Speech, Silence, and Structure

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ABSTRACT

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The three Articles that comprise this Dissertation explore how free expression and judicial federalism regulate hurtful speech and promised silence. The Articles tackle torts and free speech, contracts and free speech, and a comparative variation on those two themes. Judicial federalism threads all three Articles. The first Article, *Silencing State Courts*, argues that the current mode of enforcing the First Amendment against state common law speech torts fails to promote cooperative judicial federalism. Second, *Silence for Sale* argues that state courts should free themselves from constitutional straitjackets and recognize a robust public policy of free expression that voids some nondisclosure agreements. Finally, *Comparative Judicial Federalism* argues that the strength of a federal free speech guarantee varies with a country's particular species of judicial federalism. By comparing free speech and judicial federalism in the United States and Australia, it argues that Australia's judicial federalism augments its implied freedom of political communication.

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For my Mother and Grandmother

SPEECH, SILENCE, AND STRUCTURE

Introduction

The three Articles that comprise this Dissertation explore how free expression and judicial federalism regulate hurtful speech and promised silence. The Articles tackle torts and free speech, contracts and free speech, and a comparative variation on those two themes. Judicial federalism threads all three Articles. The first Article, *Silencing State Courts*, argues that the current mode of enforcing the First Amendment against state common law speech torts fails to promote cooperative judicial federalism. Second, *Silence for Sale* argues that state courts should free themselves from constitutional straitjackets and recognize a robust public policy of free expression that voids some nondisclosure agreements (NDAs). Finally, *Comparative Judicial Federalism* argues that the strength of a federal free speech guarantee varies with a country's particular species of judicial federalism. By comparing free speech and judicial federalism in the United States and Australia, it argues that Australia's judicial federalism augments its implied freedom of political communication.

In a flash of inspired error, Justice Thomas very recently encouraged the Supreme Court to reconsider *New York Times Co. v. Sullivan*.[1] He joined the Court in denying certiorari to the plaintiff, Kathy McKee, after the First Circuit had affirmed the dismissal of her defamation lawsuit against Bill Cosby on *Sullivan*-related grounds.[2] Justice Thomas raised eyebrows by condemning *Sullivan* and its progeny as "policy-driven decisions masquerading as constitutional law."[3] First, Justice Thomas thought each state "perfectly capable of striking an acceptable balance" between free speech and individual

[1] 376 U.S. 254 (1964).

[2] McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari).

[3] Id. at 376.

reputation.[4] Second, *Sullivan* wrongly "displace[d] vast swaths of state defamation law."[5] Finally, *Sullivan* should have been decided on a much narrower ground.[6] Justice Thomas's opinion illustrates many of the themes of the Dissertation. In this Introduction, I will return to it to explain why it is deeply misguided.

Speech that Hurts: *Silencing State Courts*

Silencing State Courts centers on the First Amendment's protection of speech that would otherwise be tortious under state common law. It argues that there are two paradigms of First Amendment enforcement against state speech torts, represented by the venerable *Sullivan* and the more recent *Snyder v. Phelps*.[7] In *Sullivan*, the elected police commissioner of Montgomery, Alabama, sued the New York Times and four individuals for libel. The alleged libel, which contained trivial errors of fact, criticized the conduct of the Montgomery police during the Civil Rights Movement, but did not name the plaintiff himself. In an opinion the importance of which is difficult to overstate, Justice Brennan held that a public official cannot "recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[8] In *Snyder*, the father of a fallen Marine sued members of the fundamentalist Westboro Baptist Church, who had picketed his son's funeral, for intentional infliction of emotional distress (IIED), intrusion upon seclusion, and civil conspiracy. Chief Justice Roberts, in an opinion joined by all but Justice Alito, held that nonviolent speech in a public place on a matter of public concern is protected from civil damages. The First Amendment defense to state speech torts "turns largely on whether that speech is of public or private concern."[9]

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[4] Id. at 682. The law blogs lit up in protest. Indeed, if *Sullivan* proves anything at all, it is that sometimes the states just can't be trusted to strike an acceptable balance between speech and reputation.

[5] Id. at 680.

[6] Id. at 677.

[7] 562 U.S. 443 (2011).

[8] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[9] Snyder v. Phelps, 562 U.S. at 451.

This Article attempts to drive a methodological wedge between *Sullivan* and *Snyder*. Scholars lump *Sullivan* and *Snyder* together,[10] but in fact they are paradigmatically different. *Sullivan*'s paradigm is the common law. Justice Brennan's opinion adopted the internal point of view towards Alabama's common law. It accepted, so far as the Free Speech Clause permitted, the state law of libel as a guide for conduct. Indeed, *Sullivan* settled a longstanding common law debate over the existence of a conditional privilege in defamation for criticism of public officials or candidates for public office. *Silencing State Courts* excavates that debate as it played out at the American Law Institute's 1937 annual meeting discussing a tentative draft of the first torts Restatement.[11] A Kansas judge, who had written the leading opinion for the conditional privilege,[12] squared off against Learned Hand, who ultimately prevailed in having the conditional privilege struck from the draft. But the Kansas approach carried the day in *Sullivan* nearly three decades later. Justice Brennan fashioned the federal rule out of materials supplied by state common law, citing the Kansas opinion extensively.[13] This remade the common law of libel, but only by injecting a discrete federal element into the state cause of action.

Snyder, by contrast, did not engage with Maryland common law. The nature of IIED and the interests it protects were barely relevant and mentioned only in passing. The intrusion upon seclusion claim received even less attention. Instead, the Court framed the question presented and its holding generally in terms of "tort liability" and imposed a blanket First Amendment "defense in state tort suits, including

[10] See, e.g., Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell L. Rev. (forthcoming 2019) (manuscript at 53); John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DePaul L. Rev. 433, 437–43 (2016); David S. Han, *Rethinking Speech-Tort Remedies*, 2014 Wisc. L. Rev. 1135, 1175; Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 Duke L. J. 1109, 1162–63 (2013); Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. Pa. J. Const. L. 1117, 1157 (2015).

[11] *Proceedings of 1937 Annual Meeting*, 14 Am. L. Inst. Proc. 2, 135–57 (1937).

[12] Coleman v. MacLennan, 98 P. 281 (Kan. 1908).

[13] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (citing Coleman v. MacLennan, 98 P. 281 (Kan. 1908)).

suits for intentional infliction of emotional distress."[14] In an analysis of the five significant opinions applying *Snyder*,[15] *Silencing State Courts* shows that *Snyder* strong-arms state courts into preempting all torts that apply to speech of public concern. These courts engage in backwards avoidance: they routinely avoid a mine-run private law issue by deciding a significant First Amendment question. Even before discovery, state courts eliminate speech tort claims on First Amendment grounds. Once the First Amendment shows up, these lawsuits do not need developed factual records. Tort plaintiffs have no opportunity to fully vindicate their claims. Nonviolent speech in public view on a matter of public concern is immune to civil liability.

Silencing State Courts contends that *Sullivan*'s model is better than *Snyder*'s because it promotes cooperative judicial federalism. Equal dialogue between the federal and state judiciaries is valuable, and flourishes when state rights of action embed discrete federal issues (and vice versa). *Sullivan* precisely injected a limited federal rule into the defamation cause of action, whereas in *Snyder* the First Amendment overtook the entire litigation. *Snyder* shut down the articulation of state law; silencing state courts on the common law is a systemic ill. While *Sullivan*'s common law methodology inaugurated over fifty years of productive state-federal judicial dialogue, in seven years *Snyder* suppressed every significant opportunity for intersystemic judicial conversation.

A central pillar of Justice Thomas's opinion in *McKee v. Cosby* exploited the rhetoric of preemption. He claimed that *Sullivan* "displaces vast swaths of state defamation law," "abolish[es] the common law of libel," and "scuttl[es] the libel laws of the States in [a] wholesale fashion."[16] *Silencing State Courts* comprehensively refutes this argument. *Sullivan*, in fact, is state-regarding. It did not colonize state libel law. Rather than holding the libel tort wholly unconstitutional when wielded by public officials *qua* officials, as

[14]Snyder v. Phelps, 562 U.S. 443, 451, 451 n.2 (2011).

[15]Dumas v. Koebel, 841 N.W.2d 319 (Wis. Ct. App. 2013); Greene v. Tinker, 332 P.3d 21 (Ala. 2014); City of Keane v. Cleaveland, 118 A.3d 253 (N.H. 2015); Rodriguez v. Fox News Network, LLC, 356 P.3d 322 (Ariz. Ct. App. 2015); Gleason v. Smolinski, 125 A.3d 920 (Conn. 2015).

[16]McKee v. Cosby, 139 S. Ct. 675, 680 (2019) (Thomas, J., concurring in denial of certiorari); id. at 678, 680 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 370, 381 (1974) (White, J., dissenting)).

the concurrences urged,[17] the Court required the official to prove the critic's malice. This allows damages for dishonest, vindictive and intentionally harmful statements, and immunizes honest yet erroneous critiques. *Sullivan* also preserved a role for the jury to determine whether the conditional privilege had been abused.[18] In truth, it is *Snyder*, not *Sullivan*, that "displaces vast swaths" of state speech torts. *Snyder*'s majority opinion (joined, oddly enough, by Justice Thomas) encouraged state courts to ignore their own law and answer one overriding federal question: is the speech at issue of public concern? If so, the defendant is "shield[ed] … from tort liability."[19]

Speech in Breach: *Silence for Sale*

Silence for Sale moves on from torts (obligations imposed by law *ex post*) to contracts (obligations voluntarily accepted by the parties *ex ante*). The motivation is the profound collective realization that NDAs promote disinformation and inequality. The #MeToo movement shows that secret ordering can work deep injury to public discourse. *Silence for Sale* attempts to reckon with the threat that NDAs pose to free expression and argues that courts cannot ignore that threat. This argument swims against the tide that prizes freedom of contract and the voluntary trade of speech rights.

Any argument that the First Amendment applies directly to private NDAs runs headlong into a state action fortress.[20] *Silence for Sale* therefore taps into the private law doctrine voiding contracts against public policy. This doctrine is an excellent vehicle for the articulation of a free speech limitation on private contracts. It is a rare example of public interest trouncing private gain: contracts in restraint of trade, to take what is considered the most ancient example, were consistently voided in the eighteenth century.[21] The free speech theories that

[17] Sullivan, 376 U.S. at 293 (Black, J., concurring), 298–99 (Goldberg, J., concurring).

[18] See, e.g., Green v. Tinker, 332 P.3d at 30, 34 n.49, 36.

[19] Snyder v. Phelps, 562 U.S. at 447, 461.

[20] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

[21] William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 357 (1954); Richard A. Epstein, *Volume Introduction*, in Contract — Freedom and Restraint xv, xvii (Richard A. Epstein ed., 2000) (common law held cartelization contracts unenforceable because they damaged social welfare).

dominate today are also oriented toward the public interest. And yet, currently the only NDAs that courts refuse to enforce are those that conceal criminal or tortious conduct.[22] Even then, courts will enforce an NDA concealing wrongdoing if it is embedded in a settlement agreement. In the battle between freedom of contract and freedom of speech, contract almost always wins.

Silence for Sale first drives home the proliferation and pervasiveness of NDAs in our lives. In almost every relationship with a legal valence, NDAs play a significant role in moderating the flow of information. They are, for example, among the first binding contracts signed in commercial deals.[23] This Article walks through the variety of contexts in which NDAs are embedded: employment, dispute resolution, commerce, journalism, intimacy, and consumption. From this survey, the Article educes the values that NDAs serve: economy, privacy, administration of justice, democracy, and national security. Importantly, however, the relationship between NDAs and these values is not stable. For example, trade secrets might permit firms to maximally exploit their intellectual property, but empirical evidence suggests that trade secrets hurt innovation.[24]

Armed with an appreciation of the importance and value of NDAs, *Silence for Sale* proceeds to argue that NDAs can destabilize each member of the standard trilogy of free speech values (agency, democracy, and truth). Consider agency. Speaker-focused accounts of the argument from agency say that free speech is necessary for self-expression and self-development. Audience-centric accounts say that our agency increases with the availability of speech that might form the basis of our rational decisionmaking. NDAs undermine speaker agency by curbing a putative speaker's ability to externalize her mental contents; and they undermine a listener's agency by depriving her of information she would otherwise have. Similarly, some NDAs are problematic for the argument from democracy. An NDA extracted by a candidate for public office may prevent voters from accessing information necessary for the intelligent exercise of the franchise.

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[22] Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261 (1998).

[23] Cathy Hwang, *Deal Momentum*, 65 UCLA L. Rev. 376, 385, 385 n.26 (2018).

[24] Andrea Contigiani et al., *Trade secrets and innovation: Evidence from the "inevitable disclosure" doctrine*, 39 Strategic Management J. 2921 (2018).

And many NDAs are troubling for the argument from truth, because every NDA removes speech from the public process of continual disputation.

There are several obstacles that explain why it has not occurred to courts to develop a public policy doctrine subjecting NDAs to free speech scrutiny. The first, noted above, is freedom of contract. The second, also already noted, is the state action doctrine. But these two explanations point to broader pathologies. In the first place, why does freedom of contract typically trump freedom of speech? It is question-begging to answer that the speaker has waived or traded away her free speech rights. The critical point is that the values and interests in enforcing NDAs must actually be weighed against the values and interests in free speech. Second, the state action doctrine only explains why *constitutional* free speech scrutiny cannot reach private contracts. It does not follow that courts are powerless to identify and operationalize free expression as a public policy to void or limit NDAs. Indeed, *Silence for Sale* diagnoses this pathology as a monopoly: constitutions have wholly monopolized our free speech discourse. It is time for the common law to wrest back some free speech norms independently of constitutions and their rigid state-action requirements.

In fact, the common law doctrine that voids contracts against public policy is the perfect terrain for operationalizing the value conflict between contract and speech. Free of the rigid mandates of constitutional provisions, state courts can implement their own local conception of free speech public policy. And there is precedent for operationalizing fundamental constitutional principles in this way. For about a century, before statute intervened, state and federal courts voided election wagers.[25] Common law courts thought that these contracts had the potential to fundamentally corrupt the franchise. There is a clear parallel in free expression's argument from democracy. *Silence for Sale* analogously argues that courts should not enforce NDAs that would make the judicial process complicit in delegitimizing an election. It concludes that courts should not enforce an NDA between candidates for public office and their alleged extramarital partners.

[25] See, e.g., Ball v. Gilbert, 53 Mass. (12 Met.) 397 (1847).

Returning to his opinion in *McKee v. Cosby*: Justice Thomas could plausibly argue that erasing *Sullivan* empowers victims. After all, the lower courts applied *Sullivan* to deny McKee's defamation claim against Cosby because she was classified as a limited-purpose public figure who could not show actual malice.[26] Now, there is no evidence that an NDA was ever in place between McKee and Cosby. But the argument that shredding *Sullivan* empowers victims has a counterpart in the NDA context. A promise of confidentiality, this argument goes, is often all the bargaining leverage that victims have. As Jeannie Suk Gersen wrote: "Absent a legally enforceable promise to keep the matter wholly out of the public eye, many powerful people would prefer to take their chances at defending themselves in court or in the press."[27]

To my mind, these arguments miss the point. Justice Thomas's beef, really, is with the cases after *Sullivan* that expanded its federal rule beyond government officials to public figures.[28] There may very well be a cogent argument that *Sullivan* has been stretched beyond breaking point, but that is an argument for reinforcing *Sullivan*, and not its doubtful extensions, as the North Star of our First Amendment tradition. For the parallel NDA argument, let's concede, arguendo, that a promise of confidentiality is a victim's only bargaining chip. Some victims will be less well compensated if courts cease the mindless enforcement of NDAs concealing sexual misconduct. But that does not settle the question. In its shocking and awesome scale, the #MeToo movement demonstrates that these NDAs enable a culture of impunity to fester unchecked. Victims who want to speak out are censored by the threat of legal consequences: a breach of contract judgment and vindictive liquidated damages. Courts should refuse to be complicit in the collective harm laid bare by #MeToo.

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[26] McKee v. Cosby, 874 F.3d 54, 61–62 (1st Cir. 2017).

[27] Jeannie Suk Gersen, *Trump's Affairs and the Future of the Nondisclosure Agreement*, The New Yorker (Mar. 30, 2018), https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-nondisclosure-agreement.

[28] E.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

Free Speech Federalism: *Comparative Judicial Federalism*

Comparative Judicial Federalism shows that the relative degree of integration of central (federal) and local (state) courts affects the reach of freedom of expression. It's trite to observe that Australia's implied freedom of political communication is weak compared to the extraordinary power of the Free Speech Clause of the First Amendment. But in one context—the enforcement of federal free speech norms against the common law—the implied freedom matches and might even surpass the First Amendment. What explains, in the common law context, the remarkable scope of Australia's purportedly modest implied freedom compared to the First Amendment? *Comparative Judicial Federalism* argues that the answer lies in each country's conception of judicial federalism. In short, Australia's judicial federalism augments its implied freedom of political communication.

To make good on the comparative claim, this Article develops a general theory of comparative judicial federalism (not comparative judicial review, though they are related). Comparative judicial federalism enables the comparison of the relationship and extent of integration between central and local courts in different countries. There is very little comparative judicial review scholarship, and that which exists is undertheorized. To bring some rigor to the comparative enterprise, this Article argues that there are three dimensions to judicial federalism: institutional, jurisdictional, and jurisprudential. The institutional dimension concerns the existence of separate systems of state and federal courts. The jurisdictional dimension refers to the distribution of judicial power between the central and local courts. The jurisprudential dimension centers on the sources of law that bind each judiciary.

This framework enables a systematic comparison of the federal judicial systems in the United States and Australia, which is key to understanding the unexpected power of Australia's implied freedom in the common law context. First, the United States has maintained a separate network of inferior federal courts since 1789. By contrast, Australia embraced the Madisonian Compromise for the better part of the twentieth century, lacking a broad network of inferior federal courts until the creation of the Federal Court of Australia in 1976. Second, the model of federal jurisdiction in the United States is atomized,

exercisable only by Article III courts. Australia, however, adopted a gestalt model of federal jurisdiction that closely integrates the state and federal courts. Finally, the High Court of Australia administers a national common law, binding on state and federal judges alike; but in the United States there is no federal general common law, with each state articulating its own.

Comparative Judicial Federalism concludes that the High Court of Australia, as its federal supreme court is named, is a "*Swift*-plus" tribunal. It resembles the U.S. Supreme Court during the era of *Swift v. Tyson*,[29] because it is a national appellate court deciding issues of general law. But it is also a stronger national tribunal than the *Swift*-era Supreme Court, because its decisions on general law are binding on all state and federal courts in Australia. The High Court administers a regime that is functionally equivalent to a binding version of *Swift*.

Applying this conclusion to the enforcement of federal free speech norms yields a couple of interesting conclusions. It explains, first, why the implied freedom looks very similar to the First Amendment when deployed against common law speech torts. In *Lange v Australian Broadcasting Corporation*,[30] the case which conformed defamation to the implied freedom, the High Court grounded its authority to rewrite the common law in its status as a *Swift*-plus court. In *Snyder*, by comparison, the Supreme Court sourced its authority to rewrite Maryland's common law in the First and Fourteenth Amendments. Despite these different grounds, both courts' reasons bear more than a passing resemblance: they fashioned national common law defenses. This suggests that the Supreme Court in *Snyder* acted as a *Swift*-plus court. There is a strong resemblance between the methodology of the High Court, which legitimately administers a national common law, and the Supreme Court, which does not. This is not an argument that *Snyder* was beyond the Supreme Court's power; *Snyder*'s federal defense is a legitimate example of "constitutional common law."[31] But it indicates that it can be difficult to distinguish between a *constitutional* or *federal* common law, on the one hand, and a *Swift*-plus, *national general* common law, on the other.

[29]41 U.S. (16 Pet.) 1 (1842).

[30](1997) 189 CLR 520 (Austl.).

[31]Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

Second, *Comparative Judicial Federalism* shows that the implied freedom can reach where the First Amendment cannot: private NDAs. Australian courts, unlike those in the United States, are not hamstrung by a quasi-jurisdictional state action doctrine. Moreover, American and Australian courts have specified different sources of authority to shape their interventions in the common law. In the United States, the common law is primarily local. Justice Brennan in *Sullivan* therefore looked to state courts for the doctrinal materials to fashion his federal rule. But in Australia, the common law is a central institution which predates the Constitution and in which the Constitution is embedded. When developing the common law to conform to the implied freedom, *Lange* therefore relied on a judgment of Sir James Parke from 1834—written 66 years before Australia's Constitution was enacted.[32] The High Court can imbue classic common law doctrines, like the one that voids contracts against public policy, with constitutional significance. In the absence of a state action requirement, there is no obstacle to the High Court recognizing a public policy of free political communication which could void some NDAs.

In *McKee v. Cosby*, Justice Thomas made a tantalizing aside that has flown under the radar. He hinted that the *Sullivan* Court should have decided the whole case on a much narrower ground. The alleged libel in *Sullivan* generally criticized the local police without naming the plaintiff. But Alabama law required that a defamatory statement be made "of and concerning" the plaintiff. Nevertheless, the lower court thought it "common knowledge" that municipal police are "under the direction and control of a single commissioner" and that criticism of police "is usually attached to the official in complete control of the body."[33] General governmental criticism was therefore imputed to the official in charge. Justice Brennan rejected this reasoning: "such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations."[34] The evidence was

[32]Toogood v. Spyring (1834) 149 Eng. Rep. 1044; 1 C. M. & R. 181 (Parke B) (Exch).

[33]New York Times Co. v. Sullivan, 376 U.S. 254, 291 (1964) (quoting New York Times Co. v. Sullivan, 144 So.2d 25, 39 (Ala. 1962)).

[34]Id. at 292.

constitutionally insufficient to support a finding that the statements were of and concerning the public official.

Justice Thomas recited this facet of *Sullivan* and, in passing, said: "This holding was sufficient to resolve the case."[35] Although garnering far less attention than the view that *Sullivan* should be entirely reexamined, his suggestion here is nearly equally consequential. It amounts to a claim that the U.S. Supreme Court should act as a *Swift*-plus tribunal when it reviews speech tort cases on First Amendment grounds. On this view, in every speech tort case a federal court is authorized by the First and Fourteenth Amendments to determine whether the requirements of state law have been satisfied. In other words, with the Free Speech Clause the "administration of justice thus becomes essentially a federal function."[36]

The cost of Justice Thomas's suggestion is that it destroys an opportunity for cooperative judicial federalism. *Silencing State Courts* argues that equal dialogue between the federal and state judiciaries is valuable. Because it promoted cooperative judicial federalism, *Sullivan*'s mode of First Amendment enforcement is preferable to *Snyder*'s. In *Swift*-plus jurisdictions like Australia, cooperative judicial federalism does not make sense: lower courts follow the binding statements of the central tribunal rather than engage in a cross-systemic conversation of equals. Of course, there are efficiency gains for a more centralized judiciary. And a national *Swift*-plus court is perhaps more suited to Australia's small and relatively homogeneous population. But adopting the *Swift*-plus model, as Justice Thomas recommends for speech torts, sacrifices the ongoing and continually evolving formation of American judicial opinion, and the diversity of viewpoints which is its hallmark.

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[35]McKee v. Cosby, 139 S. Ct. 675, 677 (2019) (Thomas, J., concurring in denial of certiorari).

[36]Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 499 (1954) ("The Australian Constitution … gives the High Court of the Commonwealth plenary authority to review state court decisions on questions of state as well as federal law. The administration of justice thus becomes essentially a federal function, though exercised largely through the subordinate tribunals of the states.").

If I'm lucky, my future work will continue to feature the themes that surfaced in *Speech, Silence, and Structure*. Writing *Silence for Sale*, for example, supplied a privileged opportunity to reflect on #MeToo, which is, along with Black Lives Matter, the most important speech event of the twenty-first century. In a paper that is tentatively titled *Expression and Equality*, I will argue that #MeToo reveals equality as an independent and primary free speech value. It will attempt to show that the basic content of #MeToo speech is *experiential* or *situational empathy*. Embedded in this empathic expression is a moral judgment that a predator denied the speaker's status as an equal, and the speaker's reclamation of that equal status. This speech, I will argue, proves that equality can play a central justificatory role for free expression.

SILENCING STATE COURTS

Jeffrey Steven Gordon*

ABSTRACT

In state courts across the Nation, an absolutist conception of the First Amendment is preempting common law speech torts. From intentional infliction of emotional distress and intrusion upon seclusion, to intentional interference with contractual relations and negligent infliction of emotional distress, state courts are dismissing speech tort claims on the pleadings because of the broad First Amendment defense recognized by *Snyder v. Phelps* in 2011. This Article argues, contrary to the scholarly consensus, that *Snyder* was a categorical departure from the methodology adopted by *New York Times Co. v. Sullivan*, the landmark 1964 case that first applied the First Amendment against state common law. *Sullivan*, on the one hand, was a classical common law decision, taking the internal point of view with respect to state common law. *Snyder*, on the other, was only concerned with the existence of protected speech, an issue for which state common law was irrelevant. This Article contends that *Snyder*'s absolutism has negative systemic consequences for judicial federalism: courts are unnecessarily prevented from judging certain conduct right or wrong under the local standards of state tort law, even if the First Amendment ultimately immunizes a defendant from liability. *Sullivan*'s methodology is better than *Snyder*'s because it embraced cooperative judicial federalism. *Sullivan* has underwritten fifty years of productive state-federal judicial dialogue; in just seven years, *Snyder* has censored every significant opportunity for cross-systemic judicial conversation.

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INTRODUCTION

A strange thing is happening to common law speech torts. In state courts across the Nation, they're disappearing, preempted by the First Amendment. From a New Hampshire city suing its libertarian residents for harassing city officers,[1] to brothers suing a TV station in Arizona for broadcasting their father's suicide,[2] to a Wisconsinite school bus driver suing a journalist for publicizing her petty criminal history,[3] to a woman suing her ex-boyfriend's mother for plastering missing-person posters outside her home in Connecticut,[4] the First Amendment is preempting intentional infliction of emotional distress (IIED), intrusion upon seclusion, intentional interference with contractual relations, and negligent infliction of emotional distress. Ignoring hornbook constitutional avoidance doctrine, state courts routinely decide the First Amendment question—whether the speech is protected—while consciously refusing to consider the common law question—whether the speech is tortious in the first place—that is logically (and legally) prior. This is backwards avoidance: state courts avoid a run-of-the-mill private law issue by deciding a significant federal constitutional question.

Perhaps worse, state courts often dismiss these common law claims before discovery. It turns out that once the First Amendment appears, these lawsuits do not need developed factual records.[5] That's because there are only three facts that matter to

[1] City of Keene v. Cleaveland, 118 A.3d 253 (N.H. 2015).
[2] Rodriguez v. Fox News Network, L.L.C., 356 P.3d 322 (Ariz. Ct. App. 2015).
[3] Dumas v. Koebel, 841 N.W.2d 319 (Wis. Ct. App. 2013).
[4] Gleason v. Smolinski, 125 A.3d 920 (Conn. 2015).
[5] *See infra* Section II.B.3.

the First Amendment: the violence, location, and content of the speech. Nonviolent expressive conduct that is in public view and on a matter of public concern is immunized. The most important question by far is whether the speech's content falls within a roomy conception of public concern. In these cases, the First Amendment doctrine requiring appellate courts to independently and closely examine the factual record is a mirage. The First Amendment denies plaintiffs not only a trial, but also the more basic opportunity to present their case.[6]

The culprit is the Supreme Court's 2011 opinion in *Snyder v. Phelps*.[7] In *Snyder*, the father of a fallen Marine sued members of the fundamentalist Westboro Baptist Church for emotional harm caused by their picketing of his son's funeral.[8] The Supreme Court set aside the father's $5 million jury verdict.[9] "As a Nation," wrote Chief Justice Roberts for the majority of eight, "we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[10] Paying almost no attention to Maryland law, Roberts announced that the First Amendment provides a public concern defense in all state tort suits affixing liability to speech.[11] Rather than begin with state common law rules of liability, Roberts "beg[a]n[ ] in the opposite corner with the First Amendment."[12] State courts picked up *Snyder*'s all-purpose federal defense and have run with it. Speech on a matter of public concern (an expansive category) is privileged.

This Article offers a sustained methodological critique of *Snyder* through the structural lens of judicial federalism (the relationship between the state and federal court systems). To be clear, it does not argue that *Snyder*'s outcome was wrong or that *Snyder* was an unconstitutional exercise of power. Regardless of your theory of incorporation,[13] the reconstructed First Amendment applies in full force against the states. And it's a First Amendment truism that civil damages cannot be imposed for protected speech.[14] If

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[6] This Article takes state courts seriously. *See also* Anna E. Carpenter et al., *Studying the New Civil Judges*, 2018 WIS. L. REV. 249, 250–52 (noting the "state court knowledge deficit"); Zachary D. Clopton, *Making State Civil Procedure*, CORNELL L. REV. (forthcoming 2018) (manuscript at 4) ("[S]tate courts matter.").

[7] Snyder v. Phelps, 562 U.S. 443 (2011).

[8] *Id.* at 449–50.

[9] *Id.* at 450, 459.

[10] *Id.* at 461.

[11] *Id.* at 451–53.

[12] Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 292.

[13] *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 137–230 (1998) (tracing the history of the incorporation debate, criticizing the total and selective incorporation models, and proposing the refined incorporation model); *id.* at 231–46 (discussing the incorporation of the Free Speech Clause of the First Amendment).

[14] Private figure plaintiffs can recover actual damages for defamation if they prove negligence. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). *See generally* David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135 (arguing for more remedial flexibility in the application of the First Amendment to speech torts).

we accept that Westboro's speech was protected, then *Snyder* rightly set aside the jury verdict.

But the existence of protected speech is not the only legal inquiry. State common law speech torts can be legitimately constitutionalized in two broad ways. *Snyder* represents the first model. On this view, the First Amendment is an external limit that precludes a state from imposing liability for speech of public concern. Its vision of the First Amendment is absolutist because it protects speech of public concern regardless of context, form, factual record, and theory of liability. The first (and, most of the time, only) question is whether the content of the defendant's speech is of public concern. If it is, then the plaintiff's allegation—whether sounding in IIED, a privacy tort, an economic tort, negligence, or some other theory of civil liability—is simply irrelevant. This enables backwards avoidance, making it unnecessary for a court to decide if the state tort actually covers the speech. Only the speech matters: if speech is protected, the state is preempted. *Snyder*, then, contributed to the ongoing "rule-ification" of the First Amendment and adopted a rule-conflict model for its enforcement.[15] The external limit of the First Amendment invalidates or strikes down the tort. This model fits neatly into the emergent paradigm of thinking about the First Amendment as an unstoppable force, a *Lochner*-esque preemption machine.[16]

There is another way. The second model views the First Amendment as an internal limit on the state right of action. In *New York Times Co. v. Sullivan*,[17] our index case deploying the First Amendment to limit state common law torts, Justice Brennan established the famous "federal rule,"[18] also characterized as a "conditional privilege,"[19] that a public official is "prohibit[ed] . . . from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[20] On this view, the threshold question is whether the application of state rules of law would impose liability for expressive conduct. If yes, then there is state action, and only then is the First Amendment inquiry taken up. This view considers crucially important not only the verdict, but also the legal reasons—the rules and principles of state law—purporting to legitimize the verdict. Rather than simply set aside the verdict because it punishes speech, this model interrogates and refashions the state common law underwriting the verdict, molding that law to ensure it conforms to the First Amendment.

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[15] Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 106 (2012).

[16] *See, e.g.*, Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207–09 (2015).

[17] 376 U.S. 254 (1964).

[18] *Id.* at 279–80.

[19] *Id.* at 282 n.21. The Supreme Court took the characterization of the federal rule as a privilege from a decision of the Supreme Court of Kansas. *Id.* at 280 (citing Coleman v. MacLennan, 98 P. 281 (Kan. 1908)).

[20] *Sullivan*, 376 U.S. at 279–80.

The claim that *Snyder* and *Sullivan* represent different models of First Amendment enforcement is contentious and needs justification. Indeed, the scholarly consensus is that both *Sullivan* and *Snyder* operate as external, all-or-nothing limits on the states.[21] On the contrary, this Article argues that scholars have been too quick to align *Snyder* with *Sullivan*. This Article drives a wedge between their models of First Amendment enforcement by arguing that *Sullivan*, unlike *Snyder*, is a common law decision. Specifically, this Article argues that Brennan's opinion adopted the internal point of view vis-à-vis Alabama's common law.[22] As a threshold matter, *Sullivan* rested its authority to rewrite state common law on the First and Fourteenth Amendments.[23] It rightly accepted that the rules and principles of state common law, and not only the ancillary orders enforcing state judgments, count as state action.[24] By piercing the libel verdict's veil, Brennan subjected the legal reasons purporting to legitimize that verdict to First Amendment scrutiny. Brennan did not throw out Alabama's libel tort; rather, he accepted Alabama's common law of libel as far as constitutionally permissible.[25] This attitude—a practical attitude of accepting state common law—is the internal point of view.

Drawing on a theory of common law adjudication,[26] this Article argues that adopting the internal point of view towards state common law explains why *Sullivan* is a common law decision. The common law is a disciplined exercise of practical reason that reflects and informs the complex texture of daily life and relationships of members of the political community. State courts, which are the primary repositories of the common law, pride themselves on their status as common law courts. Because they are closer to the people, state courts prefer to solve problems with local rules. This, in turn, opens a dialogue on two fronts: first, with other state courts who

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[21] *See, e.g.*, Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. (forthcoming 2019) (manuscript at 53) (placing *Snyder* in "the Court's sequence of decisions" originating with *Sullivan*); John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 437–43 (2016) (situating *Snyder* as an extension of *Sullivan*'s approach); Han, *supra* note 14, at 1175 (discussing "the Supreme Court's general adherence to the all-or-nothing approach in speech-tort cases ranging from *Sullivan* through *Snyder*."); Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1162–63 (2013) (situating *Snyder* as an extension of *Sullivan*'s approach); Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117, 1157 (2015) ("[I]n the line of cases from *Sullivan* and *Snyder*, the Court has attempted to establish a categorical, quasi-legislative scheme of dignitary tort.").

[22] *See Sullivan*, 376 U.S. at 265.

[23] *Id.* at 265–92.

[24] *See id.* at 265.

[25] *Id.* at 265–92.

[26] *See* Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002) [hereinafter Postema, *Part I*]; Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1 (2003) [hereinafter Postema, *Part II*].

adopt or reject analogous common law rules, and second, with local legislatures who prefer to comprehensively regulate.

Armed with the internal point of view to Alabama law, *Sullivan* adopted this common law methodology, and resolved a long-standing common law debate. In the early twentieth century, state courts debated the existence of a conditional privilege in defamation for criticism of public officials or candidates for public office.[27] *Sullivan* accepted a modified version of the so-called "liberal rule," which permitted the conditional privilege, quoting extensively from Rousseau Burch's 1908 opinion for the Kansas Supreme Court in *Coleman v. MacLennan*.[28] Interestingly, the debate played out at the American Law Institute's [ALI] 1937 annual meeting. During discussion of a tentative draft of the First Torts Restatement, Burch, who had written *Coleman* thirty years earlier, debated Learned Hand, who rejected the liberal rule. Learned Hand convinced the ALI membership. The views of the author of *Masses Publishing Co. v. Patten*[29] on the relationship between libel and free speech, articulated nearly thirty years before *Sullivan*, are of independent interest.

Finally, this Article argues that *Sullivan*'s methodology is preferable to *Snyder*'s because *Sullivan* embraced, and *Snyder* eschewed, cooperative judicial federalism.[30] *Snyder* shut down the articulation of state law. Because doctrine is a public good, silencing state courts on state law—here, the unnecessary federal preemption of state speech torts—is a systemic ill. Cooperative judicial federalism focuses on the value of judicial dialogue between federal and state courts. It flourishes particularly when a state right of action embeds a federal issue (and vice versa) because those cases generate mixed questions of state and federal law. Exercising concurrent jurisdiction, state and federal courts respond to each other's opinions, shape the contours of their own (and each other's) law, and ensure state compliance with federal law. While *Sullivan*'s common law methodology inaugurated over fifty years of productive state-federal judicial dialogue, in just seven years *Snyder*'s absolutism has suppressed every significant opportunity for intersystemic judicial conversation. One of *Sullivan*'s unheralded virtues, then, is that it created the right conditions for a genuinely cooperative judicial federalism. That's a compelling reason to prefer the *Sullivan* model.

There is a deep irony in *Snyder*'s model of First Amendment enforcement. *Snyder*'s constitutional defense, in the words of one state court, "avoid[s] a 'prolonged, costly,

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[27] *See, e.g.*, Coleman v. MacLennan, 98 P. 281 (Kan. 1908).

[28] *Id.* at 285. *See Sullivan*, 376 U.S. at 281–82 n.21.

[29] 244 F. 535 (S.D.N.Y. 1917). *See generally* Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1 (1990) (arguing that in *Masses*, "Hand was the first judge to place heavy reliance on democratic theory in seeking to understand the meaning of the first amendment," and that his premises and reasoning "have become the basic, though often unacknowledged, features of modern first amendment analysis").

[30] "Judicial federalism" is used broadly to refer to the relationship between the state and federal courts.

and inevitably futile trial.'"[31] But a trial isn't futile for a losing plaintiff. Indeed, even pretrial litigation isn't futile if it permits plaintiffs to properly and completely communicate their injury. Pretrial discovery and motion practice allow the tort plaintiff to allege: *that defendant wronged me*.[32] *Snyder*'s First Amendment, however, silences this expressive function of tort law. Moreover, it's ironic that *Snyder*'s First Amendment smothers the articulation of state law. In an IIED suit, for example, surely it is speech of public concern when a court expresses the local political community's collective judgment that a defendant acted beyond all possible bounds of civilized conduct. The First Amendment enforces the *national* community's judgment that the defendant shouldn't pay damages for that conduct; it does not follow that reasoned elaboration of the *local* community's judgment is worthless.

The argument proceeds as follows. After Part I describes the reasoning and significance of *Sullivan* and *Snyder*, Part II distinguishes between their models of First Amendment enforcement. It defends the thesis that *Sullivan* is a common law decision by arguing that Brennan adopted the internal point of view vis-à-vis Alabama's common law. But *Snyder* enforced an external, absolutist vision of the First Amendment, which has shut down the articulation of state common law by state courts. Finally, Part III argues that *Sullivan*'s methodology is superior to *Snyder*'s because it embraced cooperative judicial federalism and generated decades of productive state-federal judicial dialogue.

I. *SULLIVAN* AND *SNYDER*

This Part describes the reasoning and significance of the Article's two focal points, *Sullivan* and *Snyder*. In sum, *Sullivan* is necessary to the legitimacy of the United States; *Snyder* is not so consequential. Latent in the following discussion is that these two cases are symbols, representing not only choices about how the First Amendment is enforced against the states, but also choices about how federal and state law writ large interact. Lurking unarticulated in each is a vision of judicial federalism. Parts II and III will draw out those different visions.

A. Sullivan

On November 3, 1960, Lester Bruce Sullivan, the elected Police Commissioner of Montgomery, Alabama, was "very pleased."[33] Twelve "outstanding jurors"[34] had

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[31] Rodriguez v. Fox News Network, L.L.C., 356 P.3d 322, 325 (Ariz. Ct. App. 2015) (citation omitted).

[32] Scott Hershovitz recently argued that tort law serves an expressive function. *See* Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. Tort L. 405, 406 (2017) ("What message does tort liability send? At the least, this: *The defendant wronged the plaintiff*.").

[33] *Jury Awards $500,000 In Alabama Libel Suit*, HARTFORD COURANT, Nov. 4, 1960, at 29.

[34] *Id.*

just awarded him $500,000 for an alleged libel contained in a paid advertisement in the New York Times describing police harassment and abuse. The largest libel award in Alabama history,[35] it was also the most damaging salvo in Sullivan's campaign against the northern press. Earlier that year, on his thirty-ninth birthday, Sullivan had issued a statement excoriating the "prejudiced northern press" and its program of "further[ing] . . . racial strife and exploitation for financial gain and spectacular distorted news coverage."[36]

Sullivan's active prosecution of the media starkly contrasted with his passive (to put it generously) policing of white brutality. On February 27, 1960, a white man clubbed Christine Stovall, a twenty-two-year-old black woman, over the back of the head.[37] The press reported that nearby police made no arrests.[38] Sullivan said, "[o]ur hands were tied . . . because officers didn't arrive on the scene until the disturbance was over . . . and they couldn't arrest anyone without a complaint."[39] The following year, as Freedom Riders arrived in Montgomery on a Greyhound Bus, the city's police force was nowhere to be found.[40] The Freedom Riders were mercilessly beaten.[41] Sullivan said, "we have no intention of standing police guard for a bunch of trouble makers coming into our city and making trouble."[42]

It was left to the federal courts to police Sullivan. His abnegation of duty earned an injunction from District Judge Frank M. Johnson, who found "that the Montgomery Police Department, under the direction of Sullivan . . . willfully and deliberately failed to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons," which "continued even after the arrival of the bus."[43] Sullivan's attempt to weaponize libel was thwarted by the Supreme Court in *New York Times Co. v. Sullivan*.[44] Justice Brennan reversed Sullivan's damages award by establishing the famous "federal rule,"[45] also characterized as a "'conditional'

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[35] ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 35 (1991). In 1964, as now, libel in Alabama is a common law cause of action subject to some statutory regulation.

[36] Statement by L. B. Sullivan, March 5, 1960, *available at* http://archives-alabama-primo.hosted.exlibrisgroup.com/01ALABAMA:default_scope:01ALABAMA_ALMA21613897002743 [https://perma.cc/TNG8-CSD4].

[37] *Montgomery Woman Beaten*, N.Y. TIMES, Feb. 28, 1960, at 51.

[38] *Id.*

[39] *Sitdown Campaigns Are Pushed*, ANNISTON STAR, Feb. 29, 1960, at 1.

[40] LEWIS, *supra* note 35, at 10–11.

[41] Don Martin, *U.S. Official Is Knocked Unconscious: Montgomery Police Break Up Scuffles With Tear Gas*, WASH. POST, May 21, 1961, at A1.

[42] *Id.* at A6. Sullivan tried to leverage all the attention into a gubernatorial candidacy, "if public reaction continue[d] to be favorable." *Alabama Cop May Seek Post*, CHI. DAILY DEFENDER, July 17, 1961, at 11.

[43] United States v. U.S. Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897, 901 (M.D. Ala. 1961).

[44] 376 U.S. 254 (1964).

[45] *Id.* at 279.

privilege,"[46] that a public official is "prohibit[ed] . . . from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[47]

The Court in *Sullivan* also claimed power to "'make an independent examination of the whole record' . . . to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[48] Brennan disposed of a Seventh Amendment objection on two distinct grounds. First, he observed that the Seventh Amendment "does not preclude us from determining whether governing rules of federal law have been properly applied to the facts."[49] Second, Brennan pointed out that the Supreme Court is empowered to review a state court's findings of fact "'where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'"[50] In *Sullivan*, the first ground did all the work: the facts, as found, showed that the advertisement was not of and concerning Sullivan, and its publication did not amount to actual malice.[51]

The *Sullivan* case was "an occasion for dancing in the streets"[52] and the most important First Amendment decision of the twentieth century.[53] It held that a state's law of libel "can claim no talismanic immunity from constitutional limitations" and "must be measured by standards that satisfy the First Amendment."[54] The Court staked out the "central meaning of the First Amendment" as the abolition of seditious libel.[55] And it concluded that the federal rule protected the good-faith publication of criticism of public officials who enforced discriminatory laws and policies in the south.[56]

Sullivan, then, stood at a nexus of the private law of torts, the First Amendment, and federalism. First, aided by sympathetic state courts, Sullivan had obtained a private law tort remedy against the publisher of a paid advertisement criticizing official conduct. According to M. Roland Nachman, Jr., Sullivan's lawyer, an award of damages for the advertisement was "within the normal, usual rubric and framework of libel."[57]

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[46] *Id.* at 282 n.21.

[47] *Id.* at 279–80.

[48] *Id.* at 285 (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

[49] *Id.* at 285 n.26.

[50] *Id.* (quoting Fiske v. Kansas, 274 U.S. 380, 385–86 (1927)).

[51] *Id.* at 285–92.

[52] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting a personal conversation with Alexander Meiklejohn).

[53] Henry Paul Monaghan, In Memoriam—Herbert Wechsler, *A Legal Giant Is Dead*, 100 COLUM. L. REV. 1370, 1375 (2000).

[54] *Sullivan*, 376 U.S. at 269.

[55] *Id.* at 273.

[56] *See id.* at 292.

[57] Oral Argument at 01:23:59, New York Times v. Sullivan, 376 U.S. 254 (1964) (No.

Second, at the time conventional doctrine held that the First Amendment did not protect libel. Professor Herbert Wechsler, representing the New York Times, agitated against that ingrained view, and announced that the Alabama judgment "poses . . . hazards to the freedom of the press of a dimension not confronted since the early days [of] the Republic."[58] Third, Nachman not only argued that libel fell outside the First Amendment as a doctrinal matter.[59] He also argued that "[t]he Court has left the characterization of publications as libelous or not libelous to the States."[60] In other words, there can be no federal common law of libel.

It is worth pausing to emphasize *Sullivan*'s stakes. Its enforcement of the First and Fourteenth Amendments against state common law was part of an epic constitutional struggle. *Sullivan* and its plaintiff cannot be disentangled from the Jim Crow south, as Anthony Lewis chronicled in elegant detail.[61] The menace of racism infected the trial: the Times found it difficult to retain local counsel; to avoid violence, its New York attorneys stayed in Alabama motels under assumed names; Sullivan's lawyers struck two African Americans from the list of thirty-six potential jurors; and the trial judge was a Confederate zealot.[62] Nor was *Sullivan* the only libel action afoot against the Times. A cluster of lawsuits threatened the paper's financial viability.[63] Indeed, a loss for the Times may have silenced national coverage of the civil rights movement.[64]

There are, moreover, strong reasons to think that *Sullivan* is necessary for a free society. It is closely aligned with the eradication of seditious libel—the central thrust of, or one of the core policies underlying, the First Amendment.[65] The Madison and Meiklejohn arguments about self-government establish that the minimal conception of free expression protects criticism of government.[66] And Rawls argued that the absence of the crime of seditious libel is a necessary condition of a free society:

> So long as this crime exists the public press and free discussion cannot play their role in informing the electorate. And, plainly,

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39), https://apps.oyez.org/player/#/warren11/oral_argument_audio/14501 [https://perma.cc/A8Y6-YGSF].

[58] *Id.* at 00:00:27.

[59] *See id.* at 01:23:21.

[60] *Id.*

[61] *See generally* LEWIS, *supra* note 35, at 15–22 (describing racial segregation and discrimination in the United States in the mid-twentieth century, especially in Alabama and the south, where it "was . . . far more virulent, because it had force of law," and was a defining characteristic of "the atmosphere in Alabama as *The New York Times* prepared to defend itself in court in Montgomery against the first libel action, brought by Commissioner Sullivan").

[62] *Id.* at 24–27.

[63] *See id.* at 42.

[64] *See id.* at 34–45 (noting that the suit by Sullivan was designed "to choke off a process that was educating the country about the nature of racism and was affecting public attitudes on that issue").

[65] Monaghan, *supra* note 53, at 1376 n.34.

[66] *See* New York Times v. Sullivan, 376 U.S. 254, 275, 297 (1964).

> to allow the crime of seditious libel would undermine the wider possibilities of self-government and the several liberties required for its protection. Thus the great importance of *New York Times v. Sullivan*.[67]

For Rawls, the freedom of political speech is essential "to any fully adequate scheme of basic liberties."[68]

B. Snyder

On March 10, 2006, Albert Snyder rode with his ex-wife and their two daughters to St. John's Catholic Church in Westminster, Maryland.[69] They were attending the funeral of Snyder's son, Marine Lance Corporal Matthew Snyder, who had died in Iraq in the line of duty a week earlier.[70] As the funeral procession pulled into the church grounds, Snyder saw the tops of some signs held by picketers between 200 and 300 feet away.[71] He did not learn what was written on the signs until later that day, when someone switched on the news at a private wake in his parents' home.[72]

The picketers were seven members of the Westboro Baptist Church. Westboro deploys confrontational tactics to preach its Calvinist theology, which Randall Balmer, Westboro's expert witness and a respected historian of American religion, described as "fire-and-brimstone," "fundamentalist militancy," and "'prophetic' and condemnatory."[73] Westboro preaches that the United States "is full of sin, and proud of her sin."[74] "This proud sin," Westboro members said in sworn affidavits, "does not just include homosexuality, though that is a major one."[75] Adultery, divorce, remarriage, and idolatry are also among the "institutionalize[d] sin[s]."[76] The United States, they say, "has become a nation of idolaters, and their main idols are the military uniform, the American flag, and patriotism."[77] Coupled with the view that the United States

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[67] JOHN RAWLS, POLITICAL LIBERALISM 343 (2005).

[68] *Id.* (citing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529–44).

[69] *See* Michael Smerconish, *He Looked Hate in the Eye*, POLITICO (Mar. 7, 2014), http://www.politico.com/magazine/story/2014/03/al-snyder-westboro-baptist-church-104353 [https://perma.cc/93JC-X3UX]; Mike Argento, *Time of Solace, Signs of Hate*, YORK DAILY RECORD, Mar. 11, 2006, at 01.

[70] Argento, *supra* note 69.

[71] Snyder v. Phelps, 562 U.S. 443, 449 (2011).

[72] *Id.*

[73] Statement of Randall Balmer, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. RDB-06-1389), 2007 WL 3118533, at 3–6.

[74] Affidavit of Rebekah A. Phelps-Davis at ¶ 17, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. 06-CV-1389).

[75] *Id.* ¶ 63.

[76] *Id.* ¶¶ 17, 63.

[77] *Id.* ¶ 18.

"is de facto Babylon" are beliefs that Westboro members are prophets, that scriptural "discussions about the fall of Babylon . . . are in fact for America," that tragedies are punishments from God, and that the Iraq war was "a precursor to the destruction of this nation and this world."[78] It follows that "we have a duty to publish to this nation, and the world, a message that God is punishing them for their proud sins."[79]

So, on March 10, 2006, Fred Phelps, two of his adult daughters, and four of his minor grandchildren picketed Matthew Snyder's funeral.[80] After about forty-five minutes of picketing, they packed up just as the funeral service was beginning.[81] Westboro had given law enforcement notice.[82] The picketing was peaceful, unamplified, and confined to a small police-designated area on public land sandwiched between a public street and church property.[83] It was neither seen nor heard during the funeral service.[84] Phelps's daughters held signs saying: "God Hates You," "God Hates America," "America is Doomed," "Semper Fi Fags" (with a graphic of stick figures having sex), "Not Blessed Just Cursed," and "God's View" (with a graphic of Uncle Sam in cross-hairs).[85] Phelps's grandchildren held signs saying: "You're Going to Hell," "God Hates the USA/Thank God for 9/11," "Fag Troops," "Don't Pray for the USA," "Thank God for Dead Soldiers," "Thank God for IEDs," "Maryland Taliban," "Fags Doom Nations," "Priests Rape Boys," and "Pope in Hell." All seven wore T-shirts emblazoned with "God Hates Fags."[86]

Snyder commenced a diversity action against Phelps and Westboro,[87] and later added Phelps's daughters as defendants.[88] Three of the state law tort claims—IIED, intrusion upon seclusion, and civil conspiracy—survived to a jury trial.[89] The jury returned a verdict for Snyder on all three, awarding $2.9 million in compensatory damages and $8 million in punitive damages.[90] The District Judge reduced punitive damages to $2.1 million.[91] The Fourth Circuit reversed, accepting Westboro's argument that the judgment contravened the First Amendment.[92]

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[78] *Id.* ¶¶ 25, 34, 36.

[79] *Id.* ¶ 35.

[80] *See* Isaac Baker & Ari Natter, *Group Pickets Across Country*, CARROLL CTY. TIMES, Mar. 11, 2006, at 01.

[81] *See id.*

[82] Snyder v. Phelps, 562 U.S. 443, 448 (2011).

[83] *Id.* at 448–49.

[84] *Id.* at 460.

[85] *Id.* at 448, 454; Affidavit of Rebekah A. Phelps-Davis at ¶ 126, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. 06-CV-1389); Argento, *supra* note 69, at 01.

[86] *Snyder*, 562 U.S. at 448, 454; Argento, *supra* note 69, at 01.

[87] Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008).

[88] Snyder v. Phelps, 580 F.3d 206, 210–11 (4th Cir. 2009).

[89] *See id.* at 211.

[90] *Id.*

[91] Snyder v. Phelps, 533 F. Supp. 2d 567, 571 (D. Md. 2008).

[92] Snyder v. Phelps, 580 F.3d 206, 211, 226 (4th Cir. 2009).

