

2018

Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship

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Recommended Citation

Clay Calvert, *Gag Clauses and the Right to Gripe: The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship*, 24 *Widener L. Rev.* 203 (2018)

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**GAG CLAUSES AND THE RIGHT TO GRIPE: THE CONSUMER
REVIEW FAIRNESS ACT OF 2016 & STATE EFFORTS TO
PROTECT ONLINE REVIEWS FROM CONTRACTUAL
CENSORSHIP**

*Clay Calvert**

ABSTRACT

This article examines new legislation, including the federal Consumer Review Fairness Act, signed into law in December 2016, targeting non-disparagement clauses in consumer contracts. Such “gag clauses” typically prohibit or punish the posting of negative reviews of businesses on websites, such as Yelp and TripAdvisor. This article asserts that state and federal statutes provide the best means, from a pro-free-expression perspective, of attacking such clauses, given the disturbingly real possibility that the First Amendment has no bearing on contractual obligations between private parties.

I. INTRODUCTION

During the 2016 presidential election season, Democrats and Republicans alike complained about nearly everything—the opposing nominee,¹ their own nominee,² fake news,³ presidential debates,⁴ media

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¹ See, e.g., Amy Chozick, *Hillary Clinton to Portray Donald Trump’s Foreign Policy Positions as Dangerous*, N.Y. TIMES (June 1, 2016), <https://www.nytimes.com/2016/06/02/us/politics/hillary-clinton-donald-trump-foreign-policy.html> (quoting Jake Sullivan, Democratic nominee Hillary Clinton’s top policy adviser, for the proposition that Republican nominee “Donald Trump is unlike any presidential candidate we’ve seen, maybe ever, certainly in decades, in that he does not cross the threshold of fitness for the job”); Maggie Haberman, *Donald Trump Returns Fire, Calling Hillary Clinton a ‘World-Class Liar,’* N.Y. TIMES (June 22, 2016) <https://www.nytimes.com/2016/06/23/us/politics/trump-speech-clinton.html> (reporting that Republican nominee Donald Trump called Democratic nominee Hillary Clinton a “world-class liar” and claimed she “may be the most corrupt person ever to seek the presidency”); Michael Wolff, *Wolff: Derailing the Trump Train*, USA TODAY (Aug. 7, 2016, 7:02 PM) <https://www.usatoday.com/story/money/columnist/wolff/2016/08/07/wolff-derailing-trump-train/88289836/> (“The case, made by Republicans, Democrats and, more and more without restraint, the news media, gets stronger every day: Donald Trump is dangerous, unfit and crazy. And the conclusion becomes ever-more emphatic: He must not be president.”).

bias,⁵ and the vacancy on the Supreme Court of the United States.⁶ It is fitting, then, that one of the only measures members of Congress from both

² See, e.g., Amy Chozick et al., *Hillary Clinton Struggles to Find Footing in Unusual Race*, N.Y. TIMES (May 28, 2016), <https://www.nytimes.com/2016/05/29/us/politics/hillary-clinton-donald-trump.html> (“In the corridors of Congress, on airplane shuttles between New York and Washington, at donor gatherings and on conference calls, anxiety is spreading through the Democratic Party that Mrs. Clinton is struggling to find her footing.”); Scott Clement, *Will Immigration, Guns and Abortion be Wedge Issues in 2016?*, WASH. POST, (July 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/07/20/will-immigration-guns-and-abortion-be-wedge-issues-in-2016/> (“Roughly three-quarters of persuadable Republicans dislike Trump and a similar share of persuadable Democrats dislike Clinton.”); Adam Nagourney, *Convention Offers Donald Trump His Biggest Sales Opportunity*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/19/us/politics/convention-offers-donald-trump-his-biggest-sales-opportunity.html> (reporting that during the Republican Convention in Cleveland, Donald Trump faced “the challenge of reassuring Republicans unhappy with their candidate, symbolized by the absence of so many party leaders, while using the event to expand his appeal to a broader electorate”); Frank Newport & Andrew Dugan, *Clinton Still Has More Negatives Among Dems than Sanders*, GALLUP (June 6, 2016), <http://www.gallup.com/opinion/polling-matters/192362/clinton-negatives-among-dems-sanders.aspx> (reporting the results of a poll conducted in late May and early June of 2016 among voters who identified as Democrats that revealed that Bernie Sanders, who shortly thereafter failed to win the Democratic party nomination, “continues to be significantly more popular than Hillary Clinton. Sanders’ current net favorable rating among Democrats (+52) outpaces Clinton’s (+39) by 13 points.”); Jennifer Steinhauer, *Democrats’ Weak Bench Undermines Hope of Taking Back Senate*, N.Y. TIMES (Aug. 25, 2016), <https://www.nytimes.com/2016/08/26/us/politics/democrats-weak-bench-undermines-hope-of-taking-back-senate.html> (noting that Republicans “find themselves in a fundamental conflict between Mr. Trump’s populist insurgents and traditional conservatives”).

³ In December 2016, erstwhile Democratic nominee Hillary Clinton railed against what she called an “epidemic of malicious fake news” and “voiced support for some federal legislation to address the ‘fake news’ issue.” Paul Kane, *Hillary Clinton Attacks ‘Fake News’ in Post-election Appearance on Capitol Hill*, WASH. POST, (Dec. 8, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/12/08/hillary-clinton-attacks-fake-news-in-post-election-appearance-on-capitol-hill/>.

⁴ See, e.g., Nicholas Confessore & Patrick Healy, *Actually, a Malfunction Did Affect Donald Trump’s Voice at the Debate*, N.Y. TIMES (Oct. 1, 2016), <https://www.nytimes.com/2016/10/01/us/politics/donald-trump-debate.html> (reporting that the Commission on Presidential Debates determined that the first debate “was marred by an unspecified technical malfunction that affected the volume of Donald J. Trump’s voice in the debate hall,” and noting that Trump “complained that the changing volume had distracted him and alleged again that someone had created the problem deliberately”); Philip Rucker et al., *As Clinton Builds on a Strong Debate, Trump Lobs Attacks and Complaints*, WASH. POST (Sept. 27, 2016), https://www.washingtonpost.com/politics/as-clinton-builds-on-a-strong-debate-trump-lob-attacks-and-complaints/2016/09/27/6bb4cd2e-84cc-11e6-92c2-14b64f3d453f_story.html?utm_term=.fa2b56f633ea (reporting that, after a presidential debate in September 2016 at Hofstra University, Republican nominee Donald Trump claimed “debate moderator Lester Holt, the anchor of ‘NBC Nightly News,’ was biased, and the Republican complained about the quality of his microphone”).

⁵ See, e.g., Noah Bierman, *Donald Trump Helps Bring Far-right Media’s Edgier Elements into the Mainstream*, L.A. TIMES (Aug. 22, 2016, 8:35 AM), <http://www.latimes.com/politics/la-na-pol-trump-media-20160820-snap-story.html> (“A Morning Consult poll released Friday found a plurality of Americans of all political stripes –

sides of the aisle agreed on that year was a bill⁷ safeguarding—you guessed it—the right to complain. Introduced in the House of Representatives in April 2016 by Republican Leonard Lance of New Jersey and Democrat Joseph Kennedy III of Massachusetts,⁸ the Consumer Review Fairness Act of 2016 passed the House in September 2016.⁹ The Senate then unanimously approved it without amendment two months later.¹⁰ President Barack Obama, in turn, signed the bill into law on December 14, 2016.¹¹

Codified at 15 U.S.C. § 45(b), the law generally voids non-disparagement clauses—colloquially called gag clauses¹² or, less ominously and forebodingly, customer waivers¹³—in form contracts¹⁴ that either

38% – believed *the media were biased* in trying to help elect Hillary Clinton president, a far greater percentage than the 12% who said the media were biased in favor of Trump.”) (emphasis added); Alexander Burns & Nick Corasaniti, *Donald Trump’s Other Campaign Foe: the ‘Lowest Form of Life’ News Media*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/13/us/politics/donald-trump-obama-isis.html> (“Long a vehement critic of the political news media, Mr. Trump has increasingly organized his general-election effort around antagonizing the press. He dedicates long sections of his speeches and innumerable tweets to savaging individual outlets, and claiming that *media bias* could effectively ‘rig’ the election for Hillary Clinton.”) (emphasis added).

⁶ See, e.g., Alan Rappoport, *As Donald Trump Falters, Democrats Plan to Press Fight for Supreme Court*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/us/politics/donald-trump-democrats-supreme-court.html> (“The Senate has been stuck in a stalemate since the death of Justice Antonin Scalia in February left a vacancy on the bench. Republicans have refused to hold confirmation hearings on President Obama’s nominee, insisting that the next president should make the choice.”); The Editorial Board, *The Senate’s Confirmation Shutdown*, N.Y. TIMES, (June 9, 2016), <https://www.nytimes.com/2016/06/09/opinion/the-senates-confirmation-shutdown.html> (complaining that the failure by U.S. Senate Republicans to provide confirmation hearings for Supreme Court nominee Merrick Garland was “shameful” and that it left the nation’s high court “hamstrung, unable to deliver conclusive rulings on some of the most pressing legal issues facing the country”).

⁷ H.R. 5111, 114th Cong. (2016) (enacted).

⁸ Paul Muschick, *Businesses Can’t Block Customer Reviews from Leaving Online Reviews*, MORNING CALL (Dec. 28, 2016, 6:07 PM), <http://www.mcall.com/news/local/watchdog/blog/mc-consumer-reviews-cant-be-banned-watchdog-20161221-column.html>.

⁹ Stephanie Mlot, *Congress Passes Bill Protecting Consumer Reviews*, PC MAGAZINE, (Nov. 30, 2016, 7:03 AM), <http://www.pcmag.com/news/349960/congress-passes-bill-protecting-consumer-reviews>.

¹⁰ *Id.*

¹¹ Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1359 (2016); Andrew Tarantola, *President Obama signs the Consumer Review Fairness Act into law*, ENGADGET (Dec. 15, 2016), <https://www.engadget.com/2016/12/15/president-obama-signs-the-consumer-review-fairness-act-into-law/>.

