BLASPHEMY AND THE ORIGINAL MEANING OF THE FIRST AMENDMENT

Until well into the twentieth century, American law recognized blasphemy as proscribable speech. The blackletter rule was clear. Constitutional liberty entailed a right to articulate views on religion, but not a right to commit blasphemy[1] — the offense of "maliciously reviling God," which encompassed "profane ridicule of Christ."[2] The English common law had punished blasphemy as a crime,[3] while excluding "disputes between learned men upon particular controverted points" from the scope of criminal blasphemy.[4] Looking to this precedent, nineteenth-century American appellate courts consistently upheld proscriptions on blasphemy,[5] drawing a line between punishable blasphemy and protected religious speech.[6] At the close of the nineteenth century, the U.S. Supreme Court still assumed that the First Amendment did not "permit the publication of . . . blasphemous . . . articles."[7] And in 1921 the Maine Supreme Judicial Court affirmed a blasphemy conviction under the state's First Amendment analogue.[8] Even on the eve of American entry into World War II, the Tenth Circuit upheld an anti-blasphemy ordinance against a facial First Amendment challenge.[9]

Only in the postwar period did the doctrine promulgated by appellate courts begin to shift. In *Joseph Burstyn, Inc. v. Wilson*,[10] the U.S. Supreme Court invoked the Free Speech Clause to invalidate a prior restraint on "sacrilegious" films.[11] *Burstyn* did not directly hold anti-blasphemy laws unconstitutional,[12] but its obiter dicta gave aid and

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[1] *Compare* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 474–75 (Boston, Little, Brown & Co. 1868) ("The constitutional provisions . . . guarantee to every one a perfect right to form and to promulgate . . . opinions and doctrines upon religious matters . . . ."), *with id.* at 474 ("[B]lasphemy is punishable as a crime . . . .").

[2] People v. Ruggles, 8 Johns. 290, 293 (N.Y. Sup. Ct. 1811).

[3] *See* Taylor's Case (1676) 86 Eng. Rep. 189, 189 (KB); 4 WILLIAM BLACKSTONE, COMMENTARIES *59.

[4] R v. Woolston (1729) 93 Eng. Rep. 881, 882 (KB).

[5] *See Ruggles*, 8 Johns. at 292, 298; Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400–01, 408 (Pa. 1824); State v. Chandler, 2 Del. (2 Harr.) 553, 555, 577–79 (Ct. Gen. Sess. 1837); Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 218, 221 (1838).

[6] *See, e.g.*, *Ruggles*, 8 Johns. at 295; *Updegraph*, 11 Serg. & Rawle at 405 ("[T]he broad boundary . . . is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious . . . .").

[7] Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[8] State v. Mockus, 113 A. 39, 44–45 (Me. 1921).

[9] *See* Oney v. Oklahoma City, 120 F.2d 861, 865 (10th Cir. 1941). The ordinance imposed a fine for the offense of "casting contumelious reproach or profane ridicule on God." *Id.* at 862 n.5.

[10] 343 U.S. 495 (1952).

[11] *See id.* at 503–06.

[12] "We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'" *Id.* at 506. In *Burstyn*, the state had

comfort to the laws' enemies.[13] And although two state appellate courts sustained blasphemy proscriptions after *Burstyn*,[14] a third struck down a state anti-blasphemy law under the First Amendment's Religion Clauses.[15] Most recently, a federal district court invalidated a state blasphemy statute under the Free Speech Clause and the Establishment Clause.[16] Present-day scholars often assume that anti-blasphemy laws are unconstitutional,[17] celebrating the absence of such laws as a core First Amendment principle,[18] though treatise writers, noting the limited authority supporting the laws' invalidity, tend to be more circumspect.[19]

This Note argues that none of the constitutional clauses currently thought to make anti-blasphemy laws unconstitutional — Free Exercise, Free Speech, Establishment — originally prohibited blasphemy prosecutions. In other words, the original public meaning of the First Amendment, whether in 1791 or in 1868,[20] allowed for criminalizing blasphemy. Part I shows that Americans from the Founding through Reconstruction understood free religious exercise as permitting the proscription of blasphemy. Part II explains how the public conceived of free speech in a way that excluded blasphemy from constitutional protection. And Part III illustrates that constitutional commitment to nonestablishment posed no barrier to punishing blasphemy. Although an abundance of evidence — constitutions and statutes, trial and appellate

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created a prior licensing scheme to regulate a novel and ill-defined category of "sacrilegious" films. *See id.* at 503–04. By contrast, traditional anti-blasphemy laws applied subsequent punishments to "blasphemy," a category with bounds delineated by statutory definition and judicial interpretation. *See, e.g.*, *infra* p. 701.

13 *See Burstyn,* 343 U.S. at 505 ("It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine . . . .").

14 Commonwealth *ex rel.* Brown v. Rundle, 227 A.2d 895, 896–97, 896 n.4 (Pa. 1967) (statute making it a crime to "blaspheme[] . . . Almighty God, Christ Jesus, [or] the Holy Spirit," *id.* at 896 n.4, valid under First Amendment), *cert. denied*, 387 U.S. 937 (1967); State v. Stoltenberg, 218 N.W.2d 452, 453 (Iowa 1974) (per curiam) (conviction for "blasphemous language" upheld).

15 State v. West, 263 A.2d 602, 605 (Md. Ct. Spec. App. 1970).

16 Kalman v. Cortes, 723 F. Supp. 2d 766, 806 (E.D. Pa. 2010).

17 *See, e.g.*, Evelyn M. Aswad et al., *Why the United States Cannot Agree to Disagree on Blasphemy Laws*, 32 B.U. INT'L L.J. 119, 126 (2014).

18 *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 7 (Jamie Kalven ed., 1988) ("[A] first great principle of the consensus emerges: *In America there is . . . no blasphemy*."). Some scholars even read contemporary liberal attitudes toward blasphemy into the Founding era. *See, e.g.*, Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 GA. ST. U. L. REV. 1305, 1318–21 (2010) (relying on thin historical evidence to make a sweeping claim about Founding-era opposition to blasphemy laws).

19 *See, e.g.*, 12 AM. JUR. 2D *Blasphemy and Profanity* § 5 (2021) ("Blasphemy laws . . . may survive constitutional scrutiny . . . [or] may not.").

20 *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting) (arguing that ordinary citizens' understanding at the time of Fourteenth Amendment ratification determines the scope of First Amendment rights incorporated against the states); *id.* at 2053 n.14 (Alito, J., concurring) (analyzing both the moment of the First Amendment's adoption and the lead-up to the Fourteenth Amendment to establish the original public meaning in a state case).

cases, scholarly and popular commentary — indicates that anti-blasphemy laws are constitutional under the First Amendment's original meaning, originalist writers tend to ignore this issue.[21] Originalists should engage with this history: they should either explain why countervailing concerns overcome the original constitutional meaning or adopt a view of First Amendment jurisprudence that aligns with the original understanding.

I. ANTI-BLASPHEMY LAWS AND FREE RELIGIOUS EXERCISE

From the Founding era, when the country ratified the First Amendment, through Reconstruction, when the Fourteenth Amendment applied the Federal Free Exercise Clause to the states, Americans viewed blasphemy prosecutions as compatible with free religious exercise. The same state legislatures that ratified the Free Exercise Clause passed statutes that criminalized blasphemy. And the same public that ratified the state religious freedom provisions[22] convicted defendants charged with blasphemy.[23] When defendants appealed their convictions under both the federal and the state provisions, influential appellate judges affirmed that prosecuting blasphemy was consistent with religious liberty: anti-blasphemy laws, which targeted "malicious[] reviling [of] God, or religion," still allowed for "free and decent discussions on any religious subject."[24] The courts thus developed a body of religious liberty doctrine that was firmly established by the Civil War. Whether the relevant constitutional moment was 1791 or 1868, the Free Exercise Clause, as originally understood, posed no barrier to proscribing blasphemy.

Along with the general public, the legislatures that ratified the First Amendment treated blasphemy proscriptions as compatible with religious freedom. Two years after Massachusetts adopted its 1780 constitution — including a religious liberty provision[25] — it enacted a blasphemy statute.[26] "[M]any members of the convention which framed the

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[21] *But see* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 310 & n.285 (2017).

[22] For use of analogous state constitutional provisions to determine the original meaning of the Federal Bill of Rights, compare *District of Columbia v. Heller*, 554 U.S. 570, 600–03 (2008) (majority opinion), with *id.* at 685–86 (Breyer, J., dissenting).

