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What's the Harm? The Future of the First Amendment

Articles

Comments

The Shifting Law of Sexual Speech: Rethinking Robert Mapplethorpe

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Robert Mapplethorpe, *Self-Portrait* (1988), Tate Modern

INTRODUCTION

This Article explores the dramatic changes that have occurred over the last thirty years in the First Amendment doctrines governing sexual speech. As a prism through which to evaluate these changes, I consider the thirtieth anniversary of the landmark Robert Mapplethorpe trial, the first censorship prosecution against an art museum in the history of this country and the defining battle in the culture wars that roiled post-Reagan America. The target was the exhibition of formally beautiful, sexually hard-core photographs by Robert Mapplethorpe on view at a museum in Cincinnati. The controversy that erupted over those images—fueled by anxieties about AIDS, homosexuality, sadomasochism, race, government funding for the arts, and the vanishing boundary

between art and pornography—spilled out of the courtroom into popular culture and into the halls of the United States Congress.

This Article looks back at this landmark art trial and establishes its continuing relevance for free speech law. What emerges is a surprising story about dramatic changes in the major First Amendment rules governing sexual speech. In particular, I look at the shifting trajectories over the years of the two legal doctrines that were at the center of the Mapplethorpe case—obscenity law and child pornography law—and I show the radically divergent paths these two areas of law have taken. While obscenity law has receded in importance, and while the allegedly obscene photos from the trial have become widely accepted in museums and in the art market, child pornography law has followed the opposite course. In contrast to the allegedly obscene pictures, which pose almost no legal risk today, the two photographs of children that were on trial have become more, not less, controversial over the past thirty years, to the point where curators are quietly reluctant to show these images at all. In my view, these photos now occupy a space of legal and moral uncertainty.

In recent years there has been a growing art world "obsession" with Robert Mapplethorpe.[1] Three major museums have staged retrospectives of Mapplethorpe's work in the past few years.[2] Once denounced on the floor of the U.S. Senate, his work viewed as menacing and contagious, Mapplethorpe has now emerged as a market and museum darling, to the point where a critic recently declared that the art world had been gripped with a case of "Mapplethorpe fever."[3] The once-taboo photos that were on trial for obscenity have now become prized in museums and in the art market. Yet in spite of this fever, and the easy acceptance of the pictures that were once charged with violating obscenity law, the two images of children from the trial have quietly receded from view, and their legal status has become more fragile than it once was.

What happened to change the dynamics of showing these works, legally and culturally? And what explains the differing trajectories of the two major doctrines governing sexual speech? The trial marked the last gasp of obscenity law, which has since become legally inert. Yet child pornography law has expanded dramatically over the same period.

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[1] *See* Rain Embuscado, *Forthcoming Book of His Archive Adds to Recent Robert Mapplethorpe Fever*, ARTNET NEWS (Feb. 9, 2016), https://news.artnet.com/art-world/robert-mapplethorpe-archive-published-422789 [https://perma.cc/C2VF-LUP3].

[2] *See Robert Mapplethorpe: The Perfect Medium,* J. PAUL GETTY MUSEUM, http://www.getty.edu/art/exhibitions/mapplethorpe/ [https://perma.cc/N3P2-2546] (last visited Mar. 25, 2020) (website for Getty show); *Robert Mapplethorpe: The Perfect Medium*, LOS ANGELES CTY. MUSEUM OF ART, https://www.lacma.org/art/exhibition/robert-mapplethorpe-perfect-medium [https://perma.cc/X5JK-D457] (last visited Mar. 27, 2020) (website for LACMA show).

[3] Embuscado, *supra* note 1.

In tracing the divergent paths taken by these two doctrinal areas, three themes emerge: First, I show the direct relationship between obscenity law's decline and child pornography law's ascent. Second, I explore the shift within free speech law about what kinds of harms should be legally cognizable. Both obscenity law and child pornography law are premised on notions of harm that are anomalous within First Amendment doctrine. Yet over the last thirty years, the diffuse notion of harm that animated obscenity law has been eclipsed by the concrete vision of harm that undergirds child pornography law: harm baked into the production of the material itself. Finally, I argue that shifting cultural norms in the wake of the Mapplethorpe trial have had a profound impact on First Amendment law, even as the law has affected those norms. Free speech law governed this chapter in the culture wars, yet in surprising ways, the changing social norms unleashed by the culture wars have also governed free speech law.

Part I explores Mapplethorpe's artistic process and legacy and tells the story of the nation-wide scandal that erupted around his work, culminating in the landmark 1990 trial. In Part II, I argue that a combination of AIDs panic, racism, and homophobia, as well as backlash against the changing role of art in society, made Mapplethorpe a perfect target for prosecution during the culture wars of the 1980s and 1990s. I then analyze why, in spite of all these factors that made Mapplethorpe the perfect target, the prosecution nonetheless led to an acquittal. Here I argue that certain artistic aspects of the work made Mapplethorpe surprisingly easy to defend under obscenity doctrine. Part III analyzes the prosecution of two photographs of nude children included in the exhibition; I argue that these photographs now occupy a space of greater legal and cultural uncertainty than they did thirty years ago. Part IV argues that a fundamental mistake about artistic meaning underlay the Mapplethorpe's court's pronouncements on the photographs as well as common legal assumptions about the stability of artistic meaning. I conclude that the dramatic changes in free speech law discussed in this Article have been inextricably intertwined with and influenced by the battles over social norms that the Mapplethorpe controversy unleashed.

I. SCANDAL AND THE LANDMARK ART TRIAL

A. The Story of Mapplethorpe

Intertwined with Mapplethorpe's legal legacy is a rich artistic and cultural narrative. Mapplethorpe provoked political controversy, polarized critics, broke boundaries in the history of art and photography, and

paved the way for a new generation of artists working today.[4] Formally perfect, sometimes radical in content, the work continues to capture the attention of curators and collectors long after Mapplethorpe's death from AIDS in 1989 at age 42.

1. The artist's work

Mapplethorpe's mature photographic work fell into three main categories: nudes, still lifes (particularly of flowers), and portraits. The work that provoked Congress and prosecutors was a subset of nudes that Mapplethorpe called the "sex pictures";[5] he also called them "smut art."[6]

The initial sex pictures were taken in a period from 1977–1980 and depicted the gay male S&M community Mapplethorpe was actively participating in at the time, when he frequented New York clubs like the Mineshaft.[7] Mapplethorpe initially collected these images into a portfolio of thirteen photos called the *X Portfolio*. These photographs, some of them showing hard-core, radical sex acts (as I will describe below), were rarely exhibited in the U.S. during Mapplethorpe's life, even as his fame grew. The photos were often segregated from his main body of work despite Mapplethorpe's attempt to integrate them into the corpus of his art.[8] For example, in one of their few showings during the artist's life, the sex pictures were displayed at the downtown avant-garde art space, the Kitchen, while the same month in 1977, the more polished Holly Solomon Gallery held an exhibit of Mapplethorpe's regal and uncontroversial portraits.[9]

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[4] *See* PAUL MARTINEAU & BRITT SALVESEN, ROBERT MAPPLETHORPE: THE PHOTOGRAPHS (Paul Martineau & Britt Salvesen eds., 2016). For an important analysis of the artistic significance of Mapplethorpe's work, see ARTHUR C. DANTO, PLAYING WITH THE EDGE: THE PHOTOGRAPHIC ACHIEVEMENT OF ROBERT MAPPLETHORPE (1996).

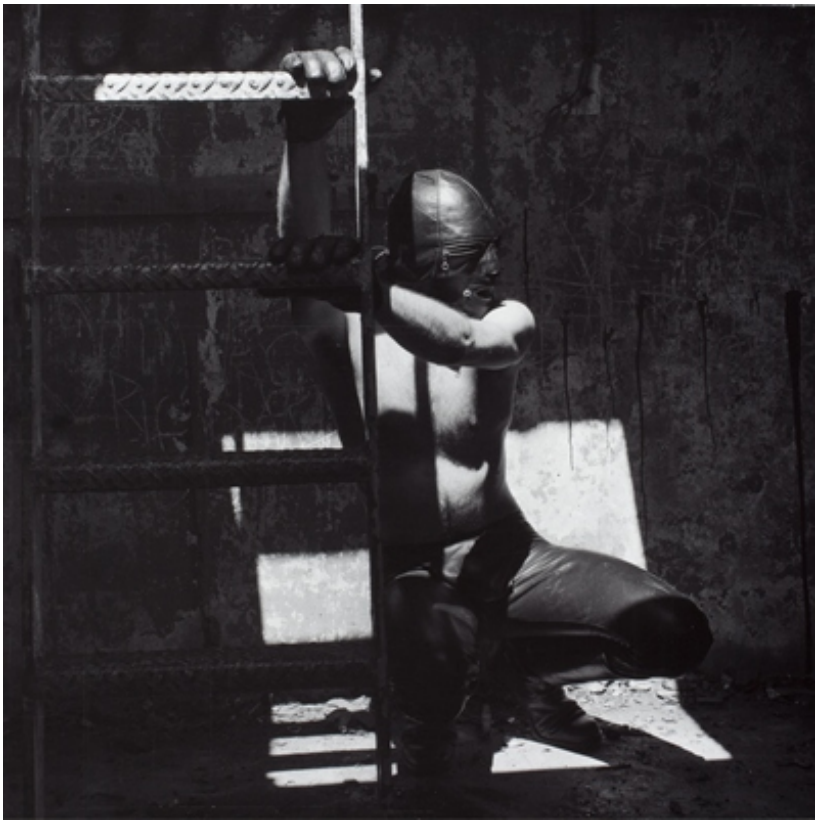
[5] Richard Meyer, *Mapplethorped: Art, Photography, and the Pornographic Imagination*, *in* ROBERT MAPPLETHORPE: THE PHOTOGRAPHS 231, 237 (Paul Martineau & Britt Salvesen eds., 2016).

[6] Kevin Moore, *Whipping Up a Storm: How Mapplethorpe Shocked America*, GUARDIAN (Nov. 17, 2015), https://www.theguardian.com/artanddesign/2015/nov/17/robert-mapplethorpe-the-perfect-moment-25-years-later [https://perma.cc/389U-ESNK].

[7] *See* Ryan Linkof, *On the Edge*, *in* ROBERT MAPPLETHORPE: THE PHOTOGRAPHS 55 (Paul Martineau & Britt Salvesen eds., 2016). The *X Portfolio* contained the earliest of the sex pictures, but Mapplethorpe continued to produce more.

[8] Meyer, *supra* note 5; *see also* Moore, *supra* note 6.

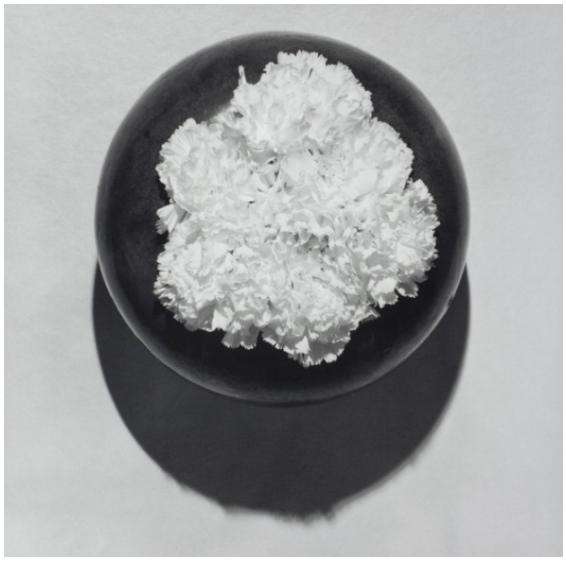
[9] *Id.*



Robert Mapplethorpe, *Jim, Sausalito* (X Portfolio) (1977), the J. Paul Getty Museum

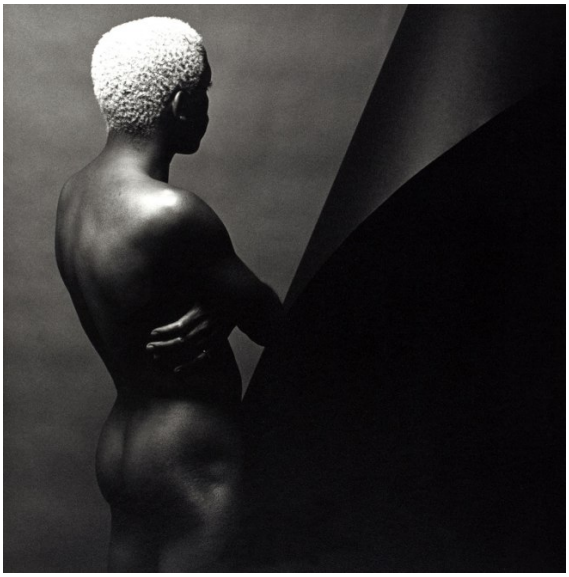
Robert Mapplethorpe, *X Portfolio* (1978), the J. Paul Getty Museum

The companion to the *X Portfolio*, produced at the same time, was another collection of thirteen photos called the *Y Portfolio*. (Portfolio collections in photography are a traditional method of assembling a compendium of an artist's work.) The *Y Portfolio* contained Mapplethorpe's elegant, stylized pictures of flowers. Accompanying these two was a third collection of thirteen photographs called the *Z Portfolio*, which Mapplethorpe put together in 1981. It was comprised of images of nude Black men, some of whom Mapplethorpe was artistically and sexually involved with.[10]



Mapplethorpe, *Carnation, N.Y.C.* (Y Portfolio) (1978)

[10] These images were ultimately published in a book called the *Black Book*. ROBERT MAPPLETHORPE, BLACK BOOK (1988). For my discussion of the controversial racial politics of this work, see *infra* Part IV.



Mapplethorpe**,** *Leigh Lee, N.Y.C.* (Z Portfolio) *(*1980)

Mapplethorpe wanted the three portfolios ideally exhibited "all in one mass";[11] in this way he highlighted the formal similarities between the jarringly distinct subjects.[12] In Cincinnati, where five of the *X Portfolio* pictures led to obscenity charges, the *X*, *Y*, and *Z Portfolios* were displayed together in a grid like format.[13]

Mapplethorpe's career soared in the late 1980s at roughly the same time he grew ill from AIDS. A one-man show of his work opened in July 1988 at the Whitney Museum of American Art, marking a new level of status and visibility in his career. That same year, a retrospective of his work called *The Perfect Moment* was organized by the Institute of Contemporary Art ("ICA") at the University of Pennsylvania in Philadelphia. Opening in December 1988, it was set to travel to six more venues, including Cincinnati, from 1989 to 1990.[14] On March 9, 1989, Mapplethorpe died of AIDS at age 42.

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[11] Janet Kardon, *Mapplethorpe Interview*, *in* ROBERT MAPPLETHORPE: THE PERFECT MOMENT 28 (2d ed. 1989).

[12] *See* Linkof, *supra* note 7, at 56. As Mapplethorpe commented, "I don't think there's that much difference between a photograph of a fist up someone's ass and a photograph of carnations in a bowl." Parker Hodges, ROBERT MAPPLETHORPE: PHOTOGRAPHER, Manhattan Gaze, Dec. 10. 1979–Jan. 6, 1980, at 5.

[13] Richard Meyer, *The Jesse Helms Theory of Art*, 104 OCTOBER 131, 136 (2003). They were installed on a tilted table too high for small children to see on their own. *Id.*

[14] MARTINEAU & SALVESEN, *supra* note 4, at 7.

2. The funding debates

Two months after Mapplethorpe's death, politicians in the U.S. Senate began an attack on the National Endowment for the Arts ("NEA") for its funding of controversial art. The initial focus was on another scandalous artist, Andres Serrano. Serrano's work *Piss Christ* was a picture of a crucifix submerged in the artists' urine. Serrano had been awarded a $15,000 prize by the Southeastern Center for Contemporary Art in North Carolina, which had received funding in part from the NEA.[15] Conservative members of Congress and an activist evangelical group, the American Family Association (headed by the Reverend Don Wildmon), led the charge against the NEA for its funding choices.

In June 1989, shortly after Congress began its attack on the NEA, and only a few months after Mapplethorpe's death, *The Perfect Moment* (the traveling Mapplethorpe retrospective that had originated at the University of Pennsylvania's ICA) was scheduled to open in Washington, D.C. at the Corcoran Gallery of Art. But in a startling act of self-censorship, the director of the Corcoran cancelled the show—after all the invitations had gone out—citing the escalating political debates about art in Congress. Presumably the Corcoran curator was worried about congressional attention because the ICA had received $30,000 from the NEA to support the exhibition and its catalogue.[16] As is frequently the case with acts of self-censorship, the Corcoran's decision to cancel the show only served to draw further attention to Mapplethorpe's work.

Brandishing Mapplethorpe's virtuosic and frankly sexual pictures before Congress, conservative Senator Jesse Helms seized the moment.[17] Helms pointed repeatedly to Mapplethorpe's supposed "promotion of a homosexual lifestyle" and his death from AIDS. Although they defeated Helms's more radical proposal, an outraged Congress nonetheless amended the statutory rules governing NEA grants to deny funding to "obscene" art; the law was later struck down as unconstitutionally vague.[18] After this legal defeat, Congress tried again, this time

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[15] *See* Cynthia Carr, *Going to Extremes*, VILLAGE VOICE, Nov. 20, 1990, at 67; Gregory B. Lewis & Arthur C. Brooks, *A Question of Morality: Artists' Values and Public Funding for the Arts*, 65 PUB. ADMIN. REV. 8 (2005).

[16] NATIONAL ENDOWMENT FOR THE ARTS: A HISTORY, 1965–2008 93 (Mark Bauerlein & Ellen Grantham eds., 2009).

[17] Senator Helms denounced Mapplethorpe's work as "filth" and "trash." 135 CONG. REC. S8807–08 (daily ed. July 26, 1989) (statement of Sen. Helms). *See generally* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2092 (1991).

[18] Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 101–121, 304(a), 103 Stat. 701, 741 (1989), *invalidated by* Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 781–82 (C.D. Cal. 1991). The NEA chose not to appeal the decision. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 575 (1998).

amending the statute governing NEA grants to add a so-called "decency rule."[19] The new language, upheld by the Supreme Court in *NEA v. Finley*,[20] was passed in direct response to the Mapplethorpe and Serrano controversies. It provided that in its grant-making decisions, the NEA should take "into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[21] Mapplethorpe had become the poster child for what conservatives claimed was a culturally elite art world that mocked American values.[22]

3. The trial

It was in this hostile political climate that *The Perfect Moment* was set to open in Cincinnati at the Contemporary Arts Center ("CAC"). Amidst political pressure, the museum sought to steel itself against attack; it segregated any general federal funds it received from the Mapplethorpe show, placed warning signs for visitors, and did not admit anyone under 18 to the exhibition.[23] Approximately 80,000 people saw the show.[24] On March 22, 1990, the CAC sought a declaratory judgment that the work was not obscene. The show opened on April 7, 1990 and was met on its first day with a grand jury indictment. Mapplethorpe was dead, but the museum and its director, Dennis Barrie, were charged with violating obscenity law as well as an Ohio law prohibiting nude depictions of children. Seven of the show's 175 pictures were on trial.[25] Barrie faced up to one year in jail.[26]

The prosecution's main case was to present the photos and the testimony of three police offers who established that the photos were displayed at CAC. The defense presented four days of expert testimony,

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[19] 20 U.S.C. 954(d) (1994).

[20] 524 U.S. 569 (1998) (rejecting a claim that the law was impermissible viewpoint discrimination and unconstitutionally vague). For discussion of *Finley*, see Lackland H. Bloom, Jr., NEA v. Finley*: A Decision in Search of a Rationale*, 77 WASH. U. L.Q. 1 (1999); Kristine M. Cunnane, *Maintaining Viewpoint Neutrality for the NEA:* National Endowment for the Arts v. Finley, 31 CONN. L. REV. 1445 (1999); Cara Putman, National Endowment for the Arts v. Finley*: The Supreme Court Missed an Opportunity to Clarify the Role of the NEA in Funding the Arts: Are the Grants A Property Right or an Award*, 9 GEO. MASON U. CIV. RTS. L.J. 237, 242 (1999).

[21] 20 U.S.C. § 954(d)(1) (1990).

[22] Robert Reid-Pharr, *Putting Mapplethorpe in His Place*, ART IN AM. (Mar. 2016), https://www.gladstonegallery.com/sites/default/files/MAP-2016_03%20Art%20in%20America.pdf [https://perma.cc/LT66-HAK].

[23] STEVEN C. DUBIN, ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL ACTIONS 184–85 (1992).

[24] *Id.*

[25] The five pictures that were alleged to be obscene were as follows: One shows a man urinating into another man's mouth; another called *Lou, N.Y.C.* shows a finger inserted into a penis. Three more each depict a man with an object inserted in the rectum: a cylinder, a bull whip (this is a self-portrait), and a man's fist and forearm. Fiss, *supra* note 17 at 2089 n.4.

[26] The CAC faced a $10,000 fine. DUSTIN KIDD, LEGISLATING CREATIVITY: THE INTERSECTIONS OF ART & POLITICS 71 (2016).

largely from art critics and curators.[27] After a jury trial, the defendants were acquitted.[28] The trial gripped the art world, turning Mapplethorpe into a *cause célèbre* and a symbol of the threat posed by the culture wars to artistic and sexual freedom.[29]

B. "Mapplethorpe Fever":[30] The Resurgent Interest in the Work

There has been a resurgence of interest in Mapplethorpe in recent years. A younger generation of curators has engaged with his legacy, and his status as an art market star has risen. Over the last few years critics have chronicled the art world's "growing obsession" with the artist.[31] One critic declared that the art world has been gripped with a case of "Mapplethorpe fever."[32] Vogue Magazine termed it "Mapplethorpe mania."[33] Certainly museums have been lavishing attention on his work. Two major museums recently collaborated on a joint retrospective of Mapplethorpe's oeuvre; *Robert Mapplethorpe: The Perfect Medium* spanned both the J. Paul Getty Museum and LACMA (the Los Angeles County Museum of Art).[34] A documentary about his work and the scandal surrounding it debuted to critical acclaim in 2016.[35] The Guggenheim staged a major one-year, two-part Mapplethorpe retrospective in 2019.

