7–8 (1985) [*hereinafter* MacKinnon *Pornography*]; see also Wesson, *supra* note 12, at 868.

¹⁴ See, e.g., Schroeder, *supra* note 7, at 164, 174 ("[S]exuality must be conceptualized in terms of the social meaning given to it. In this light, feminine sexuality can be seen as the ultimate sign of women's lack of will: the lack of feminine subjectivity. This is precisely because feminine sexuality is compelled and non-voluntary as a social matter. . . . Women's involuntary sexuality is voluntarily imposed by men acting as a class."); Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 644 (1987) ("[M]ale supremacy is so ground into our beings that we take it

graphy—as it has existed, and as it continues to exist today—has played a key role in the formation of this social construct.¹⁵ Without this type of pornography, it is likely that women could experience an improved status, both within their sexual relationships and within society in general.¹⁶

B. HISTORICAL EFFORTS TO ADDRESS THE PROBLEM

To curtail its harm to women, many serious attempts have been made to restrict pornography.¹⁷ Much academic consideration has been given to the reasons these attempts failed and ways in which future attempts might succeed, specifically with respect to constitutional limitations.¹⁸ Perhaps

for granted Since earliest childhood, [women have] been aware that [their] primary role was to please men").

¹⁵ See, e.g., MacKinnon *Pornography*, *supra* note 13, at 19 (quoted in Penelope Seator, *Judicial Indifference to Pornography's Harm: American Booksellers v. Hudnut*, 17 GOLDEN GATE U. L. REV. 297, 355 n.234 (1987)) ("Pornography participates in [male] eroticism through creating an accessible sexual object, the possession and consumption of which is male sexuality, as socially constructed; to be consumed and possessed as which, is female sexuality, as socially constructed; and pornography is a process that constructs it that way.") (emphasis added).

¹⁶ See *Words, Conduct, Caste*, *supra* note 5, at 799, 801 ("A principal feature of the caste system based on gender consists of legal and social practices that translate women's sexual and reproductive capacities into a source of second-class citizenship [A] particular concern is that self-respect and its social bases ought not to be distributed along the lines of . . . gender [O]ne group ought not to be systematically beneath another with respect to basic human functionings.").

¹⁷ For example, in the 1980s, a government commission was established to examine pornography (the Meese Commission), which recommended numerous measures to curb pornography. ATT'Y GEN. COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, *supra* note 6. In doing so, it endorsed some of the central views reflected in the Dworkin-MacKinnon model law. *Id.* Canada also addressed the issue of regulation of pornography and its status vis-a-vis free speech rights and harm to women and society. See *Comparative Perspective*, *supra* note 6, at 1079-82.

¹⁸ See, e.g., *Pornography and the First Amendment*, *supra* note 8; Kagan, *supra* note 4; Angela A. Liston, Note, *Pornography and the First Amendment: The Feminist Balance*, 27 ARIZ. L. REV. 415 (1985); Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460 (1984) [hereinafter *Anti-Pornography Laws*]; Edith L. Pacillo, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 SUFFOLK U. L. REV. 123 (1994); Martin Karo & Marcia McBrian, *The Lessons of Miller and Hudnut: On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REFORM 179 (1989); Carr, *supra* note 6, at 1275; Dinolfo, *supra* note 6, at 623 ("[Seventh Circuit] failed to consider the issue of harm to women [when it decided *Hudnut*.]"); Nadine Strossen, Book Review, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. REV. 201 (1987) [hereinafter *Convergence*] (reviewing Varda Burstyn, *WOMEN AGAINST CENSORSHIP* (1985)); Rowena Young, Book Note, *The New Politics of Pornography*, 91 COLUM. L. REV. 1269 (1991) (review of Professor Donald Alexander Downs's book); Greenfield, *supra* note 7, at 1218-29 ("[P]rotect the freedom that comes from speech, rather than, or in addition to, the liberty to speak [I]f women are prevented from flourishing by the pervasiveness of images that shame and denigrate them on the basis of their sex, these harms would be cognizable within the First Amendment.") (emphasis

the most legally sophisticated attempt to curb pornography was Indianapolis's anti-pornography ordinance,¹⁹ which was drafted by law professor Catharine MacKinnon, passed by the Indianapolis and Marion County City-County Council, and signed into law by the Indianapolis mayor in 1984. However, when challenged in federal court, in *American Booksellers Association, Inc. v. Hudnut*, the district judge ruled that the ordinance was unconstitutionally vague, that it constituted a prior restraint in violation of the First Amendment, and that the City-County Council lacked a compelling interest to regulate the speech encompassed by the ordinance.²⁰ The district judge reasoned that the state's interest in protecting women from humiliating and degrading pornographic depictions was not a sufficiently fundamental interest to warrant intrusion on free speech rights.

Although the supporters of the Indianapolis anti-pornography ordinance asserted that pornography was harmful to women, they did not cite to the broad types of harm that result to women from pornography, such as employment discrimination and general societal inequality. The harms to which these supporters cited were limited to: (1) harms affecting women directly involved in pornography; (2) harms to women and children vio-

added); Comment, *Discrimination and Pornography*, 17 TEX. TECH L. REV. 1577 (1986); Marian L. Lausher, Note, *Redefining Pornography as Sex Discrimination: An Innovative Civil Rights Approach*, 20 NEW ENG. L. REV. 767 (1985); Wesson, *supra* note 12; Michelle McGovern, *A Progressive Perspective on Pornography: American Booksellers Association v. Hudnut*, 4 WIDENER L. SYMP. J. 451 (1999).

There has also been much non-academic consideration given to ways in which future attempts to curtail pornography might succeed. See, e.g., Robin Morgan, *How to Run the Pornographers Out of Town and Preserve the First Amendment*, MS., Nov. 1978, at 55, 78-80 ("[R]ecommend[] boycotting products advertised in ways that demean women, picketing pornography shops and confronting their customers, urging magazines and newspapers not to include pornographic advertising, attempting to expose those who profit from pornography, and urging public officials to refrain from cooperating with pornographic publications.") (cited in *Convergence*, *supra*, at 234 n.165).

¹⁹ See Indianapolis & Marion County, Ind., Ordinance 24 (May 1, 1984), amended by Indianapolis & Marion County, Ind., Ordinance 35 (June 15, 1984).

²⁰ *Am. Booksellers Ass'n, Inc. v. Hudnut*, 598 F. Supp. 1316, 1339 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The district judge's rationale has been summarized well by Patricia Barnes:

[The district judge] contended that adult women generally have the capacity to protect themselves from being personally victimized by pornography so that the state's interest in safe-guarding the physical and psychological well-being of women is not compelling enough to sacrifice guarantees of the First Amendment. Barker focused upon the most theoretical aspect of the ordinance, stating that the state's interest in protecting women from humiliating and degrading pornographic depictions "though important and valid as this interest may be in other contexts [it] is not so fundamental an interest as to warrant a broad intrusion into otherwise free expression."

Patricia G. Barnes, *A Pragmatic Compromise in the Pornography Debate*, 1 TEMP. POL. & CIV. RTS. L. REV. 117, 126 n.61 (1992).

lently abused in conjunction with production and viewing of pornography; and (3) the negative impact on the *viewers* of pornography.²¹ Thus, the court did not directly consider the harm pornography causes *all women* in the broader context of daily life (regardless of the connection with the porn industry).²²

C. FLAWS IN JUDICIAL RESPONSE TO *HUDNUT*

The district judge failed to apply a well-established principle of tort law: one cannot consent to the harm of another. By concluding that women can protect themselves against any personal harm from pornography, the district judge failed to recognize that the harm created by pornography is suffered by *all* women—not just those women who choose to participate in its production or consumption. Accordingly, the district judge was incorrect in assuming that a woman who refuses to be involved in pornography will thereby avoid its harm. In fact, the insidious harm of pornography is that it inevitably harms every single woman, whether she is aware she is experiencing those harmful effects or not. In the *Hudnut* ruling, the district judge essentially relied on the incorrect and legally unsupportable assertion that one woman is permitted to authorize harm on other women. This is simply not legally correct.

The district judge was similarly incorrect in making the assumption that the government's interest in free speech was greater than its interest in regulating speech known to cause harm to women as a group. Interestingly, in deciding and affirming *Hudnut*, neither the district court, the Seventh Circuit, nor the Supreme Court ever articulated why the government's interest in regulating speech known to harm women did not outweigh pornographers'²³ free "*speech*" interests—or, to put it another way, why the harms caused by pornography did not outweigh pornographers' "*rights*" to harm women. As this Article goes on to discuss in more detail in Part

²¹ *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984). *See also* Liston, *supra* note 18, at 419–20 (identifying the harms cited by the ordinance's supporters and considered by the court as: coercion of women into pornography through physical force, psychological pressure, drugs, and economic exigencies; forcing women to engage in dangerous acts in the production of pornography; negative impacts on the behavior of viewers in terms of their attitudes toward and perceptions of women; and the use of pornography in the sexually violent abuse of women and children).

²² *See* McGovern, *supra* note 18, at 466 (“[The courts deciding and affirming the decision in *Hudnut*] underestimated the harm that is pornography . . . [and] [s]ide-stepped the question of whether and to what extent pornography harms women.” (internal quotation marks omitted)).

²³ The term *pornographers* is used here to refer to those who participate in the production or consumption of pornography.

III.C: New Permission for a Temporary Ban on Pornography, the Supreme Court has recently issued case law to the contrary, which raises doubt about the validity of this unsupported assumption and specifically authorizes infringement on fundamental rights—such as free speech rights—in order to remedy historical discrimination against women.²⁴

The Seventh Circuit held that the Indianapolis ordinance was unconstitutional because it constituted viewpoint discrimination.²⁵ The flaw in this opinion is that it assumes Congress never has the power to infringe on free speech rights in a manner that constitutes viewpoint discrimination. Importantly, the Supreme Court has recently issued case law to the contrary.²⁶

The Seventh Circuit also held that the harm of pornography to women demonstrates its power as speech.²⁷ However, this ignores the common sense dictate that a law should not be interpreted to contradict itself.²⁸ The First Amendment is designed, at least in part, to reduce harm in society, particularly harm to groups who have been subordinated with respect to

²⁴ See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

²⁵ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332–34 (7th Cir. 1985).

²⁶ See generally *Hibbs*, 538 U.S. at 721.

²⁷ *Hudnut*, 771 F.2d at 329. See also Paul Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 420–21 (1989) (“[Any message of pornography that is degrading to women is] speech that seeks to persuade and thus would be entitled to high-level protection.”).

²⁸ Many authors analyzed this decision and identified ways in which the rationale is flawed or inconsistent with other law. One astute author observed:

One powerful analogy that the *Hudnut* court overlooked was that of the Equal Protection Clause as interpreted by the Supreme Court in *Brown v. Board of Education*. The *Brown* Court sought to eradicate racial segregation in the schools not on the grounds that it harmed traditional morality in society at large or that it inspired whites to commit acts of violence against Blacks, but rather because such discrimination “generated a feeling of inferiority as to Black children’s status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

....

Another powerful analogy that the *Hudnut* court overlooked was that of the First Amendment as interpreted by the Supreme Court in *Ferber*. The *Ferber* Court’s reasoning, which upheld the regulation of child pornography because it directly harmed children, could be extended to women. Contrary to fears expressed by civil libertarians, such a judgment need not rest on Victorian morals and condescending views toward women. Rather, it would rely upon an acknowledgment that women are systematically harassed, assaulted, raped, and killed, and that women experience such treatment as part of an experience of social inequality based on gender. Because men typically do not undergo these experiences, they may not suffer from the same threat to equality and integrity that pornography poses to women. To protect women from the terrorization of pornography is thus to grant them relief from discrimination, and social equality, rather than “special protection” in the paternalistic sense.

Comparative Perspective, *supra* note 6, at 1083–85.

power existing in forms other than speech (e.g., financial, political, and social power). When harm is held to be “a constitutional justification for perpetuating harm,”²⁹ it is obvious that a breakdown in analysis has occurred.³⁰ Upholding a law based on its failure to achieve its own purpose is a flaw in logic unworthy of constitutional analysis.

The underlying flaw in all of the above judicial barriers to anti-pornography legislation is that they fail to appropriately value women and their right to equality.³¹ Free speech rights are important. Women’s rights to equality, dignity, and freedom from harm, however, are more important.³² Women should be freer than speech.³³ In 2011, in the United States, it is an embarrassment to continue to allow male-centric sex-driven speech rights to be given priority over women’s equality rights.³⁴ Because women’s equality rights are human rights,³⁵ our current national policy values sex-driven speech over human equality.³⁶ It is an abuse of the Constitution

²⁹ Seator, *supra* note 15, at 312.

³⁰ As Catharine MacKinnon noted, “Courts are supposed to measure value [of speech] against harm, not by harm.” Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 814 (1991) [*hereinafter* *Pornography as Defamation*] (emphasis added).

³¹ Dinolfo, *supra* note 6, at 623 (“[*Hudnut* decision] gives little credence to the immense body of evidence compiled by researchers which indicates that pornography directly and indirectly causes serious harm to women.”); McGovern, *supra* note 18, at 453 (“The Seventh Circuit’s opinion in *American Booksellers Association v. Hudnut* is not only contrary to progressive feminism, but it is also offensive to American society as a whole because it does nothing to remedy the evils that perpetuate the inequality and subordination of women.”).

³² Cf. Alexis de Tocqueville, *Equality, Democracy, and Liberty*, in EQUALITY 82 (David Johnston ed., 2000) (“[D]emocratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery.”).

³³ See Kenneth L. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447, 486 (1984) (“To ask about the possible contributions of women’s world view to our constitutional law is thus to explore beyond the reshaping of male-defined roles and institutions to accommodate women’s needs. It is to imagine the possibility of a more general widening of our constitutional horizons.”).

³⁴ “[B]y concentrating on the speech, art or pleasure that might be lost, rather than on the prevention of harm to women, one is admitting that women are ranked below things—that women are not considered persons.” Schroeder, *supra* note 7, at 148. “[I]t is now clear that whatever the value of pornography is—and it is universally conceded to be low—the value of women [in our society] is lower.” Catharine A. MacKinnon, *Sexual Politics and the First Amendment*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 211 (1987).

³⁵ See Hillary Clinton, First Lady of the United States, Remarks for the United Nations Fourth World Conference on Women Beijing, China (Sept. 5, 1995).

³⁶ See Schroeder, *supra* note 7, at 155 (“[The] First Amendment . . . seems to value ideas over people.”).

to use it to justify continued mistreatment of women designed to empower men and satisfy their basest urges.

D. POLICY CONSIDERATIONS

Good public policy seeks to advance equality for women. When this goal can be accomplished within constitutional bounds, there is no valid excuse for hampering those efforts. More specifically, a proposal for restricting pornography that is designed to advance women's equality *without* violating First Amendment rights is just the type of effort for which there is no valid excuse for opposition.³⁷ Therefore, public policy should support a proposed temporary ban on pornography because it will likely increase women's autonomy and enjoyment of constitutionally guaranteed liberties, without seriously infringing on the constitutional rights of others.³⁸

1. Women Should Be Freer than Speech

The judiciary has repeatedly valued free speech rights over women's equality rights.³⁹ Rather than limiting speech, it chose to limit women's equality.⁴⁰ The unfettered protection of a small subcategory of speech that carries little, if any, political message, while openly acknowledging its de-

³⁷ See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (endorsing anti-subordination principles).

³⁸ See Greenfield, *supra* note 7, at 1222 (book essay arguing for an Aristotelian theory of the First Amendment) ("Personal autonomy is not a means to an end Autonomy, real autonomy, is the end."); *Pornography and the First Amendment*, *supra* note 8, at 623-24 ("I conclude that examining substantive differences in power as a basis for regulation of pornography is appropriate in this context, and helps the case for regulation, even if we ought to avoid such an examination as a general rule."); *Anti-Pornography Laws*, *supra* note 18, at 462 (discussing previous legislation) ("[T]he Supreme Court could still sustain some form of anti-pornography statute by looking beyond existing doctrine to the reasons underlying the first amendment's tolerance of obscenity and libel laws.").

³⁹ *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1336 (S.D. Ind. 1984). "In the Seventh Circuit's decision, to subordinate women is simply to say something, to express an idea. The court assimilated the harm of pornography to its viewpoint, ignoring, in the process, the real harms, that are not thought, to real women, who are not ideas." Seator, *supra* note 15, at 341-42. See also Eric Hoffman, Comment, *Feminism, Pornography, and Law*, 133 U. PA. L. REV. 497, 505-07 (1985).

⁴⁰ See Seator, *supra* note 15, at 300-01; Barnes, *supra* note 20, at 123 ("From a judicial perspective, the harm that women suffer from pornography, encompassing everything from sex discrimination to battery and rape, is not as compelling as the message of violence against women that is commercially marketed by the pornography industry. . . . [T]he Supreme Court implied that society's concern for preventing harm against women is less important than pornographers' rights to imbue society with sexual violence . . .").

leterious effects on workplace equality⁴¹ for half of the population, is unconscionable. Workplace equality has long been a purported goal of our country.⁴² Democracies, when forced to prioritize, have considered equality a higher priority than freedom.⁴³ However, any political message conveyed through pornography can be conveyed—even if imperfectly—through another medium. Imperfections in the drafting of prior legislation seeking to protect such a basic right for women is no justification for maintaining a social order that protects and rewards the degradation and disempowerment of women. If one right must be less protected than another, it is clearly the sexually-oriented *speech* rights of a subcategory of the (male) population—not the equality rights of an entire gender.⁴⁴ Such limited restriction on freedom of expression is well justified by the serious, expansive harms it would prevent.⁴⁵ In short, women should be freer than speech.⁴⁶

2. One Can't Consent to the Harm of Another

The idea that pornography is harmful to women was dismissed by the *Hudnut* court on the rationale that women are able to make informed decisions as to whether or not they wish to participate in the production or consumption of pornography; any accompanying harms that they experience are based on decisions that are consensual and—unlike children—they are capable of adequately protecting themselves from those harms if

⁴¹ See *Comparative Perspective*, *supra* note 6, at 1086–90.

⁴² See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e.

⁴³ See de Tocqueville, *supra* note 32, at 80.

⁴⁴ The Canadian Supreme Court got it right when it held that an obscenity ban that included pornography was justifiable under the Canadian Chart (which is analogous to the U.S. Constitution and contains very similar freedom of speech rights) “because the overriding objective of the law was the avoidance of harm to society in general and to women in particular, an interest sufficient to warrant a restriction on the freedom of expression.” Note, *supra* note 6, at 1080–81 (citing *Butler v. Her Majesty The Queen*, [1992] 1 S.C.R. 452, 489, 498–99 (Can.)).

⁴⁵ See Brest & Vandenberg, *supra* note 14, at 630–31. “The more one thinks that pornography is a serious issue, the less one is likely to think that the slippery slope/line-drawing problem is insuperable, and vice versa.” Schroeder, *supra* note 7, at 127 n.11 (paraphrasing *Pornography and the First Amendment*, *supra* note 8, at 626).

