NetChoice

Protecting Free Enterprise and Free Expression Online

Tipping Point: How State Regulation of Voluntary Financial Technology Tips Violates the First Amendment

Introduction

The Constitution's free speech guarantees don't come with a financial services exception.[1] Yet Connecticut's recent legislation regulating voluntary tipping in earned wage access ("EWA") services does exactly that—imposing content-based restrictions on protected speech under the guise of

[1] See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (rejecting the proposition that speech loses First Amendment protection merely because it concerns commercial matters).

consumer protection.[2] This regulatory overreach[3] not only misunderstands the fundamental nature of voluntary tipping but also runs headlong into core First Amendment principles that have protected expressive conduct like voluntary tipping.[4]

EWA services provide millions of Americans with a crucial alternative to higher cost alternatives, often operating on innovative voluntary tipping models that empower consumers while fostering community support.[5] These services have demonstrably reduced reliance on high-interest payday loans, with data showing that about 50% of EWA users can now afford a $400 emergency expense when they previously could not.[6] Rather than celebrate this innovation, Connecticut's Public Act No. 23-126 (the "Act") subjects voluntary tips to an arcane lending regulatory framework—effectively treating expressions of gratitude as interest payments.[7]

This misguided approach ignores decades of Supreme Court precedent establishing that the First Amendment protects not just verbal expression but also conduct that communicates a message.[8] Just as courts have recognized that charitable solicitation[9], campaign contributions[10], and even the act of giving someone the middle finger[11] constitute protected expression, voluntary tipping communicates a distinct message of approval and support. The Act regulates this expression through content-based restrictions and prior restraints cannot withstand constitutional scrutiny.

The constitutional infirmities in Connecticut's approach are both obvious and many. First, by singling out voluntary tips in the context of financial services—but not in countless other contexts where consumers

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[2] Conn. Pub. Act No. 23-126 (2023). The Act amends Connecticut's small loan lending statute to treat voluntary tips as finance charges, effectively subjecting expressions of gratitude to interest rate caps and licensing requirements. See Conn. Gen. Stat. §§ 36a-555(2), 36a-556(a) (2023).

[3] Colorado House Bill 25-1020, introduced in January 2025, represents an even more extreme approach than Connecticut's law, proposing to completely ban the solicitation or acceptance of voluntary tips in connection with earned wage access services. This categorical prohibition of protected expression illustrates the growing trend of unconstitutional restrictions on financial innovation. See Colo. H.B. 25-1020, 74th Gen. Assemb., Reg. Sess. (2025), https://leg.colorado.gov/bills/hb25-1020.

[4] The Supreme Court has long recognized that the First Amendment protects not just verbal expression but also conduct that communicates a message. See *Spence v. Washington*, 418 U.S. 405, 409-11 (1974); *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

[5] Todd H. Baker & Corey Stone, *Making Earned Wage Access Work for Workers*, 107 Iowa L. Rev. 1389, 1391-92 (2022) (documenting the growth and impact of EWA services); see also Lauren Saunders, *Understanding the "Voluntary" in Voluntary Earned Wage Access*, 55 Clearinghouse Rev. 218, 220-21 (2021) (describing various EWA business models).

[6] See Earnin, *Earnin's Impact to the Community* (2023), https://www.earnin.com/impact (reporting improved financial outcomes for EWA users).

[7] The Act's definition of "APR" now includes "any fee, voluntarily or otherwise, charged, agreed to or paid by a borrower in connection or concurrent with a small loan." Conn. Gen. Stat. § 36a-555(2)(D) (2023).

[8] See *Johnson*, 491 U.S. at 404 (1989) ("We have long recognized that [First Amendment] protection does not end at the spoken or written word.").

[9] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (holding that charitable solicitation is protected by the First Amendment).

[10] *Buckley v. Valeo*, 424 U.S. 1, 14-23 (1976) (recognizing campaign contributions as protected expression).

[11] *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) ("This ancient gesture of insult is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity.").

routinely express gratitude through tips—the Act creates a classic content-based restriction that triggers strict scrutiny.[12]

> *The Supreme Court's decision in Barr v. American Association of Political Consultants Inc. makes clear that* ***laws focusing on "whether the caller is speaking about a particular topic" constitute content-based restrictions*** *requiring the most exact constitutional review.*[13]

Connecticut's targeting of disfavored tips only in the context of financial services falls squarely within this prohibition.

Second, the Act's licensing requirements impose an unconstitutional prior restraint on protected speech, requiring government permission before companies can even accept voluntary expressions of gratitude from satisfied customers.[14] This framework vests impermissible discretion in state officials to determine who may engage in protected expression, running afoul of foundational First Amendment principles dating back to *Lovell v. City of Griffin*.[15] The Supreme Court has consistently rejected such schemes, recognizing that requiring government permission to engage in protected expression is "offensive... to the very notion of a free society."[16]

Third, even if the Act's restrictions were analyzed under the more permissive framework for commercial speech established in *Central Hudson*, they would still fail constitutional muster.[17] The government cannot demonstrate that its heavy-handed approach directly advances a substantial interest or employs means narrowly tailored to that purpose.[18] This is particularly true given the availability of less restrictive alternatives that could address any legitimate consumer protection concerns without burdening protected expression.[19]

The implications of this analysis extend far beyond Connecticut's borders or even the specific context of EWA services. As financial technology continues to evolve, regulators increasingly face the challenge of