¹² See Christopher Elliott, *A Pending Bill Would Prohibit Retribution for Negative TripAdvisor and Yelp Reviews*, WASH. POST, (Sept. 22, 2016), https://www.washingtonpost.com/lifestyle/travel/a-pending-bill-would-prohibit-retribution-for-negative-tripadvisor-and-yelp-reviews/2016/09/22/9cf39396-7e9d-11e6-8d0c-fb6c00c90481_story.html.

¹³ Chris Moran & Ashlee Kieler, *Speak Freely America: New Federal Law Outlaws Gag Clauses That Punish You for Negative Reviews*, CONSUMERIST, (Dec. 14, 2016, 9:30 AM),

penalize¹⁵ or prohibit¹⁶ a person entering into such an agreement with a business, or another individual from reviewing or assessing the performance of “the goods, services, or conduct”¹⁷ of that business or individual. The law vests the Federal Trade Commission (“FTC”) with primary enforcement authority,¹⁸ but also allows state attorneys general and consumer protection officers to bring civil actions in federal court on behalf of their residents after clearing several procedural hurdles.¹⁹ The measure does not ban defamation²⁰ actions filed by reviewed businesses or individuals when reviews are libelous.²¹

Ken Paulson, president of the First Amendment Center at Vanderbilt University and dean of the College of Media and Entertainment at Middle Tennessee State University, calls the new law “a valuable piece of legislation that prevents businesses from forcing consumers to give up their free speech rights.”²² The bill’s co-sponsor, Representative Lance, proclaimed after the measure cleared the Senate that it:

[I]s about protecting consumers posting honest feedback online. Online reviews and ratings are critical in the 21st century and consumers should be able to post, comment and tweet their honest and accurate feedback without fear of retribution. Too many companies are burying non-disparagement clauses in fine print and

<https://consumerist.com/2016/12/14/consumer-review-freedom-act> (“Seven years ago, we first told you about businesses using gag orders – call them ‘customer waivers’ or ‘non-disparagement clauses,’ it’s all the same – to prevent their customers from exercising their legally protected rights to voice their honest opinions.”).

¹⁴ The law defines a form contract as “a contract with standardized terms – (i) used by a person in the course of selling or leasing the person’s goods or services; and (ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.” 15 U.S.C. § 45b(a)(3)(A) (2017).

¹⁵ *Id.* § 45b(b)(1)(B) (rendering void a form contract that “imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication . . .”).

¹⁶ *Id.* § 45b(b)(1)(A) (rendering void a form contract that “prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication . . .”).

¹⁷ *Id.* § 15b(a)(2).

¹⁸ *See id.* § 15b(d)(1)–(2).

¹⁹ *See id.* § 15b(e)(1)–(6).

²⁰ Defamation “is the tort theory that provides a civil remedy for communications that harm a victim’s reputation.” Joseph H. King, Jr., *Defining the Internal Context for Communications Containing Allegedly Defamatory Headline Language*, 71 U. CIN. L. REV. 863, 868 (2003).

²¹ 15 U.S.C. § 15b(b)(2)(B) (providing that the law shall not be construed to affect “any civil cause of action for defamation, libel, or slander, or any similar cause of action . . .”).

²² Steven Porter, *Businesses Barred from Gagging Customer Reviews Under New U.S. Law*, CHRISTIAN SCI. MONITOR. (Dec. 19, 2016), <http://www.csmonitor.com/Business/2016/1219/Businesses-barred-from-gagging-customer-reviews-under-new-US-law>.

going after consumers when they post negative feedback online. This will now end.²³

Similarly, in announcing the bill in April, 2016, co-sponsor Representative Kennedy remarked that it “would ensure companies can never retaliate against customers for simply expressing an opinion.”²⁴ In light of such lofty rhetoric, this article analyzes both the Consumer Review Fairness Act of 2016 and state laws targeting consumer-review gag clauses. It contextualizes these statutes within the broader framework of First Amendment freedom of speech,²⁵ which may prove irrelevant in purely contractual settings between private parties.

Part I of the article explains more broadly the nature of non-disparagement clauses and their emergence in recent years as contractual tools for stifling negative online reviews.²⁶ Part II then evaluates the relevance, or lack thereof, of the First Amendment in thwarting non-disparagement clauses.²⁷ Next, Part III examines in greater depth the Consumer Review Fairness Act of 2016, as well as the two state efforts that preceded it in California²⁸ and Maryland²⁹ in combatting gag clauses.³⁰ Finally, Part IV concludes by suggesting, at the macro-level of analysis, that the use of non-disparagement clauses to squelch free expression highlights the need for the Supreme Court³¹ to constitutionalize contract law with a First Amendment overlay, much as it already has done in tort

²³ Press Release, Leonard Lance, Congressman, New Jersey’s 7th District, *Speaker Ryan Signs Lance Bill* (Dec. 2, 2016), <https://lance.house.gov/newsroom/press-releases/speaker-ryan-signs-lance-bill>.

²⁴ Press Release, Joe Kennedy, Congressman, 4th Dist. of Massachusetts, Kennedy, Lance Intro Bill to Protect Consumer Reviews (Apr. 28, 2016), <https://kennedy.house.gov/media/press-releases/kennedy-lance-intro-bill-to-protect-consumer-reviews>.

²⁵ The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²⁶ *Infra* notes 36–100 and accompanying text.

²⁷ *Infra* notes 101–138 and accompanying text.

²⁸ *See* CAL. CIV. CODE § 1670.8 (West 2017).

²⁹ MD. CODE ANN. COM. LAW § 14-1325 (West 2017).

³⁰ *Infra* notes 138–194 and accompanying text.

³¹ All cites referring to the “Supreme Court” mean the United States Supreme Court, unless explicitly stated otherwise.

law with the cases of *New York Times Co. v. Sullivan*,³² *Hustler Magazine v. Falwell*³³ and *Snyder v. Phelps*,³⁴ among other suggestions.³⁵

I. GAGGING ONLINE CRITICS: THE RISE OF NON-DISPARAGEMENT CLAUSES

This Part has two sections. Section A provides an overview of non-disparagement clauses, both historically and today. Section B then describes a real-life example of the abuse of such provisions that captured the attention of the United States Congress.

A. An Overview of the Problem

The Consumer Review Fairness Act is an exemplar of timely legislation targeting a troublesome and growing problem. As the *ABA Journal* reported in July 2016, some businesses increasingly are attempting “to prohibit dissatisfied customers from posting negative yet authentic reviews.”³⁶ Earlier that year, the *Washington Post* noted that “non-disparagement clauses in contracts are multiplying.”³⁷

These provisions detrimentally affect not only consumers, but also review-centric websites, such as Yelp. Yelp “provides consumers with

³² 376 U.S. 254 (1964). In *Sullivan*, the Court held that public officials who sue for libel based on speech relating to their official duties must prove that the defamatory statement in question “was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279-80.

³³ 485 U.S. 46 (1988). In *Falwell*, the Court held that public figures and public officials who sue for intentional infliction of emotional distress (“IIED”) based on parodic and satirical speech must prove, in addition to the requisite IIED tort elements, “that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” *Id.* at 56.

³⁴ 562 U.S. 443 (2011). In *Snyder*, which involved several tort causes of action, including ones for IIED and intrusion into seclusion, Chief Justice Roberts wrote for the majority that “[t]he Free Speech Clause of the First Amendment – ‘Congress shall make no law . . . abridging the freedom of speech’ – can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.” *Id.* at 451.

³⁵ *Infra* notes 194–232 and accompanying text.

³⁶ Julianne Hill, *Stars and Gripes: Legal Challenges Over Online Reviews Seek to Separate Fact from Fiction*, ABA J. (July 2016), http://www.abajournal.com/magazine/article/legal_challenges_over_online_reviews_seek_to_separate_fact_from_fiction.

³⁷ Christopher Elliott, *Write a Negative Review and Get Sued? It Can Happen, but Maybe Not for Long*, WASH. POST (Jan. 14, 2016), https://www.washingtonpost.com/lifestyle/travel/write-a-negative-online-review-and-get-sued-it-can-happen-but-maybe-not-for-long/2016/01/14/518f0aa6-b49b-11e5-9388-466021d971de_story.html?utmterm=.63e143259066.

search and review features for restaurants, retailers and other businesses.”³⁸ It claimed in the first quarter of 2016 to have had “on a monthly average basis, about [seventy-seven] million unique visitors . . . on desktop computers and [sixty-nine] million on mobile devices . . .”³⁹ By the end of the fourth quarter of 2017, more than one hundred and forty-eight million reviews had been posted on Yelp, and “Yelp had a monthly average of [twenty-nine] million unique visitors who visited Yelp via the Yelp app.”⁴⁰

A common example of a non-disparagement contract term might involve “a vacation home rental owner who stipulates in the fine print of a contract that he may keep a deposit if a guest leaves an unflattering review.”⁴¹ As *USA Today* noted in December 2015, “[s]ome businesses are lurking with ‘terms of service,’ often in fine print, that prohibit customers from writing negative reviews. Such ‘gag clauses’ chill free speech and undermine consumer power.”⁴² Indeed, the same newspaper also pointed out that “an array of businesses across the country – wedding photographers, flooring installers, online retailers, hotels, vacation rentals, and even some dentists and doctors – have attempted to foist gag clauses on customers.”⁴³ Consumer advocates assert that “most customers aren’t aware of non-disparagement clauses, which often are buried deep within boilerplate language of the agreements.”⁴⁴

When consumers upload negative reviews that violate gag clauses, they may be sued.⁴⁵ For instance, a Texas couple was sued in 2016 after they breached a non-disparagement clause with a pet-sitting company called Prestigious Pets by posting a negative, one-star review of it on Yelp.⁴⁶ The

³⁸ James F. Peltz, *After Yahoo, These Tech Firms Look Ripe for a Sale*, L.A. TIMES (Aug. 1, 2016, 3:00 AM), <http://www.latimes.com/business/la-fi-agenda-tech-mergers-20160801-snap-htmlstory.html>.

³⁹ *Id.*

⁴⁰ *About Us*, YELP, <https://www.yelp.com/about> (last visited May 2, 2018).

⁴¹ See Elliot, *supra* note 37.

⁴² *Gag clauses' chill consumers' free speech: Our view*, USA TODAY (Dec. 24, 2015, 5:45 PM), <https://www.usatoday.com/story/opinion/2015/12/23/consumer-reviews-gag-first-amendment-editorials-debates/77801050/>.