[23] This era had not yet downgraded jurors from judges of law to mere judges of facts. *See* State v. Chandler, 2 Del. (2 Harr.) 553, 575 (Ct. Gen. Sess. 1837) ("[It is] a question for the jury as well as the court . . . for both are judges of the law.").

[24] People v. Ruggles, 8 Johns. 290, 293, 295 (N.Y. Sup. Ct. 1811).

[25] MASS. CONST. of 1780, pt. I, art. II ("[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate . . . for his religious profession or sentiments . . . .").

[26] Act of July 3, 1782, MASS. GEN. LAWS ch. 8 ("[I]f any person shall willfully blaspheme the holy name of God . . . [he] shall be punished . . . .).

constitution, were members of the legislature which passed th[e] law."[27] Under this law, Massachusetts successfully prosecuted blasphemy in 1790.[28] Similarly, pursuant to New Hampshire's 1784 constitution, which recognized religious liberty,[29] the legislature passed a 1791 blasphemy law.[30] Vermont's 1793 constitution, guaranteeing free exercise,[31] was followed by a 1797 blasphemy statute.[32] New Jersey's legislature followed the same pattern under its analogous constitutional provision.[33] And after Pennsylvania passed its 1790 constitution securing religious freedom,[34] a Pennsylvania jury convicted a blasphemer in 1799.[35]

The broader legal situation at the Founding also indicates that religious liberty posed no problem for prosecuting blasphemy. Each state that ratified a new constitution also enacted a "reception provision," adopting the English common law and the colony's statutory law as the law of the newly independent state, insofar as the old law was compatible with the state's new constitution.[36] Even when the state constitution guaranteed free exercise, as was standard,[37] legal writers included

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[27] Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 217 (1838).

[28] *See Springfield, October 6*, W. STAR (Stockbridge, Mass.), Oct. 12, 1790 (Domestick Intelligence) ("Moses Goddard . . . plead guilty to his indictment for BLASPHEMY.").

[29] N.H. CONST. of 1784, pt. I, art. V ("[N]o subject shall be hurt, molested, or restrained in his person, liberty or estate . . . for his religious profession, sentiments or persuasion . . . .").

[30] Act of Feb. 16, 1791, 1791 N.H. Laws 273, 277 (punishing anyone who "wilfully blaspheme[s] the name of God, Jesus Christ, or the Holy Ghost").

[31] VT. CONST. of 1793, ch. 1, art. III ("[N]o authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship . . . .").

[32] Act of Mar. 9, 1797, ch. XXXII, § 20, *reprinted in* 1 THE LAWS OF THE STATE OF VERMONT 339 (Thomas Tolman ed., Randolph, Sereno Wright 1808) (making it a crime "contumeliously [to] reproach [God's] providence, and government").

[33] *Compare* N.J. CONST. of 1776, art. XVIII ("[N]o Person shall ever . . . be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience; nor . . . compelled to attend any Place of Worship, contrary to his own Faith and Judgment . . . ."), *with* Act of Mar. 18, 1796, § 20, 1796 N.J. Laws 208, 211 (imposing a fine, imprisonment, or both for "wilfully blasphem[ing] the holy name of God").

[34] PA. CONST. of 1790, art. IX, § 3 ("[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . . [N]o human authority can, in any case whatever, control or interfere with the rights of conscience . . . .").

[35] *See* ORACLE OF DAUPHIN & HARRISBURGH ADVERTISER, Oct. 14, 1799 (Court of Oyer and Terminer) ("[I]n this town on the 11th . . . [a] tobacconist and fiddler . . . was convicted on an indictment for BLASPHEMY.").

[36] *See* PHILLIP I. BLUMBERG, REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC 57 (2010). All thirteen states adopted new constitutions except Connecticut and Rhode Island, which retained their colonial charters. *See* LEONARD W. LEVY, BLASPHEMY 266 (1993).

[37] *E.g.*, DEL. CONST. of 1792, art. I, § 1 ("[N]o power shall or ought to be vested in or assumed by any magistrate, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship . . . ."); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456–58, 1457 n.242 (1990) (collecting these clauses).

colonial anti-blasphemy laws in compilations of current state statutes.[38] Thus, without the need for specific reenactment, colonial blasphemy statutes and the common law of blasphemy were recognized as part of state law at the dawn of the nineteenth century.

The first appellate case on blasphemy, *People v. Ruggles*,[39] addressed whether blasphemy prosecutions were compatible with free exercise. In 1810, Ruggles raised his voice to revile Christ as a "bastard" and the Virgin as "a whore" — for which a jury convicted him of the common law crime of blasphemy in New York state court.[40] On appeal before the New York Supreme Court, Ruggles challenged the blasphemy conviction under the state free exercise clause, which stipulated that "the free exercise and enjoyment of religious profession and worship without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind."[41] "The constitution allows a free toleration to all religions," Ruggles's counsel argued, meaning that Ruggles "had a right, by the constitution, to declare his opinions."[42]

Writing for a unanimous supreme court,[43] Chief Justice Kent upheld the blasphemy conviction as compatible with free exercise.[44] As the court explained, the clause guaranteed "the free, equal, and undisturbed, enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject."[45] But there was no right "to revile [Christianity], with malicious and blasphemous contempt" — a crime the court distinguished from protected religious expression.[46] To interpret the clause as "breaking down the common law barriers against" blasphemy was "an enormous perversion of its meaning."[47]

Ruggles was well received in New York. The state legislature sided with the *Ruggles* court: rather than abolish the common law crime of blasphemy, the legislature doubled down, punishing by statute even

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[38] *See, e.g.*, An Act Against Drunkenness, Blasphemy, ch. LXVII, § 5, *reprinted in* 1 LAWS OF THE STATE OF DELAWARE 173, 173–74 (New Castle, Adams 1797) [hereinafter DELAWARE LAWS]. Laws that were "EXPIRED, ALTERED, OR REPEALED" were placed in a separate appendix. DELAWARE LAWS, *supra*, app. at 1.

[39] 8 Johns. 290 (N.Y. Sup. Ct. 1811).

[40] *Id.* at 290–91, 293.

[41] *See* N.Y. CONST. of 1777, art. XXXVIII. This 1777 free exercise provision survived virtually unaltered by subsequent state constitutional revisions in the nineteenth century. *See* N.Y. CONST. of 1821, art. VII, § 3; N.Y. CONST. of 1846, art. I, § 3; N.Y. CONST. OF 1894, art. I, § 3.

[42] *Ruggles*, 8 Johns. at 291–92 (summarizing the argument of defense counsel).

[43] *See* NATHANIEL H. CARTER ET AL., REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 463 (Albany, E. & E. Hosford 1821). During this period, New York's Supreme Court of Judicature was an appellate court that decided important questions of law. *See, e.g.*, Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

[44] *Ruggles*, 8 Johns. at 295–96.

[45] *Id.* at 295.

[46] *Id.*; *see id.*

[47] *Id.* at 296.

lesser forms of irreverence.[48] Blasphemy prosecutions continued apace.[49] A decade after *Ruggles*, the judge in a New York City blasphemy case[50] explained that "[t]he case of Ruggles has settled the law on the subject," charging the jury that the constitutional "right to entertain any religious opinion" did not permit "revil[ing] the [prevailing] religion."[51] And when a delegate at the 1821 New York constitutional convention sought to challenge *Ruggles*, the convention reaffirmed it.[52]

New York was no outlier. The other appellate blasphemy cases — decided in states that likewise enjoyed constitutional religious freedom protections — also upheld anti-blasphemy laws as consistent with religious liberty.[53] In the 1824 case *Updegraph v. Commonwealth*,[54] the defendant challenged Pennsylvania's anti-blasphemy statute under the state constitution, which secured religious freedom.[55] Pennsylvania's highest court rejected the defendant's argument.[56] Although the "constitution secure[d] liberty of conscience and freedom of religious worship to all," no one had the "right publicly to vilify the religion of his neighbors and of the country."[57] In 1837, a Delaware appeals court likewise upheld the state's anti-blasphemy statute under its constitution,[58] which

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[48] Act of Mar. 5, 1813, ch. XXIV, § 6, 1813 N.Y. Laws 193, 195 (making it a crime "profanely [to] swear or curse" and citing *Ruggles* for support); *see* Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 34 (1998).

[49] Professor Phillip Blumberg found records of five New York blasphemy prosecutions in the dozen years after the *Ruggles* decision. BLUMBERG, *supra* note 36, at 324 n.19.