⁴⁶ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201–02 (1983) [*hereinafter Content Regulation*] (“[T]he concept of equality ‘lies at the heart of the first amendment’s protections against government regulation of the content of speech.’” (quoting Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (citing Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 272–80))).

they so choose.⁴⁷ However, when one recognizes that pornography, created or consumed by even truly mutually consenting adults, harms every woman, the rationale of consensual adult participation fails.⁴⁸ In fact, a judicial opinion in Canada noted that “in pornography[,] the appearance of participants’ consent does not determine whether material is degrading or dehumanizing because ‘sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.’”⁴⁹ When the powerful exercise their free speech rights in ways that are contrary to the constitutional principle of equality, and harmful to those with less power, the interest in free speech outweighs the interest in equality.⁵⁰ The real and detrimental harm of pornography to *all* women who have not chosen to be involved in its production, distribution, or consumption, is a sufficiently harmful secondary effect that warrants a temporary and remedial ban on pornography.⁵¹

3. Chilled Speech

Some would argue that even a limited ban on pornography is impermissible because this would chill speech. However, we often limit speech⁵²—particularly with sexual speech in the workplace, a place that is

⁴⁷ *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316, 1334 (S.D. Ind. 1984), *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (“Adult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography, which makes the State’s interest in safeguarding the physical and psychological well-being of women by prohibiting ‘the sexually explicit subordination of women, graphically depicted, whether in pictures or in words’ not so compelling as to sacrifice the guarantees of the First Amendment. . . . [I]f an individual is offended by ‘pornography,’ . . . the logical thing to do is avoid it . . .”).

⁴⁸ See Dinolfo, *supra* note 6, at 624 (“The harms emanating from pornography reach not only the persons portrayed in the pornographic material, but society in general.”).

⁴⁹ *Comparative Perspective*, *supra* note 6, at 1081 (citing *Butler v. Her Majesty The Queen*, [1992] 1 S.C.R. 452, 479 (Can.)).

⁵⁰ See *Comparative Perspective*, *supra* note 6, at 1081 (discussing the virtues of the district court’s reasoning in *Robinson*).

⁵¹ *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding a statute prohibiting the showing of sexually explicit motion pictures within a certain radius of any residential zone, family dwelling, church, park, or school, where the ban was aimed at avoiding the secondary effects of showing those motion pictures, such as the impact of crime rates, property values, neighborhood quality, and retail trade).

⁵² See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Snell v. Suffolk County*, 611 F. Supp. 521 (E.D.N.Y. 1985); Horton, *supra* note 6, at 423–28 (“Both the NLRA and Title VII limit employers’ free speech rights.”).

a big component of Americans' time and life.⁵³ Regulations that prohibit verbal sexual harassment in the workplace, for example, are justified because sexual harassment speech is so harmful that it warrants lower-level protection.⁵⁴ Similarly, visual images of pornography may be restricted in the workplace because pornography at work harms a woman's ability to earn income, as it degrades the value of female workers and interferes with professional dynamics between men and women.⁵⁵

Just as pornography at work harms women on the job, pornography outside of work harms all women in society, which is contrary to constitutionally guaranteed equality. If Congress may enact legislation designed to eliminate pornography's harm in the workplace, it should be able to enact legislation designed to eliminate this harm in their daily lives of women. This is particularly true given that the harms of pornography outside the workplace extend into the workplace and impact women in the same ways as the gender dynamics and power differentials that warrant restrictions on pornography in the workplace.⁵⁶

4. Counterspeech: Problems with Using the First Amendment's Balancing Test to Measure Pornography

Some argue that pornography, as with other offensive speech, should be countered by more speech or counterspeech.⁵⁷ However, in our society,

⁵³ See *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D.Fla. 1991).

⁵⁴ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Words, Conduct, Caste, supra* note 5, at 839; *Horton supra* note 6, at 411, 429 (discussing *Vinson* and summarizing the court's rationale) ("An employee should not be forced, simply because she is a woman, to endure abusive conditions in order to earn a living . . . [I]n sexual harassment cases, the fairness issue is one of equal treatment by management of male and female employees. Favoring the First Amendment right to free expression in this context feeds a power dynamic—discrimination against women—which not only favors men whether they are employers or employees, but is legislatively prohibited.").

⁵⁵ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522–32 (M.D.Fla. 1991); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁵⁶ Cf. *Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (finding that sexually-oriented expression contributing to or constituting sexual harassment in the workplace could be a basis for a sexual harassment claim by a woman who was not even the object/target of that harassing speech); *Horton, supra* note 6, at 437–38 n.160.

⁵⁷ *Pope v. Illinois*, 481 U.S. 497, 519 (1987) (Stevens, J., dissenting) ("[In dealing with community standards of obscene literature,] we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." (quoting *Smith v. United States*, 431 U.S. 291, 321 (1977))); *Maag, supra* note 6, at 266–67 ("Men and women must continue to use their right to free speech to combat pornography with

formed under the influence of pornography, women may not have the power to counterspeak their way out of discrimination and subordination.⁵⁸ "Pornography makes women into objects. Objects do not speak. When [women speak], they are by then regarded as objects, not as humans, which is what it means to have no credibility."⁵⁹ In addition, the

'more speech' educating others as to the damage of pornography's vision of women and sexuality."); *Convergence*, *supra* note 18, at 233 ("[T]he harmful effects of pornographic speech are best eliminated by 'more speech'"); Linda Ojala, *Best Defense Against Porn Is Free Speech*, MINNEAPOLIS STAR & TRIB., Nov. 5, 1983, at 13A ("Advocating censorship in the name of women's rights is a dangerous folly. . . . We are quite capable of fighting sexism with our own speech, arguments and persuasion."); Brest & Vandenberg, *supra* note 14, at 617.

However, the problem with this idea is that the male-dominated free marketplace of ideas may very well find it "useful" to deny women their rights to equality and to harm them both financially and physically. Social scientist Ira Reiss has argued that "the most permissive societies in the Western World . . . with respect to the availability of pornography have the greatest degree of gender equality both in attitudes and practice" and further argued that "if the issue is decreasing the subordination of women and increasing gender equality . . . the way to accomplish that is not to control access to pornography, but to educate the population to value women for more than their bodies." Brest & Vandenberg, *supra* note 14, at 648. *But cf.* Schroeder, *supra* note 7, at 149 (questioning Professor Sunstein's ability, as a man, to view women as sexual equals) ("As [Sunstein] does not subjectively experience himself as wanting to oppress women, he resists accepting MacKinnon's suggestion that his very masculine sexuality—and thereby his very selfhood—is oppressive of women. Accordingly, he assumes that he can discern the difference between subordinating pornography and equality-preserving erotica.").

In addition, some argue that restrictions on pornography would be unfair because they would deprive pornographers of "equal treatment in the political process." James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 888 (2007). Ironically, this argument fails to consider the lack of equal treatment in the political process that women routinely experience due, in part, to pornography. *E.g.*, Schroeder, *supra* note 7, at 155 (paraphrasing MacKinnon) ("[I]t is not acceptable to tell women that they must allow pornographers to speak when the pornographer's message is that 'women may not speak.'").

⁵⁸ See *Anti-Pornography Laws*, *supra* note 18, at 475–76 (feminists may rightfully see the First Amendment as stunting progress) ("[B]ecause women have never acquired equal status, their rebuttal of pornography's defamatory images is discounted, leaving them with no effective means of breaking the cycle of stereotyping and discrimination. . . . [T]he state, by refusing in the name of free speech to intervene . . . enforce[s] the status quo."). See also Schroeder, *supra* note 7, at 155 ("The usual remedy of 'more speech' for 'bad speech' does not work in the case of pornography where the pornographer's speech is by definition women's silence."); Barnes, *supra* note 20, at 127 ("To the extent that pornography is an 'idea,' the marketplace analogy fails. In reality, women have little hope of effective counter-speech in the commercial marketplace of adult bookstores and peep-show outlets where many women fear to tread.").

⁵⁹ Brest & Vandenberg, *supra* note 14, at 631 (quoting MacKinnon). See also *Pornography and the First Amendment*, *supra* note 8, at 618–19 ("[W]omen who would engage in 'more speech' to counter pornography are denied credibility, trust, and the opportunity to be heard—the predicates of free expression"); Schroeder, *supra* note 7, at 176 n.211 ("The power of pornography is that it can make its lies empirically true; it says women are non-human and then dehumanizes them."); Seator, *supra* note 15, at 319 n.122 ("Men, simply as men under conditions of male supremacy, have the power to effect [sic] women's subordination through sex, including through pornography."); *The First Amendment, Under Fire from the Left*, N.Y. TIMES, Mar. 13, 1994, at 12 (quoting MacKinnon), <http://www.nytimes.com/1994/03/13/magazine/the-first->

counterspeech, as a solution, does not consider the differences between pornography and other types of offensive speech. Unlike other speech, pornography's primary intent is to physiologically arouse its audience,⁶⁰ speech that harms all women⁶¹ and should be low-value.⁶² Moreover, because of the imbalance of power between men and women that is ingrained in our society—a disparity that pornography promotes—women's counterspeech⁶³ is undervalued.⁶⁴ Therefore, when courts weigh pornogra-

amendement-under-fire-from-the-left.html?pagewanted=print ("The pornographic industry does not promote speech; It silences women. It contributes to creating a context, an objectified and sexualized and denigrated context, for the deprivation of women's human rights on a mass scale.")).

⁶⁰ See, e.g., *Pornography and the First Amendment*, *supra* note 8, at 606 ("The . . . intent of pornography . . . [is] to produce sexual arousal, not . . . to affect the course of self government. . . . [P]ornography . . . is more akin to a sexual aid than a communicative expression.").

⁶¹ See *infra* notes 66, 70 and accompanying text.

⁶² See Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979) (arguing that pornography's protection under the First Amendment should be low-value speech) ("[Pornography] shares more of the characteristics of sexual activity than of the communicative process."); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 22 (1992) [*hereinafter Neutrality in Constitutional Law*] ("[P]ornographic material lies far from the center of the First Amendment concern."); Susan Etta Keller, *Viewing and Doing: Complicating Pornography's Meaning*, 81 GEO. L.J. 2195, 2210–11 (1993) (discussing Sunstein's argument that non-cognitive speech is low value).

⁶³ Professor Marianne Wesson makes a compelling argument about the inadequacy of the "counterspeech philosophy" in the context of pornography and in favor of regulation of pornography—through economic penalties—on the grounds of market theory:

Pornography is both speech and product. . . . Those who emphasize the speech aspect point to the First Amendment and its prohibition against any law "abridging the freedom of speech." Those who find the product aspect more important sometimes propose that the protection of the public justifies a ban on the production or distribution of dangerous products, of which they argue pornography is one. They also argue that in the absence of a ban, those who sell pornography, like those who profit from other commercial products, should be liable for the harms their product causes. . . . Free-speech advocates often defend and elaborate the Constitution's protection of speech by reference to a concept borrowed from the world of products: the "marketplace of ideas." . . . One who accepts this model will also accept another First Amendment cliché: that the cure for bad speech is more speech. Law-and-economics-school analysts and public choice theorists employ essentially the same analysis—seeing the marketplace for speech as similar to the marketplace for other products.

....

It is a fundamental feature of an efficient marketplace that it be free of externalities Economic analysts agree virtually unanimously that a rational market must force producers of polluting vehicles to internalize the cost of the pollution their vehicles will produce—otherwise, air pollution and its harms will increase to the detriment of all, including those who have no interest in and derive no benefit from the transaction.

....

phy's overvalued message against the harm it inflicts upon women, the resulting subjective determination in favor of pornography is an inaccurate measurement.⁶⁵

Primarily, pornography is harmful to all women because it conditions men in their lives to be sexually aroused by acts that subordinate and humiliate women.⁶⁶ Although the court in *Hudnut* argued that the harm pornography causes women "simply demonstrates [the] power of pornography as speech,"⁶⁷ conditioning to sensory stimuli is "non-cognitive and unrelated to . . . [and] the opposite of, the transmission of ideas."⁶⁸ Were men interested in pornography for its message, we would expect to see a large market for non-visual literature. Instead, "[m]any forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection under the prevailing theories."⁶⁹

Second, in balancing the interests, the courts did not consider harm to third-party women who are not involved in pornography and do not consent to its externalities.⁷⁰ For example, in *Hudnut*, the district court distin-

Thus if the transaction that encompasses the creation, distribution, and consumption of pornography is one that creates a serious external harm, the logic of the marketplace dictates that the pornography industry should internalize the harm.

Wesson, *supra* note 12, at 856–59.

⁶⁴ See Brest & Vandenberg, *supra* note 14, at 630–31 ("Women continue to be silenced even when they finally speak up to contradict the image because they are not listened to, not taken seriously, not believed."); McGovern, *supra* note 18, at 458–59 ("Because pornography dehumanizes women, it has the effect of silencing women thereby making a woman feel her ideas and opinions are not that important. In addition, a woman may feel her opinions will be shunned or not met with the same respect a man's opinions would receive.").

⁶⁵ See *infra* notes 75–77 and accompanying text.

⁶⁶ See *Pornography as Defamation*, *supra* note 30, at 802–03 ("Women are dehumanized through the conditioning of male sexuality to their use and abuse The deepest injury of pornography is not what it says but what it does."); Schroeder, *supra* note 7, at 141 ("Pornography is the eroticization of domination and submission.").

⁶⁷ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985).

⁶⁸ *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., dissenting) ("One need not be male to recognize that the principle function of this [pornographic] magazine is to create sexual arousal. Consumers of this material so partake for its known physical effects as much as they would use tobacco, alcohol or drugs for their effects.").

⁶⁹ *Words, Conduct, Caste*, *supra* note 5, at 807–08.

⁷⁰ See Wesson, *supra* note 12, at 855–59 (arguing that speakers in the marketplace of ideas, like producers in the marketplace for harmful products, should be regulated to internalize the negative externalities) ("Pornography is both speech and product. . . . Those who find the product aspect more important sometimes propose that the protection of the public justifies a ban on the production or distribution of dangerous products, of which they argue pornography is one. They also argue that in the absence of a ban, those who sell pornography, like those who profit from other commercial products, should be liable for the harms their product causes. . . .

guished its decision from *New York v. Ferber*⁷¹ because unlike children in pornography, “[a]dult women . . . have the capacity to protect themselves from participating in and being personally victimized by pornography, which makes the State’s interest in safeguarding the physical and psychological well-being of women . . . not so compelling as to sacrifice the guarantees of the First Amendment.”⁷² Since “a key tenet of liberalism [is] that the only legitimate reason for prohibiting an activity by force of law is ‘the prevention of harm or offense to [nonconsenting] parties’”⁷³, and *Hudnut* failed to account for non-consenting women⁷⁴—who are the majority of those harmed by pornography—there is new hope for viable legislation that includes the harm suffered by all women.

Finally, as discussed above, given that pornography is, in part, responsible for creating and promoting a power imbalance in favor of men over women, it is not surprising that our male dominated judiciary made the subjective⁷⁵ policy determination that free speech outweighs women’s

Free-speech advocates often refer[] to . . . the ‘marketplace of ideas.’ . . . Law-and-economics-school analysts and public choice theorists employ essentially the same analysis—seeing the marketplace for speech as similar to the marketplace for other products. . . . [For efficiency,] [e]conomic analysts agree virtually unanimously that a rational market must force producers of polluting vehicles to internalize the cost of the pollution their vehicles will produce—otherwise, air pollution and its harms will increase to the detriment of all, including those who . . . derive no benefit Thus if the transaction that encompasses the creation, distribution, and consumption of pornography . . . creates a serious external harm, the logic of the marketplace dictates that the pornography industry should internalize the harm.”).

⁷¹ *New York v. Ferber*, 458 U.S. 747, 764–66 (1982) (holding that a child pornography ban does not violate the First Amendment).

⁷² *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316, 1334 (S.D. Ind. 1984), *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986). *But see* Karo & McBrien, *supra* note 18, at 199 (noting similarities between women and children in pornography) (“Although the case of children is distinguishable . . . if legislatures may prohibit child pornography because of the special need to protect children, then they should also prohibit violent pornography . . . to protect adult women from sex-related violence, coercion, and sex discrimination.”).

⁷³ Weinstein, *supra* note 57, at 895 (quoting Joel Feinberg during a debate discussed in Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 75 (1995)).

⁷⁴ In *Hudnut*, 771 F.2d at 331–32, the Seventh Circuit refused to apply *FCC v. Pacifica Foundation*, 438 U.S. 726, 748–51 (1978), which determined that an order that regulated obscene broadcasting did not violate the First Amendment because “indecent material presented over the airwaves . . . [enters] the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” *Id.* at 748. However, similar to *Pacifica Foundation*, since pornography intrudes upon the sexual preferences of society, it also intrudes into the beds of women who do not produce or consume pornography, and who should also have the right to be left alone. *Cf. supra* note 66 and accompanying text (arguing that all women are hurt by pornography because men’s sexual preferences are influenced by pornography).

⁷⁵ *See* Schroeder, *supra* note 7, at 178 (arguing that men may not be able to subjectively weigh pornography’s harm against women) (“Insofar as men are benefitted by the sexual hie-

rights.⁷⁶ Unlike the Constitution's balance of powers, the flaw with gender related issue determinations in our case law driven system is that there should be more female judges to check the subjective decisions of male minds and accurately weigh opposing interests.⁷⁷ It fails to account for the fact that pornography is generally viewed privately and, most often, without female viewers present. It fails to account for the fact that the processes underlying physiological arousal do not process counterspeech. Most importantly in this author's opinion, it also fails to factor in the urgency of the actual physical, financial, and psychological harm that is caused by pornography *to women who are not involved in its market*—a harm that is unique to pornography.

As has been observed, there is inconsistency in the judiciary's decisions about free speech. In *FCC v. Pacifica Foundation*, the Court determined that radio transmission of comedian George Carlin's "Seven Dirty Words" were sufficiently harmful to curtail free speech rights because the radio invades "the privacy of the home," where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.⁷⁸ Extending this logic, pornography should be restricted and regulated because the women who choose *not* to participate in it have the right to be left alone, free from the harms suffered as a result of the pornography industry. While a radio listener is able to change the station or turn the radio off to avoid the harmful effects of "dirty" language, pornography harms all

rarchy, and society is a construction of human subjectivity, men...creat[e] sexuality to continue their own status. [Therefore, m]en as a group benefit from [pornography] . . .").

⁷⁶See, e.g., *Hudnut* 771 F.2d at 333–34.

⁷⁷See, e.g., Brest & Vandenberg, *supra* note 14 ("[There is a need to] make the [F]irst [A]mendment work as well for women as it does for the monied men in power...."). Cf. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's L.J. 35, 52–53 (1990) (arguing analogously that the reasonable man standard does not work well in sexual harassment cases) ("[It does not adequately recognize the] larger phenomenon of gender hierarchy.").

Yet in some situations where one party has control over the other, the Supreme Court limits the controlling party's right to speak freely. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (restricting employer's speech while discussing unionization with employees) ("[E]mployer's [First Amendment] rights cannot outweigh the equal rights of the employees to associate freely . . . [a]nd any balancing of those rights must take into account the economic dependence of the employees on their employers . . ."); *Pornography and the First Amendment*, *supra*, note 8, at 614 ("In regulating labor speech . . . the Court was sensitive to disparities in power that gave employer speech particular authority.").