⁴³ *Id.*

⁴⁴ Jenni Bergal, *Consumers Now Have the Right to Gripe Online*, PEW CHARITABLE TRS. (Dec. 15, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/15/consumers-now-have-the-right-to-gripe-online>.

⁴⁵ See Joseph Dussault, *What the Yelp Defamation Case Could Mean for Internet Free Speech*, CHRISTIAN SCI. MORNING MONITOR (Sept. 22, 2016), <http://www.csmonitor.com/Technology/2016/0922/What-the-Yelp-defamation-case-could-mean-for-internet-free-speech> (“A bipartisan bill, sponsored by Reps. Joe Kennedy (D) of Massachusetts and Leonard Lance (R) of New Jersey, seeks to protect customers against ‘non-disparagement’ clauses imposed by businesses. Customers have often signed such contracts, and they are sued after publishing a negative review.”).

⁴⁶ Sarah Mervosh, *Plano Couple Sued for \$1M over One-Star Yelp Review Asks Judge to Drop Suit*, DALLAS MORNING NEWS (June 3, 2016), <http://www.dallasnews.com/news/news/2016/06/03/plano-couple-hit-with-1m-lawsuit-over-one-star-yelp-review-asks-judge-to-drop-suit>.

gag clause at issue broadly provided that “your acceptance of this agreement prohibits you from taking any action that negatively impacts Prestigious Pets, LLC, its reputation, products, services, management, employees or independent contractors.”⁴⁷ Texas District Court Judge Jim Jordan dismissed the company’s lawsuit with prejudice under the Lone Star State’s anti-SLAPP (strategic lawsuit against public participation)⁴⁸ statutes⁴⁹ and awarded the defendant-couple, Robert and Michelle Duchouquette, court costs and attorneys’ fees to be paid by Prestigious Pets and its owner.⁵⁰ According to attorney Paul Alan Levy of the Public Citizen Litigation Group, the case marked “the first time a company defended its non-disparagement clause with a brief,” and, perhaps more significantly, the first time a judge refused to enforce a consumer-review gag clause.⁵¹

Although the outcome in that case was favorable from a pro-free speech perspective, the cost of breaching a gag clause can multiply fast because, as Professor Lucille Ponte recently notes, gag clauses frequently are accompanied by “liquidated damages clauses that set out daily penalties for posting a critical review until the posting is removed.”⁵²

Gag clauses tend, somewhat intuitively, to be viewpoint based, allowing favorable reviews while stifling only negative ones. As Professor Ponte explains:

These kinds of agreements are typically not purely contracts of silence that prohibit all speech, as positive reviews and comments are not only desirable but good for a business’s customer relationships and bottom line. Rather, a nondisparagement clause prevents consumers from making or posting any negative remarks,

⁴⁷ Plaintiffs’ Response to Defendants’ Motion to Dismiss at 2, *McWhorter v. Duchouquette*, No. DC-16-03561 (Tex. Dist. Ct., July 19, 2016), <http://www.citizen.org/documents/PPTCPAOpposition.pdf>.

⁴⁸ Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1, 7 n.30 (2006) (describing SLAPP as an acronym that stands for strategic lawsuit against public participation).

⁴⁹ See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–27.011 (West 2016).

⁵⁰ Order on Defendants’ Motion to Dismiss, *McWhorter v. Duchouquette*, No. DC-16-03561 (Tex. Dist. Ct., Aug. 26, 2016), <https://assets.documentcloud.org/documents/3038039/Prestigious-Pets-Order-of-Dismissal.pdf>.

⁵¹ Paul Alan Levy, *Texas Court Strikes Down Prestigious Pets’ Nondisparagement Clause Lawsuit*, PUB. CITIZEN CONSUMER L. & POL’Y BLOG (Aug. 30, 2016), <http://pubcit.typepad.com/clpblog/2016/08/texas-court-strikes-down-prestigious-pets-nondisparagement-clause-lawsuit.html>.

⁵² Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer “Gag” Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 WM. & MARY BUS. L. REV. 59, 79 (2016).

criticisms, or ridicule about a business, its goods, and/or its services.⁵³

Some gag clauses, as attorneys David Bell and Tiffany Ferris write, “transfer copyright ownership in any review written about a particular business to that business.”⁵⁴ This duplicitous intellectual property maneuver, the duo notes, “gives the business the right to have reviews removed from third-party review websites and forums”⁵⁵ Indeed, the Consumer Review Fairness Act of 2016 includes a provision that specifically addresses and voids such transfers of intellectual-property rights.⁵⁶

Gag clauses do more, however, than just extinguish criticism. Professor Lauren Willis asserts, “they’re bad for the economy. One way that markets become more efficient is by information getting out there, consumer to consumer.”⁵⁷ In other words, two types of markets—literal economic ones, as well as metaphorical idea marketplaces⁵⁸—are stunted by non-disparagement clauses. In fact, Paul Levy, an attorney for the watchdog group Public Citizen,⁵⁹ stresses that gag clauses “hurt other businesses that

⁵³ Ponte, *supra* note 52, at 67.

⁵⁴ David A. Bell & Tiffany Ferris, *A Congressional Anti-Gag Maneuver: Senate Unanimously Approves the Consumer Review Freedom Act*, HAYNES & BOONE, LLC (Jan. 27, 2016), <http://www.haynesboone.com/publications/a-congressional-anti-gag-maneuver>.

⁵⁵ *Id.*

⁵⁶ 15 U.S.C. § 45b(b)(1)(C) (2017). The new law voids a form contract if it:

[T]ransfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.

Id.

⁵⁷ David Lazarus, *Lawmakers Seek to End the Muzzling of Consumers by Some Businesses*, L.A. TIMES (May 8, 2015, 5:30 AM), <http://www.latimes.com/business/la-fi-lazarus-20150508-column.html>.

⁵⁸ The marketplace of ideas theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH* 2 (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 237 (1991). Dean Rodney Smolla calls the marketplace of ideas “perhaps the most powerful metaphor in the free speech tradition,” with its premise “that humankind’s search for truth is best advanced by a free trade in ideas.” RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992). In other words, under this theory, a primary “justification for free speech is that it contributes to the promotion of truth.” Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003).

⁵⁹ Public Citizen describes itself on its website as “a nonprofit consumer advocacy organization that champions the public interest” and that “resist[s] corporate power and work[s] to ensure that government works for the people – not for big corporations.” *About Us*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=2306> (last visited May 2, 2018).

operate on the up-and-up and don't need these clauses to protect themselves."⁶⁰

Ultimately, the use of gag clauses "threatens the openness of the digital economy."⁶¹ They thus fall within what Professor David Orozco recently called "a broad array of strategic corporate legal bullying practices that violate fundamental business norms such as fairness, reciprocity, reputation, and community responsiveness."⁶²

The FTC began taking action against non-disparagement clauses in 2015. That is when it accused weight-loss powder marketer Roca Labs of using gag clauses to stop negative reviews of its multimillion-dollar business.⁶³ As the FTC asserted in a press release, Florida-based Roca Labs "attempted to intimidate their own customers from sharing truthful – and truly negative – reviews of their products."⁶⁴

The FTC's complaint, filed September 2015 in federal court against Roca Labs and two of its officers, alleges that Roca's use of gag clauses "have caused or are likely to cause purchasers to refrain from commenting negatively about the Defendants or their products. By depriving prospective purchasers of this truthful, negative information, Defendants' practices have resulted or are likely to result in consumers buying Roca Labs products they would not otherwise have bought."⁶⁵ The FTC contends that gag clauses "constitute unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a) and (n)."⁶⁶ The gag clause in Roca Labs' online agreement provided:

⁶⁰ Jennie Bergal, *The Right to Gripe: States Seek to Protect Negative Online Reviews*, PEW CHARITABLE TRS. (June 16, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/16/the-right-to-gripe-states-seek-to-protect-negative-online-reviews>.

⁶¹ Reid Goldsborough, *The Do's and Don't's of Free Speech Online*, INFO. TODAY INC. (Jan. 1, 2016), <http://www.infoday.com/LinkUp/The-Dos-and-Donts-of-Free-Speech-Online-108310.shtml>.

⁶² David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137, 140 (2016). As Orozco writes, "[t]o silence negative critiques made against them, companies sometimes assert tenuous disparagement claims against individuals or small businesses who make negative statements. These entities abuse the legal system by threatening legal action to silence any negative criticism." *Id.* at 168.

⁶³ John Hielscher, *FTC Sues Sarasota Firm, Alleging False Claims*, SARASOTA HERALD TRIB. (Oct. 2, 2015, 4:09 PM), <http://www.heraldtribune.com/article/LK/20151002/News/605203848/SH/>.

⁶⁴ Press Release, Fed. Trade Comm'n, *FTC Sues Marketers Who Used "Gag Clauses," Monetary Threats, and Lawsuits to Stop Negative Consumer Reviews for Unproven Weight-Loss Products* (Sept. 28, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-sues-marketers-who-used-gag-clauses-monetary-threats-lawsuits>.

⁶⁵ Complaint for Permanent Injunction and Other Equitable Relief at 22, Fed. Trade Comm'n v. Roca Labs, Inc., No. 8:15-cv-02231-MSS-TBM (M.D. Fla. Sept. 24, 2015), <https://www.ftc.gov/system/files/documents/cases/150928rocalabscmpt.pdf>.

⁶⁶ *Id.* at 28. See 15 U.S.C. § 45(a) (2016) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); *Id.* § 45(n) (providing the FTC with the power to declare

You agree that regardless of your personal experience with RL, you will not disparage RL and/or any of its employees, products, or services. This means that you will not speak, publish, or cause to be published, print, review, blog, or otherwise write negatively about RL, or its products or employees in any way.⁶⁷

By April, 2016, the FTC and Roca Labs reportedly were on the verge of settling the matter,⁶⁸ but the case was still ongoing in early 2017.⁶⁹ Signaling, perhaps, that the FTC might fight other businesses that deploy such gag clauses, FTC Commissioner Terrell McSweeney highlighted the case against Roca Labs in a November 2016 keynote speech at the Association of National Advertisers and Brand Activation Association's marketing law conference in Chicago.⁷⁰

Despite the FTC's recent actions targeting them, gag clauses are not new. Traditionally, they were applied in contexts other than online business reviews. For example, the *New York Times* reported in 1996 that health maintenance organizations ("H.M.O.s") were imposing gag clauses on physicians that "limited their ability to talk freely with patients about treatment options and H.M.O. payment policies."⁷¹

unlawful an "act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition").