[50] The Trial of Jared W. Bell, for Blasphemy, New York City, 1821, *in* 3 AMERICAN STATE TRIALS 558 (John D. Lawson ed., 1915). The defendant, an overzealous opponent of the Hartford Convention, had been charged with calling God a "fool" for having created the men who made up the convention. *Id.* at 558–59.

[51] *Id.* at 561.

[52] *See* Banner, *supra* note 48, at 34. The delegate, Erastus Root, sought to overturn *Ruggles*'s maxim that "Christianity [is] the law of the land," by proposing that "[t]he judiciary shall not declare any particular religion, to be the law of the land." CARTER ET AL., *supra* note 43, at 462; *accord* LEVY, *supra* note 36, at 404. Chancellor Kent, the state's former Chief Justice, was in attendance: he successfully defended his *Ruggles* decision by explaining that the maxim meant only that "to revile the author of [C]hristianity in a blasphemous manner, and with a malicious intent, was an offence against public morals, and indictable." CARTER ET AL., *supra* note 43, at 463; *accord* Banner, *supra* note 48, at 34. In comparison with the potentially far-reaching maxim used to explain its blasphemy holding, *Ruggles*'s blessing of blasphemy prosecutions was uncontroversial.

[53] As Blumberg has written, each of the great appellate cases "upheld the constitutionality of the state [anti-blasphemy law] before it, notwithstanding the guaranties of freedom of religion in [the governing] state constitution." BLUMBERG, *supra* note 36, at 328.

[54] 11 Serg. & Rawle 394 (Pa. 1824).

[55] *Id.* at 399; PA. CONST. of 1790, art. IX, § 3 (quoted *supra* note 34).

[56] *Updegraph*, 11 Serg. & Rawle at 408. Nonetheless, the court reversed the conviction on a technicality, a failure of pleading. The statute criminalized "profanely" blaspheming, and so "[t]he word *profanely* used in the act, should have been inserted in the indictment." *Id.* at 409.

[57] *Id.* at 408.

[58] State v. Chandler, 2 Del. (2 Harr.) 553, 574 (Ct. Gen. Sess. 1837) ("[B]lasphemy can be punished under our state constitution."); *see id.* at 564.

guaranteed free religious exercise.[59] Addressing "whether that statute [was] *inconsistent with the state constitution*,"[60] the Chief Justice quoted the free exercise provision,[61] concluding that it imposed no obstacle to affirming the defendant's blasphemy convictions.[62]

In Massachusetts, Abner Kneeland challenged the state's blasphemy law under the religious liberty provision of the state Declaration of Rights,[63] but to no avail.[64] Appearing pro se before the Supreme Judicial Court in 1838, Kneeland quoted this provision to illustrate that the anti-blasphemy statute was "repugnant" to the state constitution.[65] Writing for the court, Chief Justice Shaw upheld the anti-blasphemy law as "entirely consistent with" the religious freedom provision.[66] For Chief Justice Shaw, the law was meant to "punish acts which have a tendency to disturb the public peace," not to "restrain . . . the profession of any religious sentiments whatever."[67] Thus, the statute was "not repugnant to" the state religious liberty clause.[68]

The outcome would not have been different under the Federal Free Exercise Clause. To be sure, in some states, the constitution qualified religious liberty with a public safety proviso[69] — unlike the Federal Free Exercise Clause, which includes no explicit qualification.[70] But states proscribed blasphemy even when their constitutions lacked any such proviso,[71] suggesting that the presence or absence of a textual

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[59] DEL. CONST. of 1831, art. I, § 1 ("[N]o power shall or ought to be vested in or assumed by any magistrate, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship . . . ."). This language, retained by Delaware's 1831 constitution, was original to its 1792 constitution. *See* DEL. CONST. of 1792, art. I, § 1.

[60] *Chandler*, 2 Del. (2 Harr.) at 564.

[61] *Id.*

[62] *Id.* at 579. The defendant had been convicted of blasphemy twice — for twice making remarks like Ruggles's — and challenged both convictions. *Id.* at 553–54.

[63] MASS. CONST. of 1780, pt. I, art. II (quoted *supra* note 25).

[64] *See* Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 209–10, 220 (1838).

[65] *Id.* at 209–10.

[66] *Id.* at 221.

[67] *Id.*

[68] *Id.* at 220.

[69] *E.g.*, MASS. CONST. of 1780, pt. I, art. II (guaranteeing religious freedom to each subject "provided he doth not disturb the publick peace, or obstruct others in their religious worship"); N.Y. CONST. of 1777, art. XXXVIII (guaranteeing free religious exercise "[p]rovided, [t]hat the liberty of conscience hereby granted, shall not be so construed, as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State"). For a discussion of these provisos, see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 918–21 (1992); McConnell, *supra* note 37, at 1461–66.

[70] *See* U.S. CONST. amend. I.

[71] *Compare* PA. CONST. of 1790, art. IX, § 3 (religious liberty provision sans proviso), *with* BLUMBERG, *supra* note 36, at 324 n.19 (listing multiple blasphemy convictions in early nineteenth-century Pennsylvania); *compare* DEL. CONST. of 1792, art. I, § 1 (no public safety proviso for religious liberty), *with* An Act Against Drunkenness, Blasphemy, ch. LXVII, § 5, 1 Del. Laws 173, 173–74 (1797) (Delaware anti-blasphemy statute), *and* Act of Feb. 8, 1826, ch. V, § 3, 1829 Del. Laws 129, 142 (statute reenacted).

qualification was doing little work. Of course, there were other verbal differences between the federal and state provisions. In contrast with the U.S. Constitution's lapidary language — which protects "the free exercise [of religion]" — the state constitutions recognized "the free exercise . . . of religious profession and worship"[72] and "the rights of conscience, in the free exercise of religious worship,"[73] among other formulations. But when an appellate court had occasion to address federal constitutional law, it treated the federal and state protections[74] as equivalent, at least with respect to blasphemy.[75] The court rejected the argument that either the U.S. Constitution or the state constitution had "virtually repealed" the state blasphemy statute as "inconsistent with . . . the freedom of religious worship."[76] Similarly, eminent jurists writing in their official capacities — Justice Story of the U.S. Supreme Court[77] and Chief Justice Shaw of the Massachusetts Supreme Judicial Court[78] — equated specific state provisions with general religious liberty principles that posed no problem for anti-blasphemy law.

Thomas Cooley followed this approach in his 1868 work on American state constitutional law, arguably "the most influential treatise of constitutional law in the second half of the nineteenth century."[79] In the chapter on "religious liberty," Cooley explained that "blasphemy is punishable as a crime" under the free exercise provisions, without needing to cite specific constitutional language.[80] At the same time, Cooley synthesized constitutional doctrine, citing the *Ruggles* line of cases to

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[72] N.Y. CONST. of 1777, art. XXXVIII.

[73] DEL. CONST. of 1792, art. I, § 1.

[74] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."); PA. CONST. of 1790, art. IX, § 3 ("[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . . [N]o human authority can, in any case whatever, control or interfere with the rights of conscience . . . .").

[75] *See* Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 399 (Pa. 1824).

[76] *Id.* Prior to *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the application of the Federal Bill of Rights to the states was an open question. Thus, the *Updegraph* defendant raised both federal and state constitutional arguments. *Updegraph*, 11 Serg. & Rawle at 399. In upholding the statute, the court did not address the federal argument at length, but it explained that the intent of the U.S. Constitution's Framers was consistent with blasphemy prosecutions. *See id.* at 403–04.

[77] *See* Vidal v. Girard's Ex'rs, 43 U.S. 127, 198 (1844) (praising the Pennsylvania religious liberty provision as securing "complete protection of every variety of religious opinion," and explaining that this provision was no barrier to the rule that Christianity "is not to be maliciously and openly reviled and blasphemed against").

[78] *See* Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 218 (1838) (praising New York's religious liberty provision as securing "universal toleration . . . in the most ample manner" but failing to comment on specific verbal differences between the New York provision and the governing Massachusetts provision).

[79] Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 49 (2020).

[80] COOLEY, *supra* note 1, at 474; *see id.* at 474–76.

explain what counted as punishable blasphemy.[81] "[S]peaking evil of the Deity with an impious purpose to derogate from the divine majesty" qualified, as did "[c]ontumelious reproaches and profane ridicule of Christ."[82] But beyond this category of blasphemy lay a "broad field for candid investigation and discussion," since religious liberty protected the right "to form and to promulgate . . . opinions and doctrines upon religious matters."[83] Thus, at the time of the Fourteenth Amendment's ratification, Americans enjoyed a developed body of constitutional doctrine under which religious liberty allowed for prosecuting blasphemy.