Therefore, the Supreme Court should rule, like other western countries, in favor of women's rights. E.g., *Comparative Perspective*, *supra* note 6, at 1080–81 (noting that the Canadian Supreme court, in *Butler v. Her Majesty the Queen*, upheld an obscenity ban because protecting women from the harms of pornography outweighs free speech concerns).

⁷⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

women, despite their complete lack of involvement in or control over it. As observed, “[i]f [courts] would view allegedly obscene materials from the point of view of the participants and unwilling observers, [they] could better discern which materials were harmful and therefore justifiably regulable.”⁷⁹

Thus, following the holdings of *Ferber* and *Pacifica*, since it is a small subset of women who participate in, produce, and consume, pornography, which harms all women, the First Amendment doctrine should allow restrictions on pornography. As has been well-stated before:

Under current constitutional doctrine, government may indeed make laws that regulate or prohibit certain categories of speech where the value of the speech is outweighed by the harm it causes. . . . The basic purpose of the First Amendment is to assure freedom of expression in a democratic society. . . . The function of the courts, therefore, is not to determine what ‘value’ certain categories of speech have to the individual. The only proper consideration for the courts is the *harm* caused by the speech to *other* individuals.⁸⁰

II. THE PROPOSED BAN

This Article proposes a restriction on pornography that is supported by recent Supreme Court case law. Unlike previous proposals, this ban is not designed to permanently *end* pornography, but to naturally decrease the demand for pornography, as it exists today, as well as decrease the *willingness* for women to *voluntarily* participate in its production. In doing so, it aims to demonstrate both the harm to women from pornography, as it exists today, and the role its self-perpetuating and re-enforcing nature play in its continued prevalence in our society. The sentiments of feminists alone (or any women, when acting as individuals) cannot effectively change the perception of and effect of today’s harmful pornography. To truly effect change, we need an affirmative social intervention sanctioned with the power of law.

The author proposes a temporary ban on all visual pornography—both still photographs and video recordings—regardless of the gender of the subjects involved or its nature as soft-core or hardcore imagery. This

⁷⁹ *Comparative Perspective*, *supra* note 6, at 1082. *Id.* at 1091 n.120 (quoting *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)) (justifying the trend of courts adopting the perspective of a “reasonable woman”) (“[A] sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women[.]”).

⁸⁰ James R. Branit, *Reconciling Free Speech and Equality: What Justifies Censorship?*, 9 HARV. J.L. & PUB. POL’Y 429, 429–31 (1986).

ban would extend for approximately two generations, or forty years; a period of time sufficient to establish a clean slate for women.⁸¹ Following the Supreme Court's guidance, to avoid the downfalls of the Indianapolis ban stricken down in 1984—the last serious effort to regulate pornography—this proposed ban is designed to be within Congressional authority, be less vague, and sufficiently narrowly tailored to be justified under the government's interest in protecting women from discrimination and degradation in the workplace and elsewhere.⁸² Congressional power to enact this proposed ban recently has been clarified and articulated by the Supreme Court in a manner providing clearer guidance to a reviewing court.

A. TIME LIMITATION

While it is impossible to predict the exact amount of time necessary to undo the effects of pornography as we currently know it, the author proposes a time period of forty years (or approximately two generations) for the proposed ban to remain in effect. The rationale behind this seemingly arbitrary determination is to designate a period of time sufficient to (1) erase from society's mind the imagery of pornography as we now know it⁸³ and (2) attain equality for women in the workplace. However, the time period must be sufficiently short to avoid overbreadth and a determination that it is unjustifiable under constitutional review.

Objectively, it is difficult to predict what period of time would be necessary to effect the change sought by a temporary ban. This author believes that to effectively eliminate pornography's effects—both conscious and subconscious—there must be an intervening generation, as children's perspectives and attitudes are hugely impacted by those of their parents,

⁸¹ Cf. Horton *supra* note 6, at 414 (discussing the permissibility of restrictions on pornography in the workplace because of potential resultant sexual harassment) (“[T]he next step in the development of sexual harassment law must be to ‘transform[] the male-centered norms that created . . . the workplace as women now find it.’”). See also Chevigny, *supra* note 27, at 430, 432 (arguing in favor of First Amendment protection of pornography based on its nature as “propaganda”) (“Propaganda is powerful because it is consistent with people’s way of thinking. . . . [P]owerful stereotypes about women and violence do exist. . . . Those persuaded by pornography’s ideology come to imagine the degradation of women as pleasurable just because their previous stock of sexual fantasies includes some scenario that corresponds to this ideology. . . . An effective response to pornography must provide a different view of relations between men and women, because only such a response can replace the beliefs that sustain pornography.”).

⁸² See Liston, *supra* note 18, at 418 (“[The Indianapolis anti-pornography ordinance] failed to include any first amendment balance to temper its broad sweep.”).

⁸³ As Catharine MacKinnon has long asserted, “pervasive images of women in subordinate roles influence our societal subconscious.” Greenfield, *supra* note 7, at 1201 (citing Sandra L. Bartky, FEMININITY AND DOMINATION 25, 83–98 (1990) and Cass R. Sunstein, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 209–27 (1993)).

teachers, and other elders.⁸⁴ While a longer period, such as three generations, may be even more desirable to ensure a clean slate, the proposal must be limited to survive constitutional challenges that require it to be narrowly tailored and to duly respect other important constitutional rights.

B. LIMITATION TO VISUAL IMAGERY

Under the proposal herein only pornographic video or photo images would be banned.⁸⁵ Therefore, erotic literature, hand-drawn or cartoon pornographic images, sexually oriented phone services, and even live performances such as exotic dancing, would not be prohibited. While a good argument can be made for limiting or prohibiting these media—even under the rationale of the current proposal—the author excludes these from restriction both in an effort to keep the proposed ban sufficiently narrowly tailored to withstand constitutional challenge⁸⁶ and to isolate for demonstration the uniquely detrimental effects of visual pornography on society's perception and treatment of women. Furthermore, by limiting the ban to photographic images (as opposed to literature, spoken speech, or even cartoon/drawn images), the restriction is essentially, if not precisely, a restriction on *conduct*, which can be regulated with much less concern of constitutional challenge because pure conduct is not subject to First Amendment protection.⁸⁷

⁸⁴ Greenfield, *supra* note 7, at 1201 ("If, for example, society is permeated with an assumption that women are subordinate to men, the average jury may not be offended by material expressing that subordination.").

⁸⁵ Although others proposed to prohibit visual image pornography while protecting pornography in the text (printed words), the rationale for the words vs. images distinction was very different from this Article's proposal. See Young, *supra* note 18, at 1273 (arguing that text should be protected) ("[T]he written word usually comes closer to art than photos or videos.")

⁸⁶ The Indianapolis anti-pornography legislation drafted by Catharine MacKinnon and Andrea Dworkin prohibited not only certain visual imagery but also the "graphic sexually explicit subordination of women through pictures or words." Catharine A. MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights and Speech*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 163, 176 (1987); *Pornography as Defamation*, *supra* note 30, at 801. This legislation was deemed unconstitutional, in part, because of its breadth in restricting all media for the communication of pornography's ideas. But, as Catharine MacKinnon noted, "It is possible to say what pornography says without doing what it does." *Pornography as Defamation*, *supra* note 30, at 803.

⁸⁷ See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307, 316–17 (1967).

C. SCOPE OF CONTENT

The proposed temporary ban on pornography would apply to images of both women and men,⁸⁸ heterosexual and homosexual in nature, regardless of its characterization as softcore (for example, *Maxim*, *FHM*, *Playboy*) or hardcore⁸⁹ (*Penthouse*, “snuff,” and XXX films). As such, it largely avoids the downfall of being “viewpoint discrimination.”⁹⁰ It would prohibit images of individuals who are nude, engaged in sexually-oriented behavior, or posed in a “sexual” or “provocative” manner.⁹¹ It would also ban anything questionable, such as fully clothed *FHM* models, so long as it is sexually explicit in nature. Importantly, however, the proposed ban would apply to only visual, photographic images, and would place no limitations on literature, non-photographic images,⁹² or audio/spoken com-

⁸⁸ “It is the non-neutrality of anti-pornography legislation—its focus on violence against women—that is its central defect.” *Words, Conduct, Caste*, *supra* note 5, at 818. Application of the ban to images of both men and women seeks to avoid the dangers of viewpoint discrimination. However, this parameter cuts both ways: under *Hibbs*, the proposed temporary ban could arguably be permissible—and not unconstitutionally viewpoint based—even if it prohibited only images of women, as it is the harm of pornography to women and the historic subordination of women by the government that justifies the proposed ban. *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *See also infra* Part III.C; Seator, *supra* note 15, at 311 (“[The Seventh Circuit’s acknowledged that [d]epictions of subordination tend to perpetuate subordination. . . . [Pornography is a] practice of discrimination.”). Because men have not historically been subordinated by the government, limiting the proposed ban to a ban only on images involving women would arguably make it more narrowly tailored to the government’s interest in remedying historical discrimination against women and, therefore, even more likely to be deemed constitutional. *See infra* Part IV.B.

⁸⁹ MacKinnon’s efforts to curtail the harm of pornography have been criticized because “she does not distinguish between ‘snuff’ films and Victoria’s Secret catalogues” and “refus[es] to acknowledge that distinctions might exist (both on the harm and benefit side of the equation) among the vast array of expression included in her definition” of pornography. Greenfield, *supra* note 7, at 1211.

⁹⁰ *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); Kagan, *supra* note 4, at 889 (“[The problems of viewpoint discrimination that caused the statutes in *R.A.V.* and *Hudnut* to be struck down] would not arise if a statute were to classify materials according to their sexual explicitness Indeed, the Supreme Court already has said as much by treating as non-viewpoint-based (and sometimes upholding) regulations directed at even non-obscene sexually graphic materials.”); Neville, *supra* note 12, at 123 (discussing *R.A.V.*). To the extent that the legislation is viewpoint-discriminatory, it is important to note at this point, as other scholars have, “[v]iewpoint discrimination is legitimate when the restrictions are remedying a ‘genuine harm.’” McGovern, *supra* note 18, at 463 n.111 (citing *Words, Conduct, Caste*, *supra* note 5, at 820).

⁹¹ Other proposals for curtailing pornography limited the scope of the content to be regulated so drastically that the legislation, even if upheld, would be expected to have little effect. *See Schroeder, supra* note 7, at 134–35 (discussing Cass Sunstein’s approach to regulation of pornography).

⁹² This would include, for instance, cartoon drawings, paintings, and sculptures.

munications.⁹³ Because the ban is temporary and allows for continued expression of “questionable” messages in live performances and verbal, hand-drawn, or painted, rather than real, photographic form, this author argues that the inevitable balancing of constitutional rights is less problematic.⁹⁴

III. UNIQUE AND INNOVATIVE ADVANTAGES

This Article proposes a restriction on pornography different than any proposed before. Unlike previous proposals, this ban is not designed to *end* pornography indefinitely, but to demonstrate both its harm to women and the role its self-perpetuating nature plays in its continued prevalence in our society, and almost subconscious influence on attitude, perspective, and policy.

A. DIFFERENCES FROM PREVIOUS EFFORTS

1. It Does Not Need to Be About Violence

Previous efforts to ban pornography generally used violence toward women⁹⁵ as the primary justification for infringement upon First Amend-

⁹³ This addresses one of the primary concerns that has been raised when efforts have been made to restrict pornography on the grounds of its harm to women. *See, e.g.*, Brest & Vandenberg, *supra* note 14, at 639 (discussing slippery slope and vagueness concerns that proposed anti-pornography legislation would be construed to prohibit things such as lesbian literature). The primary concern of the First Amendment with respect to content-based restrictions and the danger of “chilled speech” is with the extent that the law distorts public debate. *Content Regulation*, *supra* note 46, at 198. Therefore, a restriction that limits speech in a very limited manner, affecting only certain media, but allows free expression of ideas in all other media, is less concerning than a complete restriction on all media because it does not eliminate ideas or viewpoints. Nonetheless, it still must withstand the strict rigors of a content-based challenge, assessing the government’s interest in restricting speech based on its content. *See* Linmark Assoc. v. Township of Willingboro, 431 U.S. 85, 93–94 (1977); *Content Regulation*, *supra* note 46, at 200–01, 217.

To the extent that *R.A.V.* prohibits this legislation because it discriminates against the content of certain speech, note that Justice Stevens concurred that “the Court does not in fact mean much of what it says in its opinion.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 419 n.1 (1992) (Stevens, J., concurring).

⁹⁴ *Cf.* Kagan, *supra* note 4, at 899 (“[I]f legislators can make the case that speech leads to harm, if the speech regulated correlates precisely with that harm, and if the speech is itself low-value, then any viewpoint discrimination involved in the regulation becomes irrelevant.”).

⁹⁵ There is extensive evidence that pornography results in increased violence towards women. *See, e.g.*, Gerety, *Pornography and Violence*, 40 U. PITT. L. REV. 627 (1979); Dinolfo, *supra* note 6, at 622 n.17. Specifically, violent pornography is the most harmful type of pornography. *See, e.g.*, Deana Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125, 131

ment rights.⁹⁶ While this type of harm certainly underscores the need and rationale for limiting pornography,⁹⁷ pornography's non-violent harm is independently sufficient to justify such restrictions.⁹⁸ Specifically, under constitutional review, the government's interest in promoting and ensuring equal treatment of women, both in the workplace and in society in general, is sufficient to warrant infringement upon others' First Amendment rights, under any level of review.

2. It Does Not Need to End Pornography

Previous efforts to ban pornography sought to end or restrict pornography permanently. Because the effects of pornography should diminish over time in its absence, it makes sense to limit the duration for which the legislation restricts the sale, purchase, or distribution of pornography. Accordingly, the proposed limitations would be temporary in nature and therefore would not implicate First Amendment rights for the long-term.

The proposed ban would demonstrate the harmful effects of pornography on women. One reason legislation to ban pornography has not been put into effect is the argument that pornography is not harmful to women or is not sufficiently harmful to justify limitations on free speech.⁹⁹ With a

(1990) ("When men develop attitudes of acceptance toward violent sexual aggression, women are inevitably harmed.").

⁹⁶ See, e.g., *Words, Conduct, Caste*, *supra* note 5, at 803–04 ("[S]exually explicit speech should be regulated not because it is sexually explicit (the problem of 'obscenity') but because and when it merges sex with violence (the problem of 'pornography')"); Pollard, *supra* note 95, at 127–38; Schroeder, *supra* note 7, at 124–35 (discussing Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 840–42 (book review) and Sunstein's *Pornography and the First Amendment*, *supra* note 8, at 592); Barnes, *supra* note 20, at 117–18; Young, *supra* note 18; Maag, *supra* note 6, at 249 ("[describing the] harmful effects of violent pornography on women"); see also Lisa Lerman, *Preface to Colloquium, Violent Pornography: Degradation of Women Versus Right of Free Speech*, 8 N.Y.U. REV. L. & SOC. CHANGE 181 (1978–79). Sexual abuse is one of the main harms of pornography, which justifies its prohibition. See, e.g., Seator, *supra* note 15, at 297–98.

⁹⁷ See Dinolfo, *supra* note 6, at 626–27 nn.34–37, for a discussion of anecdotal and scientific evidence of the causal link between pornography and violence toward women.

⁹⁸ See Liston, *supra* note 18, at 416–17 ("While the danger of suppressing speech must be carefully considered, pornography's harm to women, as found to exist by the Indianapolis City-County Council, is great enough to merit a legal remedy."); *Words, Conduct, Caste*, *supra* note 5, at 804 ("If we moved beyond coercion and violence, we might ask more broadly about the role of pornography in creating inequality through the sexual subordination or objectification of women.").

⁹⁹ See, e.g., *Convergence*, *supra* note 18, at 226–27 (criticizing the hypotheses of Cass Sunstein, Catherine MacKinnon, and Andrea Dworkin and asserting that censoring pornography does not reduce violence or sexism against women); Seator, *supra* note 15, at 343 ("Because

temporary ban that is sufficient in duration, the absence of pornography will lead to positive changes for women, thus demonstrating that pornography *is* harmful.¹⁰⁰ The effects of pornography have been so ingrained in society that the harms are often invisible: pornography's portrayal of dynamics between the genders is mistakenly perceived as the *natural* status quo dynamic between the genders.¹⁰¹ Thus, we will be unable to fully recognize the true impact of pornography until we have had the opportunity to experience its absence.¹⁰² As the *natural* gender dynamic appears and unfolds in the absence of today's pornography, this author predicts it will be substantially different.

The proposed ban would subvert degrading pornography for the long-term. A temporary elimination of pornography for a duration sufficient to undo the status quo it has engendered would lead to a drastic decrease of

pornography, its harm, and women, as seen from the point of view that pornography is central in constructing, its harms are not perceived or, when perceived, are trivialized.”).

Others concede that pornography may cause harm to women, but argue that it is only a small part of the problem and, therefore, restrictions on pornography are not justified. *See, e.g.*, Neville, *supra* note 12, at 128 (“[W]omen unfortunately face physical and social harms, such as violence and subordination, wholly apart from the production of pornography. An anti-pornography ordinance is therefore underinclusive because it only addresses one small cause of a large problem.”). However, there is no empirical basis for this argument, and it is not possible to determine what proportion of the abuse and subordination women experience can be traced back to pornography unless and until it is eliminated for some period of time.

¹⁰⁰ Cf. Schroeder, *supra* note 7, at 151–52 (“Antipornography legislation would recognize that pornography, the speech of men, silences the speech of women by . . . denying the sounds which issue from the mouths of women the status of speech.”).

¹⁰¹ *See* MacKinnon *Pornography*, *supra* note 13, at 27–28 (“The harm of pornography, broadly speaking, is the harm of the civil inequality of the sexes made invisible as harm because it has become accepted as the sex difference. . . . [I]f you see women as just different, even or especially if you don’t know that you do, subordination will not look like subordination at all, much less like harm. It will merely look like an appropriate recognition of the sex difference.”); Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN’S L.J. 5, 13 (1984) (“Pornography is both a symptom and a cause of the continuing vitality of our patriarchal society.”). *See also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 148 (1987) (“[P]ornography institutionalizes the sexuality of male supremacy, which fuses the erotization [sic] of dominance and submission with the social construction of male and female. Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men’s power over women means that the way men see women defines who women can be.”).

¹⁰² *See* Words, Conduct, Caste, *supra* note 5, at 811 (“[P]ornography is more symptom than causer but it is cause as well.”); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1185 (1989) (“[T]he next feminist task [is to] . . . reveal and challenge the male-centered attitudes that structure the workplace [and that the] . . . ‘equality principle’ [is] the primary analytic tool of the assault on exclusion, to this task.”). *See* Horton *supra* note 6, at 412–14, for a more full discussion on this feminist task.

degrading pornography in the long-term¹⁰³—without the use of legislation that aims to end pornography entirely.¹⁰⁴ Because such legislation has proven unable to withstand First Amendment scrutiny in a society infused with pornography's harmful effects and dominated by the gender inflicting harm on women,¹⁰⁵ this author believes that this type of harmful pornography will only be significantly curtailed to the extent its supply and demand can be decreased.

A temporary ban on pornography would decrease the demand for it as it exists today. Pornography, as it exists today, is most often degrading to women.¹⁰⁶ Most of it portrays men and women as unequal in power, with women being little more than objects for men's arousal as men dominate and humiliate women.¹⁰⁷ This pornography serves like propaganda, molding men's concepts of gender roles. Accordingly pornography has

¹⁰³ See Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 22 (1985) ("[Equality] has to take the place of subordination in human experience: physically replace it. Equality does not co-exist with subordination . . .").