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[12] See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding that laws targeting speech based on its communicative content are presumptively unconstitutional).
[13] 140 S. Ct. 2335, 2347 (2020) (plurality opinion).
[14] See Conn. Gen. Stat. § 36a-556(a) (2023) (requiring a license before accepting voluntary tips that would exceed specified thresholds).
[15] 303 U.S. 444, 451-52 (1938) (striking down ordinance requiring permission to distribute literature).
[16] *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002).
[17] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).
[18] See *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (requiring government to demonstrate that regulation directly advances its interest).
[19] Cf. *Thompson v. Western States Medical Center*, 535 U.S. 357, 371 (2002) ("If the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").

adapting oversight frameworks to new business models.[20] But the Constitution's protections for free expression cannot be sacrificed on the altar of regulatory convenience. This Article provides a framework for understanding why voluntary tipping constitutes protected expression and how regulators can achieve legitimate consumer protection goals without running afoul of the First Amendment.

Part II examines the EWA industry and its voluntary tipping model in detail, demonstrating how these services have revolutionized access to earned wages while fostering community support. Part III establishes that voluntary tipping constitutes protected expression under multiple First Amendment frameworks, drawing on Supreme Court precedent protecting everything from charitable solicitation to expressive conduct. Part IV analyzes why Connecticut's approach constitutes an impermissible content-based restriction on speech, applying the Court's recent decisions in *Reed v. Town of Gilbert*[21] and *Barr*. Part V demonstrates how the Act's licensing requirements operate as an unconstitutional prior restraint. Part VI proposes alternative regulatory approaches that could achieve legitimate consumer protection goals without violating the First Amendment. Finally, Part VII explores the broader implications for financial services regulation in an era of rapid technological change.

II. The Earned Wage Access Industry: Innovation, Expression, and Regulatory Overreach

A. The Rise of Earned Wage Access Services

The emergence of earned wage access services represents more than just another fintech innovation—it marks a fundamental shift in how millions of Americans access their already-earned wages and avoid predatory lending practices.[22] Unlike traditional payday lenders that trap consumers in cycles of debt with triple-digit interest rates,[23] EWA providers like Earnin, Daily Pay, and Payactiv have pioneered a radically different model: advancing workers their earned-but-unpaid wages with no mandatory fees or interest charges.[24] This innovation hasn't just disrupted predatory lending; it's created a community-driven alternative that empowers workers while fostering expressions of mutual support.[25]

The numbers tell a compelling story. By 2023, over 10 million American workers used EWA services.[26] Even more striking, research shows that EWA users are 50% more likely to avoid overdraft fees, twice as

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[20] See Chris Brummer, *Fintech Law in the Twenty-First Century*, 88 U. Chi. L. Rev. 531, 533-35 (2021) (discussing regulatory challenges posed by financial innovation).
[21] 576 U.S. 155 (2015).
[22] See Todd H. Baker, *FinTech Alternatives to Short-Term Small-Dollar Credit: Helping Low-Income Working Families Escape the High-Cost Lending Trap*, M-RCBG Associate Working Paper Series No. 75, 12-15 (2017) (documenting how EWA services provide alternatives to payday lending).
[23] See Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* 4 (2012) (finding average APRs of 391% for payday loans).
[24] See Earnin, Cash Out User Agreement (2023) ("You are not required to pay any fees or charges to use any of the Cash Out Services.").
[25] See Leslie Parrish, *Making Payroll Cards Work for Employees*, Center for Financial Services Innovation 8-10 (2019) (describing community aspects of EWA services).
[26] Financial Health Network, *Earned Wage Access and Direct-to-Consumer Advance Usage Trends* 3 (2023).

likely to avoid payday loans, and report significantly lower levels of financial stress.[27] These aren't just statistics—they represent real people escaping cycles of debt that have plagued low-income communities for decades.

And significantly, unlike traditional loans, EWA advances are non-recourse, meaning providers can't pursue collections or report to credit bureaus if users don't repay.[28]

B. The Voluntary Tipping Model: Expression Through Action

At the heart of many EWA services lies an innovative voluntary tipping model that fundamentally differs from traditional lending fees.[29] Take Earnin's approach: users can access their earned wages without paying any mandatory fees whatsoever.[30] Instead, they're given the option—but never the obligation—to leave a voluntary tip to support the service.[31] This isn't just a pricing mechanism; it's an expressive system that allows satisfied users to communicate their approval and support for a service that helps their community.[32]

Several features distinguish voluntary tips in the EWA context from traditional lending fees:

First, tips are completely optional—users can access the full service without tipping at all.[33] Second, tips are fully refundable within 30 days, with no questions asked.[34] Third, the decision not to tip never affects a user's ability to access the service in the future.[35] These features make evident that tips serve as expressions of gratitude rather than disguised fees.