Reflecting this doctrinal consensus, states with religious liberty guarantees continued to pass anti-blasphemy laws before and after the Civil War. Pennsylvania enacted an anti-blasphemy statute in 1860, despite the state constitution's religious liberty provision.[84] Under its equivalent constitutional guarantee, New Jersey passed anti-blasphemy legislation in 1874.[85] And an 1897 Iowa statute criminalizing "blasphemous . . . language" found no obstacle in the state constitution, which had copied the language of the Federal Religion Clauses.[86]

As with every consensus, there were dissenters. St. George Tucker, who speculated that religious liberty and associated guarantees had abolished the crime of blasphemy,[87] was "[a]pparently alone at the time," a voice of "isolated and ineffective dissent"[88] among the early Republic's other prominent legal commentators — James Wilson, Zephaniah Swift, James Kent, Lemuel Shaw, and Joseph Story — who all accepted blasphemy proscriptions as part of American law.[89] A private letter from

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[81] *Id.* at 473–74 (citing People v. Ruggles, 8 Johns. 290 (N.Y. Sup. Ct. 1811); *Updegraph*, 11 Serg. & Rawle 394; State v. Chandler, 2 Del. (2 Harr.) 553 (1837); *Kneeland*, 37 Mass. (20 Pick.) at 221).

[82] *Id.* at 472–73.

[83] *Id.* at 474–75.

[84] *Compare* Act of Mar. 31, 1860, Pub. L. No. 392, § 30, *reprinted in* 11 A DIGEST OF THE LAWS OF PENNSYLVANIA 410 (Frederick C. Brightly ed., Philadelphia, Kay & Brother 1885) (making it a crime to "blaspheme . . . Almighty God, Christ Jesus, [or] the Holy Spirit"), *with* PA. CONST. of 1838, art. IX, § 3.

[85] *Compare* N.J. CONST. of 1844, art. I, § 3, *with* Act of Mar. 27, 1874, § 66, N.J. REV. STAT. 122, 144 (punishing anyone who "wilfully blaspheme[s] the holy name of God").

[86] *Compare* Using Blasphemous or Obscene Language, IOWA CODE ANN. § 5034 (Conaway 1897), *with* IOWA CONST. of 1857, art. I, § 3 ("The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). Similarly, the religious freedom provision of South Carolina's 1868 constitution did not prevent the state from criminalizing "blasphemous language" in 1873. Act of Feb. 20, 1873, No. 281, 1873 S.C. Acts 352; *see* S.C. CONST. of 1868, art. I, § 9.

[87] 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES 59 n.9 (Philadelphia, William Young Birch & Abraham Small 1803) ("[Blasphemy], as a *civil* offence, seems to have been abolished, by the provisions contained in the bill of rights, &c. together with the other offences against religion . . . .").

[88] BLUMBERG, *supra* note 36, at 322.

[89] *See* 3 JAMES WILSON, *Lectures on Law, Part III: Chapter VI*, *in* WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 109, 112 (Philadelphia, Lorenzo Press 1804) (lectures originally delivered in 1790 and 1791, *id.* at 1); 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF

1814 suggests that Thomas Jefferson also deemed blasphemy prosecutions at odds with religious freedom.[90] If so, Jefferson, the idiosyncratic intellectual, was simply an outlier from the "accepted . . . doctrine" elaborated in "celebrated . . . cases."[91] Along with its progeny, *Ruggles* enjoyed "[w]idespread public support": reprinted frequently, the 1811 opinion only grew in popularity over time.[92] At the turn of the century, when a law journal described it as "[t]he leading decision in American law upon the subject" of blasphemy,[93] *Ruggles* was still the rule.

II. ANTI-BLASPHEMY LAWS AND FREEDOM OF SPEECH

As originally understood, freedom of speech and of the press afforded no protection to blasphemy. The states that enumerated "speech" and "press" rights in their Founding-era constitutions nonetheless prosecuted blasphemy.[94] Legislatures bound by state constitutional guarantees of "freedom of speech" and "freedom of the press" passed statutes criminalizing blasphemy while also voting to ratify the First Amendment. Nor did the state speech and press provisions convey a different meaning than their federal analogues.[95] From the Founding era to the end of the nineteenth century, every appellate judge who ruled on the validity of an anti-blasphemy statute under a speech or press guarantee voted to uphold the statute. For these judges, the law protected "opinions seriously, temperately, and argumentatively expressed," but not the "despiteful railings" of blasphemers.[96] Ultimately, nineteenth-century courts

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THE STATE OF CONNECTICUT 321 (Windham, John Byrne 1796); People v. Ruggles, 8 Johns. 290, 295–96 (N.Y. Sup. Ct. 1811) (Kent, C.J.); Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 206 (1838) (Shaw, C.J.); Vidal v. Girard's Ex'rs, 43 U.S. 127, 198 (1844) (Story, J.).

[90] *See* Letter from Thomas Jefferson to Nicolas G. Dufief (Apr. 19, 1814), *in* 7 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 303–05 (J. Jefferson Looney ed., 2010).

[91] BLUMBERG, *supra* note 36, at 323.

[92] Sarah Barringer Gordon, *Blasphemy and the Law of Religious Liberty in Nineteenth-Century America*, 52 AM. Q. 682, 693 (2000).

[93] Arthur William Barber, *Christianity and the Common Law*, 14 GREEN BAG 267, 271 (1902). The article's author was of significant enough stature that he received a *Times* obituary. *See Arthur W. Barber, Lawyer, Dies at 59*, N.Y. TIMES, June 27, 1931, at 12. Nor was this lawyerly view out of step with public sentiment. A 1913 anti-blasphemy parade in Philadelphia was reported to have drawn fifty thousand demonstrators. *See 50,000 Parade in Mighty Protest Against Blasphemy*, PHILA. INQUIRER, Sept. 29, 1913, at 2.

[94] The prosecutors who brought the charges, the judges who instructed the juries, and the juries that convicted the blasphemers all formed a part of the civically engaged public whose understanding is thought to determine the Free Speech Clause's original meaning. *See* Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 611–12 (2008) (arguing that the "original public meaning" of a constitutional provision is determined by the views of a "reasonably well-informed set of voters," *id.* at 612).

[95] *See* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 539 (2019) ("The Founders . . . did not suggest that the federal Speech and Press Clauses would somehow have entirely different meanings than their state-level counterparts.").

[96] Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824).

and commentators classed blasphemy with obscenity and libel, as speech unprotected by the First Amendment or its state counterparts.[97] This understanding of blasphemy as unprotected speech prevailed around the time of the Reconstruction Amendments.

At the Founding, anti-blasphemy laws coexisted with constitutional guarantees of free speech and free press — a fact the modern Supreme Court has emphasized in cases on unprotected speech.[98] Ten of the fourteen states eligible to ratify the Bill of Rights protected expression in their own constitutions.[99] All ten guaranteed freedom of the press,[100] and two — Pennsylvania and Vermont — also explicitly protected freedom of speech.[101] Both states proscribed blasphemy. Pennsylvania convicted a blasphemer in 1799.[102] And Vermont passed a 1797 anti-blasphemy statute notwithstanding its "freedom of speech" clause.[103]

Similar results obtained in states that only explicitly protected freedom of the press. Under the state's free press clause,[104] the New Hampshire legislature passed an anti-blasphemy statute — just one year after it had ratified the First Amendment.[105] And shortly after Massachusetts ratified the free press provision of its 1780 constitution, it passed an anti-blasphemy statute.[106] Notwithstanding Maryland's free press clause,[107] a 1799 compilation of state statutes "actually in

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97 *See, e.g.*, Corliss v. E.W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893).

98 New York v. Ferber, 458 U.S. 747, 754 (1982); Roth v. United States, 354 U.S. 476, 482 & nn.10–12 (1957). For the Court in *Roth v. United States*, 354 U.S. 476, this history was important evidence that the "unconditional phrasing of the First Amendment was not intended to protect every utterance." *Id.* at 483.

99 *See Roth*, 354 U.S. at 482.

100 DEL. CONST. of 1792, art. I, § 5; GA. CONST. of 1789, art. IV, § 338; MD. CONST. of 1777, Declaration of Rights, § 38; MASS. CONST. of 1780, pt. I, art. XVI; N.H. CONST. of 1784, pt. I, art. I, § 22; N.C. CONST. of 1776, Declaration of Rights, § XV; PA. CONST. of 1790, art. IX, § 7; S.C. CONST. of 1790, art. IX, § 6; VT. CONST. of 1777, ch. I, art. XIV; VA. CONST. of 1776, ch. I, § 12.