¹⁰⁴ See *Words, Conduct, Caste*, *supra* note 5, at 811–12 ("One need not believe that the elimination of pornography would bring about sexual equality, eliminate sexual violence, or change social attitudes in any fundamental way in order to agree that a regulatory effort could reduce violence and diminish views that contribute to existing inequalities.").

¹⁰⁵ Despite some recent increases in the number of female judges, judges are still predominantly male. with the recent addition of Justices Sonia Sotomayor and Elena Kagan to the Supreme Court leaving its percentage of women at a mere 33.3%, while the percentage of women in the federal judiciary at large is still a mere 25%. Shawna J. Wilson, *Diversity: A Look at the Federal Judiciary*, The Young Lawyer (Oct. 2009), http://www.americanbar.org/publications/young_lawyer_home/young_lawyer_archive/yld_tyl_oct09_diversity.html. This phenomenon has already been well described:

The bottom line of all the resistance we encounter to [regulation of pornography] is that a lot of people, people who matter, enjoy pornography. That is why they defend it. . . . The worry is not that it would misfire, but that it would fire at all. The fear is, it would work.

Donnerstein, *supra* note 6, at 49. Catharine MacKinnon summarized it best when she wrote that "[t]he law sees and treats women the way men see and treat women." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983). See also *Comparative Perspective*, *supra* note 6, at 1082 ("[T]he [Supreme] Court has analyzed the constitutionality of anti-obscenity laws almost exclusively by reference to pornography's impact on (and importance to) male consumers, and on the traditional moral fabric of heterosexual society."); *id.* at 1091 ("When pornography is recast from a woman's perspective, as the powerfully debilitating and terrorizing expression that it may be, arguments for its protection under *Hudnut* become arguments for its suppression under *Butler* and *Robinson*."); Wesson, *supra* note 12 at 868 ("[M]any of the harms women encounter in their daily lives [as a result of pornography] do not 'count' in lawsuits or criminal codes because they are . . . just uninteresting to those whose interests constructed the law."); Jacobs, *supra* note 101, at 8 ("Conspicuously absent from the judicial opinions . . . is any mention of male exploitation of women through obscenity.").

¹⁰⁶ See Seator, *supra* note 15, at 319 n.122.

¹⁰⁷ See *Pornography and the First Amendment*, *supra* note 8, at 601.

conditioned men to be sexually aroused by the domination and degradation of women.¹⁰⁸ Absent this conditioning, subsequent generations of men will still have sexual drive, but sexual satisfaction will likely not be contingent on dominating their sexual partners.¹⁰⁹

Furthermore, were men's dominance of their female partners not considered the *norm* for sexual interactions, men seeking such interactions would likely be deemed deviant. As a result, this type of pornography would be less prevalent.¹¹⁰ While men may continue to enjoy sexually explicit images—perhaps in larger numbers than women—this author believes that the new generation of images could portray women as equal, dignified, and complete human beings, while still being sexually arousing. Thus, pornography could theoretically exist without being harmful to women. The degradation of women that is a key element of pornography today, however, can only be “un-conditioned” from men's and society's notions of sex with a temporary elimination of pornography that will enable new notions of sexual stimulation and gender relationship to emerge.

A temporary ban on *all* pornography (rather than a ban just on pornography that is degrading to women)¹¹¹ would allow for sexual relationships and gender dynamics to manifest more naturally, without being molded by portrayals of how they *should* be.¹¹² If the genders were to negotiate sexual interactions without using pornography as a reference for

¹⁰⁸ See Dworkin, *supra* note 103, at 10 (“[Pornography] is the conditioning of erection and orgasm in men to the powerlessness of women It sexualizes inequality and in doing so creates discrimination as a sex-based practice.”).

¹⁰⁹ See GLORIA STEINEM, *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 219 (1983) (explaining the distinction between how people approach images of erotica, focused on mutual pleasure, and pornography, focused on domination).

¹¹⁰ See Schroeder, *supra* note 7, at 150 (“[A]nti-pornography legislation would interfere with the constructive aspect of pornography by serving as a public declaration by our society that the values epitomized in pornography are unacceptable.”). Cf. Karo & McBrien, *supra* note 18, at 195 n.99 (“Legal sanctions imply that a matter is so compelling that it cannot be left to individual whim. If the law takes racism seriously, people will take racism seriously. The same concept applies to sex discrimination and pornography . . .”).

¹¹¹ The author would like to emphasize here that the two are virtually identical. However, to the extent that the two are different, application of the ban to *all* pornography helps avoid downfall as viewpoint discrimination. See *Pornography and the First Amendment*, *supra* note 8, at 626. (“[T]o the extent that antipornography legislation may be deemed view-point based, its status as such is less troubling in light of the peculiar character of the method by which the pornographic ‘message’ is communicated.”) But see Chevigny, *supra* note 27, at 421 (“Censorship of pornography, as defined by the feminist critique, also would tend to spill over into the ‘view-point discrimination’ condemned in *American Booksellers Association v. Hudnut*.”).

¹¹² See Seator, *supra* note 15, at 342 (“In life, the harm of pornography is obscured because what is done to those harmed—principally women—is consonant with, even constructive of, what it means to be a woman.”).

how *normal* or *desirable* women engage in sex, there should be a drastic change in the way sex occurs between the genders and, consequently, in the male-female dynamics overall.¹¹³

In sum, a temporary ban on certain types of pornography would allow for a detoxification from the notions created and perpetuated by its images.¹¹⁴ After a lapse of time, pornography could exist in a manner that satisfies its goal of providing sexually stimulating images for those who choose to view it, without reinforcing gender stereotypes and harming women as a group.

A temporary ban on pornography would decrease women's participation in its production. It is often argued, sometimes by feminists, that pornography should not be banned because the women who appear in it do so voluntarily; a ban on pornography would be paternal and limit these women's rights to appear in and profit from pornography.¹¹⁵ The standard *opposing* argument is that these women are not truly able to choose to participate in a consensual way, as they are influenced, constrained, and coerced—and typically have limited alternative earning potential in other arenas of the economy.¹¹⁶ A temporary ban on pornography would help

¹¹³ Cf. Horton, *supra* note 6, at 448 ([T]raditionally male-dominated trades, [and] . . . workplaces where the sexes are segregated by job . . . are precisely the workplaces where Title VII has had little to no effect, and where the need for an innovative approach to eradicating workplace norms that perpetuate male domination and sex segregation is greatest.”).

¹¹⁴ Even opponents of censoring pornography acknowledge that “there is sharp evidence that sex patterns, once established, are as difficult to change as any other social habits, and, in addition, there are strong inhibiting factors that intervene to keep our responses within the cultural norms.” *Convergence*, *supra* note 18, at 229–30.

¹¹⁵ See Greenfield, *supra* note 7, at 1213 (“[T]he notion that women should be restricted from making choices that might cause harm to themselves and others appears inconsistent with feminist concerns.”). Greenfield centers his discussion around the *Johnson Controls* case, noting that MacKinnon could have drawn “principled distinctions” between *Johnson Controls* and the pornography setting. This author distinguishes the *Johnson Controls* case (and the attendant feminist efforts to protect female autonomy in choosing jobs that presented risks of “harm to themselves and others”: risks assumed by the women employed by *Johnson Controls* were limited to the decision-making woman and any fetus within her. Pornography is different because its harms are cast upon *all* women, regardless of the decisions they make concerning pornography. As has been set forth as the primary justification for the proposed temporary ban on pornography, one may not consent to the harm of another person. Even if one accepts that a fetus is a person, the distinction still stands, as a fetus is then one person within and inseparable from the woman, while the harm of pornography reaches *all* women everywhere. *But see Comparative Perspective*, *supra* note 6 at 1083–85 (“[T]o protect women from the terrorization of pornography is thus to grant them relief from discrimination, and social equality, rather than ‘special protection’ in the paternalistic sense.”).

¹¹⁶ Professor Karst noted that “[t]he facts of male dominance and the stereotype of female dependence combine to produce a social system that reinforces itself in a circular pattern. A vital element of this system is that women themselves are persuaded to cooperate in maintaining it.” Karst, *supra* note 33, at 459. See also, McGovern, *supra* note 18, at 467 (“Although it may be

demonstrate what portion of women, currently participating in the production or consumption of pornography, truly do so voluntarily.¹¹⁷ Without being socialized in a culture indoctrinated by pornography,¹¹⁸ women may be better able to attain financial independence through other routes.

First, if women were viewed as equals in the workplace, they may be able to attain other high-paying jobs and they may not view their value in terms of attractiveness and ability to sexually appeal to men.¹¹⁹ If women truly had the same educational and workplace opportunities and status as men, the offer of money to appear in pornography would not be as coercive on them. If women were viewed as sexual equals to men, they could have more bargaining power in the world of sexual interactions. However, without a temporary hiatus from the male-constructed status quo and financial exchange that exists today under the influence of pornography,¹²⁰ we are unable to experience a true equality of opportunities and alternatives that will allow us to say with certainty that those women who choose

true that most women may not have a 'gun to their heads' in the literal sense when participating in pornography, they may have a 'gun to their heads' in the economic sense."); *Pornography as Defamation*, *supra* note 30, at 798 ("Those not expressly coerced into pornography were there for the same reasons prostitutes are in prostitution: poverty, sexual abuse as children . . . and desperation. Those who say women are in pornography by choice should explain why it is women who have the fewest choices who are in it most."); *ONLY WORDS*, *supra* note 7, 20–21; MacKinnon *Pornography*, *supra* note 13 (describing economic duress and sexual mistreatment of women).

¹¹⁷ Professor MacKinnon has been criticized for her "implicit claim that none of the women who participate in the making of pornography has truly consented to her participation," and her alleged belief that "the choices of women who participate in its production and the preferences of women who enjoy reading it or watching it are to count for nothing." Greenfield, *supra* note 7, at 1212–13. The theory of—and justification for—the current proposal to curtail pornography's harm does not depend upon whether some or all women voluntarily participate in the production or consumption of pornography, nor whether voluntary female participation in pornography ought to be protected in itself; rather, it is justified solely by the harm caused to women who are entirely removed from the pornography industry.

¹¹⁸ See Maag, *supra* note 6, at 254 ("Pornography may harm women by conditioning their attitudes toward themselves.").

¹¹⁹ See Maag, *supra* note 6, at 254 ("[W]omen internalize media images that portray them as inferior and masochistic. Women then act according to their self-images by lowering or stifling completely their aspirations.").

¹²⁰ The two most prominent advocates for the two sides of the pornography debate are female law professor Catharine MacKinnon, who is best known for the judiciary's striking of her efforts to curb pornography's harm, and on the other side, in favor of pornography on grounds of protection of free speech rights, is renowned male law professor Floyd Abrams, who also holds a position as a senior partner in one of the most economically successful law firms in New York City. See *The First Amendment, Under Fire from the Left*, *supra* note 59, at 42, for a transcript of a debate between the two.

to participate in pornography have truly made an independent, voluntary, and un-coerced choice.¹²¹

A porn actress may be imperfectly analogized to a slave. Were a slave offered low pay to do the work she was already doing for free, she would probably say she had chosen to do the work. However, were she also offered freedom with opportunities for comparable pay, she would probably tell you she wanted to escape her slavery. If girls are raised in an environment with realistic education, employment, and financially stable opportunities, are not inundated with propaganda linking their worth with sexual desirability, and if the men in power were not socialized by pornography to espouse this link, fewer women would choose to participate in making pornography.

B. BRIDGING FEMINIST APPROACHES

An ongoing schism regarding pornography exists between schools of feminism.¹²² Radical feminists¹²³ assert that pornography should be eliminated because it harms women and because women cannot truly voluntarily consent to participation, because it is created in an oppressive and coer-

¹²¹ Cf. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 124 (1989) ("Women's complicity in their condition does not contradict its fundamental unacceptability if women have little choice but to become persons who then freely choose women's roles. For this reason, the reality of women's oppression is, finally, neither demonstrable nor refutable empirically.").

¹²² See, e.g., Ann Russo, *Pornography's Active Subordination of Women: Radical Feminists Reclaim Speech Rights*, in *WOMEN MAKING MEANING: NEW FEMINIST DIRECTIONS IN COMMUNICATION* 144 (Lana F. Rakow ed., 1992) (discussing intra-feminist pornography debate); Thomas C. Palmer, Jr., *A Bill of Divorcement: Women Are Split on Anti-pornography Law*, BOS. GLOBE, March 29, 1992, at 69; Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1188-90 (1993); Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B.F. RES. J. 681, 682. See also Barnes, *supra* note 20, at 118-19 ("[T]he debate over whether to regulate pornography revealed cracks in feminist theory."); *Convergence*, *supra* note 18, at 210-11 ("[T]he pornography debate pits feminists, who view pornography as a principal cause of sex discrimination and violence against women, against civil libertarians, who view it as protected free speech . . . Civil libertarians who oppose censorship are fighting on behalf of feminists, not against them."). See also Wesson, *supra* note 12 at 847-49, for a thorough discussion of feminism's divide regarding pornography.

¹²³ Andrea Dworkin, *Pornography is a Civil Rights Issue for Women*, 21 MICH. J. L. REFORM 55 (1987-88). Catharine MacKinnon and Andrea Dworkin have also been described as "progressive feminists." See McGovern, *supra* note 18, at 451 (quoting Robin West, *Constitutional Scepticism*, 72 B. U. L. REV. 765, 774 (1992)) ("[P]rogressive feminists believe in order for American women to live peaceful, fulfilling lives the Constitution must be interpreted to protect social minorities, such as women, from private authority that seeks to subordinate them. . . . One source of private authority seeking to subordinate women is the 'intimate power of men over women.'").

cive environment. Liberal feminists, meanwhile, maintain that it is important for women to be able to participate in pornography if they so choose, because to suggest otherwise would be paternalistic and disempower women as autonomous beings.¹²⁴ The proposed temporary ban on pornography is innovative in that it is designed to, over time, reconcile the inconsistencies of these two ideologies with respect to pornography.¹²⁵ Further, it would provide the gender equality sought by both schools of thought,¹²⁶ because after it expires women would have the true ability, free from coercion or male-authored social indoctrination, to participate in pornography under new terms of sexual and gender equality.¹²⁷

In short, the proposed ban recognizes that one woman is not entitled to exercise her liberties—that is, deciding to participate in pornography—in a way that results in harm to other women who would choose to be free from the harms arising from pornography. Thus, because women are

¹²⁴ See, e.g., Janis Searles, *Sexually Explicit Speech and Feminism*, 63 REV. JUR. U.P.R. 471, 471 (1994) (“[N]ot only should there be no first amendment exception for pornography, but that increased sexual speech should be a feminist goal.”); WENDY MCELROY, XXX: A WOMAN’S RIGHT TO PORNOGRAPHY (1995); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS (2002 ed.); Nan D. Hunter & Sylvia A. Law, Brief Amici Curiae of Feminist Anti-Censorship Task Force et al., in *American Booksellers Association v. Hudnut*, 21:1 & 2 MICH J. L. REFORM 69, 118–22 (Fall 1987–Winter 1988); Wendy Kaminer, *Feminists Against the First Amendment*, THE ATLANTIC 110 (Nov. 1992); Lisa Duggan, Nan D. Hunter, & Carole S. Vance, *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133 (1993). Cf. Colker, *supra* note 37 (“[S]ometimes conflicting principles . . . [of] anti-differentiation advocates . . . [and] anti-subordination advocates . . . [with respect to equal protection doctrine.]”); Crawford, *supra* note 9 at 104–05 (discussing categorizations of “pro-regulation feminists” and “pro-sex feminists” which appears to correlate with the categorizations of “radical” feminists and “liberal” feminists, respectively).

Professor Cass Sunstein has also argued for restrictions on pornography with a school of thought that has been labeled as “neutered feminism.” See Schroeder, *supra* note 7, at 124.

Another category of feminists—referred to as third-wave feminists—are deemed to be emerging and have been said to have a fresh perspective on the issue of pornography that emphasizes the individual consumer’s role in the interpretation of pornography, while extending the arguments of the pro-sex (or liberal) feminists of the second-wave feminists in that third-wave feminists “fail to acknowledge the possibility that pornography harms either the women who are involved in its production or those who consume it.” Crawford, *supra* note 9, at 104–05.

¹²⁵ See *supra* note 156.

¹²⁶ See Pacillo, *supra* note 18 (“[T]he common goal of both the liberal and radical feminist movements [is to] . . . promote [women’s] right to equal protection under the law.”).

¹²⁷ Cf. de Tocqueville, *supra* note 32, at 80 (“It is possible to imagine an extreme point at which freedom and equality would meet and be confounded together. Let us suppose that all the members of the community take a part in government, and that each one of them has an equal right to take a part in it. As none is different from his [or her] fellows, none can exercise a tyrannical power: [they] will be perfectly free because they will all be entirely equal; and they will all be perfectly equal, because they will be entirely free. To this ideal state democratic nations tend.”).

harmed—in both tangible and significant ways implicating economic status, autonomy, dignity, and equality—by the existence of pornography in its current state, pornography should be restricted to serve remedial purposes that further gender equality.

1. One Cannot Consent to the Harm of Another

While neither school of feminism seeks to limit women's autonomy, even truly voluntary participation in pornography, as it exists today, is unconscionable as it harms all women.¹²⁸ No woman has the legal, ethical, or moral authority to authorize harm on any other woman, much less on *all* other women. This realization eliminates the need for a discord among feminists about the importance of an individual woman's right to choose to participate in pornography despite the resulting harm she may experience. Pornography as it exists today has been deemed harmful to women as a matter of law. One woman's participation in degrading pornography inflicts harm upon all women. One cannot consent to the harm of another. Accordingly, a ban on pornography is justified.¹²⁹

2. Pornography Can Be About Sex Instead of Degradation or Violence

Liberal feminists often object to radical feminists' opposition to pornography on the grounds that women enjoy pornography, just like men.¹³⁰ While there is no doubt that women enjoy sex, it is irrelevant whether some women enjoy pornography to the same extent as men, given its

¹²⁸ As with the racial segregation in education that was deemed by *Brown v. Board of Education* to harm black children by "denoting their inferiority"—despite the fact that many African-Americans would prefer to have separate schools and would choose to segregate themselves from white students—pornography harms all women, regardless of whether any particular woman has chosen to participate in it or whether all men consume pornography. As such, it is harmful to women as a group because of its "denoting [of] their inferiority" and should be deemed impermissible discrimination. See Seator, *supra* note 15, at 345–46 (discussing the applicability of the underlying rationale of *Brown v. Board of Education* to anti-pornography legislation).

¹²⁹ See Weinstein, *supra* note 57, at 895 ("A key tenet of liberalism [is] that the only legitimate reason for prohibiting an activity by force of law is 'the prevention of harm or offense to [nonconsenting] parties other than the actor.'" (quoting Feinberg, *supra* note 73, at 249 (citing Murphy, *supra* note 73, at 75))).

