

**BUT IS IT SPEECH? MAKING CRITICAL SENSE OF THE DOMINANT
CONSTITUTIONAL DISCOURSE ON PORNOGRAPHY, MORALITY AND HARM
UNDER THE PERVASIVE INFLUENCE OF UNITED STATES FIRST
AMENDMENT JURISPRUDENCE**

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SUMMARY

Under the pervasive influence of United States First Amendment jurisprudence, adult gender-specific sexually explicit (or “pornographic”) material is conceptualized, and thus protected in the “marketplace of ideas”, as a particular mode of expression; to be viewed as part of the fabric of an open, free and democratic society. The values which free expression are seen to promote centre upon the advancement of political debate and promotion of personal self-fulfilment and autonomy.

Attempts to conceptualise sexually explicit material within a gender-specific human rights framework present distinct challenges which, in a patriarchal legal and political design, appear to be near insurmountable. These challenges seem to be related to the enduring impact of the common law conception of obscenity (with its strong moralistic overtones) on the jurisprudence of the United States Supreme Court, coupled with a subjective libertarian-inspired test, and the Supreme Court’s general reluctance (also echoed by the South African Constitutional Court) to consider a gender-specific conception of harm emanating from feminist arguments premised upon women’s constitutional interests in human dignity, equality and bodily integrity.

The social revolution of the 1960s, coupled with the women’s liberation movement, called for a distinct departure from the traditional conception of sexually explicit material as a mode of constitutionally defensible free speech and expression, a conception which unavoidably calls for a moralistic approach, separating acceptable forms of expression from those not deemed worthy of (constitutional) protection (termed “obscenity”, specifically created to satisfy the “prurient interest”).

The Supreme Court’s obscenity jurisprudence is characterised by two key features. First, the court subscribes to an abstract concept of free speech, which proceeds from the assumption that all speech is of equal value, and thereby surmises that “non-obscene” sexually explicit

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material has social value, as do esteemed works of literature and art. Secondly, the court assumes that all individuals have equal access to the means of expression and dissemination of ideas and thus fails to acknowledge substantive (and gendered) structural inequalities.

A closer inspection reveals that the Supreme Court's justification of why freedom of expression is such a fundamental freedom in a constitutional democracy (and the reason that "non-obscene" sexually explicit material consequently enjoys constitutional protection) is highly suspect, both intellectually and philosophically. And yet the South African Constitutional Court has explicitly recognised the same philosophical justification as the basis for free speech and expression. The Constitutional Court has, in fact, both supported and emphasised the idea that freedom of expression stands central to the concepts of democracy and political transformation through participation, and has expressly confirmed the association between freedom of expression and the political rights safeguarded under the Bill of Rights. Moreover, the Constitutional Court has also endorsed the conception of adult gender-specific sexually explicit material as a form of free expression.

And yet by embracing a moralistic, libertarian model of free expression, the very ideal of a free, democratic and equal society, one in which women can live secure from the threat of harm, is put at risk. A moralistic, libertarian model is simply not capable of conceptualising sexually explicit material as a possible violation of women's fundamental interests in equality, dignity and physical integrity.

This article has a two-fold objective. The first is to critically examine the dominant discourse on adult gender-specific sexually explicit material emanating from United States jurisprudence (and its resonance in South African constitutional thought), and secondly, to assess whether this particular conception is sensitive to the possible constitutional harm which may result from an abstract liberal-inspired accommodation of sexually explicit material in an imagined free and open democratic society, such as the one presented by the South African legal and constitutional contexts.

KEYWORDS: Sexually explicit material · obscenity · morality · harm · free speech and expression · First Amendment · female sexuality · human rights framework · constitutional jurisprudence