The Supreme Court rejected Snyder's appeal in an opinion by Chief Justice Roberts, joined by all except Justice Alito.[93] Proceeding on "the unexamined premise that [Westboro's] speech was tortious," Roberts noted that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[94] Making out the defense "turns largely on whether [Westboro's] speech is of public or private concern, as determined by all the circumstances of the case."[95] Speech is of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[96] The Court must examine the "content, form, and context" of the speech as disclosed by an independent review of the whole record.[97] Roberts gave two examples of speech of purely private concern: information about a particular individual's credit report made solely in the personal interest of the speaker to a small number of subscribers who were bound not to disseminate; and videos of a government employee engaged in sexual activity.[98]

Turning to the speech at issue, Roberts held that "[t]he 'content' of Westboro's signs plainly relates to broad issues of interest to society at large."[99] This conclusion is stated rather than justified. Westboro's signs, although "fall[ing] short of refined social or political commentary," nevertheless highlighted "matters of public import," namely, "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."[100] It did not matter that some of the signs could be fairly considered as related to the Snyders specifically, because "the overall thrust and dominant theme of Westboro's demonstration spoke to broader public issues."[101] On form, Roberts held that the signs conveyed Westboro's position "in a manner designed . . . to reach as broad a public audience as possible."[102] And on context, Roberts held that the funeral setting "cannot by itself transform the nature of Westboro's speech."[103] Roberts rejected Snyder's arguments on content, form, and context—for example, that Westboro's picketing was simply a pretext for a private, personal attack on Snyder

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[93] Snyder v. Phelps, 562 U.S. 443, 446, 461, 463 (2011).

[94] *Id.* at 451, 451 n.2.

[95] *Id.* at 451.

[96] *Id.* at 453 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983); City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004)).

[97] *Id.* at 453–54 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).

[98] *Id.* at 453 (citing *Dun & Bradstreet, Inc*., 472 U.S. at 762 and *City of San Diego*, 543 U.S. at 84).

[99] *Id.* at 454 (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 759).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

and his family, and that the signs deserved minimal First Amendment protection because Westboro exploited the funeral as a platform to publicize its message—by reiterating that Westboro peacefully communicated its sincerely held beliefs on matters of public concern while lawfully present on public land.[104] Westboro's speech was therefore "entitled to 'special protection' under the First Amendment."[105]

The remainder of the opinion argued three seemingly unrelated points. First, IIED is not a content-neutral time, place, or manner restriction on speech.[106] Rather, "[i]t was what Westboro said that exposed it to tort damages," and "any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed."[107] Second, the IIED element of outrageousness is "highly malleable" with "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[108] This creates an unacceptable risk that the jury would be turned into a censor; an outraged jury cannot overcome the First Amendment's special protection. Finally, in the only substantive argument dealing with the intrusion upon seclusion claim, Roberts rejected Snyder's assertion that he was a member of a captive audience at his son's funeral.[109] The captive audience doctrine, Roberts explained, is applied only sparingly. Snyder did not meet his burden of "'showing that substantial privacy interests [were] invaded in an essentially intolerable manner,'"[110] because Westboro stayed well away from, and did not interfere with, the memorial service itself, and Snyder saw no more than the tops of the signs while driving there.[111]

Justice Breyer's prudential concurrence emphasized that the Court's opinion was narrowly limited to Westboro's picketing. Although he "agree[d] with the Court's conclusion that the picketing addressed matters of public concern," Breyer thought that more was required.[112] After all, a physical assault committed as a means to broadcast a matter of public concern to a wide audience is not immunized by the First Amendment, and "in some circumstances the use of certain words as means would be similarly unprotected."[113] The judicial task, when "First Amendment values and state-protected (say, privacy-related) interests seriously conflict," is to "review[ ] the underlying facts in detail."[114] And—just like the Court—Breyer reiterated that Westboro's peaceful picketing communicated its sincerely held beliefs on matters

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[104] *Id.* at 453–54.
[105] *Id.* at 458.
[106] *Id.* at 457–58.
[107] *Id.* at 457.
[108] *Id.* at 458 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).
[109] *Id.*
[110] *Id.* at 459–60 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
[111] *Id.* at 460.
[112] *Id.* at 461 (Breyer, J., concurring).
[113] *Id.*
[114] *Id.* at 462.

of public concern while lawfully present on public land, that the picketing did not impact the funeral service, and that Snyder only saw the tops of the signs as he drove there.[115] The application of state law would "punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm."[116]

Justice Alito penned a lonesome dissent. He disagreed "that the First Amendment protected [Westboro's] right to brutalize Mr. Snyder."[117] Alito was obviously affected by Snyder's "incalculable loss," and worried that the First Amendment insulated Westboro from liability for a "vicious verbal assault" that had deprived Snyder the elementary right of every parent to bury a dead child in peace.[118] Alito denied that the First Amendment is a license to "intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."[119] Because IIED is "a very narrow tort"[120] that can be satisfied by speech, "[w]hen grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery."[121] Alito carefully reviewed Westboro's speech and concluded that it "specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military,"[122] and that "this attack, which was almost certain to inflict injury, was central to [Westboro's] well-practiced strategy for attracting public attention."[123] On the one hand, Alito said, "commentary on the Catholic Church or the United States military constitutes speech on matters of public concern," but, on the other, "speech regarding Matthew Snyder's purely private conduct does not."[124] Alito thought Breyer's analogy—that a physical assault committed as a means to broadcast a matter of public concern to a wide audience is not immunized by the First Amendment—captured the nature of Westboro's verbal assault here.[125]

Alito directly engaged the Court's opinion on three fronts. He argued, first, that the Court was wrong to conclude that "the overall thrust and dominant theme of Westboro's demonstration spoke to broad[ ] public issues."[126] Rather, Westboro's specific attack on Matthew was of "central importance."[127] "[I]n any event," Alito argued, "I fail to see why actionable speech should be immunized simply because

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115 *Id.*
116 *Id.* at 462–63.
117 *Id.* at 463 (Alito, J., dissenting).
118 *Id.*
119 *Id.* at 464.
120 *Id.*
121 *Id.* at 466.
122 *Id.* at 470.
123 *Id.* at 466.
124 *Id.* at 470.
125 *See id.* at 471.
126 *Id.*
127 *Id.*

it is interspersed with speech that is protected."[128] Second, Alito rejected what he called the Court's "suggest[ion] that [Westboro's] personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge."[129] Westboro executed a "cold and calculated strategy to slash a stranger as a means of attracting public attention," and its desire to achieve maximum publicity did not turn a personal attack into a contribution to public debate.[130] Third, Alito contended that the location of the picketing—on public land adjacent to a public street—should not be dispositive: if otherwise actionable speech grounds IIED liability, then a public street near a funeral is not "a free-fire zone."[131]

II. *SULLIVAN* V. *SNYDER*

Sullivan and *Snyder* are usually placed in the same category of First Amendment enforcement, because *Snyder* takes up *Sullivan*'s mantle to limit state common law torts according to the constitutional free speech guarantee.[132] Since *Sullivan*, no tenable First Amendment theory can deny that the First Amendment protects some speech which would otherwise be actionable under a state's common law. For example, a state's IIED tort: compensates for injury to state of mind, and is not a "generally applicable law"; does not involve the injured party's waiver of First Amendment rights; can punish for speech of public concern; and can be balanced away when it restricts speech.[133] In a choice between "two radically different ways that the First Amendment addresses civil liability involving speech—either full First Amendment protection or virtually none at all"[134]—*Sullivan* and *Snyder* are of the same ilk.

But their modes of First Amendment enforcement are categorically different. This Part aims to drive a wedge between them. *Sullivan* is a common law decision. It started with the Alabama law of libel because that is what the state courts purported to enforce.[135] And, as this Part shows, *Sullivan*'s primary holding settled a long-standing common law debate that raged in state courts over the existence of a

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[128] *Id.*

[129] *Id.* at 471–72.

[130] *Id.* at 472.

[131] *Id.*

[132] *See generally* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1658–60 (2009) (explaining that *Sullivan*'s application of the First Amendment to state common law had "profound implications" and that the Supreme Court "expanded the *Sullivan* rule in defamation law" and "also applied the First Amendment beyond defamation to a variety of speech torts").

[133] *See generally id.* at 1672–85 (detailing various theories of First Amendment applicability, including the nature of the injury approach, the generally applicable law approach, the consensual waiver approach, the public concern approach, and the First Amendment balancing approach).

[134] *Id.* at 1652.

[135] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

conditional privilege in a defamation action for criticism of public officials or candidates for public office. Brennan quoted extensively from, and modeled his federal rule on, the leading state court decision supporting the so-called "liberal rule," which immunized criticism of public officials and candidates for office.[136] *Sullivan* is a common law decision because it adopted the internal point of view towards state common law.

Snyder started not with Maryland's common law, but with the First Amendment. Roberts announced that the First Amendment provides a public concern defense in all state tort suits affixing liability to speech.[137] Consequently, speech on matters of public concern (an expansive and elastic category) is not actionable. This Part demonstrates that since it was decided, state courts have applied *Snyder* to a wide range of factual circumstances and to torts beyond IIED. *Snyder* is absolutist because its immunization of speech that is arguably of public concern has effectively pre-empted state common law speech torts. Although courts are required to analyze the content, form, and context of speech in determining the extent of First Amendment protection, in reality, content is almost always dispositive.

A. Sullivan*: Start with the Common Law*

Methodologically, *Sullivan* is a common law decision. This claim, though simple-sounding, needs unpacking. *Sullivan* is a common law decision because Brennan's opinion adopted the internal point of view vis-à-vis Alabama's common law. Brennan first held that a state common law rule grounding a jury verdict counts as state action.[138] He then adopted the point of view of a state common law court to supply a rule of decision that conformed to the First Amendment.[139]

1. Looking Behind the Libel Label

The state action point did not receive much airtime in briefing, oral argument, or Brennan's final opinion. Wechsler's brief urged the Court to look behind the libel label. The brief emphasized that not only the judgment but also the "rule of law" (or "rule of liability" or "principle of liability") was state action that is offensive to the First Amendment.[140] In Wechsler's telling, the Times "challenged a State rule of law applied by a State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground."[141] It

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[136] *Id.* at 282.

[137] *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011).

[138] *See Sullivan*, 376 U.S. at 264–65.

[139] *See id.*

[140] Brief for Petitioner at 29, 30, 32, 38, 39, 42, 49, 58, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39). The pincites refer to expressions like "rule of law" in the petitioner's brief.

[141] *Id.* at 39–40.

was "obvious[ ]" to Wechsler that both "[t]he rule *and* judgment" were "of course" state action.[142] In a phrase picked up by Brennan, Wechsler said that "libel does not enjoy a talismanic insulation from the limitations of the First and Fourteenth Amendments."[143] Wechsler's "first proposition" during oral argument was "that this action was judged in Alabama by an unconstitutional rule of law . . . offensive on its face to the First Amendment."[144]

Brennan accepted this argument almost glibly. He held that the common law rule was constitutionally deficient due to inconsistency with the First and Fourteenth Amendments.[145] Like Wechsler's brief, Brennan's opinion referred to the "rule of law" or "rule of liability"[146] as state action to be "measured by standards that satisfy the First Amendment."[147] "It matters not," said Brennan, that the "law has been applied in a civil action and that it is common law only, though supplemented by statute."[148] What matters is whether state "power has in fact been exercised."[149] The common law fashioned and applied by the Alabama courts counted as state action that must yield to the First Amendment.

Having subjected the legal reasons purportedly legitimizing the jury verdict to First Amendment scrutiny, there were a few options available to Brennan. One was to throw out the libel tort when wielded by officials as officials, as Wechsler and the concurrences urged.[150] Another was to require the official to prove special damages (that is, actual or material economic harm).[151] A third option was to require the official to prove the critic's malice.[152] The requirement of malice distinguished between dishonest statements designed to harm the official and honest yet factually incorrect criticisms.[153]

Brennan's famous adoption of an actual malice requirement was characterized by a striking and unusual engagement with state common law. Thanks to *Erie R.R. Co. v. Tompkins*,[154] the Supreme Court rarely bothers with the intricacies of state common law, on which state courts are authoritative. A similar tendency is apparent

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[142] *Id.* (emphasis added).

[143] *Id.* at 29. *See also Sullivan*, 376 U.S. at 269 ("[l]ibel can claim no talismanic immunity from constitutional limitations.").

[144] Oral Argument, *supra* note 57, at 00:40:55.

[145] *Sullivan*, 376 U.S. at 264.

[146] *Id.* at 268.

[147] *Id.* at 264–65, 268–69, 278.

[148] *Id.* at 265.

[149] *Id.*

[150] *Sullivan*, 376 U.S. at 293 (Black, J., concurring), 297–98 (Goldberg, J., concurring); Brief for Petitioner at 51–52, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39); Oral Argument, *supra* note 57, at 00:41:08.

[151] *See* Brief for Petitioner at 53, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).

[152] *See id.* at 53–54.

[153] *See id.* at 54.

[154] 304 U.S. 64 (1938).

when state statutes present federal constitutional questions. Federal courts are often reluctant to narrow state statutes to avoid those questions.[155] Although arguably erroneous, federal courts avoid avoidance in state statutory cases. This approach is driven by a concern that federal courts lack power to rewrite state statutes if the Constitution does not affirmatively require it. Rather than decide the question for themselves, the federal courts often punt to state legislatures or state courts. In *Sullivan*, the Alabama law of libel was a mix: a creature of the common law regulated by statute.[156] Unusually in a post-*Erie* world, Brennan held that the First and Fourteenth Amendments affirmatively required that the Alabama law of libel be changed.

2. The Internal Point of View

Put differently, Brennan adopted an internal point of view vis-à-vis Alabama common law. Ordinarily, the Constitution either upholds or invalidates state law. Rather than narrow, federal courts prefer to veto state statutes. Wechsler and the concurrences similarly preferred to view the application of the First and Fourteenth Amendments as a binary operator: before, state officials could bring defamation claims; after, they could not.[157] On this view, the Constitution operates externally to state common law. But Brennan took a different view. The First and Fourteenth Amendments justified Brennan adopting an internal point of view vis-à-vis Alabama law and modifying that law to remove the constitutional infirmity.

The distinction between the internal and external points of view of a social group equipped with rules of conduct was first made by Herbert Hart in 1961. The external point of view is an attitude towards the rules of the group "as an observer who does not himself accept them."[158] The internal point of view towards the rules is the attitude of "a member of the group [who] accepts and uses them as guides to conduct."[159] Hart illustrated this concept by way of a traffic light on a busy street. The external point of view, he said, is limited to the view of an observer who says that "when the light turns red there is a high probability that the traffic will stop."[160] But this "will miss out a whole dimension of the social life" of the drivers, who adopt the internal point of view by treating the red light "not merely [as] a sign that others will stop," but "as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation."[161]

The debate over the correct understanding of the distinction between the internal and the external points of view is alive and well. This is not the place to rehash that

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[155] Abbe R. Gluck, *Intersystemic Statutory Interpretations: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1948–58 (2011).

[156] New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

[157] *See id.* at 293, 297–99 (Black, J., concurring).

[158] H.L.A. HART, THE CONCEPT OF LAW 89 (2d ed. 1994).

[159] *Id.*

[160] *Id.* at 90.

[161] *Id.*

debate. The distinction has been widely adopted (a version of it was deployed by both Hart and Ronald Dworkin) but no one seems to agree precisely on what it is. Hart distinguished between the observer and the group member;[162] Dworkin between the sociologist or historian and the participant;[163] Shapiro (reconstructing Hart) between the theoretical and the practical.[164] In a skeptical intellectual history, Barzun distinguished between substantive and methodological varieties of the distinction.[165] I'll focus on the substantive internal point of view, which, as articulated by Shapiro, is "the practical attitude of rule acceptance,"[166] or, according to Barzun, is "the attitude of someone who accepts a given rule as a guide for his or her conduct."[167] A person "takes the internal point of view towards a rule when one intends to conform to the rule, criticizes others for failing to conform, does not criticize others for criticizing, and expresses one's criticism using evaluative language."[168]

Under the Rules of Decision Act,[169] federal courts regard relevant state law as rules of decision, unless federal law requires otherwise. This means that federal judges take the substantive internal point of view towards state law. They display a practical attitude of accepting state law: they intend to conform to state law (except where it is preempted by federal law), criticize other judges if they fail to apply state law correctly, view the fact of criticism as legitimate, and use evaluative language. But there are, nevertheless, crucial differences in the expression of the practical attitude of state law acceptance in federal and state courts. State courts have a legal claim to the status of ultimate sovereign authority over state law. They make and develop state law. As a species of the substantive internal point of view, I'll call this the *authorial* attitude: state courts author state law.

Federal courts adopt another species of the substantive internal point of view, which I'll call *scribal*. Thanks to *Erie*, in the absence of applicable federal law, federal courts have no authoritative say over the content of state law. When federal courts

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[162] *See id.* at 89–90.

[163] *See* RONALD DWORKIN, LAW'S EMPIRE 13–14 (1986).

[164] *See* Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006) (distinguishing between two points of view: the practical, which "is that of the insider who must decide how he or she will respond to the law"; and the theoretical, which "is that of the observer, who is often, but not necessarily, an outsider, who studies the social behavior of a group living under law").

[165] Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015) (summarizing three different internal points of view, one substantive and two methodological, and arguing that the distinction between the internal and external perspectives has "proliferated throughout legal theory," "allowed novel, interdisciplinary approaches to studying legal phenomena," and "offered a sophisticated intellectual justification for engaging in more traditional, doctrinal forms of scholarship," but has also "dodged as many questions as it has answered").

[166] Shapiro, *supra* note 164, at 1157, 1159, 1161.

[167] Barzun, *supra* note 165, at 1218.

[168] Shapiro, *supra* note 164, at 1163.

[169] Rules of Decision Act, 28 U.S.C. § 1652 (2012).

apply state law in the exercise of federal jurisdiction, and state law has run out, the federal court can either hazard an *Erie* guess or, in some instances, certify the question to the state supreme court. In a run-of-the-mill case, the federal court ascertains state law as best it can, seeking to capture and apply state law as it exists, point-in-time. This scribal attitude thus takes a substantive internal point of view by seeking a current but static snapshot of state law. And while federal court judges need no longer "be a ventriloquist's dummy,"[170] it was not until 1991 that the U.S. Supreme Court adopted de novo rather than deferential review of lower federal court determinations of state law.[171] Federal courts are not authors, but scribes of state law.

3. The "Discoursive" Method of the Common Law

Reconstructing a modest and historically minded conception of the common law, Gerald Postema sensitively theorized some of our platitudinous aphorisms about the common law: incrementalism, case-by-case adjudication, bottom-up reasoning, and so on.[172] The common law, he argued, "is rooted in a disciplined practice of public practical reasoning, maintaining a substantial congruence (but not identity) with the texture of daily life and affairs of members of the political community."[173] For our purposes, there are three aspects of this so-called "artificial reason" that merit highlighting.

The first is that the classical conception of the common law focused on what Matthew Hale dubbed the "texture of human affairs" and the "conversation between man and man."[174] In Postema's reconstruction, "Hale's use of these two terms 'texture' and 'conversation' is rich and telling," because they capture the complexity of "all the forms of daily social interaction, commerce, and communication that give shape to human affairs."[175] The aim of the common law judge was "to make concrete judgments from a comprehensive grasp of the concrete relations and arrangements woven into the fabric of common life."[176] Judges acquire "the social capacity to make judgments that even in novel cases one can be confident will elicit recognition and acceptance as appropriate in one's community."[177] When interpreting a covenant, for example, Hale's judge "sets the words into the context of his understanding of the concrete commerce of the parties," and deploys relevant cases and "his understanding

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[170] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 396 (6th ed. 2002).

[171] Salve Regina College v. Russell, 499 U.S. 225, 236 (1991) ("The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*.").

[172] Postema, *Part I*, *supra* note 26; Postema, *Part II*, *supra* note 26.

[173] Postema, *Part II*, *supra* note 26, at 27.

[174] *Id.* at 4.

[175] *Id.* at 4 n.17.

[176] *Id.* at 5.

[177] *Id.* at 9–10.

of the practice of making sense out of such agreements."[178] The common law crafted solutions molded to the tangible social relationships between parties, and its credibility depended on a sensitive, textured understanding of those complex relationships.

Second, the artificial reason of the common law is "discoursive," because it constitutes "deliberative reasoning and argument in an interlocutory, indeed forensic, context."[179] Sound law is "tried and sifted upon disputation and argument" in open court.[180] Hale thought that common law judging "was a distinctively deliberative, discoursive capacity," that is, "an ability to articulate and defend judgments publicly."[181] And, on this view, the authority of a common law opinion derives from its surviving continual contestation in a public forum. A judicial decision claims authority as "the product of a process of discoursive reasoning and contextually-situated reflective judgment."[182] According to Hale, a judgment counts as law if it is integrated or incorporated into the practice of common law reasoning[183]: as Postema put it, "[o]nly through continual use, exposition, interpretation, and extension—through being taken up and appropriated by practitioners of the common law—was a novel rule or doctrine made part of the common law."[184] And, through its incorporation into the common law, a doctrine influences the activities of members of the political community, strengthening the link between the common law and the complex texture of human experience.

Finally, the common law resisted the canonical formulation of its doctrines. Common law rules and norms can be reduced to text, argued Postema, "but no such formulation is conclusively authoritative; each is in principle vulnerable to challenge and revision in the course of reasoned argument and dispute in the public forensic context."[185] Bacon thought that the common law "is not to be sought from the words of the rule, as if it were the text of the law,"[186] and Coke thought that "[t]he reporting of particular cases . . . is the most perspicuous course of tracing the right rule and reason of the law."[187] Postema labeled these statements "orthodox common law jurisprudence."[188]

We see the threads of this discoursive account of common law jurisprudence at work today, especially in state courts. State courts view themselves, and distinguish themselves from federal courts, as common law courts. Ellen Ash Peters, former Chief Justice of the Connecticut Supreme Court, wrote that "[u]nlike the federal courts, Connecticut courts still function, most of the time, as common law courts, where the

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178 *Id.* at 9.
179 *Id.* at 7.
180 *Id.*
181 *Id.* at 16.
182 *Id.* at 17.
183 *See id.* at 13.
184 *Id.* at 20.
185 *Id.* at 14.
186 *Id.* at 6.
187 *Id.*
188 *Id.*

operative principles are more often derived from fact-bound precedents than from authoritative texts."[189] Similarly, Margaret H. Marshall, former Chief Justice of the Massachusetts Supreme Judicial Court, contended, "[t]o an extent virtually unknown in the federal courts, state court judges are common law judges."[190] "Because we are deeply rooted in the common law," argued Marshall, "we are fluent in its cardinal principle of law's plasticity," and the ability of the common law to "adapt[ ] to changing realities with a disciplined incrementalism."[191]

State courts, because they are common law courts, reflect and influence the day-to-day activities of, and relationships among, their residents.[192] State courts are local courts, less centralized than their federal counterparts, and in that sense are "closer" to the people.[193] The doctrinal basins of the common law (torts, contracts, property, and restitution) are located in the states. State common law courts often prefer to solve problems possessing a constitutional dimension by fashioning a common law rule that avoids the constitutional difficulty. Their "focus . . . is to fashion workable rules for a narrower, more specific range of people and situations."[194] "The state courts' long tradition as common law generalists," argued Helen Hershkoff, "affords legitimacy to this nonconstitutional elaboration of public issues."[195] The absence of a federal general common law means that the general common law is state law; and that common law is co-constitutive of the complex texture of human affairs.

In its ideal form, the common law practice of state courts is classically discoursive. For one thing, of course, state courts "regularly borrow from each other, using good ideas and forms of analysis that lawyers cite in appellate proceedings."[196] State courts are wary of a U.S. Supreme Court that prematurely silences interstate judicial dialogue when federalizing the common law.[197] Moreover, a preference for

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[189] Ellen Ash Peters, *What Are the Locals Up To? A Connecticut Snapshot*, *in* WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 129, 130 (Kathleen Claussen et al. eds., 2010).

[190] Margaret H. Marshall, *State Courts in the Global Marketplace of Ideas*, *in* WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 153, *supra* note 189, at 160.

[191] *Id.*

[192] *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 5–11 (1995).

[193] Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 465 (1996); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2067 (2010).

[194] Judith S. Kaye, *A Double Blessing: Our State and Federal Constitutions*, 30 PACE L. REV. 844, 848 (2010).

[195] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1164 (1999).

[196] Randall T. Shepard, *State Supreme Courts as Places for Litigating New Questions*, *in* WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 137, *supra* note 189, at 150.

[197] Marshall, *supra* note 190, at 162–63.

crafting common law solutions to avoid constitutional difficulties opens a dialogue with the state legislature. Judith Kaye, former Chief Judge of the New York Court of Appeals, noted that common law decisions "leave it open for legislatures to fix comprehensive standards."[198] Molding common law rules against the backdrop of constitutional norms "afford[s] the legislature an explicit opportunity to develop programmatic content."[199] The integrated discourse among a state's lawmaking institutions is deep. Ellen Ash Peters observed that "state supreme courts see the creation of an integrated state jurisprudence, without sharp lines of demarcation between constitutional law, statutory law, and judge made law, as part of our judicial responsibility."[200] And, because state courts are closer to the people and to state legislatures, unacceptable common law is "more readily redressable."[201] Developing common law rules consistently with constitutional norms increases the likelihood that those rules survive continual public contestation and are taken up by legislatures and other courts.

4. *Sullivan*'s Discourse

Armed with the internal point of view to Alabama law, *Sullivan* adopted the discoursive method of the common law. In the first half of the twentieth century, a debate raged in state courts over the existence of a conditional privilege to a defamation suit.[202] In the mid-1930s, state courts were about evenly split on whether a member of the public was conditionally privileged to make false and defamatory statements of fact about public officers and candidates for office.[203] To establish a privileged occasion, the defendant had to show that the speech related to the qualifications of a public officer or a candidate for office. The burden then shifted to the plaintiff to prove that the privilege had been abused, that is, the plaintiff had to prove that the defendant did not believe the truth of the statement or did not have reasonable grounds for believing in its truth. The states recognizing this conditional privilege were said to adhere to the "liberal rule," because it permitted more public discussion and loosened defamatory restrictions; the states rejecting the conditional privilege adhered to the "narrow rule."[204]

Kansas, for example, affirmed the liberal rule in a 1908 case, *Coleman v. MacLennan*.[205] The plaintiff, the state's attorney-general seeking re-election, sued

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[198] Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 745 (1992).

[199] Hershkoff, *supra* note 195, at 1164.

[200] Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1070–71 (1998).

[201] Kaye, *supra* note 194, at 848–49.

[202] RESTATEMENT OF TORTS § 1041 (AM. LAW. INST., Tentative Draft No. 13, 1936) (Note to Annual Meeting).

[203] *Proceedings of 1937 Annual Meeting*, 14 AM. LAW. INST. PROC. 135 (1937) ("The authority is just about evenly divided.").

[204] RESTATEMENT OF TORTS § 1041 (AM. LAW. INST., Tentative Draft No. 13, 1936).

[205] 98 P. 281 (Kan. 1908).

the owner and publisher of a newspaper for an allegedly defamatory article purporting to state facts about the plaintiff's official conduct relating to a school fund transaction.[206] The trial judge instructed the jury on the conditional privilege, and the jury found for the defendant.[207] Rousseau Burch, for the Kansas Supreme Court, affirmed the lower court in an interesting and wide-ranging opinion.[208] Burch held that anyone claiming to be defamed by a communication on "matters of public concern, public men, and candidates for office," "must show actual malice, or go remediless."[209] Burch noted that "[u]nder a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office."[210] Analogizing from English cases on parliamentary and courtroom privilege, Burch argued, in a passage made famous by *Sullivan*, that the importance of the discussion of the character and qualifications of candidates for office "is so vast and the advantages derived are so great that they more than counterbalance" any potential injury to individuals.[211]

Nearly twenty years after *Coleman*, the debate over the liberal and the narrow rules played out at the American Law Institute's 1937 annual meeting, attended by Burch and also by Learned Hand.[212] The thirteenth tentative draft of the first torts Restatement adopted the liberal rule, citing *Coleman* as a leading case.[213] This proved contentious. Fowler V. Harper, the Associate Reporter and a noted torts expert, said that the state of authority was about evenly divided or "a little bit on the side of the strict rule."[214] Augustus N. Hand, Learned Hand's first cousin and, like Learned Hand, a judge on the Second Circuit, moved to strike the conditional privilege from the Restatement.[215] William Draper Lewis, ALI's founding director, called it "the most important question you have in relation to this volume."[216]

Burch spoke in favor of the liberal rule. He defended *Coleman* but was "extremely reluctant to be in the attitude of the fireman rescuing his own child."[217] Nevertheless, he responded to criticism that the conditional privilege was contrary to English law, saying, "I have never thought it necessary to roll up the bottoms of my trousers when it was raining in London."[218] He suggested that the Restatement's broad and unchallenged conditional privilege rule—permitting "any one of several

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206 *See id.* at 281.
207 *See id.* at 281–82.
208 *Id.* at 293.
209 *Id.* at 285.
210 *Id.*
211 *Id.* at 286.
212 *Proceedings of 1937 Annual Meeting*, 14 AM. LAW. INST. PROC. 2 (1937).
213 RESTATEMENT OF TORTS § 1041 (AM. LAW. INST., Tentative Draft No. 13, 1936).
214 *Proceedings of 1937 Annual Meeting*, 14 AM. LAW. INST. PROC. 148 (1937).
215 *Id.* at 137 (Judge Augustus Hand).
216 *Id.* (Director William Draper Lewis).
217 *Id.* at 142–43 (Hon. Rosseau A. Burch).
218 *Id.* at 143.

persons having a common interest in a particular subject matter" to claim a conditional privilege—would support the liberal rule, just as it supported a conditional privilege to members of non-profit associations for communications concerning the qualifications of officers and members.[219] The requirement of good faith, "a matter that is tried every day in all the courts of the country," ensured that newspapers were not given a license to defame.[220] And he argued that the predicted dangers flowing from the liberal rule—that it would deter people from running for office and encourage outrageous and scandalous press reporting—had not eventuated in Kansas, where the liberal rule had prevailed for sixty years.[221] Burch's final point was fundamental. If an investigation leads to an honest and reasonably founded belief in facts which turn out to be wrong, Burch asked, "just because somebody is running for office, that must be suppressed?"[222]

Burch's support of the liberal rule pitted him against Learned Hand. Hand started from the premise that "[t]he elector is not helped by learning false things about a man who is running for office or who is in office."[223] He embraced the view that there is no public interest in the discussion of falsehood. For Hand, the problem was one of burden of proof. If the liberal rule privileged newspapers to publish facts about a public officer or candidate that turned out to be untrue, then Hand would have no objection.[224] But the burden of showing good faith and that the privilege had not been abused rests with the injured party. A newspaper "has not got to justify itself" because "[i]t is enough for it to say this man was running for public office or he was in public office and then the burden moves to the other side."[225] This burden, Hand argued, is impossible to discharge. Take, for example, "a great metropolitan paper."[226] How is an injured party "to burrow into the structure and the management of a great paper to find out what inquiry they make; whether the editor was moved by a personal feeling of spite; whether he was sore against the party[?]"[227]

Hand then suggested that libel is not a very effective control on newspapers. He drew a distinction between preventing a newspaper from making statements (which no one could countenance) and making the newspaper liable for its statements. "At least," said Hand, libel "gives [the injured person] some money. That is not much."[228] If newspapers are not liable for damages, then "they have a free hand for anything that they want to say in the heat of a campaign or perhaps when guided by the meanest

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219 *Id.*
220 *Id.*
221 *Id.* at 146.
222 *Id.* at 147.
223 *Id.* at 150.
224 *See id.*
225 *Id.* at 151–52.
226 *Id.* at 152.
227 *Id.*
228 *Id.*

of motives."[229] Hand thought that "a most unjust deprivation of remedies to the parties who are injured."[230] Hand thus supported rejecting the conditional privilege.

Burch briefly responded, arguing that the problems with the burden of proof were more apparent than real. Relating an anecdote of a libel trial, Burch said that a jury deciding the question of good faith would find against a defendant who "displayed a tendency to conceal," even if the evidence ultimately showed that the defendant was testifying truthfully.[231] A jury would not be satisfied that an untrustworthy defendant honestly believed facts after making a reasonable investigation. Burch thought that burden-of-proof difficulties "all wash[ ] out when the parties face the jury and good faith will appear which will warrant the jury finding one way or the other without difficulty."[232] This rejoinder was apparently unconvincing. After a little more discussion, the ALI sided with Hand and rejected the conditional privilege, 98 votes to 22.[233]

In *Sullivan*, Brennan held that the First Amendment required the liberal rule—in other words, the First Amendment resolved the common law question as Burch had suggested in 1937. Brennan quoted extensively from *Coleman*, noting that it represented "[a]n oft-cited . . . like rule, which has been adopted by a number of state courts,"[234] and that "[t]he consensus of scholarly opinion apparently favors the rule that is here adopted."[235] The "privilege for the citizen-critic of government" was "required by the First and Fourteenth Amendments."[236] It is true, of course, that the privilege established in *Sullivan* is not precisely coterminous with the liberal rule. But Brennan went out of his way to draw from state common law. His first draft of the *Sullivan* opinion stated that "[s]afeguards have already been devised by state courts to guard against the risk that the civil action for libel might be a vehicle for the suppression of protected comment."[237] The liberal rule articulated by *Coleman*, Brennan's first draft continued, "satisf[ies] the requirements of the Fourteenth Amendment."[238] *Sullivan*, in other words, was sensitive to the states as authorities over their own common law. Alabama common law was inconsistent with the First Amendment; looking to sister states for a constitutional answer is, at the very least, state-regarding and sensitive to the legitimate interests of the states to develop and direct the course of their own common law.

The course of authority after *Sullivan* is well known and, after a shaky start, developed into a stable doctrinal regime.[239] In 1977, John Wade said that the developments

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229 *Id.*
230 *Id.*
231 *Id.* at 154 (Hon. Rosseau A. Burch).
232 *Id.*
233 *Id.* at 156–57.
234 New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).
235 *Id.* at 280 n.20.
236 *Id.* at 282–83.
237 LEWIS, *supra* note 35, at 265–66.
238 *Id.*
239 This is not necessarily a consensus view. In 1990, when *Sullivan* was 25 years old, a

in the law of defamation after *Sullivan* were "coming about through the traditional common law technique," that the Supreme Court was "working out the problems on a case-by-case basis," and that "[t]here have been some wrong turns, but they have been corrected."[240] The Supreme Court's reform of defamation, said Wade, produced "a much better system, simplified and workable administratively—and with a better total balance of interests."[241] The Supreme Court's extensive reformation of the law of defamation was "sound and solid," and "all the signs point to a very fine completed product."[242]

B. Snyder*: Start with the First Amendment*

While *Sullivan* started with the state's legal reasons underpinning the jury verdict, *Snyder* started with the bare social fact that a verdict is attached to speech. The initial focus on naked speech in *Snyder*, rather than state common law, is a methodological difference that apparently tees up a prodigious value conflict. The modern First Amendment is defined by its hostility to discretion. But the discoursive method of the common law plainly embraces discretion in its incremental attempt to reflect and contribute to the complex texture of daily human interaction. This section shows, by reference to IIED, that this value conflict is more apparent than real. Then, by focusing on how state courts have applied *Snyder*, this section demonstrates that *Snyder* is absolutist because it protects speech that is arguably of public concern, regardless of form, context, factual record, or theory of liability. In sum, *Snyder*'s rule is that arguably public speech is always immune.

1. First Amendment Hostility to Discretion

The unstoppable march of the First Amendment is old news. The literature is awash with First Amendmentisms (expansionism, *Lochner*ism, consequentialism) characterizing its uncontrollable spread. One of the engines of this growth is the First Amendment's historic and epic hostility to discretion. The intellectual traditions embodied by the First Amendment view discretion very skeptically. The Supreme

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number of critiques appeared in legal scholarship. One criticized *Sullivan* as leaving "little opportunity for common-law growth or innovation," and arguing that "[t]he fifty laboratories are gone; there is just the United States Supreme Court groping for a rational scheme." Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. ILL. L. REV. 173, 182–83. Some scholars continue to argue that *Sullivan* created doctrinal confusion. *See, e.g.*, Tilley, *supra* note 21, at 1155–60 (arguing that the Court, in the post-*Sullivan* dignitary tort cases, "has elegantly articulated the need to balance speech and dignity," but "the rules it has promulgated are inconsistent and imprecise").

[240] John W. Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 710 (1977).

[241] *Id.* at 711.

[242] *Id.*

Court zealously embraced this skepticism. It is no exaggeration to say that First Amendment doctrine views discretion as free speech's blood enemy.

When used to evaluate speech, words like *malice* and, especially, *offensive* and *outrageous* give us a bout of First Amendment jitters. "Malice," said Black in his *Sullivan* concurrence, "is an elusive, abstract concept, hard to prove and hard to disprove."[243] It is "at best an evanescent protection for the right critically to discuss public affairs."[244] IIED's outrageousness element fares even worse. Quoting *Hustler*, Roberts's opinion in *Snyder* stated that outrageousness "is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'"[245] Eugene Volokh thought that "[m]any statements might be labeled 'outrageous' by some judge, jury, university administrator, or other government actor."[246] If a tort attaches liability to outrageous (whatever that means) speech, then the First Amendment should step in.

The argument that a word like "outrageous" in a legal standard is malleable and vague strikes me as obvious and unhelpful. It is obvious because clearly there are borderline cases of outrageous conduct (following Timothy Endicott and others, let's say that a legal standard is vague if there are borderline cases for its application).[247] Vagueness in law is very common,[248] perhaps even pervasive,[249] and officials and juries impose liability on the basis of vague standards every day (reasonableness is a prime example). And it's unhelpful because it proves too much. If the First Amendment destroyed all vague standards attaching liability to speech, then it would invalidate all content-neutral time, place, and manner regulations too: there are borderline cases of content neutrality.

The argument must be that outrageous is so vague a concept that there are no clear cases of IIED. It is a borderline case every time a court finds that a defendant's

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[243] New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring).

[244] *Id.*

[245] Snyder v. Phelps, 562 U.S. 443, 458 (2011) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

[246] Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 300.

[247] *See* TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 31 (2000) ("An expression is vague if there are borderline cases for its application."); *id.* at 32 (noting that tall is a vague word and that "a borderline case is one in which, even if we do know how tall someone is, we do not know whether to say that they are tall or not tall"). Without any more context, Endicott might say that "outrageous" is a "dummy standard," that is, a requirement that decisionmakers set a standard. But "if there is a doctrine of precedent, judicial decisions may give a particular content to a dummy standard." *Id.* at 49, 49 n.35.

[248] *Id.* at 1.

[249] *See* Geert Keil & Ralf Poscher, *Vagueness and Law: Philosophical and Legal Perspectives*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 1, 9 (Geert Keil & Ralf Poscher eds., 2016).

expressive conduct is outrageous. And because outrageousness is all border and no center, decisionmakers have complete discretion to decide whether expressive conduct is outrageous. Therefore, IIED is a license to censor. But, as Zipursky argued, this is "exactly backwards."[250] The outrageousness element of IIED functions not as an open-ended conferral of arbitrary discretion, but as a significant limitation on liability. The legal reality is that "IIED is among the most heavily guarded torts."[251] Courts routinely accept defendants' arguments that their conduct, "while admittedly inappropriate and hurtful, does not rise to the extraordinary level expected for the tort."[252]

It's wrong to think of IIED as a tort with only an outrageous element. "The tort is not," argued Zipursky, "acting outrageously and thereby causing severe emotional distress."[253] More accurately, "[o]ver decades and even centuries, courts recognized clusters of cases in the following areas: striking effrontery in dealing with passengers or guests, vicious practical jokes, gross sexual misconduct and/or stalking, and mishandling of the deaths, funerals, or corpses of family members."[254] These classes of cases are the core or center of IIED, and the tort expands in the usual common law, incremental way. In determining whether the tort applies to new facts, courts are guided by the stinginess of the outrageous element, and judges have a large gatekeeping role to ensure that juries do not run amok. IIED, and its outrageousness element, are not comprehensively vague. There are core instances and—like many other legal standards—there are borderline applications.

Not that any of this is apparent from *Snyder*, which was indifferent to Maryland's common law of torts. It is a remarkable feature of *Snyder*—a case originating in the district court's diversity jurisdiction—that Maryland law is mentioned in passing only twice.[255] The first is a sentence stating the elements of IIED, citing a Maryland Court of Appeals case from 1977.[256] The second is a paragraph on why the outrageousness element is insufficiently protective.[257] The opinion betrayed no effort to decide whether the outrageousness element actually threatened the First Amendment; instead, it simply relied on *Hustler*'s wrong-headed assertion that outrageousness is too vague.[258] Even though IIED had been recognized as a viable tort in Maryland for more than thirty years,[259] *Snyder* made no effort to find out what "outrageous" means under Maryland law.

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[250] Benjamin C. Zipursky, Snyder v. Phelps*: Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 500 (2011).

[251] *Id.*

[252] *Id.*

[253] *Id.* at 503.

[254] *Id.* at 502–03.

[255] *See* Snyder v. Phelps, 562 U.S. 443, 451, 458 (2011).

[256] *Id.* at 451 (citing Harris v. Jones, 380 A.2d 611 (Md. 1977)).

[257] *Id.* at 458.

[258] *See id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

[259] Maryland first recognized the IIED tort in *Harris v. Jones*, 380 A.2d 611 (Md. 1977).

Snyder's failure to interrogate Maryland's IIED tort suggests that it adopted an external point of view vis-à-vis state law. Without inquiring into the tort-related legal reasons grounding the jury verdict, or the attitudes or beliefs of the Marylanders who accept IIED as a practical standard of conduct, the Supreme Court viewed the jury verdict as a bare social fact offensive to the First Amendment. And this posited a conflict-of-laws relationship between state common law and federal law. This model of rule-conflict says that a state common law tort is either consistent or inconsistent with the First Amendment, and if it is inconsistent it is invalid and superseded by the Free Speech Clause.[260] The state tort, then, must be abandoned in favor of the rule of decision supplied by the First Amendment. Thus Volokh accurately described *Snyder* as holding that "the intentional infliction of emotional distress tort is presumptively unconstitutional when applied to speech on matters of public concern."[261]

Forgive me for thinking it odd to describe a state common law tort as "invalid" or "unconstitutional," or as being "struck down." That is, of course, the appropriate vocabulary for judicial review of state (and federal) legislation. As a species of law, legislation is amenable to the valid/invalid binary. But one of the fundamental differences between judicial and legislative lawmaking is what Joseph Raz called the "special revisability of judge-made law."[262] The common law may be incrementally revised each time it is litigated. The judicial power to distinguish precedent, and to modestly amend or develop the common law, means that legislation is more static than judge-made law. These are general observations of course; nevertheless, "[i]t is typical of common law rules to be moulded and remoulded in the hands of successive courts using explicitly or unconsciously their powers of reformulating and modifying the rules concerned."[263]

Snyder, however, equated Maryland's common law right of action to legislation. As noted above, the common law since Hale and Coke resists the reduction of its rules and principles to a canonical text because they are "vulnerable to challenge and revision in the course of reasoned argument and dispute in the public forensic context."[264] Treating IIED as reduced to a fixed, canonical text, the Supreme Court adopted a plain-meaning interpretation of "outrageous," ignored state common law, and effectively preempted IIED when applied to speech of public concern. By taking an external point of view to Maryland's IIED tort, as though it were statute-like and invulnerable to change, the Court denied the capacity of a judge to act as an author of the common law and develop the tort in a way that removes the inconsistency with the First Amendment.

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[260] *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 27 (1977).

[261] Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 916 (2015).

[262] JOSEPH RAZ, *Law and Value In Adjudication*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 195 (2d ed. 2009).

[263] *Id.*

[264] Postema, *Part II*, *supra* note 26, at 14.

2. Seven Years On: *Snyder* in State Court

The First Amendment's hostility to discretion is borne out by the important state court cases that have considered *Snyder*.[265] These cases have not been collected or analyzed elsewhere, and they are critically important to an appreciation of how state courts have understood and applied *Snyder*.[266] *Snyder* framed the question presented and its holding in terms of "tort liability."[267] It imposed a blanket First Amendment "defense in state tort suits, including suits for intentional infliction of emotional distress."[268] The Court also included suits for intrusion upon seclusion, although that tort received even less attention than IIED in the *Snyder* opinion. *Snyder*'s reasoning is, therefore, freely generalizable. Indeed, state courts have adopted the broad, trans-substantive First Amendment defense. Only the tort of defamation, to which *Sullivan* and its progeny directly apply, is resistant to *Snyder*'s broad sweep.

a. Robin Hooders in New Hampshire

The clearest example of *Snyder*'s broad sweep comes from New Hampshire,[269] where the official state motto is "Live Free or Die." The City of Keene in southwestern New Hampshire employed three Parking Enforcement Officers (PEOs) to monitor its downtown parking meters and issue tickets.[270] Six of the City's residents, who were relatively new Granite Staters and part of a movement called "Free Keene," conducted what they called "Robin Hooding": regularly and closely following and videotaping the PEOs, identifying expired meters, and refilling them before a ticket could issue.[271] A card would be left on the vehicle's windshield: "Your meter expired! However, we saved you from the king's tariff!"[272] They characterized their activity

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[265] A Westlaw search for "Snyder/5 Phelps" across all state courts produces 89 cases and 24 trial court orders. The cases analyzed here are all the noncriminal opinions that relied on *Snyder*'s methodology.

[266] Clay Calvert, in an earlier analysis focusing on IIED and media defendants, argued that lower courts were not limiting *Snyder* to its facts. *See* Clay Calvert, *Public Concern and Outrageous Speech: Testing the Inconstant Boundaries of IIED and the First Amendment Three Years After* Snyder v. Phelps, 17 U. PA. J. CONST. L. 437 (2014). Calvert's article was published before any of the opinions analyzed here were issued.

[267] Snyder v. Phelps, 562 U.S. 443, 447 (2011) ("The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case."); *id.* at 461 ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.").

[268] *Id.* at 451.

[269] City of Keene v. Cleaveland, 118 A.3d 253 (N.H. 2015).

[270] *See* City of Keene v. Cleaveland, Nos.213-2013-cv-00098, 213-2013-cv-0241, 2013 WL 8691664, at *2 (N.H. Super. Ct. Dec. 3, 2013).

[271] *See Cleaveland*, 118 A.3d at 255.

[272] *Id.*; Dan Barry, *Libertarians Trail Meter Readers, Telling Town: Live Free or Else*, N.Y. TIMES, May 5, 2014, at A1.

as political protest with an ultimate goal of abolishing parking enforcement because parking is not a criminal act, the City should not be charging citizens to park, and parking tickets are a threat against the people.[273]

On an almost daily basis, the Robin Hooders videotaped and trailed the PEOs, sometimes about a foot away or so close that if the PEO turned around they would bump into each other.[274] They followed the PEOs on breaks and on their days off.[275] They called various PEOs a "fucking thief," "liar," "racist," "bitch," and "coward."[276] They accused the PEOs of stealing from citizens and of vandalism when the PEOs chalked tires.[277] They suggested that a PEO who was a veteran would "drone brown babies."[278] This PEO resigned.[279] Another PEO contemplated quitting.[280] She found it difficult to focus on her job, she refused to work Saturdays because she felt unsafe, and she contacted the police on three occasions.[281] The third PEO felt intimidated, and would tense up and become distracted when she heard approaching footsteps.[282] Apart from the reduction of staffing hours and loss of ticket revenue, the City also incurred costs by hiring a private investigator and a therapist.[283]

The City sued the six Free Keeners in state court for tortious interference with contractual relations and civil conspiracy, and sought preliminary and permanent injunctive relief.[284] Defendants moved to dismiss, contending that the pleadings failed to state a claim on tortious interference, and that all causes of action violated the free speech clause of the First Amendment, and Articles 8 (government accountability) and 22 (free speech) of Part I of the New Hampshire Constitution.[285] The City then filed a separate civil complaint against the same defendants based on the same alleged facts, which requested a jury trial and sought money damages for tortious interference and negligence.[286]

In the Superior Court of New Hampshire, Judge Kissinger, after a three-day evidentiary hearing, granted the motion to dismiss all claims because they violated the First Amendment.[287] Although "skeptical" that tortious interference could be made out when private citizens protest government employees, Kissinger nevertheless did

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[273] *See Cleaveland*, 118 A.3d at 256.

[274] *See id.* at 257.

[275] *See id.* at 256–57. *See also Cleaveland*, Nos.213-2013-cv-00098, 213-2013-cv-0241, 2013 WL 8691664, at *2 (N.H. Super. Ct. Dec. 3, 2013).

[276] *Cleaveland*, 118 A.3d at 256; *Cleaveland*, 2013 WL 8691664, at *2.

[277] *Cleaveland*, 2013 WL 8691664, at *4.

[278] *Id.* at *4.

[279] *Id.* at *4; *Cleaveland*, 118 A.3d at 257.

[280] *Cleaveland*, 2013 WL 8691664, at *3.

[281] *Cleaveland*, 118 A.3d at 257; *Cleaveland*, 2013 WL 8691664, at *2–3.

[282] *Cleaveland*, 118 A.3d at 257; *Cleaveland*, 2013 WL 8691664, at *5.

[283] *Cleaveland*, 2013 WL 8691664, at *5.

[284] *Cleaveland*, 118 A.3d at 255.

[285] *Id.* at 256.

[286] *Id.*

[287] *Cleaveland*, 2013 WL 8691664, at *9.

not reach the issue because "the enforcement of such a tort is an infringement on the Respondents' right to free speech and expression under the First Amendment of the Federal Constitution."[288] In an opinion littered with citations to *Snyder*, Kissinger described defendants' conduct as "speech and expressive protest of the City's parking regulation through filling meters, placing cards on windshields, telling the PEOs they should quit, calling the PEOs 'thieves,' 'fucking thieves,' and 'liars,' and attacking [a] PEO . . . for his military service."[289] This speech implicates "the political authority of the City as a sovereign and its regulation of the citizens, as well as the United States' military actions abroad," which "are clearly matters of public concern."[290] The speech "is given special protection because it is at a public place on a matter of public concern."[291]

The tortious interference claim, said Kissinger, could not be characterized as a "reasonable time, place, or manner restriction" on speech.[292] He explained that tortious interference with contractual relations requires a plaintiff to show that the defendant intentionally and improperly interfered with an economic relationship between the plaintiff and a third party.[293] Like IIED's outrageousness requirement, Kissinger thought that the requirement of improper interference was so subjective as to "create[ ] an unreasonable risk that the jury will find liability 'on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'"[294] With this, Kissinger dismissed the tortious interference and civil conspiracy claims, denied injunctive relief, and dismissed the negligence claim.

In the New Hampshire Supreme Court, Justice Bassett affirmed the trial court's ruling on tortious interference, but reversed and remanded the denial of injunctive relief.[295] Bassett noted that "we normally address constitutional questions first under the State Constitution and rely on federal law only to aid in our analysis."[296] Because the trial court did not address the state constitutional arguments, however, Bassett first considered the arguments under the federal Constitution.[297] Although echoing the trial

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[288] *Id.* at *10.

[289] *Id.* at *12.

[290] *Id.*

[291] *Id.* at *13.

[292] *Id.* at *14.

[293] *Id.* at *9–10.

[294] *Id.* at *14 (quoting Snyder v. Phelps, 562 U.S. 443, 458 (2011) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988))).

[295] The Supreme Court of New Hampshire reversed and remanded the denial of injunctive relief because the trial court had not considered all the factual circumstances of the case. The Supreme Court "express[ed] no opinion as to whether the City's allegations, if proven, [we]re sufficient to warrant the trial court's exercise of its equitable power, or as to whether the particular injunctive relief requested by the City would violate the Federal or State Constitutions." *Cleaveland*, 118 A.3d at 264.

[296] *Id.* at 258.

[297] *Id.* at 258–59.

court's skepticism that a tortious interference claim can exist when private citizens protest the government, Bassett agreed that it was not necessary to reach the issue because enforcing the City's tortious interference claim "would infringe upon the respondents' right to free speech under the First Amendment."[298] His First Amendment analysis basically tracked the lower court's, with a similarly large dose of *Snyder*: in sum, the First Amendment bars state tort liability attaching to speech of public concern.

The City did not challenge the trial court's conclusion that the *content* of defendants' speech was of public concern.[299] It did, however, contend that the First Amendment does not protect specific conduct such as "following closely, chasing, running after, approaching quickly from behind, lurking outside bathrooms, yelling loudly, and filming from close proximity."[300] Bassett disagreed. He observed that a boycott of businesses which causes economic harm and is realized by expressive conduct ("speeches, marches, and threats of social ostracism") cannot ground an award of damages.[301] Physical violence "is beyond the pale of constitutional protection," but peaceful expression on matters of public concern "need not meet standards of acceptability."[302] The specific conduct targeted by the City was nonviolent and "intended to draw attention to the City's parking enforcement operations and to persuade the PEOs to leave their positions."[303] "[T]he mere threat of tort liability," explained Bassett, would have an intolerable chilling effect.[304]

b. A Police Chase and a Suicide in Arizona

On September 28, 2012, armed with a Glock pistol, JoDon Romero carjacked a maroon Dodge Caliber in the parking lot of a Phoenix Denny's.[305] He led police on an hour-long, high-speed chase.[306] At first driving east along Interstate 10 for five miles, Romero made a U-turn, fired his pistol at a police car, and sped west on I-10 for an hour.[307] He exited at Tonopah, a "census-designated place" in the Tonopah Desert near Salome, and eventually turned onto a dirt path before stopping.[308] Romero got out, ran a short distance, fell down, got up, walked through some brush, and

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[298] *Id.* at 259.