¹³⁰ See, e.g., *Convergence*, *supra* note 18, at 217–19 ("Underlying virtually every section of [the Dworkin-MacKinnon model law is that] there is an assumption that sexuality is a realm of unremitting, unequalled victimization of women But this analysis is not the only feminist perspective on sexuality. . . . Women are agents, and not merely victims, who make decisions and . . . seek out and enjoy sexuality." (quoting Duggan, Hunter & Vance, *supra* note 124, at 151)).

harmful effects to women as a group. While there may be some percentage of women in the population who have a strong degree of sexual agency and enjoy pornography, the reality is that a large portion of women are treated as sexually subservient to men. By re-setting the context in which pornography exists, a temporary ban would allow pornography to re-emerge in a form that is enjoyable to both sexes without being harmful or degrading to either sex.¹³¹ If pornography could exist in a society in which it was not inextricably linked with violence toward and degradation of women, and in which women had equal power in decisions surrounding its production, consumption, and in counterspeech to it, it could exist for the enjoyment of all who choose to view it. Pornography could be about sex, rather than violence and degradation.¹³² A temporary ban on pornography could lead to a society in which *all women*—regardless of educational, financial, or marital status—are able to act as independent, sexual agents.

C. NEW PERMISSION FOR A TEMPORARY BAN ON PORNOGRAPHY

The last time that serious efforts were made to restrict pornography was in the mid-1980s.¹³³ At that time, the judiciary held that the interest in free speech outweighed the interest in sex-based equality, and upheld the right to produce pornography.¹³⁴ Since the 1980s, however, the judiciary has determined that pornography that implicates gender stereotypes can constitute impermissible discrimination, if such stereotypes are degrading to women.¹³⁵ The Supreme Court also recently reaffirmed its position that

¹³¹ Cf. *Anti-Pornography Laws*, *supra* note 18, at 466 (“[Radical feminists’ goal as one] trying to make a social norm of the idea that pornography, by dehumanizing women and by promoting their humiliation and brutalization as a means of sexual excitement, perpetuates women’s subordination and inequality”).

¹³² See Liston, *supra* note 18, at 416 (“Pornography’s evil is not its sexual content but its ‘degrading and dehumanizing portrayal of women.’” (quoting Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in TAKE BACK THE NIGHT 26, 32 (L. Ledered, ed. 1980))).

¹³³ In 1984, Indianapolis, Minneapolis, and Los Angeles enacted legislation to restrict pornography, but the legislation did not survive challenge. Seator, *supra* note 15, at n.1, 8–9. In 1985, an anti-pornography referendum was introduced in Cambridge, Massachusetts, but was rejected by less than 4,000 votes. Seator, *supra* note 15, at n.1, 8–9.

¹³⁴ *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316, 1339 (S.D. Ind. 1984), *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

¹³⁵ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (finding that, in a context of male dominance, pornographic photographs of women constitute sexual harassment); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (“[A]n environment that fosters the degradation of women hinders a female employee’s productivity, self-image, and ability to advance, as well as erodes her professional image in the eyes of co-workers.”). See also Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037, 1065 (1994); Horton, *supra* note 6, at 411.

Congress has the power to enact remedial legislation that infringes on others' constitutional rights—even fundamental rights—to remedy its own historical gender discrimination. In *Nevada Department of Human Resources v. Hibbs*, for example, the Supreme Court upheld prophylactic legislation designed to remedy historical workplace discrimination stemming, at least partially, from the government's improper reliance on gender role stereotypes concerning women's caretaking responsibilities.¹³⁶

Because pornography has already been deemed harmful to women's equality in the workplace, the Supreme Court's holding in *Hibbs* gives Congress permission to temporarily ban pornography. *Hibbs* held that governmental action that categorizes or facilitates the notion of women's role as unequal to men's, due to reliance on gender role stereotypes, is prima facie discrimination and violates women's constitutional right to equal protection.¹³⁷ It further held that Congress may utilize its enforcement powers under Section 5 of the Fourteenth Amendment to remedy such discriminatory action, even if that remedy benefits women over men.¹³⁸

Pornography creates, fosters, and perpetuates the notion of women as sex objects, which the Supreme Court has deemed to be discriminatory gender role stereotyping that is impermissible by the government in general or by public or private employers.¹³⁹ However, the government itself has discriminated against women through gender role stereotyping.¹⁴⁰ One

It is important to note that it is precisely the use of these gender role stereotypes (now deemed impermissible as a basis for discrimination in some contexts and deemed impermissible as any part of a government rationale or decision) that has been argued previously as evidence of pornography's entitlement to First Amendment protections—a rationale that is now called into question and perhaps would be deemed by a court to be greatly weakened. See Chevigny, *supra* note 27, at 426 ("Propaganda is powerful because it is consistent with people's way of thinking. We cannot escape our stereotypes through 'rationality' or 'detachment'; stereotypes are the principal tools for thinking that we have. . . . [T]he position to which the propaganda seeks to persuade us is linked dramatically to pre-existing stereotypes. . . . [P]owerful stereotypes about women and violence do exist.").

¹³⁶ See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003).

¹³⁷ See *id.*

¹³⁸ *Id.*

¹³⁹ See *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1998) (gender role stereotyping impermissible discrimination in workplace); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (citing impermissible historic discrimination against women by state governments in upholding FMLA); Horton, *supra* note 6, at 441–42 ("If stereotyped attitudes can demonstrably influence employment decisions and prevent the promotion or hiring of women, it follows that stereotyped attitudes can also work a more subtle form of discrimination through the work environment.").

¹⁴⁰ The government has contributed to discrimination against women both in the workplace and in other realms of life. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Bradwell v. Illinois*, 16 Wall 130, 21 L.Ed. 442 (1873) (excluding women from the prac-

way it is has done so is by facilitating gender role stereotypes.¹⁴¹ Pornography perpetuates discrimination against women in the workplace and

tice of law because of gender role stereotypes)); *In re Motion to Admit Miss Lavinia Goodell*, 39 Wis. 232, 245 (1876) (“[T]he law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor.”) (discussed in BENDER & BRAVEMAN, *supra* note 5, at 600 n.1); Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 183–85 (1982), discussed in Karst, *supra* note 33, at 468 (“Wendy Williams, looking at the legislative history of the exclusion of women from registration, has shown convincingly that a major motivation for Congress’s action lay in a particular view of the proper roles of men and women in society: men as the protectors, and women as the center of domestic life.”); NAT’L WOMEN’S LAW CTR., *SLIP-SLIDING AWAY: THE EROSION OF HARD WON GAINS FOR WOMEN UNDER THE BUSH ADMINISTRATION AND AN AGENDA FOR MOVING FORWARD* (2004) (discussing the Bush administration’s active erosion of policies guaranteeing equal opportunity for women in the workplace and schools and its elimination of programs designed to protect women’s interests); U.S. COMM’N ON CIVIL RIGHTS, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN vii (1981) (acknowledging the existence of federal programs and policies that limit women’s choice and equal opportunity); Sylvia Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1305 (1983); Colker, *supra* note 37, at 1027 (“The statutory mode of equal protection is riddled with exceptions that perpetuate women’s subordination, the most egregious of which is that sex-specific employment discrimination claims under Title VII can be defended with arguments of ‘bona fide occupational qualification’ (BFOQ). Title VII contains the BFOQ exception for sex-specific policies, but not for race-specific policies, with the result that some sex-specific rules are allowed even though they have a discriminatory impact. Similarly, Title IX of the Education Amendments of 1972 contains numerous sex-based exceptions to its antidiscrimination provisions.”); Colker, *supra* note 37, at 1040 (“‘[S]pecial protection’ legislation . . . created sex-specific rules purportedly to assist women but that, in fact, helped to perpetuate paternalistic stereotypes about them.”).

¹⁴¹ See *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (discussing state governments’ history of discriminating against women in employment based on gender role stereotypes that assume family care responsibilities belong to women); Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99, 110 (1989) (“New Deal policies incorporated the assumptions of the male breadwinner family ideal: mothers ought to depend on male wages, . . . men should have priority in training and work programs.”); Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1455 (1991) (discussing how the law actively promotes a gendered allocation of domestic duties and ways in which the law disadvantages women economically, and in employment); MARTIN O’CONNELL & DAVID E. BLOOM, *JUGGLING JOBS AND BABIES: AMERICA’S CHILD CARE CHALLENGE* 15 (1987) (discussing the marriage penalty tax policy implemented during the Reagan era, which made it less cost effective for many wives to work); Karst, *supra* note 33, at 449–50 (discussing government created inequality). Professor Karst explains at length how “[p]rominent among the means historically used to control women’s sexuality and maternity has been the law.” *Id.* at 458. For example, Supreme Court Justice Joseph Bradley once opined that:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent ca-

elsewhere, on the basis of gender role stereotypes.¹⁴² The government has played a role in the specific harm inflicted upon women by pornography despite repeated legislative efforts to curtail pornography's harm.¹⁴³ In the face of Congressional and judicial acknowledgement that pornography is harmful to all women's equality in the workplace, the judiciary has repeatedly upheld men's right to degrade women through pornography and thereby impede women's attainment of equality in the workplace. It has, in effect, valued free speech rights over equality rights.¹⁴⁴

reer from that of her husband The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Bradwell v. Illinois, 83 U.S. 130, 139 (1873). This opinion is also discussed in Karst, *supra* note 33, at 449–50. The Supreme Court also upheld a state law limiting the number of hours women—though not men—could work in given professions, justifying the legislation with the following statement, which gave the government permission to control the use of women's bodies—though not men's bodies—in the name of public interest:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Muller v. Oregon, 208 U.S. 412 (1908). This opinion is quoted and discussed in Colker, *supra* note 37, at n.162. Cf. Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 118 (1982).

¹⁴² See Seator, *supra* note 15, at 311 (explaining how pornography is a "practice of discrimination" against women) ("[The Seventh Circuit Acknowledged that d]epictions of subordination tend to perpetuate subordination. . . .").

¹⁴³ The Indianapolis-Marion County City-County Council found that:

Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.

Indianapolis & Marion County, Ind., Ordinance 24, § 16-1(a)(2) (May 1, 1984), amended by Indianapolis & Marion County, Ind., Ordinance 35, § 16-1(a)(2) (June 15, 1984).

¹⁴⁴ See *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). See also Seator, *supra* note 15, at 356 ("Other less serious and much less fully demonstrated harms have justified limits on first amendment interest In the *Hudnut* litigation, the courts failed to respond to sexual harm to women as they have responded to other harms In *Hudnut*, both courts used the first amendment to protect male supremacy.").

In light of *Hibbs*, Congress now has authority to enact a temporary ban on pornography. The ban would remedy the workplace inequality that is experienced by women and is created, at least in part, by the government's repeated authorization of pornography while efforts to curtail pornography have been struck down. The ban is further supported because previous legislative attempts to eliminate gender discrimination in the workplace¹⁴⁵ have not proved effective in achieving that goal.¹⁴⁶

D. NEW HOPE FOR UPHOLDING A TEMPORARY BAN ON PORNOGRAPHY

Justice Ginsburg noted, with respect to affirmative action and gender inequality, that the framers of the Constitution "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."¹⁴⁷ Attitudes, values, and perspectives on the importance of competing rights have changed since restrictions on pornography were last reviewed in the 1980s, as academic debate surrounding earlier court opinions has led to enlightened and evolving views.¹⁴⁸ Advance-

¹⁴⁵ Congress has previously sought to eliminate gender discrimination in the workplace by enacting such remedies as Title VII, the Pregnancy Discrimination Act, and the FMLA, yet such gender discrimination persists. See 29 U.S.C. § 2601.

¹⁴⁶ See *Hibbs*, 538 U.S. at 721 (warranting more aggressive legislation where previous legislative efforts have fallen short).

¹⁴⁷ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 336 (2004).

¹⁴⁸ For example, after *Hudnut*, many academic articles made sound arguments about perceived flaws in the courts' decisions. One author noted that First Amendment law has evolved such that property values are deemed more important governmental interests than the equality, dignity, and safety of women. See Barnes, *supra* note 20, at 129–30, 132 ("Though obscenity is not protected by the First Amendment, it is less harmful to society than violent pornography. Indeed the Court recently approved a ban on a type of speech that is much more defensible than pornography. . . . Even with respect to books and films that are not legally obscene, the United States Supreme Court has not hesitated to protect property values. . . . [P]ure speech—the posting of campaign posters—can be prohibited for aesthetic reasons. . . . The Court has also ignored the fact that most women find sexual violence to be even more aesthetically unappealing than billboard blight.").

As the evolution of sexual harassment law demonstrates, we know that public sentiment on the acceptability of pornography (and its different conceivable forms) can change:

Although people's attitudes about sexual behavior may be deeply ingrained, the development of prohibitions against sexual harassment in the workplace and the increasing public intolerance of this behavior indicate that it is possible to change them. Behavior which has so often been deemed normal and acceptable is now being challenged as creating a "hostile environment," which violates Title VII. . . . The evolution of sexual harassment doctrine holds out the promise that we can someday recognize that "it is precisely the fact that [coercion] is sexual" that makes such conduct discrimination.

ments in related case law suggest that women's equality rights carry more weight than earlier pornography cases indicated.¹⁴⁹ Congress has persisted in its efforts to eliminate gender discrimination in the workplace by enacting the recent, post-*Hudnut* Family and Medical Leave Act subsequent to the enactment of Title VII and the Pregnancy Discrimination Act. Additionally, in the more recent and analogous case of *R.A.V. v. City of St. Paul*, Justice Stevens expressed a willingness to uphold content-discriminatory legislation designed to prevent harms to minority groups.¹⁵⁰

Moreover, there are more women in positions of power¹⁵¹ who are able to make decisions about those competing rights than there were in the 1980s.¹⁵² One key example of this is newly-confirmed Supreme Court Jus-

Stellings, *supra* note 9, at 194-95. Accordingly, the public's attitudes toward pornography can also change.

¹⁴⁹ See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

¹⁵⁰ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 433-34 (1992) (Stevens, J., concurring). The concurring opinions in *R.A.V.* expose many gaps in the majority's reasoning and that "[i]t may be . . . that anti-pornography efforts have nothing to fear from *R.A.V.* because its purported rule was dead on arrival—fashioned (and perhaps even intended) to have no effect beyond its accompanying judgment." See Wesson, *supra* note 12, at 854. "Supporters of pornography legislation would claim that anti-pornography ordinances are not content-discriminatory because they target harms wholly apart from the content of the speech. Justice Stevens made a similar argument about hate speech in *R.A.V.*" Neville, *supra* note 12, at 128.

One scholar points out that in *R.A.V. v. City of St. Paul*, "the Court invalidated a facially unconstitutional ordinance that attempted to prohibit racially motivated hate speech directed at individuals. [However,] [t]he five Justices who made this argument were careful to emphasize that they did not mean to threaten the sexual harassment aspects of Title VII" and also that "[t]he four concurring Justices . . . argued that, if properly drafted, a statute may ban hate speech because of its societal harm." Wolfson, *supra* note 135, at 1066 n.175.

¹⁵¹ Even the female judge who decided *Hudnut* at the district court level, in 1984, was subject to the influences of a "pornographic society" such that her decisions about balancing interests and identifying compelling interests was necessarily influenced by her culture. See NICHOLAS KRISTOF & SHERYL WUDUNN, *HALF THE SKY* (2009) (discussing the phenomenon in which women, as a product of a gender discriminatory society, actively perpetuate gender discrimination).

Perhaps a judge deciding that issue today (in light of academic debate since that time) would concede that the government has a compelling interest in regulating the low-value speech it acknowledges harms women's ability to experience the equality rights to which they are entitled by the constitution—especially in light of the Seventh Circuit's finding, on appeal, that pornography perpetuates sex discrimination. See Barnes, *supra* note 20, at 125-26 (discussing the findings of both the district court and the Seventh Circuit).

¹⁵² As Professor Karst forecast in 1984:

Constitutional law in particular is a field in which we might expect movement toward the values of the network sooner rather than later. Not only is constitutional law somewhat less bound by precedent than the law in other areas; it is also a field that has engaged the interest, the emotions, and the sense of purpose of large numbers of women

tice Elena Kagan. Justice Kagan, former dean of Harvard Law School, was one of the few academics to express support for the regulation or restriction of pornography, based on its harm to women.¹⁵³ Additionally, Justice Souter recently retired and was replaced by a female Justice.¹⁵⁴ This shift in the Supreme Court's composition could create a significantly different reception to anti-pornography legislation.

In the 1980s, federal courts in the United States found that the government's interest in protecting women from the harms of pornography was not so compelling as to sacrifice the guarantees of the First Amendment.¹⁵⁵ In the 1990s, Canada, which mirrors the United States with respect to free speech rights, enacted legislation restricting pornography. Additionally, the Canadian Supreme Court upheld the legislation after performing a balancing test and concluded that the need to protect women and society from the harms caused by the free flow of pornographic materials outweighs the harm of any infringement on free speech rights.¹⁵⁶ In doing so, it noted: (1) the dangers to society, for both men and women, from pornography and how it reinforces gender-based stereotypes; and (2)

who are just now entering the legal profession. . . . These women do not seem to think change is impossible, and neither do I.

Karst, *supra* note 33, at 507. In 1980, only 17% of judges in the United States were women. *Id.* at 507 n.229 (citing Dullea, *Women as Judges: The Ranks Grow*, N.Y. TIMES, Apr. 26, 1984 at C1, col. 4). Today women make up 25% of the federal judges in the United States. Shawna J. Wilson, *Diversity: A Look at the Federal Judiciary*, THE YOUNG LAWYER (Oct. 2009), <http://www.abanet.org/yld/tyl/oct09/diversity.shtml>. In 1983, only 37% of law students and 15% of lawyers were women. Karst, *supra* note 33, at 507 n.230 (citing Fossum, *A Reflection on Portia*, 69 A.B.A. J. 1389, 1389 (1983)). Today, those percentages are 44% and 24%, respectively. *Women and the Law*, <http://www.uslaw.com/library/article/ABAWomenJustice.html> (last visited Nov. 16, 2009). In 1990, only 2 of 100 senators and 29 of 435 representatives in Congress were female. Today, only 17 Senators and 74 Representatives are women. Ctr. for Am. Women and Politics, *Record Numbers of Women to Serve in Senate and House*, CAWP ELECTION WATCH, Nov. 10, 2008, available at http://womensissues.about.com/gi/o.htm?zi=1/XJ&zTi=1&sdn=womensissues&cdn=newsissues&tm=10&f=10&tt=2&bt=1&bts=1&zu=http%3A/www.cawp.rutgers.edu/press_room/news/documents/PressRelease_11-05-08.pdf. "The women who will directly influence the growth of constitutional doctrine will be professionals and policymakers—a relatively small group of women who are the most likely to be conscious of the harms caused by the traditional construct of femininity." Karst, *supra* note 33, at 507 n.231.

¹⁵³ Kagan, *supra* note 4, at 2.

¹⁵⁴ *Times Topics: Sonia Sotomayor*, N.Y. TIMES (Feb. 1, 2010), http://topics.nytimes.com/top/reference/timestopics/people/s/sonia_sotomayor/index.html.

¹⁵⁵ *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1333, *aff'd*, 475 U.S. 1001 (1986).