⁶⁷ Lesley Fair, *Gagging Rights? FTC Case Challenges Diet Claims and Company's Use of Consumer Gag Clauses*, FTC BUS. BLOG (Sept. 28, 2015, 9:13 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/09/gagging-rights-ftc-case-challenges-diet-claims-companys-use>.

⁶⁸ Dani Kass, *FTC, Supplement Co. Request Stay in False Ad Suit*, LAW360 (Apr. 18, 2016), <http://www.law360.com/articles/785821/ftc-supplement-co-request-stay-in-false-ad-suit>.

⁶⁹ See Fed. Trade Comm'n v. Roca Labs, Inc., 2017 U.S. Dist. LEXIS 5298 (M.D. Fla. Jan. 13, 2017) (involving a motion for contempt and sanctions against a non-party witness in the case).

⁷⁰ Terrell McSweeney, FTC Commissioner, Keynote Remarks at the 2016 ANA/BAA Marketing Law Conference (Nov. 10, 2016), https://www.ftc.gov/system/files/documents/public_statements/996554/mcsweeney_-_keynote_remarks_at_ana-baa_marketing_law_conference_11-10-16.pdf.

⁷¹ Associated Press, *U.S. Healthcare to End Limits on Doctors' Advice to Patients*, N.Y. TIMES (Feb. 6, 1996), <http://www.nytimes.com/1996/02/06/business/us-healthcare-to-end-limits-on-doctors-advice-to-patients.html>. See Robert Pear, *Doctors Say H.M.O.'s Limit What They Can Tell Patients*, N.Y. TIMES (Dec. 21, 1995), <https://www.nytimes.com/1995/12/21/us/doctors-say-hmo-s-limit-what-they-can-tell-patients.html> ("Doctors across the country say that health maintenance organizations routinely limit their ability to talk freely with patients about treatment options and H.M.O. payment policies, including financial bonuses for doctors who save money by withholding care.").

Although the actual extent of the use of gag clauses affecting doctors was “hotly contested,”⁷² the United States Department of Health and Human Services quickly stepped into the fray to hold that “H.M.O.’s may not limit what doctors tell Medicare patients about medical treatment options.”⁷³ Multiple states also took legislative action against gag clauses in H.M.O. contracts.⁷⁴ By 1999, as Professor William Sage wrote in the *Columbia Law Review*, “nearly every state [had] enacted legislation outlawing contractual restrictions on disclosure” in managed-care contracts.⁷⁵ In brief, there is ample precedent for lawmakers taking effective action against gag clauses.

While gag clauses in H.M.O. contracts may be a relic of the past, they are “increasingly common” today in contexts beyond consumer reviews, such as employment contracts, where they ban “former employees from criticizing their erstwhile employer.”⁷⁶ Additionally, as Professor Genelle Belmas and attorney Brian Larson observed in 2007, “[s]oftware manufacturers have also included clauses that forbid publication of any review of their products without consent.”⁷⁷ Furthermore, the *New York Times* reported in June 2016 that a number of for-profit universities include enrollment contracts featuring gag clauses that:

[B]ar students or former students from telling others about the complaint resolution process or the specifics of any final ruling. And internal process requirements prohibit students from taking their complaints public without first going through the school’s own process. In some cases, schools try to bar people from taking complaints elsewhere – even if the internal process yields no relief.⁷⁸

⁷² Julia A. Martin & Lisa K. Bjercknes, *The Legal and Ethical Implications of Gag Clauses in Physician Contracts*, 22 AM. J.L. & MED. 433, 441 (1996).

⁷³ Robert Pear, *The Gag is Off H.M.O. Doctors*, N.Y. TIMES (Dec. 8, 1996), <http://www.nytimes.com/1996/12/08/weekinreview/the-gag-is-off-hmo-doctors.html>.

⁷⁴ See Justin D. Harris, *Health and Welfare: The Timely Demise of “Gag Orders” in Physicians’ Contracts with Managed Care Providers*, 28 PAC. L.J. 906, 910 (1997) (“A number of other states have responded to the growing dissatisfaction with HMOs by passing legislation that, like the newer California legislation, prohibits HMOs from inserting gag clauses in their contracts.”).

⁷⁵ William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 COLUM. L. REV. 1701, 1748–49 (1999).

⁷⁶ David Lazarus, *Whistle-blowing: Insurer Gets Smacked for Bullying Employees*, L.A. TIMES (Aug. 19, 2016, 3:00 AM), <http://www.latimes.com/business/lazarus/la-fi-lazarus-healthnet-whistleblower-20160819-snap-story.html>.

⁷⁷ Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL’Y 37-38 (2007).

⁷⁸ *Don’t Force Students to Sign Away Their Rights*, N.Y. TIMES (June 10, 2016), <https://www.nytimes.com/2016/06/10/opinion/dont-force-students-to-sign-away-their-rights.html>.

A 2016 study by the Century Foundation⁷⁹ “found gag clauses in about one in every ten enrollment contracts at for-profit colleges receiving federal aid. No such provisions were found at nonprofit, public, or privately funded for-profit institutions.”⁸⁰ The study noted that an enrollment-contract gag clause “inserts a firewall between wronged students, reducing the likelihood that they will learn about each other’s complaints, preventing them from working together to seek a better resolution.”⁸¹

The next section turns to a real-life example that vividly demonstrates the destructive impact of gag clauses not only on free expression, but also on individual emotional tranquility and familial fiscal stability.

B. The Case of Jennifer Palmer

In November 2015, during testimony before the United States Senate Committee on Commerce, Science, and Transportation, Jennifer Palmer explained how a non-disparagement clause, supposedly buried in a terms-of-sale-and-use agreement with an online business called KlearGear, wreaked havoc on both her life and her husband’s credit rating.⁸² Specifically, in late 2008 her husband, John Palmer, ordered and paid for two items online from KlearGear.⁸³ After the items never arrived, the Palmers were told via email by a KlearGear representative that the order was unpaid and therefore cancelled.⁸⁴ The Palmers were never able to speak with anyone at KlearGear, however, because the phone numbers on the company’s website merely provided automated responses.⁸⁵

Growing frustrated with the service and what she called “the impossibility of reaching anyone,”⁸⁶ Jennifer then took a step in February 2009 that would later haunt her and her husband: she posted her opinions about KlearGear on a website called RipoffReport.com.⁸⁷ It was not until

⁷⁹ This organization describes itself as “a progressive, nonpartisan think tank that seeks to foster opportunity, reduce inequality, and promote security at home and abroad.” *About the Century Foundation*, CENTURY FOUND., <https://tcf.org/about> (last visited May 2, 2018).

⁸⁰ Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students’ Rights*, CENTURY FOUND. (Apr. 28, 2016), <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights>.

⁸¹ Habash & Shireman, *supra* note 80.

⁸² *Zero Stars: How Gaggling Honest Reviews Harms Consumers and the Economy: Hearing on S. 2044 Before the S. Comm. on Commerce, Sci. & Transp.*, 114th Cong. (2015) [hereinafter “Palmer Testimony”] (statement of Jennifer Kulas Palmer, Plaintiff, Palmer v. KlearGear), https://www.commerce.senate.gov/public/_cache/files/2966d0eb-8812-4035-ae59-4b75979864e4/93F3E6B5DE58928F85DF4367AEC0373A.jen-palmer-testimony.pdf.

⁸³ *Id.* at 1.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

May, 2012 that the trouble started. That's when, as Jennifer testified, her husband:

[R]eceived an email from KlearGear demanding that John have the review on RipoffReport.com removed within 72 hours, or pay KlearGear \$3,500 for violations of their Terms of Sale and Use. . . . KlearGear claimed that my review violated a "non-disparagement clause" in KlearGear's Terms of Sale and Use, the text of which barred the customer – who was John, not me, but that didn't matter to them – from "taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees." John did some research . . . and discover[ed] that the clause wasn't even present in the Terms of Sale when he placed his order back in December 2008. He found that the clause did not appear until February 2012.

Jennifer attempted to remove her review, but as she told the Senators at the hearing, RipoffReport.com's policy prohibits removals.⁸⁸ She testified that her husband then:

[T]ried explaining to KlearGear that the "non-disparagement clause" was not in the Terms of Sale and Use at the time of John's order from KlearGear; that it was I, not John, who wrote the review; and RipoffReport.com's policy of not removing reviews meant we had no control over whether the review remained online. The person claiming to be KlearGear's legal representative just reiterated to us that "this matter will remain open until the published content is removed," and threatened to report the \$3,500 as a debt to the credit reporting agencies.⁸⁹

Indeed, the \$3,500 later showed up as debt owed to KlearGear on John Palmer's credit reports with Experian and Equifax, two of the three major credit-reporting companies in the United States.⁹⁰ Jennifer testified that it took more than eighteen months to remove the information from her husband's credit reports⁹¹—a result coming only after the watch-dog group

⁸⁸ Palmer Testimony, *supra* note 82, at 1-2.

⁸⁹ Palmer Testimony, *supra* note 82, at 2.

⁹⁰ Palmer Testimony, *supra* note 82, at 2.

⁹¹ Palmer Testimony, *supra* note 82, at 2.

Public Citizen filed suit on the Palmers' behalf against KlearGear.⁹² The Palmers won a default judgment against KlearGear, which failed to defend the case.⁹³

Before the lawsuit and prior to the removal of the KlearGear debt from John Palmer's credit record, however, he experienced difficulty obtaining a car loan and was denied a credit card.⁹⁴ The Palmers were also refused financing by several companies for buying a new furnace after their old one broke as winter approached.⁹⁵

On top of the fiscal woes, Jennifer further testified about the emotional toll, noting "the humiliation of having to explain everything"⁹⁶ and "living in fear"⁹⁷ of "not being able to get emergency credit for basic needs."⁹⁸ In fact, one of the causes of action in the Palmers' complaint filed in federal court in Utah was for intentional infliction of emotional distress.⁹⁹

The bottom line, as Jennifer explained, was that her "story shows what can happen when companies are allowed to use non-disparagement clauses in their contracts to bully consumers. And it shows why Congress should take action to prohibit the use of these clauses in consumer contracts."¹⁰⁰ Congress now has done precisely that with the Consumer Review Fairness Act of 2016.