[299] *Id.* at 260. *See also Cleaveland*, 2013 WL 8691644, at *12.

[300] *Cleaveland*, 118 A.3d at 260.

[301] *Id.* at 261.

[302] *Id.*

[303] *Id.*

[304] *Id.* at 260.

[305] Jessica Testa, *Why Did Jodon Romero Kill Himself On Live Television?*, BUZZFEED (May 9, 2013, 10:27 PM), https://www.buzzfeed.com/jtes/why-did-jodon-romero-kill-himself-on-live-television?utm_term=.tbBOyAJLVj#.yI9kn3XQdA [https://perma.cc/6U6M-R5JL].

[306] *Id.*

[307] *Id.*

[308] *Id.*

stopped at a small dirt clearing.[309] As police officers approached, Romero put the pistol to his head, fired, and crumpled to the ground.[310]

Two helicopters buzzing overhead captured footage of Romero's suicide. One belonged to the Phoenix Police Air Support Unit and the other to KSAZ-TV, the Fox News affiliate in Phoenix.[311] The Fox footage aired live during a nationally broadcast breaking-news program; the ordinary five-second delay for live feeds was not functioning.[312] So, despite the program anchor's on-air commands to technicians to "get off" the feed, Romero's suicide was broadcast live.[313]

At school, two of Romero's teenage sons heard that a suicide had been broadcast on live TV.[314] When they got home, they located a clip of the Fox newscast on YouTube.[315] As they watched, they realized that it was their father who had taken the Dodge at gunpoint and led police on a high-speed chase.[316] The boys then saw footage of their father shooting himself.[317]

The boys' mother, Angela Rodriguez, sued Fox on their behalf for intentional and negligent infliction of emotional distress.[318] On First Amendment grounds, the Court of Appeals of Arizona affirmed the trial court's order dismissing the lawsuit.[319] Applying *Snyder*, Judge Johnsen held that "the Fox broadcast clearly addressed a matter of public concern."[320] She rejected plaintiff's argument that although the police chase was newsworthy, Romero's suicide was a purely private matter. "Without doubt," Johnsen said, "'the overall thrust and dominant theme' of the coverage addressed important matters of public concern."[321] On content, Johnsen explained that "[t]he public has a strong interest in monitoring the manner in which law enforcement responds to criminal behavior," and that Romero "posed an immediate and ongoing threat to public safety."[322] On form and context, Johnsen noted that the chase and suicide were broadcast during a news program.[323] The footage was not private speech disguised as a public broadcast.[324] The Supreme Court of Arizona denied a petition for review and the U.S. Supreme Court denied a petition for certiorari.[325]

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309 *See id.*
310 Rodriguez v. Fox News Network, LLC, 356 P.3d 322, 324 (Ariz. Ct. App. 2015).
311 Testa, *supra* note 305.
312 *Id.*
313 *Rodriguez*, 356 P.3d at 324; Testa, *supra* note 305.
314 *Rodriguez*, 356 P.3d at 324.
315 *Id.*
316 *Id.*
317 *Id.*
318 *Id.*
319 *Id.*
320 *Id.* at 326.
321 *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 454 (2011)).
322 *Id.*
323 *Id.*
324 *Id.*
325 Rodriguez v. Fox News Network, LLC, 136 S. Ct. 2521 (2016).

c. A Public School Bus Driver in Wisconsin

Sometime in April 2012, Robert Koebel, a TV reporter employed by Journal Communications, Inc., approached Melissa Dumas in a parking lot, with a camera operator in tow.[326] Through public record requests, Koebel had identified Dumas as a Milwaukee Public School bus driver who, eight years earlier, had been convicted of misdemeanor prostitution.[327] Koebel was investigating a news story for Milwaukee's NBC affiliate about school bus drivers with criminal histories.[328] The final story aired footage of Koebel confronting a visibly shocked Dumas with her mug shot and police report.[329] Koebel described "salacious details" from the police report.[330] "Koebel also reported that Dumas had been arrested for 'drugs and driving on a suspended license,' and that Dumas had been in a school bus accident in 2009 when she worked for a different bus company."[331] The story also showed footage of Koebel interviewing Dumas's manager at the bus company.[332] The manager said that he had no knowledge of the conviction.[333] The broadcast concluded with Koebel noting that Dumas had been dismissed.[334]

Dumas sued Koebel and his employer, Journal Communications, for invasion of privacy, IIED, and intentional interference with a contractual relationship.[335] Defendants moved to dismiss the invasion of privacy claim because the information broadcast was a matter of public record.[336] The other two claims, they argued, were barred by the First Amendment.[337] Exhibited to defendants' motion to dismiss was a video of the broadcast, a transcript of the video published on the internet, and records relating to Dumas's arrest and driving history.[338] The trial court converted the motion to dismiss into a motion for summary judgment, which it granted on all claims.[339] Judge Curley affirmed for the Court of Appeals of Wisconsin.[340]

Curley first affirmed the dismissal of the invasion of privacy claim, relying on a Wisconsin statute providing that it is not an invasion of privacy to communicate any information "available to the public as a matter of public record."[341] There was no dispute that Dumas's misdemeanor conviction is a matter of public record. And

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[326] Dumas v. Koebel, 841 N.W.2d 319, 321–22 (Wis. Ct. App. 2013).
[327] *Id.*
[328] *Id.* at 321.
[329] *Id.* at 322.
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.* at 322–23.
[339] *Id.* at 323.
[340] *Id.* at 319–20.
[341] *Id.* at 325 (applying WIS. STAT. § 995.50(2)(c) (2011–12)).

Curley rejected Dumas's contention that her name is not a matter of public record, relying on precedent holding that "the public has a right to know the names of the individuals who are driving their children to and from school."[342]

Relying almost exclusively on *Snyder*, Curley noted that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits,"[343] and held that "[i]f we determine that the allegedly tortious speech is a matter of public concern, we must grant summary judgment on the tort claims alleged."[344] Curley concluded that although defendants' broadcast was "undoubtedly embarrassing" to Dumas, it was nevertheless a matter of public concern entitled to full First Amendment protection.[345] On content, Curley observed that although parts of the story publishing Dumas's history were "salacious," "it did highlight a matter of public import: whether such a history should have prohibited an individual from working as a school bus driver."[346] On context, Curley said that "Koebel confronted Dumas in public and asked her questions about public information, and Dumas did not allege any facts showing that she had a preexisting relationship with either Koebel or Journal Communications that would suggest a veiled attempt at a private attack."[347] And on form, Curley dismissed Dumas's challenge to "the way in which Koebel confronted her," simply saying that it was "clear . . . that any surprise, embarrassment, and indignation arose from the content of Koebel's speech."[348] The Supreme Court of Wisconsin denied a petition for review.[349]

d. A Disappearance in Connecticut

Nearly fifteen years ago, Billy Smolinski, Jr., disappeared from his home in Waterbury, Connecticut.[350] Nobody can say what happened to him. Billy had asked his next-door neighbor to walk his German shepherd "because he was travelling north to look at some cars."[351] But when his parents went to his house the next day, Billy's truck was parked in the driveway with his wallet and keys inside.[352] Theories swirled. Billy's mother and sister, convinced that his ex-girlfriend Gleason knew more than she would say, applied pressure.[353] They disparaged Gleason to her friends.[354] They posted many

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[342] *Id.* at 325–26 (quoting Atlas Transit, Inc. v. Korte, 638 N.W.2d 625, 633 (Wis. Ct. App. 2001)).

[343] *Id.* at 326 (quoting Snyder v. Phelps, 562 U.S. 443, 451 (2011)).

[344] *Id.* at 327.

[345] *Id.*

[346] *Id.* at 328.

[347] *Id.*

[348] *Id.*

[349] Dumas v. Koebel, 848 N.W.2d 859 (Table) (2014).

[350] Gleason v. Smolinski, 125 A.3d 920, 927 (Conn. 2015).

[351] Alexander Nazaryan, *Billy Smolinski, Gone Since 2004, Is Part of a 'Silent Mass Disaster,'* NEWSWEEK (Aug. 7, 2014, 6:05 AM), https://www.newsweek.com/2014/08/15/billy-smolinski-gone-2004-part-silent-mass-disaster-263142.html [https://perma.cc/DE3V-WF29].

[352] *Id.*

[353] *See Gleason*, 125 A.3d at 927.

[354] *Id.*

missing person flyers depicting Billy along Gleason's school bus route (Gleason worked as a school bus driver) and near Gleason's home.[355] After noticing that Gleason and a friend were tearing down some posters, Billy's mother and sister followed Gleason and videotaped her activities.[356] Eventually Gleason went to the police station, where Billy's mother and sister followed, and a confrontation occurred.[357]

Gleason sued Billy's mother and sister for defamation and intentional infliction of emotional distress.[358] The trial court awarded damages on both counts, as well as punitive damages, but no First Amendment argument was preserved at trial.[359] On appeal, the Connecticut Appellate Court rejected defendants' contention, based on *Snyder*, that a First Amendment violation had deprived them of a fair trial.[360] The Appellate Court credited the trial court's finding that defendants' placement of posters was targeted specifically at plaintiff, intended to "break" her into providing defendants with information.[361] The Appellate Court held that, although the posters did not name the plaintiff, "the context and placement of the posters was designed to 'hound' the plaintiff into providing . . . information . . . rather than to raise a matter of public concern."[362]

The Connecticut Supreme Court, on defendants' appeal, reversed the Appellate Court and held that defendants' conduct was protected by the First Amendment.[363] Justice Robinson first reviewed *Snyder* at length,[364] and then turned to "an examination of the objective nature of the speech at issue . . . namely, the defendants' extensive campaign of missing person posters."[365] On content, Robinson held that "matters pertaining

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[355] *Id.*

[356] *Id.* at 929.

[357] *Id.* The Connecticut Superior Court, the Appellate Court, and the Supreme Court all discussed: the origins and nature of Billy's relationship with Gleason; an alleged love triangle; the demise of the relationship between Billy and Gleason two days before Billy's disappearance; Billy's reaction; and the foundations for Billy's family's suspicion of Gleason. The trial judge summed it up: "The facts of this case are distressing. Two sets of basically decent people found themselves in conflict and involved in a series of mutually antagonistic events because of a tragic event—the disappearance and apparent death of a young man with his whole life ahead of him." Gleason v. Smolinski, No. NNH-CV-06-5005107-S, 2012 WL 3871999, at *1 (Conn. Super. Ct. Aug. 10, 2012).

[358] Gleason also sued Billy's mother and sister for invasion of privacy and tortious interference with business relationships and expectancies. The invasion of privacy claim wasn't successful at trial and Gleason didn't appeal. The tortious interference claim didn't make it to trial. *Id.* at *1.

[359] *Id.* at *17.

[360] Gleason v. Smolinski, 88 A.3d 589, 597–99 (Conn. App. Ct. 2014). The standard under Connecticut law for prevailing on a claim of constitutional error not preserved at trial includes a requirement that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial." *Gleason*, 125 A.3d at 930 n.10.

[361] *Gleason*, 88 A.3d at 599.

[362] *Id.*

[363] Gleason v. Smolinski, 125 A.3d 920, 960 (Conn. 2015).

[364] *Id.* at 938.

[365] *Id.*

to missing persons" are of public concern.[366] Because the flyers solely sought information about Billy and did not name the plaintiff, their content related to a matter of public concern.[367]

Robinson agreed, at least in principle, with the Alaska Supreme Court in *Greene v. Tinker*[368] that *Snyder* is "not an all-purpose tort shield," and he rejected the "sweeping" argument that "speech involving a matter of public concern is inactionable."[369] He explained, however, that "the existence of preexisting animus . . . does not necessarily render the messages conveyed . . . matters of purely private rather than public concern."[370] Defendants' intention to "hound" plaintiff until she "broke" did not remove First Amendment protection because "the targeted content and location" of the flyers "was consistent with the overarching public concern of gaining information about Bill's disappearance."[371] Robinson distinguished the flyers here from the picketing signs in *Snyder* because the signs "referred, at least obliquely, to Snyder."[372] He also pointed out that the flyers "were placed on or adjacent to public roadways," and therefore entitled to heightened First Amendment protection.[373]

Interestingly, Robinson said that he was "[g]uided heavily" by *Cleaveland* because it "considered similarly targeted and harassing conduct."[374] The New Hampshire Supreme Court, explained Robinson, thought it relevant that the challenged conduct was nonviolent, took place on public streets and sidewalks, and was intended, at least in part, to persuade the PEOs to quit their jobs.[375] Similarly, defendants' conduct here was "intended to persuade [plaintiff] with regard to a matter of public concern as in *Cleaveland*," and it was not intended to "merely torture her gratuitously with regard to a purely private matter."[376] The defendants' "ill-motivated flyer campaign," therefore, was protected by the First Amendment.[377] Rather than direct judgment as a matter of law, Robinson ordered a new trial, because the lower courts ignored defendants' other harassing conduct—calling the plaintiff offensive names, following her, and videotaping her—which "might well be held to furnish an independent basis" for plaintiff's IIED claim.[378]

Defendants also appealed the trial court's defamation verdict. The trial court found three statements by defendants to be defamatory, which together conveyed the

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366 *Id.*
367 *Id.*
368 332 P.3d 21 (Ala. 2014).
369 *Gleason*, 125 A.3d at 939 (quoting *Greene*, 332 P.3d at 34–35).
370 *Id.* at 939 (citation and internal quotation marks omitted).
371 *Id.* at 940.
372 *Id.* at 942.
373 *Id.*
374 *Id.* at 944.
375 *Id.* at 942–44 (citing City of Keene v. Cleaveland, 118 A.3d 253 (N.H. 2015)).
376 *Id.* at 944.
377 *Id.* at 945.
378 *Id.* at 944–45.

imputation that plaintiff or someone in her family murdered Billy, and that plaintiff knew where Billy was buried.[379] Robinson acknowledged that, beyond the common law, "there are numerous federal constitutional restrictions that govern the proof of the tort of defamation," which depend on the status of the plaintiff (public or private figure) and the subject of the speech (public or private concern).[380] The parties did not dispute that the statements were of public concern and that plaintiff was a private figure. Robinson, therefore, viewed the inquiry as a question of "the law governing the proof of defamation claims . . . made by private figure plaintiffs, but relating to matters of public concern."[381]

Relying on a straightforward application of *Gertz*,[382] Robinson rejected defendants' argument that a private figure plaintiff must prove by clear and convincing evidence that defendant acted with actual malice in making an allegedly defamatory statement on a matter of public concern.[383] Rather, Robinson held that in such a case the "defamatory statements must be provably false, and the plaintiff must bear the burden of proving falsity."[384] But "neither the trial court nor the Appellate Court ever expressly considered whether the plaintiff proved the falsity of the defamatory statements," giving rise to a First Amendment violation.[385] Also to no avail was plaintiff's reliance on the trial court's finding of actual malice; Robinson held that the record did not support such a finding.[386]

Justice Eveleigh's dissent, joined by one other justice, denied that the First Amendment protected defendants' conduct.[387] Eveleigh agreed that the flyers' content, "without more, ostensibly relates to a matter of public concern."[388] But he argued that the flyers' context and form showed otherwise. Eveleigh centered on what he called the trial judge's "crucial" and "critical" factual finding: defendants' targeted placement of posters served no purpose beyond harassing the plaintiff and expressed no protected message.[389] The majority, argued Eveleigh, overturned this factual finding *sub silentio*, without locating clear error as Connecticut law required.[390] Instead, the majority substituted its own factual finding—that "the targeted content and location was consistent with the overarching public concern of gaining information about Bill's disappearance"[391]—absent a prerequisite ruling that the trial judge had clearly

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379 *See id.* at 946.
380 *Id.* at 947–48.
381 *Id.* at 954.
382 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
383 *Gleason*, 125 A.3d at 954–55.
384 *Id.* at 956 (citation and internal quotation marks omitted).
385 *Id.* at 957.
386 *Id.* at 957–58.
387 *Id.* at 960 (Eveleigh, J., dissenting).
388 *Id.* at 963.
389 *Id.* at 961–62.
390 *Id.* at 961.
391 *Id.*

erred. This was all the more troubling, according to Eveleigh, because the majority disregarded the trial judge's credibility determinations.[392]

Bound by the trial judge's factual findings, Eveleigh emphasized three features of the speech at issue. First, the speech was "uttered in a context that consists of the *sole and exclusive* desire to harm the plaintiff and, concomitantly, no intent to convey a protected idea or message to the public."[393] Second, the speech "is inextricably linked to intimidating conduct that borders on harassment of a private party on a purely private matter."[394] And third, holding defendants liable would "not chill protected speech or pose a risk of self-censorship."[395] No case, argued Eveleigh, has conferred First Amendment protection on speech meeting these three criteria, even if the speech contained "facially acceptable content expressed in a traditional public forum."[396]

Eveleigh distinguished both *Cleaveland* and *Snyder*. *Cleaveland* was distinguishable on two grounds. The first "critical difference" was that *Cleaveland* involved "harassing activity that, as a matter of fact, was inextricably linked to, and intended to advance, [a] protected message to the public—a message protesting the government."[397] But here, defendants' conduct "was not a bona fide expression to the public of a message that the [F]irst [A]mendment protects."[398] In other contexts, defendants' message would be protected. But defendants' admission that their only purpose was to harass the plaintiff "formed the basis of the trial court's credibility determination that this conduct was merely and solely tortious conduct directed at a private party in an antagonistic, private dispute."[399] Second, a judgment for money damages would not chill protected speech here. Defendants in *Cleaveland* "would be penalized for expressing [their] message," and others "would think twice and potentially self-censor."[400] But a judgment against defendants here would "not penalize the defendants for searching for Bill or bringing their grievances about the authorities' lack of diligence to public light."[401] Instead, it would prevent people "from targeting, intimidating, harassing, and *intentionally* inflicting emotional distress upon any person they believe to have previously engaged in the commission of a crime."[402]

As for *Snyder*, according to Eveleigh, "it was the content of the speech—the honestly believed, protected message that the defendants in *Snyder* wished to communicate to the public—that caused the distress, not the context in which the speech occurred."[403]

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392 *Id.* at 965–66.
393 *Id.* at 969.
394 *Id.*
395 *Id.*
396 *Id.*
397 *Id.* at 970.
398 *Id.*
399 *Id.*
400 *Id.* at 971.
401 *Id.*
402 *Id.* at 972.
403 *Id.*

Here, however, plaintiff's distress "resulted solely from the context in which the speech occurred—the relentless hounding of the plaintiff where she lived and worked—not the content of the posters."[404] Moreover, a judgment here would "not pose any risk of having resulted from differing tastes or views on what the posters conveyed or the ideas they espoused, nor does it pose a risk of suppressing unpleasant expression."[405] Rather, it would impose liability for defendants' continued and aggravated conduct which hounded the plaintiff for the sole purpose of intimidation and harassment.

e. A History of Animosity in Alaska

Only one state court case considering the application of *Snyder* in detail has resisted its broad sweep. But its primary reason for refusing to apply *Snyder* was that the cause of action was defamation; only as an afterthought did it repeat the false slogan that *Snyder* is limited to its particular factual record.[406]

Distantly related, and hailing from the Alaskan community of Pilot Station, Beverly Tinker and Karen Greene (and their respective families) had "a history of animosity."[407] In 2007, Tinker, who worked at the Pilot Station Health Clinic, "improperly accessed Greene's medical file."[408] After Greene filed a complaint about the incident with the clinic operator, Tinker was reprimanded and directed to participate in a confidentiality education program or lose her job.[409] The clinic operator also directed Tinker never to access Greene's file again.[410]

It got messier in 2011. In February, when Greene was in the early stages of pregnancy, she visited the health clinic.[411] Greene asked a staff member to ensure that Tinker would not learn of the pregnancy and due date.[412] In addition to her concerns about Tinker's prior misconduct, Greene wanted to keep the pregnancy private because of an earlier miscarriage.[413] Soon enough, Tinker told the staff member of Greene's pregnancy and the due date.[414] The staff member duly informed Greene, who confronted Tinker at the clinic and filed a second complaint with the clinic operator.[415] It turned out, however, that Tinker was informed of Greene's pregnancy "through a gossip chain that began with Greene herself."[416]

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404 *Id.* at 973.
405 *Id.*
406 *See* Greene v. Tinker, 332 P.3d 21, 35 (Alaska 2014).
407 *Id.* at 25.
408 *Id.*
409 *Id.*
410 *Id.*
411 *Id.*
412 *Id.*
413 *Id.*
414 *Id.*
415 *Id.* at 25–26.
416 *Id.* at 26.

Receiving no response to her second complaint, Greene took the matter to the Pilot Station Traditional Council.[417] Greene "attended several meetings of the tribal council, which according to Tinker was dominated by members of Greene's extended family."[418] At one meeting Greene read a letter accusing Tinker of violating confidentiality.[419] An investigation by the clinic operator eventually revealed that Greene's second complaint was unsubstantiated.[420]

Tinker sued Greene for defamation.[421] Greene counterclaimed.[422] Both parties "sought damages, including punitive damages," and attorney's fees.[423] During pretrial motion practice, the trial court rejected Greene's argument that the alleged disclosures by Tinker were a matter of public concern, so that Greene had an absolute privilege to complain about them.[424] The trial court explained that "three instances of discussion in an arguably public forum such as the Pilot Station [Traditional] Council do not transmute one's complaints about a specific individual's actions into a public concern."[425] Instead of an absolute privilege, the trial court held that Greene "had a conditional privilege to make defamatory statements about Tinker."[426] The question for the jury was whether Greene had abused her conditional privilege, and the trial court instructed the jury accordingly. The jury awarded Tinker one dollar in nominal damages.[427]

Greene appealed the trial judge's legal rulings on conditional privilege and the Alaska Supreme Court affirmed.[428] Chief Justice Fabe thought that *Sullivan* represented a "major departure" from the common law of defamation.[429] Fabe then discussed the extension of *Sullivan* to public figures and explained, relying on *Gertz*, that "the First Amendment imposes only the most minimal restrictions on state-law liability in defamation actions brought by private individuals."[430] For private figure defamation actions, Alaska precedents had not yet determined whether actual malice was required or whether negligence sufficed.[431] Fabe at least hinted that the trial court may have

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417 *Id.*

418 *Id.*

419 *Id.*

420 *Id.* at 27.

421 Tinker also sued Greene for intentional interference with contractual relations, but abandoned that claim. *Id.*

422 Greene's counterclaims were for invasion of privacy and abuse of process. *Id.* The trial court entered a directed verdict on abuse of process, and the jury found Tinker not liable for invasion of privacy. *Id.* at 30.

423 *Id.* at 27.

424 *Id.* at 28.

425 *Id.* (internal quotation marks omitted).

426 *Id.*

427 *Id.* at 24.

428 *Id.* at 36.

429 *Id.* at 33.

430 *Id.* at 34.

431 *Id.* at 34. *See also id.* at 34 n.43.

been *over*protective, because it instructed the jury as though Tinker were a public figure who was required to show actual malice.[432]

Greene argued at length that, after *Snyder*, "speech involving a matter of public concern is inactionable."[433] Fabe was having none of it: "the First Amendment is not an all-purpose tort shield, and *Snyder* did not change this."[434] She thought that "it requires some hard squinting to read *Snyder* as creating such a sweeping rule."[435] *Snyder*, Fabe announced, "contains no indication that the Court intended to depart at all—much less depart dramatically—from its carefully drawn defamation precedents."[436] And, of course, "the Court explicitly limited its holding in *Snyder* to the facts before it."[437] The major factual difference was that *Snyder* involved a demonstration on public land adjacent to a public street,[438] whereas "Tinker's defamation claim was based entirely on Greene's complaint to Tinker's supervisor."[439]

3. *Snyder* Is Absolutist

These cases leave little doubt that, certainly outside defamation, state courts have wholeheartedly embraced *Snyder* even at the expense of their own common law. It is easy to see why: *Snyder*'s reasoning is freely generalizable. Rather than limiting its reasons to the Maryland IIED tort, *Snyder* is expressed in terms of "tort liability."[440] The major premise of the Court's opinion is that the "Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits," and its minor premise is merely that IIED is one of those torts.[441] The only court to have denied a broadly stated First Amendment defense to a state tort is the Alaska Supreme Court, but in that case the cause of action was defamation, to which *Sullivan* and its progeny directly applied.

The similarities between Roberts's opinion for the Court in *Snyder* and Black's absolutist concurrence in *Sullivan* are instructive and striking. Black would have held that the First Amendment does not merely limit state libel laws but completely

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[432] *See id.*

[433] *Id.* (internal quotation marks omitted).

[434] *Id.* at 35.

[435] *Id.* at 34.

[436] *Id.*

[437] *Id.* at 35.

[438] *See generally* Snyder v. Phelps, 562 U.S. 443 (2011).

[439] *Greene*, 332 P.3d at 35. Fabe also dealt with analogous arguments under the Alaska Constitution's free speech guarantee. *See id.* at 35–36.

[440] *Snyder*, 562 U.S. at 447 ("The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case."). *Id.* at 461 ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.").

[441] *Id.* at 451.

prohibits a state's power to award damages to public officials against critics of their official conduct. Black's thoughts on Brennan's actual malice requirement parallel Roberts's on outrageousness. "Malice," argued Black, "is an elusive, abstract concept, hard to prove and hard to disprove."[442] It is "at best an evanescent protection for the right critically to discuss public affairs."[443] Just as Roberts observed that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate,"[444] so Black thought that "[t]his Nation" cannot "live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials."[445] Black could have been summarizing the *Snyder* holding when he concluded that "[a]n unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."[446]

Snyder is absolutist.[447] Its conception of the First Amendment precludes state common-law tort liability attaching to speech whose content is of public concern, irrespective of context, form, factual record, and basis of liability. To sum up the state court use of *Snyder*—despite judicial protestations to the contrary—speech whose content is of public concern is not actionable. Defamation is a significant exception. But the important state court cases applying *Snyder* demonstrate its absolutism. They show that *Snyder*'s two purported limitations are not real: first, the content-form-context trilogy is dominated by content alone, and second, *Snyder*'s avowed factual narrowness is a tepid limitation.

First, despite judicial assurances that no one element of the content-form-context trilogy is dispositive,[448] it turns out that content *is* dispositive and a circumstantial analysis generally changes nothing. Consider the two state cases where context and form mattered most: *Cleaveland* and *Gleason*. In *Cleaveland*, the targeted harassment of the PEOs, which included personal insults, was insufficient to deny First Amendment protection to speech whose content was of public concern.[449] And in *Gleason*, defendants covered telephone poles at plaintiff's home and work with flyers relating

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[442] *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring) (internal quotation marks omitted).

[443] *Id.*

[444] *Snyder*, 562 U.S. at 461.

[445] *Sullivan*, 376 U.S. at 297 (Black, J., concurring).

[446] *Id.*

[447] First Amendment "absolutism" is associated with Justice Hugo Black's insistence that the First Amendment "says 'no law,' and that is what I believe it means," Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962), "without any 'ifs' or 'buts' or 'whereases,'" Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

[448] "In considering content, form, and context," Roberts said in *Snyder*, "no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech." *Snyder*, 562 U.S. at 454.

[449] *See* City of Keane v. Cleaveland, 118 A.3d 253, 260 (N.H. 2015).

to her former lover's unexplained disappearance—concededly for the sole purpose of hounding and breaking the plaintiff.[450] As the *Cleaveland* court acknowledged, prompted by *Snyder*, absent actual physical violence, the context and form of the speech is irrelevant.[451] And the *Gleason* court held that so long as targeted, public harassment is "consistent with the overarching public concern"[452] of the speech, then the First Amendment insulates the speaker from tort liability.[453]

In the result, an expansive conception of public concern shields a speaker from tort liability that would otherwise attach.[454] True, there are some qualifications: if there is physical violence, for example, or if the speech constitutes personal harassment out of public view. But sustained personal vilification in a public place is protected by the First Amendment, so long as there is a connection between the content of the speech and a matter of public concern. As Daniel Solove and Neil Richards anticipated in their important work on free speech and civil liability, this approach "provides too broad a scope of First Amendment protection."[455]

Second, *Snyder*'s promise that its "holding . . . is narrow," and that its "reach . . . is limited by the particular facts,"[456] has been honored only in the breach. In light of the dominance of content in the content-form-context trilogy, the factual record is relatively unimportant. Identifying the content of speech is a rarely contested issue of fact; but whether that content is of public concern is an oft-contested question of law. Similarly, the location of speech is a question of fact, but it is not a nuanced factual inquiry; and it suffices for First Amendment protection if the speech is in public view (or even better, located on or adjacent to a public street). And the location of speech when broadcasting images is *not* the same as the location of events depicted by those images. *Rodriguez* shows that the public broadcast of *events* not in public view (for example, a suicide in the remote Arizonan desert) nevertheless counts as *speech* in public view.[457] In sum, peaceful speech in public view whose content is of public concern is protected.

This factual inquiry—identifying the content, location, and violence of the speech at issue—does not ordinarily require a developed record. Indeed the irrelevance of

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[450] *See* Gleason v. Smolinski, 125 A.3d 920, 940, 940 n.20 (Conn. 2015).

[451] *See Cleaveland*, 118 A.3d at 260.

[452] *Gleason*, 125 A.3d at 940.

[453] *See id.*

[454] In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974), Justice Powell argued that the public concern test, which *Snyder* embraced, would overly restrict a state's legitimate interest in enforcing a legal remedy for defamation of a private individual. "And," Powell argued, "it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government.'" *Id.* at 346 (citation omitted). Powell "doubt[ed] the wisdom of committing this task to the conscience of judges." *Id.*

[455] Solove & Richards, *supra* note 132, at 1683.

[456] Snyder v. Phelps, 562 U.S. 443, 460 (2011).

[457] *See* Rodriguez v. Fox News Network, LLC, 356 P.3d 322, 326 (Ariz. Ct. App. 2015).

the factual record is confirmed by the procedural posture of the state cases applying *Snyder*. *Rodriguez* was determined on a motion to dismiss—that is, on the pleadings prior to fact discovery.[458] The Court consciously decided to "address Fox's constitutional defense" to "avoid a 'prolonged, costly, and inevitably futile trial.'"[459] Similarly, in *Dumas*, a motion to dismiss filed prior to discovery (converted to a motion for summary judgment because it exhibited a video and transcript of the broadcast and records relating to Dumas's arrest and driving history) terminated the litigation.[460] The tort claims in *Gleason* went to trial, but the First Amendment was only raised on appeal.[461] Only in *Cleaveland*—terminated on a motion to dismiss but after a three-day evidentiary hearing—did the trial court decide the First Amendment issue on a relatively developed factual record.[462] The clear tendency is that in cases applying *Snyder*, much of the factual record is simply irrelevant to the First Amendment inquiry.

The incapacitation of the jury is an obvious corollary of the irrelevance of the factual record. *Snyder* went out of its way to justify jury distrust: a jury may not, said Roberts, "impose liability on the basis of the jurors' tastes or views, or . . . on the basis of their dislike of a particular expression."[463] Scholars have supported the distrust of the jury to properly enforce the First Amendment. In 1970, Henry Monaghan contended that, "[i]n general, any expansive conception of the jury's role is inconsistent with a vigorous application of the First Amendment."[464] Even though *Sullivan* preserved a role for the jury in principle, Monaghan noted that Brennan refused to remand the case against the New York Times back to the hostile state courts and juries.[465] More recently, Eugene Volokh argued that "[m]any statements might be labeled 'outrageous' by some judge, jury, university administrator, or other government actor."[466]

There is, of course, real reason to worry that juries might fail to vigorously enforce the First Amendment. But why can't this distrust be averted in the usual way, by proper jury instructions? *Snyder* does not explain. And *Snyder* ignored the possibility that the First Amendment could be enforced by requiring the bench to decide the "outrageous" element. Neither juries nor judges, apparently, can be trusted to decide whether speech is "outrageous" (*Snyder*)[467] or "improper" (the trial judge in *Cleaveland*).[468] Guided by the judicial articulation of innumerable other "highly malleable" and "inherent[ly]

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458 *See id.* at 324.

459 *Id.* at 325 (citation omitted).

460 *See* Dumas v. Koebel, 841 N.W.2d 319, 323 (Wis. Ct. App. 2013).

461 *See* Gleason v. Smolinski, 125 A.3d 920, 928 (Conn. 2015).

462 *See* City of Keene v. Cleaveland, 118 A.3d 253, 256, 258 (N.H. 2015).

463 Snyder v. Phelps, 562 U.S. 443, 458 (2011) (internal quotation marks omitted) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

464 Henry P. Monaghan, *First Amendment "Due Process*," 83 HARV. L. REV. 518, 527 (1970).

465 *See id.* at 527 n.37, 528.

466 Volokh, *supra* note 246, at 300.

467 *See Snyder*, 562 U.S. at 458.

468 *See* City of Keene v. Cleaveland, 118 A.3d 253, 258 (N.H. 2015).

subjective[]" legal standards,[469] juries have been deciding such questions for centuries. Whether conduct is reasonable or reckless—that is the bread and butter of the modern jury. But whether speech is outrageous—nope. At the risk of repetition, it is true that the role of the jury has been justifiably limited in many contexts. It is true, too, that the First Amendment evolved long ago from a guarantee of "protection of the people collectively from unrepresentative government" to the "protection of currently unpopular ideas from a current majority."[470] *Snyder*, however, did not adequately explain its scope, and ignored open alternatives (proper instructions or judicial determination of the problematic element). Notice also that *Greene v. Tinker*, the Alaskan defamation case applying *Sullivan*, preserved a role for the jury consistently with the First Amendment (the question for the jury was whether the conditional privilege had been abused).[471]

The net result is that *Snyder* enforced an absolutist First Amendment, notwithstanding the solemn curial pledges that *Snyder* is a narrow decision. The application of the First Amendment to state speech torts fixes on a small number of discrete and rarely contested facts. In reality, one factual finding—the content of the speech—is a simple predicate that swings open the wide First Amendment door.

III. *SULLIVAN*, NOT *SNYDER*

This Part argues that *Sullivan*'s methodology should be preferred over *Snyder*'s, because *Sullivan* embraced cooperative judicial federalism. *Sullivan*'s model of First Amendment enforcement has underwritten fifty years of productive state-federal judicial dialogue. In just seven years, *Snyder* has suppressed every significant opportunity for intersystemic conversation. One of *Sullivan*'s unheralded virtues, then, is that it created the right conditions for a genuinely cooperative judicial federalism.

A. Cooperative Judicial Federalism

Cooperative judicial federalism goes by various names in the scholarship: dialectical,[472] interactive,[473] polyphonic[474] or relational federalism,[475] or intersystemic[476] or

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[469] *Snyder*, 562 U.S. at 458.

[470] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 242 (1998). *See also* Monaghan, *supra* note 464, at 527–29.

[471] Greene v. Tinker, 332 P.3d 21, 28, 30 (Alaska 2014).

[472] Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046–47 (1977).

[473] Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 864 (1985).

[474] ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 7 (2009).

[475] Charleton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL OF RTS J. 511, 512 (2011).

[476] Gluck, *supra* note 155, at 1906.

interjurisdictional[477] adjudication. The broad thrust of this literature is that federal-state judicial dialogue is valuable, and that *Erie* did not foreclose that dialogue. Concurrent jurisdiction creates opportunities for cooperative judicial federalism, because both state and federal courts are authorized to decide the same legal questions. A court of one system often decides a question arising under the laws of the other. Although federal courts are not authoritative on questions of state law, there is nevertheless real room for intersystemic conversation when they interpret state statutes and constitutions.[478]

The scholarship says that dialogue between federal and state courts is valuable. In a seminal work on dialectical federalism, Cover and Aleinikoff argued that the development of criminal procedure doctrine is "a conversation among equals," which "demonstrate[s] a remarkable breadth of views and concerns," has "a profound impact on the development of constitutional law," and "may be justified because it articulates a basic tension in our society's view of the criminal process."[479] Similarly, Gluck invites us to "imagine the possibilities" were statutory interpretation methodology to be given stare decisis effect.[480] Courts would be encouraged to experiment with their statutory interpretation methodology, creating "a realistic possibility for cross-systemic pollination of interpretive theory."[481] Of course, federal-state judicial dialogue was commonplace before *Erie*, because general common law was a legitimate source that both state and federal judges could interpret and develop.[482]

Cooperative judicial federalism should flourish particularly when state rights of action embed federal issues, or federal rights of action embed state issues. Because these cases generate questions of state and federal law, they present real opportunities for state and federal courts to engage in productive dialogue, to respond to each other's opinions, and to shape the contours of their own (and each other's) law, ensuring state law compliance with federal commands. As Martin Redish argued, "both state and federal systems have much to gain from institution of a dialogue between the courts of both systems," especially when state and federal law can't be easily separated.[483]

Enforcing the First Amendment against state torts therefore presents an opportunity for cooperative judicial federalism. *Sullivan* and *Snyder* both deployed the First Amendment to set aside a jury verdict underwritten by state law. They both required that a state's common law speech tort embed a mandatory First Amendment issue.

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[477] Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 103 (James A. Gardner & Jim Rossi eds., 2011).

[478] *See* SCHAPIRO, *supra* note 474, at 102; Gluck, *supra* note 155.

[479] Cover & Aleinikoff, *supra* note 472, at 1055, 1065–66.

[480] Gluck, *supra* note 155, at 1992.

[481] *Id.*

[482] *See* Cover & Aleinikoff, *supra* note 472, at 1048 n.66.

[483] Redish, *supra* note 473, at 901.

But the similarities stop there. *Sullivan* seized the opportunity for cooperative judicial federalism; *Snyder* spurned it. In the following decade, state courts absorbed *Sullivan* and its progeny into the specifics of their common law.[484] This process epitomizes cooperative judicial federalism because the Supreme Court's broad pronouncement made "much room for federal-state dialogue."[485] But *Snyder* paid almost no attention to state law, leaving no breathing space for federal-state dialogue. *Snyder*'s absolutism, part and parcel of the First Amendment's unstoppable march, shut down the articulation of state law and with it the possibility of federal-state judicial dialogue.

B. The Common Law and Cooperative Judicial Federalism

Why did the *Sullivan* paradigm for enforcing the First Amendment against state common law torts generate a cooperative judicial federalism? *Sullivan*'s inauguration of cooperative judicial federalism is partly (and inseparably) about the role and status of the common law in the United States. In "Our Federalism,"[486] the common law is primarily located in the states. This is a consequence of two facts: first, Henry Hart's celebrated axiom that federal law is "interstitial in its nature," designed to achieve a specialized or targeted purpose;[487] and second, Brandeis's famous declaration in *Erie* that "[t]here is no federal general common law."[488] These are not absolutes, but they resonate when the First Amendment limits state common law torts. In effect, *Sullivan* imposed an affirmative duty on state and federal judicial officers in some common law cases. *Snyder* imposed a congruent affirmative duty too; that duty, however, ignores and preempts state common law, straining the systemic fact that the primary location of the common law is in the states.

Sullivan generated cooperative judicial federalism because it took an internal point of view with respect to Alabama's common law of libel. By taking a practical attitude of rule acceptance to state common law, the Court in *Sullivan* pictured federal and state courts engaged in the same enterprise: molding or revising state common law to comply with the First Amendment. *Sullivan* was an interstitial decision: it identified a "gap" in state law (namely, the rule permitting an official to recover libel damages for a publication criticizing official conduct), and filled the gap using the First Amendment.[489] And Brennan did not create a federal general common law of

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[484] Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 344 (2009) (describing the doctrinal landscape defined by *Sullivan* as "relatively settled and stable").

[485] Cover & Aleinikoff, *supra* note 472, at 1049.

[486] Younger v. Harris, 401 U.S. 37, 44 (1971).

[487] HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953).

[488] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[489] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 261, 283–85 (1964).

libel. It's fashionable to say that *Sullivan* "federalized" or "constitutionalized" defamation; sometimes *Sullivan* is described very differently as "h[o]ld[ing] Alabama's defamation tort unconstitutional."[490] These are exaggerations, and the truth lies somewhere in the middle. Brennan introduced a federal element for public officials alleging that criticism of their official conduct was defamatory. That federal rule did not colonize state common law wholesale.

Sullivan created the right conditions for cooperative judicial federalism by ensuring that the First Amendment operated against the background of the state common law. On this view, the First Amendment functions by altering or supplanting legal relationships established by the states. It is therefore necessary first to look at the substantive operation of state common law by reference to the rights, duties, privileges, powers, and immunities that it creates, changes, or abolishes. Once the substantive operation of the state common law is discerned, the First Amendment modifies that substantive operation if necessary. This methodology encourages cooperative judicial federalism because it does not pit federal law against state law. The federal question is reached only if, from the perspective of a judicial officer who accepts state common law as a practical guide for action, the substantive operation of the state's common law infringes the First Amendment. This generates varied questions of state and federal law in which both state and federal courts are competent, creating opportunities for intersystemic dialogue.

A sampling of recent defamation cases in state courts vividly illustrates that *Sullivan* embraced cooperative judicial federalism. In *D Magazine Partners, L.P. v. Rosenthal*,[491] for example, the Texas Supreme Court amply demonstrated that its common law had assimilated the federal constitutional requirements while leaving room for an analysis of defamation elements under state law (including defamatory "gist," requirements of a prima facie case, and various defenses). In *Elliott v. Murdock*,[492] the Supreme Court of Idaho held that a statement was not defamatory

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[490] Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1395 (2017). *See also* John C.P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 TOURO L. REV. 147, 151 (2018) ("[S]tarting with *New York Times v. Sullivan*, the Supreme Court has shown itself prepared to deem entire swaths of state tort law null and void, often in the name of protecting business interests.").

[491] 529 S.W. 3d 429, 433 (Tex. 2017) (noting "the longstanding yet delicate balance" between the First Amendment's "need for a vigorous and uninhibited press" and the state's "legitimate interest in redressing wrongful injury"); *id.* at 440 (applying, consistently with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "a negligence standard in cases involving a private plaintiff seeking defamation damages from a media defendant").

[492] 385 P.3d 459, 465–66 (Idaho 2016) ("This Court, in reliance on the United States Supreme Court's reasoning in *Gertz*, has held that an individual can become a public figure on a limited range of issues through voluntary public engagement on those issues."); *id.* at 466 (observing that "[e]ven if, for the purposes of argument, the statements are accepted as defamatory, [plaintiffs] fail to raise a genuine issue of material fact as to whether [they] are public figures" to whom *Sullivan*'s actual malice standard applies).

under state law before deciding that, in any event, plaintiff was a public figure. The Supreme Judicial Court of Massachusetts, in *Edwards v. Commonwealth*,[493] assessed the adequacy of a defamation complaint according to federal standards as incorporated into Massachusetts law. And the Court observed that an independent basis existed under state law to impose the actual malice standard. In *SIRQ, Inc. v. The Layton Companies, Inc.*,[494] the Utah Supreme Court applied state law as guided by *Sullivan* and reversed the trial judge's failure to properly conduct an initial inquiry to ensure that only statements capable of defamatory meaning made it to the jury in a false light claim. The Maryland Court of Appeals has incorporated *Sullivan* as a "First Amendment conditional privilege."[495] "Although defamation jurisprudence traces its origins to a number of seminal First Amendment cases of the United States Supreme Court," the Court insisted that "the resolution of defamation claims brought by private individuals has largely been left to the province of state courts."[496]

Snyder operated very differently. It sidestepped Maryland law altogether: IIED was mentioned in passing and intrusion upon seclusion was silently preempted.[497] The First Amendment inquiry was acontextual, divorced from the substantive operation of state common law. The First Amendment, in other words, did not operate interstitially "against the background of the total *corpus juris* of the states";[498] rather, the federal question overtook the whole litigation. And its application to a whole swathe of torts—IIED, intrusion upon seclusion, intentional interference with contractual relations, and negligent infliction of emotional distress—strongly suggests that *Snyder* created a federal general common law, which largely preempts state speech torts. Nor has *Snyder* developed in the usual common law way. It has not sparked an incremental reform of IIED law; rather, it has sparked an absolutist application of the First Amendment, underwritten by an expansive public concern test.[499] A natural consequence of this absolutism is the hyperstability and predictability of the doctrinal regime thus generated. A federal law, severed from an underlying state right of action, has preempted a static, external vision of state common law.

State courts applying *Snyder* engage in *backwards avoidance*. They decide a momentous federal constitutional question to avoid ordinary issues of state private

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493 76 N.E.3d 248, 256–59 (Mass. 2017) (citing Massachusetts cases incorporating *Sullivan*'s actual malice requirement into state law).

494 379 P.3d 1237, 1245 (Utah 2016) (quoting state court opinions for the proposition that false light claims are "predicated on publication of a defamatory statement" and "reside in the shadow of the First Amendment") (quoting *Russell v. Thompson Newspapers, Inc.*, 842 P.2d 896, 907 (Utah 1992) and *Jensen v. Sawyers*, 130 P.3d 325 (Utah 2005)); *id.* at 1246 ("[F]alse light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims.").

495 Seley-Radtke v. Hosmane, 149 A.3d 573, 576, 581 (Md. 2016).

496 *Id.* at 575.

497 *See* Snyder v. Phelps, 562 U.S. 443, 458–60 (2011).

498 HART & WECHSLER, *supra* note 487, at 435.

499 *Snyder*, 562 U.S. at 451–53.

law. We have seen, for example, that state courts applying *Snyder* to economic torts like intentional interference do not consider whether those torts actually contravene the First Amendment. In *Cleaveland*, the trial judge was "skeptical that a claim for tortious interference with contractual relations exists in circumstances such as those presented here," but held that the Court "need not reach this issue as the enforcement of such a tort is an infringement on the Respondents' right to free speech and expression under the First Amendment of the Federal Constitution."[500] The Supreme Court of New Hampshire mirrored this reasoning.[501] The Court consciously refused to follow its usual practice of "normally address[ing] constitutional questions first under the State Constitution and rely[ing] on federal law only to aid in [its] analysis."[502] Instead, although the Court "share[d] the trial court's skepticism" concerning the intentional interference tort, it agreed that "[it] need not decide whether a viable tortious interference claim can exist under the circumstances present in this case," because *Snyder* precluded recovery.[503]

Although it ignored Maryland law, *Snyder* nevertheless held that there was only one way that Maryland law could be reconciled with the First Amendment, namely, the creation of an all-purpose federal defense.[504] It is one thing to say, as *Snyder* does, that the First Amendment incorporated by the Fourteenth Amendment limits state common law.[505] No one disputes that, and it is consistent with the scribal attitude of the federal courts towards state law (I argued above that federal courts take a scribal attitude to state law, and state courts take an authorial attitude to state law). It is entirely

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[500] City of Keene v. Cleaveland, Nos. 213-2013-cv-00098, 213-2013-cv-0241, 2013 WL 8691664, at *10 (N.H. Super. Ct. Dec. 3, 2013).

[501] *See* City of Keene v. Cleaveland, 118 A.3d 253, 260–61 (N.H. 2015).

[502] *Id.* at 258.

[503] *Id.* at 259. In *Rodriguez*, the Arizona court noted that starting with the First Amendment rather than state law would "avoid a 'prolonged, costly, and inevitably futile trial.'" Rodriguez v. Fox News Network L.L.C., 356 P.3d 322, 325 (Ariz. Ct. App. 2015) (internal citation omitted). The flip side of this concern, however, is that an incorrect First Amendment determination in state court will truncate the application of state law, resulting in a costly appeal and remand process. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991) ("The Minnesota Supreme Court's incorrect conclusion that the First Amendment barred Cohen's claim may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established under Minnesota law and whether Cohen's jury verdict could be upheld on a promissory estoppel basis. Or perhaps the State Constitution may be construed to shield the press from a promissory estoppel cause of action such as this one. These are matters for the Minnesota Supreme Court to address and resolve in the first instance on remand."). Henry Monaghan observed that in *Snyder* the Court exercised its power to select the precise issues for determination. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 696–97 (2012).

[504] *Snyder*, 562 U.S. at 451.

[505] *See id.* at 460 ("As we have noted, 'the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'").

another to say, also as *Snyder* does, that there is only one way to enforce that limit. That is a separate and stronger claim that the First and Fourteenth Amendments completely determine the application of the limit across a whole class of state torts (common law and statutory).

The difficulty associated with the stronger claim—that state tort law can be reconciled with the First Amendment *only* by creating an all-purpose federal defense—is that it robs state courts of their authorial attitude, that is, their capacity to develop their own law by taking a critical reflective attitude towards it. As we have seen, the state courts applying *Snyder* ignore their own tort law and their own constitutions, and do not decide *how* to square their own law with the First Amendment.[506] Instead, they are required to unthinkingly obey *Snyder*'s command. And this command translates to directives to state courts: do not bother fussing over your local law; do not worry about the possibility of a different division of authority between judge and jury; do not fret about pointless jury instructions.

Snyder makes state courts mere scribes of their own law. The federal structure contemplates that a state-created right of action is governed by state law, unless federal law applies. The starting point is state law, followed by the enforcement of an interstitial national law to achieve its special and targeted objective. *Snyder*'s absolutism flips the starting point.[507] As it has been applied in state courts, the starting point is not the state law purporting to legitimize the jury verdict, but instead whether the speech is protected.[508] And this requires state courts to take a brief static snapshot of state tort law to predict the likelihood of liability attaching to speech. Rather than ask whether the state common law in fact impinges on the First Amendment and, if so, how it could be modified to remove the inconsistency, *Snyder* simply invalidates the state law in its predicted application.

Snyder therefore raises the question: if the First and Fourteenth Amendments, and *Erie*, embody judicially developed federal commands, and the IIED tort is a judicially developed state right of action, why not allow state courts to do the heavy lifting? Why deny state courts the capacity to develop their own common law, over which they are ordinarily sovereign (in the absence of applicable federal law), consistently with the First and Fourteenth Amendments, rather than require them to obey a defense effectively legislated by the Supreme Court?

Had he looked a little harder, Roberts might have embraced cooperative judicial federalism and the internal perspective towards state common law. *Snyder*, in its rejection of the authorial perspective, failed to notice the true nature of IIED's outrageousness requirement. It failed to realize, moreover, that IIED targets conduct that is not just outrageous, but both extreme and outrageous; a "double limitation" which "requires both that the character of the conduct be outrageous and that the

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[506] *See supra* notes 500–05.

[507] *Cf.* Kalven, *supra* note 52, at 191–92.

[508] *See supra* notes 500–05.

conduct be sufficiently unusual to be extreme."[509] And *Snyder* refused to consider the different roles of judge and jury in an IIED claim—discussed in *Harris v. Jones*[510] and described in the Third Restatement as the "court play[ing] a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm"[511]—as a potential cure for the constitutional defect. The judge "first makes a judgment . . . as to whether the conduct alleged could be found extreme and outrageous and the harm sufficiently severe such that liability is permissible," and, if so, "submits the case for the jury to determine whether the defendant engaged in extreme and outrageous conduct and whether the plaintiff suffered severe emotional harm."[512] *Snyder* simply did not explain why these common law rules ran afoul of the First Amendment.

Put differently, *Snyder* is functionally equivalent to a First Amendment collateral attack. This external, collateral attack simply fixes on a verdict enforcing a state right of action against a speaker. The state law basis underwriting the verdict—for example, the tort or theory of liability, the legal source (common law, legislation, or both)—is entirely ignored. The effect of *Snyder*'s methodology is to change the right of action completely. The state courts practicing backwards avoidance transform the plaintiff's state tort allegation into a First Amendment claim of the defendant. *Snyder* thus contributed to the "epidemic pathology" that state courts parrot U.S. Supreme Court reasoning on constitutional issues.[513] In the result, neither federal nor state courts answer questions of state law that cry out for resolution, silencing state-federal judicial dialogue and denying intellectual and decisional resources—the "guidance,

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[509] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW. INST. 2012).

[510] 380 A.2d 611 (Md. 1977). *Harris v. Jones*, the case Roberts cited to establish that Maryland recognized IIED, was sensitive to the "particularly troublesome question" of "[w]hether the conduct of a defendant has been 'extreme and outrageous.'" *Id.* at 614. Citing other state courts, the Maryland Court of Appeals held in *Harris v. Jones* that "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as extreme and outrageous," and, where reasonable minds may differ, "it is for the jury to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Id.* at 615.

[511] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW. INST. 2012).

[512] *Id.*

[513] Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 726 (2016). For defamation actions, where one might think that the gravitational force of *Sullivan*'s "federal rule" would be overwhelming, it is noteworthy that state courts claim a significant degree of decisional independence. *See, e.g.*, Seley-Radtke v. Hosmane, 149 A.3d 573, 575 (Md. 2016) ("[T]he resolution of defamation claims brought by private individuals has largely been left to the province of State courts."); Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 73 (W.Va. 1981) (critical of the state of defamation law after *Sullivan*, but noting that "*Sullivan* and its progeny . . . placed a first amendment, free speech gloss upon all prior law of defamation" and "permitted the states to adopt their own standards of liability in defamation actions").

perspective, inspiration, reassurance, or cautionary tales"[514]—offered by the discoursive method of the common law.