101 *Compare* PA. CONST. of 1776, ch. I, art. XII ("[T]he people have a right to freedom of speech, and of writing, and publishing their sentiments . . . ."), *with* PA. CONST. of 1790, art. IX, § 7 ("[E]very citizen may freely speak, write, and print on any subject . . . .") (largely equivalent but more concise); *compare* VT. CONST. of 1777, ch. I, art. XIV ("[T]he people have a right to freedom of speech, and of writing and publishing their sentiments . . . ."), *with* VT. CONST. of 1793, ch. I, art. XIII (same).

102 *See* ORACLE OF DAUPHIN & HARRISBURGH ADVERTISER, *supra* note 35.

103 VT. CONST. of 1793, ch. I, art. XIII; *see* Act of Mar. 9, 1797, ch. XXXII, § 20, *reprinted in* 1 THE LAWS OF THE STATE OF VERMONT, *supra* note 32, at 339.

104 N.H. CONST. of 1784, pt. I, art. XXII ("The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.").

105 Act of Feb. 16, 1791, 1791 N.H. Laws 273, 277 (making it a crime "wilfully [to] blaspheme the name of God, Jesus Christ, or the Holy Ghost"); *see* 5 LAWS OF NEW HAMPSHIRE 507 (Henry Harrison Metcalf ed., 1916) (First Amendment ratified by New Hampshire on January 25, 1790).

106 *See* MASS. CONST. of 1780, pt. I, art. XVI ("The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth."); Act of July 3, 1782, MASS. GEN. LAWS ch. 8 (1782).

107 MD. CONST. of 1777, Declaration of Rights, § 38 ("[T]he liberty of the press ought to be inviolably preserved.").

force," and excluding those laws "virtually repealed," included a colonial statute that criminalized "blaspheming or cursing God" "by writing or speaking."[108] Likewise, Delaware's colonial anti-blasphemy law, included in an official 1797 statutory compilation,[109] was reenacted in 1826.[110] Delaware's free press clause posed no barrier.[111]

The 1824 Pennsylvania case *Updegraph v. Commonwealth* was the first appellate decision to answer a free speech challenge to an anti-blasphemy law.[112] Pennsylvania's constitution explicitly protected free speech: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject . . . ."[113] Updegraph's counsel quoted this provision in defense of his client, who had been convicted of blasphemy for a speech at a Pittsburgh club.[114] The defense also appealed to the Federal Free Speech Clause to argue that the blasphemy statute was unconstitutional.[115] The Supreme Court's 1833 decision *Barron v. Baltimore*[116] later held the Federal Bill of Rights inapplicable to state governments, but, at the time of *Updegraph*, it was not yet settled whether such constitutional limitations applied to the states.[117] In this context, the defense cited "[t]he constitution [both] of this state, and of the general government," which alike "guarantee[d] to each citizen the free and undisturbed enjoyment and expression of his opinions on all matters."[118]

The Pennsylvania Supreme Court held that neither the federal nor the state constitution had rendered the blasphemy statute "obsolete [or] virtually repealed."[119] For guidance in interpreting both constitutions, the court turned to U.S. Supreme Court Justice Wilson, who had participated in framing the U.S. Constitution, and had, at the Pennsylvania legislature's behest, revised state statutory law to comply with the 1790 state constitution.[120] "With his fresh recollection of both constitutions,"

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108 1 THOMAS HERTY, A DIGEST OF THE LAWS OF MARYLAND 92 (Baltimore, 1799). A separate 1811 collection of Maryland statutes incorporated the same law. 1 VIRGIL MAXCY, THE LAWS OF MARYLAND 169 (Baltimore, Philip H. Nicklin & Co. 1811).

109 An Act Against Drunkenness, Blasphemy, ch. LXVII, § 5, *reprinted in* DELAWARE LAWS, *supra* note 38, at 173–74.

110 Act of Feb. 8, 1826, ch. V, § 3, 1829 Del. Laws 129, 142.

111 *See* DEL. CONST. of 1792, art. I, § 5 ("[A]ny citizen may print on any subject.").

112 *Ruggles*, the initial blasphemy appellate case, had focused on the New York religion clause in upholding a blasphemy conviction. People v. Ruggles, 8 Johns. 290, 295–97 (N.Y. Sup. Ct. 1811).

113 PA. CONST. of 1790, art. IX, § 7.

114 Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 395 (Pa. 1824); *see id.* at 398–99.

115 *See id.* at 395–96.

116 32 U.S. (7 Pet.) 243 (1833).

117 *See* BLUMBERG, *supra* note 36, at 320 n.2.

118 *Updegraph*, 11 Serg. & Rawle at 395.

119 *Id.* at 408; *see id.* at 399.

120 *See id.* at 403–04.

Justice Wilson had delivered his influential *Lectures on Law*, which described blasphemy as a punishable offense.[121] Whether considered under the heading of religious liberty or of free speech, it was "firmly settled" that "blasphemy against the Deity . . . is indictable and punishable as a temporal offence."[122] As the court explained, "no author or printer, who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal."[123] Blasphemy required "offensive levity, scurrilous and opprobrious language," or other indication of malice.[124] The law distinguished between "opinions seriously, temperately, and argumentatively expressed," on the one hand, and "despiteful railings," on the other.[125]

The 1838 case *Commonwealth v. Kneeland*[126] applied this doctrine to blasphemy in print. Kneeland, a publisher, had been convicted for blasphemous statements in an article he had written.[127] On appeal, he challenged this conviction under the Massachusetts Constitution's free press clause.[128] For Kneeland, the blasphemy statute was "repugnant" to this liberty of the press clause, which "guarantie[d] [him] the strict right of propagating [his] sentiments" — though not, he conceded, the right to "slander[] his neighbor in print."[129] Writing for the Massachusetts Supreme Judicial Court, Chief Justice Shaw upheld the statute and conviction under the state free press provision.[130] The 1782 statute had been "repeatedly enforced" and "recently . . . reenacted," its validity "never . . . doubted."[131] As the court interpreted it, the statute permitted "the fullest inquiry, and the freest discussion, for all honest and fair purposes."[132] The statute did not "prevent the simple and sincere avowal of a disbelief" or "restrain the formation of any opinions."[133]

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121 *Id.* at 404; *see* WILSON, *supra* note 89, at 112. The republication of the blasphemy statute in collections of operative laws and the continued convictions under the statute provided further proof of its constitutionality. *See Updegraph*, 11 Serg. & Rawle at 404.

122 *Updegraph*, 11 Serg. & Rawle at 405.

123 *Id.*

124 *Id.* at 406.

125 *Id.* at 400.

126 37 Mass. (20 Pick.) 206 (1838).

127 The article claimed that "god" was "nothing more than a mere chimera of [the Universalists'] imagination" and that the "whole story concerning [Christ] is as much a fable and a fiction as that of the god Prometheus." *Id.* at 207.

128 *Id.* at 209–10; *see* MASS. CONST. of 1780, pt. I, art. XVI ("The liberty of the press is ess-ential to the security of freedom in a State: it ought not, therefore, to be restrained in this Commonwealth.").

129 *Kneeland*, 37 Mass. (20 Pick.) at 210.

130 *Id.* at 219.

131 *Id.* at 217–18. It was also important evidence that New Hampshire, Vermont, and Maine all had comparable constitutional provisions and comparable blasphemy statutes. *See id.* at 218.

132 *Id.*

133 *Id.* at 220–21.

Kneeland's crime was not that he had admitted to disbelief in God, but that he had "calumniate[d] and disparage[d]" God.[134]

Although Justice Morton wrote in dissent, he "concur[red] with [the court] in sustaining [the statute's] constitutionality."[135] The free press provision protected "the unrestricted discussion of all subjects . . . and the dissemination . . . of all honest opinions"[136] — this constituted the "legitimate exercise of the freedom of speech or of the press."[137] But even the "fullest enjoyment of this right" did not warrant "obscene or profane language or publications" or "malicious falsehoods."[138] The dissent classed together "[v]erbal slander, profanity, obscenity, and blasphemy" as beyond constitutional protection.[139] For the dissent, the argument that all speech "[n]o matter how obscene, how profane, how blasphemous . . . is all protected by the constitution" refuted itself.[140] Where the dissent parted ways with the majority was on the jury instruction. Because the trial judge's instruction did not adequately define the crime of blasphemy, Justice Morton would have reversed the conviction.[141] But on the more important issue — the constitutionality of punishing blasphemy — the majority and dissent were one in mind.