¹⁵⁶ *Butler v. Her Majesty The Queen*, [1992] 1 S.C.R. 452 (Can.). See Dinolfo, *supra* note 6, at 623 (discussing the Canadian approach to regulating pornography).

the importance of the anti-pornography legislation's objective in a society that wishes to promote respect for all of its members.¹⁵⁷

Implicit in the Seventh Circuit's opinion in *Hudnut* is the conclusion that there are less restrictive means of addressing pornography's harms to women than anti-pornography legislation.¹⁵⁸ However, as gender inequality still persists today despite the existence of laws and policy that actively seek to bring about gender equality—and as the pornography industry and its harms continue to grow¹⁵⁹—it has become increasingly evident that more aggressive legislation is warranted and that the balancing of interests warrants a shift in favor of women's rights to equality and dignity over men's rights to degrade them.¹⁶⁰ Canada set a good precedent in upholding pornography-restricting legislation on the basis that it promotes “respect, equality, and non-violence, the essential elements of a free and democratic society.”¹⁶¹ Public sentiment in the United States confirms the increasing importance of equality for women, especially in the workplace.¹⁶² With both *Hibbs* and the continuing success of affirmative action programs that are designed to remedy the government's historical racial discrimination, which have come about since *Hudnut* was decided, a court today reviewing remedial and limited pornography restrictions, designed to remedy historical discrimination may, and further gender equality in the workplace will, be more likely to find that this type of restriction was justifiable, even in the face of a First Amendment challenge.¹⁶³

¹⁵⁷ *Butler*, [1992] 1 S.C.R. 452 (Can.).

¹⁵⁸ *Am. Booksellers Ass'n. v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985).

¹⁵⁹ *See, e.g., Despite U.S. Campaign, A Boom in Pornography*, N.Y. TIMES, July 4, 1993, at A20.

¹⁶⁰ *See* Daum, *supra* note 5, at 551 (decrying the lack of anti-pornography feminists' publication on pornography and its harm since the proliferation of pornography on the internet).

¹⁶¹ Dinolfo, *supra* note 6, at 658–60 (“[Canadian courts believed that] placing a limitation on peoples' rights and freedoms, where needed to achieve a collective goal, is essential and consistent with the ideals of a democratic society.”).

¹⁶² *See, e.g., Nicholas D. Kristof & Sheryl WuDunn, Why Women's Rights Are the Cause of Our Time, Saving the World's Women*, N.Y. TIMES, Aug. 23, 2009.

¹⁶³ Cass Sunstein argued that “antipornography legislation should be regarded not as an effort to exclude a point of view, but instead as an effort to *prevent* harm.” *Pornography and the First Amendment*, *supra* note 8, at 617 (emphasis added). Legislation designed to *remedy*—rather than *prevent*—harm, is more likely to be upheld, given Congress's Section 5 Enforcement Powers, which allow it to enact properly drafted remedial legislation despite its infringement on others' constitutional rights. *Cf. Georgia Wralstad Ulmschneider, The Supreme Court, the First Amendment and Anti-Sex-Discrimination Legislation: Putting American Booksellers Association, Inc. v. Hudnut in Perspective*, 32 DUQ. L. REV. 187, 214–15 (1994) (“[T]he Supreme Court's decision in *Hudnut* cannot stand alone as a guide to the future outcomes of the Supreme Court cases involving [First Amendment] challenges to anti-sex-discrimination legislation. . . . In all of the cases other than *Hudnut*, the Court was willing to uphold anti-sex-discrimination

Proponents of previous efforts to enact anti-pornography legislation have argued that courts should "reinterpret the First Amendment to require the government affirmatively to promote the speech of the disempowered, rather than merely negatively to refrain from prohibiting speech."¹⁶⁴ In light of *Hibbs*, it appears that Congress has the power to enact this type of remedial legislation. Additionally, Supreme Court case law appears to acknowledge that pornography implicates gender stereotypes that constitute discrimination in the workplace. Taken together, a ban like the one proposed herein should be constitutional, despite its infringement on First Amendment rights of free speech.¹⁶⁵

IV. CONSTITUTIONAL JUSTIFICATION

A. AUTHORITY: FOURTEENTH AMENDMENT ENFORCEMENT POWERS

One of the long-held and purported goals of our nation is equality of the sexes.¹⁶⁶ By the same rationale that justified affirmative action that favored minorities over Caucasians,¹⁶⁷ Congress can utilize its enforcement powers, under Section 5 of the Fourteenth Amendment, to enact remedial legislation that inhibits pornographers' right to free speech¹⁶⁸ because it is

when the equality demand involved activity in the public sphere, when the assumptions about women in the dispute were previously abandoned, stereotypical notions about women in the workforce, and when the legislation either regulated unprotected expression or was viewpoint-neutral.").

¹⁶⁴ Schroeder, *supra* note 7, at 155 (1992) (discussing the anti-pornography legislation efforts of Catharine MacKinnon).

¹⁶⁵ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); Wolfson, *supra* note 135, at 1064-65; see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1536 (M.D. Fla. 1991) ("[T]he Court may, without violating the first amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees.").

¹⁶⁶ See U.S. COMM'N ON CIVIL RIGHTS, CHILD CARE AND EQUAL OPPORTUNITY FOR WOMEN vi, 1-2 (1981) (citing discussing legislation, executive orders, and judicial decisions indicative of this goal of equal opportunity for women).

¹⁶⁷ Scholars have long suggested that something akin to affirmative action should be implemented to advance gender equality, and have alluded to the elimination or curtailment of pornography as a promising means for doing so. See, e.g., *Pornography as Defamation*, *supra* note 30, at 812-13 ("Affirmative action plans and anti-discrimination policies are not regarded as discrimination on the basis of viewpoint, although they prohibit the view that Blacks are inferior to whites from being expressed by discriminating against them. . . .").

¹⁶⁸ Professor Sunstein has previously made reference to Section 5 of the Fourteenth Amendment in his arguing for First Amendment analysis that permits restriction of pornography to help eradicate caste-like gender discrimination. See *Words, Conduct, Caste*, *supra* note 5, at 800, 802 ("[U]nrestricted speech can contribute to gender caste [T]he government might be

warranted, and arguably necessary, to remedy the harm of the government's historical gender discrimination and to change the resultant hierarchy of gender relations that exists today.¹⁶⁹ Despite the high value placed on free speech rights in our country, Congress has the authority to remedy historical discrimination against women by both federal and state government.¹⁷⁰ Congress could remedy the discrimination by passing legislation that restricts pornography,¹⁷¹ as long as that legislation is deemed

permitted to justify certain narrow restrictions on speech by reference to the Civil War Amendments, by claiming that the interest in equality is sufficiently neutral and weighty to support those restrictions.”).

¹⁶⁹ Schroeder, *supra* note 7, at 150 (“To pretend that we can achieve equality in this society is the ‘magical approach’ to sexual equality—wishing it were so. Rather, we must radically change society so that equality is attainable.”). See also McGovern, *supra* note 18, at 466 (discussing the perpetuation of previous harm caused by pornography’s continuing existence) (“[F]uture generations of women will have to deal with the same problems that flow from inequality as their mothers did.”); Seator, *supra* note 15, at 357–58 (“When pornography is understood for what it is—the abuse and subordination of women and children . . . male supremacy will budge.”).

¹⁷⁰ Professor Karst’s pre-*Hibbs* writing alludes to a remedy approximating this type of remedy. See Karst, *supra* note 33, at 460 (“[I]f the law of a male-oriented society has contributed to the hold of stereotypical assumptions about women, the same body of law has been made to serve the ends of reform, and offers hope of reforms yet to come. . . . [I]f we can see that the process that forms men has produced a world view tending toward one form of social ordering, then we should also be able to see that the process that forms women produces an alternative world view. Perhaps that perspective offers hope for a reconstruction of a different kind, not merely to open ‘man’s world’ to women but to reshape constitutional law for all of us.”). See generally Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1 (1994) (discussing “substantive equality” feminist theory that attempts to remedy the effects of past discrimination).

¹⁷¹ Professor Cass Sunstein makes reference to Section 5 of the Fourteenth Amendment in his discussions of pornography versus free speech rights. *Words, Conduct, Caste*, *supra* note 5, at 798–802. With the issuance of *Hibbs*, Professor Sunstein’s “anti-caste” principle can be effectuated via Congressional Section 5 enforcement powers under the Fourteenth Amendment, with prophylactic legislation designed to remedy the government’s historical role in discrimination against women by pornography. *Id.*

Many would agree with Professor Weinstein’s statement,

[W]hen addressing us as the ultimate governors in a democratic society, government may not limit speech because it believes that the speech will lead us to make unwise or even disastrous social policy decisions. To regulate speech for this reason would violate the core democratic precept that the people are the ultimate sovereigns.

Weinstein, *supra* note 57, at 879. However, regulating speech for purposes of remedying past discrimination by enabling women to be heard, in making those social policy decisions, is another matter entirely. Regulating speech for purposes of eliminating the unequal treatment of women in the workplace, which the government played a role in establishing, is consistent with our broader social policy goals and worth the minimal infringement on speech rights, which have been historically favored over women’s equality in a way that arguably constituted impermissible governmental discrimination against women.

“congruent and proportional” to the harm it seeks to remedy.¹⁷² The perpetuation of gender role stereotypes could be considered “congruent and proportional” to the harm that pornography causes women.

In *Hibbs*, the Court upheld the Family and Medical Leave Act (FMLA), which “aims to protect the right to be free from gender-based discrimination in the workplace,” by allowing both mothers and fathers a right to take job-protected leave to care for new children or ill family members.¹⁷³ In doing so, the Court noted “the FMLA attacks the formerly state-sanctioned stereotype that [women have a particular gender-specific role that influences employment performance], thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”¹⁷⁴ It also explained, in language that may be favorable to remedial anti-pornography legislation:

Stereotypes about women’s . . . roles are reinforced by parallel stereotypes presuming a lack of [those roles] for men. . . . These mutually reinforcing stereotypes created a self-fulfilling *cycle of discrimination that forced women to continue to assume th[os]e role[s]* . . . and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination¹⁷⁵

The Court found that “Congress was justified in enacting the FMLA as remedial legislation”¹⁷⁶ applicable to both public and private employers, by noting the role of state governments in contributing to the gender-based discrimination¹⁷⁷ and reasoning that the FMLA was “narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship.”¹⁷⁸ The Court stated that FMLA was needed because Congress had already tried unsuccessfully to address the problem through Title VII and the Pregnancy Discrimination Act.¹⁷⁹ In short, the FMLA was “congruent and proportional” to the harm sought to be remedied, which satisfied the test for “distinguish[ing] appropriate

¹⁷² See *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). See also *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

¹⁷³ *Hibbs*, 538 U.S. at 728.

¹⁷⁴ *Id.* at 737.

¹⁷⁵ *Id.* at 736 (emphasis added).

¹⁷⁶ *Id.* at 734.

¹⁷⁷ *Id.* at 729–30.

¹⁷⁸ *Id.* at 738.

¹⁷⁹ *Id.* at 737.

prophylactic legislation from [an impermissible] 'substantive redefinition of the Fourteenth Amendment [equal protection] right at issue.'"¹⁸⁰

As *Hibbs* instructs, in determining how far legislation may go in infringing upon one group's rights, a court may look at previous efforts to achieve the legislation's goal.¹⁸¹ In considering this potential inquiry, it is interesting to note that the *Hudnut* court was reluctant to set precedent by allowing the feminist statute to stand because "every politically weak group might seek such protection."¹⁸² The fact that a group constituting half of the population and unified by biology was deemed "politically weak"¹⁸³ by a federal court as recently as the 1980s, and yet remains "weak" twenty-plus years after the *Hudnut* court struck down legislation designed to help eliminate this weakness, is strong evidence that increasingly aggressive, remedial legislation is necessary. Despite the post-*Hudnut* enactment of the prophylactic FMLA, gender discrimination in the workplace and elsewhere persists. Therefore, because Title VII, the PDA, FMLA, and other similar state laws failed to achieve their goals, with respect to remedying and eliminating gender inequality in the workplace, Congress is justified in enacting increasingly aggressive legislation to further gender equality in the workplace.

Because we are focused on furthering gender equality, not only in the workplace but beyond, and because our government has historically contributed to the discrimination against women that occurs both inside and outside the workplace, Congress has the authority to enact aggressive, remedial legislation that seeks to promote gender equality in our society.¹⁸⁴ Restrictions on pornography that extend outside of the workplace are warranted and are "congruent and proportional" to the historical gender discrimination by both state and federal governments. Moreover, the courts'

¹⁸⁰ *Id.* at 728.

¹⁸¹ *Id.* at 737.

¹⁸² Karo & McBrien, *supra* note 18, at 190 (discussing *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985)).

¹⁸³ *Id.*

¹⁸⁴ Although the supporters of the Indianapolis anti-pornography ordinance asserted that pornography was harmful to all women, they did not cite to the broad types of harm to women that result from pornography, such as employment discrimination, and general societal inequality. See *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984). The harms to which these supporters cited, which the court found did not justify infringing on First Amendment speech rights—were limited to: (1) harms affecting women directly involved in pornography; (2) harms to women and children violently abused in conjunction with production and viewing of pornography; and (3) the negative impact upon the viewers of pornography. *Id.* Thus, the court did not directly consider the harm pornography causes *all women* in the broader context of daily life (regardless of the extent of involvement in or removal from the pornography industry), including but not limited to the employment arena. *Id.*

earlier decisions regarding pornography are examples of governmental discrimination against women.¹⁸⁵

1. The First Amendment As a Tool of Governmental Discrimination

The First Amendment is fundamental to freedom, yet because its domain is so vague and analysis of it so subjective, it has arguably become a conduit for discrimination. Setting aside the many other historical instances of the government's discrimination against women, the federal government's enforcement of the First Amendment is itself sufficient historical discrimination to make prophylactic legislation warranted.¹⁸⁶ As with hiring and firing decisions made by employers, judicial decisions premised on upholding gender role stereotypes impede women's ability to experience true equality,¹⁸⁷ including women's progress in the employment context.¹⁸⁸ By acknowledging the harm pornography does to women by perpetuating gender role stereotypes,¹⁸⁹ while failing to appropriately account for this harm in its balancing of interests,¹⁹⁰ the courts' interference with state legislative efforts to curb pornography and the federal

¹⁸⁵ See *supra* note 184 (regarding applicability of Section 5 only to remediation of discrimination by *state* governments).

¹⁸⁶ Although Section 5 of the Fourteenth Amendment specifically provides authority for Congress to enact prophylactic legislation to remedy historical discrimination by the *states*—despite their Eleventh Amendment sovereign immunity—underlying rationale supports the idea that Congress is warranted in enacting legislation to remedy historical discrimination by the *federal* government in light of evolving views as to what constitutes gender discrimination in violation of the Constitution as interpreted by the federal courts and their evolving interpretations of constitutional rights. Catharine MacKinnon argued:

[P]ornography turns gendered and sexualized inequality into “speech,” which has made it a right. Thus does pornography, cloaked as the essence of nature and the index of freedom, turn the inequality between women and men into those twin icons of male supremacy, sex, and speech, and a practice of sex discrimination into a legal entitlement.

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 3 (1987). See also Barnes, *supra* note 20, at 123 (“By affirming the Seventh Circuit’s decision [in *Hudnut*] without opinion, the Supreme Court implied that society’s concern for preventing harm against women is less important than pornographers’ rights to imbue society with sexual violence.”).

¹⁸⁷ See, e.g., McGovern, *supra* note 18, at 466 (“[In *Hudnut*, b]oth [the Seventh Circuit and the Supreme Court], under a justification of upholding First Amendment freedoms, protect the power of men over women.”).

¹⁸⁸ See, e.g., Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 731 n.5, 732 (2003) (“[Government discrimination based on stereotypes about women’s roles] has historically produced discrimination in the hiring and promotion of women.”).

¹⁸⁹ See *supra* Part I.A.

¹⁹⁰ See *supra* Part I.B.

courts' implicit support of the very pornography it acknowledged as leading to discrimination against women in employment, is a basis for enacting remedial legislation that permissibly infringes on the First Amendment rights of pornographers and their audiences.¹⁹¹ There is no reason to believe that our male-dominated government, including the judiciary, is any less interested in pornography and its accompanying subordination of women than the rest of our male-dominated society.¹⁹² Scholars have long recognized that in its decisions related to pornography, our court system has "used the [F]irst [A]mendment to protect male supremacy."¹⁹³ With *Hibbs*, the Supreme Court has reaffirmed its position that gender role stereotypes are an impermissible basis for governmental decisions surrounding legislation.¹⁹⁴ The idea that women are voluntarily cast by men's

¹⁹¹ See, e.g., McGovern, *supra* note 18, at 453; *id.* at 466–67 ("The Seventh Circuit's opinion in *American Booksellers Association v. Hudnut* . . . is . . . offensive to American society as a whole because it does nothing to remedy the evils that perpetuate the inequality and subordination of women. . . . [T]he Seventh Circuit, by cloaking itself in the guise of First Amendment principles, denies women the fruits of the just law. In addition, these First Amendment principles have been viewed as denying women equality under the law.").

¹⁹² One articulation of the motive behind male-created law that leaves women disadvantaged is that "[a]ny change in the respective roles of the sexes which militates against such masculine domination . . . may stir uneasiness in the heart of one amply rewarded by, and comfortable with, the political status quo." John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 743 (1971).

¹⁹³ Seator, *supra* note 15, at 356–57 ("The method the courts used in *Hudnut* was the method employed in *Plessy* to protect the system of white supremacy. The result in *Hudnut*, however, is closer to the result in *Dred Scott v. Sandford*: the protection of a system of trafficking in human beings."); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 213 (1989) ("[T]he courts were confronted with the real damage pornography does to women's status and treatment The courts accepted the harm but held the pornography more important than those it harms—hence protected it as speech."). See also Karst, *supra* note 33, at 474 n.108 (discussing freedom of the press as a constitutional value that objectifies women) ("[T]o the extent that it protects portrayals of women as sexual objects, current first amendment doctrine obstructs the modification of the social construct of woman."); Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J.L. & HUMAN. 227, 248–49 (2009) (noting the Court's greater protection for sexual speech in which women are silent and objectified, like in pornography, as opposed to its lesser protection for very similar sexual speech in which women are subjective actors able to speak, act, and confront, as in nude dancing). These decisions have been analogized to early race-related decisions that we now recognize as flawed and unjust. See Schroeder, *supra* note 7, at 160 (analogizing pornography to apartheid and arguing that it is therefore subject to restrictive legislation).

¹⁹⁴ *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (reaffirming *United States v. Virginia*, 518 U.S. 515 (1996)) ("[State governments] continue to rely on invalid gender stereotypes in the employment context. . . . Reliance on such stereotypes cannot justify the States' gender discrimination in this area."). See also *Califano v. Webster*, 430 U.S. 313, 317 (1977) (acknowledging the impermissibility of government action based on gender role stereotypes). Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing use of sex stereotypes as evidence of impermissible gender discrimination in the workplace, violating Title VII).

speech as submissive beings whose role is to satisfy men's desires regarding sex and power, while men are the dominant power holders with control over women, is a mutually reinforcing stereotype and, therefore, may not properly serve as the basis for a judicial decision in striking down legislative efforts to curb the gender-specific harms of pornography, found by it to be unacceptable as a matter of policy.