C. Making Snyder *Cooperative*

How, then, should *Snyder* have been written to embrace cooperative judicial federalism? One approach is to mimic *Hustler* for private-figure IIED lawsuits, which would require a plaintiff to show *Sullivan*-brand actual malice.[515] Falwell failed to make out his IIED claim because the advertising parody of which he complained did not contain a false statement of fact made with knowledge, or in reckless disregard, of its falsity.[516] But actual malice is custom-made for public figures, who attain that status by position alone or by "thrusting their personality into the vortex of an important public controversy."[517] Another reason that actual malice is inapt stems from its commitment to a conception of truth and falsity. Truth or falsity is part of the defamation cause of action (and, for that matter, a false-light invasion of privacy cause of action); but in an IIED suit, extreme and outrageous speech that is not readily characterizable as true or false can nevertheless cause severe emotional harm.

A second option is to take up the Restatement's suggestion and imbue certain aspects of the IIED cause of action with constitutional significance. This could require, for example, a judge to make an initial assessment of whether the defendant's extreme *and* outrageous conduct reaches a necessary First Amendment threshold, before submitting the case to the jury. A third option is to adopt the newsworthiness privilege that exists in various state law privacy torts. To be sure, the newsworthiness privilege may have its own problems and may closely resemble *Snyder*'s public concern test. But it would place responsibility on state courts, as primary authors, to ensure that their common law conforms to the First Amendment.

The point isn't to advocate one view over another, but to show that the problem confronted in *Snyder* could have been solved in many ways, and that the solution chosen by *Snyder* sacrificed state common law and cooperative judicial federalism on the altar of an absolutist First Amendment. The second and third options outlined very briefly here are akin to *Sullivan*. They pick up state common law trends, showing at least some comity and respect to the states as sovereign authorities backing state common law, and to the state courts writing that common law. Within the confines of the First Amendment, these alternatives allow states to author their own common law.

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[514] Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn from Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1642 (2004).

[515] *See* Hustler Magazine Inc. v. Falwell, 485 U.S. 46, 56 (1988).

[516] *See id.* at 56–57.

[517] Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

CONCLUSION

The application of the First Amendment to state common law torts is a continual, sometimes urgent, problem. In 1967, the Supreme Court of Texas decided *Fisher v. Carrousel Motor Hotel, Inc.*,[518] the well-known "plate grabbing" case. Emmit E. Fisher, a black NASA mathematician, had been invited to attend a conference in Houston.[519] After the morning session, attendees adjourned for a buffet lunch at a whites-only private club.[520] As Fisher stood in line, an employee approached him, snatched the plate from his hand, and shouted that he could not be served in the club.[521] There was no direct physical contact and Fisher did not apprehend any physical injury.[522] He was highly embarrassed and hurt by the hotel employee's conduct in the presence of colleagues.[523] The Texas Supreme Court held "that the forceful dispossession of . . . Fisher's plate in an offensive manner was sufficient to constitute a battery."[524]

After *Snyder*, there is a real question as to whether *Fisher*—"a landmark racial discrimination case"[525]—remains good law. In 2014, when considering a discussion draft of the Third Restatement of intentional torts to persons, two ALI members doubted *Fisher* on First Amendment grounds.[526] This Article has endeavored to explain that the danger is not only that cases like *Fisher* come out differently after *Snyder*. The danger is also systemic: that *Snyder* forecloses plaintiffs and courts from alleging, reasoning, and judging that certain conduct is right or wrong under the local standards of state tort law.

Sullivan, as we have seen, does not pose the same systemic risk,[527] because it took state common law seriously. Its methodology recognizes not only that state common

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[518] 424 S.W.2d 627 (Tex. 1967).

[519] *Id.* at 628.

[520] *Id.*

[521] *Id.* at 628–29.

[522] *Id.* at 629.

[523] *Id.*

[524] *Id.* at 630.

[525] Richard Delgado, *One Man's Dignity: An Interview with Emmit E. Fisher*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 23 (Laura J. Lederer & Richard Delgado eds., 1995).

[526] *See Proceedings of 2014 Annual Meeting*, 91 AM. LAW. INST. PROC. 129–30 (2014). Peter F. Langrock argued *Fisher* "raise[d] . . . certain First Amendment questions, which are not dealt with," and "[n]o matter how offensive the language may be, there is still the First Amendment, and we've got to protect that." *Id.* at 130. Professor George C. Christie also acknowledged *Fisher*'s "First Amendment issues." *Id.* at 135.

[527] Consider, for example, Iowa, where "[t]he judicial heavy lifting necessitated by" Sullivan "has abated" but where "[t]he dialectal heat generated by the competing interests of [common law] reputation and freedom of speech continues to simmer." Patrick J. McNulty & Adam D. Zenor, *Iowa Defamation Law Redux: Sixteen Years After*, 60 DRAKE L. REV. 365. 368 (2012) ("Most of the cases decided by the Iowa Supreme Court in the last sixteen years are private disputes involving application of common law principles," including significant cases "in which the principles of the common law and the First Amendment intersect.").

law counts as law under *Erie*, but also that a state common law judgment represents the local political community's collective opinion that the defendant wronged the plaintiff. At the same time, it recognizes that the defendant should not pay for the wrong. Importantly, moreover, *Sullivan*'s approach recognizes that local standards—the rules and principles of state common law—can themselves be offensive to the First Amendment and, if so, should be changed accordingly. *Sullivan* says that the First and Fourteenth Amendments changed the Alabama law that purported to hold the Times and the four ministers liable for criticizing an elected public official.[528] Because *Sullivan* adopted the internal point of view vis-à-vis state common law, it permitted state common law to be revised.

Snyder's methodology is broad; *Sullivan*'s is deep. *Snyder* applies across all state torts; *Sullivan* responds to the special contours of the right of action. *Snyder* fixes only on a verdict; *Sullivan* reaches into state common law. Neither *Sullivan* nor *Snyder* is an unconstitutional judicial overreach. The better approach is determined, then, by asking: what is lost or gained in choosing one over the other? What we gain in choosing *Sullivan* is the best vision of our judicial federalism. Choosing the internal point of view towards state common law creates opportunities for cooperative judicial federalism. *Sullivan*'s classical common law approach does not silence but encourages discourse and state-federal judicial dialogue.

[528] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 283–85, 292 (1964).

SILENCE FOR SALE

Jeffrey Steven Gordon[*]

71 ALA. L. REV. (forthcoming 2019)

In the battle between freedom of contract and freedom of speech, contract almost always wins. Just why that is so, however, has never been adequately addressed. Recently, nondisclosure agreements (NDAs)—contracts that censor speech—have come under intense scrutiny for their central role in ensuring that moneyed wrongdoers can act with impunity. Yet none of the criticism deals with an elemental injury wrought by NDAs: the harm that contractually enforced silence unleashes on free expression. Prompted by the #MeToo movement, and especially the devastating success of NDAs that prohibited victims of sexual harassment and assault from speaking out, this Article argues that freedom of contract should not always trump freedom of speech. It starts by demonstrating that NDAs are ubiquitous in our lives, and that they can serve important individual and social interests. But, this Article goes on to show, some NDAs also conflict with cardinal free speech values. For example, an NDA where a private individual sells her silence to a candidate for public office may prevent voters from meaningfully exercising their sovereignty at the ballot box, violating the "informed voter" conception of free speech. After articulating the significant threats that NDAs present to the dominant free speech values (truth, democracy, and agency), this Article contends that courts should tap into the common law doctrine voiding contracts against public policy. NDAs against the public policy of free expression should not be enforced. By recovering a line of cases from the late eighteenth and early nineteenth centuries, in which the common law refused to enforce contracts that contradicted fundamental constitutional principles, this Article returns some free speech norms to the common law. It busts the monopoly that the First Amendment has claimed over free speech discourse.

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INTRODUCTION

A few months before he died of a sudden heart attack in October 1946, Leroy Gardner, director of the prestigious Saranac Laboratory, received a visitor. The visitor, trailblazing industrial toxicologist Harriet Hardy, found Gardner distressed. The manufacturers who funded his research forbade him from publishing his animal studies, in which mice and cats exposed to asbestos developed cancer. The asbestos industry enforced its contractual veto over publication, "one of many instances where asbestos corporations manipulated and influenced the scientific literature to protect their vested interests."[1] Fifty years later, the disgraced movie producer Harvey Weinstein built a "complicity machine" to quiet allegations of years of abuse. Victims of Weinstein's predation were contractually bound to stay mum.[2] Bill O'Reilly, the former Fox News host, silenced his own accusers by paying $45 million in confidential settlements. Some of these bargains required not just silence but, if the information ever became public, denial.[3] In the final months of his life, Ian Gibbons, a brilliant scientist who had the tragic misfortune to be hired by Theranos, could not confide in his wife because of the strict agreement he had signed.[4] And who could forget Donald Trump, whose lackey in 2016 paid two women to remain silent over alleged affairs.[5]

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[1] David S. Egilman & Harriet L. Hardy, *Manipulation of Early Animal Research on Asbestos Cancer*, 24 AM. J. INDUS. MED. 787, 789 (1993). See also Harriet Hardy & David Egilman, *Corruption of Occupational Medical Literature: The Asbestos Example*, 20 AM. J. INDUS. MED. 127, 128 (1991); Bill Richards, *New Data on Asbestos Indicate Cover-Up of Effects on Workers*, WASH. POST, Nov. 12, 1978, at A1; Lawrence K. Altman, *Dr. Harriet Hardy, Harvard Professor, Dies at 87*, N.Y. TIMES, Oct. 15, 1993, at B10; HARRIET L. HARDY, CHALLENGING MAN-MADE DISEASE 42–43 (1983).

[2] Megan Twohey et al., *Feeding the Complicity Machine*, N.Y. TIMES, Dec. 6, 2017, at A1, A20.

[3] Emily Steel, *Settlement Agreements Reveal How O'Reilly Silenced His Accusers*, N.Y. TIMES, Apr. 5, 2018, at B3.

[4] JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP 146 (2018).

[5] Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Paid Porn Star*, WALL ST. J., Jan. 13, 2018, at A1.

There is a common thread here: nondisclosure agreements (NDAs). The NDA is the legal mechanism enabling silence to be sold, and a crucial pillar of many schemes to conceal information of vital public import. And NDAs are *everywhere*. That's because the need for confidentiality arises in "infinite and consequential circumstances."[6] Trump himself helpfully tweeted that NDAs are "very common among celebrities and people of wealth."[7] In fact, they are very common, period. In the S&P1500, 87% of CEO employment contracts contain an NDA.[8] For everyone else, an NDA is a condition of employment "offered by employers on a take-it-or-leave-it basis."[9] Employment, dispute resolution, deals, the gig economy, journalism, intimacy—name a relational context, and some lawyer somewhere has regulated its information flow with an NDA. Indeed, NDAs are so common that companies automate their production. In 2017, the General Counsel of Adobe Systems explained that 70% of the 2,000 NDAs executed annually do not require a lawyer. Sometimes an NDA only needs "one click to generate"; otherwise, "a dynamic agreement … is built on questions and answers."[10]

The unrelenting parade of abusive NDAs marching across the news may lead us to jump to the conclusion that all NDAs are bad. But make no mistake: confidentiality agreements are valuable. They protect privacy. A victim often seeks contractual assurance that details of wrongdoing are hushed. And, because the wrongdoer

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[6] RONALD GOLDFARB, IN CONFIDENCE: WHEN TO PROTECT SECRECY AND WHEN TO REQUIRE DISCLOSURE 156 (2009).

[7] Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2018, 3:54 AM), https://twitter.com/realDonaldTrump/status/991994433750142976

[8] Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 4 (2015).

[9] Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 384–85 (2006).

[10] Mike Dillon, *How We Stripped Down NDAs: Adobe's GC wanted a nondisclosure agreement template that could be used without Calling a Lawyer*, CORP. COUNS. BUS. J. (Sept. 14, 2017), https://ccbjournal.com/articles/how-we-stripped-down-ndas-adobes-gc-wanted-nondisclosure-agreement-template-could-be.

invariably wants confidentiality too, the victim gets more compensation.[11] NDAs also protect commercially valuable information. Google's algorithms and Coca-Cola's formulae are closely guarded trade secrets. NDAs assure companies that such valuable secrets will not be freely passed along to competitors. Without NDAs, moreover, many negotiated deals would (and many settlements could) fall through. Major news stories might not materialize if confidentiality of sources could not be guaranteed. And so on.

Perhaps it's precisely because NDAs are so valuable that the assault on their enforceability has been so tepid and piecemeal. Plaintiffs' lawyers have focused on President Trump, who, as far as NDAs go, is an easy target: the unconstitutional conditions doctrine prevents governments from censoring unclassified information by contract.[12] Or, they have focused on content-neutral doctrines that police all contracts, like unconscionability and duress.[13] There are also avenues for attacking specific types of NDAs, including the National Labor Relations Act[14] and state legislation prohibiting NDAs when settling sexual assault claims.[15] The scholarship, while thoughtful, has also failed to supply sufficiently robust conceptual resources to confront the entirety of the NDA problem. One scholar proposed regulations that targeted repeat offenders.[16] Another argued that NDAs should be subject to scrutiny on public policy grounds, but that argument was limited by its framing: NDAs analogous to those that protect trade secrets are valid, and NDAs

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[11] Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311 (2018).

[12] United States v. Marchetti, 466 F.2d 1309, 1313 (4th Cir. 1972); McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983).

[13] See, e.g., Emma J. Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU: BLOG (Jan. 24, 2018, 9:45 AM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too.

[14] See, e.g., Quicken Loans, Inc. v. NLRB, 830 F.3d 542 (D.C. Cir. 2016) (denying petition to review NLRB's determination that an employment contract forbidding employees to use or disclose a broad range of personnel information, or to criticize the employer publicly, violated the NLRA).

[15] E.g., Cal. Civ. Proc. Code § 1002 (West 2018).

[16] Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 79 (2018).

analogous to those that conceal crime are not.[17] Still others argue that NDAs are unenforceable when they amount to restraints of trade,[18] or when they harm third parties.[19]

One of the profound social insights of the past two years is that all this private (more accurately, secret) ordering shapes and determines public discourse. And yet, after this collective realization dawned, and in all the critical acid poured over NDAs, one question remains: *where is free speech?* The First Amendment, we are told, is absent for two good reasons. One is the state action doctrine. The Free Speech Clause and corresponding state guarantees apply only to governments, not to private parties. As a federal district court recently observed, there is no state action when a court "merely" enforces a private contract.[20] "To hold otherwise," said the judge, "would mean that courts could never enforce non-disclosure agreements."[21]

The second is freedom of contract. In 1991, the Supreme Court said that a law that "simply requires those making promises to keep them" escapes First Amendment scrutiny, because any speech restrictions are "self-imposed."[22] Speech rights are voluntarily traded.[23] "Constitutional rights are waived every day," said Frank Easterbrook nearly forty years ago, and "[t]here is nothing special about the First Amendment."[24] Eugene Volokh argued that "it's proper to let speakers contract away their rights."[25] For Daniel Solove and Neil Richards, speech rights are "alienable" and the First

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

[18] Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207 (1999).

[19] David A. Hoffmann & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. (forthcoming), https://ssrn.com/abstract=3328569.

[20] Bronner v. Duggan, 249 F.Supp.3d 27, 41 (D.D.C. 2017).

[21] Id.

[22] Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

[23] G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 479–80 (1993).

[24] Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 346.

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

Amendment should apply to a private law restriction on speech only if "the speaker cannot avoid accepting the duty."[26] Timothy Zick is partial to what he calls an "autonomy approach."[27] Erica Goldberg thinks that NDAs get a free speech pass because "individuals voluntarily exchanged their ability to speak for compensation."[28]

These two responses are red herrings. The state action doctrine might explain the absence of the First Amendment, but it does not explain the absence of free speech. And reciting freedom of contract just begs the question: why does freedom of contract always trump freedom of speech? The answer cannot simply be waiver, promise, alienation, or some other synonym for contract. The values and interests in enforcing NDAs must actually be weighed against the values and interests in free speech. Sometimes our silence should not be sold.

The hour is nigh for a wholesale reckoning with the threat that NDAs pose to free expression. This Article embraces the opportunity presented by the NDA crisis to shake our instinctive, closely held faith that selling silence does not implicate free speech. It argues that NDAs present significant threats to the dominant free speech values (truth, democracy, and agency), and that courts should refuse to enforce some NDAs for violating the public policy of free expression. In establishing these claims, this Article makes three primary contributions. The first is an extensive account of the prevalence and value of NDAs. This Article shows that confidentiality agreements are crucial components of our social and legal lives. From arms-length commercial parties to close intimates, NDAs temper the information flow and assure us that our confidences will be kept. This Article highlights some important interests that NDAs serve: economy, privacy, administration of justice, democracy, and national security.

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[26] Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1677, 1692 (2009).

[27] Timothy Zick, *"Duty-Defining Power" and the First Amendment's Civil Domain*, 109 COLUM. L. REV. SIDEBAR 116, 119 (2009), https://columbialawreview.org/wp-content/uploads/2016/08/Zick.pdf

[28] Erica Goldberg, *Thoughts on Enforcing Non-Disclosure Agreements*, IN A CROWDED THEATER (March 21, 2018), https://inacrowdedtheater.com/2018/03/21/thoughts-on-enforcing-non-disclosure-agreements/.

Second, this Article articulates how NDAs threaten all the dominant free speech values. Consider, for example, agency. Even for speaker-centric agency accounts, NDAs are problematic. On these theories, free speech is crucial for self-expression or self-development.[29] NDAs destabilize these interests by curbing a confidant's ability to externalize her mental contents.[30] This is not a hypothetical concern: recall Ian Gibbons, the late Theranos scientist who felt he could not confide in his wife.[31] And at least one of the NDAs wielded by Harvey Weinstein prohibited the victim from talking to her therapist.[32] For audience-focused accounts of agency, NDAs are equally problematic. NDAs limit audience autonomy if they deprive listeners of information they would otherwise have. Our agency decreases when information decreases. The secret ordering ordained by NDAs, therefore, undermines agency.[33]

The third contribution of this Article is to identify and break the First Amendment's monopoly over free speech. Since waking from its hibernation in the early twentieth century,[34] the Free Speech Clause has grown to mediate all our free speech discourse. It's now

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[29] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989)

[30] SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014).

[31] CARREYROU, *supra* note 4, at 146.

[32] Twohey et al., *supra* note 2, at A20.

[33] A subsidiary contribution of this Article is that it establishes First Amendment pluralism. In other words, the First Amendment does not prioritize or privilege one free speech value over others. First Amendment monists—like Robert Post, who thought that the First Amendment accords lexical priority to participatory democracy—value doctrinal certainty and stability. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011). But this Article argues that First Amendment monism is itself inconsistent with our constitutional practice. Drawing on Philip Bobbitt's theory of constitutional interpretation, this Article notices a similarity between Bobbitt's modalities of constitutional argument (textual, historical, structural, doctrinal, prudential, and ethical) and our accepted modes of First Amendment argument (truth, democracy, and agency). PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). In short, the First Amendment consists in the practice of arguing that free speech serves these important values. First Amendment monism denies or depreciates the legitimacy of multiple First Amendment values. That, however, is just not our constitutional practice.

[34] Vincent A. Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY 13, 28 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019)

impossible to talk about free speech without also talking about the First Amendment. This is not the familiar complaint that the Free Speech Clause embodies a "first class" right,[35] or has been weaponized[36] or Lochnerized.[37] The point, rather, is that the Free Speech Clause has colonized every site of free speech discourse. Even state free speech guarantees, some expressed very differently to the First Amendment, often simply mimic the federal right.[38]

This Article busts the First Amendment's free speech monopoly at the altar of the common law doctrine voiding contracts against public policy. The public policy doctrine, as a branch of the state's common law of contracts, is one of the few areas of the law resistant to the First Amendment's claim to be the privileged source of free speech norms. This Article recovers a forgotten line of cases in which common law courts refused to enforce contracts because they were, in Lord Mansfield's phrase, "against the fundamental principles of the constitution."[39] The doctrine was embraced wholeheartedly in the fledgling United States. Election wagers were voided because they so corrupted the franchise that it "could not be regarded as the expressed will of an intelligent constituency."[40]

It turns out, then, that the doctrine that contracts against public policy are void is no stranger to public law principles. This Article cashes out the rediscovered doctrine to invalidate two recent and controversial NDAs. First, the NDA between candidate Trump and an adult film actress should not be enforced by a court of law. By suppressing information of public concern about a presidential candidate, the contract keeps the electorate in the dark. Courts should not be complicit in the frustration of an informed voting public. Second, the NDA between Harvey Weinstein and one of his victims is

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[35] Silvester v. Becerra, 138 S. Ct. 945, 950–52 (2018) (Thomas, J., dissenting from denial of certiorari).

[36] Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).

[37] The academic characterization *du jour*. E.g., Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 179, 179 n.2 (2018).

[38] E.g., City of West Des Moines v. Engler, 641 N.W.2d 803, 805 (Iowa 2002). See generally Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

[39] Allen v. Hearn (1785) 99 Eng. Rep. 969; 1 T.R. 56 (K.B.).

[40] Ball v. Gilbert, 53 Mass. (12 Met.) 397 (1847).

void. Just as election wagers were invariably nixed because of their "tendency" to violate fundamental principles, each NDA that conceals sexual harassment and abuse tends to damage to free expression. Courts should recognize that enforcing sexual misconduct NDAs makes the judicial process complicit in this collective harm.

The argument develops as follows. Part I first discusses exactly what an NDA is. It then proceeds to contextualize NDAs to illustrate their prevalence and the important values they serve. Part II argues for First Amendment pluralism, and then articulates the significant free speech concerns posed by NDAs. Finally, Part III justifies the doctrine that contracts against the public policy of free expression are unenforceable. It analyzes a Trump NDA and a Weinstein NDA, arguing that free speech public policy voids both.

I. THE DNA OF NDAS

NDAs are important. This Part examines precisely what NDAs are: the legal rights and duties that they generate; their prevalence in our commercial, social, and legal lives; and the values and interests that they serve. Studying NDAs in their own right illustrates the need to be cautious, in Parts II and III, when considering whether free speech renders some of them unenforceable.

A. The Acontextual NDA

In an NDA, one person, the confidant, promises to refrain from speaking about a matter or from disclosing information, in exchange for money or other consideration from the confider. NDAs are contextual, that is, they are always embedded in the context of some legal or normative relationship between the parties. Utter strangers do not execute NDAs. It's true, sometimes parties to an NDA have not met, but some prior relationship must exist (or be contemplated) for which an NDA makes sense. An NDA may be part of, or may partly constitute, a discrete transaction, say, or a long-term associational agreement.[41] That said, this section will analyze an NDA as

[41] This is a general property of all contracts. Contracts, "like other forms of human association … are … embedded in conventions, norms, mutual assumptions and unarticulated expectations." Hugh Collins, *Introduction: The Research*

though it were executed between complete strangers: a "bare" promise by one stranger not to speak about some information in exchange for consideration from another stranger. Although artificial, the acontextual NDA serves as an analytical ideal. It permits us to analyze the obligations imposed and rights conferred by an NDA *qua* NDA. The next section will contextualize promises of silence and ask how an NDA's context affects its strength.

1. Structure of an NDA

Suppose that Donald and Stephanie, two strangers, sign an NDA: Donald pays Stephanie money for her to remain silent about certain information. Assuming no other relevant circumstances like duress, Stephanie voluntarily created a binding legal obligation by her promise. That promise, like contract law generally, serves the value of individual autonomy, namely Stephanie's enhanced control over her life.[42] Her capacity to promise that she will waive her speech right expanded the range of available options open to her. It enabled her monetary gain. It's good that Stephanie can decide to legally undertake to not speak.

Stephanie's promise confers a legal right on Donald that the promise be kept.[43] The NDA provides Donald with legal assurance that Stephanie will keep her silence, since Stephanie voluntarily

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Agenda of Implicit Dimensions of Contracts, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 1, 2 (David Campbell et al. eds., 2003).

[42] Joseph Raz, *Is There a Reason to Keep a Promise?*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 58, 61–62, 67 (Gregory Klass et al. eds., 2014); see also Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROB. 19 (2013).

[43] This and subsequent claims in this paragraph rely on Raz, *supra* note 42. Raz's account of the normativity of promises is illuminating for the institution of contract law, which supports the social practice of promising. Normatively, Stephanie's bare promise to Donald (without payment) confers on Donald a right that the promise be kept, and a right and power to waive his right, releasing Stephanie from her undertaking, at any time and at Donald's complete discretion. Id. at 72. As Raz notes, Donald has a normative assurance that Stephanie will keep her silence: Stephanie voluntarily undertook to not speak (assuming, of course, no other relevant circumstances); Donald has power to terminate Stephanie's obligation to remain silent; Stephanie cannot terminate her obligation on the ground that it is no longer in Donald's interest. Id. at 72–74.

promised not to speak (assuming, again, no other relevant circumstances like duress) and Donald can enforce that obligation by arbitration or an action for damages. Depending on the terms of the NDA, it is also quite likely that Donald has a legal power to release Stephanie from her promise at his discretion. Stephanie, of course, cannot terminate her legal duty because, in her view, it is no longer in Donald's interests. In most NDAs, the confidant voluntarily agrees to a continuing duty not to speak about relevant matters. Even if the information becomes public, Donald might wish that Stephanie herself not verify it.

There is a legal difference between waiving the right to speak and contracting with another to waive the right to speak. Suppose that Stephanie, prior to signing an NDA, has no intention to disclose the information that Donald wants to protect. Stephanie's reasons for waiving her right to speak could be multifarious and personal: because she thinks the information is not important, or because disclosure would harm Donald, or because disclosure is too much effort. Before signing an NDA, Stephanie can waive her right to speak and, equally importantly, she can unwaive it at any time. Waiver of the right to speak is not like waiving due process rights, which completely depend on legal institutions for their exercise. Once a defendant waives a jury trial, or a party waives an argument or a privilege, those rights are forever surrendered. The old saying is that a privilege waived is a privilege lost. But Stephanie's waiver of her right to speak, in the absence of any contract, is at her discretion. The duration of that waiver is up to Stephanie.

As soon as Stephanie enters into an NDA, she is legally bound by her promise unless and until Donald releases her from the obligation. The contract confers on Donald a right that Stephanie keep her promise to waive her free speech rights. As soon as Stephanie entered into the NDA with Donald, the duration and scope of Stephanie's waiver is no longer up to her. There may be other circumstances that override the NDA (for example, unconscionability). But in the absence of such circumstances, the NDA secures Stephanie's promise to waive her right to speak about certain matters, the duration and scope of which is subject to Donald's say-so.

To summarize, the acontextual NDA between Donald and Stephanie consists in the following:

(a) Donald's payment of money to Stephanie (or some other consideration);

(b) Stephanie's promise to waive her right to speak about certain information;
(c) Stephanie's creation of a voluntary and binding legal (contractual) obligation to waive her right to speak;
(d) Stephanie's loss of her power to unwaive at her discretion;
(e) Donald's right that Stephanie keep the promise to waive; and
(f) Donald's right to release Stephanie from the promise to waive.

2. Waiver, Not Alienation

There are a couple of related corollaries that follow from the conclusion that the essence of the NDA confidant's promise is a waiver of her speech rights. First, an NDA does not transfer the confidant's speech right. Regrettably, the literature is replete with talk of transfer and alienation. An NDA is said to transfer the confidant's right to speak on the specified matter to the confider. Kathleen Sullivan, in her work on the unconstitutional conditions doctrine, adopts these metaphors.[44] So does Frank Easterbrook.[45] But the metaphors are unhelpful. An NDA does not transfer the confidant's free speech right; it secures the confidant's promise to waive that right.

Consider Frank Snepp. In 1977, after serving in the CIA for eight years, Snepp wrote a memoir criticizing the American evacuation of Saigon. He did not submit the account for prepublication review by the CIA, as was expressly required by his 1968 employment contract. The federal government successfully sued to enforce the contract, and the Supreme Court spent most of its time on the appropriate remedy.[46] But in a footnote, the Court suggested that for many government employees, a similar prepublication requirement would not withstand First Amendment scrutiny.[47] For employees

[44] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1476–89 (1989).
[45] Easterbrook, *supra* note 24.
[46] Snepp v. United States, 444 U.S. 507 (1980).
[47] Id at 509 n.3.

like Snepp, however, the agreement was a reasonable means of protecting vital national security interests.[48]

Sullivan agreed with the Court, characterizing the result as holding that Snepp's speech right was alienable: he was permitted to transfer his speech right to the federal government in exchange for employment. For Sullivan, the problem with viewing Snepp's right to speak as inalienable is that it suggests that Snepp *must* speak, because "making decisions inalienable creates duties."[49] Sullivan asked rhetorically: "If the right to divulge the secrets of government employment is deemed inalienable — for example, in order to prevent government from insulating itself from public criticism — is Snepp then obliged to speak?"[50]

Of course not. This is a non sequitur and the mischief of the metaphor lies in the very fact that it permits Sullivan's line of argument. There is no confusion once we discard talk of transfer and alienability. Snepp did not transfer his free speech right; rather, he promised to waive an aspect of it. Plainly it is nonsensical to even suggest that Snepp acquired a duty to speak as a consequence of promising to waive his right to speak. Snepp's promise to waive his speech right can be outweighed or defeated by other reasons. So the question is not whether free speech prohibits Snepp from alienating his speech right; rather, the question is whether free speech generates reasons that weaken or perhaps defeat Snepp's promise to waive his speech right.[51]

3. Waiver, Not Exercise

The second corollary is that an NDA does not exercise the confidant's speech rights. This is important because it scuttles a popular argument that immunizes an NDA from free speech scrutiny. By entering into an NDA, the argument goes, the confidant exercises her right to not speak. It follows that the NDA exercises her free

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[48] Id.

[49] Sullivan, *supra* note 44, at 1486.

[50] Id. at 1487.

[51] The transfer/alienation metaphor invites other troubling conclusions. Suppose, for example, that B breaks a valid promise of confidentiality by disclosing information to the press. If B's promise had transferred a right, then does B's subsequent disclosure of that information amount to conversion or theft?

speech right, because the right to free speech includes the right not to speak at all. And there is nothing objectionable about paying a confidant to exercise her free speech rights. "One aspect of the value of a right," argued Easterbrook, "is that it can be sold and both parties to the bargain made better off."[52] On this view, selling a right exercises the right. If we believe that constitutional rights are valuable, then we "should endorse their exercise by sale as well as their exercise by other action."[53] This argument—an NDA cannot threaten free speech because it counts as an exercise of the free speech right itself—purports to justify the absence of free speech scrutiny of NDAs.

Undoubtedly the free speech right includes a right to not speak. Raz observed that free expression includes the freedom not to communicate.[54] Blocher characterized the free speech right embodied by the First Amendment as a "choice right," that is, a right to do something and to *not* do something.[55] Doctrinally, the First Amendment right to not speak developed in the mid-twentieth century.[56] By 1977, Chief Justice Burger held for the Court in *Wooley v. Maynard* that the First Amendment protects "the right to refrain from speaking at all."[57] Blocher argued that "the value of speech would be degraded if people could be compelled to engage in it," because, for

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[52] Easterbrook, *supra* note 24, at 347.

[53] Id.

[54] Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 304 n.3 (1991).

[55] Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761, 775–76 (2012).

[56] Id. at 762–63. Interestingly, Blasi observed that "the seventeenth-century notion that speech is special precisely because it is not a matter of conscious choice." Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUNDATION RESEARCH J. 521, 544–45 (1977). He explained that "[s]everal early advocates of toleration—most significantly John Locke and the Leveller William Walwyn—argued that people have no real control over their beliefs and hence should not be held legally accountable for them," and quoted Spinoza: "Not even the most experienced, to say nothing of the multitude, know how to keep silence." Id.

[57] Wooley v. Maynard, 430 U.S. 705, 714 (1977); see also Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) ("We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'").

example, coerced speech undermines credibility and sincerity.[58] The absence of a right to not speak would undermine free speech values.

Problems arise when we examine the claim that an NDA exercises the confidant's free speech rights. An NDA waives the confidant's right to speak but does not exercise the right to not speak. As Blocher argues, it is wrong to equate waiving the right to speak with an exercise of the right to not speak. Waiving the right to speak, he says, gives up freedom from restraint; a right to not speak gains freedom from coercion.[59] The basic distinction is that the right to speak operates against censorship; the right to not speak operates against compelled speech. Because free speech is a choice right, there is a distinction between exercising the right to not speak and waiving the right to speak.[60]

Exercising the right to not speak resists compelled speech; waiver is the suspension of speech rights. Both are active and voluntary actions, and both are choices to not speak. Indeed, voluntariness is essential to waiver. The Supreme Court recently held that the waiver of First Amendment rights "must be freely given and shown by clear and compelling evidence."[61] Of course, waiver can be incentivized, and incentives can shade into coercion.[62] But if an NDA were an exercise of the confidant's right to not speak, then it would resist some directive, custom, or expectation that purported to coerce speech. That's not the typical NDA. A confidant signs an NDA and chooses to not speak because of reasons that are independent of reasons generated by her right to not speak. In other words, a confidant signs an NDA to receive a benefit, not to resist coercion.

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[58] Blocher, *supra* note 55, at 794, 795-96 ("[I]t is plausible to think that the value of speech would be degraded if people could be compelled to engage in it. Listeners would not know whether a speaker was sincere, and coerced speakers themselves might eventually lose the ability to determine and state their own 'true' positions. The right to *X* must therefore include the right to not-*X* because the values underlying the right could not be vindicated by the former alone.").

[59] Blocher, *supra* note 55, at 773 (waiver "relieves the government of a duty with regard to *X* rather than creating a duty with regard to not-*X*").

[60] Id.

[61] Janus, 138 S.Ct. at 2486.

[62] The boundary between incentives and coercion is not our primary concern here. Contract law polices the boundary between voluntary waiver and compulsion by unconscionability doctrines etc.

The justification for insulating an NDA from free speech scrutiny cannot rest on the premise that it constitutes an exercise of free speech rights. An NDA waives rather than exercises those rights. The height of confusion comes when an NDA is seen as an exercise of the right to not speak *and* the alienation of that right. In an otherwise exemplary article, Solove and Richards said that "First Amendment rights are not merely alienable by individual speakers; the decision not to speak is also a First Amendment right."[63] How can someone both transfer a speech right *and* exercise that right simultaneously?

B. Contextualizing NDAs

As noted above, NDAs are always executed in the context of some prior relationship between the parties. Because of their ubiquity, NDAs cannot be sorted into a comprehensive or exhaustive typology. They can, however, be contextualized in the prior relationship; this relationship affects the strength of the rights and duties that an NDA creates. In the wake of the Harvey Weinstein scandal, the Women and Equalities Committee of the United Kingdom House of Commons released a report on workplace sexual harassment.[64] The report distinguished between NDAs in employment contracts and NDAs in settlement agreements.[65] Employment and settlement are important, but they are not the only relational contexts in which NDAs are deployed. As this section shows, NDAs are present in employment, dispute resolution, commerce, journalism, intimacy, and consumption.

1. Employment

NDAs are used at every stage of the employment relationship—when it begins, when it ends, and when it is ongoing. Prospective employees are often required to sign NDAs as a condition of employment. An analysis of 874 CEO employment contracts in the S&P1500 between 1996 and 2010 found that 87.1% contained an

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[63] Solove & Richards, *supra* note 26, at 1688.

[64] WOMEN AND EQUALITIES COMMITTEE, SEXUAL HARASSMENT IN THE WORKPLACE, 2017–19, HC 725 (UK).

[65] Id. at 37–45.

NDA.[66] And these are highly negotiated contracts where both parties enjoyed significant bargaining power. For many employees, an NDA is non-negotiable. It is a condition of employment "offered by employers on a take-it-or-leave-it basis."[67] In an anonymous poll of 10,242 tech workers, 15.3% of respondents agreed that an NDA had silenced them or their coworkers from speaking about important issues.[68]

Many employment NDAs are legitimate. Confidential and proprietary information, especially trade secrets, must be protected. The House of Commons Women and Equalities Committee "acknowledge[d] that NDAs have a legitimate use in employment contracts" because they "are important to protect trade secrets that could otherwise undermine a company's competitiveness in the marketplace."[69] A communications consultant, in an April 2018 letter to the *Financial Times*, cautioned that "we have to be careful not to demonise the use of NDAs."[70] In 2017, the General Counsel of Adobe Systems revealed: "We . . . have pre-signed NDAs, and all are available to our employees in a very automated fashion . . . . We execute about 2,000 nondisclosure agreements a year at Adobe."[71] NDAs are so common that the noun "NDA" is often used as a verb.[72]

There are several overlapping categories of legitimate workplace NDAs. First, and most important, are NDAs that protect trade secrets. Firms routinely require NDAs from employees to protect information that derives independent economic value from not being generally known. In fact, for information to qualify as a trade

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[66] Bishara et al., *supra* note 8, at 4.

[67] Estlund, supra note 9, at 384–85.

[68] Kyle McCarthy, *15 Percent of Tech Workers Silenced by an NDA*, BLIND'S WORK TALK BLOG (Sept. 4, 2018), https://blog.teamblind.com/index.php/2018/09/04/15-percent-of-tech-workers-silenced-by-an-nda/.

[69] WOMEN AND EQUALITIES COMMITTEE, *supra* note 64, at 37.

[70] Gus Sellitto, Letter to the Editor, *We must be careful not to demonise all use of NDAs*, FIN. TIMES, Apr. 2, 2018, at 10.

[71] Dillon, *supra* note 10.

[72] John Winsor, *Victors & Spoils*, *in* PIONEERS OF DIGITAL: SUCCESS STORIES FROM LEADERS IN ADVERTISING, MARKETING, SEARCH, AND SOCIAL MEDIA 67, 72 (Paul Springer & Mel Carson eds. 2012) (quoting the founder of a crowdsourcing advertising agency as saying that for some projects "we put teams on it, usually around 10 people from around the world" and "[w]e NDA them and pay them up front").

secret, it must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[73] NDAs, therefore, not only protect trade secrets but can partly constitute them.[74] These NDAs interlock with ongoing and independent obligations to protect trade secrets (fiduciary obligations, for example, or general employee duties).[75] Second, NDAs are often executed as part of noncompete clauses, and indeed can shade into noncompete clauses. In 2017, the South Carolina Court of Appeals invalidated an agreement, signed by an employee on his first day, as void against public policy, "because the nondisclosure provisions operated as noncompete provisions."[76] Third, NDAs are required from employees and contractors for discrete projects. In fact, NDAs are now so widespread that they have infiltrated even mundane domestic affairs. Unknown tech executives are known to require NDAs from contractors who remodel their homes.[77]

Employment and workplace NDA litigation does surface in the courts. Trade secret litigation, usually centering on a departing employee, is common,[78] as is litigation seeking to enforce the confidentiality aspects of noncompete agreements. There are also reported cases of plaintiffs suing former employers for providing damaging information to a prospective employer, in breach of an

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[73] UNIF. TRADE SECRETS ACT § 1(4)(ii) (amended 1985) (UNIF. LAW COMM'N 1985).

[74] NDAs are central to trade secret law. Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1556–63 (2018) (observing that NDAs play a key evidentiary role for establishing the existence of a trade secret, and arguing that NDAs therefore serve an important notice function for recipients of trade secret information). See also id. at 1556 ("[T]rade secret law itself encourages—and in many cases, seems to require—non-disclosure contracts as a condition of obtaining protection.").

[75] Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 318 (2008) ("Even in the absence of an explicit contract, most employees are held to have a duty to protect their employers' interests in the employers' secret practices, information, and the like.").

[76] Fay v. Total Quality Logistics, LLC, 799 S.E.2d 318, 322 (S.C. Ct. App. 2017).

[77] Matt Richtel, *For Tech Titans, Sharing Has Its Limits*, N.Y. TIMES, Mar. 15, 2015, at BU4.

[78] Lemley, *supra* note 75, at 318 ("Trade secret cases come up in three basic sets of circumstances: competitive intelligence, business transactions, and departing employees.").

NDA.[79] Courts typically take a commonsense approach and enforce workplace NDAs that are reasonable limits on the time and scope of disclosure. But these reported cases are probably not a representative sample of employment confidentiality disputes, which are likely settled or arbitrated—and typically subject to confidentiality agreements themselves—or informally resolved.

2. Dispute Resolution

NDAs are routinely deployed in dispute resolution, usually in two broad categories: settlement/arbitration and discovery. Indeed, nowhere has the effect of NDAs been more discussed than in the context of settlement. NDAs shroud countless settlements in secrecy.[80] Settlement is a "private, largely invisible, contractual phenomenon . . . requir[ing] only that the parties agree"[81] on "terms without judicial oversight or interference."[82] Settlement contracts often include enforceable confidentiality provisions, sometimes concealing the very fact of the existence of a dispute.[83] Since the early 1990s, secret settlements have constantly been the subject of news reporting and academic commentary.[84] The debate has raged about confidentiality in civil settlements and criminal settlements. Advocates of secrecy have been arguing since the very beginning

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[79] E.g., Giannecchini v. Hospital of St. Raphael, 780 A.2d 1006 (Conn. Super. Ct. 2000).

[80] The empirical problem vis-à-vis confidential (or invisible) settlement has long been recognized. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 962–67 (2006).

[81] David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 697 (2006). *Cf.* Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 706 (2001) ("Settlements might occur … under the shadow of confidentiality, but they are not invisible.").

[82] Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 429 (2016).

[83] STEPHEN C. YEAZELL, CIVIL PROCEDURE 498 (7th ed. 2008).

[84] Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 463 (2006); Minna J. Kotkin, *supra* note 80, at 945–50 (timing the public outcry earlier, from the late 1980s).

that parties are more likely to settle if confidentiality is assured.[85] Critics respond with arguments centering on the public good of adjudication and the interest in access to information of public concern.[86] But the popular outcry and avalanche of scholarship have not damped litigants' enthusiasm for confidential settlements.

Alternative dispute resolution mechanisms, most notably arbitration, are also regularly the subject of confidentiality clauses. Unlike the United Kingdom, there is no implied obligation of confidentiality in arbitration in the United States. This means that explicit confidentiality clauses are common in arbitration agreements. Moreover, the "total privacy of the proceedings" is often touted as an important advantage of arbitration. Confidentiality and arbitration, therefore, are commonly linked, at least in the public mind and to the chagrin of one arbitration scholar.[87] It is "the confidentiality provision, not the arbitration clause," wrote Christopher Drahozal, that permits large corporations to hide misconduct.[88] Absent an NDA, "arbitration is a private process, not a confidential one."[89] Although arbitration hearings are not open to the public, and the arbitrator and administrator are under an obligation of confidentiality, "the parties generally are under no such duty."[90] "[I]nformation about disputes remains available," said Drahozal, "not from the court system but from the parties themselves."[91] (Of course, information held by courts is public; information held by the parties is not.) For Drahozal, our critical focus should be trained on confidentiality clauses, not on arbitration.

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[85] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428 (1991); Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311 (2018). This argument assumes that settlement itself is a public good, and it's impossible to enter that debate here.

[86] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[87] Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28 (2015).

[88] Id. at 29.

[89] Id. at 30–31.

[90] Id.

[91] Id. at 47–48.

Discovery confidentiality agreements "have become routine."[92] "[W]hen a litigant uses discovery to obtain damaging information about an opposing party," noted Dustin B. Benham, "the opposing party will often pay money to avoid public disclosure through a confidentiality agreement."[93] Although these agreements are generally enforceable, many parties remain uncomfortable unless the discovery NDA is enshrined in a protective order.[94] Breach of an NDA that has been converted (however mindlessly) into a protective order is no longer a matter of private ordering; rather, it implicates judicial authority and subjects the breaching party to contempt.[95]

3. Commerce

In business contexts, "[t]he need for confidentiality is . . . extensive and palpable."[96] Parties to commercial arrangements commonly execute NDAs. At the outset of negotiations, participants know that sensitive or proprietary information will likely be shared. Two or more entities seeking to achieve a common objective, or to establish a specific relationship, must control the flow of information within the entities and externally to the market. Well-crafted NDAs protect that information and regulate its flow. They are therefore an important part of interfirm business transactions. A survey of typical commercial confidentiality agreements is useful, but what follows is not exhaustive.

NDAs are necessary in mergers and acquisitions; they are among the first contracts executed between putative buyers and sellers.[97] An NDA executed early in negotiations is a powerful signal that the parties are serious. Inevitably, nonpublic information (financial information and important contracts, for example) is

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[92] Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 631 (2018).

[93] Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427 (2018).

[94] Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 371 (2006).

[95] Id.

[96] GOLDFARB, *supra* note 6, at 157.

[97] Cathy Hwang, *Deal Momentum*, 65 UCLA L. REV. 376, 385, 385 n.26 (2018).

shared among the parties. The very existence of negotiations can be actively concealed. If the target is a private company, then an NDA is usually required even for basic information (for public companies, some information is already in the public domain).[98] The target's release of information to the buyer might be staged: commencing with the disclosure of high-level financial data, followed by the buyer's access to management, then providing legal, accounting and tax information, and concluding with the most sensitive material. Confidentiality provisions are often coupled with non-use terms, prohibiting use of confidential information for any purpose other than evaluation and completion of the deal, and non-solicitation terms, prohibiting poaching employees or other key players.

Commercial NDAs generally permit legally required disclosures (such as subpoena responses), but they also sometimes contribute to regulatory compliance. For example, Regulation FD, adopted by the Securities and Exchange Commission in 2000, bans U.S. reporting companies from selectively disclosing material nonpublic information to analysts and other securities market professionals.[99] The final rule—which emerged from a worry that public companies were disclosing advance warnings of earnings results to a select few analysts and advisers—sought to level the informational playing field. Material information, if disclosed to one, must be disclosed to all.

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[98] Deal NDAs contain "standstill" provisions, which restrict the buyer's ability to acquire, vote, or dispose of stock in the seller. These provisions prevent a potential buyer from launching a hostile bid and assure a successful buyer that prior potential buyers are contractually bound not to overbid. For public company NDAs, standstill provisions are sometimes required to avoid transactions that trigger Exchange Act disclosure requirements.

[99] SEC Regulation FD, 17 C.F.R. § 243 (2018). "FD" stands for "Fair Disclosure." Regulation FD "prohibits a corporation from making selective disclosures of nonpublic, material information by requiring public disclosure once the private disclosure has been made." J & R Marketing, SEP v. General Motors Corp., 549 F.3d 384, 393 n.4 (6th Cir. 2008). It applies to issuers with a class of securities registered under section 12, or issuers required to file reports under section 15(d), of the Securities Exchange Act of 1934. 17 C.F.R. § 243.101(b). The SEC estimates that "approximately 13,000 issuers make Regulation FD disclosures approximately five times a year for a total of 58,000 submissions annually, not including an estimated 7,000 issuers who file Form 8-K to comply with Regulation FD." Securities and Exchange Commission, Submission for OMB Review; Comment Request, 83 Fed. Reg. 49959–60 (Sept. 27, 2018).

But Regulation FD's disclosure requirements do not apply if the recipient "expressly agrees to maintain the disclosed information in confidence."[100] An NDA may be necessary, then, for a public company to adhere to Regulation FD when it privately discloses material information to a credit rating agency.[101]

Confidentiality agreements are necessary not only for mergers and acquisitions, but also for joint ventures, alternative structures, financing, private placements, and many other transactions. The negotiation and closing of a syndicated loan[102] may require express confidentiality undertakings not only to protect sensitive financial information but also to comply with Regulation FD. Similarly, private placements or unregistered offerings—securities offerings exempt from registration with the SEC—are confidential (general solicitation is prohibited and the offering memorandum often includes confidentiality clauses). And when public companies make private offerings (private investments in public equity), compliance with Regulation FD requires that potential investors enter into NDAs.

NDAs are required in myriad commercial contexts outside financing and restructuring. Anchor tenants share confidential information with their landlords.[103] And recent decades demonstrate that NDAs are widespread in producing and selling goods, especially technology products. Software developers who license their platforms to customers normally include NDAs as part of the terms

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[100] 17 C.F.R. § 243.100(b)(2)(ii) (2018). The agreement need not be in writing.

[101] When adopted, Regulation FD exempted communications to credit rating agencies. This exemption was repealed as required by section 939B of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Credit rating agencies are regulated as nationally recognized statistical rating organizations (NRSROs), which are specifically excluded from the definition of investment advisors (and are typically not covered recipients under Regulation FD). However, not all credit rating agencies are NRSROs, necessitating confidentiality agreements for compliance with Regulation FD.

[102] A syndicated loan is a credit facility where "multiple banks 'syndicate' under a lead arranger, each holding only a portion of the loan." Loan Syndications and Trading Ass'n v. SEC, 882 F.3d 220, 223 (D.C. Cir. 2018). There is an active secondary market for syndicated loans. Id.

[103] Confidentiality agreement, 2 Real Estate Leasing Practice Manual § 80:1.

of use. The Google Cloud Platform License Agreement and the Amazon Web Services Customer Agreement both include confidentiality provisions. For businesses licensing proprietary software, the failure to include robust contractual duties of nondisclosure can be costly.[104] Similarly, device manufacturers commonly require confidentiality in its supply chains. Apple, for example, maintains NDAs with its suppliers. During product development, Apple's NDAs are particularly onerous: Apple can audit the supplier's compliance with the nondisclosure terms, the supplier must only refer to Apple and the project by code names, and the supplier is subject to a $50 million liquidated damages clause.[105]

One final commercial context, which hinges on confidentiality, is illustrative: NDAs signed by business advisers and consultants. McKinsey is perhaps the best-known example, but there are many others. As its lawyers put it in a recent court filing, McKinsey's "clients often require that McKinsey's involvement with their organizations remains confidential, so as not to affect their operations and business strategies adversely."[106] NDAs, therefore, are simply "[o]ne manifestation of McKinsey's commitment to maintaining confidentiality of client names."[107] The consulting agreement with the Financial Oversight and Management Board for Puerto Rico, for example, includes a standard confidentiality clause.

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[104] See, e.g., Broker Genius, Inc., v. Zalta, 280 F.Supp.3d 495, 517–18 (S.D.N.Y. 2017) ("Nevertheless, because [plaintiff] regularly disclosed its alleged secrets to each of its customers without notifying them of the information's confidential nature or binding them to confidentiality agreements, [plaintiff] is unlikely to be able to show that it undertook reasonable measures to protect the secrecy of its alleged trade secrets."). See also Convolve, Inc. v. Compaq Computer Corp., 527 Fed. App'x 910, (Fed. Cir. 2013) (failure to issue a written confidentiality memorandum—as required by the negotiating NDA designed to "further[] a business relationship"—fatal to breach of contract and misappropriation of trade secret claims).

[105] *Apple Inc. Confidentiality Agreement* (Aug. 24, 2012); *Apple Restricted Project Agreement Regarding Project Onyx* (Oct. 31, 2013); *Apple Inc. Statement of Work #1* (Oct. 31, 2013) (on file with author).

[106] Defs.' Mem. of Law in Supp. of Mot. to Dismiss Am. Compl. at 6–7, Alix v. McKinsey & Co., No. 1:18-CV-04141-JMF (S.D.N.Y. Oct. 10, 2018).

[107] Id.

4. Journalism

Journalists routinely promise to keep the identity of sources secret.[108] According to the *New York Times*, "many important stories in sensitive areas like politics, national security and business could never be reported if we banned anonymous sourcing."[109] These agreements are necessary for journalists to gather information of public concern. In 1982, Dan Cohen, a Republican supporting Wheelock Whitney's Minnesota gubernatorial campaign, offered information about a rival candidate to two newspapers. A condition precedent of Cohen's offer was a promise of confidentiality from the newspapers. He then supplied records of unlawful assembly charges (later dismissed) and a petit theft conviction (later vacated) of Marlene Johnson, the Democratic candidate for lieutenant governor. Breaking their promises, both newspapers named Cohen as the source. He was promptly fired from his job at an advertising agency. He sued the newspapers and, eventually, the Minnesota Supreme Court held that he could recover damages under a promissory estoppel theory.[110]

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[108] A content analysis of the front pages of the *Washington Post* and the *New York Times* from 1958 to 2008 found that anonymous sources peaked in the 1960s and 1970s and that reporters today provide more detail about them. Matt J. Duffy & Ann E. Williams, *Use of Unnamed Sources Drops from Peak in 1960s and 1970s*, 32 NEWSPAPER RESEARCH J., no. 4, Fall 2011, at 6–21.

[109] Philip B. Corbett, *How The Times Uses Anonymous Sources*, N.Y. TIMES: READER CENTER (June 14, 2018), https://www.nytimes.com/2018/06/14/reader-center/how-the-times-uses-anonymous-sources.html. *See also* ANONYMOUS SOURCE TRACKER, https://schaver.com/anonymous/ (last visited Mar. 31, 2019) (non-exhaustive online tracker of anonymous sources in prominent news outlets). The use of anonymous sources is often criticized. Matt J. Duffy, *Anonymous Sources: A Historical Review of the Norms Surrounding Their Use*, 31 AM. JOURNALISM 236 (2014).