This vision of free speech, triumphant in the courts of the early Republic,[142] continued to prevail after passage of the Fourteenth Amendment. Despite the speech and press protections in Michigan's constitution,[143] the state's official compilation of "general laws in

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134 *Id.* at 220.

135 *Id.* at 243 (Morton, J., dissenting).

136 *Id.* at 233.

137 *Id.* at 237.

138 *Id.* at 236–37.

139 *Id.* at 229; *see also id.* at 237.

140 *Id.* at 228–29.

141 *Id.* at 246. The trial judge had instructed the jury that "wilful denial" of God constituted a violation of the statute. *Id.* at 225 (majority opinion). The majority took "wilful" to mean "with [an] injurious, unlawful intent," and thus approved the instruction. *Id.* By contrast, the dissent thought "wilful" meant only "obstinate" or "stubborn," which did not convey the requisite criminal intention. *Id.* at 245 (Morton, J., dissenting). The dissent would have required an instruction that the crime consisted in the "*wilful* and *blasphemous* denial" of God. *Id.* at 246.

142 To be sure, in a private letter from 1825, John Adams expressed a desire that some anti-blasphemy laws — those that made it a crime "to deny or to doubt the divine inspiration of all the books of the old and new Testaments" — should be repealed, suggesting such laws were in tension with the "right of free inquiry." Letter from John Adams to Thomas Jefferson (Jan. 23, 1825), https://founders.archives.gov/documents/Jefferson/98-01-02-4904 [https://perma.cc/675B-7UUH]. But it is not clear that Adams considered all anti-blasphemy laws unconstitutional. And given contemporary originalists' emphasis on public meaning rather than private intentions, the public acts of courts and legislatures are more salient evidence than a private letter. Moreover, many of the official acts proscribing blasphemy dated closer in time to the ratification of the First Amendment.

143 *See* MICH. CONST. of 1850, art. IV, § 42 ("No law shall ever be passed to restrain or abridge the liberty of speech or of the press . . . .").

force"[144] as of 1872 included an anti-blasphemy statute.[145] Connecticut, whose constitution likewise guaranteed speech and press freedoms,[146] included an anti-blasphemy law in an official 1875 statutory compilation,[147] which omitted statutes deemed "useless or obsolete."[148] And in 1874, the New Jersey legislature reenacted an anti-blasphemy statute,[149] the state constitution's speech and press guarantees notwithstanding.[150]

New Jersey prosecuted offenders,[151] including Charles Reynolds, a former Methodist minister convicted of blasphemy in 1887 during a high-profile trial.[152] With oratorical bombast, defense attorney Robert Ingersoll, a notorious freethinker,[153] quoted the "great clause in the Constitution of 1844 . . . a clause that shines . . . like a star at night. — 'No law shall be passed to restrain or abridge the liberty of speech or of the press.'"[154] Ingersoll appealed to the jury — as "the judges of the

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144 1 COMPILED LAWS OF THE STATE OF MICHIGAN iii (James S. Dewey ed., Lansing, W.S. George & Co. 1872) (emphasis omitted).

145 Offenses Against Chastity, Morality and Decency, ch. 249, § 17, *reprinted in* 2 COMPILED LAWS OF THE STATE OF MICHIGAN, *supra* note 144, at 2115, 2118. The statute, which criminalized "cursing or contumeliously reproaching God," had originally been passed in 1846. *See* Act of May 18, 1846, ch. 158, § 17, *reprinted in* THE REVISED STATUTES OF THE STATE OF MICHIGAN 681 (Sanford M. Green ed., Detroit, Bagg & Harmon 1846).

146 CONN. CONST. of 1818, art. I, § 6 ("No law shall ever be passed to curtail or restrain the liberty of speech or of the press.").

147 Offences Against Decency, Morality, and Humanity, tit. 20, ch. VIII, § 1, *reprinted in* THE GENERAL STATUTES OF THE STATE OF CONNECTICUT 512 (David B. Booth et al. eds., Hartford, The Case, Lockwood & Brainard Co. 1875). The legislature had passed the statute in 1821. *Id.*

148 THE GENERAL STATUTES OF THE STATE OF CONNECTICUT, *supra* note 147, at xi.

149 Act of Mar. 27, 1874, § 66, N.J. REV. STAT. 122, 144 (punishing anyone who "wilfully blaspheme[s] the holy name of God," including by "cursing or contumeliously reproaching Jesus Christ or the Holy Ghost").

150 *See* N.J. CONST. of 1844, art. I, § 5 ("No law shall be passed to restrain or abridge the liberty of speech or of the press.").

151 *See Tried for Blasphemy*, N.Y. TIMES, May 24, 1882, at 3 (recording a recent New Jersey blasphemy trial that resulted in an acquittal).

152 *On Trial for Blasphemy*, N.Y. TIMES, May 20, 1887, at 8 (describing the crowds at the trial); *The Conviction of Reynolds*, N.Y. TIMES, May 21, 1887, at 4. In a diatribe he had printed and distributed as a pamphlet, Reynolds blamed God's "own stupid blundering" for the Great Flood. The Trial of Charles B. Reynolds for Blasphemy, Morristown, New Jersey, 1887, *in* 16 AMERICAN STATE TRIALS 795, 796 (John D. Lawson ed., 1928) [hereinafter The Trial of Reynolds]. According to Reynolds, God had created a world "worse than He (knowing all things?) ever supposed it could be" and "knew no better way out of the muddle than to destroy it by drowning." *Id.* The same pamphlet lambasted the Old Testament patriarchs and prophets, "God's own pet saints," as "old wretches," and insulted the infant Christ — God incarnate — by imagining that "God was spanked when he was naughty." *Id.* at 796–97.

153 *See The Conviction of Reynolds*, *supra* note 152, at 4.

154 The Trial of Reynolds, *supra* note 152, at 810 (quoting N.J. CONST. of 1844, art. I, § 5); *see also On Trial for Blasphemy*, *supra* note 152, at 8 ("[H]e quoted from the State Constitution to show that the statute could not stand, as the Constitution declared . . . that no law should be passed to abridge liberty of speech or the freedom of the press.").

law, as well as the judges of the facts" — to acquit: the statute was "unconstitutional, because it does abridge the liberty of speech."[155]

The defense's free speech argument failed to persuade.[156] According to the trial judge, the statute, recently reenacted, was "not obsolete" but "good law," and the crime of blasphemy differed from "[h]eresy and unconformity."[157] "The law, I instruct you, is constitutional."[158] The jury apparently agreed, convicting the defendant after an hour's deliberations.[159] Scholarly comment also supported the trial judge: "Ingersoll is wrong . . . in denouncing such prosecutions as an infringement of the constitutional right of free speech," one law journal argued, comparing "prosecutions for blasphemy" to "prosecutions for libel."[160] This understanding of free speech also had support in the popular press. "Neither can we agree with [Ingersoll] that the law is iniquitous," *The New York Times* explained, for "[o]bscene literature and blasphemous literature stand upon the same footing."[161]

The New York Times had taken the same view in an 1879 article on an English blasphemy trial. "Blasphemy is rightly punished by statute here, as well as there," the *Times* argued.[162] The paper cited Chief Justice Kent in *Ruggles* and Chief Justice Shaw in *Kneeland* to explain the difference between "opinions . . . promulgated with propriety," which "the law d[id] not prohibit," and the "wanton manner" required for the crime of blasphemy.[163] "Th[is] rule," distinguishing free expression from blasphemy, was "fully recognized" in the other states.[164]

The era's federal judiciary also recognized the rule that blasphemy fell outside the scope of First Amendment protection. For a federal court in Massachusetts, "[f]reedom of speech and of the press," as guaranteed by the U.S. Constitution and most state constitutions, meant immunity from repercussions for speech, "except so far as such publication, by reason of its blasphemy, [or] obscenity . . . may be a public offense, or, by its falsehood and malice, may injuriously affect . . . individuals."[165] In the court's eyes, blasphemy was equivalent to obscenity and defamation for First Amendment purposes. The U.S. Supreme Court

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155 The Trial of Reynolds, *supra* note 152, at 850.

156 Responding to Ingersoll during the jury charge, the trial judge explained that, although "Ingersoll defended freedom of speech by words so beautiful . . . as to send a thrill through the veins," Ingersoll's "evidence" did not match his rhetoric. *Id.* at 857.

157 *Id.* at 856.

158 *Id.* at 857.

159 *Id.*; *see also The Conviction of Reynolds*, *supra* note 152, at 4.

160 *Current Topics*, 35 ALB. L.J. 441, 441 (1887).

161 *See The Conviction of Reynolds*, *supra* note 152, at 4.