Mapplethorpe's star is also rising in the art market. An image from the *X Portfolio* broke a new auction record for that series in 2015.[36] The auction was for one of his most controversial—and highly regarded—explicit images, *Man in a Polyester Suit*, depicting the artist's lover,

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[27] DUBIN, *supra* note 24, at 188–89.

[28] Mary T. Schmich, *Art Gallery, Director Not Guilty: Cincinnati Jurors Clear Both of Obscenity Charges*, CHI. TRIB., Oct. 6, 1990, at 1; *see also* Sonya G. Bonneau, *Ex Post Modernism: How the First Amendment Framed Nonrepresentational Art*, 39 COLUM. J.L. & ARTS 195, 219 (2015).

[29] Paul Martineau & Britt Salvesen, *Introduction*, *in* ROBERT MAPPLETHORPE: THE PHOTOGRAPHS 1,7 (Paul Martineau & Britt Salvesen eds., 2016).

[30] Embuscado, *supra* note 1.

[31] *Id.*

[32] *Id.*

[33] Julia Felsenthal, *Mapplethorpe Mania Hits Los Angeles*, VOGUE (Mar. 16, 2016), https://www.vogue.com/article/robert-mapplethorpe-the-perfect-medium-interview [https://perma.cc/8L9V-CWLT].

[34] *See* J. PAUL GETTY MUSEUM, *supra* note 2; LOS ANGELES CTY. MUSEUM OF ART, *supra* note 2.

[35] James Poniewozik, *Review: 'Mapplethorpe: Look at the Pictures' on HBO Gives Context to Controversy*, N.Y. TIMES (Apr. 3, 2016), http://www.nytimes.com/2016/04/04/arts/television/review-mapplethorpe-look-at-the-pictures-on-hbo-gives-context-to-controversy.html [https://perma.cc/5BVE-YUT6].

[36] The Sotheby's sale marked "the first time in 23 years that one of the 15 images from the original edition of *X Portfolio*" came up at auction. Sarah Cascone, *Robert Mapplethorpe's Controversial 'Man in Polyester Suit' Photo Sells for $478,000*, ARTNET NEWS (Oct. 8, 2015), https://news.artnet.com/market/robert-mapplethorpe-polyester-suit-sells-338631 [https://perma.cc/7JKN-N3KG].

Milton Moore, wearing a three-piece suit with his penis exposed and his head unseen. This image, once denounced in Congress, sold for $478,000.[37] (The photograph was one of an edition of fifteen.) The last time the work sold publicly was in 1992, when it brought $9,000.[38]

II. DOES OBSCENITY LAW STILL MATTER?

Until Mapplethorpe, there had never been an obscenity prosecution against an art museum in the history of this country. Obscenity law was haunted by the specter of having banned great works of *literature*, but never significant works of art. In its first obscenity decision in 1957, *Roth v. United States*,[39] the Supreme Court entered with some trepidation a doctrinal arena marked by a history of literary philistinism. Prior to the Court's intervention, lower courts had overseen the suppression (and, later, the eventual freeing) of acclaimed books such as James Joyce's *Ulysses* and D.H. Lawrence's *Lady Chatterley's Lover*.[40] Writing his concurrence in *Roth*, the Court's first foray into the field, Chief Justice Warren evoked obscenity law's historic suppression of "great" cultural works,[41] referring to the "[m]istakes of the past."[42]

And indeed, those mistakes had become a thing of the past by the time the Mapplethorpe case came to trial in 1990. Although the

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[37] Daniel McDermon, *Mapplethorpe Photograph Brings $478,000 at Auction*, N.Y. TIMES: ARTSBEAT BLOG (Oct. 7, 2015, 3:26 PM), https://artsbeat.blogs.nytimes.com/2015/10/07/mapplethorpe-photograph-brings-478000-at-auction/ [https://perma.cc/E9DD-PUM3]. While this was the record for a work from Mapplethorpe's *X Portfolio*, an earlier record for all of Mapplethorpe's images was set at Christie's in 2006, when his 1987 portrait of Andy Warhol sold for $643,200. *See* Stephen Milioti, *Despite Record Prices for Photographs at This Year's Auctions, it is Still Cheaper to Corner the Market in Leibovitz than Lichtenstein. Here's How to Get Started*, FORTUNE (Nov. 17, 2006), https://archive.fortune.com/magazines/fortune/fortune_archive/2006/11/13/8393128/index.htm [https://perma.cc/9RJJ-K267]. In 2017, a Mapplethorpe self-portrait sold for £450,000 (£548,750 with fees). Anna Brady, *Auction Record for Mapplethorpe as Christie's Introduces Two New Sales*, ART NEWSPAPER (Oct. 4, 2017), https://www.theartnewspaper.com/news/christies [https://perma.cc/DRJ3-8WB7].

[38] *Id.*

[39] Roth v. United States, 354 U.S. 476 (1957). Prior to *Roth*, the Court had heard an obscenity case but split four-to-four and thus did not issue an opinion. The result was to affirm a state court obscenity judgment against noted critic Edmund Wilson's novel, *Memoirs of Hecate County*. Doubleday & Co. v. New York, 335 U.S. 848 (1948). Thus, the Court was itself implicated in this history of failure. It had failed to protect a novel by one of the most prominent cultural critics of the day.

[40] *See* United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933) (allowing the entry of *Ulysses* into the United States after previous censorship); Grove Press, Inc. v. Christenberry, 175 F. Supp. 488 (S.D.N.Y. 1959) (overturning, under the *Roth* standard, the Postmaster of New York's suppression of Grove Press's unexpurgated edition of *Lady Chatterley's Lover*).

[41] The Chief Justice wrote: "The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy." *Roth*, 354 U.S. at 495 (Warren, C.J., concurring in result). *Cf.* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 178–79 (1982) (noting obscenity regulation's history of plain errors in banning what we now consider great cultural works).

[42] *Roth*, 354 U.S. at 495 (Warren, J., concurring).

Supreme Court had struggled mightily during the years between its first major obscenity decision and its last in 1973,[43] its goal had been to ban "'hard-core' pornography"[44] while at the same time protecting works of cultural import.[45] By 1973, when the Court finally agreed on the modern definition of obscenity, it looked as if it had settled on a formula that achieved both goals and that would ward off another cultural embarrassment. Then came Mapplethorpe.

The current definition of obscenity, crafted by the Court in 1973 in *Miller v. California*, allows the government to ban material only if the work, taken as a whole and according to contemporary community standards:[46]

(a) "appeals to the prurient interest;"

(b) "depicts [sexual conduct] in a patently offensive way . . . ; and"

(c) "lacks serious literary, artistic, political, or scientific value."[47]

All three prongs must be met before a work can be held obscene and thus banished from First Amendment protection. This means that no matter how sexually explicit—even disgusting—it may be, if a work possesses "serious . . . artistic . . . value," it is protected.[48] Although one might presume this standard would protect automatically any work

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[43] Miller v. California, 413 U.S. 15 (1973). Although it was a significant case in terms of its clarification of *Miller*'s third prong, the Court's decision in *Pope v. Illinois*, 481 U.S. 497 (1987), did not change the basic definition or the rationale of obscenity law, both of which have remained in place since *Miller* and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 97 (1973) were decided in 1973.

[44] The Court specified in 1973 that only "'hard core' pornography" should be banned under the obscenity test, *Miller*, 413 U.S. at 28, but failed to give a definition for the term. The phrase had appeared before in obscenity jurisprudence, including in Justice Stewart's famous opinion stating that he understood obscenity law to encompass only "hard-core pornography." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (footnote omitted). Yet as for the definition of that phrase, he wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ." *Id.*

[45] This angst of the Court's struggle over the years is palpable in the cases: Chief Justice Burger referred the somewhat "tortured history" of the Court's obscenity cases. *Miller*, 413 U.S. at 19. Justice Harlan, terming the obscenity problem "intractable," observed that it had "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part).

[46] In *Pope*, 481 U.S. at 500–01, the Court explained that the community standards analysis did not apply to the third prong of the test for value.

[47] *Miller*, 413 U.S. at 24 (citations omitted). Note that the third prong is judged from the perspective of the reasonable person rather than an "average person" in a community. *Pope*, 481 U.S. at 500–01.

[48] *Id.* at 34.

displayed in a major U.S. museum, that presumption turned out to be wrong.

The Mapplethorpe case marked the return of obscenity law's repressed history of banning works of cultural value, the very problem that modern obscenity jurisprudence was designed to combat.[49] What was it about Mapplethorpe's work that destabilized the Court's project? And what was it about Mapplethorpe that led to a new chapter in this history of cultural attacks, provoking the first obscenity trial against an art museum in the history of the U.S.?

The answer has to do with the nature of Mapplethorpe's work and the dramatic changes in the meaning of "art" that it signaled. But it also has to do with a problem that had been brewing undetected in obscenity law for some time: its fundamental clash with a sweeping shift that was taking place in art.

A. Mapplethorpe's Scandalous Subject Matter

First consider the obvious reason why Mapplethorpe's work provoked this unprecedented trial: some of his images were so controversial and provocative, particularly for their time, that the prosecution seemed preordained. Mapplethorpe depicted sadomasochistic, sometimes violent, hard-core sex acts between gay men. For example, one of the prosecuted pictures showed a man fisting another man, his hand and wrist inserted into the other's anus. Another picture depicted a leather-clad man urinating into the mouth of another man, who kneels to accept it. Even by today's standards, thirty years later, in which pornography,[50] not to mention homosexuality,[51] have become

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[49] This had been in some ways Chief Justice Brennan's core project in *Roth*, when he wrote that all works of value were to be protected. But the Court's project was not fully successful in guiding lower courts. For example, it took an appeal all the way to the Supreme Court to save the well-reviewed, popular film Carnal Knowledge, which had been held obscene by the Georgia Supreme Court. *See* Jenkins v. Georgia 418 U.S. 153 (1974). The Supreme Court, while noting the film's positive reviews, relied not on its value but on its lack of extreme sexual content to invalidate the conviction under the First Amendment. The Court did not apply *Miller*'s serious value prong to the film; rather, it based its holding on the first two prongs of *Miller*. Nonetheless, the Court did describe the film's favorable reviews and critical acclaim. *Id.* at 158, 158 n.5.

[50] See Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007) (writing about the mainstreaming of porn); *see also*, Amy Adler, *What Happened to the Feminist Critique of Pornography?* 19–25 (2020) (unpublished manuscript) (on file with the author). A curator for one of the recent retrospectives commented on the changing cultural values that allowed her to hang the *X Portfolio* pictures with less controversy. She spoke of the "greater acceptance of explicitly sexual work" in the U.S. Helen Stoilas, *Who's Afraid of Mapplethorpe*, ART NEWSPAPER (Mar. 15, 2016), http://theartnewspaper.com/news/museums/mapplethorpe-in-la/ [https://perma.cc/WR8Z-TKBF].

[51] On changing views about homosexuality: If Supreme Court law is any guide to cultural values, one only need look at the trajectory from *Bowers v. Hardwick*, 478 U.S. 186 (1986) (decided four years before the Mapplethorpe case and approving the criminalization of homosexual sodomy), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003), to Obergefell v. Hodges, 576 U.S. 644 (2015)

comparatively mainstream, some of the S&M pictures are hard to look at.[52] One Mapplethorpe picture, for example, not included in the Cincinnati exhibit, depicts a bleeding penis (after having been grazed by a knife), clamped in a bondage device.[53]

But in contrast to how we see them today, these images carried a radically different meaning thirty years ago. They were shown at the height of the AIDS crisis and the "culture wars"[54] that were raging in post-Reagan America. Homophobia and AIDS panic were rampant. Homosexual sodomy was criminal, with the Supreme Court's approval.[55] Gay men were politically reviled as they were being ravaged by an epidemic. Panic over the possibility that one could be contaminated just by touching gay men was so great that police sometimes wore rubber gloves during AIDS activist protests.[56] Conservative writer William F. Buckley had argued that people with AIDS should be mandatorily tattooed.[57] Mapplethorpe had died from AIDS a year before the exhibition opened in Cincinnati; he documented his illness in his art.[58] And his work was received as if the pictures themselves were polluted with the contaminating threat of the disease. As critics have noted, "the spectre of death" hung over the photos; "the information that Mapplethorpe died of AIDS [was] always available."[59] Members of Congress continually spoke of Mapplethorpe's disease as they denounced funding for his

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(finding a constitutional right to gay marriage), to observe the growing mainstream and judicial acceptance of homosexuality.

[52] *See, e.g.*, Moore, *supra* note 6 ("If today the X Portfolio pictures are hard to look at (and they still are), it has more to do with the violence than the sexuality.").

[53] Linkof, *supra* note 7, at 56 (describing Mapplethorpe's *Dick, N.Y.C.* (1978)); *cf.* MIRA SCHOR, WET: ON PAINTING, FEMINISM, AND ART CULTURE 28 (1997) (describing the photograph *Richard* (1978), a diptych of a penis strapped into a wooden contraption, splattered with blood in the second frame).

[54] For a discussion of the culture wars and other artists who were targeted during the period, see CULTURE WARS: DOCUMENTS FROM THE RECENT CONTROVERSIES IN THE ARTS (Richard Bolton ed., 1992); JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); MARJORIE HEINS, SEX, SIN, AND BLASPHEMY: A GUIDE TO AMERICA'S CENSORSHIP WARS (1993) (describing numerous cases of attacks on art); Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 206–07 (2000). For an historical account of controversial art, *see* MICHAEL G. KAMMEN, VISUAL SHOCK: A HISTORY OF ART CONTROVERSIES IN AMERICAN CULTURE (2006).

[55] *See Bowers*, 478 U.S. at 190–191. Although the Court upheld criminalization of all sodomy (heterosexual and homosexual), the opinion focused on gay sex. *But see* Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers*).

[56] Joe B. Warrick, *Researcher: Police Should Use Gloves, Masks in Handling AIDS Victims*, UPI, Oct. 12, 1987 (describing police as "panic-stricken").

[57] William F. Buckley, Opinion, *Crucial Steps in Combating the AIDS Epidemic; Identify All the Carriers*, N.Y. TIMES (Mar. 18, 1986), http://movies2.nytimes.com/books/00/07/16/specials/buckley-aids.html [https://perma.cc/HT7P-LM6H].

[58] One of the most shocking photographs in the exhibition was Mapplethorpe's frank self-portrait of his AIDS-ravaged, skeletal face, his hand gripping a cane with a skull, reproduced on page 2.

[59] Ingrid Sischy, *Photography: White and Black*, NEW YORKER, Nov. 13, 1989, at 124, 138–39.

work. Senator Helms, for example, calling Mapplethorpe's work "homosexual pornography," said Mapplethorpe "died of AIDS while spending the last years of his life promoting homosexuality."[60]

Further adding fuel to the fire, the works were tinged with the frisson of interracial sex. Many of Mapplethorpe's most famous portraits were of eroticized, nude Black men; some photos depicted interracial couples. Senator Helms highlighted the interracial theme in his attack on Mapplethorpe. Helms denounced a picture (that did not exist, oddly, other than in his imagination) of "two males of different races" in an erotic pose "on a marble-top table" as evidence of the artist's depravity.[61] (In Part IV, infra, I turn directly to the complex issue of race in Mapplethorpe's work.)

Though the heady combination of race, homosexuality, pornography, AIDS-panic, and violent sadomasochistic practices was already enough to provoke controversy, an additional factor upped the ante: the fact that the photos were presented in highly classicized style and displayed with the imprimatur of "art" in a museum made them even more galling to conservative critics. Indeed, as explained above, the photos helped launch a national debate about government funding for the arts. Congress found in Mapplethorpe a perfect symbol of what it viewed as the perverse, menacing art world, thumbing its nose at mainstream values.

Thus it's hard to imagine a more perfect target for prosecutors wishing to win an obscenity prosecution in 1990: an unpopular speaker, targeted by Congress as a contagious pervert, whose work depicted unpopular practices that tapped into national dread, hatred, and paranoia. As explained above, under the *Miller* standard for obscenity, a conviction under obscenity law requires a prosecutor to prove three prongs.[62] The first two prongs seem like no-brainers for a win against these images in 1990 America (in a conservative Midwestern city no less). Under the first prong, the government must prove that a work appeals to the "prurient"—meaning "shameful or morbid"—interest.[63] Under the second prong of *Miller*, the government must show that the work is "patently offensive" according to "contemporary community

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[60] 135 CONG. REC. S12111 (daily ed. Sept. 28, 1989) (statement of Sen. Helms); *see also id.* at H3640–41 (daily ed. July 12, 1989) (statement of Rep. Dannemeyer) (noting Mapplethorpe's death from AIDS, and calling him a "homosexual activist[ ]").

[61] Helms quoted in Maureen Dowd, *Unruffled Helms Basks in Eye of Arts Storm*, N.Y. TIMES (July 28, 1989), https://www.nytimes.com/1989/07/28/arts/unruffled-helms-basks-in-eye-of-arts-storm.html [https://perma.cc/R65J-BPUX].

[62] *See* Miller v. California, 413 U.S. 15, 25 (1973).

[63] *See* Roth v. United States, 354 U.S. 476, 487 n.20 (1957) (quoting MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957)); Brockett v. Spokane Arcades, 472 U. S. 491, 497 (1985).

standards."[64] Both inquiries seem designed to suppress representations of sexual practices that deviate from the mainstream—and perfectly tailored for Mapplethorpe. For example, in discussing the meaning of prurience, the Supreme Court had previously let stand a lower court interpretation that defined prurience as the opposite of "a good, old-fashioned, healthy" interest in sex.[65] Prurience thus depends on a dichotomy between "shameful or morbid" desire on the one hand, and "good old-fashioned, healthy" sexuality on the other. In 1990 America, it seems clear that Mapplethorpe's sex pictures would have fallen on the wrong side of that line.

Indeed, the defense all but conceded that it would lose on the first two prongs of the *Miller* test.[66] The case seemed like an easy win for the prosecution. Mapplethorpe's work was a perfect lightning rod for the sexual and cultural tumult that was sweeping America. But there was a third prong of the test that would prove pivotal to the case: was Mapplethorpe's work "serious art"?

B. The Clash between Obscenity Law and Postmodern Art

Beyond the almost ludicrously controversial subject matter of the work for its time, I believe there was another reason the prosecution of Mapplethorpe's work was preordained. In my view, the crisis of Mapplethorpe was built into the structure of obscenity law itself and its clash with a dramatic change in artistic practice that had been brewing, unnoticed, as the Court crafted its modern definition of obscenity in 1973. Obscenity law was built on the very assumption that contemporary artists like Mapplethorpe had begun to question as a central tenet of their work: that there was a distinction between pornography and art. The fusion of pornography and art that Mapplethorpe championed was not a peripheral practice but instead central to a deeper transition in art that was underway just as *Miller* was decided.

The *Miller* standard for obscenity law, discussed above, had diminished the constitutional protection the Court had afforded art in its previous obscenity cases. The Court's prior obscenity test (upheld by only a plurality) had protected any work, no matter how filthy, prurient, or offensive, unless it was "*utterly* without redeeming social value."[67] This was the famous language that had protected the novel *Fanny Hill* in

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[64] *Miller*, 413 U.S. at 24.

[65] *Brockett*, 472 U.S. at 499 (citations omitted).

[66] *See* Marc Mezibov, *The Mapplethorpe Obscenity Trial*, LITIGATION, Summer 1992, at 12–20, 71.

[67] Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966) (plurality opinion) (emphasis in original).

1966.[68] *Miller* rejected this expansive test in favor of a standard that protected less art and was easier for the prosecution to meet.[69] A work of art now needed to possess "serious artistic value" to gain protection. As Justice Brennan noted in his dissent to *Miller*'s companion case, *Paris Adult Theatre I v. Slaton*:

> The Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have some social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is . . . an invitation to widespread suppression of sexually oriented speech.[70]

The problem is that this legal retrenchment occurred at a radical turning point in the history of art: the rise of "postmodernism." The changes in art that were brewing at the time of *Miller* would ultimately render the new standard even less protective of art than Justice Brennan had feared.[71] This is because the "serious artistic value" test etched in stone the precise standard against which art was beginning to rebel in 1973. As I have argued elsewhere and as I explain below, *Miller* was premised on the reigning, but soon to crumble, vision of art in mid-century America, the period called "Modernism."[72]

Miller's protection only for art that demonstrated "serious value" would have made perfect sense in mid-century America. As I have argued, a particular form of modernism, "late modernism," which had triumphed in the 1950s and 1960s, was foundational to *Miller*.[73] It may be hard for us in our era of critical and artistic pluralism to imagine the cultural penetration once attained by one artistic school of thought.[74]

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[68] *Id.*

[69] *Miller*, 413 U.S. at 22 (interpreting prior obscenity cases as creating "a burden virtually impossible to discharge" for prosecution).

[70] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting).

[71] Amy Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990). This Part draws significantly from that piece, which argues that the *Miller* standard enshrined in obscenity law the precise vision of art that so many artists rebelled against in the 1970s and 1980s as postmodernism took hold and that *Miller* thus introduced into obscenity law a standard that was deeply incompatible with the new art that was emerging when it was drafted. *Id.*

[72] *Id.*

[73] *See, e.g.*, PETER HALLEY, *Against Post-Modernism: Reconsidering Ortega*, *in* COLLECTED ESSAYS 1981–1987, at 27 (1988). Note that critic Michael Fried also held enormous sway over art in this period.