The voluntary tipping model also creates a unique form of community expression. When users tip, they're not just paying for a service—they're supporting a service that has provided them and millions of people like them help to avoid more predatory or harmful alternatives. [36] This communal aspect distinguishes EWA tipping from traditional financial services fees and aligns it more closely with other forms of expressive conduct that courts have long protected.[37]

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[27] See Earnin, *Earnin's Impact to the Community* (2023) (reporting improved financial outcomes).
[28] *Id.*
[29] See Lauren Saunders, *Understanding the "Voluntary" in Voluntary Earned Wage Access*, 55 Clearinghouse Rev. 218, 220-21 (2021).
[30] Earnin, Cash Out User Agreement (2023).
[31] *Id.*
[32] See William Michael Lynn, *The Psychology of Tipping*, 44 Cornell Hotel & Restaurant Admin. Q. 14, 15 (2003) (discussing expressive functions of tipping).
[33] Earnin, Cash Out User Agreement (2023).
[34] *Id.*
[35] *Id.*
[36] Earnin, *Earnin's Impact to the Community* (2023).
[37] See, e.g., *Spence v. Washington*, 418 U.S. 405, 409-11 (1974) (protecting expressive conduct); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (same).

C. The Regulatory Response: Competition Prevention Masquerading as Consumer Protection

Rather than recognize the expressive nature of voluntary tipping, Connecticut's Act fundamentally mischaracterizes these expressions of gratitude as lending fees.[38] This category error leads to absurd results: under the Act's framework, a user who receives a $100 advance seven days before payday cannot tip more than $0.69 without triggering onerous licensing requirements.[39] Even more troubling, the Act's licensing scheme vests government officials with broad discretion to determine who may accept expressions of gratitude above this arbitrary threshold.[40]

The driving force behind this regulatory overreach appears to be legacy payday lenders seeking to stifle innovative competitors rather than genuine consumer protection concerns. By imposing onerous restrictions on voluntary tipping while leaving traditional high-interest payday lending largely untouched, the Act serves more to protect incumbent lenders from competition than to safeguard consumers.

The Act's approach reveals a deeper regulatory failure to understand how technology has enabled new forms of financial expression and community support. Other jurisdictions have taken more nuanced approaches, recognizing that EWA services fundamentally differ from traditional lending. Several states have enacted specific EWA legislation that acknowledges the unique characteristics of these services,[41] including Nevada (SB 431), Kansas (HB 2022), and Utah (HB 217). For instance, California's Department of Financial Protection and Innovation has explicitly acknowledged that certain EWA models fall outside lending regulations.[42]

Connecticut's regulatory overreach becomes even more apparent when compared to how voluntary tipping functions in other contexts. The same state that seeks to effectively prohibit EWA users from expressing gratitude through tips places no similar restrictions on voluntary tips for:

- Restaurant servers and delivery drivers[43]
- Ride-sharing and taxi services[44]
- Hair stylists and beauty professionals[45]
- Social media content creators[46]
- Political fundraising platforms[47]

[38] Conn. Pub. Act No. 23-126 (2023).
[39] See Conn. Gen. Stat. § 36a-555(2)(D) (2023).
[40] See Conn. Gen. Stat. § 36a-556(a) (2023).
[41] See, e.g., Cal. Dep't of Fin. Protection & Innovation, *Earned Wage Access Products and Services*, Memorandum (March 7, 2022).
[42] *Id.*
[43] See Conn. Gen. Stat. § 31-60 (2023) (regulating tipped wages in service industries).
[44] See, e.g., Uber, *How to Tip Your Driver* (2023).
[45] See Square, Inc., *2022 Annual Report* 12 (reporting on tipping through payment processing services).
[46] See Twitter, *Introducing Tips* (May 2021).
[47] See ActBlue, *What are ActBlue tips for?* (2023); WinRed, *WinRed Experiments with Tips* (2023).

This disparate treatment of voluntary tips in the EWA context represents exactly the kind of content-based restriction on expression that triggers strict scrutiny under the First Amendment.[48] As the next section demonstrates, the Act's regulation of voluntary tipping as lending activity cannot survive constitutional scrutiny.

III. First Amendment Protection of Voluntary Tipping

A. The Constitutional Framework for Protected Expression

The Supreme Court has consistently recognized that the First Amendment protects not just verbal or written communication, but also expressive conduct that conveys a particularized message likely to be understood by observers.[49] This protection extends beyond traditional political speech to encompass various forms of expression, including charitable solicitation,[50] commercial advertising,[51] and even the act of giving someone the middle finger.[52] The Court has explicitly rejected attempts to create categorical exceptions to First Amendment protection based on either the economic nature of the speech[53] or the identity of the speaker.[54]

This broad protection reflects the Court's recognition that the "First Amendment's guarantee of free speech does not end at the spoken or written word."[55] Instead, the Constitution safeguards the entire "spectrum of communicative action,"[56] protecting both the right to speak and "the right to refrain from speaking at all."[57] This framework provides the foundation for understanding why voluntary tipping in the EWA context constitutes protected expression.

B. Voluntary Tipping as Protected Expression

1. The Expressive Nature of Tipping

Voluntary tipping represents a clear form of expressive conduct that communicates multiple constitutionally protected messages. When an EWA user chooses to leave a tip, they express:

- Gratitude for the service provided[58]
- Support for the platform's mission and community[59]

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[48] See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (plurality opinion).
[49] *Spence v. Washington*, 418 U.S. 405, 409-11 (1974).
[50] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).
[51] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).
[52] *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013).
[53] *Virginia State Bd.*, 425 U.S. at 762.
[54] *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010).
[55] *Texas v. Johnson*, 491 U.S. 397, 404 (1989).
[56] *Cohen v. California*, 403 U.S. 15, 26 (1971).
[57] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
[58] See Michael Lynn, *The Psychology of Tipping*, 44 Cornell Hotel & Restaurant Admin. Q. 14, 15 (2003).
[59] See Earnin, *Earnin's Impact to the Community* (2023).