[110] Cohen v. Cowles Media Co., 479 N.W.2d 387 (Minn. 1992). This litigation was on remand from the U.S. Supreme Court. Cohen v. Cowles Media Co., 501 U.S. 663 (1991). Initially, the Minnesota Supreme Court had held that the newspapers' promise of confidentiality was not a contract. Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990). Of course, this state law holding was not reviewable in the U.S. Supreme Court. The Minnesota Supreme Court held, further, that "enforcement of the promise of confidentiality under a promissory estoppel theory would violate [the newspapers'] First Amendment rights." Id. at 205. This First Amendment holding was the subject of federal court review. The

An unmasked source who was promised anonymity rarely litigates. The few courts that have considered the issue generally hold that, without more, a journalist's promise to keep the source confidential is not an enforceable contract.[111] But this conclusion is dependent on state law.[112] In every state, a written and negotiated agreement between reporter and source, demonstrating privity of contract, is likely enforceable.[113] And even where a journalist's promise to keep a source's identity secret is not an enforceable contract, other rights of action, such as promissory estoppel, might be available.

Press embargoes over new products—a common tactic of publishers, movie studios,[114] technology developers, and so on—is a public relations exercise brought to you by time-limited NDAs.[115] In 2012, J.K. Rowling completed her first novel since Harry Potter. The publisher, bent on concealing details, required a reviewer to read the 512-page book in its New York office. The reviewer also signed an NDA "whose first draft—later revised—had prohibited

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U.S. Supreme Court reversed, explaining that "the Minnesota doctrine of promissory estoppel … is generally applicable to the daily transactions of all the citizens of Minnesota," and "[t]he First Amendment does not forbid its application to the press." Cohen v. Cowles Media Co., 501 U.S. at 670.

[111] Cohen v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990), rev'd on other grounds, 501 U.S. 663 (1991); Ruzicka v. Conde Nast Publ'ns, Inc., 939 F.2d 578 (8th Cir. 1991); Pierce v. The Clarion Ledger, 452 F.Supp.2d 661 (S.D. Miss. 2006); Steele v. Isikoff, 130 F.Supp.2d 23 (D.D.C. 2000). See also Ventura v. The Cincinnati Enquirer, 396 F.3d 784 (6th Cir. 2005).

[112] See, e.g., Doe v. Am. Broad. Co., 152 A.D.2d 482 (N.Y. 1st Dep't 1989); Anderson v. Strong Memorial Hospital, 573 N.Y.S.2d 828, 831 (N.Y. Sup. Ct. 1991).

[113] E.g., Huskey v. National Broadcasting Co., 632 F.Supp. 1282 (N.D. Ill. 1986); Doe v. Univision Television Group, Inc., 717 So.2d 63, 65 (Fla. App. 1998).

[114] Marshall Fine, *Why Embargo Move Critics' Reviews?*, HUFFPOST (Mar. 12, 2013), https://www.huffingtonpost.com/marshall-fine/why-embargo-movie-critics_b_2859089.html; Jen Chaney, *The 'Girl With the Dragon Tattoo' review controversy*, WASH. POST (Dec. 5, 2011), https://www.washingtonpost.com/blogs/celebritology/post/the-girl-with-the-dragon-tattoo-review-controversy/2011/12/05/gIQAbcmXWO_blog.html.

[115] Matthew Bell, *J K Rowling and the Publisher's Moan*, THE INDEPENDENT: VOICES (Sept. 23, 2012), https://www.independent.co.uk/voices/comment/j-k-rowling-and-the-publishers-moan-8165843.html ("Embargoes are normal.").

me from taking notes."[116] Other reviewers were asked to sign an NDA before the book was hand-delivered; one clause sought to keep the existence of the NDA itself a secret.[117] Device manufacturers and software developers similarly strive to keep pre-launch details under wraps.[118] In mid-2018, a GPU manufacturer sent a standalone NDA to several media outlets, which included a non-disparagement clause.[119] Another device manufacturer included terms forbidding reporters from calling competitors to discuss the product.[120] Insurance companies, too, have required journalists to sign NDAs when announcing prescription drug plans.[121]

5. Intimacy

Public figures sign NDAs with intimate partners to ensure discretion. The most salacious recent example is an NDA dated October 28, 2016, signed by adult film star Stormy Daniels, who alleges that she had an affair with President Trump from 2006 to 2007. Trump denies the affair. He also denies signing the NDA,[122] but admitted that he reimbursed his lawyer who did sign it;[123] the lawyer later told federal prosecutors that Trump personally directed

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[116] Ian Parker, *Mugglemarch*, THE NEW YORKER, Oct. 1, 2012, at 52.

[117] Bell, *supra* note 115. See also Jen Doll, *J.K. Rowling and the N.D.A. of Secrets*, THE ATLANTIC (Sept. 26, 2012), https://www.theatlantic.com/entertainment/archive/2012/09/jk-rowling-and-nd-secrets/323203/.

[118] Rob Pegoraro, *'NDAs': I Could Tell You, But I'd Have to Sue You*, WASH. POST, Apr. 14, 2000, at E01.

[119] *NVIDIA Non-Disclosure Agreement* (on file with author). Section 3 provides, in part: "Recipient shall use Confidential Information solely for the benefit of NVIDIA."

[120] Adam L. Penenberg, *Embargoes, NDAs, and tech journalism's way of doing business*, PANDO (Nov. 18, 2012), https://pando.com/2012/11/18/embargoes-ndas-and-tech-journalisms-way-of-doing-business/.

[121] Ivan Oransky, *Are NDAs the new embargo agreements? Humana and Walmart seem to think so*, EMBARGO WATCH (Oct. 1, 2010, 12:21 PM), https://embargowatch.wordpress.com/2010/10/01/when-an-embargo-agreement-isnt-enough-use-an-nda-say-humana-and-walmart/.

[122] Def.'s Notice of Mot. & Mot. to Dismiss Pl.'s Declaratory Relief Cause of Action for Lack of Subject Matter Jurisdiction, No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Oct. 8, 2018).

[123] Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2018, 3:46 AM), https://twitter.com/realDonaldTrump/status/991992302267785216

the hush payment.[124] The terms of the NDA covered information about Trump's "children or any alleged children or any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct or related matters."[125] In another example, Nicholas Perricone, a celebrity doctor,[126] signed a confidentiality agreement with his wife shortly after he commenced dissolution proceedings in 2003. The agreement recited that the parties "fully understand that the plaintiff and his business interests may be severely harmed by the public dissemination of defamatory or disparaging information," and prohibited them from "disseminat[ing] to the public and the press any such disparaging or defamatory information."[127]

6. Consumers

Consumers may be subject to NDAs simply by consuming. Some platforms' terms of use, like ridesharing app Lyft and music service Spotify, include an NDA and an arbitration clause.[128] Apple iCloud—which is built into every Apple device, and whose user base grew from 782 million in 2016[129] to about 850 million two years later[130]—requires users to agree that it "contains proprietary and confidential information" and that they must "not use such proprietary information or materials in any way whatsoever except . . .

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[124] Joe Palazzolo et al., *Trump Played Central Role In Payoffs, Despite Denials*, WALL ST. J., Nov. 10, 2018, at A1.

[125] Confidential Settlement Agreement & Mutual Release (Oct. 28, 2016) § 4.1(a), Ex. 1 to First Am. Compl., No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Mar. 26, 2018).

[126] Alex Witchel, *Perriconology*, N.Y. TIMES MAGAZINE, Feb. 6, 2005, at 28.

[127] Perricone v. Perricone, 972 A.2d 666, 671 (Conn. 2009).

[128] Spotify's NDA is part of the arbitration clause, and Lyft's NDA, although applying generically to "Users" most probably applies to drivers. *Spotify Terms and Conditions of Use*, SPOTIFY (Feb. 7, 2019), https://www.spotify.com/us/legal/end-user-agreement/; *Lyft Terms of Service*, LYFT (Feb. 6, 2018), https://s3.amazonaws.com/api.lyft.com/static/terms.html.

[129] *'"They Might Be Giants" With a Spanish Accent', With Special Guests Eddy Cue and Craig Federighi* (Feb. 12, 2016) at 32:57, https://daringfireball.net/thetalkshow/2016/02/12/ep-146.

[130] Jordan Novet, *The case for Apple to sell a version of iCloud for work*, CNBC: ENTERPRISE (Feb. 11, 2018, 1:01 PM), https://www.cnbc.com/2018/02/11/apple-could-sell-icloud-for-the-enterprise-barclays-says.html.

in compliance with this Agreement." Consumers also agree not to use iCloud to "disclose any trade secret or confidential information in violation of a confidentiality, employment, or nondisclosure agreement."[131]

Other software platforms with millions of users reserve NDAs for businesses rather than consumers. Confidentiality provisions are present, for example, in the terms for Google Cloud Services but not for the consumer search engine Google or consumer Gmail; in the terms for Amazon Web Services but not for the Amazon retail platform. The Microsoft Product Terms includes a benchmarking clause (that prohibits users from publishing benchmark test results) only for server-side products. These benchmarking clauses, named DeWitt clauses after the computer science professor who dared to publish benchmark results for an Oracle database product in 1982, seem to have most bite in business-to-business software licenses.[132]

Small categories of consumers actively agree to NDAs. Eager gamers voluntarily test "closed alpha" or "closed beta" versions of games, which require explicit assent to an NDA. Finally, it should be noted that consumers are routinely subject to forced arbitration, which keeps information out of the public domain: financial products and services (like credit cards) can require consumers to submit disputes to arbitration,[133] as do ridesharing platforms like Uber,[134] dating apps like Tinder,[135] hospitality companies like Airbnb,[136] and newspapers like the Wall Street Journal.[137]

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[131] *Welcome to iCloud*, APPLE: LEGAL (Sept. 17, 2018), https://www.apple.com/legal/internet-services/icloud/en/terms.html.

[132] Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37 (2007).

[133] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY § 2 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[134] Uber does not enforce the arbitration clause for individual claims of sexual assault or harassment against drivers. Daisuke Wakabayashi, *Yielding to Critics, Uber Eliminates Forced Arbitration in Sexual Misconduct Cases*, N.Y. TIMES, May 16, 2018, at B3.

[135] *Terms of Use*, TINDER (Mar. 5, 2019), https://www.gotinder.com/terms/us-2018-05-09.

[136] *Terms of Service*, AIRBNB (Jan. 21, 2019), https://www.airbnb.com/terms.

[137] *Subscriber Agreement and Terms of Use*, WALL ST. J. (June 27, 2018), https://www.wsj.com/policy/subscriber-agreement.

C. NDA Values

Despite the ubiquity of NDAs, it's difficult to empirically assess their effectiveness. If NDAs work, then they are hidden.[138] The inference is certainly open that NDAs are effective because they are so common and because they are comparatively rarely litigated. And anecdotal evidence strongly suggests that they are extremely potent. The Adobe General Counsel observed that in 2012:

> I held an all-hands meeting where I asked everyone to raise their hand if they had ever negotiated an NDA or prepared one. It was about 90 percent of the room. And then I asked them to raise their hand if in all those thousands of NDAs we collectively had worked on, any of them had been the subject of a dispute or litigation. I think only two people raised hands.[139]

Similarly, recent news reports marshalled evidence that NDAs were a crucial pillar of a Harvey Weinstein's "complicity machine."[140] And one can hardly imagine a cottage industry of NDA startups (ezNDA, EveryNDA, NDAExpress) sprouting if the basic product was worthless.

This section makes explicit what the previous section suggests: NDAs serve a plurality of interests. Like all contracts, NDAs can serve autonomy and efficiency interests. I dare not enter here the debate raging in contract theory over the ultimate value or values of contract. Instead, I will focus on the concrete connection between NDAs and the values they serve, while remaining agnostic on whether one or other of those values truly is ultimate. NDAs can promote economic interests, privacy, administration of justice, democracy, and national security. No doubt there are others.[141] Although this section highlights that NDAs can promote these goods, it is equally important to realize that NDAs can undermine

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[138] Andrea Contigiani et al., *Trade secrets and innovation: Evidence from the "inevitable disclosure" doctrine*, 39 STRATEGIC MANAGEMENT J. 2921, 2922 (2018) (empirical trade secrecy scholarship is "understandably sparse" because "observability [is] a prerequisite for empirical analysis" and "managers have an economic incentive to keep trade secrets secret"); id. at 2938 ("Trade secrecy is an inherently difficult phenomenon to study empirically.").

[139] Dillon, *supra* note 10.

[140] Twohey et al., *supra* note 2.

[141] Another example that springs to mind is perhaps related to autonomy: self-development. An employee may sign an NDA for free simply for the professional opportunity to work with a select team on a secret, cutting-edge project.

these goods too. NDAs are like the curate's egg: partly good, partly bad.

1. Economy

NDAs can serve private economic interests. When two firms enter into a confidentiality agreement, they share valuable information that enables, or partly comprises, a transaction. The confidentiality provisions are designed to maximize the parties' joint gains (or "contractual surplus," in the argot of an influential contract theory).[142] Similarly, a party to a settlement agreement who is indifferent to the secrecy of its terms may extract a higher price for a confidentiality undertaking. An employer may require its employees, or a product developer its suppliers, to execute NDAs to maintain a competitive advantage (trade secrets, research and development, and so on). NDAs prevent competitors free-riding on information that was costly to acquire.[143]

The relationship between NDAs and public economic interests is not stable. On the one hand, the flow of market-sensitive information can be controlled by judiciously deploying NDAs. Regulation FD shows that NDAs can contribute to market integrity by preventing the misuse of private information. On the other hand, management consultants use NDAs to perpetuate an information monopoly. Secrecy is the management consultant's "most sacred promise."[144] While promising secrecy, consultants in fact are corporate executives' "primary source of interorganizational

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[142] Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010).

[143] Lynn Sharp Paine, *Trade Secrets and the Justification of Intellectual Property: A Comment on Hettinger*, 20 PHIL. & PUB. AFF. 245, 254–55 (1991). See also H. Rep. 104-788, *reprinted in* 1996 U.S.C.C.A.N. 4021, 4023 ("For many companies [confidential] information is the keystone to their economic competitiveness. They spend many millions of dollars developing the information, take great pains and invest enormous resources to keep it secret, and expect to reap rewards from their investment.").

[144] Walt Bogdanich & Michael Forsythe, *Cracking McKinsey & Company*, N.Y. TIMES, Feb. 19, 2019, at A2.

knowledge."[145] "The accumulation and sharing of privileged knowledge," said John Gapper in the *Financial Times*, "is integral to how it works."[146] As Christopher McKenna put it, consultants exploit "economies of knowledge" by providing clients "access to crucial organizational knowledge through their previous consulting assignments," thereby "transfer[ring] knowledge between rival organizations without incurring regulatory sanctions."[147] "The consultant," concluded Gapper, "is a broker who attempts to amass so much knowledge that each company has to hire him, no matter how uncomfortable that feels."[148]

Similarly, NDAs have a contestable relationship with the public economic good of innovation.[149] Trade secret owners claim that NDAs encourage firms to innovate: firms are incentivized to pour money into research and development if NDAs can protect the output.[150] In an economy where "innovation is increasingly characterized by a high degree of collaboration" and "external cooperation," trade secrets "facilitate flows of knowledge" by "establish[ing] secure channels for exchanges of know-how."[151] But it might not be that simple. If innovation consists in "new combinations," as Joseph Schumpeter famously wrote, then strong trade secret protection might limit idea recombination across firm and industry boundaries.[152] Employees might be less inclined to innovate

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[145] CHRISTOPHER D. MCKENNA, THE WORLD'S NEWEST PROFESSION: MANAGEMENT CONSULTING IN THE TWENTIETH CENTURY 20 (2006).

[146] John Gapper, Opinion, *McKinsey model springs a leak*, FIN. TIMES, Mar. 10, 2011, at 13.

[147] MCKENNA, *supra* note 145, at 24–25.

[148] Gapper, *supra* note 146.

[149] Scholarship typically investigates the connection between trade secrets and innovation. NDAs are crucial to the existence of trade secrets: "trade secrets arise in the bilateral context of confidentiality duties." Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649, 1675–76 (2009).

[150] Thomas Hellmann & Enrico Perotti, *The Circulation of Ideas in Firms and Markets*, 57 MANAGEMENT SCIENCE 1813, 1821 (2011) ("If firms could not protect any trade secrets at all, incentives for innovation would be severely stunted.").

[151] Jennifer Brant & Sebastian Lohse, *Trade Secrets: Tools for Innovation and Collaboration*, International Chamber of Commerce, Research Paper 3, at 12.

[152] JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT 66–67 (1934); 1 JOSEPH A. SCHUMPETER, BUSINESS CYCLES 84–86 (1939). See also

if trade secret law limits their mobility.[153] Indeed, there is some empirical evidence suggesting that the inevitable disclosure doctrine—where courts prohibit employees from joining their employer's competitors if the employer can establish that the employee would inevitably disclose trade secrets in the new role—negatively affects innovation quality.[154] In sum, if trade secret protection is too strict, on the one hand, then "market institutions for idea circulation may remain underdeveloped"; on the other hand, "if it is too lax, firms lose their ability to protect themselves and their employees from excessive appropriation."[155]

2. Privacy

Confidentiality agreements are important privacy devices. Corporate entities do not have an intrinsic interest in privacy; a firm values privacy only if it is instrumental to the firm's assessment of its own economic interest.[156] Natural persons, however, often have intrinsic privacy interests that NDAs can protect. Intimates and former intimates, especially those in the public gaze, sign NDAs to protect the closely-held details of their private lives. Similarly, confidential discovery agreements and secret settlements ensure that the parties' personal facts do not "leave the room." In jurisdictions where there is no right to privacy, an NDA is an enforceable legal

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John Hagedoorn, *Innovation and Entrepreneurship: Schumpeter Revisited*, 5 INDUSTRIAL & CORPORATE CHANGE 883, 885–88 (1996); Mark Dodgson, *Exploring new combinations in innovation and entrepreneurship: social networks, Schumpeter, and the case of Josiah Wedgwood (1730–1795)*, 20 INDUSTRIAL & CORPORATE CHANGE 1119 (2011); Heinz D. Kurz, *Schumpeter's new combinations: Revisiting his* Theorie der wirtschaftlichen Entwicklung *on the occasion of its centenary*, 22 J. EVOL. ECON. 871 (2012).

[153] Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not To Compete*, 74 NYU L. REV. 575 (1999).

[154] Contigiani et al., *supra* note 138.

[155] Hellmann & Perotti, *supra* note 150, at 1821 n.13.

[156] Trade secrets are sometimes posited as part of a firm's privacy. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 487 (Burger, C.J.) ("A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable."). But the harm of trade secret misappropriation sounds in money, not privacy.

tool that guarantees at least some legal assurance and protection of privacy.

3. Administration of Justice

The relationship between NDAs and the administration of justice is contingent. Today, the law's default position is that agreed-upon secrecy in litigation encourages "quicker, more informal, and often cheaper resolutions for everyone involved."[157] Confidentiality promotes settlement and arbitration, which eases the burden on public institutions.[158] NDAs, therefore, are good for the administration of justice. It was not always thought so. Before 1925, courts did not order specific performance of contracts privatizing dispute resolution, partly because arbitration diverted disputes from public courts to private tribunals.[159] Criticism persists: a chorus of scholars and journalists argues that secrecy in litigation is too much administration and not enough justice.

4. Democracy

NDAs can promote and erode democracy. Confidentiality agreements between journalist and source, which courts occasionally characterize as ethical promises rather than enforceable contracts,[160]

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[157] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018). Justice Gorsuch, for the Court, was writing about arbitration. But arbitration and confidentiality often go hand-in-hand. As Justice Ginsburg observed in dissent, "[a]rbitration agreements often include provisions requiring that outcomes be kept confidential." Id. at 1648 (Ginsburg, J., dissenting).

[158] Levmore & Fagan, *supra* note 11.

[159] "Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes." Epic Sys., 138 S. Ct. at 1621; *accord* id. at 1642 (Ginsburg, J., dissenting). Riding circuit in 1845, shortly before his death, Justice Story wrote that "a court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice." Tobey v. County of Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (Case No. 14,065). Importantly, courts would not enforce agreements to arbitrate before an award was made; once made, however, arbitral awards were enforced. Id. at 1320, 1321.

[160] E.g., Ruzicka v. Conde Nast Publ'ns, Inc., 939 F.2d 578 (8th Cir. 1991). Mark Felt told Bob Woodward: "The relationship was a compact of trust; nothing

insulate the source from discovery and therefore encourage full and frank disclosure. Some of the most significant political reporting in modern history relied on journalists agreeing to keep source identities confidential. The best-known example is Mark Felt, Bob Woodward's confidential source for Watergate.[161] There are many other examples,[162] and a mass of scholarship focuses on the newsperson's privilege.[163] Of course, doubts about the motives of anonymous sources and the accuracy of their information will never subside; still, the argument for protecting the confidentiality of government sources is particularly strong.[164]

5. National Security

The link between confidentiality and national security has long been recognized. But it is only in the last twenty years that policymakers have explicitly connected private NDAs to national security. In 1996, "against a backdrop of increasing threats to corporate security and a rising tide of international and domestic economic espionage," Congress passed the Economic Espionage Act.[165] The Act created the federal crime of wrongfully copying or otherwise controlling trade secrets with intent to benefit a foreign government.[166] The House Report recited that "the development of

about it was to be discussed or shared with anyone." Bob Woodward, *How Mark Felt Became 'Deep Throat'*, WASH. POST, June 2, 2005, at A01.

[161] In 2005, Bob Woodward recalled that Mark Felt insisted on utter confidentiality. In Woodward's telling, Felt was "relatively free with me [Woodward] but insisted that he, the FBI and the Justice Department be kept out of anything I might use indirectly or pass onto others. He was stern and strict about those rules with a booming, insistent voice. I promised, and he said that it was essential that I be careful. The only way to ensure that was to tell no one that we knew each other or talked or that I knew someone in the FBI or Justice Department. No one. … He beat it into my head: secrecy at all cost, no loose talk, no talk about him at all, no indication to anyone that such a secret source existed." Id.

[162] See NORMAN PEARLSTINE, OFF THE RECORD: THE PRESS, THE GOVERNMENT, AND THE WAR OVER ANONYMOUS SOURCES (2007).

[163] E.g., Christina Koningisor, *The De Facto Reporter's Privilege*, 127 YALE L.J. 1176, 1180–85 (2018) (collecting some of the literature).

[164] Blasi, *supra* note 56, at 606.

[165] United States v. Hsu, 155 F.3d 189, 194 (3d Cir. 1998).

[166] Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended at 18 U.S.C. §§ 1831-1839 (2018)).

proprietary economic information is an integral part of America's economic well-being," and that "threats to the nation's economic interest are threats to the nation's vital security interests."[167] Because NDAs are often partly constitutive of trade secrets, indictments under the Economic Espionage Act frequently allege that defendants breached private confidentiality agreements. For example, a recent indictment alleges that a Huawei engineer twice emailed photographs of a proprietary T-Mobile robot in violation of signed NDAs.[168] And of course, private NDAs can threaten national security. In 2017, for example, ZTE admitted to asking employees to sign NDAs that would hide its violations of Iranian sanctions.[169]

II. SELLING SILENCE, SELLING OUT SPEECH

Given that NDAs serve important values, both generally (autonomy, for example) and concretely (privacy, say), courts willingly enforce them. And yet, the public gaze is intensely focused on NDAs and their impact on public discourse. Wrongdoers such as Harvey Weinstein have weaponized NDAs to silence women and conceal criminality. Public officials and figures, including President Trump, deploy NDAs to bury information of public concern. But even without these examples, the capacity of NDAs to distort public discourse demands critical attention. A society's enforcement of NDAs is relevant to its free speech right. This Part argues that NDAs can conflict with many of the values and interests that justify free speech. Some NDAs—not all of them or even most of them—pose real challenges to our most basic free speech commitments. The goal is to shake our faith that freedom of contract always trumps freedom of speech. Selling silence sometimes sells out free speech.

This section is focused on free speech theory. There is a distinction, often unobserved, between free speech and a right to free speech. The former is theoretical and the latter institutional. The Free Speech Clause of the First Amendment might embody a theory of free speech, which finds some institutional expression in the

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[167] H. Rep. 104-788, *reprinted in* 1996 U.S.C.C.A.N. 4021, 4023.

[168] Indictment at 4, 5–6, 9, 21, United States v. Huawei Device Co., No. 2:19-CR-00010-RSM (W.D. Wash. Jan. 16, 2019).

[169] Factual Resume at 21, 23, United States v. ZTE Corp., No. 3:17-CR-0120K (N.D. Tex. Mar. 7, 2017).

courts (and other legal institutions). Of course, free speech theory is connected to the free speech right to limit government regulation. But they are separate. Whether free speech serves certain values or interests is a question distinct from, but related to, what regulation is permitted. Free speech *theory* cannot provide a comprehensive account of a free speech *right*.[170] The boundaries of the right to free expression in the United States and in Australia, say, are different because the institutional expression of the right is different.[171]

A. How We Talk About Free Speech

The usual argument for free speech is that it serves some other value: truth, democracy, and agency. The interminable bouncing around of a discrete set of values characterizes free speech theorizing, and these values constitute our free speech grammar. Kent Greenawalt called them free speech justifications and divided them into consequentialist and nonconsequentialist justifications.[172] On the one hand, consequentialist justifications assert an empirical connection between free speech and good consequences, or between censorship and bad consequences. To argue that free speech makes government more accountable is to adopt a consequentialist position. Nonconsequentialist justifications, on the other hand, say that free speech is good, and censorship is bad, regardless of consequences. On these views, censorship is a wrong in itself. Thomas Nagel maintained a similar distinction between instrumental justifications and intrinsic justifications.[173] These distinctions are sometimes useful, but it is important to acknowledge that it can be hard to tell "where the intrinsic nature of the act stops and consequences begin."[174]

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[170] Raz, *supra* note 54, at 305–06.

[171] Id. ("[S]o far as the core justification of the right goes, there is a flexible range of permissible or acceptable boundaries; the choice between them turns on their suitability for the institutional arrangements in the different societies.").

[172] Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 127–30 (1989).

[173] Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 96 (1995).

[174] Greenawalt, *supra* note 172, at 129.

Remarkably, the structure of free speech argumentation has not changed since Milton published the *Areopagitica* in 1644. Milton's dazzling poetic brilliance anticipated many of the modern arguments for free speech,[175] particularly the argument from truth later developed by John Stuart Mill. The form of the *Areopagitica*—an address to Parliament urging repeal of the Licensing Order of 1643—and its classical allusion—Isocrates's speech *Areopagiticus* written in 355BC, which, in Milton's words, was a "discourse to the Parliament of Athens [Areopagus], that persuades them to change the form of democracy which was then established"[176]—presage the argument from democracy[177] that is today associated with Alexander Meiklejohn.[178] Milton also suggested an autonomy-based argument by noting that prepublication licensing is a "manifest hurt" that not only "distrust[s] the judgment and the honesty" but is also "the greatest displeasure and indignity to a free and knowing spirit."[179] "He who is not trusted with his own actions," said Milton, "has no great argument to think himself reputed in the Commonwealth wherein he was born, for other than a fool or a foreigner."[180]

First Amendment scholars, then, typically work with the values that constitute our free speech grammar. But recently First Amendment "Lochnerism" has seized the academic imagination.[181] The law professoriate observes the powerful resemblance between *Lochner*-era invalidation of economic regulations and the First Amendment's deregulatory turn.[182] The consequences of First

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[175] Vincent Blasi, *A Reader's Guide to John Milton's* Areopagitica*, the Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273.

[176] JOHN MILTON, *AREOPAGITICA;* A SPEECH OF MR. JOHN MILTON FOR THE LIBERTY OF UNLICENC'D PRINTING, TO THE PARLIAMENT OF ENGLAND (1644), *reprinted in* 2 COMPLETE PROSE WORKS OF JOHN MILTON 486, 489 (Ernest Sirluck ed., 1959).

[177] Eric Nelson, *"True Liberty": Isocrates and Milton's* Areopagitica, 40 MILTON STUD. 201 (2001).

[178] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[179] MILTON, *supra* note 176, at 530–31.

[180] Id. at 531.

[181] Amanda Shanor, *First Amendment Coverage*, 93 NYU L. REV. 318 (2018), 331 (referring to "the growing literature on First Amendment *Lochnerism*"), 331 n.57 (collecting literature).

[182] See, e.g., Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

Amendment Lochnerism have been trenchantly criticized; the quest for a progressive First Amendment has begun.[183] One of the most interesting responses to First Amendment Lochnerism is Leslie Kendrick's clarification of free speech's status as a "special right."[184] On this view, free speech is a special right if it is sufficiently distinct (i.e., analytically independent from other rights and activities) and robust (i.e., protective of the activity).[185]

Suffice it to say that this Article treats free speech as a special right because that is our social and constitutional practice. Kendrick focuses on conceptual distinctiveness, but says that "a right may be distinctive not conceptually but purely as a matter of social practice."[186] The First Amendment singles out "the freedom of speech," and this "explain[s] . . . the existence of a special right."[187] An argument that subsumes free speech within a more general liberty right[188] flies in the face of our constitutional practice. Rawls thought that freedom of political speech was of "great significance . . . to any fully adequate scheme of basic liberties."[189] Raz pointed to "the great importance of free expression" and "the need to make freedom of expression a foundational part of the political and civic culture of pluralistic democracies."[190] Our social and constitutional practice treats free speech as a special right.

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[183] The Columbia Law Review's 2018 Symposium was called, "A First Amendment for All? Free Expression in an Age of Inequality." 118 COLUM. L. REV. 1953–2249 (2018).

[184] Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87 (2017).

[185] Id. at 91–110.

[186] Id. at 92.

[187] Id. ("Perhaps a society has a constitutional text that mistakenly singles out a certain activity and for all practical purposes cannot be amended. Such circumstances would explain, and perhaps justify, the existence of a special right in that society.").

[188] For one example, see Tara Smith, *Just Sayin'—How the False Equivalence of Speech with Action Undermines the Freedom of Speech—and Action* (unpublished manuscript) (on file with author).

[189] JOHN RAWLS, POLITICAL LIBERALISM 343 (2005).

[190] Raz, *supra* note 54, at 324.

B. Monism and Pluralism

Free speech pluralism argues that there are several values that justify free expression, and that none is privileged over others. T.M. Scanlon is the most articulate free speech pluralist, questioning a search for unity and doubting whether free speech values "can be helpfully subsumed under any single label."[191] Raz too advocated free speech pluralism, noting that "[t]here is no reason to think that just one consideration can provide a complete account of the right."[192] Raz pointed out that his argument (that free expression is valuable because public portrayal of forms and styles of life is validating) "joins three other arguments to form the foundation of a liberal doctrine of free expression," namely the arguments from democracy, tolerance, and checking abuse of power.[193]

Free speech monism contends that there is one value that best justifies free speech or is prior to (or more important than) other values. It's useful to distinguish between free speech monism and First Amendment monism. It is one thing, said Robert Post, to note that there are many values contributing to a justification of free expression; "[i]t is quite a different question, however, whether constitutional doctrine should express each of these different reasons."[194] Post is a First Amendment monist because he argued that the Free Speech Clause, not free speech generally, is rooted foremost in participatory democracy. He insisted on the "lexical priority" of "the principle of democratic participation."[195] This monism is grounded in institutional reasons: "pragmatic simplification, which is exemplified by my effort to develop a lexically fundamental purpose for First Amendment doctrine."[196] "Constitutional doctrine," said Post, "must be formulated in a way that serves the need of the legal system to develop relatively simple, clear, and consistent lines of precedent capable of guiding lower courts and

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[191] T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 543, 543–45 (2011).

[192] Raz, *supra* note 54, at 308.

[193] Id. at 324.

[194] Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 619 (2011).

[195] Post, *supra* note 33, at 489; Post, *supra* note 194, at 618.

[196] Id. at 617.

governmental actors."[197] These are claims about law and its institutions, not about free speech theory.

Post, then, is a First Amendment monist; he is not a free speech monist. Democratic participation supplies "the best possible account of our actual historical principles," but "Americans have many diverse and disparate reasons for valuing freedom of expression."[198] Similarly, James Weinstein acknowledged that "a multiplicity of underlying values" and "multifarious norms" animate free speech theory, but there is no "common ground for judging the relative normative appeal of these contending theories."[199] "What uniquely qualifies participatory democracy as the core free speech norm," he concluded, "is that it is the only contender that the case law does not massively contradict."[200] For both Post and Weinstein, doctrinal fit is an overriding concern. Weinstein especially: "if doctrinal coherence and the pragmatic benefits that such coherence brings are to be given any significant weight, then among normatively appealing theories the one with the better doctrinal fit should be judged the best overall theory."[201]

Seana Shiffrin is a free speech monist. She argued that "a thinker-oriented approach to freedom of speech offers a stronger foundation for freedom of speech protections than competing theoretical approaches."[202] In Shiffrin's view, the "pitched battle" among competing free speech values is puzzling.[203] Rather than add another value to the list, Shiffrin argued that "a deeper connection unifies them."[204] Traditional free speech values like truth and democracy assume the existence of "a developed thinker behind the scenes," and "[r]easoning from the standpoint of the thinker and her interests can yield a more comprehensive, unified foundation for freedom of speech protection."[205] Shiffrin asserted a hierarchy

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[197] Id. at 619–20.

[198] Post, *supra* note 33, at 477; Post, *supra* note 194, at 619.

[199] James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 635, 650 (2011).

[200] Id. at 643.

[201] Id. at 635.

[202] SHIFFRIN, *supra* note 30, at 80.

[203] Id. at 83.

[204] Id. at 84.

[205] Id. at 84–85.

where the moral agency of a free thinker underwrites all other free speech values.[206]

First Amendment monism is a mistake (put to one side the question of free speech monism). First Amendment monists are preoccupied with doctrinal fit, even while they acknowledge the doctrine to be multifocal. In my view, the First Amendment achieves administrable coherence by treating free speech as exhausted by several different argumentative archetypes. These archetypes correspond to the most influential free speech theories: arguments from truth, democracy, and agency. The First Amendment consists in these conventional argumentative practices.

This is Philip Bobbitt's constitutional theory writ smaller.[207] Bobbitt argued that constitutional law consists in, and is legitimized by, certain conventional argumentative practices. The so-called modalities of constitutional argument are historical, textual, structural, prudential, doctrinal, and ethical. Bobbitt contended that there is no grand hierarchy that integrates these modalities into a coherent whole, and he rejected any attempt to justify constitutional law by reference to external criteria alien to that practice. A grand hierarchy would need to be explained by some external justificatory criteria; but such justification cannot claim the legitimacy of constitutional law, because it would not proceed according to the modalities constituting that law.[208]

Just like there are modalities of constitutional argument, there are modalities of First Amendment argument. These free speech modalities—truth, democracy, agency—constitute our First Amendment grammar, and they comprise the First Amendment's theoretical resources. A judge enforces the First Amendment when she and her colleagues engage in the conventional argumentative practices constituting the First Amendment. Every First Amendment problem that arises is analyzed according to these conventional forms of argument. In an arresting passage, Bobbitt says:

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[206] Free speech monism does not entail the view that the value underwriting free speech monism is exhaustive. Shiffrin says, "I do not mean to suggest that the connection between freedom of speech and moral agency exhausts the significance of freedom of speech." Id. at 85–86; see also Raz, *supra* note 54, at 305.

[207] BOBBITT, supra note 33.

[208] Id.; Philip Bobbitt, Youngstown*: Pages from the Book of Disquietude*, 19 CONST. COMM. 3 (2002).

> If you were to take a set of colored pencils, assign a separate color to each of the kinds of arguments, and mark through passages in an opinion of the Supreme Court deciding a constitutional matter, you would probably have a multi-colored picture when you finished. Judges are the artists of our field, just as law professors are its critics, and we expect the creative judge to employ all the tools that are appropriate, often in combination, to achieve a satisfying result.[209]

The same is true for First Amendment cases. The rich American free speech tradition reflects and embodies aspects of all its argumentative archetypes, not just one. Although often posited as rivals, these theories are not necessarily inconsistent; they are overlapping and sometimes mutually supporting. Political speech might vindicate individual autonomy. Of course, the scope of each theory's limitation on government regulation of speech varies. The First Amendment aesthetic is the uneasy embodiment of these sometimes consistent, sometimes opposing theories.

The primary case for First Amendment monism leans heavily on two institutional arguments. The first is a perceived need for "ease of explanation and comprehension" and "feasibility of implementation in an imperfect institutional environment."[210] This is really a set of aspirations that begs the question. How do we know when a doctrine is sufficiently comprehensible and institutionally feasible? If privileging participatory democracy is institutionally feasible, why not participatory democracy *and* truth? Why not First Amendment dualism? Why is one the magic number and not two? The incomprehensibility of First Amendment doctrine is unlikely to be because there is more than one animating value. It's probably because the judicial articulation of the discrete set of free speech values is deficient. Winnowing free speech values down to one is not going to remedy that deficiency, especially when each traditional free speech value is multifaceted and subsumes subsidiary and competing values itself.[211]

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[209] BOBBITT, *supra* note 33, at 93–94.

[210] Post, *supra* note 194, at 617 (quoting with approval Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 531 (2011)).

[211] For example, Vincent Blasi pointed out that the argument from democracy embraces not only a participation rationale, but also constituent-service, informed-voter, and checking rationales. Blasi, *supra* note 210, at 536 ("It is by no

The second argument for First Amendment monism is that the preferred value—for Post and Weinstein, participatory democracy—fits best with our constitutional practice. But First Amendment monism itself does not fit with our constitutional practice. Prioritizing participatory democracy, or any other major free speech value, chronically undersells the First Amendment; it is akin to saying that historical argument, say, best fits with our tradition of constitutional argumentation and should be privileged for that reason. It ignores vast swathes of our constitutional canvas. One needs to grapple with the argument from truth, for example, on its own terms to provide a plausible account of our First Amendment tradition.[212]

The cost of privileging one free speech value over others when applying the First Amendment would be borne by our constitutional culture. First Amendment monism, instead of producing doctrine shot through with the multi-colors of intellectual diversity and ideological variety, is a recipe for doctrinal stasis and monotony. Do we really prefer Meiklejohn to Milton? Would a focus on participatory democracy have denied us Justice Holmes's marketplace of ideas? Or Justice Brandeis's rhapsodizing on character? Indeed, First Amendment monism works an irony. It stultifies the development of other values in First Amendment doctrine, almost to censor them. Nearly four hundred years ago, Milton wrote about free speech environmentalism and the importance of inquisitive energy, the "musing, searching, revolving new notions and ideas" and "fast reading, trying all things."[213] We should be wary of a First Amendment monism that threatens this culture.

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means obvious that the normative appeal of participation as a rationale for free speech is greater than that of constituent-service, informed-voter, or checking rationales, each of which also derives from the foundational commitment to democracy.").

[212] Blasi, *supra* note 210, at 538 ("Any explanatory analysis of either the case law or the public understanding of the freedom of speech needs to address the pervasiveness and durability, even to the extent of gaining traction in popular culture, of the marketplace-of-ideas figure of speech.").

[213] MILTON, *supra* note 176, at 554.

C. Free Speech Values and NDAs

Whether a certain practice threatens free speech depends on "the normative theory" adopted.[214] Consistent with First Amendment pluralism, this section will argue that NDAs conflict with many of our First Amendment values. The analysis here gathers a variety of theories under three values: truth, democracy, and agency. No doubt there is reason to cavil with these labels. I acknowledge that the classificatory regime adopted here is not necessarily stable. But these represent our foundational commitments to free speech, and if NDAs pose a substantial threat to even one of them, then there is reason to worry.[215]

1. Truth

Poetically voiced by Milton,[216] analyzed by Mill,[217] and rhetorically repurposed by Holmes,[218] the argument from truth is extraordinarily powerful and popular. It says that ideas converge to truth only when they are subjected to, and refined by, the continual examination and criticism entailed by free speech. Of truth, Milton famously said: "Let her and falsehood grapple; who ever knew Truth put to the worse in a free and open encounter."[219] There are echoes of Milton in Mill's assertion that truth "has to be made by the rough process of a struggle between combatants fighting under hostile banners,"[220] and in Holmes's celebrated maxim that "the best test of

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[214] Leslie Kendrick, *Use Your Words: On the "Speech" in "Freedom of Speech"*, 116 MICH. L. REV. 667, 695, 699, 701–02 (2018).

[215] In a recent article, Jeremy Waldron takes a similar methodological approach when arguing that free speech values do not require the suppression of heckling. Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges, or Gibes*, 2018 SUP. CT. REV. 1, 17, 15–21.

[216] MILTON, *supra* note 176.

[217] JOHN STUART MILL, ON LIBERTY (1859) ch. 2, *reprinted in* 18 COLLECTED WORKS OF JOHN STUART MILL 228 (J. M. Robson ed., 1977).

[218] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[219] MILTON, *supra* note 176, at 561.

[220] MILL, *supra* note 217, at 254.

truth is the power of the thought to get itself accepted in the competition of the market."[221]

It is impossible to do perfect justice to this theory (or its detractors[222]) here, but a few observations may be made. First, the argument from truth is focused primarily on audience and third-party interests, namely, their interest in approaching truth by exposure to the competition between ideas.[223] Second, it is a process-oriented theory.[224] It is not fixated on evaluating the substantive rightness or wrongness of an idea; rather, the validity of an idea is judged on its capacity to survive or adapt under critical stress. Third, it is an instrumental or consequentialist theory of free speech.[225] Free speech, on this view, is not intrinsically valuable but only valuable to the extent that it contributes to the emergence of truth. Fourth, the argument from truth rests, at least by Mill's lights, on human fallibility.[226] Because we could be wrong, maybe partially, about any of our beliefs, suppressing the contrary view might impede our path to truth. Finally, this theory permits expression of false beliefs because they challenge us to fasten our true beliefs to the most secure foundation. "A man may be a heretic in the truth," said Milton, "and if he believes things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."[227]

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[221] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[222] For example, Ronald Dworkin highlighted "Mill's doubtful epistemology." Ronald Dworkin, *Foreword*, *in* EXTREME SPEECH AND DEMOCRACY vii (Ivan Hare & James Weinstein eds., 2009). Similarly, Frederick Schauer criticized the argument from truth because it is alien to our actual processes of truth acquisition. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982). Others have also dismissed the argument from truth as implausible. But I'm less concerned here with the validity of the theories. Whether we like it or not, the argument from truth has a prominent place in our First Amendment tradition and forms part of our First Amendment grammar.

[223] T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 528–29 (1979).

[224] SCHAUER, *supra* note 222.

[225] Greenawalt, *supra* note 172, at 130.

[226] David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102 ETHICS 534, 547–48 (1992).

[227] MILTON, *supra* note 176, at 543. *See also* Brian Leiter, *Justifying Academic Freedom: Mill and Marcuse Revisited* (unpublished manuscript) (on file

An NDA removes information or beliefs from the marketplace of ideas. As far as the argument from truth is concerned, that is a harm. Regardless of the substantive rightness or wrongness of the information or belief, its absence impedes our path to the truth. That is not to say, of course, that there may be valid reasons for executing an NDA. Google's search engine algorithm is a valuable trade secret; Google employees sign NDAs to keep the algorithm under wraps. But the argument from truth is not responsive to the value of the information suppressed. It is only concerned with our capacity to arrive at the truth by continual disputation. Without Google's algorithm, the state of artificial intelligence and the mechanism of information dissemination are opaque to us, and we cannot adequately adjust or test our beliefs on these matters. Plainly, NDAs are a problem for the argument from truth.

Of course, not all harms to the "marketplace" are created equal. A single NDA may not pose a systemic threat to the argument from truth. But collectively it is a different matter. Thanks to President Trump's Twitter feed, we know that NDAs are "very common among celebrities and people of wealth" and are routinely enforced in arbitration proceedings.[228] Vast numbers of employees sign NDAs too.[229] These agreements cover a large quantity of information that is suppressed by an opaque decision-making system. No doubt an employee is chilled from discussing even information that is not covered by her NDA. And an injunction (or an order for specific performance) against an employee threatening to disclose information operates as a prior restraint. From the perspective of the argument from truth, the enormous number of NDAs coupled with large-scale arbitration presents a serious threat to free speech.

That said, it is possible to argue that NDAs actually serve the argument from truth. Some NDAs suppress falsehoods. Consider the rapid settlement of a frivolous claim. Rather than risk the cost of a potential reputational hit, the defendant might prefer to quietly and swiftly settle the claim with an NDA to silence the plaintiff. Trump

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with author) at 10 (expressing Mill's argument that "even if we believe what is true already, being challenged by false beliefs insures that we hold our beliefs for sound reasons, not just dogmatically").

[228] Trump, *supra* note 7.

[229] Bishara et al., *supra* note 8; Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. DIGITAL ARTICLE (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change.

also maintains that hush payments were made to silence false information. In this guise, NDAs might protect the marketplace of ideas from distortion by reducing the currency of falsity and preventing unnecessary harm. The difficulty with this view, of course, is that the argument from truth celebrates its protection of falsity. It does not itself supply criteria to decide whether information is true or false; falsity is valuable because it "serve[s] to polish and brighten the armory of Truth."[230] All propositions are permitted expression. NDAs, then, conflict with the argument from truth, especially given the scale at which they are routinely (and opaquely) enforced today.

2. Democracy

The argument from democracy or self-government is a genus of theories where Meiklejohn is the dominant species.[231] Meiklejohn, sometimes dismissed as sonorous and impressionistic,[232] argued that freedom of expression is necessary to meaningfully exercise the right to vote. Unless criticism of public officials and candidates for public office is "uninhibited, robust, and wide-open,"[233] voters will not be sufficiently informed about their electoral choice. This "informed voter" species of the argument from democracy assumes that the people are sovereign and paradigmatically exercise that sovereignty at the ballot box. The exercise of their sovereign powers requires free examination of candidates and policies, and free communication among the people.[234]

Another important species of the argument from democracy is Vincent Blasi's articulation of the checking value of the First Amendment.[235] According to Blasi, "free speech, a free press, and

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[230] MILTON, *supra* note 176, at 567.

[231] MEIKLEJOHN, *supra* note 178.

[232] JEREMY WALDRON, THE HARM IN HATE SPEECH 173 (2012); Jeremy Waldron, *The Conditions of Legitimacy: A Response to James Weinstein*, 32 CONST. COMM. 697, 697–98 (2017).

[233] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[234] James Madison, *Virginia Resolution on the Alien and Sedition Acts* (protesting the Alien and Sedition Acts because they confer "a power . . . levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right").

[235] Blasi, *supra* note 56.

free assembly can serve in checking the abuse of power by public officials."[236] In the 1960s and 70s, the First Amendment "facilitat[ed] a process by which countervailing forces check the misuse of official power": witness the Civil Rights Movement, peace marches, Vietnam, and Watergate.[237] Although the checking value is a species of the argument from democracy, Blasi positioned it as deriving from "the democratic theory of John Locke and Joseph Schumpeter, not that of Alexander Meiklejohn."[238] The "role of the ordinary citizen," on this view, "is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds."[239] A professional, organized, and financed commentariat is necessary to ensure citizens can exercise that veto power.[240] Notably, Blasi did not argue that the checking value grounded First Amendment monism; rather, he intended "to further the understanding of one basic value which has been underemphasized" and which "should be a significant component in any general theory of the First Amendment."[241]

By contrast to the informed voter and checking value theories, which are consequentialist, another version of the argument from democracy posits that "freedom of speech is not just instrumental to democracy but constitutive of that practice."[242] Ronald Dworkin grounded this argument in political legitimacy, claiming that it is illegitimate for the state to enforce an official decision against dissenters who were forbidden from expressing their objection to the decision before it was taken. The state, said Dworkin, must treat each individual as a free and equal member of the political community, and therefore must accord everyone the opportunity to express their political, moral and cultural convictions, tastes and prejudices.

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[236] Id. at 527.
[237] Id.
[238] Id. at 542.
[239] Id.
[240] Id. at 541–42.
[241] Id. at 528.
[242] Dworkin, *supra* note 222, at v.

Otherwise, it is illegitimate for the state to coerce individuals who dissent from the collective decision.[243]

For the informed-voter and checking-value theories, an NDA is problematic if it prevents individuals from contributing to the ongoing development of public opinion or from checking egregious abuses of public power. There are many reasons to think that the widespread use of NDAs could produce an electorate that is poorly informed on political matters and could debilitate the citizenry's power to veto a candidate or his policies. A culture of concealment nourished by NDAs will prevent the formation of public opinion, obstruct the checking of government malfeasance, and reduce diversity of viewpoint. Indeed, the capacity of NDAs to interfere with the informed-voter and checking-value theories is recognized by the unconstitutional conditions doctrine. The normative basis of that doctrine is that the government cannot prohibit its employees from criticizing it. History shows that government employees who speak out are necessary for the healthy development of public opinion and for checking serious abuses of power. President Trump's requirement that White House officials sign NDAs was thus rightly criticized.[244]

It does not quiet concern to say that the NDA counterparty was a private entity and not government. To be sure, the instrumental

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[243] This argument is an outgrowth of the debate on the legitimacy of hate speech laws. As with the other First Amendment values, my discussion here is incomplete. For more, see Jeremy Waldron, *Hate Speech and Political Legitimacy*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 329 (Michael Herz & Peter Molnar eds., 2012); Ronald Dworkin, *Reply to Jeremy Waldron*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 341 (Michael Herz & Peter Molnar eds., 2012); James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMM. 527 (2017); WALDRON, *supra* note 232, at 173–97; Waldron, *supra* note 232.

[244] Julie Hirschfeld Davis et al., *Hoping What Happens in the White House Stays in the White House*, N.Y. TIMES, Mar. 22, 2018, at A15; Ruth Marcus, *Nondisclosure agreements at the White House*, WASH. POST, Mar. 19, 2018, at A17; Ronan Farrow, *A Lawsuit by a Campaign Worker is the Latest Challenge to Trump's Nondisclosure Agreements*, THE NEW YORKER (Feb. 25, 2019), https://www.newyorker.com/news/news-desk/a-lawsuit-by-a-campaign-worker-is-the-latest-challenge-to-trumps-nondisclosure-agreements.

arguments from democracy regard NDAs with government as presumptively questionable.[245] But NDAs with private parties can be equally troubling. Consider the practice, known as "catch and kill," where media outlets purchase rights to, and then bury, stories critical of a public official or candidate.[246] If the information caught and killed affects public discourse or reveals public malfeasance, then these arguments from democracy say it should be released. Substituting the government for a private party does not remove the free speech concerns. If anything, it underscores the need for an independent press, which is one of the explicit premises of the checking value.[247]

The argument that NDAs are problematic from the point of view of political legitimacy is structured differently. Dworkin suggested a distinction, developed by others,[248] between "upstream" laws and "downstream" laws.[249] Upstream laws are those that regulate the expression of individual views; downstream laws are those that are responsive to the views expressed by the speech regulated upstream. The example used is hate speech. Laws against hate speech, plainly enough, are upstream. Laws against hate crimes and discrimination are downstream: they protect victims against consequences of, or practices dependent on, the views expressed by hate speech. It seems plausible that the regulation of upstream speech will more effectively deal with downstream consequences. But Dworkin says that is a mistake. The gist of his argument is that suppressing views upstream diminishes the legitimacy of laws downstream. In a crucial passage, Dworkin said:

> We must protect [minorities] against unfairness and inequality in employment or education or housing or the criminal process, for example, and we may adopt laws to achieve that protection. But we must not try to intervene further upstream, by forbidding

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[245] Of course, legitimate reasons (such as classified information) can, all things considered, justify a regime of nondisclosure.

[246] Ronan Farrow, *Donald Trump, A Playboy Model, and a System for Concealing Infidelity*, THE NEW YORKER (Feb. 16, 2018), https://www.newyorker.com/news/news-desk/donald-trump-a-playboy-model-and-a-system-for-concealing-infidelity-national-enquirer-karen-mcdougal.

[247] Blasi, *supra* note 56, at 541–42.

[248] Waldron, *supra* note 243, at 331; WALDRON, *supra* note 232, at 177–81; Weinstein, *supra* note 243, at 529.

[249] Dworkin, *supra* note 222, at viii.

> any expression of the attitudes or prejudices that we think nourish such unfairness or inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them.[250]

Put differently, the state should stop people from acting on invidious views, but it should not stop them from expressing those views. Laws that censor hate speech prevent the expression of opposition to, and therefore delegitimize, antidiscrimination laws.