[74] Perhaps the closest contemporary analogue to Greenberg might be one of the powerful art dealers, such as Gagosian or Zwirner. But in spite of their power in the market (and the market's power over museums), there is still no modern figure who exerts the kind of critical power Greenberg did. The rebellion against his vision was a success but is still a testament to his pervasive reach.

But in mid-century America, late modernism, particularly as articulated by its leading critic, Clement Greenberg, was so dominant that a recent scholar described Greenberg as having ruled the mid-century art world with a "papal authority."[75]

The period of late modernism as articulated by Greenberg (and his peers) was a purist movement.[76] Greenberg believed that art could "maintain its past standards of excellence"[77] by using the "characteristic methods of a discipline to criticize the discipline itself—not in order to subvert it, but to entrench it more firmly in its area of competence."[78] Late modernism distinguished between good art and bad art by demanding that good art be pure, self-critical, original, sincere, and serious.[79]

The standard of "serious artistic value" seems perfectly designed to protect the art we most valued in the late modernist era. As an art critic wrote of modernism, "the highest accolade that could be paid to any artist was this: 'serious.'"[80] It is as if the word "serious" were a code word for modernist values: critics consistently equate it with the modernist stance.[81] In fact, the very foundation of *Miller*, the belief that some art is just not good enough or serious enough to be worthy of protection, mirrors the modernist notion that distinctions could be drawn between good art and bad, and that the value of art was objectively verifiable.[82]

Yet the Court devised the *Miller* test for "serious artistic value" in 1973, precisely the time that modernism in art was entering its death throes. *Miller* represented one of the last gasps of this crumbling but still powerful modernist zeitgeist. One year earlier, the art critic Leo Steinberg had been perhaps the first to apply the name "post-modernism" to the revolutionary shift in art that was emerging just as *Miller* was decided.[83] The emerging postmodern ethos took aim at each of the

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[75] Barry Gewen, *State of the Art,* N.Y. TIMES, Dec. 11, 2005, § 7, at 28 (quoting art historian Robert Rosenblum).

[76] *See, e.g.*, Clement Greenberg, *Modernist Painting*, *in* MODERN ART AND MODERNISM: A CRITICAL ANTHOLOGY 6 (Francis Frascina & Charles Harrison eds., 1982) ("[A]rt . . . in its 'purity' [would] find the guarantee of its standards of quality.").

[77] *Id.* at 10.

[78] *Id.* at 5.

[79] Clement Greenberg wrote in 1955, "There is good and bad in [contemporary painting], and . . . the difference . . . owes its realization to a severer discipline . . . ." Clement Greenberg, *"American-Type" Painting, in* MODERN ART AND MODERNISM 94 (Francis Frascina & Charles Harrison eds., 1982); *see also* CLEMENT GREENBERG, *Avant-Garde and Kitsch*, *in* ART AND CULTURE: CRITICAL ESSAYS 3 (1961) (finding value in high art but not in kitsch).

[80] Douglas Davis, *Post-Performancism*, ARTFORUM, Oct. 1981, at 31, 39.

[81] *See, e.g.*, Thomas Crow, *These Collectors, They Talk about Baudrillard Now, in Discussions*, *in* CONTEMPORARY CULTURE 1 (Hal Foster ed., 1987).

[82] *See*, *e.g.*, BRIAN WALLIS, *What's Wrong with This Picture?*, *in* ART AFTER MODERNISM: RETHINKING REPRESENTATION xii (Brian Wallis ed., 1984).

[83] LEO STEINBERG, *Other Criteria*, *in* OTHER CRITERIA: CONFRONTATIONS WITH TWENTIETH-

Greenbergian precepts I catalogued above. Artists attacked basic modernist distinctions: between good art and bad, between high art and popular culture, between the sanctity of the art context and real life. Artists not only questioned the modernist demand that art be "serious," many made work that also questioned the idea that art must have any traditional "value" at all.

One of many ways that artists attacked these assumptions was to incorporate pornography into their art. The introduction of this debased vernacular into the realm of high art disrupted the modernist norms that undergirded the serious artistic value standard. In some ways, this disruption was the essence of Mapplethorpe's practice. He insisted "I can make pornography art."[84] Mashing up "fine art photography and the commercial sex industry," Mapplethorpe was "scrambling aesthetic categories and genres" that had previously been understood to be "mutually exclusive."[85] According to one critic, this was the major contribution of Mapplethorpe's work: his incorporation of the pornographic led to a "redrawing of the boundary line of the aesthetic to include that which had previously been excluded from it."[86] By making what he called "smut art," his work undermined the foundation on which the *Miller* test and obscenity law were founded: that we can separate the pornographic from the artistic and valuable.

C. Why Art Won: An Assessment

How on earth did the Mapplethorpe defense win given all this? Mapplethorpe's shocking subject matter rendered prongs one and two of the *Miller* test forgone losers. Prong three, protecting works of "serious artistic value," depended on the precise late modernist view of art that Mapplethorpe's work challenged.

Yet, surprisingly, while certain characteristics of his photography made Mapplethorpe an inevitable obscenity law target thirty years ago, other qualities of his work help explain why the prosecution resulted in an acquittal. Indeed, I want to assert that in some ways, the Mapplethorpe case was *easy* to defend. In spite of his shocking subject matter, on a formal level, Mapplethorpe's work looked thoroughly and undeniably like art. In fact, it was conventional, even old-fashioned. He was an accomplished and elegant photographer. Formally beautiful, rich with art historical allusions to the classical tradition (from Greek

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CENTURY ART 91 (1972).

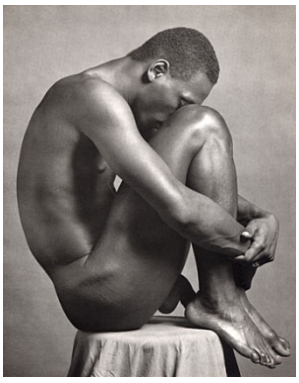
[84] *See* Kardon, *supra* note 11.

[85] *See* Meyer, *supra* note 5.

[86] Jonathan D. Katz, *Robert Mapplethorpe's Queer Classicism: The Substance of Style*, *in* ROBERT MAPPLETHORPE: THE PHOTOGRAPHS 257, 258 (Paul Martineau & Britt Salvesen eds., 2016).

sculpture to Caravaggio to nineteenth century portraiture), his meticulously printed work highlighted his classicized use of light and composition.[87] (The images below give a glimpse of these qualities.) Calling attention to their formal artistry, the photographs are tasteful, even traditional; his use of black and white (rather than the popular color photography at the time) signaled restrained classicism and old-fashioned assumptions about what art was meant to look like. At the time, street photography like Gary Winogrand's had captured the attention of critics, in contrast to Mapplethorpe's more traditional staged studio photographs.[88] It was easy to describe Mapplethorpe's photos as "art"—if you stopped looking at the subject matter and looked only at their formal qualities.[89]

Hippolyte Flandrin, *Study* (1835-6)



Mapplethorpe, *Ajitto* (1981)[90]

[87] Nonetheless, one should remember that Mapplethorpe's use of photography as his medium, rather than painting or sculpture, was in tension with this classicizing effect. He was creating the work at a time when photography was still not fully accepted as a high art form. In some ways, Mapplethorpe work thus explored the marginalization of photography from high art, just as it explored the more extreme marginalization of smut. For a discussion of photography's contested status as art, see SUSAN SONTAG, ON PHOTOGRAPHY 115 (1977).

[88] *See* DANTO, *supra* note 4, at 24–29 (contrasting Mapplethorpe with Winogrand).

[89] It is important to note that many people within the art world did not take his work seriously and still don't. In contrast to Danto's assessment, others dismiss Mapplethorpe as commercial and slick, a mere "fashion photographer." *See, e.g.*, Arthur Lubow, *Has Robert Mapplethorpe's Moment Passed?*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/arts/design/robert-mapplethorpe-guggenheim.html [https://perma.cc/8HQ7-WRNP]; DANTO, *supra* note 4, at 104 (describing the work and particularly its beauty as making it "somewhat suspect in the eyes of the art world").

[90] The photographer Wilhelm von Gloeden liberally quoted from Flandrin's painting in his 1902 photograph *Caino* that was likely a source for Mapplethorpe.

Mapplethorpe, *Jim* (1980)

Contrast his work with other artists from the same era who were also disrupting the boundaries between obscenity and art. For example, consider Karen Finley, a later target of the culture wars, who brought the Supreme Court challenge to the very NEA amendments that Congress had passed in response to the Mapplethorpe scandal.[91] In contrast to Mapplethorpe, Finley produced performance art that may have been hard to categorize as "art" at all, particularly for a generation accustomed to paintings and sculpture as the paradigmatic art forms. Famously smearing her nude body with yams, screaming about sex acts, performing in art venues but also bars, Finley dispensed with traditional markers of "art." A signature Finley piece was called *Yams Up My Granny's Ass*.[92] Compared to Finley's art, Mapplethorpe's work was formally traditional and even conservative; its shock derived from the tension between its high art presentation and its untraditional content.

[91] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[92] For discussion of this piece, its gender politics, and the conservative reaction to Finley's art, see DAVIDA BLOOM, RAPE, RAGE AND FEMINISM IN CONTEMPORARY AMERICAN DRAMA 108–09 (2015).

Karen Finley Performance

Or consider Jeff Koons's merger of art and porn, his *Made in Heaven* series from 1989 that was exhibited in New York shortly after the Mapplethorpe trial. In some ways, Mapplethorpe's work strikes me as easier to defend on an obscenity charge than Koons's would have been if challenged at the time. In contrast to Mapplethorpe's work, Made in Heaven used the vernacular of porn without any trappings of art. Koons produced the series by posing with his then-wife, the porn star Cicciolina. The images of the couple were shot not by the "artist" but by Cicciolina's usual porn photographer, using the sets and the accoutrements of porn, complete with lurid, tacky backdrops. Like much of Koons's art, the work looked garish, kitschy, and lowly; it reveled in its lack of conventional markers of high art.[93] And, like Mapplethorpe's, the work included hard-core images, such as a close up of anal sex. Of course, though some of the work was hard-core, Koons was still more insulated from prosecution or conviction than Mapplethorpe in the sense that he was engaging in heterosexual sex acts—with his wife no less. Even so, the work still has the capacity to shock; in the 2014

[93] For a discussion of this series, see SCOTT ROTHKOPF, *No Limits*, *in* JEFF KOONS: A RETROSPECTIVE 15, 24–25 (2014); *see also*, Michael Kimmelman, *Art in Review*, N.Y. TIMES, Nov. 29, 1991, at C28 (reviewing the Made in Heaven show); Calvin Tomkins, *Koons at Fifty*, NEW YORKER, Feb. 7, 2005, at 33 (discussing the Made in Heaven show in the context of Koons's other work).

retrospective of Koons's work, the Whitney displayed this series (other than the billboard, pictured below) in a separate room from the rest of the exhibition, complete with warning signs about its content.

Jeff Koons, *Made in Heaven* (1989)

Thus, compared to other artists who were incorporating sex into their work at the time, I think Mapplethorpe's work was relatively easy to defend under *Miller*'s third prong. The old-fashioned formalism of Mapplethorpe's work, coupled with obscenity law's requirement of "serious . . . artistic . . . value" explains the sometimes laughable testimony that emerged at the trial. In my experience, contemporary art world professionals sometimes seem perplexed by the tenor taken by some experts for the defense in 1990.[94] For example, consider the almost ludicrously formalist testimony of Janet Kardon, the curator who had organized the Mapplethorpe show for the ICA. Describing Mapplethorpe's self-portrait with a bullwhip inserted into his anus, Kardon ignored the sexual content, testifying about its "classical" composition by focusing on the placement of the horizon line.[95] When asked to comment on another photographs from the *X Portfolio*, depicting a finger shoved into a man's penis, Kardon said, "It's a central image, very symmetrical, a very ordered, classical composition."[96] Symmetry and composition are

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[94] Moore, *supra* note 6.

[95] HOLLIDAY T. DAY, POWER: ITS MYTHS AND MORES IN AMERICAN ART 1961–1991 113 (1991).

[96] Andy Grundberg, *Critic's Notebook; Cincinnati Trial's Unanswered Question*, N.Y. TIMES (Oct. 8, 1990), http://www.nytimes.com/1990/10/18/arts/critic-s-notebook-cincinnati-trial-s-unanswered-question.html [https://perma.cc/RZS5-ZB3V]; *see also* Isabel Wilkerson, *Clashes at Obscenity Trial on What an Eye Really Sees*, N.Y. TIMES (Oct. 3, 1990), https://www.nytimes.com/1990/10/03/us/clashes-at-obscenity-trial-on-what-an-eye-really-sees.html [https://perma.cc/7AZU-6G7K]. At another point, discussing the photograph *Jim and Tom, Sausalito*, in which one leather-clad man urinates into another's mouth, Kardon emphasized the "opposing diagonals" of the lines

not exactly the first things one thinks about when viewing this image. A critic at the time called such testimony "disingenuous."[97] A more recent critic labelled Kardon's emphasis on formal qualities of the work "bizarre."[98] But Kardon's peculiar testimony was rooted directly in the requirements of the *Miller* test, and in the truth of Mapplethorpe's classicized work. That classicism, plus Mapplethorpe's rising fame and emerging blue-chip museum status, made his case relatively easy to defend under *Miller*, at least compared to many of his peers, who were defying the standard of serious artistic value in a way that made their work seem almost unrecognizable as "art."

D. The Decline of Obscenity Law

How significant a threat is obscenity law to art in a post-Mapplethorpe world? Not very—for two reasons. First, as I will explain, obscenity law has all but died as a prosecutorial tool.[99] Second, and relatedly, the merger between art and pornography that Mapplethorpe and his compatriots championed has receded as a theme in contemporary art.

In the 1990s, for a number of reasons I have explored elsewhere, obscenity law began to fall into relative disuse.[100] One main reason obscenity was all but abandoned was that child pornography was viewed as the far more pressing problem. Under the Clinton administration, as public concern about child sexual abuse escalated, the Child Exploitation and Obscenity Unit of the Department of Justice chose to focus its limited resources on child pornography rather than obscenity.[101]

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created by the men's bodies. KIDD, *supra* note 26, at 72.

[97] Grundberg, *supra* note 96.

[98] Moore, *supra* note 6.

[99] Josh Gerstein, *Holder Accused of Neglecting Porn*, POLITICO (Apr. 16, 2011), http://www.politico.com/story/2011/04/holder-accused-of-neglecting-porn-053314#ixzz4GrYnOHA1 [https://perma.cc/YG7T-6K6R] (describing how Holder shut down the Justice department's Obscenity Prosecution Task Force that had been set up during the Bush administration).

[100] As I document in *All Porn All the Time*, the abandonment of obscenity law was a result of multiple factors, including the rise of the sexual revolution and the mix of vexing and awkward institutional and doctrinal problems the doctrine presented in First Amendment theory and practice. Obscenity was always a First Amendment anomaly. *See* Adler, *All Porn All the Time*, *supra* note 50.

[101] The Clinton administration's policy was not explicitly announced but was clear in the pattern of prosecutions. In the period from 1992 to 2000, federal prosecutions of child pornography increased more than fivefold, from 104 to 563 per year. In contrast, federal prosecutions of obscenity fell by more than half in the same period, from 44 cases in 1992 to 20 in 2000. *See* OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, No. I–2001–07, REVIEW OF CHILD PORNOGRAPHY AND OBSCENITY CRIMES REPORT (2001) available at https://oig.justice.gov/reports/plus/e0107/results.htm [https://perma.cc/698G-PG82]. The position to cut back on obscenity prosecutions was widely maligned by conservative anti-pornography groups and legislators. *See House Subcommittee Criticizes DOJ for Not Prosecuting Internet Obscenity*, TECH L. J. (May 24, 2000), http://www.techlawjournal.com/crime/20000524.htm [https://perma.cc/GY5L-WBAN].

Since that shift, the decline in obscenity prosecutions—and the explosion of adult pornography it both responded to and facilitated—have made it hard to reverse course and to put the pornography genie back in the bottle. In our porn-soaked contemporary culture, a pornographer's defense is built into obscenity law's reliance on community standards: the government in an obscenity case must prove that the material exceeds contemporary community standards.[102] Yet given the sea of pornography in which we live (a condition created in part by the decline of obscenity law), it is now much harder for a prosecutor to prove that material on trial deviates in its prurience and patent offensiveness from the kind of stuff everyone else in the community has been watching. Perhaps this is why when the Bush administration's Department of Justice revived obscenity law in the early 2000s,[103] it tended to target extremely hard-core pornography on the fringes of the industry, material that might seem to a jury to be unlike the usual pornographic fare they or their neighbors had grown accustomed to.[104] In any event, the Bush revival of obscenity law was quietly put to bed by the Obama administration, which (like Clinton's) devoted its resources to child pornography rather than adult obscenity cases.[105] Nonetheless, as I have documented, obscenity law is still invoked sometimes to fills the gaps for other doctrinal areas.[106] And although there has been a resurgence of conservative political rhetoric against pornography, there have been

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[102] Miller v. California, 413 U.S. 15, 24 (1973).

[103] *See* Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST (Sept. 24, 2005), https://www.washingtonpost.com/archive/politics/2005/09/20/recruits-sought-for-porn-squad/4efa6c1b-7be2-4a3a-a003-c1a3a2f5579a/ [https://perma.cc/Q9BE-SCUU]; *see also* Alberto R. Gonzales, U.S Attorney General, *Prepared Remarks at the U.S. Attorney's Conference* (Apr. 21, 2005) transcript available at https://www.justice.gov/archive/ag/speeches/2005/042105usattorneysconference.htm [https://perma.cc/GR6W-FAVR] ("I've made it clear that I intend to aggressively combat the purveyors of obscene materials.").

[104] *See* Adler, *All Porn All the Time*, *supra* note 50, at 705–06.

[105] *See* Gerstein, *supra* note 99; *see also* Jamshid Ghazi Askar, *Prosecute Pornography? Why Mitt Romney and President Obama Can't Agree*, DESERET NEWS (Sept. 13, 2012), http://www.deseretnews.com/article/865562332/Prosecute-pornography-Why-Mitt-Romney-and-President-Obama-cant-agree.html?pg=all [https://perma.cc/HDH8-DQKE].

[106] *See, e.g.*, Adler, *All Porn All the Time*, *supra* note 50. For example, Congress has resorted to obscenity law to achieve legislative agendas that have met with initial Supreme Court defeat. For instance, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("Protect Act"), Pub. L. No. 108–21, § 504, 117 Stat. 650, 678 (2003), explicitly invoked the rubric of obscenity law in response to the Supreme Court's invalidation of Congress's attempt to ban virtual child pornography. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104–208, § 121, 110 Stat 3009 (1996), *invalidated by* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Similarly, after the Supreme Court invalidated Congress's attempt to criminalize depictions of animal cruelty in United States v. Stevens, 559 U.S. 460 (2010), Congress used obscenity law to rewrite the legislation in a way that would pass constitutional muster. *See* Animal Crush Video Prohibition Act of 2010, 18 U.S.C. § 48 (2010)*;* United States v. Richards, 755 F.3d 269 (5th Cir. 2014) (upholding the revised law which uses obscenity law to ban "crush" videos).

few prosecutions.[107] Most would be unwinnable in my estimation because the pornographic culture in which we now live will present a significant hurdle for prosecutors pursuing obscenity convictions.

The second reason that obscenity law is less of a threat to art than it once was has to do with related developments in art. The merger of porn and art that Mapplethorpe pioneered, once a scandalous assault on the modernist demarcation between art and non-art, high and low, has become so commonplace as to be dull, even old-fashioned. Artist John Currin, in an interview about a recent exhibition with its *de rigueur* blend of art, appropriated images and hard-core pornography, explained his use of porn by saying: "It's not a shock tactic. In every art school in the world there's a guy doing porn. As a failed shock tactic, that's kind of interesting to me."[108]

Of course, there's still a lot of sex in museums and galleries; at times it has seemed almost normative. And I still get an occasional call, perhaps once every few years, from a museum that is worried about sexual content that might cross the line, at least enough to invite controversy if not prosecution. (By contrast, the calls I get from institutions or artists with concerns about other kinds of offensive art, or about the possible reach of child pornography law, are more frequent.) And some of the sexually infused art on view these days is so graphic that I assume any law review would be uncomfortable reproducing it, even in a scholarly article, just as mainstream newspapers like the New York Times still do not reproduce some of Mapplethorpe's renowned works.[109] But even so, it's hard to think of any sexually explicit art work in our porn-saturated world that has the power to shock us as Mapplethorpe once did.

I do not want to discount entirely the possibility that the next sexual outlaw/artist could fall prey. The Mapplethorpe case shows us that we should worry about the risk of selective prosecution of an underenforced law against an unpopular speaker.[110] It is commonplace to say that in our current era, the chances of being prosecuted for obscenity are like the chances of being struck by lightning.[111] But as

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[107] *See* Adler, *What Happened to the Feminist Critique Of Pornography?*, *supra* note 50, at 33–34 (describing new conservative rhetoric around pornography and explaining that it has been largely ineffective).

[108] Karen Rosenberg, *Influences: John Currin*, N.Y. MAG. (Nov. 19, 2006), http://nymag.com/arts/art/features/24355/ [https://perma.cc/M8RE-QW56].

[109] The *Times* recently commented on its omission of an image of Mapplethorpe's acclaimed *Man in a Polyester Suit* which recently broke an auction record as described in McDermon *supra* note 37.