- Approval of the business model[60]

These messages satisfy the Supreme Court's test for expressive conduct established in *Spence v. Washington*: they reflect an intent to convey a particularized message under circumstances where the likelihood is great that the message would be understood by those who view it.[61]

The expressive nature of tipping is well-documented in academic literature. Research has identified five primary motivations for tipping: (1) expressing gratitude, (2) helping service providers, (3) ensuring future service, (4) gaining social approval, and (5) fulfilling perceived duties.[62] Several of these motivations directly implicate First Amendment concerns about expressive conduct and association.

2. Distinguishing Voluntary Tips from Mandatory Fees

The voluntary and refundable nature of EWA tips fundamentally distinguishes them from mandatory fees or interest charges that courts have traditionally viewed as purely commercial conduct.[63] Several features underscore this distinction:

First, unlike traditional lending fees, EWA tips are completely optional—users can access the full service without tipping.[64] Second, tips can be refunded within 30 days with no questions asked, demonstrating their voluntary nature.[65] Third, the decision whether to tip has no impact on future service access.[66]

These characteristics align EWA tipping more closely with protected forms of charitable or political giving and expressive conduct than with traditional financial service fees.[67] The Supreme Court has consistently recognized that the solicitation of charitable contributions is protected speech,[68] and lower courts have extended this protection to various forms of voluntary giving that express support or approval.[69]

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[60] See Lynn, supra note 58, at 16.
[61] 418 U.S. at 410-11.
[62] Lynn, supra note 58, at 15.
[63] See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (distinguishing expressive conduct from purely commercial activity).
[64] Earnin, Cash Out User Agreement (2023).
[65] *Id.*
[66] *Id.*
[67] This voluntary tipping model is widely used across various non-profit and mission-driven platforms, including ActBlue (https://help.actblue.com/hc/en-us/articles/16869089253399), the Center for Responsible Lending (https://www.responsiblelending.org/donate), DonorsChoose (https://help.donorschoose.org/hc/en-us/articles/202002613), Give Lively (https://www.givelively.org/faqs), GoFundMe (https://support.gofundme.com/hc/en-us/articles/203604424), and WinRed (https://support.winred.com/en/articles/9169216). The widespread acceptance of voluntary tipping across these platforms underscores its fundamental nature as protected expression rather than a disguised fee.
[68] *Village of Schaumburg*, 444 U.S. at 632.
[69] See, e.g., *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993).

C. The Speaker's and Recipient's Constitutional Interests

1. The Tipper's Expressive Rights

The First Amendment protects not just the right to express oneself through words, but also through conduct that conveys a message.[70] When EWA users choose to leave a tip, they engage in expressive conduct that communicates approval, support, and gratitude. This expression falls squarely within the scope of First Amendment protection, as courts have recognized that even seemingly minor acts can constitute protected expression when they convey a message.[71]

The voluntary nature of the tips strengthens their expressive character. Unlike mandatory fees that must be paid to access a service, voluntary tips represent a conscious choice to express support above and beyond what's required. This element of choice transforms the act of tipping from mere commercial transaction into protected expression.[72]

2. The Platform's Right to Solicit Support

EWA platforms' solicitation of voluntary tips also merits First Amendment protection. The Supreme Court has repeatedly recognized that soliciting financial support implicates core First Amendment interests, whether in the context of charitable fundraising,[73] political contributions,[74] or other forms of voluntary support.[75] This protection extends to for-profit entities, as the Court has rejected "the notion that the First Amendment protects only the appropriate capitalist vision of economic relationships."[76]

When EWA platforms ask users to consider leaving a tip to support their mission, they engage in protected speech that:

- Advocates for their business model
- Builds community support
- Advances their mission of providing alternatives to predatory lending and other harmful or higher-cost alternatives
- Fosters voluntary association among users

3. The Public's Right to Receive Information

The Supreme Court has long recognized that the First Amendment protects not just speakers but also the rights of audiences to receive information.[77] In the context of EWA tipping, this protection extends to:

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[70] *Johnson*, 491 U.S. at 404.
[71] See, e.g., *Radwan v. Manuel*, 55 F.4th 101, 115 (2d Cir. 2022) (collecting cases).
[72] Cf. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 789 (1988) (rejecting attempt to regulate charitable solicitation based on percentage of donations used for charitable purposes).
[73] *Village of Schaumburg*, 444 U.S. at 632.
[74] *Buckley v. Valeo*, 424 U.S. 1, 14-23 (1976).
[75] *Riley*, 487 U.S. at 789-90.
[76] *Citizens United*, 558 U.S. at 355.
[77] *Virginia State Bd.*, 425 U.S. at 756-57.