The question, then, is whether NDAs are sufficiently upstream, in the sense that they suppress the expression of individual views, to degrade the legitimacy of a downstream collective decision for which the suppressed views would be relevant. Two examples demonstrate that NDAs can damage the legitimacy of the election of a candidate for public office (a downstream collective decision). First, suppose the Democratic or Republican nominee for President purchases the silence of a former extramarital paramour. Rightly or wrongly, the former paramour's speech would have figured in the collective decision to elect the candidate. Suppose, second, a corporate entity formerly controlled by a public official purchased the silence of current employees about allegations of sexual harassment against the official. Such NDAs may not necessarily condemn a subsequent election but would, to some degree, delegitimize it.[251]

What matters is that NDAs can be upstream censors that degrade downstream collective decisions like elections. Elections that suppress all opposition speech are rightly stamped as illegitimate. The suppression of facts or empirical information that could form the foundation of ethical or normative opposition to a candidate must also impair the legitimacy of an election. A male candidate for President who purchases, through his agents, a woman's silence over an alleged extramarital affair robs the public of an empirical basis for ethical opposition to that candidate. The fact of the affair, if there was one, is no doubt important for some voters. But more important is the fact of the NDA itself, and its capacity to bury relevant information, in a political culture that peddles in Newspeak like "alternative facts," "fake news," and "post-truth."

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[250] Id.

[251] For Waldron, legitimacy is a matter of degree. WALDRON, *supra* note 232, at 186–92.

3. Agency

Like the other defenses of free speech, the argument from agency is a broad church referring to theories centered on human autonomy or moral agency. By one count, autonomy grounds no less than six defenses of free speech.[252] Scanlon, who supplied one such account in 1972[253] and later renounced it,[254] exhorts us to stop talking about autonomy because it covers too many varying interests.[255] Fair enough. But until our free speech theorists and First Amendment scholars and practitioners and judges eradicate talk of autonomy, we are obliged to use the label. It is, as Greenawalt put it, one of "the subtle plurality of values that does govern the practice of freedom of speech."[256]

In 1972, Scanlon argued for what he called the Millian Principle.[257] This holds that the justification for speech regulations cannot include two kinds of harms. The first is false beliefs that the speech would lead people to hold; the second is harmful consequences of actions that the speech would lead people to consider worthwhile. Scanlon's argument for the Millian Principle was that autonomous citizens cannot accept such justifications. "To regard himself as autonomous," Scanlon wrote, "a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action."[258] An autonomous person cannot unquestioningly accept another's beliefs or reasons for action; she must, in relying on another's judgment, "be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence."[259] If a person accepts the government's justification for speech regulation that certain beliefs are false or that certain actions supported by

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[252] Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 312 (1998).

[253] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

[254] Scanlon, *supra* note 223.

[255] Scanlon, *supra* note 191, at 546.

[256] Greenawalt, *supra* note 172, at 119.

[257] Scanlon, *supra* note 253, at 213.

[258] Id. at. 215.

[259] Id. at 216.

speech are in fact harmful, then he fails to regard himself as autonomous. Scanlon backed away from this view but it remains influential.[260]

While the Millian Principle prioritized audience interests, other accounts of free speech that appeal to agency emphasize speaker interests as well. Seana Shiffrin, for example, focused on "the autonomy of the individual *mind*," arguing that free speech is necessary for us to externalize our mental contents and thus for our self-development and the development of meaningful relations with others.[261] This "thinker-based" approach to free speech says that the interests of individuals as thinkers justify free speech because speech and expression are uniquely capable of externalizing one's mental contents. Those interests include "capacities for autonomous deliberation and reaction, practical judgment, and moral relations."[262] Our practical capacity to express our mental contents, and to receive others' expression of theirs, is necessary for personal and interpersonal development. This makes free speech necessary for moral agency.

There is an interesting relationship between the agency theories and the democracy theories. Agency theorists assert that the argument from democracy presupposes that the informed voter, say, is an autonomous agent exercising political choice.[263] Shiffrin motivated her thinker-based approach partly because other "theories all presuppose, in one way or another, that there is a developed thinker behind the scenes."[264] Scanlon's autonomy theory, which he later

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[260] He backed away from this view partly because of its breadth. The Millian Principle would condemn, for example, laws against deceptive advertising. It overvalued the audience interest in autonomy and precluded the inquiry of whether that interest could sometimes be advanced by restricting some expression. Scanlon's later view did not use autonomy to limit the set of legitimate justifications of authority, as the Millian Principle did, but instead regarded "autonomy, understood as the actual ability to exercise independent rational judgment, as a good to be promoted." Scanlon, *supra* note 223, at 533. The view Scanlon arrived at was "neither democracy-based, nor autonomy based, but irreducibly pluralist." T.M. Scanlon, *Comment on Baker's Autonomy and Free Speech*, 27 CONST. COMM. 319, 325 (2011).

[261] SHIFFRIN, *supra* note 30, at 85.

[262] Id. at 88.

[263] Weinstein, *supra* note 199, at 672–73.

[264] SHIFFRIN, *supra* note 30, at 84–85.

repudiated, was in fact an attempt to generalize Meiklejohn's argument beyond political speech.[265]

The existence of this relationship is sometimes put as a challenge to democracy theorists: if the argument from democracy depends on the argument from agency, then there is no reason to limit free speech to political expression.[266] There are two responses. The first is that even granting the dependency, discussing agency at this level of generality does not yield meaningful insights about when we should view government regulations of speech suspiciously. The argument from democracy, pitched at a lower level of abstraction, crisply explains why a public official should be held to a higher standard when bringing defamation claims against those critical of his conduct. The structure of an argument based on agency lacks this directness and clarity. The second response distinguishes between values and evaluative presuppositions. Autonomy "is not an underlying *value* served by participatory democracy but rather a *presupposition* of that practice."[267] This view apparently derives from Raz's reconstruction of Kelsen's argument that legal science presupposes the basic norm without morally committing to it (what Raz called a detached statement).[268] Similarly, it might be possible to argue that autonomy is an underlying normative presupposition for statements using the thick concept of democracy; arguing that free speech promotes democracy presupposes, but does not assert, autonomy.[269]

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[265] Scanlon, *supra* note 223, at 530–31.

[266] Weinstein, *supra* note 199, at 672–73.

[267] James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 LOYOLA L.A. L. REV. 133, 165 n.129 (2007).

[268] JOSEPH RAZ, THE AUTHORITY OF LAW 140–45 (2d ed. 2009); Joseph Raz, *The Purity of the Pure Theory*, 35 REVUE INTERNATIONALE DE PHILOSOPHIE 448, 451–55 (1981).

[269] David Enoch & Kevin Toh, Legal *as a Thick Concept*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 257, 271–74 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

It's tempting to argue that NDAs do not infringe the argument from agency. If anything, NDAs reinforce agency because they permit speakers to sell their free speech rights whenever they wish.[270] But this mistakenly assumes that the free speech arguments from agency center solely on speaker interests. The basis of Scanlon's retracted autonomy theory was the audience-related Millian Principle. Shiffrin's thinker-based approach emphasized the ability to receive others' externalization of their mental contents as a necessary part of moral agency. To be sure, some autonomy accounts focus on the speaker. The best known is probably Baker's argument that the First Amendment's basic purposes are individual self-fulfillment and participation in social and democratic change.[271] Even then, however, audience interests aren't absent; indeed, Baker acknowledges that the "listener, like the speaker, uses speech for self-realization or to promote change."[272]

For the agency theories that value audience interests at least as highly as speaker interests (early Scanlon and Shiffrin), the argument that NDAs infringe free speech is structurally similar to the argument that NDAs threaten the informed-voter or checking-value theories. A community's routine enforcement of NDAs deprives agents of information necessary to decide for themselves what to believe and to weigh competing reasons for action. For example, a private actor who uses NDAs to conceal egregious or widespread criminality denies us access to reasons and evidence for our independent judgments. Deception or lack of information interferes with autonomy because it prevents or limits what an agent believes or does.[273] In sum, being kept ignorant is an obvious interference with autonomy.[274] NDAs, moreover, can infringe our capacity to form moral relations with one another. Suppose an employee wants to unburden himself to his spouse with information covered by an NDA. Even if the information is not scandalous, but simply stressful, then

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[270] In an otherwise very fine article, Solove and Richards take this view and (wrongly) consider Scanlon's early autonomy theory to be speaker-based. Solove & Richards, *supra* note 26, at 1687–88, 1687 n.186.

[271] BAKER, *supra* note 29.

[272] Id. at 67.

[273] GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 14 (1989); see also Brison, *supra* note 252, at 333.

[274] DWORKIN, *supra* note 273, at 16.

a prohibition on disclosure hampers the development of their moral relations, in particular the capacity of the spouse to empathize or sympathize with, or simply to understand, the stress.

NDAs are troubling, too, for the agency theories that value speaker interests at least as highly as audience interests (Shiffrin and Baker). It is common for NDAs to prohibit the disclosure of information to family members, friends, and associates. For example, an NDA that prohibits discussing injuries with family and friends would hinder coming to terms with those harms.[275] Both Shiffrin and Baker highlight the necessity of free speech to self-development, self-realization, and self-knowledge. NDAs blunt our freedom to externalize the content of our minds (Shiffrin)[276] and to choose to express and therefore define our identities (Baker).[277] An NDA potentially renders silence (which counts as a speech act) involuntary, or at least subject to the purchaser's say-so, and therefore "the speech act does not involve the *self*-realization or *self*-fulfillment of the speaker."[278]

III. BUSTING THE FREE SPEECH MONOPOLY

If selling silence can sell out speech, then NDAs should not enjoy a free pass from free speech scrutiny. Regrettably, however, our free speech vocabulary has been wholly colonized by constitutions, and it is highly unlikely that courts will use the First Amendment to evaluate NDAs enforceable under state common law. There is a serious concern that the judicial enforcement of a private contract cannot count as state action. The Supreme Court has stuck fast to the state action doctrine,[279] notwithstanding a scholarly assault.[280]

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[275] This is not an idle concern. Ian Gibbons, the former chief scientist at Theranos, became depressed and felt he could not confide in his wife because of an NDA he had signed. He later committed suicide. CARREYROU, *supra* note 4, at 146.

[276] SHIFFRIN, *supra* note 30, at 89–93.

[277] BAKER, *supra* note 29, at 51–54.

[278] Id. at 54.

[279] As Justice O'Connor put it, the Court's state action cases "have not been a model of consistency." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991). Nevertheless, she maintained that a coherent principle was discernible. Id.

[280] E.g., Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process*, 96 TEX. L. REV. 15, 15–16, 16 n.7, 27–45

The landmark decisions that seem to reject the doctrine are distinguished or confined to their facts. *Shelley v. Kraemer*[281] famously held that the enforcement by a state court of a racially restrictive covenant violated the Fourteenth Amendment. But BeVier and Harrison, who defend the state action doctrine, suggest that *Shelley* is only a "small" exception.[282] In *New York Times Co. v. Sullivan*[283]—our index case deploying the First Amendment to limit state common law—the plaintiff was a public official and, in any event, the holding has been limited to state common law torts.[284]

The typical strategy, when the federal constitution has run out, is to turn to state constitutions. "State constitutions, too," William Brennan reminded us over forty years ago, "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[285] In what was dubbed the "new judicial federalism,"[286] Brennan exhorted readers not to forget about the "independent protective force of state law."[287] Unfortunately, just like their federal counterpart, state constitutions

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(2017); Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 145–46, 147–52 (2017). For contextual work on the state action doctrine, see Jud Mathews, *State Action Doctrine and the Logic of Constitutional Containment*, 2017 U. ILL. L. REV. 655. For some scholarly defenses of the state action doctrine, see Lillian BeVier & John Harrison, *The State Action Principle and its Critics*, 96 VA. L. REV. 1767 (2010); Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281 (2013). Some scholars, it should be noted, neither offer a full-throated defense nor suggest eradication of the doctrine. Nathan S. Chapman, *The Establishment Clause, State Action, and* Town of Greece, 24 WM. & MARY BILL RTS. J. 405 (2015).

[281] 334 U.S. 1 (1948).

[282] BeVier & Harrison, *supra* note 280, at 1801.

[283] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[284] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Snyder v. Phelps, 562 U.S. 443 (2011).

[285] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); see also id. at 495–98 (state courts resist federal rights abridgment by expanding rights under state law).

[286] Justice Brennan's article inaugurated the "new judicial federalism," encouraging state courts to extend the protection of individual rights under state law beyond the federal baseline. See generally Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HAST. CONST'L L. Q. 93 (2000).

[287] Brennan, *supra* note 285, at 491

usually come bundled with a state action requirement.[288] The enforcement of a private right of action sounding in contract simply does not qualify as state action.

The solution, this Part argues, is to tap into the common law doctrine that contracts against public policy are unenforceable. States should refuse to enforce, as against public policy, NDAs that pose significant threats to free speech. In giving more precise content to that general proposition, this Part attempts to wrest partial control over free speech discourse from the First Amendment.

A. The Free Speech Monopoly

One of the great victories of twentieth century constitutionalism was the colonization of free speech. A primary driver was the First Amendment being incorporated to reach into individual states. Although the first case to do so (*Gitlow v. New York*,[289] decided in 1925) did not invalidate the New York law, it furnished Holmes an opportunity in dissent to declaim against punishing defendants for their "redundant discourse."[290] Many of the First Amendment cases in the following decades, some effecting profound changes, limited the authority of local officials.[291]

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[288] Committee For A Better Twin Rivers v. Twin Rivers Homeowners' Association, 929 A.2d 1060, 1070–71 (N.J. 2007) (state action is a prerequisite for asserting free speech rights in Arizona, California, Connecticut, Georgia, Michigan, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, and Wisconsin).

[289] 268 U.S. 652 (1925).

[290] Id. at 673 (1925) (Holmes, J., dissenting). I am inclined to think that having one's prose condemned by Holmes is punishment enough.

[291] New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (on appeal from Alabama courts); Cohen v. California, 403 U.S. 15 (1971) (California); Speiser v. Randall, 357 U.S. 513 (1958) (California); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (Florida); Lovell v. City of Griffin, Ga., 303 U.S. 444 (1938) (Georgia); Terminiello v. Chicago, 337 U.S. 1 (1949) (Illinois); Niemotko v. Maryland, 340 U.S. 268 (1951) (Maryland); Near v. Minnesota, 283 U.S. 697 (1931) (Minnesota); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (Nebraska); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (New Hampshire); Saia v. New York, 334 U.S. 558 (1948) (New York); Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684 (1959) (New York); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ohio); De Jonge v. Oregon, 299 U.S. 353 (1937) (Oregon); Edwards v. South Carolina, 372 U.S. 229 (1963)

A second important factor is that lawyers tended to be the twentieth century's most eloquent expositors of free speech. Judges like Hand, Holmes, and Brandeis developed their mature free speech theories in judicial opinions. Holmes is occasionally singled out for special veneration. His dissent in *Abrams v. United States*[292] was recently described as "the foundational document of America's free speech tradition," transforming the First Amendment from something of "an unfulfilled promise" to "our preeminent constitutional value and a defining national trait."[293] "[F]ree speech in America was never the same after 1919," runs another recent account, and the "triumph of the free speech principle was inevitable after Holmes unleashed his *Abrams* dissent on the minds of generations longing to break with the restrictive traditions of the past."[294] In short, "Holmes arguably invented modern freedom of speech in his *Abrams* dissent."[295]

Before the twentieth century, major free speech figures were not lawyers. John Milton was a poet. James Madison and John Stuart Mill were political philosophers and politicians; neither was a lawyer.[296] A corollary, perhaps, of the judge-as-free-speech-theorist is that free speech scholarship centered on law schools. Law professors comprised the primary scholarly audience of free speech theory, even for the influential non-lawyers (Alexander Meiklejohn and T.M. Scanlon). True: maybe the singularly poetic defenders of free speech in the twentieth century just happened to be judges. Holmes,

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(South Carolina); Thomas v. Collins, 323 U.S. 516 (1945) (Texas); Landmark Communications v. Virginia, 435 U.S. 829 (1978) (Virginia); NAACP v. Button, 371 U.S. 415 (1963) (Virginia).

[292] Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[293] THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 3, 7, 245 (2013).

[294] Ronald K.L. Collins, *Epilogue: The Long Shadow*, *in* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 349, 377 (Ronald K.L. Collins ed., 2010).

[295] Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 798 (2016).

[296] RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 55–56, 145 (1971); Edward S. Corwin, *The Posthumous Career of James Madison as Lawyer*, 25 AM. B. ASS'N J. 821 (1939).

Brandeis, and Hand are known for their rhetorical capacity and unparalleled prose. Even so, the consequence of the (possibly coincidental) fact that these three judges advanced free speech is that lawyers claimed professional expertise over the trio's writing.

Third, free speech theory is legalized, typically cashed out in terms of what government regulations are legitimate or illegitimate. It is not centrally concerned with the *social* conditions that promote the development and communication of ideas. An example might be the pedagogical practices that maximize free speech environmentalism. Instead, theorists occupy themselves with an account of the free speech right, which is a sword wielded against authority. The "free speech on campus" debate surfaces periodically, but far less public attention is devoted to the practices that educators should employ to inculcate habits of mind that are receptive and sensitive to free speech.

Moreover, despite the new judicial federalism, the First Amendment's robustness has crowded out analogous state constitutional free speech guarantees. A selection of quotes from the law reviews makes the point. In 1968, a note in the Stanford Law Review said:

> The pervasive influence of the Supreme Court in developing standards for the preservation of free expression is remarkable in view of the facts that the Court is only one of thousands of tribunals that sit in this country, that it normally interprets only one of 51 constitutions that guarantee freedom of speech and of the press, and that it was not until well into the 20th century that it began to devote serious attention to this area of individual rights.[297]

A justice of the Washington Supreme Court wrote in 1985 that "more judicial and scholarly effort has been devoted to divining the meaning and scope of the United States Bill of Rights than has been expended on all fifty state bills of rights combined."[298] And it was not until 2002 that a scholar published "the first sustained examination of Pennsylvania's constitutional guarantees of free speech and

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[297] Peter P. Miller, Note, *Freedom of Expression Under State Constitutions*, 20 STAN. L. REV. 318, 318 (1968).

[298] Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgement*, 8 U. PUGET SOUND L. REV. 157, 157 (1985).

press since the dawn of the twentieth century," and "the first comprehensive study to synthesize the two and a quarter century history of Pennsylvania's protection of free expression."[299]

Finally, the dominance of the First Amendment in the twentieth century is strongly suggested by the Google Ngram Viewer. Figure 1 shows the frequency of certain two- and three-word phrases (First Amendment, free speech, free expression, freedom of speech, freedom of expression) as a percentage of, respectively, all two- and three-word phrases occurring in a corpus of American English books in the twentieth century.[300] The phrase "First Amendment" rocketed skyward from the late 1930s, overtaking "free speech" in the mid 1950s.

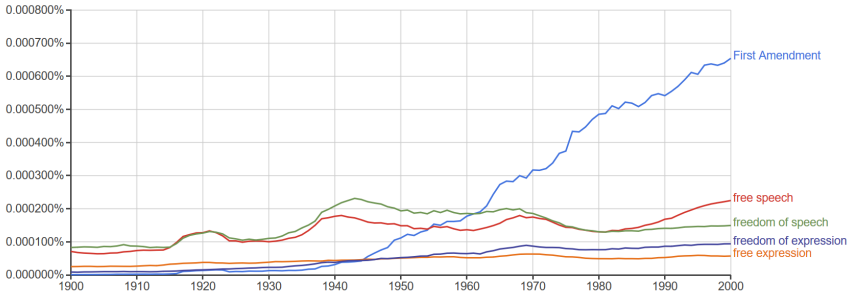

Figure 1: Frequency of Free Speech Phrases

The graph is highly suggestive, even if not demonstrative. One limitation is that it does not distinguish between the several First Amendment rights.

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[299] Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST'L L. 12, 13 (2002).

[300] *Google Ngram Viewer*, GOOGLE, https://books.google.com/ngrams/interactive_chart?content=First+Amendment%2Cfree+speech%2Cfreedom+of+speech%2Cfree+expression%2Cfreedom+of+expression&year_start=1900&year_end=2000&corpus=17&smoothing=3&share=&direct_url=t1%3B%2CFirst%20Amendment%3B%2Cc0%3B.t1%3B%2Cfree%20speech%3B%2Cc0%3B.t1%3B%2Cfreedom%20of%20speech%3B%2Cc0%3B.t1%3B%2Cfree%20expression%3B%2Cc0%3B.t1%3B%2Cfreedom%20of%20expression%3B%2Cc0 (last visited Mar. 31, 2019).

B. Contracts Against Democratic Public Policy

Let's get the customary aphorism out of the way: the doctrine that contracts against public policy are unenforceable is "a very unruly horse, and when once you get astride it you never know where it will carry you."[301] That famous rebuke, issued by Sir James Burrough in 1824, was soon quoted approvingly in an American opinion.[302] Yet the doctrine that contracts against public policy are unenforceable had already gained a strong foothold in the United States.[303] The gist of the doctrine is that, in some cases, courts will not enforce a private contract that violates some public good.[304] The rationale is two-fold: to deter future illegal bargains (deterrence) and to refuse state assistance in enforcing them (non-assistance).[305] The

[301] Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303; 2 Bing. 229, 252 (Burrough J) (Ct. Com. Pl.). See generally David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563 (2012).

[302] Chappel v. Brockway, 21 Wend. 157, 164 (N.Y. 1839).

[303] Mount & Wardell v. G. & R. Waite, 7 Johns. 434 (N.Y. 1811) (Kent, Ch. J.); Gulick v. Ward, 5 Halst. 87, 91–93 (N.J. 1828) (collecting American authorities and quoting an opinion of James Kent). The doctrine arose in England by the fifteenth century as contracts in restraint of trade were held void. W.S.M. Knight, *Public Policy in English Law*, 38 L.Q. REV. 207, 207 (1922); William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 373–75 (1954).

[304] Restatement (Second) of Contracts, Intro. Note to ch. 8 (1981).

[305] Id. Corwin favored the deterrence rationale and dismissed non-assistance as a "pious fear that the 'judicial ermine' might otherwise be soiled." 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW 1058 (1951). A reviewer disagreed. Harold C. Havighurst, *Book Review*, 61 YALE L. J. 1138, 1144–45 (1952) ("In most instances, then, the protection of the good name of the judicial institution must provide the principal reason for the denial of a remedy to one who has trafficked in the forbidden. This is, moreover, a very good reason."). The non-assistance rationale is impressively pedigreed. Holman v. Johnson (1775) 98 Eng. Rep. 1120, 1121 (K.B.) (Lord Mansfield) ("No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.").

short form of the doctrine refers to a blanket notion of unenforceability; in fact, it is marked by significant remedial flexibility.[306]

It's striking and, now, forgotten, that the classical doctrine trafficked in democratic principles. Although common law judges differed on whether wagering contracts contravened public policy,[307] all agreed that *election* wagers violated democratic norms. In 1785, the full King's Bench held that a wager between two voters over the election of a member of Parliament was void.[308] Whether the winner of the bet is entitled to recover, said Lord Mansfield,

> turns on the species and nature of the contract; and if that be in the eye of the law corrupt, and against the fundamental principles of the constitution, it cannot be supported by any Court of Justice. One of the principal foundations of this constitution depends on the proper exercise of this franchise, that the election of members of Parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote.[309]

The wager was therefore void because it placed the two voters under a pecuniary influence.[310]

Unsurprisingly, Mansfield's reasoning found a receptive audience across the Atlantic.[311] As early as 1799, Jeremiah Chase,

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[306] Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 118–21 (1988).

[307] WARREN SWAIN, THE LAW OF CONTRACT 1670–1870 (2015) at 233, 239–44.

[308] Allen v. Hearn (1785) 99 Eng. Rep. 969; 1 T.R. 56 (K.B.). This was a decision on a point of law from a special case found by a jury. Id. at 969; see 3 WILLIAM BLACKSTONE, COMMENTARIES *378. All four judges agreed that the election wager was void. Allen v. Hearn (1785) 99 Eng. Rep. at 971; 1 T.R. at 59–60.

[309] Id.

[310] Id. Another ground for the decision was that an election wager, if valid, could be a pretext for a bribe. Id.

[311] Every state court that considered the issue concluded that election wagers were contrary to public policy. Smyth v. M'Masters, 2 Browne 182, 189–90 (Pa. Ct. Com. Pl. 1812); Denniston v. Cook, 12 Johns. 376 (N.Y. Sup. Ct. 1815); M'Allister v. Hoffman, 16 Serg. & Rawle 147 (Pa. 1827); Rust v. Gott, 9 Cow. 169 (N.Y. Sup. Ct. 1828); Stoddard v. Martin, 1 R.I. 1 (1828); Brush v. Keeler, 5 Wend. 250 (N.Y. Sup. Ct. 1830); Laval v. Myers, 17 S.C.L. (1 Bail.) 486 (1830); Wood v. McCann, 36 Ky. (6 Dana) 366 (1838); Russell v. Pyland, 21 Tenn. (2 Hum.) 131 (1840); Jeffrey v. Ficklin, 3 Ark. 227 (1841); Wheeler v. Spencer, 15 Conn. 28 (1842); Hickerson v. Benson, 8 Mo. 8 (1843); Tarleton v. Baker, 18 Vt.

second cousin to Samuel,[312] wrote that a bet between two residents entitled to vote for county sheriff would be "against sound policy, and ought not to be sanctioned by a court of justice."[313] "It is a fundamental principle of our constitution that elections should be free," said Chase, and he charmingly continued:

> [T]he election of a sheriff is of great importance to the community, and ought to be free from corrupt and undue influence; and such wagers, if countenanced by the court, would certainly have a malignant and evil tendency by making the parties, their connexions and friends, partizans in the election, and creating an interest and views incompatible with the general good and sound policy which is best promoted by selecting those men who are the most fit and best qualified for the office.[314]

Similarly, in 1809, William Van Ness, a thirty-three-year-old justice of the New York Supreme Court, held that a gubernatorial election wager was void on Mansfield's authority.[315] If democratic reasons voided an election wager in England, said Van Ness, "how much is their force increased, when applied to an analogous case in our own country, in which the very existence of every department of the government, depends upon the free, and unbiassed exercise of the elective franchise."[316] James Kent, who agreed with Van Ness, wrote to similar effect five years later:

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9 (1843); Machir v. Moore, 43 Va. (2 Gratt.) 257 (1845); Givens v. Rogers, 11 Ala. 543 (1847); Bettis v. Reynolds, 34 N.C. (12 Ired.) 344 (1851); Gregory v. King, 58 Ill. 169 (1871); Hill v. Kidd, 43 Cal. 615 (1872); Cooper v. Rowley, 29 Ohio St. 547 (1876); Motlow v. Johnson, 39 So. 710, 711 (Ala. 1905).

[312] 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 (Maeva Marcus & James R. Perry eds., 1985) at 739 n.2. Both Chases voted against the ratification of the Constitution. *The Maryland Convention Proceedings, Saturday, 26 April 1788*, *in* 12 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 647–48 (John P. Kaminski et al. eds., 2015). See also CARROLL T. BOND, THE COURT OF APPEALS OF MARYLAND, A HISTORY 100–02 (1928).

[313] Wroth v. Johnson, 4 H. & McH. 284, 286 (Md. Gen. Ct. 1799). Although it was not at the apex of Maryland's judicial hierarchy, the General Court was "the great court of the people of Maryland while it existed." BOND, *supra* note 312, at 87–91.

[314] Wroth v. Johnson, 4 H. & McH. at 286–87.

[315] Bunn v. Riker, 4 Johns. 426 (N.Y. Sup. Ct. 1809).

[316] Id. at 436.

> when we consider the importance of popular elections to the constitution and liberties of this country, and that the value of the right depends upon the independence, moderation, discretion, and purity with which it is exercised; we cannot but be disposed to cherish a decision which declares gambling upon such elections to be illegal, as being founded in the clearest and most incontestable principles of public policy.[317]

Kent expressly "place[d] the decision of this case upon those great and solid principles of public policy which forbids this species of gambling, as tending to debase the character, and impair the value of the right of suffrage."[318]

The federal courts, too, nixed election wagers. William Cranch, sitting on the Circuit Court for the District of Columbia in 1831, voided on public policy grounds a wager between two residents of Washington DC that Andrew Jackson would not receive Kentucky's electoral vote.[319] After reviewing the authorities, Cranch held that "one of the maxims of sound public policy in all elective governments, [is] that elections should be pure and free," and that "[a]ny contract which would tend to substitute a corrupt for a patriotic motive to influence a vote either directly or indirectly, would be contrary to that maxim."[320] For Cranch, any monetary interest, even an indirect or contingent one, created a corrupt motive. "It is the nature and tendency of the contract, not the degree of mischief which it may effect," he said, taking his cue from Mansfield, "that decides its validity."[321] In a passage that now seems quaint, Cranch worried that the betting parties, prompted by corrupt motives, might sully the election "by exciting the passions, by holding up the promise of their influence in obtaining offices for those who seek them, or by denouncing those already in office; by circulating false reports, by hiring writers and printers to extol their candidate and slander his opponent."[322] No: "So far as the influence used in an

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[317] Vischer v. Yates, 11 Johns. 23, 28 (N.Y. Sup. Ct. 1814).

[318] Id. at 32. The judgment was reversed, on unrelated grounds, on a writ of error to the Senate sitting as the Court for the Correction of Errors. Yates v. Foot, 12 Johns. 1 (N.Y. 1814).

[319] Denney v. Elkins, 7 F. Cas. 464 (C.C.D.C. 1831) (No. 3,790).

[320] Id. at 466–67.

[321] Id. at 467.

[322] Id.

election is prompted by a pecuniary motive, so far it is corrupt, and in violation of the maxim, that elections should be pure."[323]

The two basic democratic principles animating these cases found their fullest expression in an opinion of the Massachusetts Supreme Judicial Court, speaking through Chief Justice Lemuel Shaw, in 1847 (the same year, incidentally, that Shaw's daughter married Herman Melville).[324] The first principle centers on an individual's reasons for voting. As Shaw put it, all voters must exercise "free choice," that is, they must be "free to inquire and to judge, free to will and determine, and free to act with purity and intelligence, uninfluenced and unseduced by interested, sinister, or corrupt motives."[325] Otherwise, said Shaw, "they act without regard to the fitness of the candidate, or to their own sense of duty."[326] As the Pennsylvania Court of Common Pleas said in 1812, a voter who bets on an election "puts the mind … completely into trammels," and "cannot act freely."[327] The second democratic principle is cumulative. Shaw noted: "If one bet can be made on an election, many can be made. If small sums can be staked, large ones can. So that, on a great and exciting popular election, a large amount of money may depend on the result."[328] The electorate, in the aggregate, "will have a common, and may have a large, pecuniary interest in the issue."[329] Often, Shaw reminded us, "a few thousand, or even a few hundred, votes may decide the election of a State; and the election of a State may decide that of the Union."[330] In short, "[a]n election so influenced could not be regarded as the expressed will of an intelligent constituency."[331]

A tendril of English reasoning nearly took firm root in the United States. Wagers that "tend[ed] to introduce indecent discussions" were deep-sixed by the common law.[332] In *Atherfold v.*

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[323] Id.
[324] Ball v. Gilbert, 53 Mass. (12 Met.) 397 (1847).
[325] Id.
[326] Id.
[327] Smyth v. M'Masters, 2 Browne 182, 189–90 (Pa. Ct. Com. Pl. 1812).
[328] Ball v. Gilbert, 53 Mass. (12 Met.) 397 (1847).
[329] Id.
[330] Id.
[331] Id.
[332] Atherfold v. Beard (1788) 100 Eng. Rep. 328, 331; 2 T.R. 610, 615 (K.B.).

Beard, the King's Bench voided a bet that the collection of hops duties in Canterbury for 1786 would exceed that for 1785.[333] Enforcing this wager, said one judge, "might be attended with mischievous consequences to permit any two persons, by the means of laying an impertinent wager, to bring forward a discussion of this sort, and expose to all the world the amount of the public revenue."[334] "[T]his wager could not be proved," said another, "without searching the books relating to the revenues of the country."[335] Van Ness, in his 1812 opinion for the New York Supreme Court, noticed this reasoning. He referred obliquely to the disputed 1792 gubernatorial election and thought that an election wager could generate "a discussion calculated to endanger the peace and tranquility of a community, already sufficiently heated and agitated."[336] There was a separation of powers element too. One of the judges in *Atherfold* said that "Parliament is the proper place in which these questions are to be discussed; and it would be improper to permit it elsewhere."[337] And the Pennsylvania Court of Common Pleas insisted that the validity of an election "ought never to be brought into discussion," because "the legislative and judicial authorities might be put into a state of collision, upon a question, which it is apprehended, the legislature alone is competent to determine."[338] But by 1831, Cranch (in his opinion for the D.C. Circuit Court) was "not so clear" on this aspect of public policy, preferring to rest "mainly upon the tendency of such contracts to introduce corruption into our elections."[339]

C. Contracts Against Free Speech Public Policy

The doctrine that contracts against public policy are void, then, is no stranger to constitutional principles. Indeed, the logic holding election wagers unenforceable shares a common structure with the informed-voter variant of the argument from democracy. Recall that on that view, speech regulations are illegitimate when they deprive

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[333] Id.
[334] Id. (Ashurst J).
[335] Id. (Buller J).
[336] Bunn v. Riker, 4 Johns. 426, 435 (N.Y. Sup. Ct. 1809)
[337] Atherfold (1788) 100 Eng. Rep. at 331; 2 T.R. at 615 (Ashurst J).
[338] Smyth v. M'Masters, 2 Browne 182, 189 (Pa. Ct. Com. Pl. 1812).
[339] Denney v. Elkins, 7 F. Cas. 464, 467 (C.C.D.C. 1831) (No. 3,790).

the citizen of information necessary to meaningfully vote. Likewise, courts voided election wagers because they corrupted the franchise. An election subject to widespread betting, just like an election where critics are censored by the threat of libel damages, "could not be regarded as the expressed will of an intelligent constituency."[340]

Despite this affinity, no American court has squarely held that an NDA is contrary to public policy for concealing information from the voting public. To be sure, the first Restatement of Contracts included the following tantalizing illustration:

> A, a candidate for political office, and as such advocating certain principles, had previously written letters to B, taking a contrary position. B is about to publish the letters, and A fearing that the publication will cost him his election, agrees to pay $1000 for the suppression of the letters. The bargain is illegal.

But it is unclear whence this illustration came. The second Restatement dropped it.

The general rule, even when the first Restatement was published, is that public policy permits "a contract for silence so long as it is not in contemplation to conceal and prevent the punishment of a crime."[341] The closest cases arose from bargains between newspapers and candidates, but the few opinions that exist are old and inconsistent.[342] In 1902, the Vermont Supreme Court voided a contract where a political candidate secretly purchased the editorial support of a newspaper.[343] "To secure a free and exact expression of sovereign will," the Court said, "there must be a proper selection of candidates as well as an honest election."[344] Because "the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favor."[345] A New York court, however, reached the

[340] Ball v. Gilbert, 53 Mass. (12 Met.) 397 (1847).

[341] Wells v. Sutton, 85 Ind. 70, 74 (1882).

[342] English authority also holds as contrary to public policy a bargain that a newspaper be paid to refrain from exercising its right to comment. Neville v. Dominion of Canada News Co [1915] 3 K.B. 556 (C.A.).

[343] Livingston v. Page, 52 A. 965 (Vt. 1902).

[344] Id. at 966.

[345] Id. See also Miller v. Glockner, 1 Ohio App. 149 (1913) ("the secret purchase of the editorial influence of a newspaper is void").

opposite conclusion in 1882.[346] The judge thought that "[t]he press is not a social organ of the people at all; the people have nothing whatever to do with it."[347] "And even if it were a subject of public advantage or disadvantage to have a conscientious press," he insisted, "it cannot … be a ground of interference if the contract was in itself legal."[348]

In a thoughtful article, Alan Garfield has argued that the public policy against enforcement of an NDA must "clearly outweigh" the countervailing enforcement interests.[349] He approached the problem from opposite ends of the public policy spectrum. At one end of the spectrum, contracts protecting disclosure of trade secrets are presumptively enforceable. The sources of public policy weighing in favor of enforcement include tort law (improper use or disclosure of trade secrets is independently actionable), agency law (agents are not typically authorized to use or disclose trade secrets), the Federal Rules of Civil Procedure (the Rules protect trade secrets during discovery), the Federal Rules of Evidence (same), and the Freedom of Information Act (which exempts trade secrets).[350] At the other end of the spectrum, contracts to conceal a crime are void against public policy (although it is an open question whether contracts between offender and victim are unenforceable).[351] Garfield argued that the balance struck by existing law should guide the evaluation of NDAs in the middle of the spectrum. Other legal rights and duties might already weigh disclosure interests against confidentiality interests. When the law imposes compulsory duties (for example, misappropriation of trade secrets or a prohibition on criminal conduct), then that provides guidance for what is inevitably a fact-intensive inquiry.[352]

The problem is that this approach does not reflect the practical shape of NDAs. For Garfield, the task is to place every NDA on a "spectrum" between those contracts that conceal crime (and therefore violate public policy) and those contracts that maintain trade secrets (and therefore do not violate public policy). But what about

[346] Gade v. Robinson Consolidated Mining Co., 26 Alb. L.J. 423 (1882).
[347] Id.
[348] Id. at 424.
[349] Garfield, *supra* note 17, at 315.
[350] Id. at 301–02.
[351] Id. at 306–09.
[352] Id. at 316–18.

contracts that do both? Presumably, an employment confidentiality agreement broad enough to cover trade secrets and criminality would be read down to exclude the latter. Yet some trade secrets might be intimately bound up with criminal or tortious conduct (for example, trade secrets about widely used yet highly dangerous substances). Or, to take another example, suppose that I, an alien, neglect to file a tax return. I pay the penalty and the Internal Revenue Service agrees not to report my misdemeanor to Immigrations and Customs Enforcement. Because it conceals a crime, is this contract automatically unenforceable? The "spectrum" framework is insufficient. There is a plurality of values that animate confidentiality agreements, as Part I detailed. Some of these values are incommensurable. Moreover, the public policy exception to contract enforceability is eclectic. There is no grand theory; an approach that imposes a spectrum on the doctrine invalidly reduces the incommensurable to a common metric. As Frederick Pollock wrote in 1876, the doctrine that contracts against public policy are unenforceable "presents itself as a clustered group of analogies rather than a linear chain of authority."[353] It's a scatterplot, not a spectrum.

D. Modern Times

Modern courts are wary of the public policy exception to NDA enforceability because public policy strongly favors freedom of contract. The U.S. Supreme Court, when it was still in the business of general law, emphasized the "general rule" that "competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."[354] Accordingly, "[t]he principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that

[353] FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND EQUITY 221 (Stevens & Sons 1876). This language survived every subsequent edition; the final (thirteenth) edition was published in 1950. PERCY H. WINFIELD, POLLOCK'S PRINCIPLES OF CONTRACT 261–62 (13th ed. 1950).

[354] Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356 (1931).

doctrine rests."[355] This view is influential in state courts.[356] It is compounded when applied to NDAs, because written agreements waiving speech rights are typically viewed as voluntary and rational bargains.[357] Today, NDAs are voided on public policy grounds if they purport to prohibit a party from reporting criminal misconduct to law enforcement authorities[358] or subsequent employers,[359] or if they conceal civil wrongs like trespass[360] or breach a contract with a third person.[361]

Aside from the common law public policy doctrine, there are two contexts in which modern courts examine the enforceability of NDAs. The first concerns the judicial application of *Pickering v. Board of Education of Township High School District 205*,[362] which "continue[s] to be the meter by which the First Amendment rights

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[355] Id. at 356–57. See also W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 766 (1983) ("a public policy … must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests").

[356] Livingston v. Tapscott, 585 So.2d 839, 841 (Ala. 1991); Bailey v. Lincoln General Ins. Co., 255 P.3d 1039, 1045 (Colo. 2011); Collins v. Sears, Roebuck & Co., 321 A.2d 444, 449 (Conn. 1973); City of Largo v. AHF-Bay Fund, LLC, 215 So.3d 10, 15–16 (Fla. 2017); Emory University v. Porubiansky, 282 S.E.2d 903, 904–05 (Ga. 1981); Robinson v. Allied Property & Cas. Ins. Co., 816 N.W.2d 398, 408–09 (Iowa 2012); Terrien v. Zwit, 648 N.W.2d 602, 608 n.9 (Mich. 2002); Ramapo River Reserve Homeowners Ass'n, Inc. v. Borough of Oakland, 896 A.2d 459, 467–68 (N.J. 2006); Siloam Springs Hotel, LLC v. Century Surety Co., 392 P.3d 262, 268 (Okla. 2017); In re Baby, 447 S.W.3d 807, 822 (Tenn. 2014).

[357] Wilkicki v. Brady, 882 F.Supp. 1227, 1234–35 (D.R.I. 1995) ("[P]ermitting an individual to waive his rights in such a manner advances the fundamental principle of personal autonomy. [Plaintiff] made an arguably rational decision. To deny him the opportunity to exercise his options in the face of a potentially more severe alternative outcome compromises his ability to choose. This is an interest the public shares individually and collectively that should not be lightly discounted.").

[358] Fomby-Denson v. Dep't of Army, 247 F.3d 1366 (Fed. Cir. 2001).

[359] Bowman v. Parma Bd. of Educ., 542 N.E.2d 663 (Ohio App. 1988).

[360] Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850 (10th Cir. 1972).

[361] Unami v. Roshan, 659 S.E.2d 724 (Ga. Ct. App. 2008).

[362] 391 U.S. 563 (1968).

of public employees are measured."[363] Under *Pickering*, the validity of a restraint on public employee speech is determined by "arriv[ing] at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."[364] Under the *Pickering* framework, public employees cannot be dismissed for criticizing their employer[365] or for uttering political remarks to other employees in private conversation.[366] Nor can they be prohibited from accepting compensation for making speeches or writing articles.[367]

Pickering generated a developed jurisprudence that demonstrates how courts can weigh disclosure interests against confidentiality interests. For example, recently the D.C. Circuit in *Baumann v. District of Columbia*[368] upheld the suspension of a police officer for releasing to the news media police radio communications recorded during an exchange of gunfire. On confidentiality interests,[369] the court noted the police department's "weighty interest in preserving confidential information that, if released publicly, could jeopardize the successful conclusion of a criminal investigation."[370] Confidentiality protected the integrity of

[363] Baumann v. District of Columbia, 795 F.3d 209, 215 (D.C. Cir. 2015) (quoting Tygrett v. Barry, 627 F.2d 1279, 1282 (D.C. Cir. 1980)). It's too early to discern the effect of *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S.Ct. 2448 (2018), on the *Pickering* framework. In dissent, Justice Kagan thought that *Janus* will simply create "an exception, applying to union fees alone, from the usual rules governing public employees' speech." Id. at 2491 (Kagan, J., dissenting).

[364] Pickering, 391 U.S. at 568.

[365] Pickering, 391 U.S. 563 (1968).

[366] Rankin v. McPherson, 483 U.S. 378 (1987).

[367] United States v. National Treasury Employees Union, 513 U.S. 454 (1995).

[368] 795 F.3d 209 (D.C. Cir. 2015).

[369] The court stated that in disclosing the recording the officer was speaking as a union official, not a police officer, on a matter of public concern. Id. at 215–16.

[370] Id. at 216.

investigations "by preventing the premature and unauthorized disclosure of the communications."[371] The court acknowledged that the officer and the public "have a strong interest in his speaking to the public about safety issues related to the [department's] management."[372] It was crucial, however, that aside from releasing the audio itself, the officer was free to speak publicly about the incident. And the prohibition on releasing the audio was not indefinite. Because these obligations were "sufficiently tailored temporally and in scope to enable law enforcement better to investigate criminal activity and police operations implicating police safety," the confidentiality interests outweighed the disclosure interests.[373]

The other context in which courts assess NDAs are anti-SLAPP special motions to dismiss or to strike pleadings. Some state courts have held that the local anti-SLAPP statute does not reach lawsuits seeking to enforce NDAs. The Massachusetts Supreme Judicial Court, for example, denied an anti-SLAPP special motion to dismiss because an NDA was a "substantial basis" for the claims independent of the confidant's "petitioning activity."[374] California courts, by contrast, evaluate some NDAs rather closely. If the defendant makes a threshold showing that the challenged cause of action "arises from" its exercise of free speech rights, then the plaintiff must show a probability of prevailing on the claim.[375] If the complaint lacks *all* merit, it will be struck; but if it states and substantiates a legally sufficient claim, it will survive.[376] In fact, the anti-SLAPP statute "poses no obstacle to suits that possess minimal merit."[377] In determining whether the defendant satisfied the threshold "arising from"

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[371] Id. at 217. The court pointed to other legal contexts requiring confidentiality of investigatory information: grand jurors, court reporters, and prosecutors in grand jury proceedings; judicial employees who receive confidential information in the course of their official duties; and the Freedom of Information Act's exclusion of records on law enforcement investigations and proceedings. Id. at 216.

[372] Id. at 217.

[373] Id. at 212.

[374] Duracraft Corp. v. Holmes Products Corp., 691 N.E.2d 935, 943–44 (Mass. 1998).

[375] Equilon Enterprises, LLC v. Consumer Cause, Inc., 52 P.3d 685, 694 (Cal. 2002).

[376] Navellier v. Sletten, 52 P.3d 703, 708 (Cal. 2002).

[377] Id. at 712.

condition, the court looks to "the gravamen or principal thrust" of the plaintiff's action.[378] "The anti-SLAPP statute's definitional focus," explained the Supreme Court of California, "is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech."[379] It is, then, an inquiry that privileges substance over form.

The Supreme Court of California stressed that "the anti-SLAPP statute neither constitutes—nor enables courts to effect—any kind of 'immunity' for breach . . . of contracts affecting speech."[380] But the anti-SLAPP jurisprudence does demonstrate judicial capacity to subject NDAs to free speech scrutiny. For example, in *Vivian v. Labrucherie*,[381] an ex-husband (a police officer) alleged that his ex-wife's statements to the family court and to a sheriff's department internal affairs investigation breached the non-disparagement clause of their settlement agreement. The California Court of Appeal granted the ex-wife's special motion to strike. First, the ex-husband sought "to impose liability on [his ex-wife] for having made her statements to the internal affairs investigators and in her family court papers."[382] Second, the court observed that the non-disparagement clause was relatively narrow because it exempted statements made by the ex-wife to the family court and did not obviously prohibit the ex-wife from making statements to the internal affairs investigators. Moreover, the ex-wife's statements to investigators were privileged. The litigation privilege "promotes full and candid responses to a public agency," and "the dispute in this case involves a significant public concern—a governmental investigation into inappropriate conduct by a police officer."[383]

E. Methodological Choice

A court deciding whether an NDA is void for violating public policy is faced with a methodological choice. The classical common

[378] Episcopal Church Cases, 198 P.3d 66, 73 (Cal. 2009).
[379] Navellier, 52 P.3d at 711.
[380] Id. at 712.
[381] 214 Cal.App.4th 267 (Cal. Ct. App. 2013).
[382] Id. at 274.
[383] Id. at 277.

law public policy cases adopt a categorical approach: if a bargain is an election wager, then it is unenforceable; if an NDA purports to prohibit reporting crimes to law enforcement, then it is unenforceable. The modern approach, by contrast, weighs contract enforcement interests against free expression interests. In *Perricone v. Perricone*,[384] the Connecticut Supreme Court considered whether a confidential discovery agreement in marriage dissolution proceedings violated public policy. The court lined up enforcement interests: freedom of contract, administration of justice, personal autonomy, and privacy.[385] It then assembled disclosure interests: free speech, law enforcement, public information, and official accountability.[386] The court, after noting that the NDA was neutral as to law enforcement and public information, and that the plaintiff was not an official, concluded that there was no public policy violation.[387]

The category/balance binary is a hackneyed First Amendment trope.[388] In almost every case, one side excoriates the other for arbitrary categories or impenetrable balances. The predictable dynamic played out in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[389] where a sharply divided court struck down an Illinois law permitting public-sector unions to charge nonmembers fees for collective bargaining. Justice Alito's analysis placed the state regulation in the category of laws compelling the subsidization of private speech. That was, essentially, the end of the inquiry. In his mind, the court was "simply enforcing the First Amendment as properly understood" when the state law "abridged fundamental free speech rights."[390] The case which the

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[384] 972 A.2d 666, 686–89 (Conn. 2009).

[385] Id. at 687–88.

[386] Id. at 688.

[387] Id. at 688–89. While *Perricone v. Perricone* demonstrates that courts actually employ the balancing methodology, I am not suggesting that the court got it right or even did it well.

[388] See generally Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016); JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 35–58 (2001). See also Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214–18 (2010); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34–36 (1986).

[389] 138 S. Ct. 2448 (2018).

[390] Id. at 2486 n.28.

majority overruled, *Abood v. Detroit Board of Education*,[391] was criticized as unprincipled, malleable, and discretionary.[392] For good measure, Alito's opinion faulted Justice Kagan's dissent for "propos[ing] that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests."[393] "This form of minimal scrutiny," huffed Alito, "is foreign to our free-speech jurisprudence."[394] For her part, Kagan in dissent took issue with the arbitrariness of the result. Her "key point" was that Alito's opinion is anomalous and "creates an unjustified hole in the law."[395]

These methodological approaches are typically seen as adversaries, but the real issues are *who* does the balancing and *when*. A category, to be established and justified, is the result of an upstream balancing process. *Perricone* illustrates this: lower courts will not relitigate the balance that the Connecticut Supreme Court struck between enforcement interests and free speech interests. Rather, they will apply *Perricone* categorically as establishing a rule that confidentiality clauses in divorce settlements are enforceable. In the result, then, courts will rely on precedent to decide whether a particular NDA enforceability problem should be resolved categorically or as a balancing exercise. *Stare decisis* may foreclose a substantive inquiry.

F. Now We're Talking: Two Examples

When do the free speech implications of an NDA become so acute that it is against public policy to enforce it? Baked into this question is the assumption that a confidentiality agreement is presumptively enforceable. Yet it is not simply a matter of stamping an NDA with the "waiver" label and concluding that free speech is not implicated. Nor is it a matter of voiding all NDAs that conceal information of public concern.

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[391] 431 U.S. 209 (1977).
[392] Janus, 138 S. Ct. at 2481.
[393] Id. at 2465.
[394] Id.
[395] Id. at 2497.

1. Clifford v. Trump

In October 2016, Michael Cohen (on behalf of a company called Essential Consultants LLC, or EC) and Stephanie Clifford signed an agreement.[396] Cohen, once a lawyer and fixer for President Trump, signed the agreement to pay $130,000 to Clifford in exchange for her silence over information designated as confidential. There is a live issue about the agreement's parties. It says that it is between "'EC, LLC' and/or David Dennison, (DD), on the one part, and Peggy Peterson, (PP), on the other part."[397] (The "and/or" contemplates that it is not essential that both EC and DD be parties.) The agreement notes that the names "are pseudonyms whose true identity will be acknowledged in a Side Letter Agreement."[398] The "side letter agreement" identifies Peggy Peterson as Stephanie Clifford (the identification of David Dennison is redacted in the court filing).[399] The nominal David Dennison has not signed the agreement. On each page, there is space for "PP" and "DD" to initial, and the letters "EC" are always in the space reserved for "DD."[400] The address for service on DD is an address for Cohen of Essential Consultants, and Cohen signed the agreement as attorney for Essential Consultants. Trump has publicly acknowledged that he knew about the agreement and reimbursed Cohen. Most likely, Cohen was acting as Trump's agent.

The agreement defines confidential information as follows:

> (a) All *intangible* information pertaining to DD and/or his family, (including but not limited to his children or any alleged children or any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct or related matters), and/or friends …
>
> (b) All *intangible* information pertaining to the existence and content of the Property;

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[396] Confidential Settlement Agreement & Mutual Release (Oct. 28, 2016) § 4.1(a), Ex. 1 to First Am. Compl., No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Mar. 26, 2018).

[397] Id. at § 1.1.

[398] Id.

[399] Ex. A to Confidential Settlement Agreement & Mutual Release, *supra* note 396.

[400] Confidential Settlement Agreement & Mutual Release, *supra* note 396 *passim*.

> (c) All *intangible* private information (*i.e.*, information not generally available to and/or known by the general public) relating and/or pertaining to DD, including without limitation DD's business information, familial information, any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct, related matters or paternity information, legal matters, contractual information, personal information, private social life, lifestyle, private conduct …
>
> (d) All *tangible* materials of any kind containing information pertaining to DD … including without limitation letters, agreements, documents, audio or Images recordings [*sic*], electronic data, and photographs, canvas art, paper art, or art in any other form on any media. [These] are collectively referred to as, the "Property."[401]

The agreement permanently prohibits Clifford from disclosing any confidential information—except if compelled by legal process, but she must provide Dennison with ten days' notice—and requires the transfer of all the "Property" to Dennison. Liquidated damages are set at one million dollars per breach, and confidential arbitration is required. The existence of the NDA itself is deemed confidential.[402]

Would the enforcement of this agreement violate public policy? For now, assume the following. First, that Dennison is Trump (which seems to be a matter of public notoriety). Trump was the Republican nominee for President when the agreement was signed. Second, that Trump is bound by the agreement, because his agent Cohen was acting within authority to sign the NDA. Third, that the agreement is not a settlement agreement, despite it being styled a "Confidential Settlement Agreement and Mutual Release." There is no evidence, when this agreement was signed, that there was any formal dispute to settle.