[110] *See* Elizabeth Glazer, *When Obscenity Law Discriminates*, 102 NW. U.L. REV. 1379 (2008) (evaluating the discriminatory use of obscenity law against gays and lesbians).

[111] Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES (Sept. 28, 2007), https://www.nytimes.com/2007/09/28/us/28obscene.html [https://perma.cc/JJS3-2FAF].

Mapplethorpe shows, the chances of being struck are not random; politically and sexually unpopular speakers seem particularly attractive.

Nonetheless, to the extent art thrives on transgression, in a post-postmodern, post-Mapplethorpe world, when it comes to porn, there is not much left to transgress. While Mapplethorpe and other artists once pioneered the dissolution of the art/porn boundary, many artists take this dissolution for granted and have simply moved on. Because of changes in art and culture, and related changes in legal enforcement, obscenity law poses a far less significant threat to art institutions today than it did thirty years ago.

III. CHILD PORNOGRAPHY LAW AND ART: A GROWING ISSUE FOR MUSEUMS AND GALLERIES

In contrast to the allegedly obscene pictures, which seem far less scandalous by today's standards than they were in 1990, Mapplethorpe's *A Perfect Moment* included two photographs that have become much more, not less, controversial over the past thirty years, to the point where curators are quietly reluctant to show these images at all. Both pictures are child nudes and raise the specter of child pornography. In one, called *Jesse McBride*, a young boy poses naked, perched on a chair next to a refrigerator. In the other, called *Rosie*, a four-year-old girl sits on a stone bench. She wears a dress, but her legs are bent in a way that reveals she is wearing no underpants. She gazes unsmilingly, at the camera, her face conveying perhaps curiosity, perhaps wariness. To the extent it's relevant, the mothers of both children were friends with Mapplethorpe and arranged the photo shoots.[112] As adults, both children looked back with pride on the photos.[113] McBride called the picture of himself "angelic."[114]

These pictures occupy a space of legal and cultural uncertainty. They have become harder to show over the years, both in terms of the cultural controversy they might provoke, but also because their legal status has become more fragile over time. Indeed, I believe a museum that displays these pictures today is taking on a risk (very small but not impossible) of prosecution. As I will explain below, as a matter of First Amendment law, I think these pictures ought to be protected, but the law governing this area is so subjective and unpredictable that I cannot say with certainty that they would be protected if prosecuted. That

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[112] Kim Masters, *Jurors View Photos of Children; Mothers Approved of Mapplethorpe Works*, WASH. POST, Oct. 2, 1990, at C1.

[113] For an article about the trial, Jesse McBride who was then 18, posed nude in the same position he had taken as a child, next to the portrait of his younger self, to demonstrate his approval of the original image. The image is reproduced in Meyer, *supra* note 13.

[114] Patti Hartigan, *The Picture of Innocence*, BOS. GLOBE, Aug. 8. 1990, at A40.

these images have not been targeted owes more to prosecutorial discretion—the reluctance to pursue an art museum[115]—than to legal clarity.

The legal status of these two images stands in stark contrast to that of the five pictures of adult S&M gay sex that were prosecuted in Cincinnati, which have become far less legally and culturally risky over the elapsed thirty years; they are all but certain to be protected given the current state of obscenity law that I described above. Indeed, the adult sex pictures prosecuted in Cincinnati were featured prominently in the recent major museum retrospectives of Mapplethorpe's work at the Getty, LACMA, and the Guggenheim.[116] But the curators for these shows conspicuously omitted the two child images.[117] Curators have grown increasingly uncomfortable with these photographs. And, as with other photographic child nudes by other artists, the pictures have quietly disappeared from some museum websites as well. In recent years, at least two arts institutions have taken down two other photographer's pictures of children based on threats of prosecution.[118] In my view, given the evolution of child pornography law in the lower courts, the doctrine's vast uncertainty, and the severe penalties that accompany a mistaken interpretation of it, this growing reluctance to show these kinds of art images may be a defensible, if extremely risk-averse, legal position.

What explains this trajectory? What happened to change the dynamics of showing these works, legally and culturally? Once again, the

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[115] Another significant factor is that as the crisis of child pornography has exploded, aided and abetted by the digital revolution, prosecutors have far more pressing material to pursue than art—enormous caches of images of hard-core sexual abuse committed against children.

[116] *See supra* note 2. The Guggenheim completed a yearlong two-part show in 2019. *Implicit Tensions: Mapplethorpe Now*, GUGGENHEIM MUSEUM, https://www.guggenheim.org/exhibition/mapplethorpe [https://perma.cc/VJ3R-YCXM] (last visited Sep. 1, 2020).

[117] *See* Stoilas, *supra* note 50 (describing remarks of curator who chose not to include the two pictures of children in an exhibition).

[118] In 2013, the Kohler Arts Center removed artist Betsy Schneider's series of photographs of her daughter including ones that showed her as a naked baby on her changing table. Debra Lau Whelan, *Photographer Betsy Schneider on the Kohler Arts Center Banning Her Work*, NAT'L COAL. AGAINST CENSORSHIP (Aug. 12, 2013), http://ncac.org/blog/photographer-betsy-schneider-on-the-kohler-arts-center-banning-her-work [https://perma.cc/RU4R-NDU7]. In Britain, the Tate Modern removed Richard Prince's well-known work called "Spiritual America" after police warning. Charlotte Higgins & Vikram Dodd, *Tate Modern Removes Naked Brooke Shields Picture After Police Visit*, GUARDIAN (Sept. 30, 2009), https://www.theguardian.com/artanddesign/2009/sep/30/brooke-shields-naked-tate-modern [https://perma.cc/33MT-S7QK]. The museum also shredded its existing catalogue copies for fear of prosecution. Dave Itzkoff, *Tate Modern Closes Richard Prince Exhibition, Citing Concern Over Brooke Shields Photo*, N.Y. TIMES: ARTSBEAT BLOG (Oct. 1, 2009: 11:53 AM), http://artsbeat.blogs.nytimes.com/2009/10/01/tate-modern-closes-richard-prince-exhibition-citing-concern-over-brooke-shields-photo/ [https://perma.cc/QCJ9-7BVC]. The photo is significant enough in Prince's oeuvre that when the Guggenheim did a one-man show of Prince's work, they titled the exhibition "Spiritual America" after the photograph. *See Richard Prince: Spiritual America*, GUGGENHEIM, https://www.guggenheim.org/exhibition/richard-prince-spiritual-america [https://perma.cc/K5DG-4S2U].

answer points to a story about the mutually productive relationship between censorship law and culture.

A. Thirty Years Later: The Dramatic Expansion of Child Pornography Law

In 1990, when Mapplethorpe's child pictures were shown in Cincinnati, child pornography law was in its infancy. Born in 1982, child pornography law developed at a time when child sexual abuse had only recently come to light in the late 1970s as a widespread cultural crisis.[119] Child pornography law grew up in a pre-digital era that barely resembled our present one, in which digital and technological advances have allowed the production and distribution of horrific child abuse images to skyrocket.[120] As the crisis of child pornography has grown, child pornography law has emerged as a complex, rapidly growing, and deeply anomalous area of First Amendment jurisprudence.[121] Just as obscenity law began its decline, child pornography law grew to fill the gap. The body of law that has developed since *New York v. Ferber,*[122] the Court's first child pornography case, has made the Mapplethorpe child images shown in Cincinnati more vulnerable to prosecution now than they were thirty years ago.

Child pornography law began in 1982 with the Supreme Court's decision in *Ferber*, in which it encountered a novel First Amendment problem: whether non-obscene[123] sexual depictions of children—speech not falling into any previously defined First Amendment exception—could be constitutionally restricted.[124] The Court's answer was "yes." Although the *Ferber* Court announced five reasons that supported the exclusion of child pornography from First Amendment protection,[125] the

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[119] *See* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001).

[120] *See*, *e.g.*, Michael H. Keller and Gabriel J.X. Dance, *The Internet Is Overrun with Images of Child Sexual Abuse: What Went Wrong?* N.Y. TIMES, (Sept. 29, 2019), https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html [https://perma.cc/G2XP-UZA7].

[121] Amy Adler, *The* 'Dost *Test' in Child Pornography Law: 'Trial by Rorschach Test'*, *in REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES* 81 (Carissa Byrne Hessick, ed., U. Mich. Press, 2016).

[122] 458 U.S. 747 (1982).

[123] The materials at issue in *Ferber* had been found not obscene by the jury, which was instructed to consider obscenity as well as child pornography charges against the defendant. *See Ferber*, 458 U.S. at 751. Thus, the issue for the Court was sharply defined. Miller v. California, 413 U.S. 15, 24 (1973) sets forth the Court's obscenity standard. The "*Miller* test" asks: (1) whether the "average person" would find that the speech, "taken as a whole, appeals to the prurient interest"; (2) whether it is "patently offensive"; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* (citations omitted).

[124] Note this section draws in part on Adler, *supra* note 121.

[125] *Ferber*, 458 U.S. at 756. The five rationales set out in *Ferber* were as follows:

> 1. The State has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." *Id.* at 756–57 (citing Globe Newspaper Co. v. Superior Court, 457

fundamental focus of these rationales was this: child pornography must be prohibited because of the grievous harm done to children in the production of the material.[126] The creation of child pornography requires an act of child sexual abuse. The opinion repeatedly emphasizes this concern for the abuse "of children engaged in [the] production" of child pornography. [127] Indeed, the Court framed the issue as whether "a child has been physically or psychologically harmed in the production of the work." [128]

When it comes to artistic expression, this urgent rationale animating child pornography law—to protect real children from abuse entailed in creating the materials—leads to a pivotal distinction between this area and obscenity law: unlike obscenity law, child pornography law makes no explicit exception for works of "serious . . . artistic . . . value."[129] Whereas obscenity law was initially premised on the

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U.S. 596, 607 (1982)).

2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the child's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed" in order to control the production of child pornography. *Id.* at 759 (citations omitted). The Court went on to explain that the production of child pornography is a "low-profile clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its use. *Id.* at 760.

3. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of child pornography. *Id.* at 761 (citations omitted).

4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not de minimis." *Id.* at 762.

5. Banning full categories of speech is an accepted approach in First Amendment law and was therefore appropriate in this instance. *Id.* at 763–64.

[126] *Ferber*, 458 U.S. at 764.

[127] This conception of child pornography—that it is sexual abuse, that it is the *core* of sexual abuse—was the foundation of the approach taken by courts, legislators, politicians, and the media. *See, e.g.*, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 406 (1986) ("Child pornography is child abuse.") (emphasis in original); 142 CONG. REC. S-11886-01, S-11900 (Sept. 30, 1996) (statement of Sen. Biden) ("At the heart of the analysis . . . is a very straightforward idea: Children who are used in the production of child pornography are victims of abuse, plain and simple. And the pornographers, also plainly and simply, are child abusers."); *see also* 132 CONG. REC. S-14225-01 (Sept. 29, 1986) (statement of Sen. Roth) ("[T]hose who advertise in order to receive or deal in child pornography and child prostitution are as guilty of child abuse as the actual child molester . . . ."). The Attorney General's Commission on Pornography stated that "[c]hild pornography must be considered as substantially inseparable from the problem of sexual abuse of children . . . There can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse." ATTORNEY GENERAL'S REPORT, *supra* note 127, at 406 (emphasis in original). The abuse of an actual child is "[t]he distinguishing characteristic of child pornography." *Id.* at 405.

[128] *Id.* at 765. *The Supreme Court's opinion in* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) further underscored that production harm is the key to understanding child pornography law.

[129] *Miller*, 413 U.S. at 23 (establishing an exception in obscenity law for works that lack such value). Although the Court has never entertained a child pornography case in which serious value

worthlessness of certain expression,[130] child pornography law excludes speech from First Amendment protection because of the horrible abuse from which it stems. This explains why the Court's jurisprudence in this area departs so dramatically from obscenity law: the merit of an artwork is irrelevant to the child who has been abused. As the Court explained, even if a work possesses serious value, that "bears no connection to whether or not a child has been harmed in the production of the work."[131] Thus, the *only* argument that led to the acquittal of the adult sex pictures at the Mapplethorpe trial—the serious artistic value defense—is irrelevant under child pornography law.[132] Furthermore, unlike obscenity law, child pornography law does not require us to evaluate works as a whole, a standard which is more speech protective, as described above.[133]

Meanwhile, the legal definition of child pornography has grown increasingly capacious over the last thirty years in the lower courts.[134]

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was raised as a defense, the Court in *Ferber* considered the issue in the context of an overbreadth claim, holding that the lack of an exception for serious value did not render the law "substantially" overbroad. *Ferber*, 458 U.S. at 766–74. The concurring opinions in *Ferber* show some discord on the question of serious value among the members of the court at the time of the 9-0 decision. Justice O'Connor wrote to emphasize that artistic value was irrelevant to the harm of child abuse that child pornography law sought to eradicate. "[A] 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph 'edifying' or 'tasteless.' The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm." *Id.* at 774–75 (O'Connor, J., concurring). In contrast, Justice Brennan assumed that serious artistic value would be a valid defense in a case if it were raised. He wrote that harm to a child and value of a depiction bear an inverse relationship to one another: "[T]he Court's assumption of harm to the child resulting from the permanent record and circulation of the child's participation lacks much of its force where the depiction is a serious contribution to art or science." *Id.* at 776 (Brennan, J., concurring) (citations omitted).

[130] This is the fundamental principle of *Roth v. United States*, 354 U.S. 476 (1957), the Court's first obscenity decision, in which it held that "obscenity" was a category of expression that lacked First Amendment protection. In 1973 the Court introduced new rationales for banning obscenity.

[131] *Ferber*, 458 U.S. at 764.

[132] As we will see, due to an unusual feature of Ohio state law, the value of the work was relevant in the Mapplethorpe trial, but such an exception is not required by the First Amendment. *See infra* Part III.C.

[133] A further distinction is that unlike obscenity law, child pornography law allows for the prosecution of mere possession, as opposed to distribution or production, of a suspect picture. In Osborne v. Ohio, 495 U.S. 103 (1990), a case decided shortly before the Mapplethorpe trial, the Court relied on the unique rationale underlying child pornography law to justify the decision and its rejection of a basic tenet of obscenity law: that privacy rights protect the individual possessor of obscenity in his own home even though the material he possesses is illegal to make or sell. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the government cannot prohibit mere possession of obscene material); *cf. Osborne*, 495 U.S. at 109 ("The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted [its law prohibiting possession of child pornography] in order to protect the victims of child pornography . . . ."). As the Court explained, the underlying crime of child sexual abuse entitles the States to "greater leeway in the regulation" of child pornography than of obscenity. *Ferber*, 458 U.S. at 756. This compelling rationale justifies the departure from traditional First Amendment strictures that child pornography law permits.

[134] *See* Adler, *supra* note 121.

"Child pornography" is defined as "visual depictions" of "sexual conduct involving a minor."[135] Federal law defines "sexually explicit conduct" as "(A) sexual intercourse . . . ; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person" under 18.[136] The inclusion of this latter category—"lascivious exhibition of the genitals"—as part of the class of prohibited depictions of "sexually explicit conduct" introduces the most problematic aspect of defining child pornography. How should courts discern the difference between a criminally "lascivious" image and an acceptable image of a child, such as an innocent family photo? The Court has made clear that nudity is *not* the dividing line between protected speech and lascivious child pornography. Indeed, the *Ferber* Court stated that "nudity, without more is protected expression."[137] Conversely, and surprisingly, a picture can be criminalized as "lascivious exhibition of the genitals" even if it contains *no* nudity, even if the child's genitals are not discernible,[138] and even if it contains no sexual conduct.[139]

The Supreme Court has so far offered no guidance on the question of what constitutes a "lascivious exhibition of the genitals" or what differentiates such an image from constitutionally protected images of

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[135] 18 U.S.C. § 2252. In response to *Ferber*, Congress quickly passed legislation modeled on the New York statute upheld in that case. The result was the Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2253 (2008)). That and subsequent Acts have closely followed the *Ferber* definition.

[136] 18 U.S.C. § 2256(2)(A)–(E). Congress adopted this definition from *Ferber* but changed the word "lewd" to "lascivious" to clarify the distinction between child pornography law and obscenity law, in which the word "lewd" is a term of art. Child Protection Act of 1984, Pub. L. No. 98–292, 98 Stat. 204 (1984); *see also* United States v. Dost, 636 F. Supp. 828, 830–32 (S.D. Cal. 1986) (discussing the Act).

[137] *Ferber*, 458 U.S. at 765 n.18 (citations omitted).

[138] Although the Supreme Court has never directly approved this interpretation, several influential Circuit Court opinions have held that a picture can be a lascivious exhibition of a child's genitals—and thus child pornography—even if the child's genitals are not discernible and even if the child is wearing clothes. United States v. Knox, 32 F.3d 733 (3d Cir. 1994); *accord* United States v. Helton, 302 F. App'x. 842, 847 (10th Cir. 2008) (holding videotape defendant recorded of an eleven-year-old girl wearing opaque underpants qualified as child pornography because of the way it was framed); United States v. Grimes, 244 F.3d 375, 380 (5th Cir. 2001) (finding nude images of minors with pixel boxes covering their genitals are still lascivious within the meaning of the federal child pornography statute, noting it is an easier determination than *Knox*); United States v. Horn, 187 F.3d 781, 790 (8th Cir. 1999) (holding that a "reasonable jury could conclude that the exhibition of pubic area was lascivious" in "beach scenes [of] girls wearing swimsuit bottoms"); People v. Spurlock, 114 Cal. App. 4th 1122, 1127 (2003) (holding child pornography and child exploitations statutes could apply to an image depicting topless fifteen-year old girl in her underwear with her legs spread); People v. Kongs, 30 Cal. App. 4th 1741, 1755–56 (1994) (following *Knox*, finding photographs that zoomed in on girls' pubic area were lascivious even though the girls were wearing underwear); *cf.* U.S. v. McGlothlin, 391 Fed. App'x 542, 546 (7th Cir. 2010) (finding probable cause existed regarding photographs of clothed boy in innocent activity but photographs focused on pubic area).

[139] *See, e.g.*, United States v. Johnson, 639 F.3d 433, 440 (8th Cir. 2011) ("Thus, even images of children acting innocently can be considered lascivious if they are intended to be sexual.").

children, nude or otherwise. In the absence of any guidance, and as the onslaught of horrific child sexual abuse images has grown exponentially over the years, lower courts have been busily filling the gap left open by the Supreme Court. As I have documented in recent work, the result is a growing body of law that has rendered the category of child pornography increasingly subjective at its edges.[140]

Indeed, many lower courts now evaluate whether a picture is lascivious based not on what happened to the child at issue but on whether a pedophilic viewer might find the picture arousing.[141] This allows for the possible prosecution of pictures that were not the product of abuse but still appeal to a deviant audience. In this way, the definition of child pornography has come unmoored from its constitutional rationale—that the pictures lack First Amendment protection because their production requires abuse.[142]

The leading case on the meaning of "lascivious exhibition" is *United States v. Dost*,[143] a 1986 California federal district court case that announced a six-part test for analyzing images. The *Dost* test, followed by virtually all state and lower federal courts,[144] identifies six factors that are relevant to the determination of whether a picture constitutes a "lascivious exhibition":

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

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[140] Adler, *supra* note 121.

[141] *Id.* (describing the debate in the lower courts between the objective and subjective interpretation of the *Dost* test and the subjective way in which some courts apply the *Dost* factors).

[142] It is important to emphasize that to the extent pedophiles regard these photographs of children in a sexual way, the children are grievously harmed. But this harm seems to reside more in the realm of a privacy violation (akin to revenge porn) and less in the kind of harm on which *Ferber* was premised. The abuse now lies in how the pictures are used, not how they were produced. I leave for another day the question of how to frame and prosecute this kind of harm as a privacy violation.

[143] 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom*. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).

[144] *Dost* has been relied on by virtually all Circuits that have considered it. *See, e.g.*, United States v. Rivera, 546 F.3d 245, 250 (2d Cir. 2008); *Knox*, 32 F.3d at 747 (3d Cir. 1994); United States v. Wolf, 890 F.2d 241, 244–46 (10th Cir. 1989); United States v. Rubio, 834 F.2d 442, 448 (5th Cir. 1987) (affirming use factors without specifically citing *Dost*); United States v. Amirault, 173 F.3d 28, 31 (1st Cir. 1999) (emphasizing that factors are "neither comprehensive nor necessarily applicable in every situation"); United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999) ("We find helpful the six criteria" in *Dost*); U.S. v. Brown, 579 F.3d 672, 680 (6th Cir. 2009) ("This Court, in line with other Circuit courts, has applied a six-factor test for 'lasciviousness,' as set forth in [*Dost*].") Numerous district courts have followed *Dost*, as have state courts. *See, e.g.*, Nebraska v. Saulsbury, 498 N.W.2d 338 (Neb. 1993).

> (2) whether the setting of the visual depiction is sexually suggestive, *i.e.* in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests coyness or willingness to engage in sexual activity;
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[145]

The test does not require that all factors be met to find that a depiction is a lascivious exhibition.[146] Indeed, one circuit court suggested that satisfying merely one of the six factors would suffice to criminalize a photograph as child pornography.[147]

B. Are the Mapplethorpe Pictures Protected Speech?

What would the result be today for the Mapplethorpe pictures described above, *Jesse McBride* and *Rosie*? Would a federal prosecution succeed? In my view, the answer is unclear. (Given this uncertain status, I have not included the pictures here for the reader to assess.) On my analysis of the images, in light of the way courts have interpreted the *Dost* factors, I offer a few impressions. First, if merely one *Dost* factor is required, then certainly factor four, which asks if the child is nude, is met. Furthermore, both pictures might be seen as having a focal point on the child's pubic area as well, thereby meeting both factors four and one of the test. Justice Brennan argued that this focal point inquiry can be easily manipulated. In elaborating on what he found to be the constitutional vagueness of a similar provision of a state law, Justice Brennan wrote in dissent, "the test appears to involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture or other representation. Not only is this factor dependent on the perspective and idiosyncrasies of the observer, it also is unconnected to whether the material at issue merits constitutional

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[145] *Dost*, 636 F. Supp. at 831.