- Other users who benefit from information about community support
- The public's interest in understanding alternative financial models
- The marketplace of ideas about financial services and community support

This right to receive information is particularly important in the context of innovative financial services, where public discourse and understanding facilitate informed decision-making about personal finance.[78]

D. The Communal Aspects of EWA Tipping

The community-driven nature of EWA tipping adds another layer of First Amendment protection. When users tip to show their support for the service, they participate in a form of expressive association that courts have long protected.[79] This collective aspect of EWA tipping—where users support a platform that helps millions avoid predatory lending—implicates not just individual expression but also the First Amendment's protection of expressive association.[80]

IV. Content-Based Restrictions on Voluntary Tipping

A. The Framework for Identifying Content-Based Restrictions

The Supreme Court's recent decisions in *Reed v. Town of Gilbert*[81] and *Barr v. American Association of Political Consultants*[82] provide the framework for identifying content-based restrictions on speech. Under this framework, laws are content-based if they "target speech based on its communicative content"[83] or "focus[] on whether the speaker is speaking about a particular topic."[84] This analysis applies regardless of the government's justification for the regulation—even facially neutral laws can be content-based if they cannot be "justified without reference to the content of the regulated speech."[85]

Connecticut's regulation of voluntary tipping in EWA services represents a quintessential content-based restriction for three reasons:

1. It singles out expressive conduct (tipping) in one context (financial services) for disfavored treatment
2. It requires examining the content of communications to determine if tips are "in connection with" financial services
3. It cannot be justified without reference to the content of the expression it regulates

[78] See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (discussing importance of information flow in commercial context).
[79] See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).
[80] See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).
[81] 576 U.S. 155 (2015).
[82] 140 S. Ct. 2335 (2020).
[83] *Reed*, 576 U.S. at 163.
[84] *Barr*, 140 S. Ct. at 2347 (plurality opinion).
[85] *Reed*, 576 U.S. at 164.

B. Connecticut's Content-Based Approach

1. Singling Out Financial Services Tips

Connecticut's Act creates a classic content-based distinction by regulating voluntary tips only when they occur in connection with financial services.[86] This approach parallels other laws courts have struck down for impermissibly targeting speech based on subject matter. For example:

- The Supreme Court in *Barr* invalidated a law that permitted robocalls about government debt collection but prohibited other robocalls[87]
- The Second Circuit in *Brokamp v. James* held that regulations singling out specific topics for differential treatment are content-based[88]
- Multiple circuits have struck down panhandling ordinances that targeted solicitation for immediate donations while permitting other speech[89]

The Act's disparate treatment of voluntary tips is even more striking given the ubiquity of tipping in other contexts. Consumers routinely express gratitude through tips to:

- Restaurant servers and delivery workers
- Ride-share drivers
- Non-profit organizations
- Hair stylists
- Social media content creators
- Political fundraising platforms[90]

Yet Connecticut imposes no similar restrictions on these expressions of gratitude. This surgical precision in targeting only tips "in connection with" financial services exemplifies the content-based discrimination that triggers strict scrutiny.[91]

2. Content-Based Enforcement

The Act's enforcement mechanism further reveals its content-based nature. To determine whether a tip triggers the Act's restrictions, regulators must examine both:

- The content of communications surrounding the tip
- The context in which the tip was solicited or provided[92]

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[86] Conn. Gen. Stat. § 36a-555(2)(D) (2023).
[87] *Barr*, 140 S. Ct. at 2347.
[88] 66 F.4th 374, 396 (2d Cir. 2023).
[89] See, e.g., *Norton v. City of Springfield*, 806 F.3d 411, 412-13 (7th Cir. 2015); *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019).
[90] See discussion supra Section II.C.
[91] Cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (striking down tax that singled out press).
[92] Conn. Gen. Stat. § 36a-555(2)(D) (2023).

This requirement to scrutinize the content of expression to determine whether it falls within the Act's scope represents exactly the kind of content-based inquiry that the Supreme Court has consistently rejected.[93] The fact that regulators must evaluate whether a tip was made "in connection with" financial services requires precisely the sort of content-based determinations that trigger strict scrutiny.[94]

3. Content-Based Purpose

The Act's content-based purpose is evident from its structure and legislative history. The Connecticut Department of Banking's own testimony reveals that the Act was designed to regulate income-sharing agreements, not EWA services.[95] This regulation of specific types of financial arrangements based on their communicative content exemplifies the content-based purpose that triggers strict scrutiny.[96]

C. Strict Scrutiny Analysis

1. The Demanding Standard

Content-based restrictions on speech are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[97] This is "the most demanding test known to constitutional law."[98] The government bears the burden of proving that:

1. It has a compelling interest that justifies the restriction
2. The law is narrowly tailored to achieve that interest
3. No less restrictive alternatives would serve the government's purpose[99]

2. Lack of Compelling Interest

Connecticut cannot demonstrate a compelling interest in treating voluntary tips as lending charges. Several factors undermine any claimed compelling interest:

First, the legislative history reveals no evidence that voluntary tipping in EWA services has harmed consumers.[100] Second, the Department of Banking's own testimony indicates the Act was aimed at income-sharing agreements, not EWA services.[101] Third, the government cannot claim a compelling interest in regulating voluntary expressions of gratitude in financial services when it leaves identical expression completely unregulated in numerous other contexts.[102]

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[93] See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).
[94] Cf. *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984).
[95] Matt Smith, Conn. Dep't of Banking, Testimony Submitted to the Banking Committee (Feb. 21, 2023).
[96] See *Reed*, 576 U.S. at 164.
[97] *Id.* at 163.
[98] *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).
[99] See *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011).
[100] Legislative history of Conn. Pub. Act No. 23-126 (2023).
[101] Smith, supra note 96.
[102] Cf. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 190 (1999).