With this background on non-disparagement clauses and the real-world example of the Palmers in mind, Part II addresses the bearing and significance of the First Amendment on the enforceability of these contractual terms.

II. GAG CLAUSES AND THE FIRST AMENDMENT: IS THERE A CONSTITUTIONAL OVERLAY TO CONTRACT LAW?

More than a quarter-century ago, First Amendment scholar Vincent Blasi of checking-value fame¹⁰¹ ruefully queried about gag clauses, "You

⁹² Complaint, *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (D. Utah Dec. 18, 2013) [hereinafter "Palmer Complaint"], <http://www.citizen.org/documents/Palmer-v-Kleargear-Complaint.pdf>.

⁹³ Palmer Testimony, *supra* note 82, at 3.

⁹⁴ Palmer Testimony, *supra* note 82, at 2-3.

⁹⁵ Palmer Testimony, *supra* note 82, at 3.

⁹⁶ Palmer Testimony, *supra* note 82, at 2.

⁹⁷ Palmer Testimony, *supra* note 82, at 3.

⁹⁸ Palmer Testimony, *supra* note 82, at 3.

⁹⁹ Palmer Complaint, *supra* note 92, at 15. The tort of intentional infliction of emotional distress typically is defined as consisting "of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

¹⁰⁰ Palmer Testimony, *supra* note 82, at 1.

¹⁰¹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521 (1977).

can't sell yourself into slavery. So can you sell yourself into silence? It would seem to me there are some inalienable rights you can't sign away."¹⁰² It is a critical, yet relatively understudied, issue. As Professor Alan Garfield observed in 1998, "[t]he extent to which a party can bind himself contractually to silence is largely unexplored in American case law and legal literature."¹⁰³

If the First Amendment were to apply to gag clauses, then its general prohibition against prior restraints¹⁰⁴ would be directly relevant. A prior restraint, the Supreme Court has held, is a "restraint on future speech,"¹⁰⁵ often occurring in the form of "court orders that actually forbid speech activities."¹⁰⁶ It is a fundamental tenet of First Amendment jurisprudence, in turn, that prior restraints on speech are presumptively unconstitutional.¹⁰⁷

Although gag clauses prohibiting negative reviews certainly restrict future expression, the threshold problem in challenging their constitutionality is that the First Amendment protects the right of free expression only from government action.¹⁰⁸ As the Supreme Court wrote four decades ago, "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."¹⁰⁹ It then added that "while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."¹¹⁰

This militates, of course, against the First Amendment playing any role in thwarting the application of a gag clause in a contract between a business

¹⁰² N. R. Kleinfeld, *Silence is Golden*, N.Y. TIMES (Apr. 29, 1990), <http://www.nytimes.com/1990/04/29/magazine/silence-is-golden.html?pagewanted=all>.

¹⁰³ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 263 (1998).

¹⁰⁴ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 996 (5th ed. 2015) (pointing out that while "a clear definition of 'prior restraint' is elusive," perhaps "[t]he clearest definition of prior restraint is an administrative system or a judicial order that prevents speech from occurring").

¹⁰⁵ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

¹⁰⁶ *Id.*

¹⁰⁷ *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) (observing that the First Amendment guarantees of free speech and a free press "afford special protection against orders that prohibit the publication or broadcast of particular information or commentary – orders that impose a 'previous' or 'prior' restraint on speech"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

¹⁰⁸ *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (observing that "the First Amendment protects against the Government").

¹⁰⁹ *Hudgens v. Nat'l Lab. Rel. Bd.*, 424 U.S. 507, 513 (1976).

¹¹⁰ *Id.*

and a consumer. Simply put, a contractual gag clause may fall within the realm of private law,¹¹¹ not constitutional law.

In his 1998 article, Professor Garfield thus raised a crucial question regarding the intersection of contract law, gag clauses, which fall within a larger bucket of “contracts of silence,”¹¹² as he aptly puts it, and the First Amendment: “Are promises of silence different because they implicate the First Amendment or violate a public policy favoring freedom of speech, or are these constitutional and policy concerns irrelevant when a private party agrees to silence himself?”¹¹³

On the one hand, Professor Garfield observes that “whereas the First Amendment limits governmental suppression of speech, contractual suppression of speech may not implicate the First Amendment.”¹¹⁴ Attorney Randolph Kline and his colleagues concur, noting that the First Amendment does not “preclude agreements to limit one’s own speech. In fact, private parties can voluntarily negotiate agreements among themselves . . . to limit the speech rights the parties would otherwise possess.”¹¹⁵ Similarly, in addressing the problem of gag clauses found in software license agreements, Professors Michael Rustad and Maria Onufrio wrote in 2012 that “[w]hen software licensors or other content providers impose restrictions on speech, the First Amendment prohibition on prior restraints is not applicable since there is no state action.”¹¹⁶ Furthermore, Professor Kaiponanea Matsumurd in 2014 asserted that “agreements restricting free speech,”¹¹⁷ in fact, “are routinely enforced”¹¹⁸ and that “the long-term trend has favored”¹¹⁹ contractual waivers of speech rights.

Thus, while the First Amendment may limit the scope of speech-based torts,¹²⁰ it generally has no application in contract law. As Professors Daniel Solove and Neil Richards sum it up, “[a]lthough tort law implicates the First Amendment under modern constitutional jurisprudence, the First

¹¹¹ See Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 4 (2016) (“Private law is usually defined as the branch of law that addresses the relationships between individuals, rather than between individuals and their governments.”).

¹¹² See Garfield, *supra* note 103, at 268 (asserting that “a ‘contract of silence’ is a contract in which a party has made an enforceable promise to keep quiet about something”).

¹¹³ Garfield, *supra* note 103, at 264.

¹¹⁴ Garfield, *supra* note 103, at 344.

¹¹⁵ Randolph Kline, *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 625 (2006).

¹¹⁶ Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1180 (2012).

¹¹⁷ Kaiponanea T. Matsumurd, *Binding Future Selves*, 75 LA. L. REV. 71, 95 (2014).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 96.

¹²⁰ See *supra* notes 32-34 and accompanying text (identifying three key cases in which the Supreme Court held that the First Amendment freedom of speech applies in tort law).

Amendment provides little to no restrictions when other private law rules restrict speech. Such is the case with *contract law* and property law.”¹²¹

The case of *Cohen v. Cowles Media*¹²² provides some evidence of this. There, the Court held that the First Amendment provided no defense against a civil cause of action for promissory estoppel stemming from the breach of a promise of confidentiality given by journalists to a source.¹²³ As UCLA Professor Eugene Volokh encapsulates the holding at its broadest, “[t]he Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amendment problems. Enforcing people’s own bargains, the Court concluded . . . doesn’t violate those people’s rights, even if they change their minds after the bargain is struck.”¹²⁴

Nonetheless, as Professor Shelley Ross Saxer writes, the Court in *Cohen* “found state action in a private breach of contract lawsuit involving a confidential source who sued the newspaper company that exposed him after agreeing to keep him anonymous.”¹²⁵ On this issue, the Court in *Cohen* wrote that “the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes ‘state action’ under the Fourteenth Amendment.”¹²⁶ Byron White reasoned for the five-justice majority that the state-law doctrine of promissory estoppel “would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute ‘state action’ for purposes of the Fourteenth Amendment.”¹²⁷

In brief, judicial enforcement of state contract law theory was sufficient to trigger consideration of the First Amendment by the Court in *Cohen* under principles of state action. Nonetheless, the First Amendment failed to add a layer of constitutional protection because, as the *Cohen* Court reasoned, generally applicable laws such as promissory estoppel “do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”¹²⁸

Addressing the state action question, Professor Garfield points out that “[j]udicial enforcement of a contract of silence may constitute state action and thus implicate the First Amendment.”¹²⁹ Most courts, however, do not

¹²¹ Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1660 (2009) (emphasis added).

¹²² 501 U.S. 663 (1991).

¹²³ *Id.* at 669-70.

¹²⁴ Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000).

¹²⁵ Shelley Ross Saxer, *Shelley v. Kraemer, State Action, and Judicial Takings*, 21 WIDENER L.J. 847, 848 (2012).

¹²⁶ *Cohen*, 501 U.S. at 668.

¹²⁷ *Id.*

¹²⁸ *Id.* at 669.

¹²⁹ Garfield, *supra* note 103, at 319.

recognize the proposition that judicial enforcement, by itself, constitutes state action. For instance, in April 2016 a federal district court in California turned back a First Amendment challenge to a contractual arbitration agreement by rejecting the plaintiffs' argument "that the mere fact of judicial enforcement automatically establishes state action."¹³⁰ Indeed, the United States Court of Appeals for the Ninth Circuit in 2013 opined that "[i]n the context of First Amendment challenges to speech-restrictive provisions in private agreements or contracts, domestic judicial enforcement of terms that could not be enacted by the government has *not* ordinarily been considered state action."¹³¹

In fact, as Professor Mark Rosen observed in a 2004 article, "with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements inhibiting speech does *not* trigger constitutional review, despite the fact that identical legislative limitations on speech would have."¹³² Put even more bluntly by a Washington state appellate court, "[s]tate enforcement of a contract between two private parties is *not* state action, even where one party's free speech rights are restricted by that agreement."¹³³

Yet Professor Garfield emphasizes that the Supreme Court has long applied a First Amendment overlay to state tort law,¹³⁴ with recent cases like *Snyder v. Phelps*¹³⁵ illustrating this point. As Chief Justice John Roberts observed for the eight-justice *Snyder* majority, "[t]he Free Speech Clause of the First Amendment—'Congress shall make no law . . . abridging the freedom of speech'—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."¹³⁶ In other words, if a veneer of First Amendment jurisprudence can coat tort law, then why can that amendment not similarly add a layer of constitutional protection to contract law?

Ultimately, Garfield concludes, "there is no obvious answer"¹³⁷ regarding whether the First Amendment imposes restrictions on gag clauses entered into freely between private parties. He adds that even if the state action of judicial enforcement makes the First Amendment applicable to

¹³⁰ *Roberts v. AT&T Mobility, LLC*, 2016 U.S. Dist. LEXIS 56389, at *6 (N.D. Cal. Apr. 27, 2016).