162 *Legal Checks on Religious Discussion*, N.Y. TIMES, Sept. 11, 1879, at 4 (citing People v. Ruggles, 8 Johns. 290 (N.Y. Sup. Ct. 1811); Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 220 (1838)).

163 *Id.*

164 *Id.*

165 Corliss v. E.W. Walker Co., 57 F. 434, 435 (C.C.D. Mass. 1893).

took the same position on the First Amendment. "[T]he freedom of speech and of the press (art. 1) does not permit the publication of libels, [or] blasphemous or indecent articles . . . ."[166] Although such statements were obiter dicta, they indicate that the traditional understanding of free speech and blasphemy was alive and well at the close of the nineteenth century, decades after Reconstruction.

III. ANTI-BLASPHEMY LAWS AND NONESTABLISHMENT

Unlike Congregationalist New England and the Anglican South, the mid-Atlantic colonies of Pennsylvania, Delaware, and New Jersey lacked religious establishments from the start.[167] After Independence, other states disestablished gradually, often by statute.[168] But these three mid-Atlantic states, drawing on their colonial tradition, constitutionally barred religious establishments throughout the antebellum period — and in terms arguably more absolute than the Federal Establishment Clause.[169] Pennsylvania, Delaware, and New Jersey all illustrate how a strong constitutional commitment to nonestablishment was compatible with proscribing blasphemy.[170]

Pennsylvania's 1790 constitution prohibited religious establishments in the strongest terms — without preventing blasphemy prosecutions. "[N]o preference shall ever be given, by law, to any religious establishments or modes of worship," the constitution stipulated.[171] Yet a blasphemy conviction followed within a decade of ratification.[172] And, according to newspaper reports, early nineteenth-century Pennsylvania convicted at least three other blasphemers — one of whom was recorded raising a nonestablishment defense that the trial court rejected.[173]

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166 Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

167 *See* John K. Wilson, *Religion Under the State Constitutions, 1776–1800*, 32 J. CHURCH & STATE 753, 754 (1990).

168 *Id.* at 755–57.

169 *Compare* PA. CONST. of 1790, art. IX, § 3 ("[N]o preference shall ever be given, by law, to any religious establishments or modes of worship."), PA. CONST. of 1838, art. IX, § III (same), DEL. CONST. of 1792, art. I, § 1 ("[N]or [shall] a preference [be] given by law to any religious societies, denominations, or modes of worship."), DEL. CONST. of 1831, art. I, § 1 (same), N.J. CONST. of 1776, art. XIX ("[T]here shall be no Establishment of any one religious Sect in this Province in Preference to another . . . ."), *and* N.J. CONST. of 1844, art. I, § 4 (slight and inconsequential variation in wording), *with* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

170 Originalists debate whether the Establishment Clause bars establishments at the state level. *See* Town of Greece v. Galloway, 572 U.S. 565, 604–07 (2014) (Thomas, J., concurring in part and concurring in the judgment). This Note assumes for the sake of argument that the Fourteenth Amendment incorporated the Establishment Clause.

171 PA. CONST. of 1790, art. IX, § 3.

172 *See* ORACLE OF DAUPHIN & HARRISBURGH ADVERTISER, *supra* note 35.

173 FRANKLIN GAZETTE (Philadelphia), Nov. 17, 1818 (Law Intelligence) (Robert C. Murray convicted in Philadelphia after citing state constitution's nonestablishment, religious liberty, and free speech provisions); FARMERS' CABINET (Philadelphia), Mar. 16, 1822 (The Cabinet) ("[I]n

In *Updegraph*, the 1824 appellate case, the defense challenged Pennsylvania's colonial blasphemy statute on nonestablishment grounds, but without success. Updegraph's counsel cited the constitution's "no preference" language to argue that the blasphemy statute was "inconsistent with the constitution."[174] "Religious preference[s]," the defense explained, "are not recognised in the constitutions of 1787 [U.S.] or 1790 [Pennsylvania]."[175] But, as the high court held, the anti-blasphemy statute did not amount to an unconstitutional preference: "No preference is given by law to any particular religious persuasion. Protection is given to all by our laws. It is only the malicious reviler of Christianity who is punished."[176] Pennsylvania had been founded on nonestablishment: "[G]etting quit of the ecclesiastical establishment" was why William Penn had come to America, where there was "[f]reedom from . . . the scourge of established churches."[177] Pennsylvania, with its longstanding anti-blasphemy law, continued to maintain this tradition: "Liberty to all, preference to none; equal privilege is extended to the mitred Bishop and the unadorned Friend."[178]

The court distinguished Christianity's legal status, as reflected in the blasphemy statute, from constitutionally impermissible establishments. Following William Blackstone and U.S. Supreme Court Justice Wilson, *Updegraph* endorsed that old maxim of blasphemy cases: Christianity is part of the common law.[179] But the court took this to mean that "general Christianity, is . . . part of the common law of Pennsylvania."[180] This "general Christianity" did not mean "the doctrine of worship of any particular church or sect,"[181] nor did it mean "Christianity with an established church, and tithes, and spiritual courts" — for all that would have violated the constitution.[182] Instead, the statute reflected "Christianity, without the spiritual artillery of *European* countries," "Christianity with liberty of conscience to all men,"[183] which the constitution allowed. Nonestablishment thus permitted promotion of general Christian principles, such that the state could punish blasphemy.

This understanding prevailed in Pennsylvania up to the Civil War and beyond. In 1838, Pennsylvania ratified a new constitution with the

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Pennsylvania, in a trial for blasphemy, the defendant was fined . . . ."); NEW BEDFORD MERCURY, Feb. 6, 1829 (Domestic Summary) ("Samuel Sharp has been convicted at Lancaster, Pa. of blasphemy.").

174 Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 395 (Pa. 1824); *see id.* at 408.

175 *Id.* at 395.

176 *Id.* at 408.

177 *Id.* at 408–09.

178 *Id.* at 409.

179 *Id.* at 397, 403–04; *see* BLACKSTONE, *supra* note 3, at *59; WILSON, *supra* note 89, at 112.

180 *Updegraph*, 11 Serg. & Rawle at 400 (emphasis omitted).

181 *Id.* at 408.

182 *Id.* at 400.

183 *Id.*

same nonestablishment language as before.[184] Under this identical nonestablishment provision, the legislature reenacted its colonial anti-blasphemy statute on the eve of the Civil War.[185] Pennsylvania continued prosecuting under the statute well after the war's end.[186] And two years after the passage of the Fourteenth Amendment, the Pennsylvania Supreme Court quoted the state's nonestablishment provision in reaffirming it as "well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed."[187]

Like Pennsylvania, Delaware prohibited religious establishments in its constitution. "[N]or [shall] a preference [be] given by law to any religious societies, denominations, or modes of worship," the 1792 constitution stipulated — a prohibition carried over verbatim into the 1831 constitution.[188] Yet this prohibition never prevented Delaware's colonial blasphemy statute from having the force of law. A 1797 statutory compilation published "pursuant to the Directions . . . of the [Delaware] Legislature" included Delaware's colonial anti-blasphemy law.[189] The Delaware legislature reenacted the colonial blasphemy statute in 1826, replacing its corporal punishment with a fine and imprisonment — the new standard criminal penalty.[190]

In the 1837 case *State v. Chandler*,[191] the Delaware appellate court upheld this blasphemy statute as consistent with the constitutional ban on legal preferences for religious modes of worship.[192] The defendant had maligned Christ as a "bastard" and the Virgin as a "whore" on two different occasions, for which two different juries convicted him of the statutory offense of blasphemy.[193] In challenging the convictions, the defense "relied mainly on the alledged [sic] unconstitutionality of the statute against blasphemy, as being a law preferring [C]hristianity to other modes of worship."[194] The court quoted Delaware's

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[184] *Compare* PA. CONST. of 1790, art. IX, § 3 ("[N]o preference shall ever be given, by law, to any religious establishments or modes of worship."), *with* PA. CONST. of 1838, art. IX, § III (same).

[185] Act of Mar. 31, 1860, Pub. L. No. 392, § 30, *reprinted in* 11 A DIGEST OF THE LAWS OF PENNSYLVANIA, *supra* note 84, at 410.

[186] *See* Commonwealth v. Spratt, 14 Phila. 365 (Pa. Ct. of Quarter Sess. 1880).

[187] Zeisweiss v. James, 63 Pa. 465, 471 (1870).

[188] *Compare* DEL. CONST. of 1792, art. I, § 1, *with* DEL. CONST. of 1831, art. I, § 1.