The Supreme Court has repeatedly rejected attempts to justify content-based restrictions based on speculative harms or generalized interests in consumer protection.[103] As in those cases, Connecticut's regulation of voluntary tipping without evidence of actual harm cannot satisfy strict scrutiny.[104]

3. Failure of Narrow Tailoring

Even if Connecticut could establish a compelling interest, the Act's restrictions are not narrowly tailored to achieve that purpose. The Act's overbreadth is evident in several ways:

First, it effectively prohibits all but de minimis tips—restricting tips to $0.69 on a $100 advance received seven days before payday.[105] This restriction bears no rational relationship to preventing consumer harm, particularly given that:

- Tips are completely voluntary
- Tips are fully refundable
- Payment or non-payment of tips has no effect on service quality or future service access[106]

Second, the Act's "in connection with" language sweeps in protected expression far removed from any legitimate regulatory concern. Under the Act's broad language, even expressions of gratitude made weeks after an advance could potentially trigger regulatory requirements.[107]

Third, the Act ignores obvious less restrictive alternatives that could address any legitimate consumer protection concerns without burdening protected expression. These include:

- Direct prohibition of deceptive practices
- Enhanced disclosure requirements
- Registration systems without discretionary licensing
- Traditional unfair trade practices enforcement[108]

The Supreme Court has consistently rejected prophylactic restrictions on speech where more targeted alternatives are available.[109] Connecticut's failure to employ these less restrictive alternatives dooms its regulatory scheme under strict scrutiny.

4. Availability of Less Restrictive Alternatives

The existence of obvious less restrictive alternatives further demonstrates the Act's constitutional infirmity. Connecticut could achieve any legitimate consumer protection goals through:

1. Direct regulation of deceptive practices

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[103] See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).
[104] Cf. *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002).
[105] See discussion supra Section II.C.
[106] Earnin, Cash Out User Agreement (2023).
[107] Conn. Gen. Stat. § 36a-555(2)(D) (2023).
[108] See Conn. Gen. Stat. § 42-110b(a) (2023).
[109] See, e.g., *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988).

2. Enhanced disclosure requirements
3. Non-discretionary registration systems
4. Traditional enforcement of unfair trade practices laws[110]

These alternatives would achieve the state's purported interests without burdening protected expression. The Supreme Court has consistently held that the availability of such alternatives renders content-based restrictions unconstitutional under strict scrutiny.[111]

v. Prior Restraint Through Licensing Requirements

A. The Constitutional Framework for Prior Restraints

The Supreme Court has long recognized that licensing schemes that require government permission before engaging in protected expression constitute "prior restraints" that bear a "heavy presumption against their constitutional validity."[112] This presumption is particularly strong where, as here, the licensing scheme vests government officials with discretionary authority to determine who may engage in protected expression.[113]

Prior restraint doctrine reflects the Founders' deep skepticism of licensing requirements for expression. As the Court noted in *Lovell v. City of Griffin*, the "struggle for the freedom of the press was primarily directed against the power of the licensor ... and the liberty of the press became initially a right to publish without a license what formerly could be published only with one."[114] This historical antipathy toward licensing schemes informs modern prior restraint doctrine.

B. Connecticut's Licensing Scheme as Prior Restraint

1. Structure of the Licensing Requirement

Connecticut's Act imposes a classic prior restraint by requiring government permission before EWA providers can accept voluntary expressions of gratitude above minimal thresholds. Specifically, the Act:

1. Requires a license before accepting tips that would exceed specified thresholds[115]
2. Vests licensing authority in the Banking Commissioner[116]
3. Conditions licenses on subjective determinations about:
    - "Experience, character and general fitness"
    - Whether activities will be for the "convenience and advantage" of consumers
    - Adequate financial resources
    - No material misstatements[117]

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[110] See Conn. Gen. Stat. § 42-110b(a) (2023).
[111] See *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000).
[112] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).
[113] *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988).
[114] 303 U.S. 444, 451 (1938).
[115] Conn. Gen. Stat. § 36a-556(a) (2023).
[116] *Id.*
[117] Conn. Gen. Stat. § 36a-565 (2023).

This framework parallels other licensing schemes courts have struck down as unconstitutional prior restraints.[118]

2. Triggering the License Requirement

The Act's licensing requirement is triggered by protected expression in two ways:

First, for businesses that don't charge mandatory fees, the mere acceptance of voluntary tips above the threshold requires a license.[119] Second, the Act requires examining the content of communications to determine if tips are "in connection with" financial services.[120] Both aspects implicate core First Amendment concerns about prior restraints.

The timing requirements compound the constitutional problems. The Act requires obtaining a license *before* accepting protected expression in the form of tips, even though:

- Tips are completely voluntary
- Tips are fully refundable
- Payment or non-payment of tips has no effect on service quality or future service access[121]

3. Discretionary Authority

The most problematic aspect of Connecticut's licensing scheme is its grant of broad discretionary authority to government officials. The Supreme Court has consistently held that licensing schemes affecting expression must contain "narrow, objective, and definite standards to guide the licensing authority."[122] Connecticut's Act fails this requirement in multiple ways:

First, the Commissioner must determine whether an applicant's "experience, character and general fitness" are "satisfactory"—a subjective standard that provides no meaningful constraints on official discretion.[123] Second, the Commissioner must assess whether activities will be "for the convenience and advantage of the consumers"—another standardless delegation of authority.[124] Third, the Act provides no timeframe within which the Commissioner must make these determinations.[125]

C. Application of Prior Restraint Doctrine

1. Heavy Presumption Against Constitutionality

Connecticut's licensing scheme cannot overcome the heavy presumption against prior restraints for several reasons:

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[118] See, e.g., *Kissel v. Seagull*, 552 F. Supp. 3d 277, 282 (D. Conn. 2021).
[119] Conn. Gen. Stat. § 36a-555(2)(D) (2023).
[120] *Id.*
[121] Earnin, Cash Out User Agreement (2023).
[122] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).
[123] Conn. Gen. Stat. § 36a-565 (2023).
[124] *Id.*
[125] See generally Conn. Gen. Stat. §§ 36a-555 to 36a-579 (2023).