¹³¹ *Ohno v. Yasuma*, 723 F.3d 984, 998 (9th Cir. 2013) (emphasis added).

¹³² Mark D. Rosen, *Exporting the Constitution*, 53 *EMORY L.J.* 171, 193 (2004) (emphasis added).

¹³³ *Washington v. Noah*, 9 P.3d 858, 871 (Wash. Ct. App. 2000) (emphasis added).

¹³⁴ See Garfield, *supra* note 103, at 347-48 ("Although the Supreme Court has long recognized that state enforcement of tort law can trigger the First Amendment, it has yet to decide whether the same is true for state enforcement of contracts.").

¹³⁵ *Snyder v. Phelps*, 562 U.S. 443 (2011).

¹³⁶ *Id.* at 451.

¹³⁷ Garfield, *supra* note 103, at 319.

contracts of silence, this still fails to resolve whether such a constitutional right may be waived.¹³⁸

With this unsettled state of First Amendment jurisprudence leaving a gaping chasm between the speech interests of consumers and the contractual rights of businesses to protect their reputations, both the federal government and several states now are filling the void with statutes rendering non-disparagement clauses invalid. Those laws are examined below in Part III.

III. LEGISLATIVE RESPONSES TO GAG CLAUSES: ANALYZING FEDERAL AND STATE “RIGHT TO GRIPE” STATUTES

This Part features two sections. Section A examines the federal Consumer Review Fairness Act of 2016, while Section B analyzes the legislative efforts of both California and Maryland. They were the first two states to tackle consumer-review gag clauses with legislation that predates the new federal statute.

A. Consumer Review Fairness Act of 2016

A starting point for this analysis is the Consumer Review Fairness Act’s definition of a non-disparagement clause. The Act, however, does not use either the term “non-disparagement clause” or “gag clause.” Instead, it employs the more neutral term “covered communication,”¹³⁹ which it defines as “a written, oral, or pictorial review,¹⁴⁰ performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.”¹⁴¹

This definition allows consumers to post reviews consisting of *both* words and images. For instance, a person who believes a kitchen-cabinet installer shoddily performed work could not only describe, via written text, why she thinks the work was shoddy, but also post photographs and/or videos offering seemingly more objective proof of inferior performance. Such visual evidence is important because, as Chief Justice John Roberts’ pointed out in 2012, “a picture is worth a thousand words.”¹⁴²

Second, it is important to understand that the Act does *not* ban all non-disparagement clauses. Specifically, it applies only when such clauses

¹³⁸ Garfield, *supra* note 103, at 354-55.

¹³⁹ 15 U.S.C. § 45b(a)(2) (2017).

¹⁴⁰ The concept of pictorial reviews sweeps up “pictures, photographs, video, illustrations, and symbols.” *Id.* § 45b(a)(4).

¹⁴¹ *Id.* § 45b(a)(2).

¹⁴² *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012).

appear in form contracts.¹⁴³ Form contracts, per the statute, must: (i) involve “standardized terms;”¹⁴⁴ (ii) for the “selling or leasing of goods or services;”¹⁴⁵ and (iii) fail to provide a consumer with “a meaningful opportunity . . . to negotiate the standardized terms.”¹⁴⁶

The Act’s deployment of the term “form contract”¹⁴⁷ may be strategic because it conjures up visions of adhesion contracts, which carry more than a whiff of unfairness. Indeed, contracts of adhesion, Professor Shelley Smith writes, “are standardized form contracts presented by a party with superior bargaining power to the ‘adherent’ as a ‘take-it-or-leave-it’ proposition, giving them no alternatives other than complete adherence to the terms presented or outright rejection.”¹⁴⁸ Such contracts, however, typically are enforceable under contract law principles¹⁴⁹ unless the waiver of rights in question is so vast and broad as to be unconscionable¹⁵⁰ and involves “a powerless party, usually a consumer, who has no real choice but to accede to its terms.”¹⁵¹

Unconscionability, as the United States Court of Appeals for the Ninth Circuit wrote in 2016, “has ‘both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.’”¹⁵² As Professor Andrea Boyack recently summarized it:

Adhesion contracts are enforceable, but legal theory has evolved to take into account the lack of voluntariness and content input inherent in adhesion contexts through modern doctrines such as unconscionability and distinct approaches to interpretation for adhesion contracts. Courts recognize that traditional deference to contractual terms may be inappropriate for contracts of adhesion,

¹⁴³ See 15 U.S.C. § 45b(c) (2017) (“It shall be unlawful for a person to offer a *form contract* containing a provision described as void in subsection (b).”) (emphasis added).

¹⁴⁴ *Id.* § 45b(a)(3)(A).

¹⁴⁵ *Id.* § 45b(a)(3)(A)(i).

¹⁴⁶ *Id.* § 45b(a)(3)(A)(ii).

¹⁴⁷ *Supra* note 143 and accompanying text.

¹⁴⁸ Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1035 n.1 (2010).

¹⁴⁹ See *Goesel v. Boley Int’l Ltd.*, 806 F.3d 414, 423 (7th Cir. 2015) (observing that “the fact that an agreement is a contract of adhesion does not automatically defeat enforceability”).

¹⁵⁰ See Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 40 (2014) (“And while contracts of adhesion typically are enforceable even when the parties stand in starkly uneven bargaining positions, an exceptionally broad waiver of First Amendment rights might trigger judicial scrutiny under the doctrine of unconscionability.”).

¹⁵¹ *Woodruff v. Cunningham*, 147 A.3d 777, 789 (D.C. 2016).

¹⁵² *Tompkins v. 23andME, Inc.*, 840 F.3d 1016, 1023 (9th Cir. 2016) (quoting *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 748 (Cal. 2015)).

and they therefore sometimes monitor the substantive fairness of a contract in an adhesion contract context.¹⁵³

In addition to applying only to gag clauses found in form contracts, the Consumer Review Fairness Act carves out multiple exemptions that truly limit its reach to only consumer reviews. For example, employer-employee contracts and independent-contractor agreements fall outside the Act's ambit.¹⁵⁴ Additionally, the Act generally does not apply to non-disclosure provisions affecting trade secrets,¹⁵⁵ personnel files,¹⁵⁶ medical information¹⁵⁷ and records compiled for law enforcement purposes.¹⁵⁸

As explained earlier, in 2015, the FTC began attacking gag clauses as a type of unfair business practice when it filed a complaint against weight-loss marketer Roca Labs.¹⁵⁹ The Consumer Review Fairness Act now specifically codifies gag clauses in form contracts that fall within the Act's reach as unfair and deceptive practices.¹⁶⁰ In turn, it gives the FTC the power to enforce the Act.¹⁶¹

State attorneys general, as well as other authorized state consumer protection officers,¹⁶² also can file civil lawsuits on behalf of their residents under the Act,¹⁶³ provided they, unless otherwise unfeasible,¹⁶⁴ first notify the FTC in writing of their intent to bring such a claim¹⁶⁵ and accompany it with "a copy of the complaint to be filed to initiate the civil action."¹⁶⁶ The FTC may intervene in such state-driven lawsuits.¹⁶⁷

Although the Consumer Review Fairness Act now applies nationwide as federal legislation, both California and Maryland previously adopted their own statutes targeting gag clauses. Those statutes, which remain valid and thus provide a second layer of remedies for citizens in those states, are addressed below in Section B.

¹⁵³ Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL'Y 767, 794 (2014).

¹⁵⁴ 15 U.S.C. § 45b(a)(3)(B) (2017).

¹⁵⁵ *Id.* § 45b(b)(3)(A).

¹⁵⁶ *Id.* § 45b(b)(3)(B).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* § 45b(b)(3)(C).

¹⁵⁹ *Supra* notes 63-70 and accompanying text.

¹⁶⁰ 15 U.S.C. § 45b(d)(1).

¹⁶¹ *Id.* § 45b(d)(2)(A)-(B).

¹⁶² *Id.* § 45b(e)(6)(A).

¹⁶³ *Id.* § 45b(e)(1).

¹⁶⁴ *Id.* § 45b(e)(2)(A)(iii).

¹⁶⁵ *Id.* § 45b(e)(2)(A)(i).

¹⁶⁶ 15 U.S.C. § 45b(e)(2)(A)(ii).

¹⁶⁷ *Id.* § 45b(e)(2)(B).

B. State Legislation

Prior to enactment of the federal Consumer Review Fairness Act of 2016, California and Maryland were the first states to implement laws striking at the enforcement of non-disparagement clauses in consumer contracts. These two state statutes are described below, thus adding enriched context for understanding the federal legislation.

1. California

Assembly Bill 2365, commonly referred to as the “Yelp bill,”¹⁶⁸ was signed into law by Governor Jerry Brown in September 2014 and took effect on January 1, 2015.¹⁶⁹ The measure, Professor Eric Goldman observes, became the “first-in-the-nation statute to stop businesses from contractually gagging their consumers.”¹⁷⁰

Codified at Section 1670.8 of the California Civil Code,¹⁷¹ the law is much briefer in both length and number of clauses than the Consumer Review Fairness Act of 2016. The California law provides, in key part, that “[a] contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.”¹⁷²

Unlike the federal legislation discussed earlier, this provision is *not* limited in applicability to only form contracts. Additionally, and in contrast to the federal statute, California’s statute does not carve out an exemption for employer-employee contracts and independent-contractor agreements.

In terms of enforcement, the California statute embraces a tripartite tack. Specifically, it allows consumers, the state attorney general, and local officials (both district and county attorneys) to file civil actions.¹⁷³ A first

¹⁶⁸ See Amit Singh, *The Yelp Bill: California Bans Non-Disparagement Clauses in Consumer Contracts*, STARTUP BLOG (Aug. 16, 2016), <http://www.startupblog.com/blog/the-yelp-bill-california-bans-non-disparagement-clauses-in-consumer-contracts> (“AB 2365, popularly referred to as the ‘Yelp Bill,’ prohibits companies from using non-disparagement clauses in contracts for the sale or lease of consumer goods or services.”).

¹⁶⁹ Songmee L. Connolly, *Litigation Alert: California Bans Non-Disparagement Clauses in Consumer Contracts*, FENWICK & WEST LLP (Sept. 18, 2014), <https://www.fenwick.com/publications/pages/california-bans-non-disparagement-clauses-in-consumer-contracts.aspx>.