In the 1980s, when previous anti-pornography legislation was struck down, the judiciary was even more predominantly male.¹⁹⁵ When decided by the district court and the Seventh Circuit, the balancing of free speech rights versus women's equality rights was left with a few judges, whose perspective and ideology was formed under the influence of pornography in a male-dominated world. These judges—who were predominantly men, with the exception of the female district court judge who was acting in the male-dominated judiciary—chose to ignore the Fourteenth Amendment's Equal Protection Clause.¹⁹⁶ Nothing in law required the balancing of rights to be decided as it was. Rather, this was a policy determination made by a male-dominated group who may have had a biased perspective and thus overvalued free speech rights in their analysis of the legislation. As such, this determination was an abuse of the First Amendment to promote self-interest, perpetuating harm to women and their right to equality.¹⁹⁷

It is easy to cite to the First Amendment as a purported justification for harm, because the beliefs, values, and perspectives of the individual decision-makers necessarily influence such a subjective determination. Opposing a declaration of First Amendment protection makes one seem *anti-American*, as we generally regard our free speech rights as paramount. When viewed in a larger context, the repeated decisions of the judiciary to selectively protect pornography are inconsistent with its treatment of other types of remarkably similar speech (e.g., obscenity, child pornography, and speech constituting workplace discrimination under Title VII) and stand out as disparately impacting women—in ways that are acknowledged by the judiciary to be harmful to women and their rights to

¹⁹⁵ See Beverly B. Cook, *Woman Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573, 582 (1984).

¹⁹⁶ See *Comparative Perspective*, *supra* note 6, at 1083.

¹⁹⁷ Schroeder, *supra* note 7, at 126 n.6 (“[Pornography is] the most damaging form of discrimination against women is not only lawful, it is legally protected.”); see also, Daum, *supra* note 5, at 559 (“Those interested in maintaining the patriarchal system utilize a variety of tools, including pornography, to control women's sexuality and continue the current mal-distribution of power between men and women.”).

liberty—without a sound rationale.¹⁹⁸ In light of the fact that history has revealed the instinct in our society that there is something legally objectionable and impermissible about pornography, the fact that our government is and always has been predominantly male, and that even the most well-crafted and academic anti-pornography legislation has been repeatedly shot down, it is hard not to conclude that the fox is guarding the hen-house.¹⁹⁹ The irony with pornography is that its very existence may be a component of what enables the fox to remain as guard over the hen-house.²⁰⁰ Were pornography eliminated for some period of time, we may find that the hens will become increasingly better able to guard their own house, and may actively choose to do so. In short, there is no reason to believe that the fox will deal fairly with the hens when the result would be the elimination of the fox's job and attendant power.²⁰¹

2. Implications of *R.A.V. v. City of St. Paul*

In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a local ordinance that prohibited hateful, racist speech in any form.²⁰² In striking

¹⁹⁸ Although a detailed explanation of the underlying rationale is beyond the scope of this paper, a strong argument can be made that these judicial decisions constitute a deprivation of women's liberty in violation of the Fifth Amendment, as well as a violation of women's equal protection rights.

¹⁹⁹ See PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS DAMAGING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* 34 (2005) ("Pornography is a kind of male utopia that men are keen to protect.").

²⁰⁰ See Karst, *supra* note 33, at 463 ("The traditional social construct of woman promotes the dependence of women on men, because femininity in its classical form is fundamentally at odds with a woman's recognition as a complete and independent human being."); Barnes, *supra* note 20, at 121–22 ("[Many feminists believe that] community values incorporate sex discrimination and are part of the problem [that permits the existence of widely objectionable pornography.]").

²⁰¹ John F. Wirenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment*, 20 FORDHAM URB. L.J. 27, 60–61 (1992) (arguing against anti-pornography legislation) ("[The rationales underlying the First Amendment] seem to have as their unifying theme the need for a democratic-republican state to presume the ability of its citizens to make rational choices."). To the extent that it is rational for the males in power to oppress, demean, and subjugate those lacking power (women), Mr. Wirenius is correct. To the extent that Mr. Wirenius's argument fails to acknowledge that pornography results in harm to women's equality in the workplace—a harm which Congress has the power to regulate, even at the cost of infringing on others' constitutional rights—his argument fails. It is not surprising that Mr. Wirenius would fail to appreciate these harms, as Mr. Wirenius himself has noted, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.* at 76 (Brandeis, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1927)).

²⁰² Specifically, the Court held unconstitutional a city ordinance that made it criminal to place on public or private property any symbol or graffiti "which one knows or has reasonable

it down, the Court reasoned that, even though fighting words were proscribable, the legislation was unconstitutional because it was both content discriminatory and viewpoint discriminatory.²⁰³ In his concurring opinion, Justice White argued that the ordinance would survive strict scrutiny, even if it were content discriminatory, because it was a narrowly tailored means to achieve a compelling governmental interest.

At first glance, it might appear that the holding in *R.A.V.* makes clear that a pornography ban based on its harm to women would be deemed unconstitutional even if it were designed to remedy historical gender discrimination. However, unlike the legislation struck down in *R.A.V.*, the ban on pornography proposed herein would be: (1) for a limited period of time; and (2) limited to visual, photographic imagery such that ideas currently conveyed through pornographic visual images could still be conveyed through literature, hand-drawn or painted images, live performances, or in audio form.²⁰⁴ Furthermore, as suggested by the *R.A.V.* court, the proposed pornography ban is designed to be somewhat broader with respect to content than the law in *R.A.V.*, such that it is less susceptible to being struck down as impermissible viewpoint discrimination.²⁰⁵ Thus, it is not clear that *R.A.V.* creates a complete barrier to the type of legislation proposed by this Article.²⁰⁶ Furthermore, as *R.A.V.* was decided almost twenty years ago and, like *Hudnut*, involved a balancing of interests necessarily influenced by personal values and ideology, it is not certain that the balancing of interests by the Court today would be the same as it was twenty years ago. This is particularly true given that persisting Congressional efforts to remedy historical gender discrimination in the

grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992).

²⁰³ *Id.* at 393.

²⁰⁴ In *R.A.V.*, the Court underscored that the rationale for categorically excluding fighting words from First Amendment protection is because of the *way* they are used by a speaker to express an idea, not because of the idea itself. See Neville, *supra* note 12, at 123. A temporary ban on pornography that only limited pornography in the form of visual, photographic images—but did not restrict the messages of pornography from being expressed in other media, such as through the written or spoken word—would seem to find support in the rationale for prohibiting fighting words: the restriction would not be on the idea itself but on the particularly harmful way in which the speaker attempted to convey that idea.

²⁰⁵ Furthermore, a compelling argument can be made that pornography as a category of speech—or at least the vast majority of it—has even less value than the fighting words at issue in *R.A.V.*

²⁰⁶ See, e.g., Kagan, *supra* note 4, at 874 ("[The *R.A.V.*] decision leaves open alternative means of regulating some pornography and hate speech, or of alleviating the harms that such speech causes.").

workplace have fallen short, such that more aggressive legislation may be deemed warranted.

B. LEVEL OF SCRUTINY

In determining whether the proposed ban would withstand a constitutional challenge, one must first determine the appropriate level of review. While restrictions on speech typically receive strict scrutiny review, a strong argument exists that pornography is low value speech,²⁰⁷ and its regulation would be subject to a lower level of review, particularly since this temporary ban is for remedial purposes.²⁰⁸ The proposed ban, however, is designed to survive constitutional challenge, whether under intermediate level review or strict scrutiny.

1. Intermediate Level Review

The Supreme Court often upheld restrictions on speech that are deemed “time, place, and manner” restrictions. These restrictions are acceptable so long as they: (1) are justified without reference to the content of the regulated speech; (2) serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information contained in and conveyed by the restricted speech.²⁰⁹ Although the ban proposed in this Article would serve a significant governmental interest, it would leave open ample alternative channels of communication, and would be designed to be as viewpoint-neutral as possible with regard to its restrictions on content, it is unlikely that it would be deemed sufficiently content-neutral to warrant constitutional review as a time,

²⁰⁷ See *Words, Conduct, Caste*, *supra* note 5, at 803 (“[The] law distinguishes between low-value and high-value speech . . . [M]uch pornography stands far afield of those ideals and is regulable because of the tangible harms that it causes.”); *Pornography and the First Amendment*, *supra* note 8, at 602–08, 621–22; John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, at 325–27 (2009).

²⁰⁸ See *Words, Conduct, Caste*, *supra* note 5, at 813 (“Indeed, the argument for regulation [of pornography]—in view of the nature of the material and the evidence of harm—seems more powerful than the corresponding argument for many forms of speech now subject to government control.”).

²⁰⁹ See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Grayned v. Rockford*, 408 U.S. 104, 107–08 (1972); *Clark v. Comty for Creative Non-Violence*, 468 U.S. 288 (1984); *Madsen v. Women’s Health Ctr.*, 512 U.S. 753 (1994); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997); *Hill v. Colorado*, 530 U.S. 703 (2000). See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1090–92 (2d ed. 2002).

place, and manner restriction. However, if it did, it would receive an intermediate level of review.

It would also receive intermediate level review if it were a restriction designed to avoid harmful or undesirable "secondary effects."²¹⁰ This is true even if the ban were deemed content-discriminatory.²¹¹

In *Paris Adult Theatre I v. Slaton*, which involved a restriction on hardcore pornography, the Court stated:

We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. . . . [W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.²¹²

The Court went on to identify some state interests that warranted the state's prohibition against use of property for the commercial display of obscene materials (i.e., hardcore pornography). These included "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety."²¹³ If these interests were sufficient to restrict some category of pornography, certainly the equality rights of fifty percent of the population constitute a sufficient state interest to warrant a *limited* restriction on pornography.

In reaching its holding, the Court noted an "arguable correlation between obscene material and crime."²¹⁴ Certainly, then, it would be no great stretch to imagine a correlation between pornography and harm to women's dignity and equality, both inside and outside of the workplace. Because the proposed regulation is designed to remedy historical gender discrimination by the government, the author argues that intermediate level review, rather than the typical strict scrutiny review associated with restrictions on speech, is warranted because gender is a protected status under the Constitution. Congress has the authority to exercise its powers under Section 5 of the Fourteenth Amendment to enforce the guarantees of

²¹⁰ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). See Fee, *supra* note 207, at 324, for a discussion of the "secondary effects doctrine" and its unique applicability to pornography (and other sexually oriented, "adult" speech).

²¹¹ *Alameda Books, Inc.*, 535 U.S. 425.

²¹² *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973).

²¹³ *Id.* at 49, 58.

²¹⁴ *Id.* at 58.

equality even when that exercise of power might infringe upon others' rights, such as First Amendment rights.

2. Strict Scrutiny

Even under strict scrutiny, the proposed ban could be deemed constitutional. The state has a compelling interest in fostering women's equality and preserving their dignity.²¹⁵ Because previous legislative efforts to attack gender discrimination in employment have failed to achieve that goal, it has become increasingly clear that it is necessary²¹⁶ to enact more aggressive legislation that targets the source of the objectionable discriminatory conduct. As the Court has held, pornography is one cause of gender-based employment discrimination.²¹⁷ The determination of the constitutionality of a restriction on pornography under strict scrutiny review is a balancing of interests, and the deciding factor is one of individual discretion. As such, there is reason to think that attitudes, values, and perspectives on the importance of these competing rights has changed since restriction on pornography was last reviewed in the 1980s.²¹⁸ Particularly in the context of the restriction having been enacted for remedial purposes of addressing the effects of historical gender discrimination after previous, less-aggressive legislative efforts have fallen short, the proposed ban should withstand strict scrutiny review.

²¹⁵ See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (recognizing sex equality as a compelling state interest sufficient to require integration of a private all-male organization; that the systematic subordination of women is harmful sex discrimination).

²¹⁶ "[T]he eradication of discriminatory messages is often both a necessary means and effect of eliminating discrimination. . . . [R]ights to free expression must sometimes be sacrificed in order to vindicate rights to equality." *Comparative Perspective*, *supra* note 6, at 1084.

To the extent that it may be argued that the proposed ban is impermissible because it is underinclusive in that pornography is not the only cause of inequality of women and discrimination against them, it is important to remember that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (citing *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160 (1912)). See also *Searles*, *supra* note 124, at 480 ("Pornography is neither the only nor even the central cause of women's oppression or sex discrimination.").

²¹⁷ *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) ("[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work."), *aff'd*, 475 U.S. 1001 (1986).

²¹⁸ See *Dinolfo*, *supra* note 6, at n.91 (discussing the futility of strict scrutiny review of speech restrictions where the court must determine there is a sufficiently "compelling interest" at stake); *Content Regulation*, *supra* note 46.

C. VAGUENESS AND CHILLED SPEECH

One constitutional barrier to previous anti-pornography legislative efforts was vagueness of the legislation, which leads to a fear that it will chill speech in an excessive and unacceptable way. The proposed ban is designed to be sufficiently clear as to what is prohibited that it would not be stricken down on grounds of vagueness. Because the ban would restrict all sexual images, it would be less vague than previous anti-pornography ordinances.²¹⁹ While there is always an argument that these determinations are too subjective and risk chilling free speech, the proposal's willingness to ban anything questionable, even for example, fully clothed *FHM* models, renders the ban sufficiently clear that there is no genuine danger of uncertainty.²²⁰ Its clarity gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited."²²¹ The message of pornography, whatever one contends that to be, would not be prohibited, as the proposed ban would apply only to visual, photographic images and would place no limitations on literature, hand-drawn or painted images, live performances, or spoken/audio communications.²²² To the extent that the ordinance is found by some to be vague, thus chilling visual pornographic speech, the harm resulting from this limited chilling of speech for a temporary duration would be less harm than that suffered by all women. Since the ban is temporary and allows for continued expression of questionable messages in written, hand-drawn or painted, live performance based, or verbal form, the inevitable fuzziness of defining what is banned is permissible under a balancing of constitutional rights, as women should be freer than speech.

²¹⁹ The court that struck down the Indianapolis ordinance found that the terms used to identify the types of images prohibited ("subordination," "degradation," "abasement," and "inferior," in particular) were vague, thus rendering the ordinance unconstitutional. *Am. Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1338-39 (S.D. Ind. 1984). *Cf. Hudnut*, 771 F.2d 323, *aff'd*, 475 U.S. 1001 (suggesting that a restriction on all sexually explicit speech would be less susceptible to being struck down).

²²⁰ *Cf. Regina v. Butler*, [1992] 1 S.C.R. 452 (Can.) (citations omitted) ("[O]ur court [has] recognized that it is legitimate to take into account the fact that earlier laws and proposed alternatives were thought to be less effective than the legislation that is presently being challenged. The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail. It seems that the only practicable alternative is to strive towards a more abstract definition.").

²²¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²²² This addresses one of the primary concerns raised when efforts are made to restrict pornography on the grounds of its harm to women. *See, e.g., Brest & Vandenberg, supra* note 14, at 639 (discussing "slippery slope" and "vagueness" concerns that proposed anti-pornography legislation would be construed to prohibit things such as lesbian literature).

D. PRIOR RESTRAINT HURDLE

One of the reasons the legislation in *Hudnut* was struck down was that it constituted a prior restraint in violation of the First Amendment.²²³ Under the proposed ban, there is no concern about prior restraints. Current First Amendment doctrine allows the sale of hardcore pornography to be completely prohibited without prior restraints posing any barrier to that restriction.²²⁴ The proposed temporary ban is far less restrictive, though the justification for the restriction is the same. In fact, the proposed temporary ban is arguably less controversial as it involves a state interest more justifiable than simple moral paternalism, as was the justification in *Alexander v. United States*. Moreover, the absence of a “prior restraint barrier” should be deemed no different with respect to this proposed restriction.

To further the goal of women’s equality, speakers should have to err on the side of not oppressing women, particularly when the speech at issue is explicitly sexual in nature.²²⁵ In other words, it should be a policy that if a speaker is forced to choose between erring on the side of oppressing too much speech, or erring on the side of physically, mentally, socially, and financially injuring an entire half of the population, the choice should not be difficult.²²⁶ Difficulty in defining which sexual speech directly causes the most harm is insufficient justification for permitting the harms of pornography to thrive unfettered. This is particularly true where there are other available forms of media for communicating the speaker’s message.

To the extent that the proposed ban would raise “prior restraint concerns” about chilling speech, it would be reasonable for violators of the ban to be punished with smaller penalties, perhaps small fines for first-time offenses and increasingly harsh penalties thereafter.

²²³ *Hudnut*, 598 F. Supp. at 1340–41, *aff’d*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

²²⁴ See, e.g., *Alexander v. United States*, 509 U.S. 544, 549–55 (1993); *Paris Adult Theatres I v. Slaton*, 413 U.S. 49, 49 (1973).

²²⁵ See DANIEL A. FARBER, *THE FIRST AMENDMENT* 136 (2d ed. 2003) (noting about the rationale employed in *Alexander*) (“[O]bscenity is clearly being treated as less protected than other forms of unprotected speech such as libel. Perhaps the assumption [was] that the rest of the defendant’s materials were either obscene, or nearly obscene, and that *borderline materials have such a low social value that we should not worry if they are swept up in the net following a successful obscenity prosecution*. In short, the Court apparently sees more value in the work of even the most scurrilous journalist than in adult entertainment.” (emphasis added)).

²²⁶ See, e.g., Greenfield, *supra* note 7, at 1218 (“[T]he Free Speech Clause [should] . . . hold as its core value the importance of the development of individual human capacity and of individual self-definition.”).

E. FIRST AMENDMENT PRESERVATION

There is an extensive body of existing case law addressing restrictions on other types of sexual activities and speech with regard to First Amendment protection. The First Amendment guarantee of protection of “speech against abridgment by government” recognizes exceptions.²²⁷ It is also, at times outweighed by other interests.²²⁸ The most common reason for restrictions on speech to outweigh other interests surrounding the speech is harm: “the harm done by some speech outweighs its expressive value, if any.”²²⁹ The proposed ban is within the rationale and spirit of the First Amendment as laid out in the larger body of cases addressing both exceptions to the general rule of First Amendment protection for speech and other sex-related speech and conduct.

1. Nude Dancing

It has been held that totally nude dancing may be banned without violating the First Amendment.²³⁰ Justifications for this have included morality,²³¹ as well as secondary effects of nude dancing, such as violence, public intoxication, and prostitution.²³² Although this author does not assert morality as a basis for the proposed temporary ban, the secondary effects of pornography—discrimination, prostitution,²³³ and violence, are sufficiently worrisome that the proposed ban, which is far less restrictive than the bans on nude dancing that have been upheld, should also be upheld. Given the marginal value of the vast majority of pornography, un-

²²⁷ See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 986–1123 (3d ed. 2006).

²²⁸ See Pacillo, *supra* note 18 (discussing various cases in which harm was caused by “speech,” interests were found to outweigh free speech rights, and civil liberty was imposed on those asserting First Amendment defenses).

²²⁹ See Catharine A. MacKinnon, *On Collaboration, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW*, at 192 (1987).

²³⁰ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 277 (2000) (upholding a city ordinance requiring nude dancers to wear pasties and G-strings while performing).

²³¹ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991).

²³² See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 278 (2000).