[146] Nor are the factors meant to be exhaustive. *See, e.g.*, *Horn*, 187 F.3d at 789.

[147] *Wolf*, 890 F.2d at 245 n.6; *cf.* United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989) ("Although more than one factor must be present in order to establish 'lasciviousness,' all six factors need not be present."). The Second Circuit imposes no minimum number of *Dost* factors that must be present for an image to constitute child pornography. United States v. Goodale, 831 F. Supp. 2d 804, 810 (D. Vt. 2011) (citations omitted).

protection."[148] The subjective nature of this inquiry was on full display during the Mapplethorpe trial, when the prosecutor had the following exchange on the subject with a defense witness, discussing the picture of Jesse McBride:

> "Isn't the focus primarily between the legs of the child, the penis area?" [the prosecutor] Prouty pursued.
>
> "Mr. Prouty, I don't have that reading of the direction of the lines" Stein responded.
>
> "Could anyone?" Prouty said.
>
> Defense attorney Marc Mezibov objected. "The only person that seems to have that reading is Mr. Prouty," he said.[149]

Although I doubt that either Mapplethorpe image is in a "sexually suggestive" setting under factor three, I note that this factor can be subject to surprising interpretations; for example, courts have divided on whether a bathroom is a sexually suggestive setting.[150] In a First Circuit case, the government argued, unsuccessfully (and in my view quite startlingly) that a beach was a sexually suggestive setting because "many honeymoons are planned around beach locations."[151] This kind of subjective analysis can affect the interpretation of all the factors, not just the third. And the subjectivity is significantly heightened in those jurisdictions where courts require the material be viewed through the imagined subjective vision of the pedophile voyeur when applying the factors.[152]

There are significant arguments to be made for the defense of these pictures. First is the most obvious: these pictures, taken with their parents' approval, depict children being children, playing and cavorting in an utterly non-sexual way that is more akin to a photo in a family album. To read them as sexual seems perverse. The picture of Rosie, for example, was taken (with her mother's consent) at a weekend wedding

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[148] Osborne v. Ohio, 495 U.S. 103, 138 (1990) (Brennan J., dissenting).

[149] Masters, *supra* note 112.

[150] The Tenth Circuit has held that a bathroom is a sexually suggestive setting under the second factor because "showers and bathtubs are frequent hosts to sexual encounters as portrayed on television and film. It is potentially as much of a setting for sexual activity as an adult's playroom." United States v. Larkin, 629 F.3d 177, 183 (3d Cir. 2010); *see also Goodale*, 831 F. Supp. 2d at 810. In contrast, an Oklahoma district court found that a bathroom is "not necessarily a sexually suggestive location." United States v. Helton, CR–07–70–T, 2007 WL 1674196 (W.D. Okla. June 7, 2007), *aff'd*, 302 Fed. App'x 842 (10th Cir. 2008).

[151] United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999).

[152] Adler, *supra* note 121.

celebration at her house in northern England.[153] Jesse's mother explained that the picture of her son was taken at her apartment while she was there and that her son was naked because he had just taken a shower.[154] The circumstances under which these photos were taken seem worlds away from the horrors of sexual abuse that child pornography law is designed to prohibit (and that, unfortunately, the vast amount of child pornography images portray). At trial, a local art critic had testified that the pictures were "most innocent and nonsexual," comparing them to Renaissance cherubs or "modern-day angels."[155] Both children pictured looked back on these images with pride when they were adults.[156] Specifically, I would point to the sixth *Dost* factor, as weighing heavily in favor that they were not designed to arouse an erotic reaction by the viewer.[157]

Nonetheless, this argument does not guarantee the photographs' protection. First, remember that a *Dost* conviction does not require that all factors or even the majority of them be met, and in my view at least two could arguably be met here. Second, there are counterarguments to be made under the sixth factor. In particular, to counter the claim that the work was not designed to arouse an erotic reaction in the viewer, one could point to the very merger between art and pornography that Mapplethorpe championed in his adult sex pictures. It's also possible to argue that the camera angle in the Rosie photograph, positioned as if to see up the child's dress, could be seen as sexual, particularly to a pedophile viewer.[158] Furthermore, I might worry about a recurrence of the kind of sinister prejudice that entered the debates about Mapplethorpe in Congress during the time of the exhibition, when members of Congress suggested a link between Mapplethorpe's homosexuality and a pedophilic intent. For instance, a congressman from California said that Mapplethorpe "was a child pornographer. He lived his homosexual, erotic lifestyle and died horribly of AIDS."[159]

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[153] Masters, *supra* note 112.

[154] *Id.*

[155] *Id.*

[156] Meyer, *supra* note 13; KIDD *supra* note 26. But note that this may not be a sufficient test for whether an image was a product of abuse, since so much child sexual abuse entails psychological grooming in which part of the abuse entails grooming the victim to believe he can trust his abuser.

[157] In this sense the case may be comparable to *United States v. Amirault*, 173 F.3d 28 (1st Cir. 1999). There the court said, "While it is conceivable that others may differ about some of the judgment calls we have made in our analysis of the photograph, we hesitate to dub this photograph sexually explicit where many would find the depiction innocuous . . . we believe the only truly striking aspects of the photograph to be the girl's nakedness and her youth." *Id.* at 25.

[158] KIDD, *supra* note 26, at 61. Kidd goes on to argue that the picture is open to sexual and nonsexual interpretations.

[159] *See* RICHARD MEYER, OUTLAW REPRESENTATION: CENSORSHIP AND HOMOSEXUALITY IN TWENTIETH CENTURY ART 207 (2004) (quoting Representative Dornan); *id.* at 211 (describing the

I do not interpret these pictures as sexual, nor do I interpret them as the product of child sexual abuse. Yet given the current state of child pornography law, I am not certain that the pictures would be protected by a court applying the *Dost* test. Ultimately, my analysis points to a conflict between the expansive reach of the *Dost* test and the underlying rationale of child pornography law itself, to protect children from the abuse that the *production* of child pornography necessarily entails.[160]

C. Why the Pictures Won

What saved the pictures in 1990? The answer stems from two features of the Ohio law at issue in the Mapplethorpe trial. Although that law had potentially sweeping aspects,[161] it was far more generous to defendants than federal child pornography law in two important respects.[162]

First, the Ohio law made an exception for parental consent, an exception that federal law does not provide (and indeed, one that may be ill-advised given the unfortunate reality that many children are abused by their own family members).[163] The mothers of both children, Jesse and Rosie, signed affidavits and testified expressing their approval of the images; these affidavits figured as an affirmative defense to the charges.[164]

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longstanding stereotype of the "homosexual as child molester" that was deployed against Mapplethorpe).

[160] *But see supra* note 142 where I suggest that some images that do not entail production harm in the traditional sense still impose a kind of privacy harm to the child pictured that ought to be legally cognizable albeit under a different First Amendment rubric.

[161] In a separate case, the Supreme Court had evaluated the constitutionality of the Ohio law only shortly before the Mapplethorpe case was decided. The dissenting justices in that case argued that the law swept more broadly than *Ferber* and was overbroad. *See* Osborne v. Ohio, 495 U.S. 103, 126 (1990) (Brennan J., dissenting).

[162] The charges were brought under OHIO REV. CODE ANN. § R.C. 2907.323(A)(3), which prohibited, inter alia, the possession or viewing of "any material . . . that shows a minor who is not the person's child or ward in a state of nudity . . . . " This very Ohio statute had withstood an overbreadth challenge in *Osborne*, 495 U.S. 103, decided just shortly before the Mapplethorpe trial. The U.S. Supreme Court upheld the statute as it had been construed and limited by the Ohio Supreme Court to prohibit "the possession or viewing of material or performance of a minor who is in a state of nudity, *where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals,* and where the person depicted is neither the child nor the ward of the person charged." *Id.* at 114 (emphasis added) (citations omitted). As so construed, a majority of the Court found that the statute was in line with *Ferber*.

[163] The relevant provision of Ohio law provided protection for a defendant who "knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred." OHIO REV. CODE ANN. § 2907.323(A)(3)(b) (Supp. 1989),

[164] *See* City of Cincinnati v. Contemporary Arts Ctr., 566 N.E.2d 207 (Hamilton Cty. Mun. Ct 1990) (describing affirmative defense based on "affidavits filed from the parents of the minor children consenting to possession and displaying of the photographs"); *see also* KIDD, *supra* note 26, at 72 (describing the mothers' testimony).

The second feature of the Ohio law that was more generous to defendants than the First Amendment requires was a provision to allow exceptions for work "presented for a bona fide artistic . . . purpose."[165] As I indicated previously, the Supreme Court has made clear that the defense of artistic value is not a mandatory feature of child pornography law. Of course, states are free to make laws that are more speech-protective than the Constitution requires, and Ohio's law, by carving out a sphere for artistic works, did so in this respect.

Thus, the fact that these images were exonerated in 1990 does not settle their legal status today if they were prosecuted. The Mapplethorpe defense was able to invoke two idiosyncratic speech-protective features of Ohio law that depart from what the Supreme Court has indicated is required by the First Amendment. Neither issue would be relevant in a federal prosecution.

IV. HOW MEANING SHIFTS: THE RELEVANCE FOR FIRST AMENDMENT LAW

One of the most revealing aspects of the Mapplethorpe case was a ruling issued by the Court that addressed the nature of artistic meaning.[166] The Court's analysis exposed a clash that reverberates to this day between legal and artistic views on how to assess the "meaning" of art.

The issue arose in the context of a ruling on a pretrial motion *in limine* filed by the state of Ohio on a key aspect of obscenity law. Since 1957, in *Roth v. United States*,[167] the U.S. Supreme Court made it a requirement of obscenity law that a work be evaluated "as a whole." The previous approach that *Roth* replaced had been far less protective of artistic expression; it allowed prosecutors to focus on isolated passages of a work,[168] plucking out of a novel only the naughty bits. Yet while *Roth*'s new "work as a whole" standard was relatively easy to apply to works of literature—the unit of measurement is the whole book—the Mapplethorpe trial raised a question of first impression for a court: what constitutes the "work as a whole" for an art exhibit? Is it the entire exhibit? Or is each individual picture a "work as a whole" in its own right? The question ultimately implicates the relationship between meaning and context.

In the Mapplethorpe case, this question was potentially pivotal: The five S&M sex pictures on trial, extremely graphic, appeared in a

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[165] OHIO REV. CODE ANN. § 2907.323(A)(3) (Supp. 1989).

[166] City of Cincinnati v. Contemporary Arts Ctr., 566 N.E.2d 207 (Hamilton Cty. Mun. Ct 1990).

[167] 354 U.S. 476, 489 (1957).

[168] R. v. Hicklin, L.R. 3 Q.B. 360 (1868) (Eng.).

larger exhibition of 175 works dominated by G-rated, tasteful portraits and still lifes. Indeed, the curatorial installation of the *X Portfolio* was calculated to challenge the assumption that the sexual works could be viewed apart from their context. As explained above, the sex pictures were displayed in a grid, mixed with the *Y Portfolio*'s elegant flowers. The arrangement invited the viewer to consider the sex pictures' unity with the other works. In this way, the exhibition was curated to illustrate a central tenet of Mapplethorpe's photographic project. As the artist explained in his own words: "When I've exhibited pictures, I've tried to juxtapose a flower, then a picture of a cock, then a portrait, so that you could see they were the same."[169]

Yet the Court rejected the contention that a work's meaning could depend on its context. It ruled instead that each picture was a work as a whole in its own right. In elaborating on this ruling, the judge offered a stark vision of how images produce meaning. The judge wrote, "the pictures speak for themselves . . . . The click of the shutter has frozen the dots, colors, shapes, and whatever finishing chemicals necessary, into a manmade instant of time. Never can that 'moment' be legitimately changed."[170]

Note two assumptions undergirding this statement. First, the court assumes that the image is a self-contained universe that requires no interpretation—it "speaks for itself."[171] This is a longstanding—and problematic—theme in the history of the legal treatment of images in both First Amendment law and also other legal realms.[172] As I have argued in previous work, this assumed ability of images to "speak for themselves" helps explain the systematic suspicion that images are not fully "speech" for purposes of the First Amendment, and the greater free speech protection afforded verbal as opposed to visual forms of representation.[173] Rebecca Tushnet has documented a similar problem in copyright law, where courts frequently view images as so transparent that they need no interpretation.[174]

Second, the court's analysis is built on the assumption that a work's meaning cannot vary: it is "frozen" in the "instant of time" it was

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[169] Kardon, *supra* note 11 (quoting Mapplethorpe).

[170] *Contemporary Arts Ctr.*, 566 N.E.2d at 217–218.

[171] *Id.* at 217.

[172] *See generally* Amy Adler, *The First Amendment and the Second Commandment,* 57 N.Y.L. SCH. L. REV. 41 (2012–2013) (arguing that the First Amendment systematically offers greater protection for verbal as opposed to visual forms of representation in part because images are viewed as so transparent as not to be speech).

[173] *Id.*; *see also* Adler, *supra* note 54.

[174] *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687 (2012) (noting that courts have taken "two positions on nontextual creative works such as images: they are either transparent, or they are opaque" and "[w]hen courts treat images as transparent, they deny that interpretation is necessary.").

created.[175] The analysis pictures the meaning of a photograph as eternally bound to its moment of creation, so that it can't fluctuate over time or across different contexts. As the court wrote, "never can that moment be legitimately changed."[176] This view—that visual images have a "frozen," static and unchanging meaning—has had a stranglehold on legal analyses of art, not only in First Amendment law[177] but also in other doctrinal areas, as I have previously explored.[178]

The fallacy of this legal assumption is particularly evident in the changing racial meanings that have been ascribed over the years to Mapplethorpe's works. Earlier I discussed Mapplethorpe's photographs of Black men. I argued that anxieties about race and interracial desire had fueled the conservative outrage over Mapplethorpe in 1990 America. Of course, there is no First Amendment doctrine under which these photographs of Black men could be prosecuted for their racial content alone. Obscenity law filled the gap.

At the same time that conservatives feared these pictures, some Black critics, artists, and curators of the 1980s and 1990s explored the disturbing racial politics of Mapplethorpe's images of Black males, criticizing Mapplethorpe's fetishization and objectification of the Black male body. At the same time, however, there were champions of the work, who saw it as having an activist potential to subvert rather than reinforce racial stereotypes.[179]

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[175] *Contemporary Arts Ctr.*, 566 N.E.2d at 217–18.

[176] *Id.* at 218.

[177] *See* Adler, *supra* note 172, at 45–58. There I explore the assumption that images have a single static meaning. I note that the Supreme Court in the *Summum* case took a position closer to my own, offering a view of visual images as given to fluctuating meaning overtime, across contexts, and based on who views them. *See* Summum v. Pleasant Grove, 555 U.S. 460, 477 (2009) (explaining that the meaning of a monument could be "altered by the subsequent addition of other monuments in the same vicinity" or over time).

[178] *See generally* Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016) (analyzing how copyright law's fair use test, which asks courts to assign "meaning" to works of visual art, has come to threaten artistic creativity). For an articulation of how the precise opposite view of meaning has purchase in the art world, see DAVID JOSELIT, AFTER ART 45–48 (2013) (arguing against attempts to tether artworks to meanings and envisioning art as "a commons, which resists the enclosure of meaning").

[179] There have been a range of political readings of Mapplethorpe's *Black Book*. Glen Ligon's extraordinary artwork, *Notes on the Margin of the Black Book (1991–93),* explores the artist's reaction to the troubling racial themes of the Mapplethorpe work. In an important series of essays, the critic Kobena Mercer had initially decried the racial fetishism of the work, but subsequently revised his reading to see the work as containing the activist possibility of undermining the "white supremacist imaginary." *Compare* Kobena Mercer, *Imagining the Black Man's Sex*, *in* PHOTOGRAPHY/POLITICS: TWO 61–9 (Pat Holland et al. eds., 1987) with Kobena Mercer, *Skin Head Sex Thing: Racial Difference and the Homoerotic Imaginary*, *in* HOW DO I LOOK?: QUEER FILM AND VIDEO 169, 192 (Bad Object Choices ed., 1991); *see also* Wesley Morris, *Last Taboo: Why Pop Culture Just Can't Deal with Black Male Sexuality*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/interactive/2016/10/30/magazine/black-male-sexuality-last-taboo.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/FB4E-2Z5X] (noting that at the time of the works creation one could see the "radical, defiant feat of inscribing black men—

I believe that in the thirty years since the Mapplethorpe trial, the racial component of Mapplethorpe's work has grown more inescapable to us as viewers, even eclipsing the sexual content of the work, which has become comparatively more mundane. As our society has increasingly grown aware of the troubling implications of mainstream depictions of race and Blackness, I believe that Mapplethorpe's Black males may make us even more uncomfortable than they once did, in contrast to Mapplethorpe's S&M images, which time has to some extent tamed.[180] In this way, we see that even though the pictures have stayed the same, the lens through which we view the pictures has shifted, bringing new meanings to the fore.

Ironically, the story of Mapplethorpe's work, from the time of its creation to present, demonstrates the folly of the court's approach to meaning. Instead of showing us that the meaning of his images were "frozen" in the "instant of time" they were created and that meaning can "never" change, we see instead a proliferation of fluctuating meanings that the works have evoked. The *X Portfolio* photographs were taken in the late 1970s when AIDS was unknown; Mapplethorpe was documenting his world of sexual experimentation in a time without fear of the still-undiscovered virus that was brewing as the photographs were taken. But after Mapplethorpe's death, and in the hands of conservative critics, the work came to stand for the threat posed by AIDS and by homosexuality to American culture. Conversely, to the political left, Mapplethorpe's work came to stand for artistic freedom.[181]

None of these interpretations had any basis in the moment of the works' creation. They all arose in the history of its use and reception. And over the ensuing years since the trial, Mapplethorpe's meanings have continued to change. We see the work differently now, as attitudes about homosexuality, pornography, sexuality, child sexual abuse, race, and art have all changed.

The story I have told about the works' shifting legal status bears testament to its evolving meaning. Our changing cultural perspective not only reflects but also informs the legal shifts I have described, as the works have become more vulnerable to one legal doctrine and less

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black *gay* men—into portraiture"); Evan Moffitt, *Picture Imperfect*, 179 FRIEZE 184 (2016) available at https://www.frieze.com/article/picture-imperfect-0 [https://perma.cc/3PGH-HKBT] (exploring racial critiques of Mapplethorpe's work). For my discussion of the racial politics of these images as well as my reading of Kobena Mercer's evolving view of Mapplethorpe, *see* Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL L. REV. 1499 (1996).

[180] *See* Arthur Lubow, *supra* note 89 (observing that "the images that continue to make viewers uncomfortable, and rightly so, are the ones of nude black models").

[181] *See* Meyer, *supra* note 5, at 242 (describing how the work came to symbolize freedom in the face of "intolerance and homophobia"). As Meyer wrote, our interpretation of the work "cannot be dissociated from the political panic and public controversy it provoked in 1989–90." *Id.*

vulnerable to another. Therefore, to understand how misguided the court was in its assessment of how art produces "meaning," we can look at the changing legal status of Mapplethorpe's art over the last thirty years. The history of Mapplethorpe's work, from its moment of creation to its present reception, bears witness to the way in which art's "meaning," rather than "frozen," evolves over time and across contexts. Ultimately these evolving meanings informed the shifting legal status of Mapplethorpe's art.

CONCLUSION

The Mapplethorpe trial, fueled by anxieties about AIDS, homosexuality, sadomasochism, pornography, race, government funding for the arts, and the vanishing boundary between art and smut, was the defining battle in the culture wars of post-Reagan American. As I have argued, it also marked a turning point in the First Amendment doctrines governing sexual speech. The trial marked the first obscenity prosecution against an art museum in the history of this country. But since that time, obscenity law has receded in importance and the once-scandalous, allegedly obscene photos from the trial have become widely accepted in museums and in the art market. Child pornography law has followed the opposite course. In contrast to the allegedly obscene pictures, which pose almost no legal risk today, the two photographs of children that were on trial have become more, not less, controversial over the past thirty years, to the point where curators are quietly reluctant to show these images at all. In my view, these photos now occupy a space of legal and cultural uncertainty. Ultimately my account shows how these dramatic changes in free speech law have been inextricably intertwined with and influenced by the battles over social norms that the Mapplethorpe trial unleashed.

The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform

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I. INTRODUCTION

A robust public debate is currently underway about the responsibility of online platforms for harmful content. We have long called for this discussion,[1] but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms be responsible for user-generated content?[2] If so, under what circumstances? What exactly would such responsibility look like?

At the heart of this debate is Section 230 of the Communications Decency Act of 1996[3]—a provision originally designed to encourage tech companies to clean up "offensive" online content. Section 230 was adopted at the dawn of the commercial internet. According to the standard narrative of its passage, federal lawmakers wanted the internet to be open and free, but they also realized that such openness risked

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[††] Professor of Law & Dean's Distinguished Scholar, University of Miami School of Law, President, Cyber Civil Rights Initiative. Deep thanks to the editors of the University of Chicago Legal Forum for including us in the symposium. Olivier Sylvain, Spencer Overton, Genevieve Lakier, Brian Leiter, and symposium participants provided helpful comments. It was a particular pleasure to engage with co-panelists Amy Adler, Leslie Kendrick, and Fred Schauer. Matthew Atha provided superb research assistance. We are grateful to Dan Simon and Rebecca Roman for their terrific suggestions and editing.