¹⁷⁰ Eric Goldman, *California Tells Businesses: Stop Trying To Ban Consumer Reviews*, FORBES (Sept. 10, 2014, 12:46 PM), <http://www.forbes.com/sites/ericgoldman/2014/09/10/california-tells-businesses-stop-trying-to-ban-consumer-reviews/>.

¹⁷¹ CAL. CIV. CODE § 1670.8 (West 2017).

¹⁷² *Id.* § 1670.8(a)(1).

¹⁷³ *Id.* § 1670.8(c).

violation is subject to a maximum civil fine of \$2,500, while second and subsequent breaches cost \$5,000.¹⁷⁴

Furthermore, the California statute includes a provision closely akin to a punitive damages clause. In particular, consumers or government officials may collect an additional maximum of \$10,000 if they can prove a defendant's violation of the statute was "willful, intentional, or reckless."¹⁷⁵

Although the sum of those fines initially seems paltry, they still will likely cause a chilling effect on gag clause usage in California. As Professor Goldman puts it, "[t]he penalties may be financially modest, but any California business that is foolish enough to take an anti-review contract to court will end up writing a check to their customers."¹⁷⁶

Significantly, California's law stretches beyond the state's borders. As attorney Songmee Connolly explains, the measure "has no geographic limitations and thus would apply to any consumer-facing entity or person doing business in California. Thus, even out-of-state businesses with prospective and current customers in California should ensure compliance."¹⁷⁷

Finally, the California statute makes it clear that a citizen of the Golden State can bring a lawsuit under California Civil Code § 1670.8 and any other statutory or common law theory.¹⁷⁸ Accordingly, California citizens can invoke their state's own statute targeting gag clauses and also request the state's attorney general to pursue a separate claim under the federal Consumer Review Fairness Act.¹⁷⁹

2. Maryland

House Bill 131, better known as the "Right to Yelp" bill,¹⁸⁰ was signed into law by Maryland Governor Lawrence Hogan, Jr., on April 12, 2016.¹⁸¹ Hogan's stroke of the pen made the Old Line State just the second in the

¹⁷⁴ CAL. CIV. CODE § 1670.8(c) (West 2017).

¹⁷⁵ *Id.* § 1670.8(d).

¹⁷⁶ Goldman, *supra* note 170.

¹⁷⁷ Songmee L. Connolly, *Don't Disregard Calif.'s Non-Disparagement Clause Ban*, LAW 360 (Oct. 8, 2014, 10:44 AM), <https://www.law360.com/articles/585252/don-t-disregard-calif-s-non-disparagement-clause-ban>.

¹⁷⁸ See CAL. CIV. CODE § 1670.8(e) (West 2017) ("The penalty provided by this section is not an exclusive remedy, and does not affect any other relief or remedy provided by law.").

¹⁷⁹ See *supra* notes 162–167 and accompanying text (describing the power of state officials to bring claims under the federal Consumer Review Fairness Act).

¹⁸⁰ See Matt Bush, *'Right to Yelp' Bill is Gaining Fans in Maryland Legislature*, WAMU AMER. UNIV. RADIO (Feb. 18, 2016), http://wamu.org/story/16/02/18/right_to_yelp_bill_is_gaining_fans_in_maryland_legislature/ (reporting that the measure is "unofficially dubbed the 'Right To Yelp'").

¹⁸¹ H.B. 131, 2016 Reg. Sess. (Md. 2016), <http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=HB0131&tab=subject3&ys=2016rs>.

nation, following California's lead, to adopt a law banning consumer-review gag clauses.¹⁸²

Codified at Section 14-1325 of Maryland's commercial code, the new legislation took effect in October 2016.¹⁸³ Applying only to contracts involving "the sale or lease of consumer goods or services,"¹⁸⁴ the statute renders "void and unenforceable"¹⁸⁵ clauses that waive a "consumer's right to make any statement concerning: (1) The seller or lessor; (2) Employees or agents of the seller or lessor; or (3) The consumer goods or services."¹⁸⁶ It also prohibits enforcement and threatened enforcement of such clauses, as well as efforts to penalize consumers under such clauses.¹⁸⁷

Maryland's statute specifies two items that California's gag-clause law fails to address. In particular, and unlike California's measure, Maryland's statute provides that individuals and businesses that believe they are defamed in consumer reviews retain the power to file libel actions.¹⁸⁸ Additionally, the Maryland statute exempts from its reach gag clauses restricting consumer disclosure of trade secrets and intellectual property.¹⁸⁹ California's statute, in contrast, is silent on this type of content. In accord with California's measure,¹⁹⁰ however, Maryland makes it clear that its law generally does not restrict the ability of consumer-review websites such as Yelp or TripAdvisor to take down reviews.¹⁹¹

In terms of enforcement authority, the Maryland statute provides that violations of it constitute "unfair and deceptive trade practice[s]"¹⁹² under Maryland's Consumer Protection Act and, in turn, are "[s]ubject to the enforcement and penalty provisions contained in Title 13 of this article."¹⁹³ What does this mean? The general criminal penalty provision of Title 13 provides that "any person who violates any provision of this title is guilty of a misdemeanor and, unless another criminal penalty is specifically provided elsewhere, on conviction is subject to a fine not exceeding \$1,000 or

¹⁸² *The Right to Yelp is Now Maryland Law*, NAT'L FED'N. INDEP. BUS. (July 19, 2016), <http://www.nfib.com/content/news/legal/the-right-to-yelp-is-now-maryland-law-74679/>.

¹⁸³ MD. CODE ANN. COM. LAW § 14-1325 (West 2017).

¹⁸⁴ *Id.* § 14-1325(b). It defines consumer goods and services as those "primarily for personal, household, or family purposes." *Id.* § 14-1325(a)(3).

¹⁸⁵ *Id.* § 14-1325(d).

¹⁸⁶ *Id.* § 14-1325(b).

¹⁸⁷ *Id.* § 14-1325(c)(1)-(2).

¹⁸⁸ *Id.* § 14-1325(e)(3).

¹⁸⁹ See MD. CODE ANN. COM. LAW § 14-1325(e)(2) (West 2017) (providing that the statute does not bar inclusion "in a contract or a proposed contract for the sale or lease of consumer goods or services a provision prohibiting a consumer from disclosing proprietary information, techniques, or processes").

¹⁹⁰ See CAL. CIV. CODE § 1670.8 (e) (West 2017) ("This section shall not be construed to prohibit or limit a person or business that hosts online consumer reviews or comments from removing a statement that is otherwise lawful to remove.")

¹⁹¹ MD. CODE ANN. COM. LAW § 14-1325(e)(1) (West 2017).

¹⁹² *Id.* § 14-1325(f)(1).

¹⁹³ *Id.* § 14-1325(f)(2).

imprisonment not exceeding one year or both, in addition to any civil penalties.”¹⁹⁴

With this analysis of both the federal Consumer Review Protection Act and the California and Maryland non-disparagement statutes in mind, this article concludes by calling on the Supreme Court to adopt a layer of First Amendment protection to cover contract law cases in which an undue burden is imposed on free expression. This approach, as becomes clear, borrows a test from another constitutional law domain – namely, the Court’s current abortion-barrier jurisprudence.

IV. CONCLUSION

Both state laws and the federal Consumer Review Fairness Act may successfully eradicate the pernicious effects of non-disparagement clauses lurking in contracts between consumers and businesses. For this, these articles of legislation merit praise and, in turn, the lawmakers behind them deserve kudos.

Yet the larger constitutional question regarding the First Amendment’s role in this contractual space lingers unresolved.¹⁹⁵ Although not focusing his analysis directly on gag clauses, Professor Donald Smythe lays a possible foundation for the First Amendment to play such a part, at least when contracts involve fictitious, state-created entities such as corporations. Smythe argues:

[S]ince corporations are State-sponsored entities with rights and privileges that individuals do not enjoy, private transactions between individuals and corporations raise questions about the nature of the State sponsorship and its implications for the liberty of the individuals. If liberty requires not just that individuals be as free from coercion as possible, but also that they have spheres of personal autonomy and privacy, and if the transactions between individuals and corporations intrude into individuals’ spheres of personal autonomy and privacy, then the State may indirectly contribute to the impingement upon the liberty of individuals through its sponsorship of the corporations.¹⁹⁶

In brief, the personal and individual autonomy of deciding whether or not to speak is hindered by government-sanctioned businesses via gag

¹⁹⁴ MD. CODE ANN. COM. LAW § 13-411(a) (West 2017).

¹⁹⁵ See *supra* Part II (addressing the role – or lack thereof – that the First Amendment plays in thwarting gag clauses).

¹⁹⁶ Smythe, *supra* note 111, at 15.

clauses buried in form contracts, thus providing an entrée for First Amendment applicability. Furthermore, in addition to impeding speakers' rights, gag clauses also harm the rights of others – namely, the thousands of people who visit consumer-review websites – to learn important information that might very well influence where, how and on what goods and services they spend money. Here, the unenumerated First Amendment right to receive speech is deployable for buttressing the argument that speaker autonomy is thwarted by gag clauses.¹⁹⁷ As the Supreme Court wrote more than a half-century ago, “the right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.”¹⁹⁸

The First Amendment right to receive speech is exceptionally powerful in precisely the same commercial and business contexts in which consumer-review gag clauses lurk and fester. Specifically, the Supreme Court recognized more than forty years ago in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁹⁹ that society has a “strong interest in the free flow of commercial information.”²⁰⁰ It explained why this is so when economic decisions are at stake:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.²⁰¹

In accord with this logic, the unfettered flow of opinions and reviews regarding businesses, services and products directly facilitates a “free enterprise economy”²⁰² by helping to ensure that “economic decisions”²⁰³ of other potential consumers are “intelligent and well informed.”²⁰⁴ Gag clauses throttle this process. The bottom line is that corporations, as government-sanctioned businesses, harm the rights of *both* speakers

¹⁹⁷ See generally Belmas & Larson, *supra* note 77, at 73 (“First Amendment jurisprudence provides considerable support to the concept of a right to hear.”).

¹⁹⁸ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). See also *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (opining that “the right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”).

¹⁹⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²⁰⁰ *Id.* at 764.

²⁰¹ *Id.* at 765.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

(consumers) and audiences (potential consumers) through the inclusion of non-disparagement clauses.