²³³ Cf. Kagan, *supra* note 4, at 887 (discussing enforcement of laws against prostitution as a means of curbing pornography) (“[A]n Arizona court upheld, against First Amendment challenge, the use of prostitution and pandering statutes against a woman who managed and performed in a sex show. The court reasoned, consistent with established First Amendment doctrine, that the prosecutions were permissible because even if the show had expressive content, the state had acted under statutes directed at conduct in order to further interests unrelated to the suppression of expression.”).

der the secondary effects doctrine and the rationale of *Barnes v. Glen Theatre, Inc.*²³⁴ and *City of Erie v. Pap's A.M.*,²³⁵ a balancing of interests should render the temporary and limited ban on pornography proposed herein sufficiently justified to withstand a First Amendment challenge. This is particularly true in light of the acknowledged difficulty in distinguishing between nude dancing and pornography for purposes of First Amendment protection analysis.²³⁶

2. Prostitution

Pornography should be restricted for the same reasons that prostitution is restricted virtually everywhere in the United States. In fact, anti-prostitution statutes have been repeatedly interpreted in the lower courts, once by a female judge,²³⁷ as prohibiting the production of commercial pornography, as it falls within the definition of prostitution: that is, engaging in sex in exchange for money.²³⁸ On appeal, many of these cases were overturned, perhaps not surprisingly, by male judges.²³⁹

The difference between prostitution and pornography is that prostitution can lead to physical harm to men, such as the transmission of sexual diseases, whereas pornography's harms are more limited to women.

As scholars have noted before, "in reality the production of hardcore pornography often involves something akin to prostitution."²⁴⁰ An important difference between pornography and prostitution that makes the former more appropriately subject to regulation is that pornography harms *all* women in a way that prostitution does not. Prostitution is limited to those particular individuals involved in the transaction. In fact, because all men who encounter prostitution are forced to confront a live woman who is, at least to a much greater extent than the women in pornography, able to speak for herself, prostitution is less harmful to women than pornography.

²³⁴ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

²³⁵ *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

²³⁶ See Adler, *supra* note 193, at 228–31.

²³⁷ See *State v. Theriault*, 960 A.2d 687, 688 (2008) (authored by Justice James Duggan, overturning the decision by Justice Carol Ann Conboy).

²³⁸ See *People v. Fixler*, 128 Cal. Rptr. 363 (Cal. Dis. Ct. App. 1976) (authored by Associate Justice and former war veteran Lynn "Buck" Compton).

²³⁹ See, e.g., *id.*

²⁴⁰ Weinstein, *supra* note 57, at 870 n.21. See also Kagan, *supra* note 4, at 891 ("[T]he Constitution may well permit direct regulation of speech, if phrased in a viewpoint-neutral manner, when the regulation responds to a non-speech related interest in controlling conduct involved in the materials' manufacture.").

3. Commercial Speech

Commercial speech receives less constitutional protection than other types of speech. While it may not be entirely prohibited, it may be restricted in ways that would be deemed unconstitutional for other types of speech. For example, the Supreme Court has demonstrated “blindness to viewpoint discrimination . . . in the area of commercial speech.”²⁴¹ Additionally, the Court has held that over-breadth is not a basis for challenging or striking down regulations of commercial speech.²⁴² The rationale for providing commercial speech with decreased protection is equally applicable to pornography, which can be fairly analogized to and categorized with commercial speech.²⁴³ Pornography can be immensely profitable. Thus, for all practical purposes, pornography generally proposes a commercial transaction and is commercial speech.²⁴⁴

Commercial speech, such as advertisements, can be prohibited without violating the Constitution if the advertisement provides false information, and does not contribute to the “marketplace of ideas,” because the importance of providing consumers with accurate information outweighs free speech rights.²⁴⁵ If the desire to preclude false information is a sufficient basis for restricting speech used merely to make a profit, then the desire to protect women from abuse, degradation, and discrimination should

²⁴¹ Kagan, *supra* note 4, at 876 n.13 (citing *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 330–31 (1986) (upholding a law prohibiting advertising of casino gambling, but leaving, untouched all speech discouraging such gambling)); *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 569–71 (1980) (striking down a broad law prohibiting advertising to stimulate the use of electricity, but suggesting that a more narrowly-tailored law along the same lines would meet constitutional standards, even if the law were to allow all expression discouraging use of electricity).

²⁴² *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 497 (1982) (“[T]he overbreadth doctrine does not apply to commercial speech.”).

²⁴³ See Seator, *supra* note 15, at 357 (“The real marketplace in which pornography exists is not the liberal’s imagined marketplace of ideas. It is an actual marketplace where women and children are trafficked for sexual pleasure and economic profit. The power that the pornographers wield in the marketplace in which pornography exists is not the power of ideas or truth; it is the power of sex and money protected as the power of ‘speech.’ The real marketplace is the one in which the pornographers have had the economic and sexual power to get what they do accepted as speech—to define the regulation of pornography as the regulation of speech.”). See also Weinstein, *supra* note 57, at 877 (“[The] government also routinely regulates a multitude of financial, commercial and professional speech without any First Amendment hindrance.”).

²⁴⁴ Supreme Court defined commercial speech as speech “proposing a commercial transaction.” *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 64 (1983).

²⁴⁵ See, e.g., *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

be recognized as more important than the free speech rights of pornographers.²⁴⁶

4. Obscenity and the SLAP Test

With its 1957 decision in *Roth v. United States*, the Supreme Court carved out the obscenity exception to the First Amendment's broad protection of speech.²⁴⁷ Following that, *Miller v. California* set forth the modern definition of *obscenity*, holding that for a work to be legally obscene it must be offensive by community standards, appeal to prurient interests, and be without serious social, literary, artistic, or political value.²⁴⁸ Subsequent decisions have held that speech similar to obscenity receives less First Amendment protection than other types of speech.²⁴⁹

Scholars have noted that our common sense seems to indicate that pornography and obscenity are not meaningfully distinguishable.²⁵⁰ This author would argue that the harms of pornography are distinguishable from, and are far worse than those of obscenity. For one, because pornography appeals to a much larger percentage of the population, its harms have a much broader, more widely felt effect. Meanwhile, because obscenity, by definition, is revolting to most people, there is not the same danger of influencing a large number of men's conduct.

Numerous scholars find the Supreme Court's obscenity test inadequate for addressing pornography because it fails to account for the harm suffered by women and its utilization of the average person's standards in determining what can be prohibited as obscenity.²⁵¹ Pornography has a

²⁴⁶ When a man "trafficks in pornography, the man is not *simply* saying that [the woman] is subordinate to him as a woman and is the appropriate object of abuse; he abuses and subordinates her." Seator, *supra* note 15, at 319 n.122.

²⁴⁷ *Roth v. United States*, 354 U.S. 476 (1957).

²⁴⁸ *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁴⁹ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976). See also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1028 (5th Cir. 1987) (Jones, J., dissenting) (arguing for lack of First Amendment protection for pornography that is obscene); Wolfson, *supra* note 135, at 1039 ("[T]he Supreme Court has decided that near-obscene speech is less equal than other categories of speech.").

²⁵⁰ See, e.g., Kagan, *supra* note 4, at 893 (explaining her efforts, as a law professor, to separate the topics of obscenity and pornography) ("[Law students] could hardly talk about the one topic separately from the other. In discussing obscenity, they returned repeatedly to the exploitation of women; in discussing pornography, of course, they dwelt on the same.").

²⁵¹ See, e.g., Karo & McBrian, *supra* note 18, at 190–91 ("[M]erely labeling antipornography ordinances as dangerous encroachments on first amendment rights ignores the rights of

role in establishing gender role stereotypes. The average person has grown up in a culture infused with these stereotypes and, as such, he or she is likely to accept them as the norm. Therefore, the average person is likely to fail to recognize the extent of harm pornography inflicts upon all women; instead it is experienced as the norm.²⁵²

Unfortunately, any amount of serious literary, artistic, political, or scientific value ("SLAP value") appears to save pornography from restriction; the *Miller* test seems to value speech rights over women's rights to equality and dignity. However, this author believes that SLAP-valued speech can be expressed by a medium that does not involve photographic pornographic images of women being subordinated and degraded. The current levels of protection are unjustified where those literary, artistic, political, or scientific ideas that are conveyed through visual imagery in pornography can be expressed, even if imperfectly, through another medium.

In short, when it comes to balancing interests, women should be permitted to be freer than speech. In *Ferber*, the Court permitted restrictions to protect children harmed by pornography. A court reviewing this proposed temporary ban on visual pornography herein should abandon the *Miller* safeguards and consider following *Ferber*.²⁵³ The proposed legislation could be enacted by invocation of Congressional Section 5 enforcement powers, just as the recent *Hibbs* decision suggests.

Previous scholars asserted that "[a]ny legal analysis concerning sexually explicit material must distinguish between obscene material that is not speech protected by the first amendment, and pornographic material."²⁵⁴ The temporary ban proposed herein would allow side-stepping of an obscenity analysis²⁵⁵ because a remedial measure authorized by congress-

those harmed by pornography."); Liston, *supra* note 18, at 424-28; *Anti-Pornography Laws*, *supra* note 18, at 465-67; Greenfield, *supra* note 7, at 1200-01.

Scholars have also argued, more generally, that the Supreme Court's definition of obscenity is preposterous and useless. See, e.g., Kathleen M. Sullivan, *The First Amendment Wars*, NEW REPUBLIC, Sept. 28, 1992, at 35, 38.

²⁵² This seems to be particularly true for men. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (noting that although men might react to obscene language and pornography as harmless and innocent, women might react otherwise); see also Horton, *supra* note 6, at 437-38, n.160 (discusses and summarizes this aspect of *Andrews v. City of Philadelphia*).

²⁵³ See *Ferber*, 458 U.S. at 761.

²⁵⁴ Liston, *supra* note 18, at 415.

²⁵⁵ Compare *Words, Conduct, Caste*, *supra* note 5, at 805, 807 (proposing an anti-caste civil remedy for harms caused by pornography) ("The real difference between this approach and the current focus on obscenity lies not in greater breadth of coverage but in its emphasis on dis-

sional enforcement powers under Section 5 of the Fourteenth Amendment may infringe upon free speech rights, including non-obscene pornography. Similarly, because it would allow the message of the visual, photographic pornography that is prohibited to be expressed in other media, the argument that a work needs to be considered as a whole is less compelling.

There is still hope that obscenity doctrine may evolve and that, eventually, pornography and its message of harm to women will become offensive by societal standards, thus making it as regulable as obscenity under *Miller*.²⁵⁶ The ban proposed herein is the type of measure that would make this more likely.²⁵⁷ However, even under the rationale of *Miller*, the proposed ban would be upheld because pornography harms *all* women, including the vast majority of women who choose not to participate in its production and its consumption. In *Miller*, the Supreme Court held that the state has a legitimate interest in regulating obscenity when it poses a danger of offending unwilling recipients, even in the form of psychological harm.²⁵⁸ If psychological offense is a sufficient basis for restricting offensive speech, then actual financial and, sometimes, physical harm, in addi-

crimination and harm to women rather than offense or contemporary community standards.”) with Carr, *supra* note 6, at 1302–03 (arguing that any successful feminist-proposed antipornography law would have to somehow account for the *Miller* obscenity test).

²⁵⁶ Kagan, *supra* note 4, at 895 (“[O]ne of the great (if paradoxical) achievements of the anti-pornography movement has been to alter views on obscenity—to transform obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women [Hopefully, a]s prosecutors, juries and judges increasingly adopt this new view of obscenity, enforcement practices and judicial verdicts naturally will come to resemble, although not to replicate, those that would obtain under an anti-pornography statute.”); *Neutrality in Constitutional Law*, *supra* note 62, at 29 (“[W]e could imagine a society in which the harms produced by pornography were so widely acknowledged and so generally condemned that an anti-pornography ordinance would not be regarded as viewpoint-based at all.”); Wolfson, *supra* note 135, at 1043 (“Today, due to the sexual revolution and the changing roles and status of women, gays and lesbians, the codes have changed radically and are in constant flux.”) Nicholas Wolfson has also observed:

In American constitutional law, pornography, whatever it is, is not identical to obscenity. Obscenity is a legal term. It is the depiction of sexual conduct that appeals to the prurient interest, is patently offensive, and lacks serious value. Crudely put, it is repulsive sex that lacks value. The harm in obscenity is the damage it does to the traditional ordered moral fabric of society. What is moral or repulsive and what is of value are notoriously subjective and murky concepts. Obscene speech is not protected by the First Amendment.

Id. at 1038. See also Neville, *supra* note 12, at 126 (“As community standards evolve, more pornography will become ‘obscene’”)

²⁵⁷ The purpose of the proposed legislation would be to re-set gender relations such that women may be viewed as equal to men. If and when women are viewed as equal to men, the type of pornography that flourishes today would likely be deemed offensive and unacceptable by future community standards.

²⁵⁸ *Miller v. California*, 413 U.S. 15, 18–19 (1973).

tion to psychological harm, should be sufficient justification for restricting pornography.²⁵⁹ Under this rationale, the proposed ban would survive constitutional challenge even if one accepts that strict scrutiny or intermediate level review is warranted for a remedial restriction on pornography, because of its unique and vastly disparate harmful impact upon women.²⁶⁰

5. A Totality of the Circumstances Approach

Pornography currently fails to fit into any existing restriction to the First Amendment. Yet, unlike other types of speech, many different groups have made different arguments supporting its restriction.²⁶¹ Apparently, there is something about pornography that our collective societal intuition finds objectionable and harmful.

More importantly, pornography is unique because it so closely approaches many prohibitible categories of speech: it is virtually indistinguishable from obscenity as defined by the Supreme Court and it is arguably threatening hate speech. The fact that its characteristics make it come so close to fitting the existing exceptions to First Amendment protection suggests that it is the type of speech deserving of its own exception supported by analogous reasoning.

Not surprisingly, those most likely to be harmed by pornography are those least likely to have decision-making power about eliminating it. Pornography has remained protected for as long as it has largely because it serves the interests of men and has been protected by the male-dominated judiciary. As Judge Edith Jones of the Fifth Circuit Court of Appeals observed in her concurrence and dissent²⁶² in *Herceg v. Hustler Magazine, Inc.*:

²⁵⁹ See *Words, Conduct, Caste*, *supra* note 5, at 807, 809, 811.

²⁶⁰ *Id.* at 809 ("Pornographic material causes sufficient harms to justify regulation . . . [T]he harms do create a far stronger case for regulation than underlies the antiobscenity position, which relies on less tangible aesthetic goals and on the more vague idea of adherence to conventional moral standards."). Cf. Stellings, *supra* note 9, at 202 ("Men not only are more politically and socially powerful than women, but because of their dominance, they are not always required to justify their use of power. In fact, to overlook the extent to which our institutions permit violence against women in practice and refuse to hold men accountable would be to miss the peculiar quality of violence against women. It is this complex interplay in which violence against women is normalized, not randomized, and made personal, not foreign, that makes this violence its own distinct and peculiar system of power.").

²⁶¹ See Brest & Vandenberg, *supra* note 14, at 632–33 (discussing how legislative efforts to curb pornography, which included both feminists and conservative religious leaders, makes strange bedfellows).

²⁶² *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1025 (5th Cir. 1987) (Jones, J., concurring and dissenting).

What disturbs me to the point of despair is the majority's broad reasoning which appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by imposing civil liability for harms it directly causes. Consonant with the First Amendment, the state can protect its citizens against the moral evil of obscenity, the threat of civil disorder or injury posed by lawless mobs and fighting words, and the damage to reputation from libel or defamation, to say nothing of the myriad dangers lurking in "commercial speech." Why cannot the state then fashion a remedy to protect its [citizens] when they are endangered by [the harms of] pornography? To deny this possibility, I believe, is to degrade the free market of ideas to a level with the black market for heroin.

....

I believe the majority has critically erred in its analysis of this case under existing First Amendment law. The majority decided at the outset that Hustler's [pornographic article at issue] does not embody child pornography, fighting words, incitement to lawless conduct, libel, defamation or fraud or obscenity, all of which categories of speech are entirely unprotected by the First Amendment. Nor do they find in the article "an effort to achieve a commercial result," which would afford it modified First Amendment protection. *Comforted by the inapplicability of these labels, they then accord this article full First Amendment protection, holding that in the balance struck between society's interest in [protecting those harmed by pornography, including those harmed with actual death] and the chilling effect on the "right of the public to receive . . . ideas," [those harmed] lose[.]* Any effort to find a happier medium, they conclude, would not only be hopelessly complicated but would raise substantial concerns that the worthiness of speech might be judged by "majoritarian notions of political and social propriety and morality." I agree that [the pornographic article at issue] does not conveniently match the current categories of speech defined for First Amendment purposes. *Limitations on its constitutional protection does not, however, disserve any of these categories and is more appropriate to furthering the "majoritarian" notion of protecting the sanctity of human life.* Finally, the "slippery slope" argument that if Hustler is held liable here, *Ladies Home Journal* or the publisher of an article on hang-gliding will next be a casualty of philistine justice simply proves too much: *This case is not a difficult one in which to vindicate [the harm caused by pornography].*

Proper analysis must begin with an examination of Hustler generally and this article in particular. *Hustler is not a bona fide competitor in the "marketplace of ideas."* It is largely pornographic, whether or not technically obscene. One need not be male to recognize that the principal function of this magazine is to create sexual arousal. Consumers of this material so partake for its known physical effects much as they would

use tobacco, alcohol or drugs for their effects. *By definition, pornography's appeal is therefore non-cognitive and unrelated to, in fact exactly the opposite of, the transmission of ideas.*

....

No sensitive First Amendment genius is required to see that . . . *there is simply no credible argument that this type of speech requires protection* to insure that debate on public issues will be uninhibited, robust, and wide-open.²⁶³

Efforts continue to be articulated as to how pornography is harmful, and why it can be eliminated without violating the Constitution. Meanwhile, we should listen to our societal intuition and seek to curtail its harm. Difficulty in clearly defining harmful pornography or adequately articulating constitutionally acceptable limitations on it does not justify permitting its known harms to fester. The First Amendment is not absolute. The extent to which a particular type of speech is protected is determined by a weighing of interests, a balancing of costs and benefits. The Court's holdings consistently demonstrated that sexually oriented speech receives a different level of constitutional protection than core First Amendment speech.²⁶⁴ Factoring in all the different interests, harms, arguments, and analogies, this author suggests that a totality of the circumstances approach makes clear that pornography is the type of speech that can be properly restricted, and the ban herein is narrowly tailored enough to survive constitutional challenge.

V. CONCLUSION

Congress should invoke its Fourteenth Amendment enforcement powers to enact a temporary ban on pornography to remedy the government's historical discrimination against women. The unique features of this proposed ban, its limited duration and applicability only to visual imagery, would enable it to survive strict scrutiny review in a way that previous anti-pornography legislation has not. Utilizing a totality of the circumstances approach in analyzing the permissibility of the legislation, it is likely to withstand a First Amendment challenge because, over the long run, the harm caused by a temporary ban is far less than the harm caused to women. By implementing such a ban, we would become able to view

²⁶³ *Id.* at 1025–28 (Jones, J., concurring and dissenting) (emphasis added) (citations omitted) (internal quotation marks omitted).

²⁶⁴ See Fee, *supra* note 207, at 301–02.

sex and women's roles in a way that would improve and balance gender relations for men and women.