[1] *See generally* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); *see also* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012).

[2] That is, beyond the select avenues that currently are not shielded from liability, such as intellectual property, federal criminal law, the Electronic Communications Privacy Act, and the knowing facilitation of sex trafficking.

[3] 47 U.S.C. § 230 (2018). According to Blake Reid, the most accurate citation for the law is "Section 230 of the Communications Act of 1934"; we have retained "Section 230 of the Communications Decency Act" because of its common usage. Blake Reid, *Section 230 of… What?*, BLAKE.E.REID (Sept. 4, 2020), https://blakereid.org/section-230-of-what/ [https://perma.cc/DUL6-DKK2].

encouraging noxious activity.[4] In their estimation, tech companies were essential partners in any effort to "clean up the Internet."[5]

A troubling 1995 judicial decision, however, imperiled the promise of self-regulation. In *Stratton Oakmont, Inc. v. Prodigy*, a New York state court ruled that any attempt to moderate content turned platforms into publishers and thus increased their risk of liability.[6] Lawmakers devised Section 230 as a direct repudiation of that ruling. The idea was to incentivize, rather than penalize, private efforts to filter, block, or otherwise address noxious activity.[7] Section 230 provided that incentive, securing a shield from liability for "Good Samaritans" that under- or over-filtered "offensive" content.[8]

Over the past two (plus) decades, Section 230 has helped secure a variety of opportunities for online engagement, but individuals and society have not been the clear winners. Regrettably, state and lower federal courts have extended Section 230's legal shield far beyond what the law's words, context, and purpose support.[9] Platforms have been shielded from liability even when they encourage illegal action, deliberately keep up manifestly harmful content, or take a cut of users' illegal activities.[10]

To many of its supporters, however, Section 230 is an article of faith. Section 230 has been hailed as "the most important law protecting internet speech" and characterized as the essential building block of online innovation.[11] For years, to question Section 230's value proposition was viewed as sheer folly and, for many, heretical.

No longer. Today, politicians across the ideological spectrum are raising concerns about the leeway provided to content platforms under Section 230.[12] Conservatives claim that Section 230 gives tech

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[4] *See generally Hearing on Fostering a Healthier Internet to Protect Consumers Before the H. Comm. on Energy and Commerce*, 116th Cong. (2019) (statement of Danielle Keats Citron, Professor, B.U. Law Sch.) (available at https://docs.house.gov/meetings/IF/IF16/20191016/110075/HHRG-116-IF16-Wstate-CitronD-20191016.pdf [https://perma.cc/9F2V-BHKL]).

[5] Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google is About to Change,* NPR (Mar. 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change [https://perma.cc/FG5N-MJ5T].

[6] *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995); *see also* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019) (offering an excellent history of Section 230 and the cases leading to its passage).

[7] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 170–73.

[8] Citron & Wittes, *supra* note 1, at 404–06.

[9] *Id.*

[10] *Id.*

[11] *See CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/W75F-6MRN].

[12] *See* Danielle Keats Citron & Quinta Jurecic, *Platform Justice: Content Moderation at an Inflection Point* at 1, 4 (Hoover Inst., Aeigis Series Paper No. 1811, 2018), https://www.hoover.org/sites/default/files/research/docs/citron-jurecic_webreadypdf.pdf [https://perma.cc/6XZY-9H

companies a license to silence speech based on viewpoint.[13] Liberals criticize Section 230 for giving platforms the freedom to profit from harmful speech and conduct.[14]

Although their assessments of the problem differ, lawmakers agree that Section 230 needs fixing. As a testament to the shift in attitudes, the House Energy and Commerce Committee held a hearing on October 16, 2019 on how to make the internet "healthier" for consumers, bringing together academics (including one of us, Citron), advocates, and social media companies to discuss whether and how to amend Section 230.[15] The Department of Justice held an event devoted to Section 230 reform (at which one of us, Franks, participated) on February 19, 2020.[16]

In a few short years, Section 230 reform efforts have evolved from academic fantasy to legislative reality.[17] One might think that we, as critics of the Section 230 status quo, would cheer this moment. But we approach this opportunity with caution. Congress cannot fix what it does not understand. Sensible policymaking depends on a clear-eyed view of the interests at stake. As advisers to federal lawmakers on both sides of the aisle, we can attest to the need to dispel misunderstandings in order to clear the ground for meaningful policy discussions.

The public discourse around Section 230 is riddled with misconceptions.[18] As an initial matter, many people who opine about the law are

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[13] *See Sen. Cruz: Latest Twitter Bias Underscores Need for Big Tech Transparency*, U.S. SENATOR FOR TEX. TED CRUZ (Aug. 16, 2019), https://www.cruz.senate.gov/?p=press_release&id=4630 [https://perma.cc/23UU-SWF7].

[14] Marguerite Reardon, *Democrats and Republicans Agree that Section 230 is Flawed*, CNET (June 21, 2020), https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/ [https://perma.cc/6VJG-DW5W].

[15] *See Hearing on "Fostering a Healthier Internet to Protect Consumers,"* HOUSE COMMITTEE ON ENERGY & COM., https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fostering-a-healthier-internet-to-protect-consumers [https://perma.cc/4YK2-595J]. Witnesses also included computer scientist Hany Farid of the University of California at Berkeley, Gretchen Petersen of the Alliance to Counter Crime Online, Corynne McSherry of the Electronic Frontier Foundation, Steve Huffman of Reddit, and Katie Oyama of Google. *Id.* At that hearing, one of us (Citron) took the opportunity to combat myths around Section 230 and offer sensible reform possibilities, which we explore in Part III.

[16] *See Section 230 Workshop—Nurturing Innovation or Fostering Unaccountability?*, U.S. DEP'T OF JUST. (Feb. 19, 2020), https://www.justice.gov/opa/video/section-230-workshop-nurturing-innovation-or-fostering-unaccountability [https://perma.cc/PQV2-MZGZ]. The roundtable raised issues explored here as well as questions about encryption, which we do not address here.

[17] There are several House and Senate proposals to amend or remove Section 230's legal shield.

[18] *See* Adi Robertson, *Why The Internet's Most Important Law Exists and How People are Still Getting it Wrong*, VERGE (June 21, 2019), https://www.theverge.com/2019/6/21/18700605/section-230-internet-law-twenty-six-words-that-created-the-internet-jeff-kosseff-interview [https://perma.cc/6ALQ-XN43]; *see also* Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019), https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/ [https://perma.cc/D9XG-BYB5].

unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law's goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230—its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II of this Article details how this conflation distorts discussion in three ways: it assumes all internet activity is protected speech, it treats private actors as though they were government actors, and it presumes that regulation will inevitably result in less speech. These distortions must be addressed to pave the way for effective policy reform. This is the subject of Part III, which offers potential solutions to help Section 230 achieve its legitimate goals.

II. SECTION 230: A COMPLEX HISTORY

Tech policy reform is often a difficult endeavor. Sound tech policy reform depends upon a clear understanding of the technologies and the varied interests at stake. As recent hearings on Capitol Hill have shown, lawmakers often struggle to effectively address fast-moving technological developments.[19] The slowness of the lawmaking process further complicates matters.[20] Lawmakers may be tempted to throw up their hands in the face of technological change that is likely to outpace their efforts.

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[19] *See* Dylan Byers, *Senate Fails its Zuckerberg Test*, CNN BUS. (Apr. 11, 2018), https://money.cnn.com/2018/04/10/technology/senate-mark-zuckerberg-testimony/index.html [https://perma.cc/Y2M6-3RMG]. The 2018 congressional hearings on the Cambridge Analytica data leak poignantly illustrate the point. In questioning Facebook CEO Mark Zuckerberg for several days during his testimony before the House and the Senate, some lawmakers made clear that they had never used the social network and had little understanding of online advertising, which is the dominant tech companies' business model. To take one example of many, Senator Orrin Hatch asked Zuckerberg how his company made money since it does not charge users for its services. *See Hearing on Facebook, Social Media Privacy, and the Use and Abuse of Data Before the S. Comm. On the Judiciary*, 115th Cong. (2018); *see also* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 479–88 (2019). As is clear from committee hearings and our work, however, there are lawmakers and staff devoted to tackling tech policy, including Senator (now Vice President–Elect) Kamala Harris, Senator Richard Blumenthal, Senator Mark Warner, Congresswoman Jackie Speier, and Congresswoman Kathleen Clark, who exhibit more familiarity and knowledge with tech companies and their practices.

[20] According to conventional wisdom, it can take years for bills to become law. Perhaps unsurprisingly, the process is speedier when lawmakers' self-interests hang in the balance. The Video Privacy Protection Act's rapid-fire passage is an obvious case in point. That law passed in less than a year's time after the failed nomination of Judge Robert Bork to the Supreme Court revealed that journalists could easily obtain people's video rental records. *Video Privacy Protection Act*, WIKIPEDIA (Sept. 2, 2020), https://en.wikipedia.org/wiki/Video_Privacy_Protection_Act [https://perma.cc/8WJD-JB2P]. Lawmakers fearing that their video rental records would be released to the public passed VPPA in short order. *Id.*

This Part highlights the developments that bring us to this moment of reform. Section 230 was devised to incentivize responsible content moderation practices.[21] And yet its drafting fell short of that goal by failing to explicitly condition the legal shield on responsible practices. This has led to an overbroad reading of Section 230, with significant costs to individuals and society.

A. Reviewing the History Behind Section 230

In 1996, Congress faced a challenge. Lawmakers wanted the internet to be open and free, but they also knew that openness risked the posting of illegal and "offensive" material.[22] They knew that federal agencies could not deal with all "noxious material" on their own and that they needed tech companies to help moderate content. Congress devised an incentive: a shield from liability for "Good Samaritans" that blocked or filtered too much or too little speech as part of their efforts to "clean up the Internet."[23]

The Communications Decency Act (CDA), part of the Telecommunications Act of 1996, was introduced to make the internet safer for children and to address concerns about pornography.[24] Besides proposing criminal penalties for the distribution of sexually explicit material online, members of Congress underscored the need for private sector help in reducing the volume of "offensive" material online.[25] Then-Representatives Christopher Cox and Ron Wyden offered an amendment to the CDA entitled "Protection for Private Blocking and Screening of Offensive Material."[26] The Cox-Wyden Amendment, codified as Section 230, provided immunity from liability for "Good Samaritan" online service providers that over- or under-filtered objectionable content.[27]

Section 230(c), entitled "Good Samaritan blocking and filtering of offensive content," has two key provisions. Section 230(c)(1) specifies that providers or users of interactive computer services will not be treated as publishers or speakers of user-generated content.[28] Section 230(c)(2) says that online service providers will not be held liable for

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[21] Or at least this is the most generous reading of its history. *See* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019) (showing that one of us (Franks) is somewhat more skeptical about the narrative that Section 230's flaws were not evident at its inception).

[22] Selyukh, *supra* note 5.

[23] *See* Citron & Wittes, *supra* note 1, at 406.

[24] *See id.* at 418.

[25] KOSSEFF, *supra* note 6, at 71–74; Citron, *Cyber Civil Rights*, *supra* note 1.

[26] *Id.* at 403.

[27] *Id.* at 408.

[28] Communications Decency Act, 47 U.S.C. § 230(c)(1) (1996).

good-faith filtering or blocking of user-generated content.[29] Section 230 also carves out limitations for its immunity provisions: its protections do not apply to violations of federal criminal law, intellectual property law, the Electronic Privacy Communications Act, and, as of 2018, the knowing facilitation of sex trafficking.[30]

In 1996, lawmakers could hardly have imagined the role that the internet would play in modern life. Yet Section 230's authors were prescient in many ways. In their view, "if this amazing new thing—the Internet—[was] going to blossom," companies should not be "punished for *trying* to keep things clean."[31] Cox recently explained that, "the original purpose of [Section 230] was to help clean up the Internet, not to facilitate people doing bad things on the Internet."[32] The key to Section 230, Wyden agreed, was "making sure that companies in return for that protection—that they wouldn't be sued indiscriminately—were being responsible in terms of policing their platforms."[33]

B. Explaining the Judiciary's Interpretation of Section 230

The judiciary's interpretation of Section 230 has not squared with this vision. Rather than treating Section 230 a legal shield for responsible moderation efforts, courts have stretched it far beyond what its words, context, and purpose support.[34] Section 230 has been read to immunize from liability platforms that:

- knew about users' illegal activity, deliberately refused to remove it, and ensured that those users could not be identified;[35]
- solicited users to engage in tortious and illegal activity;[36] and

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[29] *Id.* § 230(c)(2).

[30] *Id.* § 230(e).

[31] *See* Danielle Keats Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties [https://perma.cc/ARY6-KTE8].

[32] *See id.*

[33] *See id.*

[34] *See* Citron & Wittes, *supra* note 1, at 406–10; Mary Anne Franks, *How the Internet Unmakes the Law*, 16 OHIO ST. TECH. L. J. 10 (2020); *see also* Olivier Sylvain, *Recovering Tech's Humanity*, 119 COLUM. L. REV. FORUM 252 (2020) (explaining that "common law has not had a meaningful hand in shaping intermediaries' moderation of user-generated content because courts, citing Section 230, have foresworn the law's application).

[35] Franks, *How the Internet Unmakes the Law*, *supra* note 34, at 17–22.

[36] *See id.*

> designed their sites to enhance the visibility of illegal activity while ensuring that the perpetrators could not be identified and caught.[37]

Courts have attributed this broad-sweeping approach to the fact that "First Amendment values [drove] the CDA."[38] For support, courts have pointed to Section 230's "Findings" and "Policy" sections, which highlight the importance of the "vibrant and competitive free market that presently exists" for the internet and the internet's role in facilitating "myriad avenues for intellectual activity" and the "diversity of political discourse."[39] But as one of us (Franks) has underscored, Congress's stated goals also included:

> the development of technologies that "maximize user control over what information is received" by Internet users, as well as the "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of the computer." In other words, the law [was] intended to promote the values of privacy, security and liberty alongside the values of open discourse.[40]

Section 230's liability shield has been extended to activity that has little or nothing to do with free speech, such as the sale of dangerous products. [41] Consider Armslist.com, a self-described "firearms marketplace."[42] Armslist helps match unlicensed gun sellers with buyers who cannot pass background checks, buyers like domestic abuser Radcliffe Haughton.[43] Haughton's estranged wife, Zina, had obtained a restraining order against him that banned him from legally purchasing a firearm,[44] but Haughton used Armslist.com to easily find a gun seller that did not require a background check.[45] On October 21, 2012, he used the gun he purchased on the site to murder Zina and two of her co-

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[37] *See* Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*, *supra* note 31. *See generally* Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 1 (2017).

[38] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

[39] *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1099 (9th Cir. 2009).

[40] *See* Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Feb. 17, 2014), https://www.huffpost.com/entry/section-230-the-lawless-internet_b_4455090 [https://perma.cc/R6SF-X4WQ].

[41] *See, e.g.*, Hinton v. Amazon.com.DEDC, LLC, 72 F. Supp. 3d 685, 687–90 (S.D. Miss. 2014); *see also* Franks, *How the Internet Unmakes the Law*, *supra* note 34, at 14.

[42] *See* ARMSLIST FIREARM MARKETPLACE, https://www.armslist.com/ [https://perma.cc/VX34-GVB4].

[43] *See id.*

[44] *See id.*

[45] *See id.*

workers.[46] The Wisconsin Supreme Court found Armslist to be immune from liability under Section 230(c)(1), despite profiting from the illegal firearm sale that led to multiple murders.[47]

Extending Section 230's immunity shield to platforms like Armslist.com, which deliberately facilitate and earn money from unlawful activity, directly contradicts the stated goals of the CDA. Armslist.com can hardly be said to "provide 'educational and informational resources' or contribute to 'the diversity of political discourse.'"[48] Invoking Section 230 to immunize from liability enterprises that have nothing to do with moderating online speech, such as marketplaces that connect sellers of deadly weapons with prohibited buyers for a cut of the profits, is unjustifiable.

C. Evaluating the Status Quo

The overbroad interpretation of Section 230 means that platforms have scant legal incentive to combat online abuse. Rebecca Tushnet put it well a decade ago: Section 230 ensures that platforms enjoy "power without responsibility."[49]

Market forces alone are unlikely to encourage responsible content moderation. Platforms make their money through online advertising generated by users liking, clicking, and sharing content.[50] Allowing attention-grabbing abuse to remain online often accords with platforms' rational self-interest.[51] Platforms "produce nothing and sell nothing except advertisements and information about users, and conflict among those users may be good for business."[52] On Twitter, for example, ads can be directed at users interested in the words "white supremacist" and "anti-gay."[53] If a company's analytics suggest that people pay more

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[46] *See id.*

[47] *See* Daniel v. Armslist, LLC, 926 N.W.2d 710, *cert. denied*, 140 S. Ct. 562 (2019). The nonprofit organization the Cyber Civil Rights Initiative, of which one of us (Franks) is the President and one of us (Citron) is the Vice President, filed an amicus brief in support of the petitioner's request for writ of certiorari in the Supreme Court. *See* Brief for the Cyber Civil Rights Initiative and Legal Scholars et al. as Amici Curiae Supporting Petitioners, Daniel v. Armslist, LLC, 140 S. Ct. 562 (2019) (No. 19-153).

[48] *See* Brief for the Cyber Civil Rights Initiative and Legal Scholars et al. as Amici Curiae Supporting Petitioners at 16, Daniel v. Armslist, LLC, 140 S. Ct. 562 (2019) (No. 19-153).

[49] Rebecca Tushnet, *Power without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1002 (2008).

[50] *See* Mary Anne Franks, *Justice Beyond Dispute*, 131 HARV. L. REV. 1374, 1386 (2018) (reviewing ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES (2017)).

[51] Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet As It Is (and As It Should Be)*, 118 MICH. L. REV. 1073 (2020).

[52] *See id.*

[53] Kim Lyons, *Twitter allowed ad targeting based on 'neo-Nazi' keyword*, VERGE (Jan. 16, 2020), https://www.theverge.com/2020/1/16/21069142/twitter-neo-nazi-keywords-ad-targeting-bbc

attention to content that makes them sad or angry, then the company will highlight such content.[54] Research shows that people are more attracted to negative and novel information.[55] Thus, keeping up destructive content may make the most sense for a company's bottom line.

As Federal Trade Commissioner Rohit Chopra warned in his powerful dissent from the agency's 2019 settlement with Facebook, the behavioral advertising business model is the "root cause of [social media companies'] widespread and systemic problems."[56] Online behavioral advertising generates profits by "turning users into products, their activity into assets," and their platforms into "weapons of mass manipulation."[57] Tech companies "have few incentives to stop [online abuse], and in some cases are incentivized to ignore or aggravate [it]."[58]

To be sure, the dominant tech companies have moderated certain content by filtering or blocking it.[59] What often motivates these efforts is pressure from the European Commission to remove hate speech and terrorist activity.[60] The same companies have banned certain forms of online abuse, such as nonconsensual pornography[61] and threats, in response to lobbying from users, advocacy groups, and advertisers.[62] They have expended resources to stem abuse when it has threatened their bottom line.[63]

Yet the online advertising business model continues to incentivize revenue-generating content that causes significant harm to the most vulnerable among us. Online abuse generates traffic, clicks, and shares

-policy-violation [https://perma.cc/RQ9G-S5AT].

[54] *See* Dissenting Statement of Federal Trade Commissioner Rohit Chopra, *In re Facebook, Inc.*, Commission File No. 1823109, at 2 (July 24, 2019).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See* Franks, *Justice Beyond Dispute*, *supra* note 50, at 1386.

[59] *See* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1039 (2018); *see also* Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for the Information Age*, 91 B.U. L REV. 1435, 1468–71 (2011).

[60] *See id.* at 1038–39.

[61] *See* Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1252, 1312 (2017).

[62] *Id.* at 1037.

[63] *See* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 229 (discussing how Facebook changed its position on pro-rape pages after fifteen companies threatened to pull their ads); *see also* Franks, *"Revenge Porn" Reform: A View from the Front Lines*, *supra* note 61, at 1312.

because it is salacious and negative.[64] Deepfake pornography sites[65] as well as revenge porn and gossip sites[66] thrive thanks to advertising revenue.

Without question, Section 230 has been valuable to innovation and expression.[67] It has enabled vast and sundry businesses. It has led to the rise of social media companies that many people find valuable, such as Facebook, Twitter, and Reddit.

At the same time, Section 230 has subsidized platforms whose business is online abuse and the platforms who benefit from ignoring abuse. It is a classic "moral hazard," ensuring that tech companies never have to absorb the costs of their behavior.[68] It takes away the leverage that victims might have had to get harmful content taken down.

This laissez-faire approach has been costly to individuals, groups, and society. As more than ten years of research have shown, cyber mobs and individual harassers inflict serious and widespread injury.[69] According to a 2017 Pew Research Center study, one in five U.S. adults have experienced online harassment that includes stalking, threats of violence, or cyber sexual harassment.[70] Women—particularly women of

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[64] *See* Deeptrace Labs, *The State of Deepfakes: Landscape, Threats, and Impact*, DEEPTRACE.COM (Sept. 2019), https://storage.googleapis.com/deeptrace-public/Deeptrace-the-State-of-Deepfakes-2019.pdf [https://perma.cc/J2ML-2G2Y] (noting that eight of the top ten pornography websites host deepfake pornography, and there are nine deepfake pornography websites hosting 13,254 fake porn videos (mostly featuring female celebrities without their consent). These sites generate income from advertising. Indeed, as the first comprehensive study of deepfake video and audio explains, "deepfake pornography represents a growing business opportunity, with all of these websites featuring some form of advertising").