Adding to the impetus for applying the First Amendment to cases involving consumer non-disparagement clauses is the unequal nature of the bargaining power between the individuals and entities involved. As Professor Garfield argues, “not all contractual promises of silence should be treated alike. Surely there is a difference between contracts entered into by two parties of equal bargaining power and adhesion contracts signed by employees or ‘clicked’ onto by consumers.”²⁰⁵

Yet, as Part III made clear, adhesion contracts generally are enforceable.²⁰⁶ For example, one federal court noted that “an adhesion contract is enforceable unless the plaintiff lacked a meaningful choice whether to accept the provision in question and the provision is ‘so one-sided as to be oppressive.’”²⁰⁷ Put slightly differently by another court, “adhesion contracts are enforceable unless unconscionable,” and “[t]o establish unconscionability, the plaintiffs must prove both that they lacked a meaningful choice and that the terms of the contract were unreasonably favorable to the other party.”²⁰⁸

The mere fact, however, that consumers fail to read the terms of online agreements and therefore overlook inclusion of gag clauses is unlikely to render such contracts unconscionable. To wit, the United States Court of Appeals for the Seventh Circuit notes that “[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.”²⁰⁹ Indeed, the Supreme Court of Iowa calls it “well-settled that failure to read a contract before signing it will not invalidate the contract.”²¹⁰

Thus, to render a consumer-review gag clause invalid in the absence of either the Consumer Review Fairness Act or similar state laws, a court not only must find that the contract entered into by a consumer was, in fact, one of adhesion, but also that it was unconscionable. This entails convincing a judge of procedural unconscionability – perhaps the gag clause was in smaller print than the rest of the agreement, was buried deep into the agreement and/or was written vaguely or confusingly – and substantive unconscionability. The substantive argument, in turn, needs to be that it is an overly harsh, one-sided result²¹¹ for a person to forfeit his or her right to

²⁰⁵ Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1120 (2001).

²⁰⁶ *Supra* notes 149–151 and accompanying text.

²⁰⁷ *Wolfe v. TBG Ltd.*, No. 13-3315, 2014 U.S. Dist. LEXIS 11039, at *10 (E.D. Pa. Jan. 28, 2014) (quoting *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 184 (3d Cir. 1998)).

²⁰⁸ *Olle v. 5401 Western Ave. Residential, LLC*, 569 F. Supp. 2d 141, 146 (D. D.C. 2008) (citation omitted).

²⁰⁹ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

²¹⁰ *Bartlett Grain Co. v. Sheeder*, 829 N.W.2d 18, 26 (Iowa 2013) (quoting *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011)).

²¹¹ *AT&T Mobility v. Conception*, 563 U.S. 333, 340 (2011).

publicly criticize – but not, conversely, to laud or praise – a business, thereby depriving others of possibly truthful information that might affect their fiscal decisions.

A better approach, however, is for the Supreme Court to adopt a layer of First Amendment protection when a form contract detrimentally affects an individual's right to express an opinion regarding the goods, services or performance of the other party to the contract. Just as the First Amendment plays such a role today in the realm of common law torts like libel²¹² and intentional infliction of emotional distress,²¹³ so too could it play a similar speech-protective role in the face of contractual gag clauses.

The devil, of course, is in the details of determining precisely when and what contractual conditions should trigger the First Amendment's application. A complete analysis of this issue is beyond the scope of this article, which instead focuses on legislative tacks, such as the Consumer Review Fairness Act, for addressing gag clauses. Nonetheless, one intriguing possibility is to borrow a standard that now controls the Supreme Court's abortion-impediment jurisprudence.

Specifically, the Court in 2016 in *Whole Women's Health v. Hellerstedt*²¹⁴ applied an undue burden standard²¹⁵ to determine if two Texas statutes adopted in 2013 violated a woman's constitutional right to choose to have an abortion.²¹⁶ One statute required physicians who perform abortions to have admitting privileges at a hospital within thirty miles,²¹⁷ while the other mandated that abortion clinics comply with state regulations governing ambulatory surgical centers.²¹⁸

Writing for a five-justice majority, Stephen Breyer wrote that “neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, *each constitutes an undue burden* on abortion access, and each violates the Federal Constitution.”²¹⁹ Justice Breyer explained that the undue burden standard, derived from the

²¹² See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²¹³ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

²¹⁴ 136 S. Ct. 2292 (2016).

²¹⁵ The initial use of the undue burden standard by the Court dates back twenty-five years to its decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). In that case, Justice Sandra Day O'Connor wrote that “the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.” *Id.* at 876. She explained that “[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877.

²¹⁶ *Hellerstedt*, 136 S. Ct. at 2300.

²¹⁷ TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (West 2017); 25 TEX. ADMIN. CODE ANN. §§ 139.53(c)(1), 139.56(a)(1) (2017).

²¹⁸ TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2017); 25 TEX. ADMIN. CODE ANN. § 139.40 (West 2017).

²¹⁹ *Hellerstedt*, 136 S. Ct. at 2300 (emphasis added) (citations omitted).

Court's 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²²⁰ "asks courts to consider whether any burden imposed on abortion access is 'undue'"²²¹ and "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."²²²

As Professor Jessie Hill explains, "[b]y focusing on the health *benefits* of the law in relation to the *burdens*, the Court made sense of, and breathed new life into, the undue burden standard."²²³ Dean Erwin Chemerinsky writes that in *Hellerstedt*, the Court "stressed that in deciding whether a law imposes an undue burden on abortion it is for the judiciary to balance the justifications for the restrictions against their effect on the ability of women to have access to abortions."²²⁴

What might the undue burden standard, which considers both the benefits and burdens of abortion-access restrictions, look like if applied to contractual obligations curbing speech? First and importantly, the standard recognizes that in some instances a restriction on a party's speech rights may actually carry significant benefits. This might be so, for instance, in the realm of confidentiality clauses in employer-employee contracts that prevent disclosure by employees of a company's trade secrets²²⁵ and intellectual property. Such clauses restrict the disclosure of proprietary property and data that are essential for businesses to succeed today.²²⁶ Trade secrets encourage innovation and dissuade unethical behavior.²²⁷ As attorneys Damien R. Meyer and Meaghan Kramer recently explained:

Companies invest significant resources creating confidential and proprietary information and setting themselves apart from their competitors. This information is valuable not only to its holder, but also to

²²⁰ 505 U.S. 833 (1992).

²²¹ *Hellerstedt*, 136 S. Ct. at 2310.

²²² *Id.* at 2309.

²²³ Jessie Hill, *Some Thoughts About Whole Women's Health v. Hellerstedt*, PRAWFSBLAWG (July 5, 2016), <http://prawnsblawg.blogs.com/prawnsblawg/2016/07/some-thoughts-about-whole-womans-health-v-hellerstedt.html> (emphasis added).

²²⁴ Erwin Chemerinsky, *Everything Changed: October Term 2015*, 19 GREEN BAG 2d 343, 355 (2016).

²²⁵ See Anna A. Onley, *Trade Secret Law: A Proposal for Eliminating Adjudicative Loopholes Under Statutory Law of Trade Secrets in the Seventh Circuit*, 11 SEVENTH CIR. REV. 333, 333 – 334 (2016) ("Trade secrets include confidential customer lists, chemical formulas, and manufacturing processes as well as business methods and software, which are increasingly more difficult to protect under federal patent law." (internal citation omitted)).

²²⁶ See Andrew Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection: A Legal and Business Decision*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 371, 371 (2002) (noting that "modern businesses have substantially increased reliance on intellectual property").

²²⁷ Derek E. Bambauer, *Secrecy is Dead – Long Live Trade Secrets*, 93 DENV. L. REV. 833, 846 (2016).

its competitors. The challenge to keep secret a company's most valuable information has never been greater. Temptation for employees and others to misappropriate and misuse valuable data looms in most industries.²²⁸

Such duties of confidentiality in these cases guard against the theft of property – intellectual property – by individuals who seek to exploit it for his or her own financial good, not a larger public interest. In brief, the benefits of restricting speech are exceedingly high in the trade secret realm,²²⁹ while the burden is not undue. As the Supreme Court recognized more than four decades ago, “[t]he maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law.”²³⁰ The Court also remarked at that time on “the importance of trade secret protection to the subsidization of research and development and to increased economic efficiency within large companies through the dispersion of responsibilities for creative developments.”²³¹ In summary, a confidentiality or non-disclosure clause restricting employee speech in the trade secrets and intellectual property spaces would not trigger First Amendment protection.

Confidentiality agreements safeguard trade secrets and intellectual property, with the intent of encouraging innovation and thwarting theft.²³² In contrast, consumer-review gag clauses are designed to stop dissemination of both truthful facts and honest opinions that could affect other consumers' choices regarding fiscal expenditures and, in turn, influence a company's reputation and financial bottom line. Efficient economic markets – those dependent on the free flow of such information to weed out poorly performing products, services and businesses – are thus unduly burdened by gag clauses. Neither innovation nor ethical behavior is fostered by gag clauses, counter to contractual provisions restricting dissemination of trade secrets and intellectual property.²³³

In summary, both state laws and the federal Consumer Review Fairness Act of 2016 are significant, positive steps forward in allowing information

²²⁸ Damien R. Meyer & Meaghan Kramer, *Trade Secret Protections Clarified: The Growing Struggle Over Workplace Confidences*, 51 ARIZ. ATT'Y, Apr. 2015, at 12.

²²⁹ Professor Kurt Saunders explains that “the very survival of a business may depend on its ability to maintain the secrecy of its proprietary information. One study estimated a typical business may derive seventy percent or more of its value from its intellectual property. Theft and improper disclosure of trade secrets can be costly.” Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 210-11 (2006).

²³⁰ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

²³¹ *Id.* at 482.

²³² *Supra* notes 225-230 and accompanying text.

²³³ *See supra* notes 225-230 and accompanying text (addressing trade secrets and intellectual property concerns).

– both factual and opinionated – to flow more freely from consumers to potential consumers in the face of business-imposed gag clauses. The next step, however, is to move beyond short-term legislative fixes to the realm of constitutional law and, in particular, to the First Amendment. Non-disparagement clauses illustrate the importance of the Supreme Court fashioning a layer of First Amendment protection surrounding contracts that affect free expression. The undue burden standard may, this article suggests, provide one viable approach for such contractual constitutionalization.