[189] DELAWARE LAWS, *supra* note 38, at iii; *see* An Act Against Drunkenness, Blasphemy, ch. LXVII, § 5, *reprinted in* DELAWARE LAWS, *supra* note 38, at 173–74.

[190] Act of Feb. 8, 1826, ch. V, § 3, 1829 Del. Laws 129, 142. As state legislatures in the early Republic moved away from the colonial penal system, with its corporal punishments, they imposed incarceration or the payment of a fine as the penalty for all noncapital offenses. *See* Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1250 (1982).

[191] 2 Del. (2 Harr.) 553 (Ct. Gen. Sess. 1837).

[192] *Id.* at 574.

[193] *Id.* at 553–54.

[194] *Id.*

nonestablishment clause, nonetheless concluding that the indicted offenses were "punishable as blasphemy by our state constitution."[195]

The Delaware appellate court drew a distinction between constitutionally impermissible establishments and the anti-blasphemy law. "[A] religion preferred by law" would, on the court's view, count as a "legal establishment which the present constitution expressly forbids."[196] But recognizing the "religion preferred by the people" did not amount to an impermissible establishment.[197] The court found ample evidence from Delaware's history and current practice that Christianity was "the religion preferred by the people of Delaware," such that the court's members were "bound to notice as judges acting under the authority of the people . . . what is that religion which they have voluntarily preferred."[198] The state's people remained free to change their religion, but as long as they had voluntarily chosen Christianity "their judges [were] bound to notice their free choice . . . and to protect them in the exercise of their right."[199] Thus, "by the constitution and laws of Delaware, the [C]hristian religion is a part of those laws, so far that blasphemy against it is punishable, while the people prefer it as their religion."[200]

From the time of Independence, New Jersey's constitution barred religious establishments, but that never prevented the state from criminalizing blasphemy. The 1776 New Jersey Constitution provided "[t]hat there shall be no Establishment of any one religious Sect in this Province in Preference to another."[201] Under this prohibition, the state legislature passed a statute punishing blasphemy that reviled the Triune God — Father, Son, and Holy Spirit — professed by Christians.[202] New Jersey revised its constitution in 1844, enacting nearly the same nonestablishment clause as before.[203] And under this clause, the legislature in 1874 reenacted the same anti-blasphemy statute.[204]

At the celebrated 1887 blasphemy trial of Charles Reynolds,[205] the defense cited New Jersey's nonestablishment provision but failed to persuade judge or jury. Reynolds's defense attorney appealed to the

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195 *Id.* at 577; *see id.* at 564.

196 *Id.* at 567.

197 *Id.*

198 *Id.*

199 *Id.* at 568.

200 *Id.* at 572.

201 N.J. CONST. of 1776, art. XIX.

202 *See* Act of Mar. 18, 1796, § 20, 1800 N.J. Laws 208, 211 (punishing anyone who "wilfully blaspheme[s] the holy name of God . . . by cursing or contumeliously reproaching Jesus Christ, or the Holy Ghost, or the Christian religion").

203 N.J. CONST. of 1844, art. I, § 4 ("There shall be no establishment of one religious sect, in preference to another . . . .").

204 *See* Act of Mar. 27, 1874, § 66, N.J. REV. STAT. 122, 144 (1874).

205 *See Jersey Law Triumphant: Reynolds Found Guilty of Blasphemy*, N.Y. TIMES, May 21, 1887, at 8.

nonestablishment clause, which showed that "[t]here was to be no establishment of one religion over another."[206] The defense likewise quoted the religion provisions adjacent to the nonestablishment clause,[207] concluding that "[t]his statute . . . is not in accordance with" the 1844 constitution.[208] Nonetheless, the trial judge instructed the jury that the statute was constitutional, and the jury promptly convicted.[209]

Like New Jersey, South Carolina illustrates that, around the time of the Reconstruction Amendments, anti-blasphemy statutes were compatible with nonestablishment. Four months before it ratified the Fourteenth Amendment, South Carolina ratified its Reconstruction constitution,[210] which mandated that "[n]o form of religion shall be established by law."[211] Only a few years later, South Carolina's Reconstruction legislature passed an anti-blasphemy statute.[212] If Reconstruction-era notions of nonestablishment prevented anti-blasphemy legislation, a state under federal occupation would not have passed an anti-blasphemy law.

CONCLUSION

In proscribing blasphemy, nineteenth-century Americans did not flout constitutional guarantees of free speech, free exercise, and nonestablishment. Rather, they conceptualized those guarantees in a way that permitted anti-blasphemy laws.[213] Free speech and free exercise forbade government from punishing the "serious[] and conscientious[]" discussion of religious topics.[214] But anti-blasphemy laws, which targeted only the "malicious[] . . . reviling [of] God or religion," did not prevent "discussion of any subject" or "the propagation of any sentiments."[215] Likewise, nonestablishment prohibited legal preference for

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206 The Trial of Reynolds, *supra* note 152, at 809.

207 "No religious test shall be required as a qualification for any office of public trust. No person shall be denied the enjoyment of any civil right on account of his religious principles." *Id.* (quoting N.J. CONST. of 1844, art. I, § 4).

208 *Id.*

209 *Id.* at 857.

210 South Carolina ratified its Reconstruction constitution by convention on March 17, 1868. The South Carolina legislature ratified the Fourteenth Amendment on July 9, 1868. *See* J. Res. 72, 1868 Gen. Assemb., Spec. Sess. (S.C. 1868).

211 S.C. CONST. of 1868, art. I, § 10.

212 *See* Act of Feb. 20, 1873, No. 281, 1873 S.C. Acts 352 (making it a crime to "use blasphemous language at or near the place of [a religious] meeting").

213 Originalists have advocated looking to the original conceptions of "freedom of speech" and other open-textured constitutional terms. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 50–55 (2015).

214 Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 405 (Pa. 1824).

215 Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 241–42 (1838) (Morton, J., dissenting); *see id.* at 244–45.

"any particular church or sect."[216] But this did not prevent the recognition of "general Christianity," as reflected in laws punishing "malicious reviler[s] of Christianity."[217] Even Delaware's conception of nonestablishment, which prohibited government recognition of Christianity as a "religion preferred by law," still permitted legal cognizance of Christianity as a "religion preferred by the people."[218] Under this conception of nonestablishment, government could punish anti-Christian blasphemy as an offense against the predominantly Christian public.[219]

Originalists should either explain why countervailing considerations outweigh the First Amendment's original meaning on blasphemy or adopt a view of the First Amendment consistent with the original understanding. Stare decisis often provides justification for departing from original understandings,[220] but only meager precedent (a federal district court decision and a state intermediate appellate court decision) has directly held anti-blasphemy laws unconstitutional.[221] Moreover, current Supreme Court precedent acknowledges that "[f]rom 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas"[222] — including obscenity and defamation — that have been "historically unprotected."[223] Not only does blasphemy qualify as historically unprotected; the Supreme Court has also identified and discussed it as such.[224] For originalists, the path forward may lie in emphasizing this precedent, which recognizes blasphemy for what it has traditionally been: speech beyond the protection of the First Amendment.

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216 *Updegraph*, 11 Serg. & Rawle at 408.

217 *Id.*

218 State v. Chandler, 2 Del. (2 Harr.) 553, 567 (Ct. Gen. Sess. 1837).

219 *See id.* at 572.

220 *But see* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005).

221 Kalman v. Cortes, 723 F. Supp. 2d 766, 806 (E.D. Pa. 2010); State v. West, 263 A.2d 602, 605 (Md. Ct. Spec. App. 1970); *see* Gordon, *supra* note 92, at 718 n.47 (writing prior to *Kalman v. Cortes*, 723 F. Supp. 2d 766) ("Only one court has explicitly held a blasphemy statute unconstitutional."). Of course, *Burstyn* invalidated a prior restraint on "sacrilegious" films. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505–06 (1952). But in explaining that the state's interest did not "justify prior restraints" on vaguely defined "sacrilege," the Court left open the possibility of subsequent punishments for clearly defined blasphemy. *Id.* at 505; *cf. id.* at 505–06 ("[I]t is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed . . . to prevent the showing of obscene films.").

222 United States v. Stevens, 559 U.S. 460, 468 (2010) (internal quotation marks omitted).

223 *Id.* at 470; *see id.* at 468–70, 472. The Court has admitted that there may be "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law." *Id.* at 472.

224 *See* Robertson v. Baldwin, 165 U.S. 275, 281 (1897); *cf.* New York v. Ferber, 458 U.S. 747, 754 (1982); Roth v. United States, 354 U.S. 476, 482 & nn.10–12 (1957).