[65] *See id.*

[66] Eugene Volokh, *TheDirty.com not liable for defamatory posts on the site*, WASH. POST, (June 16, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/16/thedirty-com-not-liable-for-defamatory-posts-on-the-site/ [https://perma.cc/5FBB-2B59].

[67] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 171.

[68] *See* Mary Anne Franks, *Moral Hazard on Stilts: 'Zeran's' Legacy*, LAW.COM (Nov. 10, 2017), https://www.law.com/therecorder/sites/therecorder/2017/11/10/moral-hazard-on-stilts-zerans-legacy/ [https://perma.cc/74DL-B7BK].

[69] *See generally* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1. *See* Maeve Duggan, *Online Harassment 2017 Study*, PEW RES. CTR. (July 11, 2017), https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/ [https://perma.cc/7H6B-VAP2] (noting that the 2017 Pew study found that one in four Black individuals say they have been subject to online harassment due to their race; one in ten Hispanic individuals have said the same. For white individuals, the share is far lower: just three percent. Women are twice as likely as men to say they have been targeted online due to their gender (11 percent versus 5 percent)); *see also Data & Society, Online Harassment, Digital Abuse, and Cyberstalking in America*, CTR. FOR INNOVATIVE PUB. HEALTH RES., (Nov. 21, 2016), https://innovativepublichealth.org/wp-content/uploads/2_Online-Harassment-Report_Final.pdf [https://perma.cc/P5M8-CARR] (showing that other studies have made clear that LGBTQ individuals are particularly vulnerable to online harassment, and nonconsensual pornography).

[70] *See* Duggan, *supra* note 69.

color and bisexual women—and other sexual minorities are targeted most frequently.[71]

Victims of online abuse do not feel safe on or offline.[72] They experience anxiety and severe emotional distress. They suffer damage to their reputations and intimate relationships as well as their employment and educational opportunities.[73] Some victims are forced to relocate, change jobs, or even change their names.[74] Because the abuse so often appears in internet searches of their names, victims have difficulty finding employment or keeping their jobs.[75]

Failing to address online abuse does not just inflict economic, physical, and psychological harms on victims—it also jeopardizes their right to free speech. Online abuse silences victims.[76] Targeted individuals often shut down social media profiles and e-mail accounts and withdraw from public discourse.[77] Those with political ambitions are deterred from running for office.[78] Journalists refrain from reporting on controversial topics.[79] Sextortion victims are coerced into silence with threats of violence, insulating perpetrators from accountability.[80]

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[71] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 13–14.

[72] *Id.*

[73] *See* FRANKS, CULT OF THE CONSTITUTION, supra note 21, at 197.

[74] *Id.*

[75] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 13–14.

[76] *See* Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 125–26 (2016); *see also* Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 INTERNET POL'Y REV. 1, 3 (2017). *See generally* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 192–95; Danielle Keats Citron, *Civil Rights In Our Information Age*, *in* THE OFFENSIVE INTERNET (Saul Levmore & Martha C. Nussbaum, eds. 2010); Citron & Richards, *infra* note 133, at 1365 ("[N]ot everyone can freely engage online. This is especially true for women, minorities, and political dissenters who are more often the targets of cyber mobs and individual harassers."); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 385 (2014); Citron, *Cyber Civil Rights*, *supra* note 1, at 67, 104–05; FRANKS, CULT OF THE CONSTITUTION, *supra* note 21, at 197.

[77] *See* Citron, *Cyber Civil Rights*, *supra* note 1.

[78] Katie Hill, for instance, resigned from Congress after her estranged husband disclosed intimate photos of her and another woman without consent. *See generally* Rebecca Green, *Candidate Privacy*, 95 WASH. L. REV. 205 (2020).

[79] *See, e.g.*, Michelle Ferrier, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting*, INT'L WOMEN'S MEDIA FOUND. 7 (2018), https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf [https://perma.cc/3B79-FJF80; *see also Women Journalists and the Double Blind: Choosing silence over being silenced*, ASS'N FOR PROGRESSIVE COMMC'N (2018) https://www.apc.org/sites/default/files/Gendering_Self-Censorship_Women_and_the_Double_Bind.pdf [https://perma.cc/F5V5-538U] (providing statistics on self-censorship by female journalists in Pakistan); INTERNET HEALTH REPORT 2019, MOZILLA FOUND. 64 (2019) https://www.transcript-verlag.de/media/pdf/1a/ce/ac/oa9783839449462.pdf [https://perma.cc/3M2G-GHVF] ("Online abusers threaten and intimidate in an effort to silence the voices of especially women, nonbinary people, and people of color.").

[80] *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1916 (2019).

An overly capacious view of Section 230 has undermined equal opportunity in employment, politics, journalism, education, cultural influence, and free speech.[81] The benefits of Section 230 immunity surely could have been secured at a lesser price.[82]

III. DEBUNKING THE MYTHS ABOUT SECTION 230

After writing about overbroad interpretations of Section 230 for more than a decade, we have eagerly anticipated the moment when federal lawmakers would begin listening to concerns about Section 230. Finally, lawmakers are questioning the received wisdom that any tinkering with Section 230 would lead to a profoundly worse society. Yet we approach this moment with a healthy dose of skepticism. Nothing is gained if Section 230 is changed to indulge bad faith claims, address fictitious concerns, or disincentivize content moderation. We have been down this road before, and it is not pretty.[83] Yes, Section 230 is in need of reform, but it must be the right kind of reform.

Our reservations stem from misconceptions riddling the debate. Those now advocating for repealing or amending Section 230 often dramatically claim that broad platform immunity betrays free speech guarantees by sanctioning the censorship of political views. By contrast, Section 230 absolutists oppose any effort to amend Section 230 on the grounds that broad platform immunity is indispensable to free speech guarantees. Both sides tend to conflate the First Amendment and Section 230, though for very different ends. This conflation reflects and reinforces three major misconceptions. One is the presumption that all internet activity is speech. The second is the treatment of private actors as if they were government actors. The third is the assumption that any regulation of online conduct will inevitably result in less speech. This Part identifies and debunks these prevailing myths.

A. The Internet as a Speech Machine

Both detractors and supporters agree that Section 230 provides online intermediaries broad immunity from liability for third-party content. The real point of contention between the two groups is whether this broad immunity is a good or a bad thing. While critics of Section 230 point to the extensive range of harmful activity that the law's deregulatory stance effectively allows to flourish, Section 230 defenders

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[81] *See generally* FRANKS, THE CULT OF THE CONSTITUTION, *supra* note 21.

[82] Citron & Wittes, *supra* note 1.

[83] FOSTA-SESTA stands as a case in point. One of us (Citron) worked closely with federal lawmakers on the FOSTA-SESTA bills only to be sorely disappointed with the results. *See* Part IV.

argue that the law's laissez-faire nature is vital to ensuring a robust online marketplace of ideas.

Section 230 enthusiast Elizabeth Nolan Brown argues that "Section 230 is the Internet's First Amendment."[84] David Williams, president of the Taxpayers Protection Alliance, similarly contends that, "The internet flourishes when social media platforms allow for discourse and debate without fear of a tidal wave of liability. Ending Section 230 would shutter this marketplace of ideas at tremendous cost."[85] Professor Eric Goldman claims that Section 230 is "even better than the First Amendment."[86]

This view of Section 230 presumes that the internet is primarily, if not exclusively, a medium of speech. The text of Section 230 reinforces this characterization through the use of the terms "publish," "publishers," "speech," and "speakers" in 230(c), as well as the finding that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[87]

But the presumption that the internet is primarily a medium of speech should be interrogated.[88] When Section 230 was passed, it may have made sense to think of the internet as a speech machine. In 1996, the Internet was text-based and predominantly noncommercial.[89] Only 20 million American adults had internet access, and these users spent less than half an hour a month online.

But by 2019, 293 million Americans were using the internet,[90] and they were using it not only to communicate, but also to buy and sell merchandise, find dates, make restaurant reservations, watch television, read books, stream music, and look for jobs.[91] As Nolan Brown describes it:

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[84] *See* Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want to Take it Away.*, REASON (July 29, 2019), https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/ [https://perma.cc/EW8Z-GVF7].

[85] *See* Makena Kelly, *Conservative Groups Push Congress Not to Meddle with Internet Law*, VERGE (July 10, 2019), https://www.theverge.com/2019/7/10/20688778/congress-section-230-conservative-internet-law-content-moderation [https://perma.cc/W5ZA-FH29].

[86] Eric Goldman *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTIONS 33, 33 (2019).

[87] 47 U.S.C § 230(a)(3).

[88] *See* Franks, *How the Internet Unmakes the Law*, *supra* note 34.

[89] KOSSEFF, *supra* note 6, at 59–61; Citron & Richards, *infra* note 133; Sylvain, *supra* note 37, at 19 ("back then think electronic bulletin boards, online chatrooms, and newsgroups.").

[90] *See* J. Clement, *Internet Usage in the United States - Statistics & Facts*, STATISTA (Aug. 20, 2019*),* https://www.statista.com/topics/2237/internet-usage-in-the-united-states/ [https://perma.cc/U8U7-BEVR].

[91] *See* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 191–92; J. Clement, *Most Popular Online Activities of Adult Internet Users in the United States as of November 2017*, STATISTA

> the entire suite of products we think of as the internet—search engines, social media, online publications with comments sections, Wikis, private message boards, matchmaking apps, job search sites, consumer review tools, digital marketplaces, Airbnb, cloud storage companies, podcast distributors, app stores, GIF clearinghouses, crowdsourced funding platforms, chat tools, email newsletters, online classifieds, video sharing venues, and the vast majority of what makes up our day-to-day digital experience—have benefited from the protections offered by Section 230.[92]

Many of these "products" have very little to do with speech and, indeed, many of their offline cognates would not be considered speech for First Amendment purposes.

This is not the same thing as saying that the First Amendment does not protect all speech, although this is also true. The point here is that much human activity does not implicate the First Amendment at all. As Frederick Schauer observes, "Like any other rule, the First Amendment does not regulate the full range of human behavior."[93]

> The acts, behaviors, and restrictions not encompassed by the First Amendment at all—the events that remain wholly untouched by the First Amendment--are the ones that are simply not covered by the First Amendment. It is not that the speech is not protected. Rather, the entire event—an event that often involves "speech" in the ordinary language sense of the word—does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever. The First Amendment just does not show up.[94]

Section 230 absolutists are not wrong to emphasize the vast array of activities now conducted online; they are wrong to presume that the First Amendment shows up for all of them.

First Amendment doctrine draws a line, contested though it might be, not only between protected and unprotected speech but between speech and conduct. As one of us (Citron) has written, "[a]dvances in law and technology . . . complicate this distinction as they make more

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(Nov. 7, 2018), https://www.statista.com/statistics/183910/internet-activities-of-us-users/ [https://perma.cc/QA5D-6KBB].

[92] Nolan Brown, *supra* note 84.

[93] *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617–18 (2015).

[94] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

actions achievable through 'mere' words."[95] Because so much online activity involves elements that are not unambiguously speech-related, whether such activities are in fact speech should be a subject of express inquiry. The Court has made clear that conduct is not automatically protected simply because it involves language in some way: "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[96]

And even when dealing with actions sufficiently expressive to be considered speech for First Amendment purposes,[97] "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."[98] When considering such conduct as wearing of black armbands,[99] setting fire to the American flag,[100] making financial contributions to political campaigns,[101] or burning draft cards,[102] the Court asks whether such acts are *speech* at all before turning to the question of how much, if at all, they are protected by the First Amendment.

But the conflation of Section 230 and the First Amendment short-circuits this inquiry. Intermediaries invoking Section 230's protections implicitly characterize the acts or omissions at issue as speech, and courts frequently allow them to do so without challenge. When "courts routinely interpret Section 230 to immunize all claims based on third-party content"—including civil rights violations; "negligence; deceptive trade practices, unfair competition, and false advertising; the common law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines"[103]—they go far beyond existing First Amendment doctrine, and grant online intermediaries an unearned advantage over offline intermediaries.[104]

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[95] *See* Citron, *Cyber Civil Rights*, *supra* note 1.

[96] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

[97] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (wearing of black armbands conveyed message regarding a matter of public concern).

[98] *See* Texas v. Johnson, 491 U.S. 397, 406 (1989); United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

[99] *Tinker*, 393 U.S. 503.

[100] *Johnson*, 491 U.S. 397.

[101] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[102] *O'Brien*, 391 U.S. 467.

[103] *See* Goldman, *supra* note 86, at 6.

[104] *See* Sylvain, *Intermediary Design Duties*, *supra* note 37, at 28; *see also* Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*, *supra* note 31 (arguing that claims about platforms' user interfaces or designs do not involve speech but rather actions such as inducing breaches of trust or illegal discrimination).

In addition to short-circuiting the analysis of whether particular online activities qualify as speech at all, an overly indulgent view of Section 230 short-circuits the analysis of whether and how much certain speech should be protected. The Court has repeatedly observed that not all speech receives full protection under the First Amendment.[105] Speech on "matters of public concern" is "'at the heart of the First Amendment's protection,'" whereas "speech on matters of purely private concern is of less First Amendment concern."[106] Some categories of speech, including obscenity, fighting words, and incitement, are historical exceptions to the First Amendment's protections.[107]

Treating all online speech as presumptively protected not only ignores the nuances of First Amendment jurisprudence, but also elides the varying reasons why certain speech is viewed as distinctly important in our system of free expression.[108] Some speech matters for self-expression, but not all speech does.[109] Some speech is important for the search for truth or for self-governance, but not all speech serves those values. Also, as Kenneth Abraham and Edward White argue, the "all speech is free speech" view devalues the special cultural and social salience of speech about matters of public concern.[110] It disregards the fact that speech about private individuals about purely private matters may not remotely implicate free speech values at all.

The view that presumes all online activity is normatively significant free expression protected by the First Amendment reflects what Leslie Kendrick describes as "First Amendment expansionism"—"where the First Amendment's territory pushes outward to encompass ever more areas of law."[111] As Kendrick observes, the temptations of First Amendment expansionism are heightened "in an information economy where many activities and products involve communication."[112] The debate over Section 230 bears this out.

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[105] *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010) (noting the existence of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[106] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)).

[107] U.S. v Stevens, 559 U.S. 460, 468 (2010), *superseded by statute*, 48 U.S.C. § 48 (2012).

[108] *Id.*

[109] *Id.*

[110] *See* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, TEX. L. REV. (forthcoming).

[111] *See* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (explaining that freedom of speech is a "term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance").

[112] *Id.*

The indulgent approach to Section 230 veers far away not only from the public discourse values at the core of the First Amendment, but also from the original intentions of Section 230's sponsors. Christopher Cox, a former Republican Congressman who co-sponsored Section 230, has been openly critical of "how many Section 230 rulings have cited other rulings instead of the actual statute, stretching the law," asserting that "websites that are 'involved in soliciting' unlawful materials or 'connected to unlawful activity should not be immune under Section 230.'"[113] The Democratic co-sponsor of Section 230, now-Senator Ron Wyden, has similarly emphasized that he "wanted to guarantee that bad actors would still be subject to federal law. Whether the criminals were operating on a street corner or online wasn't going to make a difference."[114]

There is no justification for treating the internet as a magical speech conversion machine: if the conduct would not be speech protected by the First Amendment if it occurs offline, it should not be transformed into speech merely because it occurs online. Even content that unquestionably qualifies as speech should not be presumed to be doctrinally or normatively protected. Intermediaries seeking to take advantage of Section 230's protections—given that those protections were intended to foster free speech values—should have to demonstrate, rather than merely tacitly assert, that the content at issue is in fact speech, and further that it is speech protected by the First Amendment.

B. Neutrality and the State Action Doctrine

The conflation of the First Amendment and Section 230, and internet activity with speech, contributes to another common misconception about the law, which is that it requires tech companies to act as "neutral public forums" in order to receive the benefit of immunity. Stated slightly differently, the claim here is that tech companies receive Section 230's legal shield only if they refrain—as the First Amendment generally requires the government to refrain—from viewpoint discrimination. On this view, a platform's removal, blocking, or muting of user-generated content based on viewpoint amounts to impermissible censorship under the First Amendment that should deprive the platform of its statutory protection against liability.[115]

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[113] *See* Selyukh, *supra* note 5.

[114] *See* Ron Wyden, *Floor Remarks: CDA 230 and SESTA*, MEDIUM (Mar. 21, 2018), https://medium.com/@RonWyden/floor-remarks-cda-230-and-sesta-32355d669a6e [https://perma.cc/6SY9-WCD9].

[115] *See* Catherine Padhi, *Ted Cruz vs. Section 230: Misrepresenting the Communications Decency Act*, LAWFARE (Apr. 20, 2018), https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act [https://perma.cc/CP39-2VGA].

This misconception is twofold. First, there is nothing in the legislative history or text of Section 230 that supports such an interpretation.[116] Not only does Section 230 not require platforms to act neutrally vis-à-vis political viewpoints as state actors should, it urges exactly the opposite. Under Section 230(b)(4), one of the statute's policy goals includes "remov[ing] disincentives for the development and utilization of blocking and filtering technologies."[117]

Second, the "neutral platform" myth completely ignores the state action doctrine, which provides that obligations created by the First Amendment fall only upon government actors, not private actors. Attempting to extend First Amendment obligations to private actors is not only constitutionally incoherent but endangers the First Amendment rights of private actors against compelled speech.[118]

High-profile examples of the "neutral platform" argument include Senator Ted Cruz, who has argued that "big tech enjoys an immunity from liability on the assumption they would be neutral and fair. If they're not going to be neutral and fair, if they're going to be biased, we should repeal the immunity from liability so they should be liable like the rest of us."[119] Representative Greg Gianforte denounced Facebook's refusal to run a gun manufacturer's ads as blatant "censorship of conservative views."[120] Along these lines, Representative Louie Gohmert contended that, "Instead of acting like the neutral platforms they claim to be in order obtain their immunity," social media companies "act like a biased medium and publish their own agendas to the detriment of others."[121]

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[116] *See* David Ingram & Jane C. Timm, *Why Republicans (and Even a Couple of Democrats) Want to Throw Out Tech's Favorite Law*, NBC NEWS (Sept. 2, 2019), https://www.nbcnews.com/politics/congress/why-republicans-even-couple-democrats-want-throw-out-tech-s-n1043346 [https://perma.cc/5UFA-FATJ] (highlighting that Rep. Cox recently underscored the fact that, "nowhere, nowhere, nowhere does the law say anything about [neutrality]").

[117] 47 U.S.C. § 230(b)(4).

[118] *See generally* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[119] *See* Cale G. Weisman, *Ted Cruz made it clear he supports repealing tech platforms' safe harbor*, FAST CO. (Oct. 17, 2018), https://www.fastcompany.com/90252598/ted-cruz-made-it-clear-he-supports-repealing-tech-platforms-safe-harbor [https://perma.cc/X3AU-MAMC]; *see also* Mike Masnick, *Senator Mark Warner Repeats Senator Ted Cruz's Mythical, Made Up, Incorrect Claims About Section 230*, TECHDIRT (Oct. 3, 2019), https://www.techdirt.com/articles/20190929/0017143090/senator-mark-warner-repeats-senator-ted-cruzs-mythical-made-up-incorrect-claims-about-section-230.shtml [https://perma.cc/5X2X-CVVT] (explaining that Democratic Senators have also reinforced this myth. For instance, Senator Mark Warner claimed that "there was a decision made that social media companies, and their connections, were going to be viewed as kind of just dumb pipes, not unlike a telco").

[120] *See Internet and Consumer Protection*, C-SPAN (Oct. 16, 2019), https://www.c-span.org/video/?465331-1/google-reddit-officials-testify-internet-consumer-protection [https://perma.cc/8YME-TN4G].

[121] *See* Louie Gohmert, *Gohmert Introduces Bill That Removes Liability Protections for Social Media Companies That Use Algorithms to Hide, Promote, or Filter User Content*, U.S.

It is not just politicians who have fallen under the spell of the viewpoint neutrality myth. The Daily Wire's former Editor-at-Large, Josh Hammer, tweeted: "It is not government overreach to demand that Silicon Valley tech giants disclose their censorship algorithms in exchange for continuing to receive CDA Sec. 230 immunity."[122]

Several legislative and executive proposals endeavor to reset Section 230 to incentivize platforms to act as quasi-governmental actors with a commitment to supposed viewpoint neutrality. One example is Senator Josh Hawley's bill, "Ending Support for Internet Censorship Act."[123] Under the Hawley proposal, Section 230's legal shield would be conditioned on companies of a certain size obtaining FTC certification of their "political neutrality." Under Representative Gohmert's proposal, Section 230 immunity would be conditioned on a platform's posting of user-generated content in chronological order. Making judgments about—in other words, moderating—content's prominence and visibility would mean the loss of the legal shield.[124] President Trump's May 28, 2020 "Executive Order on Preventing Online Censorship," issued after Twitter took the unprecedented step of fact-checking two Trump tweets containing false information about mail-in ballots and marking them as factually unsupported, sounded a similar theme, declaring that Section 230 "immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints."[125]

It is important to note, first, that there is no empirical basis for the claim that conservative viewpoints are being suppressed on social media. In fact, there is weighty evidence indicating that rightwing content dominates social media. Facebook, responding to concerns about anti-conservative bias, hired former Senator John Kyl and lawyers at Covington & Burling to conduct an independent audit of potential anti-conservative bias.[126] The Covington Interim Report did not conclude that

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CONGRESSMAN LOUIE GOHMERT (Dec. 20, 2018), https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676 [https://perma.cc/GR8B-E3GP].