This NDA is amenable to a classic public-policy categorical analysis. The fundamental point is that courts cannot be enlisted to delegitimize a presidential election. The bargain strikes at the heart of the free speech argument from democracy, and there is a strong analogy to the election wager cases. American courts have voided election wagers even for county sheriff because they can distort the franchise. The presidency is the most consequential office in the country. The stakes for ensuring that voters are not thwarted from

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[401] Id. at § 4.1.
[402] Id. at §§ 3.3, 4.4, 4.4.1, 5.1.2, 5.2, 7.1.

contributing to the ongoing development of public opinion could hardly be higher. Whether a candidate adheres to traditional norms of sexual morality matters to a large portion of voters. The categorical conclusion is that courts should not enforce an NDA if it purports to conceal information relevant for the evaluation of a presidential candidate.

It's worth pausing to emphasize the importance of Trump's status as a candidate for public office when the NDA was signed. Candidates waive some of their privacy rights. The very act of announcing one's candidacy expresses an intent to represent others' interests, to act on their behalf, and to exercise official power over them. A private individual is entitled to exercise autonomy by paying others to keep secrets; but a potential representative who intends to claim governmental authority over others partially waives that power. A candidate's claim that she will represent her constituency implicates her discretion, judgment, and morality. It puts her character in issue. Her qualities of judgment and integrity are relevant to the ongoing formation of public opinion.

On a balancing approach, the free speech interests are familiar. Enforcement interests include: freedom of contract, privacy, and democracy itself. Freedom of contract is, of course, very important, but its importance is already taken into account by the default position of enforceability. Moreover, a presidential candidate's privacy interest is diminished; that which is usually private and intimate is publicly salient. The democracy interest derives from Trump's continued insistence that the information is false. The NDA may protect democratic discourse and opinion formation by ensuring they are not polluted with falsity. But we've seen this argument before. Falsity is valuable because it can shine light on truth. And, as Justice Brennan emphasized in *New York Times Co. v. Sullivan*, a rule that protects only true information deters criticism of government, "even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[403] It therefore "dampens the vigor and limits the variety of public debate."[404]

[403] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).
[404] Id.

Does the conclusion that the Clifford NDA is against public policy change with the three assumptions? Suppose, first, that David Dennison really is Elliot Brody, a prominent Republican fundraiser who is neither a public official nor a candidate.[405] An NDA seeking to conceal information about Brody's influence over public officials may very well violate public policy. But the link between Brody's extramarital affairs and an informed electorate is rather more attenuated. An NDA hiding information about Brody's polygamy does not enlist a court to be complicit in electoral secrecy. Second, assume that Cohen acted entirely independently of Trump, and was not his agent. Enforcing such an NDA would still conscript the courts to deny voters information necessary for them to intelligently exercise the franchise. Finally, suppose that the NDA was signed as part of a real settlement agreement of, say, a speech tort action brought by Trump against Clifford. This is a much closer call. The information at issue may have already been publicly disclosed as part of the conduct underlying the speech tort. Also, free expression interests would have played a role in the speech tort action: a public official extracting a settlement may indicate that the defendant concededly acted with something close to *Sullivan*-style actual malice. And there is the administration of justice interest in settlement. But the import of the information about public officials is so great, and the limitation to settlements reached by public officials sufficiently circumscribed (and the value of confidential settlements so disputed), that I am inclined to say that this NDA violates public policy too.

2. Perkins v. Weinstein

Twenty years ago, Zelda Perkins signed an NDA as part of a settlement with Miramax, a company controlled by Harvey Weinstein and his brother. Perkins alleged that Weinstein had sexually harassed her for several years. Miramax agreed to pay Perkins £125,000 to settle her claim confidentially. The NDA prohibited

[405] Joe Palazzolo & Michael Rothfeld, *GOP Official Resigns After Secret Payments*, WALL ST. J., Apr. 14, 2018, at A1; Michael Rothfeld & Joe Palazzolo, *Top GOP Fundraiser to Stop Hush Payments Over Affair*, WALL ST. J. (July 1, 2018, 5:30 PM), https://www.wsj.com/articles/top-gop-fundraiser-to-stop-hush-payments-over-affair-1530477047.

Perkins from retaining a copy of the agreement. It required Perkins to give notice if "any criminal legal process" involving Weinstein or Miramax required her testimony, and it required her to "use all reasonable endeavours to limit the scope of the disclosure as far as possible."[406]

If this NDA were signed outside the settlement context, then there is little doubt that it would violate public policy for concealing tortious and perhaps criminal conduct. Some state legislatures have struck the balance in favor of nonenforcement even for confidential settlements, voiding such agreements in cases of sexual harassment or abuse.[407] One commentator has argued for a significant tripartite reform to capture repeat offenders.[408] These laws and proposals rightly focus on the harm to victims and third parties.[409] NDAs were the primary engine of Weinstein's impunity.

There are substantive reasons, grounded in free speech, supporting the conclusion that the confidential settlement of a sexual harassment claim may violate public policy. For one, provisions purporting to fetter Perkins's future testimony and prevent her from accessing the NDA are problematic from a traditional public policy standpoint. Perkins "is astonished by a system that prevents her from having a copy of her own agreement."[410] But most importantly, the morass of NDAs shielding sexual harassment works serious free speech harms. Free speech, if understood as truth-promoting, is undermined when a network of NDAs conceals widespread workplace wrongdoing. The scale of employment NDAs and confidential arbitration presents, in the aggregate, a fundamental threat to the argument from truth. Similarly, free speech, if understood as agency-enhancing, is frustrated when a vast NDA web hides data and therefore prevents autonomous agents from deciding what to believe and what to do. For example, NDAs prevented moviegoers from forming independent beliefs about Weinstein, and prevented

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[406] Matthew Garrahan, *'I was made to feel ashamed for disclosing his behaviour'*, FIN. TIMES, Oct. 24, 2017, at 9.

[407] E.g., Cal. Civ. Proc. Code § 1002 (West 2018).

[408] Ayres, *supra* note 16.

[409] For an argument that public policy is all about third-party harms, see Hoffmann & Lampmann, *supra* note 19.

[410] Garrahan, *supra* note 406.

them from weighing reasons for paying to see the movies he produced.

As Julia Apostle, Twitter's former lead counsel, wrote in the *Financial Times*, the sheer number confidential settlements is salient.[411] "Eight is a lot," she wrote with reference to Weinstein, "no matter the timeframe."[412] The difficulty, of course, is proving that there are more confidential settlements out there. For the moneyed predator, the whole point of the NDA is to ensure that victims do not transmit information to one another. The value of each subsequent victim's claim increases if she knows that it is part of a pattern of wrongdoing rather than an isolated occurrence. Because of this inevitable information asymmetry, which was so destructive to so many for so long, it seems that a prophylactic rule is an appropriate solution. Mansfield, and the numerous American judges who followed him, voided election wagers because of their "tendency" to violate fundamental constitutional principles. One election wager might be insignificant, but allowing one allows all. The #MeToo movement has unleashed an unprecedented communal reckoning with the profound damage and hurt inflicted by NDAs. Each NDA that purports to conceal sexual harassment or abuse has the tendency to harm free speech. Courts should recognize that enforcing sexual misconduct NDAs makes the judicial process complicit in this harm.

CONCLUSION

Too often, NDA doctrine is driven by dogma. Whenever free speech side-eyes an NDA, a defensive chorus rises: "Rights waived are rights lost." "NDAs exercise free speech rights." "Public policy favors the enforcement of contracts." These are natural, instinctive, and internalized voices. We have lived with them for decades. But they are wrong. NDAs do not exercise free speech rights; they waive them. Rather than simply assert that voluntary waiver trumps free speech, in the wake of the NDA crisis it's necessary to actually weigh the competing interests. This Article has suggested how courts should structure that weighing process.

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[411] Julia Apostle, Opinion, *Weinstein's case shows how power corrupts in legal bargains*, FIN. TIMES, Oct. 14–15, 2017, at 12.

[412] Id.

COMPARATIVE JUDICIAL FEDERALISM

Jeffrey Steven Gordon[*]

This Article argues that the strength of a federal free speech guarantee varies with a country's particular species of judicial federalism. It first develops a theoretical framework for comparative judicial federalism, that is, the relationship between local (state) and central (federal) courts. The framework is structured around judicial federalism's three dimensions: institutional, jurisdictional, and jurisprudential. After justifying these three dimensions, the Article deploys the theoretical framework to compare Australia and the United States. It concludes that in one context—the enforcement of federal free speech norms against the common law—Australia's normally modest implied freedom of political communication matches and might even surpass the Free Speech Clause of the First Amendment.

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INTRODUCTION

The High Court of Australia insists that the implied freedom of political communication differs from the Free Speech Clause of the First Amendment to the United States (US) Constitution. The Court refused 'to adopt the United States doctrine' that posits the national constitution as an external bar to the enforcement of conflicting state common law; rather, Australian law forms 'one system of jurisprudence'.[1] And the Court rarely neglects to intone that the implied freedom neither confers an individual right nor extends beyond discussion of political matters.[2] Yet despite these differences, the implied freedom and the First Amendment look very similar when enforced against the common law. Both the High Court of Australia and the US Supreme Court fashioned national common law defences to speech torts. They rewrote the common law in the name of federal constitutional free speech guarantees. If there is a difference between the implied freedom and the First Amendment in the context of the common law, it is one of degree rather than kind.

In fact, in one respect the implied freedom of political communication may very well outshine the Free Speech Clause. In the US, the combined force of the state action doctrine and freedom of contract makes it highly unlikely that the First Amendment will be deployed to limit the state common law of contract. The Supreme Court[3] in 1991 all but foreclosed that possibility, holding that promissory estoppel escapes free speech scrutiny because it 'simply requires those making promises to keep them'.[4] But in Australia, the implied freedom is not so hamstrung. 'Of necessity', said the unanimous High Court in 1997, 'the common law must conform with the Constitution' and 'the common law in Australia cannot run counter

[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–64.

[2] *McCloy v NSW* (2015) 257 CLR 178, 229 [120] (Gageler J) 258 [219] (Nettle J) 283 [317] (Gordon J).

[3] Unless context dictates otherwise, 'Supreme Court' refers to the US Supreme Court and 'High Court' refers to the High Court of Australia.

[4] *Cohen v Cowles Media Co* (1991) 501 US 663, 671.

to constitutional imperatives'.[5] The implied freedom 'has an important role in the formulation of common law principle', including the development of a new category of qualified privilege for defamation and limits on breach of confidence in equity.[6] Analogously, as I argue in this Article, there is ample scope for the development of a public policy of political communication that voids some confidentiality agreements.

If the US 'stands alone … in the extraordinary degree to which its Constitution protects freedom of speech and of the press',[7] then what explains the remarkable scope of Australia's purportedly modest implied freedom? This Article argues that the answer lies in each country's system of judicial federalism. Judicial federalism — the relationship and extent of integration between local (state) and central (federal) courts — has received very little comparative attention.[8] In part, this is because domestic law of judicial federalism tends to be intricate and complex; intricacy begets myopia.[9]

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[5] *Lange* (n 1) 566.

[6] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 220 [20] 224 [35] (Gleeson CJ).

[7] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996) 195.

[8] Comparative judicial federalism should be distinguished from comparative judicial review, which has enjoyed an explosion of scholarship since 1990. See, eg, Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar 2018); Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge UP 2018); Benjamin Bricker, *Visions of Judicial Review: A Comparative Examination of Courts and Policy in Democracies* (ECPR Press 2016); Gerhard van der Schyff, *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (Springer 2010); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2008); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge UP 2003); Yong Zhang (ed), *Comparative Studies on the Judicial Review System in East and Southeast Asia* (Kluwer 1997); Donald W Jackson and C Neal Tate (eds), *Comparative Judicial Review and Public Policy* (Greenwood 1992). 'Constitutional theory has been obsessed for many years with an attempt to provide an adequate justification for judicial review.' Alon Harel and Adam Shinar, 'The Real Case for Judicial Review' in Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar 2018) 13.

[9] Martin Redish diagnosed judicial federalism's 'doctrinal myopia'. Martin H Redish, 'Intersystemic Redundancy and Federal Court Power: Proposing a Zero

This Article develops a general analytical framework for comparative judicial federalism by isolating its three dimensions and applies that framework to the US and Australia.

In contrast to the welter of literature on comparative judicial review, comparative judicial federalism scholarship is small and splits into two camps. The first is consciously comparative, focused on specific pairwise comparisons anchored by the US. There is, for example, work on judicial federalism in the US and the European Union (EU). The second camp is not explicitly comparative but its implicit comparativism sheds light on an instantiation of judicial federalism.[10] It is popular fare in Australian legal scholarship to examine the fidelity and heresy of Chapter III against the Article III scripture. This literature does not brand itself as comparative judicial federalism, but its comparative analysis brings the Australian judicial structure into sharper relief.

The theoretical apparatus developed here provides analytical horsepower for thinking systematically about judicial federalism. It argues that there are three dimensions to judicial federalism: institutional, jurisdictional, and jurisprudential. First, the institutional dimension concerns the existence of separate systems of state and federal courts. The US, for example, has maintained a separate network of inferior federal courts since 1789. India's judiciary, by contrast, is unitary. Second, the jurisdictional dimension refers to the distribution of judicial power between the central and local courts. For example, inferior federal courts in the US are statutory, but that statutory jurisdiction is wide, encompassing diversity and federal question cases. Compare this to Canada, where the jurisdiction of the most important federal trial court is narrow and specialised, and the provincial courts loom much larger in the administration of justice. The third dimension is jurisprudential: identifying the sources of law binding on the central and local courts. The High Court administers a national common law, binding on state and federal judges alike; but in the US there is no federal general common law, and each state articulates its own common law.

Tolerance Solution to the Duplicative Litigation Problem' (2000) 75 Notre Dame L Rev 1347, 1347.

[10] Ran Hirschl calls these single-country studies. Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 232–35.

After developing the analytical framework for comparative judicial federalism, this Article applies it to the US and Australia. The ultimate conclusion draws on a well-known fact about the jurisprudential dimension, namely that there is a national common law in Australia over which the state courts do not have the final, authoritative say. This is similar to American judicial federalism before 1938, under the regime of *Swift v Tyson*,[11] when American federal and state courts were free to develop the general common law independently of each other. But in 1938 *Erie Railroad Co v Tompkins*[12] overthrew *Swift*, recasting the common law as state law to which federal courts had to defer. Today in the US, the primary site of the common law is the states and there is no federal general common law. The High Court administers a regime that is functionally equivalent to a binding version of *Swift v Tyson*, which I call *Swift*-plus.

The latter part of the Article deploys the theoretical framework in two contexts: torts and contracts. It argues that the enforcement of federal constitutional free speech guarantees in defamation cases and in breach of confidentiality cases is partly determined by the existence of a national common law. Although the implied freedom is weaker than the First Amendment, its operation is strengthened by Australia's judicial federalism. Thanks to the close integration of federal and state courts in Australia, the application of the implied freedom to the common law of defamation operates very similarly to the First Amendment. And in cases involving breach of nondisclosure agreements, the implied freedom may very well eclipse the Free Speech Clause. Australian judicial federalism, in other words, augments the implied freedom.

It makes sense to choose the US and Australia to investigate the influence of judicial federalism on the status of free speech. This is not merely because the US and Australia share similar common law heritages, constitutional traditions, political institutions and cultural propensities. American public law is deeply influential in Australia. The Australian framers were particularly taken with Article III, modifying and adapting it to create Chapter III. Although they were mostly faithful to the Article III precedent, in crucial details they deviated. The theoretical framework refines our capacity to pinpoint similarities and differences in versions of judicial federalism.

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[11] 42 US 1 (1842).

[12] 304 US 64 (1938).

This Article, then, makes two contributions. First, it generates an analytical framework for the critical evaluation of judicial federalism. Disentangling the different ways in which judiciaries divide along the three dimensions of judicial federalism provides analytical clarity and a platform for critical analysis.[13] Second, this Article connects constitutional structure to constitutional rights. It shows that judicial federalism impacts rights in unexpected and diverse ways. The analytical framework illuminates the surprising conclusion that Australian federal-state judicial integration augments free speech protection, even in the absence of a national bill of rights.

I. COMPARATIVE JUDICIAL FEDERALISM

Modern comparative federalism is partly focused on categorical and conceptual refinement ('classical federalism') and partly on the relationship between federalism and self-determination ('post-conflict federalism').[14] In its definitional mode, federalism is a 'genus of political organization'[15] defined by 'the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority'.[16] There are many species of federalism: the US and Australia, for example, are federations, compound polities combining the federal government and the constituent states, 'each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of a significant portion of its legislative,

[13] Hirschl (n 10) 238 (one type of comparative inquiry 'is meant to generate concepts and analytical frameworks for thinking critically about constitutional norms and practices').

[14] Sujit Choudhry and Nathan Hume, 'Federalism, devolution and secession: from classical to post-conflict federalism' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 356, 357–59, 363–68; Sujit Choudhry, 'Classical and post-conflict federalism: Implications for Asia' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* 163 (Edward Elgar 2014).

[15] Ronald L Watts, 'Federalism, Federal Political Systems, and Federations' (1998) 1 *Annual Rev of Political Science* 117, 120.

[16] Daniel Halberstam, 'Comparative Federalism and the Role of the Judiciary' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *Oxford Handbook of Law and Politics* (OUP 2008) 142, 142.

administrative, and taxing powers, and each directly elected by its citizens'.[17] The EU, by contrast, is usually designated a hybrid.[18]

The literature on comparative judicial federalism is dwarfed by the welter of comparative scholarship on federal supreme courts and judicial review. And the little that exists focuses on the US and the EU, noting institutional deficiencies and suggesting reform.[19] One scholar, for example, argued that the lack of integration between member state court systems and the EU judiciary will hinder the EU's long-term goal of political integration.[20] Another drew from the EU preliminary ruling system to argue for a certification practice of questions of federal law by American state courts to their federal Supreme Court.[21] This Article generalises by developing a workable analytical framework.

A. The Three Dimensions of Judicial Federalism

In comparing judicial federalism in the US and the EU, Michael Wells 'locate[d] both systems on a spectrum, in which weaker forms of judicial federalism are at one end and stronger ones at the other'.[22] On this account the EU has a 'stronger' judicial federalism than the US because local courts are a stronger constraint on central authority.[23] Wells highlighted two factors establishing the comparative 'strength' of EU judicial federalism. First, the courts of member states are primarily entrusted with the enforcement of EU law. The EU does not have a network of courts of first instance distributed throughout the member states.[24] Second, the European Court of Justice (ECJ) does not have general appellate jurisdiction over member

[17] Watts (n 15) 121.

[18] ibid 120–21.

[19] For a notable exception (more than twenty years ago), see the symposium on federal jurisdiction in issue 5 of volume 46 of the South Carolina Law Review (1995) 46 SCL Rev 641, 641–1074.

[20] Michael L Wells, 'Judicial Federalism in the European Union' (2017) 54 Hous LR 697.

[21] Jeffrey C Cohen, 'The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 Am J Comp L 421.

[22] Wells (n 20) 719.

[23] ibid 702–03, 719, 723–24.

[24] ibid 702, 722–23, 727–33.

state courts on matters of EU law. Member state courts must first request that the Court of Justice decide a question of law, and once decided, the member state court implements the ruling.[25]

The idea that judicial federalism is a spectrum is suggestive, but it needs development. Wells notes, for example, that neither the US Supreme Court nor the ECJ has jurisdiction to decide matters of local law.[26] Germany's federal courts, by contrast, do possess jurisdiction to resolve questions of purely local law.[27] The US is therefore a 'stronger' judicial federalism because, in the absence of applicable federal law, the national courts lack power to revise state law. 'But,' says Wells, 'Germany tilts toward a "strong" form of judicial federalism in another way; the absence of a network of lower federal courts'.[28] There is, then, more than one 'spectrum' of judicial federalism.

These considerations suggest at least three dimensions to judicial federalism: institutional, jurisdictional and jurisprudential. The institutional dimension concerns the existence of separate systems of state and federal courts. On this dimension, the only necessary corollary of a federal constitution is *one* court issuing final decisions on federal law. At the US Constitutional Convention, for example, John Rutledge urged that state courts should decide all cases at first instance; the right to appeal to the Supreme Court would be sufficient to uniformly enforce federal law. James Madison objected on pragmatic grounds and his compromise — conferring a legislative power but not duty to create federal trial courts — eventually prevailed. The Judiciary Act of 1789 established a network of inferior federal courts which, although initially relatively weak, today exerts enormous influence in settling questions of federal law.[29] But in the early days of the US Constitution, it was possible for Congress to refuse to exercise its power to establish inferior federal courts, which would have ordained a very different conception of judicial

[25] ibid 722–23, 733–46, 765–74.
[26] ibid 719–20.
[27] ibid 719.
[28] ibid 721.
[29] Richard H Fallon Jr and others, *Hart and Wechsler's The Federal Courts and The Federal System* (7th edn, Federation Press 2015) ch 1.

federalism.[30] By contrast, for most of the twentieth century the Australian federal judiciary was minimal. Before the 1970s, Parliament created only two federal courts of limited jurisdiction (bankruptcy and labor).[31] State courts exercised original jurisdiction in nearly all matters subject to general appellate review in the High Court.[32] And, to take a final example at the other extreme, in India there is a unitary central judiciary and no separate system of local courts.[33]

The second dimension is jurisdictional: the distribution of judicial power between the central and local courts. In the US, the federal and state judiciaries are partly integrated by relatively intricate jurisdictional rules. State courts 'have inherent authority, and are thus presumptively competent' to decide cases arising under federal law; Congress may, however, affirmatively vest federal courts with exclusive jurisdiction over particular federal claims.[34] Federal courts have '"limited jurisdiction," possessing "only that power authorized by Constitution and statute,"'[35] but that jurisdiction, though limited, is wide, encompassing diversity and federal question cases. The result is a large area of concurrent jurisdiction, where cases can be brought in either state or federal court, and there is significant dialogue between the court systems.

Compare this to Canada, where the jurisdiction of the most important federal trial court is 'narrow and specialized',[36] and the provincial courts loom much larger in the administration of justice. The provincial superior courts 'have always occupied a position of

[30] This view is not uniformly accepted. Theodore Eisenberg, 'Congressional Authority to Restrict Lower Federal Court Jurisdiction' (1974) 83 Yale LJ 498.

[31] Harry Gibbs, 'Developments in the Jurisdiction of Federal Courts' (1981) 12 UQLJ 1, 4.

[32] The Privy Council also heard appeals from state courts exercising state jurisdiction until the enactment of the Australia Act 1986 (Cth). Section 39(2)(a) of the Judiciary Act 1903 (Cth) prohibited appeals to the Privy Council from state courts exercising federal jurisdiction. *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1137-1140.

[33] Anil Chandra Banerjee, *The Constitution of the Indian Republic* (2nd edn, A Mukherjee 1950) 63.

[34] *Tafflin v Levitt*, 493 US 455, 458–59 (1990).

[35] *Gunn v Minton*, 568 US 251, 256 (2013), quoting *Kokkonen v Guardian Life Insurance Co of America*, 511 US 375, 377 (1994).

[36] Garry D Watson, 'Finality and Civil Appeals—A Canadian Perspective' (1984) 47 LCP 1, 1.

prime importance in the constitutional pattern of this country',[37] partly because, '[a]s courts of general jurisdiction, the superior courts have jurisdiction in all cases except where jurisdiction has been *removed* by statute'.[38] And the Supreme Court of Canada has successively narrowed the jurisdiction of the federal trial court. Recently, for example, the Court held that the federal trial court had no jurisdiction to hear a claim for declaratory relief by 'a federal company, created under a specially enacted federal statute, whose sole function under the statute is to operate a federal undertaking and whose claim for declaratory relief focusses exclusively on its right to carry out its statutory mandate free from unconstitutional constraints imposed by municipal bylaws'.[39] The effect is that the docket of Canada's federal trial court is dominated by challenges to specific decisions of federal bodies.[40]

It is worth pausing to emphasise that consideration of each dimension of judicial federalism is necessary before any general conclusions can be drawn. Looking at jurisdiction alone, for example, it is tempting to conclude that judicial federalism is 'stronger' in Canada than the US, because the jurisdiction of the federal trial court in Canada is so narrow. But the institutional dimension reveals a more complex reality. The provincial superior courts are, in fact, federal in one important respect: their judges are appointed and paid by the federal government.[41] Because of this institutional arrangement — provincial courts are provincially administered but federally appointed — these courts 'cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction',[42]

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[37] *A-G (Canada) v Law Society of British Columbia* [1982] 2 SCR 307, 327 (Estey J).

[38] *Windsor (City) v Canadian Transit Co* [2016] 2 SCR 617 [32] (Karakatsanis J).

[39] ibid. The characterisation of the case quoted is from the dissenting judgment of Justices Moldaver and Brown. ibid [118].

[40] ibid [18] (Karakatsanis J) (the trial judge 'observed that the [plaintiff] is not challenging a specific decision of a federal body, as is normally the case in the Federal Court').

[41] British North America Act 1867, ss 96, 100.

[42] *Law Society of British Columbia* (n 37) 327 (Estey J).

and 'they weave together provincial and federal concerns and act as a strong unifying force within our federation'.[43]

The third dimension of judicial federalism is jurisprudential: identifying the sources of law binding on the central and local courts. An intertemporal comparison in the US is revealing. Before 1938,[44] a federal district judge enforcing a state right of action was duty-bound to follow state statutes (including state court interpretations of those statutes) and, on matters of local concern, the decisions of state courts. But on matters 'of general law not regulated by statutes, and not essentially local in their nature',[45] he[46] was free to ascertain upon general reasoning and legal analogies the just rule furnished by the principles of general law governing the case.[47] This opened 'a wide field of general jurisprudence in which the federal courts decide[d] cases according to their independent judgment'.[48] In such cases, federal courts could ignore state common law when enforcing state-created rights; state law was a weak constraint on federal court authority.

American judicial federalism before 1938 gave federal judges access to a body of 'general' common law — what Justice Holmes dismissed as 'one august corpus … a transcendental body of law outside of any particular State but obligatory within it'[49] — which could, at the federal judge's discretion, displace state common law. Suppose, for example, that a landowner sued a rail company in federal court for negligently starting a fire that raced across several

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[43] *Windsor* (n 38) [32] (Karakatsanis J). See Peter W Hogg, 'Federalism and the Jurisdiction of Canadian Courts' (1981) 10 UNBLJ 9, 15 ('The courts were provincial: their constitution, organization and maintenance was a provincial responsibility. However, it seems likely that the framers … did think of them as national courts.').

[44] In 1938, the US Supreme Court decided *Erie Railroad Co v Tompkins*, 304 US 64 (1938), which overruled *Swift v Tyson*, 41 US 1 (1842).

[45] George C Holt, *The Concurrent Jurisdiction of the Federal and State Courts* (Baker, Voorhis & Co 1888) 160.

[46] Before 1950, all federal district judges were men. Burnita Shelton Matthews was the first woman appointed to a federal district court in 1950.

[47] *Swift* (n 44).

[48] *Cole v Pennsylvania Railroad Co*, 43 F2d 953, 955 (2d Cir 1930). See also *Erie* (n 44) 75 (referring to 'the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment').

[49] *Black & White Taxicab & Transfer Co v Brown & Yellow Taxicab & Transfer Co*, 276 US 518, 533 (1928) (Holmes J).

parcels of land before destroying the plaintiff's property.[50] Suppose also that the New York common law of negligence limited the defendant's liability only to damage caused to adjacent properties.[51] Because 'the logic of the situation and the overwhelming weight of authority [on the general law of negligence] without doubt support[ed] the plaintiff's position', the federal judge could freely ignore the settled New York doctrine.[52]

This practice changed with the momentous 1938 decision *Erie Railroad Co v Tompkins*. *Erie* limited federal judicial power and denied federal judges the authority to ignore state common law. After *Erie*, state courts enjoy sovereignty over *all* state law, subject to the supremacy clause in Article VI. Thus when a federal district court decides a question of state law, that decision binds no one except the parties; state courts may adopt the federal court decision but it is of no formal precedential value. The Fifth Circuit popularised a cute term to describe a district court's prediction of how a state supreme court would resolve an unsettled question of state law: an *Erie* guess.[53] Importantly, state court freedom from inferior federal court doctrine goes the other way too: state courts are not bound by federal district court decisions even on issues of federal law — although this conventional view is up for debate.[54]

These three dimensions may not be exhaustive. They are intended to facilitate the comparative task by acting as a useful analytical technology, isolating the dimensions along which different instantiations of judicial federalism usually differ. The three dimensions can overlap. They focus on the separation between central and local judiciaries, and they highlight that this separation is contingent and dynamic. And where the power of judicial review resides is a reflection of judicial federalism (indeed, one aspect of judicial review, the power of central courts to review local courts at

[50] *Cole* (n 48).

[51] ibid 954.

[52] ibid 955.

[53] *Grey v Hayes-Sammons Chemical Co*, 310 F2d 291, 295 (5th Cir 1962) ('Today, we must make an *Erie*, educated guess as to the law.').

[54] Amanda Frost, 'Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?' (2015) 68 Vand L Rev 53.

least on issues of central law, is an aspect of the jurisdictional dimension, namely, appellate jurisdiction).

B. Judicial Federalism in Australia and the US

The influence of US constitutional law in Australia is strong. The fourth opinion ever issued by the High Court — the first interpreting the Australian Constitution — unabashedly celebrated *McCulloch v Maryland*.[55] The American influence is especially apparent in Chapter III, where Australia's framers found Article III 'an incomparable model', entrenching a separation of federal judicial power.[56] The Australian framers 'adopted so definitely the general pattern of Art. III, but in their variations and departures from its detailed provisions evidenced a discriminating appreciation of American experience'.[57] Months before the High Court first convened, Andrew Inglis Clark, who counted Holmes among his

[55] *D'Emden v Pedder* (1904) 1 CLR 91, 111 (Griffith CJ) (referring to 'the celebrated case of *McCulloch v Maryland*' and concluding that 'as the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance'). Before being appointed the fifth Justice of the High Court of Australia in 1906, HB Higgins published an article in the *Harvard Law Review* describing the High Court's embrace of *McCulloch*. HB Higgins, '*McCulloch v. Maryland* in Australia' (1905) 18 Harv L Rev 559, 560 (referring to 'the great and continuous stream of masterly decisions of the United States Supreme Court').

[56] Owen Dixon, 'The Law and the Constitution' in Severin Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* 44 (2nd edn, William S Hein & Co 1997). The strict separation of judicial power was not constitutionally entrenched until 1956. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[57] Dixon (n 56) 44. Scholarship has documented that the Australian framers were in thrall to Article III and explored the similarities. Zelman Cowen, 'Diversity Jurisdiction: The Australian Experience' (1955–1957) 7 Res Jud 1; WMC Gummow, 'Pendent Jurisdiction in Australia—Section 32 of the *Federal Court of Australia Act 1976*' (1979) 10 FL Rev 211. Some of the comparative scholarship published in Australian law reviews is the work of American professors. William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the Australian Constitution, and the Assist from Article III of the Constitution of the United States' (2009) 33 MULR 718.

personal friends,[58] published on the 'supremacy of the judiciary' in the US and Australia in the *Harvard Law Review*.[59] Invocations of *Marbury v Madison* in the High Court followed on the heels of federation;[60] by 1951 'the principle of *Marbury* [wa]s accepted as axiomatic'.[61] The three dimensions of judicial federalism show the depth of the fidelity, and the heresy, of Chapter III when compared to the Article III scripture.

1. Institutional Dimension

On the institutional dimension, as noted above, the establishment of inferior federal courts was one of the first orders of business for the US Congress.[62] By contrast, Australia embraced the Madisonian Compromise for the better part of the twentieth century, lacking a broad network of inferior federal courts until the creation of the Federal Court of Australia in 1976.[63] The Federal Court of Australia, initially limited to a discrete number of express jurisdictional grants, today can hear and determine all federal questions.[64] In the US, general federal question jurisdiction was conferred on the

[58] John Reynolds, 'AI Clark's American Sympathies and his Influence on Australian Federation' (1958) 32 ALJ 62, 63–64. The US was Clark's spiritual home. Alfred Deakin described Clark as 'centring … especially upon the United States, a country to which in spirit he belonged, whose Constitution he reverenced and whose great men he idolised'. ibid 65, quoting Alfred Deakin, *The Federal Story* (Robertson & Mullens 1944) 30.

[59] A Inglis Clark, 'The Supremacy of the Judiciary Under the Constitution of the United States, and Under the Constitution of the Commonwealth of Australia' (1903) 17 Harv L Rev 1. Clark's essay is dated July 1903.

[60] *Ah Yick v Lehmert* (1905) 2 CLR 593 (Griffith CJ).

[61] *Australian Communist Party v Cth* (1951) 83 CLR 1, 262 (Fullagar J).

[62] The Judiciary Act of 1789 was the twentieth statute passed by the first Congress.

[63] An influential article reignited the proposal to establish a federal superior court. M H Byers and P B Toose, 'The Necessity for a New Federal Court' (1963) 36 ALJ 308. See Gerard Brennan, 'Creation of the Federal Court: A Reflection' (2017) 91 ALJ 461; Michael Black, 'The Federal Court of Australia: The First 30 Years' (2008) 31 MULR 1.

[64] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press 2012) 136–38.

inferior federal courts in 1875.[65] Like the US, state courts in Australia are courts of general jurisdiction. The Supreme Court and the High Court are federal courts established by Article III and Chapter III respectively; unlike the Supreme Court, the High Court is the final judicial authority on matters of federal *and* state law.[66]

In the comparative enterprise, a little realism goes a long way. One of the original justifications for a federal supreme court in both the US and Australia was the uniformity of federal law. This claim is repeated still. But it must be overstated because the opportunity for those courts to perform that function is limited: during the 2015 Term, the US Supreme Court issued 81 opinions; in 2016, the High Court of Australia handed down 53 judgments. Today's empirical reality is that the US Supreme Court and Australian High Court make little difference to uniformity.[67]

2. Jurisdictional Dimension

The model of federal jurisdiction in the US is atomised. American federal jurisdiction, to adopt a famous characterisation of American federal law, is generally interstitial in nature. It is exercised by courts created under Article III.[68] Importantly, Congress may not vest federal judicial power in state courts. State courts are bound by federal law under Article VI's supremacy clause, and when they decide federal questions they do so in the exercise of state

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[65] Fallon and others (n 29) ch 1. For completeness, general federal question jurisdiction was conferred on federal circuit courts in 1801, but the grant was repealed in 1802. Judiciary Act of 1801, s 11; Wythe Holt, 'The First Federal Question Case' (1985) 3 LHR 169.

[66] It is true as a general proposition that the US Supreme Court has no power to decide matters of purely state law. On rare occasions, the Court will judge the adequacy of a state law judgment if it was rendered antecedent to, contrary to, and intended to evade, a federal right. E Brantley Webb, 'How To Review State Court Determinations of State Law Antecedent to Federal Rights' (2011) 120 Yale LJ 1192, 1204–23.

[67] Abbe R Gluck, 'Intersystemic Statutory Interpretation: Methodology as "Law" and the *Erie* Doctrine' (2011) 120 Yale LJ 1898, 1966; Barry Friedman, 'Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts' (2004) 104 Colum L Rev 1211, 1218–20.

[68] Federal 'legislative courts', for example bankruptcy and tax courts, also exercise judicial power. The limits of Congress's power to create legislative courts are not settled.

judicial power. Federal judicial power extends, among other things, to all cases arising under federal law and to controversies to which the US is a party, between two or more states and between citizens of different states.[69] The Supreme Court possesses original jurisdiction in all cases affecting ambassadors and where a state is a party, and appellate jurisdiction in all other cases to which federal judicial power extends.[70]

By contrast, Australia adopts a gestalt model of federal jurisdiction. The pervasiveness of federal jurisdiction in Australia contributes to the close integration of state and federal courts. Federal jurisdiction is essentially co-extensive with the 'matters' (Chapter III's catch-all substitution for Article III's 'cases' and 'controversies') enumerated in sections 75 and 76 of the Constitution. Section 75 spells out the mandatory original jurisdiction of the High Court (including matters where the federal government is a party, between states, between residents of different states, between a state and a resident of another state, and, to deal with one of *Marbury*'s specific holdings, where mandamus, prohibition or injunction is sought against a federal officer). Section 76 details the permissive original jurisdiction of the High Court (including matters arising under the Constitution, involving the interpretation of the Constitution and arising under federal law). Section 77 then confers legislative power to invest the High Court's original jurisdiction in inferior federal courts or — in stark contrast to Article III — state courts. There is a live debate about how far section 77 extends.[71]

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[69] This list is not exhaustive. For the complete list, see section 2 of Article III, which must be read in conjunction with the Eleventh Amendment.

[70] The Supreme Court's appellate jurisdiction is subject to 'such Exceptions, and under such regulations as the Congress shall make'. Art III, s 2, cl 2. Precisely what this clause permits has been disputed since the founding without definite resolution. Henry Paul Monaghan, 'Jurisdiction Stripping, Circa 2020: What "The Dialogue" (Still) Has To Teach Us' (on file with author).

[71] All justices agree that section 77 empowers Parliament to replace state jurisdiction over the matters in sections 75 and 76 with federal jurisdiction in state courts. But Nettle, Gordon and Edelman JJ argue that section 77 also authorises Parliament to exclude state jurisdiction in non-court tribunals over those matters. Gageler J takes a narrower view of section 77. *Burns v Corbett* [2018] HCA 15 [70]–[79] (Gageler J) [128], [139]–[141] (Nettle J) [162], [178]–[179] (Gordon J) [212]–[224], [253]–[255] (Edelman J). But Kiefel CJ, Bell, Keane and Gageler JJ

Compared to the US Supreme Court, the expansive original and appellate jurisdiction of the High Court of Australia plays an important symbolic role in the close integration of the federal and state courts. Section 73 of the Australian Constitution confers appellate jurisdiction on the High Court not only on questions of federal law but also 'from all judgments, decrees, orders, and sentences … of the Supreme Court of any State'. Notably, this includes questions of purely state law. Exaggerated claims that Australia enjoys a unified judicial system are therefore based on nuggets of truth that 'all avenues of appeal lead ultimately to' the High Court, which, 'as the final appellate court for the country, is the means by which th[e] unity in the common law is ensured'.[72] Talk of the unity of the national common law of Australia surely strikes a dissonant chord to American ears, accustomed as they are to the Supreme Court's rebuke of a federal general common law. These jurisprudential differences are taken up in more detail below.

The jurisdiction of the inferior federal courts in the US and Australia is statutory. Before 1875, US inferior federal courts were not vested with general federal question jurisdiction.[73] At that time, diversity was the primary head of jurisdiction for the lower federal courts; today, it is federal question jurisdiction. The Federal Court of Australia has always been primarily a federal-question court. It was not until 1997 — more than 120 years after Congress conferred federal question jurisdiction on the circuit courts — that Parliament conferred general federal question jurisdiction in civil cases on the Federal Court.[74]

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held that Ch III itself prohibits state parliaments from conferring federal jurisdiction on non-court tribunals. Nettle, Gordon and Edelman JJ deny the Ch III implication. *Burns v Corbett* [2018] HCA 15 [38]–[55] (Kiefel CJ, Bell and Keane JJ) [69], [94]–[106] (Gageler J) [134]–[137] (Nettle J) [175]–[188] (Gordon J) [205]–[207], [212]–[251] (Edelman J).

[72] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 (Gummow and Hayne JJ); *Burns v Corbett* [2018] HCA 15 [20] (Kiefel CJ, Bell and Keane JJ) [125] (Nettle J).

[73] 18 Stat 470 (1875). Except for a brief period in 1801. See n 65.

[74] Judiciary Act 1903 (Cth), s 39B(1A)(c) ('The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter … arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.').

The gestalt and atomised models of federal jurisdiction are illustrated by the similar concepts of associated jurisdiction in Australia and supplemental jurisdiction in the US. In Australia, the jurisdiction of the Federal Court was initially piecemeal, defined statute-by-statute. The Court's power was inflated by the development of associated jurisdiction,[75] in which 'jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked'.[76] The American equivalent, supplemental jurisdiction,[77] 'enables federal district courts to entertain claims not otherwise within their adjudicatory authority when those claims "are so related to claims … within [federal-court competence] that they form part of the same case or controversy"'.[78] Because jurisdiction in the US is atomised, federal courts are required to distinguish the federal claims from the state claims. So federal courts may decline to exercise supplemental jurisdiction over any state claims that raise a novel or complex issue of state law. And '[w]hen district courts dismiss all claims independently qualifying for the exercise of federal jurisdiction, they ordinarily dismiss as well all related state claims'.[79] But in Australia's gestalt model of federal jurisdiction, lawsuits based on common law or state law are part of a single Chapter III 'matter', and there is neither need nor power to remand state law claims to state court. Indeed, with the general conferral of federal question jurisdiction, associated jurisdiction is now considered otiose at best and mischievous at worst.[80]

The pervasiveness of federal jurisdiction in Australia is cemented by the important role played by state courts in its exercise. Chapter III expressly authorises Parliament to invest state courts

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[75] Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian R Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne UP 2000) 290; Leeming (n 64) 113–21.

[76] Federal Court of Australia Act 1976 (Cth), s 22. See Zines (n 75) 296.

[77] Before 1990, supplemental jurisdiction in the US was also known as pendent, ancillary and tag-along jurisdiction. Statutory reform standardised the label. 28 USC § 1367. For an early influential Australian comparison, see Gummow (n 57).

[78] *Artis v District of Columbia*, 138 S Ct 594, 597 (2018).

[79] ibid 597–98.

[80] Leeming (n 64) 113–14.

with federal jurisdiction. And so Parliament did, with gusto: Australia's first judiciary legislation conferred on state courts federal jurisdiction over some of the matters (for example, diversity cases) enumerated in Chapter III.[81] The judiciary legislation repealed and replaced: repealed from state courts existing state jurisdiction over certain matters and replaced it with federal jurisdiction over those matters.[82] In the late 1980s, Parliament went further and invested state courts with all the civil jurisdiction[83] of the inferior federal court.[84] In state and federal courts, a Chapter III 'matter' does not split into constituent components of federal and state jurisdiction; a matter falling under federal jurisdiction is wholly federal.[85]

3. Jurisprudential Dimension

'There is', said Justice Brandeis in *Erie*, 'no federal general common law'.[86] Underwriting this holding were two famous Holmes dissents ridiculing *Swift v Tyson*, the 1842 Supreme Court case that authorised federal courts to ignore state court pronouncements on general common law.[87] Rather than focusing on *Swift*'s narrow statutory holding, Holmes trained his critical eye on a 'question [that] is deeper',[88] namely, one of government authority. The centrepiece of Holmes's criticism was *Swift*'s endorsement of an authority in the federal courts to decide questions of general common

[81] Judiciary Act 1903 (Cth), s 39.

[82] *Felton v Mulligan* (1971) 124 CLR 367, 412–13 (Walsh J); *Burns v Corbett* [2018] HCA 15 [131]–[132] (Nettle J).

[83] Subject to enumerated exceptions. Leeming (n 64) 160.

[84] In limited cases, an appeal lies from a state court to the inferior federal court, eg Trade Marks Act 1955 (Cth), ss 190, 195(1)(a). This appellate jurisdiction is rarely used.

[85] James Allsop, 'Federal jurisdiction and the jurisdiction of the Federal Court of Australia in 2002' (2002) 23 Aust Bar Rev 29, 41–42.

[86] *Erie* (n 44) 78. This does not preclude the existence of federal common law in the US. Henry J Friendly, 'In Praise of *Erie*—And of the New Federal Common Law' (1964) 39 NYU L Rev 383. Federal common law, often conceptualised as emanations from statute, overrides inconsistent state law (including state legislation). Mark Leeming, 'Common law within three federations' (2007) 18 PLR 186.

[87] *Black & White Taxicab* (n 49) 531 (Holmes J); *Kuhn v Fairmont Coal Co*, 215 US 349, 370 (1910) (Holmes J).

[88] *Black & White Taxicab* (n 49) 535; *Kuhn* (n 87) 372.

law independently of the states.[89] The 'subtle fallacy',[90] as Holmes termed it, lay in the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it'.[91] The assumption is mistaken because 'law … today does not exist without some definite authority behind it'.[92] That authority is the state. Federal courts were wrong, then, to treat the common law 'as a unit' or as 'one august corpus' by 'cit[ing] cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately'.[93] They were wrong because the out-of-state cases were not backed by state authority. The real question is whether the state supreme court has said, 'with an authority that no one denies … that thus the law is and shall be'.[94]

'In Australia', said Sir Owen Dixon in 1943, 'we subscribe to a very different doctrine'.[95] According to the High Court, '[t]here is but one common law in Australia which is declared by this Court as the final court of appeal'.[96] Australia's Constitution *requires* state and federal courts to treat the common law as one august corpus. Australian judges 'regard Australian law as a unit' whose 'content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may'.[97] Later, Dixon observed that in Australia '[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute'.[98] 'In contrast to the position in the United States', the High Court has said, 'the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations'.[99] So, for example, there is no need in Australia for a state law

[89] *Black & White Taxicab* (n 49) 532-33; *Kuhn* (n 87) 372.
[90] *Black & White Taxicab* (n 49) 532.
[91] *Black & White Taxicab* (n 49) 533; *Kuhn* (n 87) 372.
[92] *Black & White Taxicab* (n 49) 532.
[93] ibid.
[94] ibid 535; *Kuhn* (n 87) 372.
[95] Owen Dixon, 'Sources of Legal Authority' in Woinarksi (n 56) 198, 199.
[96] *Lange* (n 1) 562.
[97] ibid.
[98] Owen Dixon, 'The Common Law As An Ultimate Constitutional Foundation' in Woinarski (n 56) 205.
[99] *Lange* (n 1) 563.

certification system because a 'federal judge sitting in the original jurisdiction of his court would feel himself not only entitled but bound to pronounce upon State law in the same way as he would upon federal law'.[100]

This does not mean that Australian common law is 'a transcendental body of law outside of any particular State but obligatory within it'.[101] There is a Holmesian authority behind the common law of Australia that makes it binding on state and federal judges alike. But the identity and nature of that authority depends on 'a fact of legal history': that the common law was 'antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth'.[102] According to Dixon, the federation of the six Australian colonies 'did not proceed from an extra-legal transaction' but 'arose under the [common] law', and it is this common law, 'the law immemorially recognized', which itself acts as the ultimate Holmesian authority behind the one common law of Australia.[103]

The High Court can be characterised as a *Swift*-plus court. The important jurisprudential similarity between the High Court and the *Swift*-era US Supreme Court is methodology. The High Court weighs decisions from different jurisdictions, treating the common law as a unit — just like the Supreme Court under *Swift*. When manifest in the Supreme Court, Holmes thought this practice merely a symptom of *Swift*'s fallacy. For the High Court, the status of the common law as a Holmesian authority is demonstrated by the fact that, as late as 1963, it was an extraordinary step for the Court to expressly refuse to follow a decision of the Appellate Committee of the House of Lords.[104] The High Court, then, is not precisely analogous to the *Swift*-era Supreme Court. When the Supreme Court,

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[100] Dixon (n 95) 198, 199.

[101] *Black & White Taxicab* (n 49) 533.

[102] Dixon (n 95) 198, 199.

[103] ibid 198, 199–201.

[104] *Parker v R* (1963) 111 CLR 610, 632–33. In *Parker*, Dixon CJ, speaking for the whole Court, stridently refused to follow a decision of the House of Lords which was authority for 'fundamental' 'propositions … which I believe to be misconceived and wrong'. ibid. *Parker* 'was a decisive landmark in the evolution of the High Court's independence in developing Australian law'. Tony Blackshield, '*Parker v The Queen*' in Michael Coper and others (eds), *The Oxford Companion*

acting under the auspices of *Swift*, refused to follow state general common law, state courts were not bound to follow suit. But the High Court's articulation of the unitary common law binds all state and federal courts.

The US and Australian jurisprudential differences are manifest in the various judicial attitudes to federal and state law. In 1961 HLA Hart famously distinguished between the internal and the external points of view of a social group equipped with rules of conduct. The external point of view is an attitude towards the rules of the group 'as an observer who does not himself accept them'.[105] The internal point of view towards the rules is the attitude of 'a member of the group [who] accepts and uses them as guides to conduct'.[106] Hart illustrated by way of a traffic light on a busy street. The external point of view, he said, is limited to the view of an observer who says that 'when the light turns red there is a high probability that the traffic will stop'.[107] But this 'will miss out a whole dimension of the social life' of the drivers, who adopt the internal point of view by treating the red light 'not merely [as] a sign that others will stop', but 'as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation'.[108] The substantive internal point of view, as reconstructed by Shapiro, is 'the practical attitude of rule acceptance',[109] or, according to Barzun, is 'the attitude of someone who accepts a given rule as a guide for his or her conduct'.[110] A person 'takes the internal point of view towards a rule when one intends to conform to the rule, criticizes others for failing to conform, does not criticize others for criticizing, and expresses one's criticism using evaluative language'.[111]

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to the High Court of Australia (OUP 2001). Paul Finn thought that *Parker* embodied Australia's 'first stirrings of judicial independence' from the United Kingdom. PD Finn, 'Statutes and the Common Law' (1992) 22 UWAL Rev 7, 9.

[105] HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 89.

[106] ibid.

[107] ibid 90.

[108] ibid.

[109] Scott J Shapiro, 'What Is The Internal Point Of View?' (2006) 75 Fordham L Rev 1157, 1157, 1159, 1161.

[110] Charles L Barzun, 'Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship' (2015) 101 Va L Rev 1203, 1218.

[111] Shapiro (n 109) 1163.

Federal judges in the US and Australia take the substantive internal point of view towards state law. They display a practical attitude of acceptance of state law: they intend to conform to state law (except where it is pre-empted by or inconsistent with federal law), criticise other judges if they fail to apply state law correctly, view the fact of criticism as legitimate, and use evaluative language. But there are, nevertheless, crucial differences in the expression of the practical attitude of state law acceptance in Australian and US federal courts. Thanks to the gestalt model of federal jurisdiction in Australia, federal courts are seen as equal authors of state law. State courts deciding questions of state law exercising federal jurisdiction (as occurs, oddly enough, when state courts exercise diversity jurisdiction), 'become[] part of the Federal Judicature'.[112] Federal courts likewise exercising federal jurisdiction can decide questions of state law, even when those questions are unsettled and may require the development of state law. An Australian federal court is 'not only entitled but bound to pronounce upon State law in the same way as he would upon federal law'.[113] As a species of the substantive internal point of view, this is the *authorial* attitude to state law by federal courts. Both sets of courts are joint authors of state law.

By contrast, American federal courts adopt another species of the substantive internal point of view: *scribal*.[114] Thanks to *Erie*, absent applicable federal law, federal courts have no authoritative say in the content of state law. When federal courts apply state law in the exercise of federal jurisdiction, and state law has run out, the federal court can either hazard an *Erie* guess or, in some instances, certify the question to the state supreme court. (In Australia, there is need for neither the notion of an *Erie* guess nor a certification procedure.) In a run-of-the-mill case, the federal court ascertains state law as best it can, seeking to capture and apply state law as it exists, point-in-time. This scribal attitude thus takes a substantive internal point of view by seeking a current but static snapshot of state law.

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[112] *Rizeq v Western Australia* (2017) 91 ALJR 707, 712 (Kiefel CJ), 717 ('The "Federal Judicature" … includes … State courts invested with federal jurisdiction.') (Bell, Gageler, Keane, Nettle and Gordon JJ); *Burns v Corbett* [2018] HCA 15 [3], [15], [20], [22] (Kiefel CJ, Bell and Keane JJ).

[113] Dixon (n 95) 198, 202.

[114] cf Michael C Dorf, 'Prediction and the Rule of Law' (1995) 42 UCLA L Rev 651.

And while federal courts 'need no longer be a ventriloquist's dummy',[115] it was not until 1991 that the US Supreme Court adopted de novo rather than deferential review of lower federal court determinations of state law.[116] Federal courts are not authors but scribes of state law.

What about state court attitudes to federal law? In Australia, the answer is simple in virtue of state court exercise of federal jurisdiction.[117] State courts adopt an authorial attitude to federal law as 'part of the Federal Judicature'.[118] They 'examine and pass upon federal law if in the course of exercising its jurisdiction a federal law comes in question'.[119] In the US state courts do not exercise federal jurisdiction. It is true, 'the supremacy clause considered … that state courts do not bear the same relation to the United States that they do to foreign countries'.[120] Accordingly Congress has empowered state courts to enforce federal civil laws and crimes. This ensures that state courts adopt a substantive internal point of view towards federal law. State courts are obligated to enforce federal law, but in doing so they exercise state jurisdiction, that is, the judicial power of the state. The decisions on federal law by a state supreme court are of no precedential value to the federal courts, and subject to correction by the US Supreme Court. And, moreover, 'today the vast majority of state courts address federal constitutional questions free of any felt need to defer to federal circuits, including their own'.[121]

That said, the Supreme Court's enforcement of Article VI's supremacy clause requires not only that state courts take a practical attitude of acceptance of federal law, but also that they are authorial

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[115] Charles Alan Wright and Mary Kay Kane, *Law of Federal Courts* (8th edn, West Academic Publishing 2017).