First, as the Supreme Court held in *Watchtower Bible*, "it is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[126] The same principle applies here: requiring government permission before accepting voluntary expressions of gratitude offends core First Amendment values.

Second, courts have consistently rejected licensing schemes that lack precise standards to guide official discretion.[127] Connecticut's vague criteria for assessing "character" and "convenience and advantage" provide exactly the kind of standardless discretion that the First Amendment prohibits.[128]

Third, the Act's licensing requirement operates as a de facto ban on protected expression because:

- The licensing process is costly and time-consuming
- The standards for approval are vague and subjective
- The Commissioner has unlimited time to make decisions
- No alternative channels exist for accepting tips while awaiting approval[129]

2. Parallel to Other Unconstitutional Schemes

Connecticut's licensing requirement closely parallels other schemes courts have struck down as unconstitutional prior restraints. For example:

In *Kissel v. Seagull*, the District of Connecticut invalidated Connecticut's Solicitation of Charitable Funds Act, which required paid solicitors to register with state officials.[130] The court held that the registration requirement was an unconstitutional prior restraint because it:

- Was predicated on content-based distinctions
- Vested officials with broad discretion
- Lacked precise standards
- Imposed burdensome requirements[131]

The same analysis applies here. Like the charitable solicitation law in *Kissel*, Connecticut's Act:

- Singles out specific types of expression for licensing
- Grants officials broad discretionary authority
- Lacks precise standards for approval
- Imposes substantial burdens on protected speech[132]

[126] 536 U.S. 150, 165-66 (2002).
[127] See, e.g., *City of Lakewood*, 486 U.S. at 769-70.
[128] Conn. Gen. Stat. § 36a-565 (2023).
[129] See Conn. Gen. Stat. § 36a-556(a) (2023).
[130] 552 F. Supp. 3d at 282.
[131] *Id.* at 292-96.
[132] Compare Conn. Gen. Stat. § 36a-565 (2023), with statute at issue in *Kissel*.

3. Lack of Procedural Safeguards

The Supreme Court has held that licensing schemes affecting expression must contain adequate procedural safeguards, including:

1. Time limits on administrative decisions
2. Prompt judicial review
3. Preservation of the status quo pending review[133]

Connecticut's Act lacks these essential safeguards:

First, it imposes no deadline for the Commissioner to act on license applications.[134] Second, it provides no expedited judicial review process for denied applications.[135] Third, it prohibits accepting tips while awaiting approval, effectively suppressing protected expression during the licensing process.[136]

D. Alternative Regulatory Approaches

Connecticut could achieve its legitimate regulatory objectives without imposing an unconstitutional prior restraint. Less restrictive alternatives include:

1. Post-hoc enforcement against deceptive practices
2. Registration requirements without discretionary approval
3. Enhanced disclosure obligations
4. Traditional consumer protection enforcement[137]

These alternatives would allow Connecticut to protect consumers without requiring government permission before accepting protected expression. The availability of these alternatives further demonstrates the Act's constitutional infirmity.[138]

VI. Alternative Regulatory Approaches

A. Constitutionally Permissible Consumer Protection

States have legitimate interests in protecting consumers from deceptive financial practices.[139] But as the Supreme Court has repeatedly held, these interests must be pursued through means that don't unnecessarily burden protected expression.[140] This section outlines alternative regulatory approaches that would survive constitutional scrutiny while achieving legitimate consumer protection goals.

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[133] *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).
[134] See generally Conn. Gen. Stat. §§ 36a-555 to 36a-579 (2023).
[135] *Id.*
[136] Conn. Gen. Stat. § 36a-556(a) (2023).
[137] See Conn. Gen. Stat. § 42-110b(a) (2023).
[138] Cf. *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002).
[139] See *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).
[140] See *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002).

1. Direct Regulation of Deceptive Practices

The most straightforward alternative is direct prohibition of deceptive practices. Connecticut already has robust consumer protection laws that could be applied to EWA services without burdening protected expression.[141] For example:

- The Connecticut Unfair Trade Practices Act prohibits "unfair methods of competition and unfair or deceptive acts or practices"[142]
- State fraud statutes provide both civil and criminal remedies[143]
- Common law fraud principles offer additional protections[144]

These existing frameworks could address any legitimate concerns about EWA services without restricting protected expression. As the Supreme Court noted in *Riley v. National Federation of the Blind*, direct prohibition of fraud is preferable to prophylactic restrictions on speech.[145]

2. Enhanced Disclosure Requirements

Properly structured disclosure requirements can survive constitutional scrutiny while promoting consumer understanding.[146] Several approaches could work:

1. Mandatory disclosures about:
    - The voluntary nature of tips
    - Refund availability
    - Independence from service quality or future service access[147]
2. Format requirements ensuring disclosures are:
    - Clear and conspicuous
    - In plain language
    - Prominently displayed
    - Readily understandable[148]
3. Timing requirements for disclosures:
    - Before service enrollment
    - At point of advance
    - Before tip solicitation or acceptance[149]

[141] See Conn. Gen. Stat. § 42-110b(a) (2023).
[142] *Id.*
[143] See Conn. Gen. Stat. §§ 53a-215, 53a-119(2) (2023).
[144] See *Sturm v. Harb Development, LLC*, 298 Conn. 124, 142 (2010).
[145] 487 U.S. 781, 800 (1988).
[146] See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).
[147] Cf. Consumer Fin. Protection Bureau, *Earned Wage Access Programs* (Nov. 30, 2020).
[148] See *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).
[149] Cf. Truth in Lending Act, 15 U.S.C. § 1601 et seq.

These requirements would need to be carefully crafted to avoid unduly burdening protected expression.[150] But courts have generally upheld disclosure requirements that directly advance consumer understanding without restricting speech.[151]

B. Registration Without Prior Restraint

1. Non-Discretionary Registration

States can require EWA providers to register with regulatory authorities without imposing unconstitutional prior restraints.[152] A constitutional registration system would:

1. Be purely ministerial rather than discretionary[153]
2. Require only factual information about:
    - Corporate structure
    - Contact information
    - Service descriptions
    - Responsible parties[154]
3. Process applications within defined timeframes[155]
4. Allow operation pending registration review[156]

This approach would provide regulators with necessary information while avoiding the constitutional problems of discretionary licensing.[157]

2. Reporting Requirements

Regular reporting requirements can also survive constitutional scrutiny if properly structured.[158] Permissible requirements might include:

1. Periodic reports on:
    - Number of advances
    - Average advance amounts
    - Tip statistics
    - Refund rates[159]
2. Incident reporting for:
    - Consumer complaints
    - Technical issues

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[150] See *Becerra*, 138 S. Ct. at 2377.
[151] See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010).
[152] See *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984).
[153] See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988).
[154] Cf. Securities Exchange Act of 1934 § 15(b), 15 U.S.C. § 780(b).
[155] See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990).
[156] See *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).
[157] See *Joseph H. Munson Co.*, 467 U.S. at 964 n.12.
[158] See *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1106 (D.C. Cir. 2011).
[159] Cf. Consumer Fin. Protection Bureau, *Earned Wage Access Programs* (Nov. 30, 2020).

    - Material changes to services[160]
3. Financial condition reports:
    - Capital adequacy
    - Liquidity measures
    - Loss rates[161]

These requirements would need to focus on objective information rather than protected expression.[162]

C. Market-Based Solutions

1. Industry Self-Regulation

The EWA industry has already developed voluntary standards that promote consumer protection while preserving innovation.[163] These include:

1. Best practices for:
    - Clear fee disclosure
    - Tip solicitation
    - Refund processing
    - Consumer communication[164]
2. Industry standards for:
    - Data security
    - Service reliability
    - Consumer support
    - Complaint handling[165]
3. Self-regulatory organizations that:
    - Develop guidelines
    - Monitor compliance
    - Share best practices
    - Address concerns[166]

Courts have recognized that voluntary industry standards can reduce the need for government regulation.[167]

2. Technology-Based Solutions

Technology itself can provide consumer protections without restricting speech:[168]

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[160] See Cal. Dep't of Fin. Protection & Innovation, *Earned Wage Access Products and Services* (March 7, 2022).
[161] Cf. Bank Holding Company Act, 12 U.S.C. § 1844(c).
[162] See *Riley*, 487 U.S. at 800.
[163] See American Fintech Council, *Earned Wage Access Standards* (2022).
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] See *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 758-59 (1996).
[168] See Consumer Fin. Protection Bureau, *Innovation Spotlight: Earned Wage Access* (Aug. 2019).

1. Automated systems that:
    - Track advance limits
    - Process refunds
    - Monitor usage patterns[169]
2. Consumer interfaces that:
    - Clearly display options
    - Facilitate informed choice
    - Enable easy refunds
    - Provide transaction history[170]
3. Data analytics that:
    - Identify potential issues
    - Prevent overextension
    - Track outcomes
    - Enable improvements[171]

VII. Conclusion

The preceding analysis demonstrates that Connecticut's law regulating voluntary tipping in EWA services violates the First Amendment in multiple ways. The Act's content-based restrictions on protected expression fail strict scrutiny, while its licensing scheme operates as an unconstitutional prior restraint. These constitutional infirmities reflect broader challenges in regulating financial innovation while respecting fundamental rights.

The solution lies not in abandoning consumer protection or in artificially using prior restraints on speech in the name of consumer protection, but in developing regulatory approaches that achieve legitimate objectives without unnecessarily burdening protected expression. Direct regulation of deceptive practices, enhanced disclosure requirements, and non-discretionary registration systems can protect consumers while respecting the Constitution. As financial technology continues to evolve, regulators must embrace frameworks that promote innovation and consumer protection while preserving fundamental rights.

This analysis provides a foundation for that crucial work, offering principles that can guide the development of constitutional regulatory approaches not just for EWA services, but for financial innovation more broadly.

[169] *Id.*
[170] *Id.*
[171] *Id.*