[116] *Salve Regina College v Russell*, 499 US 225 (1991).

[117] *Felton v Mulligan* (1971) 124 CLR 367, 373 ('[T]here is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court.') (Barwick CJ).

[118] *Rizeq v Western Australia* (2017) 91 ALJR 707, 712 (Kiefel CJ), 717 (Bell, Gageler, Keane, Nettle and Gordon JJ); *Burns v Corbett* [2018] HCA 15 [3], [15], [20], [22] (Kiefel CJ, Bell and Keane JJ).

[119] Dixon (n 95) 198, 201–02.

[120] *Testa v Katt*, 330 US 386, 389–90 (1947).

[121] Wayne A Logan, 'A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights' (2014) 90 Notre Dame L Rev 235, 238–39.

in that attitude. State courts do not seek to ascertain a point-in-time snapshot of federal law, nor do they make a 'reverse-*Erie*' guess as to its content.[122] There is no certification mechanism from state to federal courts on questions of federal law. Given the Madisonian compromise and the theoretical possibility of no inferior federal courts, state courts must be equipped with the constitutional capacity to take the authorial attitude to federal law.[123]

II. AUGMENTING THE IMPLIED FREEDOM

The enforcement of constitutional free speech guarantees against the common law illustrates the importance of comparative judicial federalism. In short, what has been achieved by a muscular personal right of free speech in the First Amendment — authority to rewrite state common law to comply with the Free Speech Clause — has been achieved in Australia by a weaker implied freedom of political communication combined with a national common law. The burly First Amendment and the scrawny implied freedom look very similar when enforced against the common law of torts; and in fact, while the Free Speech Clause stops hard against freedom of contract, the implied freedom encounters no similar obstacle. Interestingly, two material differences in the constitutional arrangements — different free speech guarantees, different judicial federalisms — actually add up to similar doctrinal regimes.

A. Free Speech and Tort Liability

The constant challenge of comparative law is to capture salient legal differences while keeping in mind each jurisdiction's 'own

[122] Omar K Madhany, 'Towards a Unified Theory of "Reverse-*Erie*"' (2014) 162 U Pa L Rev 1261.

[123] Michael G Collins, 'Article III Cases, State Court Duties, and the Madisonian Compromise' 1995 Wis L Rev 39, 197 n 335; Paul M Bator, 'The Constitution as Architecture: Legislative and Administrative Courts Under Article III' (1990) 65 Ind LJ 233, 240–43; *Brown v Gerdes*, 321 US 178, 188 (1944) (Frankfurter J).

patois, its own unique cadence',[124] the 'different intuitive sensibilities',[125] and 'the political, sociological, cultural, psychological, and economic milieu in which the [freedom of speech] exists and out of which it has developed'.[126]

1. Australia

On 13 October 1983, Phil Lockyer was 'totally unrepentant'.[127] The previous night he had punched Tom Stephens in the face.[128] The episode is unremarkable except that at the time Lockyer and Stephens were sitting members of the upper house of the Parliament of Western Australia. The altercation occurred in the members' bar of Parliament House; according to Lockyer, Stephens had made 'a comment that was almost unrepeatable'.[129] Lockyer explained to the press: 'I'm a Norwester, mate. I was born and bred in the north-west. Up there it's just not on – you get marched out into the bull-ring'.[130] Lockyer was charged with assault.[131] References to the squabble — including renewed threats[132] and almost nostalgic recollections[133] — are sprinkled throughout Hansard for nearly thirty years.

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[124] Ronald J Krotoszynski Jr, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (NYU Press 2006) 10.

[125] James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2014) 113 Yale LJ 1151, 1160.

[126] Frederick Schauer, 'The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience' (2004) 117 Harv L Rev 1765, 1787.

[127] 'Norwester MP doesn't pull his punches' *The Sydney Morning Herald* (Sydney, 13 October 1983) 14.

[128] ibid.

[129] ibid.

[130] ibid.

[131] Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 April 2011, 2285 (Tom Stephens); Western Australia, *Parliamentary Debates*, Legislative Council, 3 April 1996, 852 (Tom Stephens).

[132] Western Australia, *Parliamentary Debates*, Legislative Council, 1 April 1992, 565 (Phil Lockyer); Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 1996, 8265 (Sam Piantadosi).

[133] Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 April 2011, 2285 (Tom Stephens) ('I suppose it was a time when politics was played pretty rough and tough around this place.'), 2285 (Colin Barnett, Premier) ('Those were the days!'); Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 1996, 8263 (Phil Lockyer) ('It was the lightest of taps.').

Neither Lockyer nor Stephens resorted to fists after the 1983 fracas.[134] But the acrimony between them lasted. Under cover of parliamentary privilege, both hurled personal accusations. Stephens alleged that Lockyer co-owned a brothel in the Philippines called 'The Randy Ram'.[135] Lockyer accused Stephens of criminal misconduct in his dealings with Giwajbem people.[136] Stephens called Lockyer a 'scumbag'.[137]

In June 1992, outside Parliament and unshielded by its absolute privilege, Lockyer accused Stephens and five other members of secretly going on 'a junket of mammoth proportions' to New Zealand, the United States and Canada, on the public dime.[138] *The West Australian* newspaper printed the allegation, provoking Stephens and the other parliamentarians to sue the publisher for defamation.[139]

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[134] Western Australia, *Parliamentary Debates*, Legislative Council, 13 November 1996, 8263 (Phil Lockyer) ('Tom Stephens has never laid a glove on me over the years.'), 8263 (Tom Stephens) ('I wish I could say the same about you!').

[135] Western Australia, *Parliamentary Debates*, Legislative Council, 28 March 1983, 1510 (Tom Stephens).

[136] Western Australia, *Parliamentary Debates*, Legislative Council, 3 April 1996, 843, 848–55 (Phil Lockyer), 855–56 (Mark Nevill). In Parliament, Lockyer referred to information received from 'the Aboriginal people of Dunham River'. ibid 851. The area near Dunham River is now known as Doon Doon. Bruce Shaw, *When the Dust Come in Between: Aboriginal Viewpoints in the East Kimberley Prior to 1982* (Aboriginal Studies Press 1992) 246 ('Dunham River yeah. That's Doon Doon now.'); N Klepacki, 'Doon Doon Station (formerly Dunham River) Kununurra, WA: Project Analysis and Summary Report' (Division of Resource Management Technical Report 37, Western Australia Department of Agriculture and Food 1984). The language of the area around Doon Doon is called Giwajbem or perhaps Jarrag. 'K63: Giwajbem', *Austlang: Australian Indigenous Languages Database* (Australian Institute of Aboriginal and Torres Strait Islander Studies 2014) <https://collection.aiatsis.gov.au/language/k63#tab-group-comment> accessed 25 April 2018; 'Giwajbem' (*Rediscovering Indigenous Languages*, State Library NSW 2014) <https://indigenous.sl.nsw.gov.au/communities/giwajbem> accessed 25 April 2018.

[137] Western Australia, *Parliamentary Debates*, Legislative Council, 3 April 1996, 854 (Tom Stephens).

[138] 'MPs' Trip a Mammoth Junket: Lockyer' *The West Australian* (Perth, 29 June 1992).

[139] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. If Lockyer had made the statement in Parliament, then *The West Australian* would have been immune from civil liability. Criminal Code (WA), s 354(1), repealed by Defamation Act 2005 (WA), s 47 sch 4 item 2 ('It is lawful … [t]o publish in good faith, for the information of the public, a fair report of the proceedings of a House

Although proceedings were commenced in state court, they were removed to the High Court.[140] A bare majority of the High Court affirmed the freedom of political communication necessary for the system of representative government embodied by the Australian Constitution, and held that '[t]he basis of that implication has its counterpart in the Constitution of Western Australia'. This grounded an affirmative defence to the state defamation action: a publication is not actionable if the defendant shows that it acted reasonably.

The more famous companion case, *Theophanous*, was heard and decided at the same time as *Stephens*. In November 1992, the Victorian newspaper *The Sunday Herald Sun* had published a letter to the editor urging voters to 'give Dr. Theophanous the heave'. Andrew Theophanous, a member of the Commonwealth House of Representatives, sued the publisher and the author of the letter for defamation in state court. As in *Stephens*, the proceedings pending in state court were removed to the High Court. The Court held that the existing law of defamation seriously inhibited freedom of communication, but stopped short of endorsing an American-style 'actual malice' requirement. Instead, the newspaper publisher needed only to show that it acted reasonably in the circumstances.

The influence of the most important First Amendment case of the twentieth century, *New York Times Co v Sullivan*, on the judgments in *Stephens* and *Theophanous* is well known.[141] Less well known is that while the High Court was considering *Stephens* and *Theophanous*, Anthony Lewis, who had recently published his seminal work on *Sullivan*, visited Australia.[142] He met with the Justices of the High Court and spoke at a defamation conference.[143] Lewis's report in the *New York Times* extolled the international 'ripples of freedom' emanating from *Sullivan*, noting that Madison would be

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of the Parliament … of … any State.'). The immunity applied to civil actions. Criminal Code Act 1913 (WA) s 5 (no civil action lies for any act that the Criminal Code declares lawful). The immunity today is known as the defence of fair report of proceedings of public concern. Defamation Act 2005 (WA), s 29.

[140] Pursuant to section 40 of the Judiciary Act 1903 (Cth).

[141] Adrienne Stone, 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 FL Rev 219.

[142] Chris Merritt, 'Protecting the Free Flow of Information' *The Australian Financial Review* (Sydney, 7 March 1994) 17.

[143] ibid.

pleased.[144] These efforts paid off. Although *Stephens* and *Theophanous* did not unreservedly embrace *Sullivan* because 'it gives inadequate protection to reputation',[145] the High Court nevertheless 'owes a clear intellectual debt'[146] to *Sullivan* — or, perhaps more accurately, to Lewis. When *Stephens* and *Theophanous* were decided, Lewis wrote in the *Times* that they were 'a startling testament to the continuing influence of the Warren Court [coming] from half a world away'.[147] For Lewis, the 'radiating influence' of *Sullivan* sapped the conservative criticism of the Warren Court.[148]

The constitutional defences established in *Stephens* and *Theophanous* were grounded in the recently discovered implied freedom of political communication. In 1992, undeterred by the Australian framers' conscious refusal to adopt a counterpart to the First Amendment, the High Court implied a freedom of political communication from the constitutional system of representative government. As subsequently refined in *Lange v Australian Broadcasting Corporation*,[149] the argument goes as follows. First, at Federation, 'representative government was understood to mean a system of government where the people in free elections elected their representatives'.[150] Second, '[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government'.[151] Third, 'the choice … must be a true choice with an opportunity to gain an appreciation of the available alternatives', so 'legislative power cannot support an absolute denial of access by the people to relevant information about the functioning

[144] Anthony Lewis, 'Ripples of Freedom' *The New York Times* (New York, 11 March 1994) A31.

[145] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (Mason CJ, Toohey and Gaudron JJ).

[146] Adrienne Stone and George Williams, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26 Mon L Rev 362, 365–66.

[147] Anthony Lewis, 'A Widening Freedom' *The New York Times* (New York, 21 October 1994) A31.

[148] ibid.

[149] (1997) 189 CLR 520, 560.

[150] ibid 559.

[151] ibid 560.

of government in Australia and about the policies of political parties and candidates for election'.[152]

This is straight out of Madison's playbook.[153] When Andrew Koppelman summarised Madison's 'best argument' against the Sedition Act of 1798, he could be speaking for the High Court:

> If public officials are to be held accountable by elections, then the electors must be able to discuss the merits of the officials. The argument is elegant and sound in part because it relies not at all on the [Constitution's] ambiguous text. Rather, it infers a right of free speech from the structural commitment to elections … If citizens are voters, then it follows that they may vote out the incumbents. If they are to do that, then they must be able to communicate with one another about whether the incumbents should be voted out of office.[154]

The High Court's syllogism is identical. A constitutional commitment to representative government, concluded the Court, 'necessarily protect[s] that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors'.[155] The Australian Constitution embodies a Madisonian (or Meiklejohnian) conception of free speech.[156]

Lange, decided in 1997, remains the leading case on defamation and the implied freedom of political communication.[157] Lange, a former New Zealand Prime Minister, sued Australia's national broadcaster in state court for defamatory statements made during a political affairs TV show. Like *Theophanous* and *Stephens*, *Lange* was removed, prior to trial, to the High Court. A unanimous Court held that '*Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution', and that the common law, consistently with the constitutional implied freedom, must

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[152] ibid.

[153] William G Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication' (2006) 34 FL Rev 421.

[154] Andrew Koppelman, 'Veil of Ignorance: Tunnel Constructivism in Free Speech Theory' (2013) 107 NWULR 647, 663–64.

[155] *Lange* (n 1).

[156] Buss (n 153).

[157] More recent implied freedom cases have not dealt with the common law.

provide a defence for 'the mistaken publication of defamatory matter concerning government and political matters to a wide audience'.[158] The Court ruminated on the symbiotic relationship between the national common law and the Constitution. The 'common law must conform with the Constitution' and, '[c]onversely, the Constitution itself is informed by the common law'.[159] Because '"the common convenience and welfare of society" is the criterion of the protection given to communications by the common law of qualified privilege', 'the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society'.[160] The Court concluded that '[t]he common convenience and welfare of Australian society are advanced by discussion … about government and political matters', that '[t]he interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege', and that 'those categories now must be recognised as protecting a communication made to the public on a government or political matter'.[161]

2. United States

Over fifty years ago, the US Supreme Court held that a state's law of libel 'can claim no talismanic immunity from constitutional limitations', and 'must be measured by standards that satisfy the First Amendment'.[162] *Sullivan* thus established a 'federal rule'[163] that the Court characterised as a 'conditional privilege':[164] a public official is 'prohibit[ed] … from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that

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[158] *Lange* (n 1) 556.

[159] ibid 564, 566.

[160] ibid 565–66, quoting *Toogood v. Spyring* (1834) 1 Cr M & R 181, 193; 149 ER 1044, 1050.

[161] *Lange* (n 1) 571.

[162] *New York Times Co v Sullivan*, 376 US 254, 269 (1964). In 1964, as now, libel in Alabama is a common law cause of action subject to some statutory regulation.

[163] ibid 279–80.

[164] ibid 279–83, 282 n 21. The Supreme Court took the characterisation of the federal rule as a privilege from a decision of the Supreme Court of Kansas. *Sullivan* (n 162) 280, citing *Coleman v MacLennan*, 98 P 281 (Kan 1908).

the statement was made … with knowledge that it was false or with reckless disregard of whether it was false or not'.[165] The rule functions as an added federal element that the official must prove when bringing a state-law defamation action.[166] Justice Brennan's opinion 'embedded'[167] the federal rule in the state common law defamation action, 'redefining the state tort itself'.[168] The Supreme Court added a new federal element to the Alabama common law defamation tort.

Of course, *Sullivan* stands for much more than a federal element added to a state tort. It is a triumph of civil rights and a vindication of a core aspect of the First Amendment. It has been called 'an occasion for dancing in the streets'[169] and the most important First Amendment decision of the twentieth century.[170] The Court reversed a damages award by the Alabama courts to a public official for libel based on a full-page advertisement in *The New York Times* in March 1960 describing police harassment and abuse in Montgomery, Alabama. *Sullivan*'s federal rule encouraged criticism of public officials who enforced discriminatory laws and policies in the South. The Court established that the 'central meaning of the First Amendment' is the abolition of seditious libel.[171] Rather than displace an entire body of state defamation law with respect to public officials, the Court was at pains to analogise the federal rule to '[a]n oft-cited statement of a like rule, which has been adopted by a number of state

[165] *Sullivan* (n 162) 279–80.

[166] ibid. Although in *Coleman v MacLennan* — the Kansas case that Justice Brennan used as a guide — the defendant pleaded privilege, today courts of appeals will dismiss public-figure defamation actions for failure to plead actual malice. *Schatz v Republican State Leadership Committee*, 669 F3d 50 (1st Cir 2012); *Mayfield v National Association for Stock Car Auto Racing Inc*, 674 F3d 369 (4th Cir 2012).

[167] Frederic M Bloom, 'Jurisdiction's Noble Lie' (2009) 61 Stan L Rev 971, 1028.

[168] Howard M Wasserman, 'A Jurisdictional Perspective on *New York Times v Sullivan*' (2013) 107 NWULR 901, 910.

[169] Harry Kalven Jr, 'The *New York Times* Case: A Note on the "Central Meaning of the First Amendment"' 1964 Sup Ct Rev 191, 221 n 125, quoting a personal conversation with Alexander Meiklejohn.

[170] Henry Paul Monaghan, 'A Legal Giant is Dead' (2000) 100 Colum L Rev 1370, 1375.

[171] *Sullivan* (n 162) 273.

courts' in libel actions.[172] The Court relied on, and quoted extensively from, an opinion of the Supreme Court of Kansas establishing a qualified privilege, and ultimately concluded that 'such a privilege is required by the First and Fourteenth Amendments'.[173]

Sullivan's defamation progeny prospered. By 1977, a prominent torts scholar declared that '[w]e have the Supreme Court to thank' for an 'extensive[]' and 'sound and solid' 'reform[] [of] the law of defamation', with 'all the signs point[ing] to a very fine completed product'.[174] The Court pressed *Sullivan* into the service of other torts too. The most consequential is intentional infliction of emotional distress (IIED). In *Hustler Magazine Inc v Falwell*,[175] decided in 1988, the Supreme Court imported *Sullivan*'s federal rule to an IIED suit under Virginia law. Falwell, a nationally known minister and commentator on politics and public affairs, sued the magazine for publishing an ad parody 'offensive to him, and no doubt gross and repugnant in the eyes of most'.[176] The Court held that public figures cannot recover damages for IIED when the conduct is the publication of a caricature such as an ad parody 'without showing in addition that the publication contains a false statement of fact which was made … with knowledge that the statement was false or with reckless disregard as to whether or not it was true'.[177]

Snyder v Phelps,[178] decided in 2011, is the Supreme Court's latest foray in this area. A jury awarded Snyder, a private figure who was the father of a fallen marine, damages for IIED against members of a fundamentalist church who picketed the funeral of Snyder's son. Setting aside the jury verdict, the Court held that the First Amendment prohibited holding the church members liable for their speech because that speech was of public concern.[179] There was no

[172] ibid 280.
[173] ibid 283.
[174] John W Wade, 'The Communicative Torts and the First Amendment' (1977) 48 Miss LJ 671, 711.
[175] *Hustler Magazine Inc v Falwell*, 485 US 46 (1988).
[176] ibid 50.
[177] ibid 56.
[178] *Snyder v Phelps*, 562 US 443 (2011).
[179] ibid 451–55.

mention of actual malice as formulated by *Sullivan*.[180] The nature of IIED and its protected interests were irrelevant to the Court's reasoning in *Snyder*. Rather, the Court framed the question presented and its holding in terms of 'tort liability'[181] and imposed a blanket First Amendment 'defense in state tort suits, including suits for intentional infliction of emotional distress'.[182] The reasoning and outcome of *Snyder* would be unaltered if any other tort were substituted for IIED. As long as the speech was on a matter of public concern — that is, as long as the speech attracted First Amendment protection — then the defendant is 'shield[ed] … from tort liability'.[183]

These cases demonstrate the expanding reach of the First Amendment. In *Sullivan*, the 'central meaning of the First Amendment'[184] was that 'seditious libel could not be made the subject of government sanction'.[185] *Snyder*, decided 47 years later, much more generally locates 'speech on matters of public concern … at the heart of the First Amendment's protection'.[186] Interestingly, the expansion of the First Amendment in the torts context has raised *Erie* concerns: 'it remains remarkable that an entire area of the common law of torts has been remade by the Supreme Court, acting in the manner of a Court still in the grips of *Swift*'.[187] The reality is worse. *Snyder*'s expansive conception of the First Amendment, and its indifference to state tort law, silences state courts and removes their

[180] ibid 451 ('Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern.').

[181] ibid 447 ('The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.'), 461 ('As a Nation we have chosen … to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.').

[182] ibid 451. Justice Alito argued in dissent that *Falwell* is distinguishable because plaintiff was a public figure and the publication was a caricature in a magazine. ibid 474–75 (Alito J).

[183] ibid 461.

[184] *Sullivan* (n 162) 273.

[185] Kalven (n 169) 209.

[186] *Snyder* (n 178) 451–52, quoting *Dun & Bradstreet Inc v Greenmoss Builders Inc*, 472 US 749, 758–59 (1985).

[187] John CP Goldberg and Benjamin C Zipursky, 'The Supreme Court's Stealth Return to the Common Law of Torts' (2016) 65 DePaul L Rev 433, 441.

capacity to develop or author their own common law. This is despite the Court's insistence in *Snyder* that '[o]ur holding today is narrow'.

3. Speech Torts and Judicial Federalism

Australian judicial federalism strengthens the implied freedom of political communication. It is common to observe that the First Amendment is a stronger guarantee of free expression than the implied freedom of political communication. But in a specific context — the common law of defamation and other speech torts — the American and Australian free speech guarantees look very similar. That is thanks to their different versions of judicial federalism.

Imagine for a moment that Australia had slavishly followed Article III. Were that the case, today the Australian Constitution would be functionally similar to American constitutional arrangements before the Civil War. The High Court would have lacked power to revise the state common law of defamation,[188] and it would have lacked power to hold that a state's constitution embodied its own implied freedom of political communication.[189] Without its particular version of judicial federalism, Australia's implied freedom would be seriously weakened.

a) Institutional Dimension

All the cases discussed above (*Sullivan*, *Falwell*, *Theophanous*, *Stephens*, *Lange* and *Snyder*) were decided by the apex federal court. But there are significant institutional differences. On the one hand, the High Court, in the exercise of its plenary authority, set precedent for state and federal courts by developing the unitary common law of Australia. On the other hand, the Supreme Court set precedent for state and federal courts on federal law only. Moreover, the lower courts played almost no role in the Australian cases *Theophanous*, *Stephens* and *Lange*. Each case was removed before final judgment into the High Court under section 40 of the *Judiciary Act 1903* (Cth). The Court decided these cases at first instance; no lower court had determined the matter. The American cases, however, had been determined by jury trial and on appeal prior to being heard in the Supreme Court. *Sullivan* was an appeal from the Supreme Court of

[188] *Lange* (n 1).
[189] *Stephens* (n 139) 232–34 (Mason CJ, Toohey and Gaudron JJ).

Alabama, which heard the appeal from the Alabama trial court; *Falwell* and *Snyder* were appeals from the US Court of Appeals for the Fourth Circuit, which heard the appeals from federal district courts in that circuit. The Supreme Court therefore benefited from not only lower court reasoning but also the filtering function of the appellate process. Yet removal into the High Court carried significant efficiency gains, settling significant questions of law before embarking on a costly trial.

b) Jurisdictional Dimension

As noted above, the High Court in *Theophanous*, *Stephens* and *Lange* exercised original jurisdiction; the Supreme Court in *Sullivan*, *Falwell* and *Snyder* exercised appellate jurisdiction. Ironically, though, the High Court had no opportunity to make or revise any findings of fact, whereas the Supreme Court was empowered by the First Amendment to do so. The questions reserved in the High Court were all questions of law (removal into the High Court most likely occurred before the factual record was settled). But under the First Amendment, the Supreme Court is 'obligated to make an independent examination of the whole record'.[190] Indeed, one of *Sullivan*'s crucial holdings is that the First Amendment requires close scrutiny of an inferior court's findings of fact.[191]

The gestalt and atomised models of federal jurisdiction are also on display. In Australia, asserting a defence that arises under federal law grounds federal jurisdiction over the entire matter. The defences in *Lange* pleaded the implied freedom, which arose under the Constitution and therefore 'suffuse[d] the whole matter' with federal jurisdiction.[192] But in the US, *Snyder*'s statement that the First Amendment can act as a defence to state tort suits has different consequences for federal jurisdiction. Merely asserting a federal defence does not suffice for federal question jurisdiction.[193] *Snyder*, then, reflects a policy that American federal trial courts should not

[190] *Snyder* (n 178) 453.

[191] *Sullivan* (n 162) 284–88.

[192] *Lange v Australian Broadcasting Corporation* [1997] HCATrans 85 (Gummow J).

[193] *The Holmes Group Inc v Vornado Air Circulation Systems*, 535 US 826, 831 (2002).

be concerned with state tort cases where the only federal aspect is a First Amendment defence. The American equivalent of Owen Dixon's Swan Hill tramp cannot claim federal jurisdiction.[194]

c) Jurisprudential Dimension

Both the US Supreme Court and the Australian High Court claim legitimate power to rewrite the common law in the name of federal constitutional free speech guarantees. Although its language applies only to the federal Congress, the Free Speech Clause was 'incorporated' against the states by the Fourteenth Amendment. The US Supreme Court therefore grounds its authority to rewrite state common law in the First Amendment as incorporated by the Fourteenth. The High Court claims legitimate power to rewrite the common law because of the implied freedom and the Court's status as the ultimate author of the single national common law. The High Court's independent jurisprudential power ensures the reach of the implied freedom of political communication over state tort law.

An interesting resemblance between *Snyder* and *Lange*, then, occurs on the jurisprudential axis. Both federal supreme courts fashioned national common law defences. *Lange* developed the Australian common law of defamation by expanding the categories of qualified privilege. The Australian Constitution both legitimised and mandated the development of the national common law in conformity with the implied freedom of political communication, and the High Court followed the common law method to create a new qualified privilege for that purpose. This mechanism of constitutional enforcement is indistinguishable from *Snyder*. *Snyder*'s intervention in Maryland law — holding that '[t]he Free Speech Clause of the First Amendment … can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress'[195] — was gnomic compared to *Lange*'s discursive elaboration

[194] Leeming (n 64) 34, quoting Owen Dixon KC's evidence to the Royal Commission in 1927 ('So, if a tramp about to cross the bridge at Swan Hill is arrested for vagrancy and is intelligent enough to object that he is engaged in interstate commerce and cannot be obstructed, a matter arises under the Constitution. His objection may be constitutional nonsense, but his case is at once one of Federal jurisdiction.').

[195] *Snyder* (n 178) 451.

of the national common law. The stylistic difference obscures that both federal supreme courts did the same thing: they created a constitutional defence to tort actions. In fact, *Snyder*'s constitutional defence is expressed much more broadly as applying to *all* state torts. *Lange* was highly sensitive to the underlying tort action, creating a new qualified privilege for defamation only.[196]

The comparative analysis suggests that the Supreme Court in *Snyder* is a *Swift*-plus court. There is a strong resemblance between the methodology of the High Court, which legitimately administers a national common law, and the Supreme Court, which does not. The High Court, when expanding the common law categories of qualified privilege, need not detain itself with American-style judicial federalism norms. An Australian state has no constitutional claim to the status of ultimate sovereign authority over the common law that exists in the state. Interestingly, the Supreme Court took exactly the same approach in *Snyder*. Of course, the Supreme Court legitimately develops a 'constitutional common law',[197] which includes the broad, all-purpose federal defence enacted by *Snyder*. This is not a claim that *Snyder* was beyond the Supreme Court's power. It is an observation that it is difficult, as the Australian comparison shows, to distinguish between a *constitutional* or *federal* common law, on the one hand, and a *Swift*-plus, *national general* common law, on the other.

Snyder's indifference to state law can be explained by the subtle difference in the attitudes of the federal and state courts towards state law. As I argued above, US federal courts adopt a scribal attitude to state law while Australian federal courts adopt an authorial attitude. This difference in attitude explains, I think, *Snyder*'s refusal to consider Maryland law in any detail. Ordinarily, federal court applications of state law are, as far as the state courts are concerned, merely advisory. *Snyder* avoided the risk that a lengthy discussion of state law would leave it open to circumvention by state courts saying that the Supreme Court misconstrued state law. There was, of course, no such risk in *Lange* because the High Court is the final

[196] It did signal that a state defamation statute did 'not place an undue burden on communication falling within the protection of the Constitution'. *Lange* (n 1) 575.

[197] Henry P Monaghan, 'The Supreme Court, 1974 Term—Foreword: Constitutional Common Law' (1975) 89 Harv L Rev 1.

court of appeal on matters of state law; it is authoritative in its authorial attitude.

B. Freedom of Speech or Freedom of Contract?

Australian judicial federalism augments the implied freedom so that, when applied against the common law of torts, it behaves just like the First Amendment. But when the common law enforces contracts (obligations voluntarily assumed by parties *ex ante*) rather than torts (obligations imposed by law *ex post*), the implied freedom surges ahead of the Free Speech Clause. This section explores the untapped potential of the implied freedom to shape Australia's common law of contracts.

1. United States

The story in the US is rather straightforward. In *Cohen v Cowles Media Co*,[198] the US Supreme Court effectively held that the Free Speech Clause does not touch private contracts. After he had extracted promises of anonymity, a gubernatorial campaign worker supplied compromising information about a rival candidate to two newspapers. The newspapers broke their promises and named the source, Cohen, who was fired from his day job at an advertising agency. He sued the newspapers for breach of contract, subsequently abandoning that right of action in favour a promissory estoppel claim. The Court rejected the newspapers' argument that the First Amendment precluded estoppel damages. The law of promissory estoppel was generally applicable and 'simply requires those making promises to keep them'.[199] 'The parties themselves', said the Court, 'determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed'.[200] *Cohen v Cowles Media Co* met with broad approval. Most commentators agree that promises between

[198] 501 US 663 (1991).
[199] ibid 671.
[200] ibid.

private parties, whether enforceable by contract or promissory estoppel, do not implicate the Free Speech Clause.[201]

The only contracts reviewable under the Free Speech Clause are those to which the government is a party. Governments may not condition benefits on the waiver of free speech rights. For example, a government may not fire public employees for speaking out on matters of public concern.[202] Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech'.[203] This is an application of the unconstitutional conditions doctrine — or 'doctrine', as it is sometimes ridiculed.[204] The unconstitutional conditions doctrine signals that confidentiality agreements pose First Amendment problems only when the government is a party. Importantly, not every speech restriction imposed by government on its employees is invalidated by the First Amendment: 'when the government imposes speech restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them'.[205]

2. Australia

In Australia, the story is unwritten. No court has squarely considered whether the implied freedom of political communication affects private confidentiality agreements. The most analogous case

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[201] Daniel J Solove & Neil M Richards, 'Rethinking Free Speech and Civil Liability' (2009) 109 Colum L Rev 1650, 1701–02; Eugene Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You' (2000) 52 Stan L Rev 1049, 1057. At least one scholar disagrees, arguing that *Cohen*'s 'most pernicious effect could be to help immunize property and contract rights from First Amendment scrutiny'. Alan E Garfield, 'The Mischief of *Cohen v. Cowles Media Co.*' (2001) 35 Ga L Rev 1087, 1126.

[202] *Pickering v Board of Education* (1968) 391 US 563; *Perry v Sindermann* (1972) 408 US 593, 597 (collecting cases).

[203] ibid 597.

[204] Thomas W Merrill, '*Dolan v. City of Tigard*: Constitutional Rights as Public Goods' (1995) 72 Denver U L Rev 859, 859.

[205] *Janus v American Federation of State, County, and Municipal Employees, Council 31* (2018) 138 S Ct 2448, 2492 (Kagan J).

centres on the 'implied undertaking' of non-use of discovery materials. Under Australian law, 'there is an implied undertaking, springing from the nature of discovery, by each party not to use any document disclosed for any purpose otherwise than in relation to the litigation in which it is disclosed'.[206] Although once an express precondition of discovery, now the implied undertaking is an obligation imposed by law, owed both to the other party and to the court.[207] The Supreme Court of Western Australia held that the implied undertaking, enforceable by contempt, did not conflict with the implied freedom, because '[i]t is not aimed at stifling political discussion', but rather 'maintain[s] the integrity of the administration of Justice'[208] and protects 'private rights to confidentiality'.[209] The analogy to private confidentiality agreements is rather weak because the implied undertaking is imposed by law.[210] Similarly, although equitable breach of confidence is likely qualified by the implied freedom,[211] it is not an obligation assumed voluntarily.

Despite the lack of direct judicial pronouncement, there is ample scope for the High Court to hold that contracts against the public policy of free political communication are unenforceable. The leading Australian cases articulate public policy in contract law as 'some definite and governing principle which the community as a whole has already adopted formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognize and enforce'.[212] Courts emphasise freedom of contract and the difficulty 'of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public

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[206] *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, 32–33 (Mason CJ).

[207] *Hamersley Iron Pty Ltd v Lovell* (1995) 19 WAR 316, 321 (Ipp J).

[208] ibid 324–25 (Ipp J).

[209] ibid 343 (Anderson J).

[210] Interestingly, the US Supreme Court also balances free speech rights against abuse of judicial process. *Seattle Times Co v Rhinehart* (1984) 467 US 20, 35–36 ('The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders.') (Powell J).

[211] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224 [35] (Gleeson CJ).

[212] *Wilkinson v Osborne* (1915) 21 CLR 89, 97 (Isaacs J).

interest amounting to public policy'.[213] And the jurisprudence is similarly clear that public policy is not static. Rather, '[f]rom generation to generation ideas change as to what is necessary or injurious', so that '[n]ew heads of public policy come into being, and old heads undergo modification'.[214]

Since the High Court recognised the implied freedom in 1992, reaffirming and applying it on many subsequent occasions, free speech on government and political matters qualifies as a definite and governing principle which the Australian community has adopted. The implied freedom is important in the development of common law principle. In *Lange*, the categories of qualified privilege were expanded because speech on government and political matters served the 'common convenience and welfare of Australian society'.[215] Similarly, Australian society has adopted the definite principle of free and open discussion about government and political affairs as one of the 'conditions necessary to ensure its welfare'.[216] It is, therefore, a head of public policy against which the validity of a contract may be tested.

Contracts that remove information about government and political matters from the process of public contestation would not be automatically invalid. As Australian courts regularly repeat, the implied freedom is not absolute.[217] The public policy of free political communication, like all grounds for refusing to enforce a contract, would not operate in an all-or-nothing fashion. Instead, it would be weighed on a case-by-case basis where 'any opposing public interest must be identified and weighed in the balance'.[218] Public interests like the administration of justice and national security could sometimes fall on the other side of the ledger to free political speech.[219] Free political communication is one important public policy; it would not override all others. Surely, however, a government official's interest in confidentiality, which he or she seeks to enforce by private contract, would rarely overcome the public policy of free political communication.

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[213] *A v Hayden* (1984) 156 CLR 532, 559 (Mason J).
[214] *In re Morris* (1943) 43 SR (NSW) 352, 356 (Jordan CJ).
[215] *Lange* (n 1) 571.
[216] *In re Morris* (n 214) 355 (Jordan CJ).
[217] *Hamersley Iron* (n 207) 323–24 (Ipp J), 342–43 (Anderson J).
[218] *Hayden* (n 213) 559–60 (Mason J).
[219] *Hayden* (n 213).

3. Enforcing Contracts and Judicial Federalism

This section will develop in more detail some of the comparative themes raised above, focusing on the unique features of the intersection between free speech and the judicial enforcement of private contracts. It first closely compares some institutional aspects of the Australian High Court and the US Supreme Court. It then centres on the so-called 'state action doctrine' in the US and its absence in Australia. It concludes by suggesting how the Australian High Court might develop the common law doctrine voiding contracts against public policy to conform with the implied freedom.

a) Institutional Dimension

Discussions about the institutional similarities between the Australian High Court and the US Supreme Court often point out that both are common law courts.[220] Yet this observation obscures more than it illuminates. Both courts have taken clear steps away from the traditional common law model of dispute resolution toward one of law declaration.[221] The appellate docket of both courts is now almost entirely discretionary. In 1984, appeals as of right to the High Court were abolished; they are now only permitted by special leave.[222] By 1988, the Supreme Court's mandatory jurisdiction was virtually eliminated.[223] The purposes driving the enlargement of both courts' discretionary dockets are very similar, if not identical: to conserve

[220] Michael Kirby, 'The High Court of Australia and the Supreme Court of the United States – A Centenary Reflection' (2003) 31 UWALR 171, 177; Sanford H Kadish, 'Judicial Review in the United States Supreme Court and the High Court of Australia: Part I' (1958) 37 Tex LR 1, 1.

[221] For more on these two adjudicatory models, see Henry Paul Monaghan, 'On Avoiding Avoidance, Agenda Control, and Related Matters' (2012) 112 Colum L Rev 665, 668–73.

[222] Judiciary Amendment Act (No 2) 1984 (Cth). Before 1984, Australian litigants possessed relatively expansive rights of appeal to the High Court. Subject to an amount-in-controversy requirement, litigants could appeal as of right to the High Court from the full courts of the supreme courts of the states (and, after it was established in 1976, the full court of the lower federal court).

[223] Kathryn A Watts, 'Constraining Certiorari Using Administrative Law Principles' (2011) 160 U Pa L Rev 1, 7–18.

the US Supreme Court 'as the arbiter of legal issues of national significance'[224] and to leave the Australian High Court 'free to concentrate on constitutional issues and on fundamental issues of law'.[225]

Overall, however, the High Court remains more closely aligned with the traditional dispute resolution model than the Supreme Court. For example, the Supreme Court exercises more control over the issues that it decides than the High Court. The Supreme Court's habit of injecting and deciding issues not raised by the parties is well documented.[226] Indeed, *Cohen v Cowles Media Co* was decided on the basis of an issue that neither party had raised below. The Court decided the case on a promissory estoppel theory, despite the fact that, in the words of Justice White, 'a promissory estoppel theory was never tried to the jury, nor briefed nor argued by the parties; it first arose during oral argument in the Minnesota Supreme Court when one of the justices asked a question about equitable estoppel'.[227] 'It is irrelevant to this Court's jurisdiction', said Justice White, 'whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided'.[228] Similarly, *Snyder* furnishes a 'nice example of how forfeiture doctrines empower judicial issue selection'.[229] The federal appellate courts considered the state tort law issues waived, establishing a platform for disposing of the case wholly on the basis of the First Amendment.[230]

By contrast, the High Court exercises less issue discretion. Suppose that a government official brings a minor civil claim[231] for breach of a confidentiality agreement in the Magistrates Court of Tasmania. In minor civil claims, the default rule is that parties are

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[224] Monaghan (n 221) 684.

[225] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1976, 2944 (Robert Ellicott QC, Attorney-General).

[226] Amanda Frost, 'The Limits of Advocacy' (2009) 59 Duke LJ 447; Monaghan (n 221) 689–91.

[227] *Cohen v Cowles Media Co* (n 4) 666–67.

[228] ibid 667.

[229] Monaghan (n 221) 696.

[230] ibid 696–97.

[231] A 'minor civil claim' is 'a claim or counterclaim for damages, or for the payment of money, if the amount claimed does not exceed $5000'. Magistrates Court (Civil Division) Act 1992 (Tas) s 3.

not represented.[232] Suppose, moreover, that the defendant raises a defence based on the implied freedom. Because this defence 'involves a matter arising under the Constitution or involving its interpretation', the defendant must give notice to all Attorneys-General (federal and state).[233] Each of those Attorneys-General has a right not only to intervene[234] but also to remove the entire case before judgment to the High Court.[235] The purpose of the removal process is to ensure that significant constitutional issues are decided by the High Court with minimum delay and cost.[236] The High Court has no choice but to decide the constitutional issue. As the Australian Law Reform Commission put it, 'any constitutional matter pending in any Australian court may be brought to the High Court for determination on the motion of an Attorney-General'.[237] Although the number of cases removed is small, they often settle important constitutional issues.[238] The analogous procedure for the US Supreme Court, judgment before certiorari, is also deployed sparingly, but it is entirely within the discretion of the Court.[239] The Court itself determines whether to short-circuit the deliberative and filtering function of the ordinary appellate process.

If a contract defendant in Australia ever raises a defence grounded in the implied freedom, most likely the entire case will be removed to the High Court for determination before any lower court has considered the constitutional issue. At least in *Cohen v Cowles Media Co*, the Minnesota Supreme Court had considered whether the state law of promissory estoppel was consistent with the Free Speech Clause. But *Theophanous*, *Stephens*, and *Lange* were all removed into the High Court before judgment. And indeed, two of the

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[232] ibid s 31AD(1).

[233] Judiciary Act 1903 (Cth) s 78B(1).

[234] ibid s 78A.

[235] ibid s 40(1).

[236] *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 247–48 (Mason CJ).

[237] Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No 92, October 2001) 293 [15.9].

[238] ibid 292 [15.6].

[239] James Lindgren and William P Marshall, 'The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals' [1986] Sup Ct Rev 259, 262–63.

three implied freedom cases currently before the High Court were removed.[240] The other was brought in the Court's original jurisdiction (a state is a party).[241] The US Supreme Court fashionably styles itself as a 'court of review, not of first view'.[242] In Australia, it is not unusual for the High Court to decide important constitutional issues in the first instance, even if it believes that the matter should have proceeded through the ordinary appellate process.

b) Jurisdictional Dimension

In the US, state action is a necessary prerequisite to the application of the First Amendment. *Cohen v Cowles Media Co* positioned state action as the 'initial question' for triggering the protection of the Free Speech Clause.[243] Without it, said Justice White, 'the First Amendment has no bearing on this case'.[244] The state action doctrine is not typically phrased as a jurisdictional issue. But it possesses jurisdictional features. It is an essential precondition to the application of the First Amendment, and perhaps cannot be waived. In the absence of state action, no First Amendment question can arise. It is therefore at least arguable that the state action doctrine is quasi-jurisdictional, as some federal Circuit Courts of Appeals have characterised the Eleventh Amendment,[245] which is to say, 'jurisdictional in the sense that it is a limitation on the federal court's judicial power', even if not 'coextensive with the limitations on judicial power in Article III'.[246]

Although the US Supreme Court has not squarely decided the issue, it is unlikely that the enforcement of a private contract amounts to state action. Justice White's opinion in *Cohen v Cowles Media Co* suggests two components of the state action holding: first,

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[240] *Preston v Avery*; *Clubb v Edwards*, Nos H2 & M46 of 2018; *Comcare v Banerji*, No C12 of 2018.

[241] *Spence v Queensland*, No B35 of 2018.

[242] *Cutter v Wilkinson*, 544 US 709, 718 n 7 (2005). The justices have invoked this description on many occasions since it was first penned in *Cutter*.

[243] *Cohen v Cowles Media Co* (n 4) 668.

[244] ibid.

[245] *Green v Graham*, 906 F 3d 955, 963–64 (11th Cir 2018).

[246] *Calderon v Ashmus*, 523 US 740, 745 n 2 (1998).

that promissory estoppel is 'a state-law doctrine which, in the absence of a contract, creates [legal] obligations never explicitly assumed by the parties', and second, that those 'legal obligations would be enforced through the official power of the Minnesota courts'.[247] In that regard, promissory estoppel is like tort liability: imposed by law rather than voluntarily assumed by the parties. To be sure, the Supreme Court famously held in *Shelley v Kraemer* that the enforcement by a state court of a racially restrictive covenant amounted to state action that violated the Fourteenth Amendment.[248] But that holding has been confined to its facts.[249] The Eleventh Circuit Court of Appeals held, for example, that the judicial enforcement of a settlement agreement 'is not governmental action for First Amendment purposes'.[250] And a federal trial judge recently observed that there is no state action when a court enforces a private contract. 'To hold otherwise', he said, 'would mean that courts could never enforce non-disclosure agreements'.[251]

Australian courts are not confronted with a similar 'state action' problem, because it is either assumed or not required.[252] In the argot of comparative constitutional law, the implied freedom can operate horizontally, whereas the Free Speech Clause only operates vertically.[253] Because it follows the gestalt model, federal jurisdiction in Australia overtakes the whole matter as soon as a contract defendant raises the implied freedom. The implied freedom, then, is much more potent than the First Amendment when courts enforce private

[247] *Cohen v Cowles Media Co* (n 4) 668.

[248] 334 US 1 (1948).

[249] *United Egg Producers v Standard Brands Inc*, 44 F 3d 940, 943 (11th Cir 1995) ('the reach of *Shelley* remains undefined outside of the racial discrimination context'); Lillian BeVier and John Harrison, 'The State Action Principle and Its Critics' (2010) 96 Va L Rev 1767, 1801 (suggesting that *Shelley* is only a 'small' exception to the state action doctrine).

[250] *United Egg Producers* (n 249) 943.

[251] *Bronner v Duggan*, 249 F Supp 3d 27, 41 (DDC 2017).

[252] Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25 Melb U L Rev 374, 406–14.

[253] ibid 405 (arguing that the implied freedom's horizontal operation, that is, between citizen and citizen, is indirect because it dictates the development of the common law); Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1 Int J Const L 79, 81 ('standard U.S. constitutional doctrine is that constitutional provisions do *not* have horizontal effect').

contracts. This potency is amplified because in Australia the common law is a central institution.

c) Jurisprudential Dimension

If state action presents no obstacle, then broadly speaking there are two ways in which federal free speech imperatives operate against the enforcement of a private contract at common law. The first is where the federal constitution acts externally to the common law. On this view, the interaction between the constitution and the common law is one of rule conflict. The only operative question is whether enforcing the contract would impose liability on the defendant for protected speech. The overriding question is whether the speech is protected; if so, then liability is foreclosed. A court is utterly unconcerned with the intricacies of the common law and does not remould that law to conform with the constitutional norm. This view tracks, or at least shares some affinity, with a scribal attitude towards the common law. The second mode of enforcement is where the federal free speech norm operates internally to the common law. Here, a court first determines the content of the common law. The court then asks whether that content (comprising common law rules and principles) must be refashioned for consistency with the constitutional free speech requirement. In other words, when necessary the federal free speech norm shapes the substantive principles of the common law. This view roughly corresponds to the authorial attitude to the common law.

These two modes of free speech enforcement against the common law are stylised extremes; the Australian High Court and the US Supreme Court have moved along the spectrum between the two poles. We could, for example, call the external or scribal model the *Snyder* or *Theophanous* model. The reasoning in *Snyder* is marked by its near-sole focus on speech and its near-total indifference to Maryland common law. As long as the speech attracts First Amendment protection, the defendant is immune to damages. Similarly, all that can be ascertained from *Theophanous* is that the implied freedom 'precluded "an unqualified application of the defamation laws

of Victoria to impose liability in damages in respect of political communications and discussion"'.[254] Precisely 'what flows from that conclusion', however, was unsettled by *Theophanous*.[255]

By contrast, we could call the internal or authorial model the *Sullivan* or *Lange* model. In *Sullivan*, Justice Brennan's majority opinion analysed the rules and principles of Alabama common law, not just the judicial enforcement of verdicts. First Amendment scrutiny was applied to the law that claimed to legitimise such a verdict. In *Lange*, too, the High Court not only recognised that 'the common law must conform with the Constitution', but also, '[c]onversely, the Constitution itself is informed by the common law'.[256] Common law developments 'equally affect' the implied freedom.[257] Qualified privilege in defamation is granted according to the common convenience and welfare of society. 'Similarly', concluded the High Court, 'the content of the freedom to discuss government and political matters must be ascertained according to what is for the common convenience and welfare of society'.[258]

In their respective attitudes to the common law as affected by federal free speech mandates, the US Supreme Court and the Australian High Court have moved in opposite directions. The Supreme Court commenced with a more internal or authorial approach in *Sullivan*, but more recently took a strongly external or scribal approach in *Snyder*. I have criticised this shift because of its negative effect on cooperative judicial federalism: it shuts down valuable intersystemic judicial conversation.[259] In the US, this valuable conversation — cooperative judicial federalism — is nourished when state rights of action embed discrete federal issues (or vice versa). On the one hand, *Snyder*, which set aside a tort verdict without engaging in the underlying law, displaces vast swaths of the common law. *Sullivan*, on the other, is state-regarding. It took the internal point of view vis-à-vis the common law of Alabama and opened a dialogue between state and federal courts on the narrowly tailored issue of actual malice in defamation.

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[254] *Lange* (n 1) 555, quoting *Theophanous* (n 145) 187 (Deane J).
[255] ibid.
[256] ibid 564.
[257] ibid 565.
[258] ibid.
[259] Jeffrey Steven Gordon, 'Silencing State Courts' (2018) 27 Wm & Mary Bill of Rights J 1.

The High Court, in contrast, has moved from the relatively external or scribal *Theophanous* model to the more internal or authorial *Lange* model. Although he did not recognise the deep transition from the external/scribal to the internal/authorial, Buss did notice the 'shift[] from the *Theophanous* approach, under which inconsistent common law "yields" to the Constitution, to the *Lange* approach, under which inconsistent common law is "developed" to bring it into conformance with the Constitution'.[260] But he found the shift 'at once fascinating and baffling, though perhaps baffling only to American eyes'.[261] For Buss, the change from *Theophanous* to *Lange* is as inscrutable as it is trifling. He argued that the distinction between *Theophanous* and *Lange* 'is one of form, not substance, and thus it seems questionable whether one can characterise the distinction as an important one'.[262]

It is important. It marks the movement from the external to the internal attitude to the common law. And this means that *Lange* attains insight into an entire dimension of the practice of law that is missed by *Theophanous*.[263] That dimension is the way in which participants in the practice of the common law regard their own behaviour, taking common law principles 'in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules'.[264] Because *Theophanous* ignores questions about the internal character of common law argument, its 'explanations are impoverished and defective, like innumerate histories of mathematics'.[265] It matters, for example, that *Lange* in 1997 developed the common law consistently with the implied freedom by leaning heavily on a judgment of Sir James Parke written in 1834.[266] This opinion predates Australia's Constitution by 66 years. The High Court's reliance on Parke, a celebrated

[260] Buss (n 153) 429–30.
[261] ibid 429.
[262] ibid 434.
[263] Hart (n 105) 90.
[264] ibid.
[265] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 14.
[266] *Toogood v Spyring* (1834) 1 CM & R 181, 193; 149 ER 1044, 1050.

English judge,[267] could hardly be more consequential. It specified the sources of binding, or at least highly persuasive, authority for the application of the Constitution. In this way, *Lange* operationalised 'a fact of legal history', namely, that Australia is constitutionally embedded in the common law.[268] The Constitution is predicated on the continued existence of the common law. The Constitution shapes the common law, and the common law is necessary for interpreting the Constitution. They are mutually supportive, and each is mediated by the other.

Similarly, the US Supreme Court in *Sullivan* took an internal point of view towards Alabama's common law. *Sullivan* drew from a rule adopted by the Kansas Supreme Court in 1908 that anyone claiming to be defamed by communication on 'matters of public concern, public men, and candidates for office', 'must show actual malice, or go remediless'.[269] After noting that the Kansas rule 'has been adopted by a number of state courts', the US Supreme Court held that the 'privilege for the citizen-critic of government' was 'required by the First and Fourteenth Amendments'.[270] *Sullivan*, therefore, specified state court opinions as a privileged source of federal constitutional application, at least when the state action at issue is the judicial enforcement of common law torts. *Sullivan*'s internal attitude to the common law was sensitive to the states.

It is legitimate, therefore, for the Australian High Court not only to subject a confidentiality agreement to free speech scrutiny. It is also legitimate for the High Court to suffuse with constitutional significance common law judgments on the doctrine that voids contracts against public policy — even if those judgments predate the Constitution itself. And indeed, the great Sir James Parke once wrote forcefully of the public policy doctrine in contract law:

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[267] Gareth H Jones, 'Parke, James, Baron Wensleydale (1782–1868), judge' in *Oxford Dictionary of National Biography* (online at 29 March 2019); Owen Dixon, 'Concerning Judicial Method' (1956) 29 ALJ 468, 472 (referring to the 'great James Parke, whose judicial achievement legal history seems now so strangely to misrepresent'); Note, 'Great English Judges — Exchequer' (1897) 11 Harv L Rev 195, 195 ('Baron Parke ranks as one of the greatest of English judges.').

[268] *Lange* (n 1) 564.

[269] *Coleman v MacLennan* (n 164) 285.

[270] *Sullivan* (n 162) 280, 282–83.

> It is the province of the judge to expound the law only … not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions … have become a part of the recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law every thing which we may think for the public good, and prohibit every thing which we think otherwise. The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail.[271]

If there is a principle that is now firmly established in Australian law, it is the implied freedom of political communication. It only takes one clever contract defendant to plead an implied freedom defence. Notices to all Attorneys-General will issue. And one of them will pluck that case from local court obscurity, foisting a significant constitutional issue on an unsuspecting High Court. When that happens, Sir James Parke, who died 33 years before the Constitution was adopted, may yet again influence its development.

CONCLUSION

Comparative judicial federalism is a neglected topic that can yield new insights and substantiate our intuitions. But it also points to broader inquiries. Whenever decisionmaking authority is distributed across coordinate bodies, the questions discussed in this Article recur. Universal jurisdiction in international law is one example. Administrative law adjudication is perhaps another. The starting point for analysis is to ask questions along the three dimensions isolated in this Article. How do (or should) the decisionmaking institutions interact? What is (or should be) their jurisdictional allocation? What are (or should be) their jurisprudential sources?

[271] *Egerton v Brownlow* (1853) 4 HLC 1, 123–24; 10 ER 359, 409 (Parke B).