[122] *@josh_hammer,* TWITTER (June 6, 2019, 1:12 PM), https://twitter.com/josh_hammer/status/1136697398481379331 [https://perma.cc/JN9C-8CFB].

[123] *See* Nolan Brown, *supra* note 84 (explaining that Senator Hawley claimed in a tweet that Section 230's legal shield was predicated on platforms serving as "for[a] for a true diversity of political discourse").

[124] *See* Gohmert, *supra* note 121.

[125] Exec. Order. No. 13925, 85 F.R. 34079 (2020).

[126] *See* Senator Jon Kyl, *Covington Interim Report*, COVINGTON INTERIM REPORT (Accessed Mar. 20, 2020), https://fbnewsroomus.files.wordpress.com/2019/08/covington-interim-report-1.pdf /https://perma.cc/8VWD-7YK5].

Facebook had anti-conservative bias.[127] As Siva Vaidhyanathan observes, there is no evidence supporting accusations that social media companies are disproportionately silencing conservative speech: the complaints are "simply false."[128] Many studies have found that conservative political campaigns have in fact leveraged social media to much greater advantage than their adversaries.[129]

But even if the claims of anti-conservative bias on platforms did have some basis in reality, the "neutral platform" interpretation of Section 230 takes two forms that actually serve to undermine, not promote, First Amendment values. The first involves the conflation of private companies with state actors, while the second characterizes social media platforms as public forums. Tech companies are not governmental or quasi-governmental entities, and social media companies and most online service providers are not publicly owned or operated.[130] Both of these forms of misidentification ignore private actors' own First Amendment rights to decide what content they wish to endorse or promote.

Neither Section 230 nor any judicial doctrine equates "interactive computer services" with state guarantors of First Amendment protections. As private actors, social media companies are no more required to uphold the First Amendment rights of their users than would be bookstores or restaurants to their patrons.[131] As Eugene Kontorovich testified before the Senate Judiciary Committee's hearing on "Stifling Free Speech: Technological Censorship and the Public Discourse":

> If tech platforms "engage in politically biased content-sorting . . . it is not a First Amendment issue. The First Amendment only applies to censorship by the government. . . . The conduct of private actors is entirely outside the scope of the First Amendment. If anything, ideological content restrictions are editorial decisions that would be protected by the First Amendment. Nor

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[127] *See id.* (noting that the audit found Facebook's advertising policies prohibiting shocking and sensational content resulted in the rejection of pro-life ads focused on survival stories of infants born before full-term. Facebook adjusted its enforcement of this policy to focus on prohibiting ads only when the ad shows someone in visible pain or distress or where blood and bruising is visible).

[128] *See* Siva Vaidhyanathan, *Why Conservatives Allege Big Tech is Muzzling Them*, ATLANTIC (July 28, 2019), https://www.theatlantic.com/ideas/archive/2019/07/conservatives-pretend-big-tech-biased-against-them/594916/ [https://perma.cc/4N5L-QNKE].

[129] *See, e.g.*, Mark Scott, *Despite Cries of Censorship, Conservatives Dominate Social Media*, POLITICO (Oct. 26, 2020), https://www.politico.com/news/2020/10/26/censorship-conservatives-social-media-432643 [https://perma.cc/US83-PEVB].

[130] *See* Citron & Richards, *infra* note 133, at 1361 (exploring how entities comprising our digital infrastructure, including search engines, browsers, hosts, transit providers, security providers, internet service providers, and content platforms, are privately-owned with certain exceptions like the Internet Corporation for Assigned Names and Numbers).

[131] *See Manhattan Cmty. Access Corp.*, 139 S. Ct. 1921 (finding privately-owned cable television channel not a state actor).

> can one say that the alleged actions of large tech companies implicate 'First Amendment values,' or inhibits the marketplace of ideas in ways analogous to those the First Amendment seeks to protect against."[132]

The alternative argument attempts to treat social media platforms as traditional public forums like parks, streets, or sidewalks. The public forum has a distinct purpose and significance in our constitutional order. The public forum is owned by the public and operated for the benefit of all.[133] The public's access to public parks, streets, and sidewalks is a matter of constitutional right.[134] The public forum doctrine is premised on the notion that parks, streets, and sidewalks have been open for speech "immemorially . . . time out of mind."[135] For that reason, denying access to public parks, streets, and sidewalks on the basis of the content or viewpoint of speech is presumptively unconstitutional.[136] But wholly privately-owned social media platforms have never been designated as "neutral public forums."[137]

As one of us (Franks) has written, the attempt to turn social media controversies into debates over the First Amendment is an yet another example of what Frederick Schauer describes as "the First Amendment's cultural magnetism."[138] It suggests that "because private companies like Facebook, Twitter, and Google have become 'state like' in many ways, even exerting more influence in some ways than the government, they *should* be understood as having First Amendment obligations, even if the First Amendment's actual text or existing doctrine would not support it."[139] Under this view, the First Amendment should be expanded beyond its current borders.

But the erosion of the state action doctrine would actually undermine First Amendment rights, by depriving private actors of "a robust sphere of individual liberty," as Justice Kavanaugh recently expressed

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[132] *See Hearing on Stifling Free Speech: Technological Censorship and the Public Discourse Before S. Comm. On the Judiciary*, 116th Congress (2019) (statement of Eugene Kontorovich, Prof. Geo. Mason Law Sch.) (available at https://www.judiciary.senate.gov/imo/media/doc/Kontorovich%20Testimony.pdf [https://perma.cc/BJ8S-8SHV]).

[133] *See* Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 95 WASH. U. L. REV. 1353, 1360 (2018).

[134] *Id.*

[135] *See* Hague v. C.I.O., 307 U.S. 496, 515 (1939).

[136] *Cf.* Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895), *aff'd*, Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

[137] *See* Padhi, *supra* note 115.

[138] *See* Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?,* KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment [https://perma.cc/8MGE-M8G3].

[139] *See id.*; Citron & Richards, *supra* note 133, at 1371.

it in *Manhattan Cmty. Access Corp. v. Halleck.*[140] An essential part of the right to free speech is the right to choose what to say, when to say it, and to whom. Indeed, the right *not* to speak is a fundamental aspect of the First Amendment's protections. As the Court famously held in *West Virginia v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[141]

If platforms are treated as governmental actors or their services deemed public fora, then they could not act as "Good Samaritans" to block online abuse. This result would directly contravene the will of Section 230's drafters.[142] For instance, social media companies could not combat spam, doxing, nonconsensual pornography, or deepfakes.[143] They could not prohibit activity that chases people offline. In our view, it is desirable for platforms to address online abuse that imperils people's ability to enjoy life's crucial opportunities, including the ability to engage with others online.

At the same time, the power that social media companies and other platforms have over digital expression should not proceed unchecked, as it does now in some respects. Currently, Section 230(c)(1)—the provision related to under-filtering content—shields companies from liability without any limit or condition, unlike Section 230(c)(2) which conditions the immunity for under-filtering on a showing of "good faith."[144] In Part IV, we offer legislative reforms that would check that power afforded platforms. The legal shield should be cabined to interactive computer services that wield their content-moderation powers responsibly, as the drafters of Section 230 wanted.[145]

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[140] *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1928.

[141] *See Barnette*, 319 U.S. at 641.

[142] Citron & Richards, *supra* note 133, at 1371.

[143] In connection with our work with CCRI, we have helped tech companies do precisely that. *See generally* Citron, *Sexual Privacy*, *supra* note 80; Franks*, "Revenge Porn" Reform: A View from the Front Lines*, *supra* note 61.

[144] 47 U.S.C. § 230(c)(2).

[145] *See* Citron & Richards, *supra* note 133, at 1374 (explaining that, of course, not all companies involved in providing our online experiences are alike in their power and privilege. "As a company's power over digital expression grows closer to total (meaning there are few to no alternatives to express oneself online), the greater the responsibilities (via regulation) attendant to that power." Companies running the physical infrastructure of the internet, such as internet service and broadband providers, have power over digital expression tantamount to governmental power. In locations where people only have one broadband provider in their area, being banned from that provider would mean no broadband internet access at all. The (now-abandoned) net neutrality rules were animated by precisely those concerns); *see also* Genevieve Lakier, *The Problem Isn't Analogies but the Analogies that Courts Use,* KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), https://knightcolumbia.org/content/problem-isnt-use-analogies-analogies-courts-use [https://perma.cc/6H7Z-XPNN]; FRANK PASQUALE, THE BLACK BOX SOCIETY (2014) (arguing that the power of search engines may warrant far more regulation than currently exists. Although social media companies

We would lose much and gain little if Section 230 were replaced with the Hawley or Gohmert proposals, or if Trump's Executive Order were given practical effect.[146] Section 230 already has a mechanism to address the unwarranted silencing of viewpoints.[147] Under Section 230(c)(2), users or providers of interactive computer services enjoy immunity from liability for over-filtering or over-blocking speech only if they acted in "good faith." Under current law, platforms could face liability for removing or blocking content without "good faith" justification, if a theory of relief exists on which they can be sued.[148]

C. The Myth that Any Change to Section 230 Would Destroy Free Speech

Another myth is that any Section 230 reform would jeopardize free speech in a larger sense, even if not strictly in the sense of violating the First Amendment. Of course, free speech is a cultural as well as a constitutional matter. It is shaped by non-legal as well as legal norms, and tech companies play an outsized role in establishing those norms. We agree that there is good reason to be concerned about the influence of tech companies and other powerful private actors over the ability of individuals to express themselves. This is an observation we have been making for years—that some of the most serious threats to free speech come not from the government, but from non-state actors.[149] Marginalized groups in particular, including women and racial minorities, have long battled with private censorial forces as well as governmental ones. But the unregulated internet—or rather, the selectively regulated internet—is exacerbating, not ameliorating, this problem. The current state of Section 230 may ensure free speech for the privileged few; protecting free speech for all requires reform.

The concept of "cyber civil rights"[150] speaks precisely to the reality that the internet has rolled back many gains made for racial and gender

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are powerful, they do not have the kind of control over our online experiences as broadband providers or even search engines do. Users banned on Facebook could recreate a social network elsewhere, though it would be time consuming and likely incomplete); Citron & Richards, *supra* note 133, at 1374 (highlighting that dissatisfaction with Facebook has inspired people's migration to upstart social network services like MeWe by exploring different non-constitutional ways that law can protect digital expression).

[146] *See* Mary Anne Franks, The Utter Incoherence of Trump's Battle with Twitter, THE ATLANTIC (May 30, 2020), https://www.theatlantic.com/ideas/archive/2020/05/the-utter-incoherence-of-trumps-battle-with-twitter/612367/ [https://perma.cc/5UNZ-4WPR].

[147] One of us (Franks) is skeptical of the argument that there is any legal theory that entitles people, especially government officials, to demand access or amplification to a private platform.

[148] At the symposium, Brian Leiter provided helpful comments on this point.

[149] *See, e.g.*, MARY ANNE FRANKS, BEYOND 'FREE SPEECH FOR THE WHITE MAN': FEMINISM AND THE FIRST AMENDMENT RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (2019); CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1; Citron, *Cyber Civil Rights*, *supra* note 1.

[150] *See* Citron, *Cyber Civil Rights*, *supra* note 1, at 66; Danielle Keats Citron and Mary Anne

equality. The anonymity, amplification, and aggregation possibilities offered by the internet have allowed private actors to discriminate, harass, and threaten vulnerable groups on a massive scale.[151] There is empirical evidence showing that the internet has been used to further chill the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.[152]

Even as the internet has multiplied the possibilities of expression, it has multiplied the possibilities of repression.[153] The new forms of communication offered by the internet have been used to unleash a regressive and censorious backlash against women, racial minorities, and sexual minorities. The internet lowers the costs of engaging in abuse by providing abusers with anonymity and social validation, while providing new ways to increase the range and impact of that abuse. The online abuse of women in particular amplifies sexist stereotyping and discrimination, compromising gender equality online and off.[154]

The reality of unequal free speech rights demonstrates how regulation can, when done carefully and well, enhance and diversify speech rather than chill it. According to a 2017 study, regulating online abuse "may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women."[155] The study's author suggests that when women "feel less likely to be attacked or harassed," they become more "willing to share, speak, and engage online." Knowing that there are laws criminalizing online harassment and stalking "may actually lead to more speech, expression, and sharing online among adult women online, not less." As expressed in the title of a recent article by one of us (Citron) and Jonathon Penney, sometimes "law frees us to speak."[156]

Franks, *Cyber Civil Rights in the Time of COVID-19*, HARV. L. REV. BLOG (May 14, 2020), https://blog.harvardlawreview.org/cyber-civil-rights-in-the-time-of-covid-19/ [https://perma.cc/766J-JYBR].

[151] *See* CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 57–72; Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 227 (2011); Citron, *Cyber Civil Rights*, *supra* note 1, at 66–67, 69–72.

[152] *See* Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, *supra* note 76.

[153] FRANKS, THE CULT OF THE CONSTITUTION, *supra* note 21.

[154] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 17.

[155] *See* Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, *supra* note 76.

[156] *See* Jonathon W. Penney & Danielle Keats Citron, *When Law Frees us to Speak*, 87 FORDHAM L. REV. 2318, 2319 (2018).

IV. MOVING BEYOND THE MYTHS: A MENU OF POTENTIAL SOLUTIONS

Having addressed misconceptions about the relationship between Section 230 and the First Amendment, state and private actors, and regulation and free speech outcomes, we turn to reform proposals that address the problems that actually exist and are legitimately concerning. This Part explores different possibilities for fixing the overbroad interpretation of Section 230.

A. Against Carveouts

Some reformers urge Congress to maintain Section 230's immunity but to create an explicit exception from its legal shield for certain types of behavior. A recent example of that approach is the Stop Enabling Sex Traffickers Act (SESTA),[157] which passed by an overwhelming vote in 2016. The bill amended Section 230 by rendering websites liable for knowingly hosting sex trafficking content.[158]

That law, however, is flawed. By effectively pinning the legal shield on a platform's lack of knowledge of sex trafficking, the law arguably reprises the dilemma that led Congress to pass Section 230 in the first place. To avoid liability, some platforms have resorted to either filtering everything related to sex or sitting on their hands so they cannot be said to have knowingly facilitated sex trafficking.[159] That is the opposite of what the drafters of Section 230 claimed to want—responsible content moderation practices.

While we sympathize with the impulse to address particularly egregious harms, the best way to reform Section 230 is not through a piecemeal approach. The carveout approach is inevitably underinclusive, establishing a normative hierarchy of harms that leaves other harmful conduct to be addressed another day. Such an approach would require Section 230's exceptions to be regularly updated, an impractical option given the slow pace of congressional efforts and partisan deadlock.[160]

B. A Modest Proposal—Speech, Not Content

In light of the observations made in Part II.A., one simple reform of Section 230 would be to make explicitly clear that the statute's protections only apply to speech. The statutory fix is simple: replace the

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[157] Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (2017).

[158] *See id.*

[159] *See* Citron & Jurecic, *supra* note 12.

[160] *See* Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*, *supra* note 31.

word "information" in (c)(1) with the word "speech." Thus, that section of the statute would read:

> (1) Treatment of publisher or speaker: No provider or user of an interactive computer service shall be treated as the publisher or speaker of any *speech* provided by another information content provider.

This revision would put all parties in a Section 230 case on notice that the classification of content as speech is not a given, but a fact to be demonstrated. If a platform cannot make a showing that the content or information at issue is speech, then it should not be able to take advantage of Section 230 immunity.

C. Excluding Bad Samaritans

Another effective and modest adjustment would involve amending Section 230 to exclude bad actors from its legal shield. There are a few ways to do this. One possibility would be to deny the immunity to online service providers that "deliberately leave up unambiguously unlawful content that clearly creates a serious harm to others."[161] Another would be to exclude from the immunity "the very worst actors:" sites encouraging illegality *or* that principally host illegality.[162] Yet another approach would be to exclude intermediaries who exhibit deliberate indifference to unlawful content or conduct.

A variant on this theme would deny the legal shield to cases involving platforms that have solicited or induced unlawful content. This approach takes a page from intermediary liability rules in trademark and copyright law. As Stacey Dogan observed in that context, inducement doctrines allow courts to target bad actors whose business models center on infringement.[163] Providers that solicit or induce unlawful content should not enjoy immunity from liability. This approach targets the harmful activity while providing breathing space for protected expression.[164]

A version of this approach is embraced in the SHIELD Act of 2019,[165] which one of us (Franks) assisted in drafting and the other (Citron) supported in advising lawmakers on behalf of the Cyber Civil

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[161] E-mail from Geoffrey Stone, Professor of Law, Univ. of Chi. Law Sch., to author (Apr. 8, 2018) (on file with author).

[162] CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 1, at 177–78 (showing that one of us (Citron) supported this approach as an important interim step to broader reform).

[163] *See* Stacey Dogan, *Principled Standards vs. Boundless Discretion: A Tale of Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J.L. & ARTS 503, 507–08 (2014).

[164] *See id.* at 508–09.

[165] H.R. 2896, 116th Cong. (1st Sess. 2019).

Rights Initiative. Because SHIELD is a federal criminal bill, Section 230 could not be invoked to defend violations of it. However, the proposed bill creates a separate liability standard for providers of communications services that effectively grants them Section 230 immunity so long as the provider does not intentionally solicit, or knowingly and predominantly distribute, content that the provider actually knows is in violation of the statute.[166]

D. Conditioning the Legal Shield on Reasonable Content Moderation

There is a broader legislative fix that Benjamin Wittes and one of us (Citron) have proposed. Under that proposal, platforms would enjoy immunity from liability *if* they could show that their content-moderation practices writ large are reasonable. The revision to Section 230(c)(1) would read as follows:

> No provider or user of an interactive computer service that *takes reasonable steps to address unlawful uses of its service that clearly create serious harm to others* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider*.

If adopted, the question before the courts in a motion to dismiss on Section 230 grounds would be whether a defendant employed reasonable content moderation practices in the face of unlawful activity that manifestly causes harm to individuals. The question would *not* be whether a platform acted reasonably with regard to a specific use of the service. Instead, the court would ask whether the provider or user of a service engaged in reasonable content moderation practices writ large with regard to unlawful uses that create serious harm to others.[167]

Congressman Devin Nunes has argued that reasonableness is a vague and unworkable policy,[168] while Eric Goldman considers the

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[166] *See* SHIELD Act of 2019, H.R. 2896, 116th Cong. § 2(a) (2019); *see also* Franks, *Revenge Porn Reform: A View from the Front Lines*, *supra* note 61 (explaining the exception).

[167] Tech companies have signaled their support as well. For instance, IBM issued a statement saying that Congress should adopt the proposal and wrote a tweet to that effect as well. *See* Ryan Hagemann, *A Precision Approach to Stopping Illegal Online Activities,* IBM THINKPOLICY LAB (July 10, 2019), https://www.ibm.com/blogs/policy/cda-230/ [https://perma.cc/YXN7-3B5V]; *see also* @RyanLeeHagemann, TWITTER (July 10, 2019), https://twitter.com/RyanLeeHagemann/status/1149035886945939457?s=20 [https://perma.cc/QE2G-U4LY] ("A special shoutout to @daniellecitron and @benjaminwittes, who helped to clarify what a moderate, compromise-oriented approach to the #Section230 debate looks like.").

[168] *See User Clip: Danielle Citron Explains Content Moderation*, C-SPAN (June 14, 2019), https://www.c-span.org/video/?c4802966/user-clip-danielle-citron-explains-content-moderation [https://perma.cc/B48G-4FYJ] (portraying Congressman Devin Nunes questioning Danielle Keats Citron at a House Intelligence Committee hearing about deepfakes in June 2018); *see also*

proposal a "radical change that would destroy Section 230." In Goldman's estimation, "such amorphous eligibility standards" makes "Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of defendant's behavior."[169]

Yes, a reasonableness standard would require evidence of a site's content moderation practices. But impossibly vague or amorphous it is not. Courts have assessed the reasonableness of practices in varied fields, from tort law to the Fourth Amendment's ban on unreasonable searches and seizures.[170] In a wide variety of contexts, the judiciary has invested the concept of reasonableness with meaning.[171] As John Goldberg and Benjamin Zipursky have argued, tort law sets norms of behavior in recognizing wrongful, injury-inflicting conduct, and it empowers victims to seek redress.[172]

Courts are well suited to address the reasonableness of a platform's speech policies and practices vis-à-vis particular forms of illegality that cause clear harm to others (at the heart of a litigant's claims). The reasonableness inquiry would begin with the alleged wrongdoing and liability. To state the obvious, platforms are not strictly liable for all content posted on their sites. Plaintiffs need a cognizable theory of relief to assert against content platforms. Section 230's legal shield would turn on whether the defendant employed reasonable content moderation practices to deal with the specific kind of harmful illegality alleged in the suit.

There is no one-size-fits-all approach to reasonable content moderation. Reasonableness would be tailored to the harmful conduct alleged in the case. A reasonable approach to sexual-privacy invasions would be different from a reasonable approach to spam or fraud. The question would then be whether the online platform—given its size, user base, and volume—adopted reasonable content moderation practices vis-à-vis the specific illegality in the case. Did the platform have clear rules and

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Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 PENN. L. REV. 2131, 2135 (2015) ("For a term or a phrase to fall short of clarity because of vagueness is quite different from having no meaning at all, and both are different from having multiple meanings—being ambiguous.").

[169] *See* Goldman, *supra* note 86, at 45.

[170] *See* Zipursky, *supra* note 168, at 2135 (noting that reasonableness is the hallmark of negligence claims by stating that "[t]he range of uses of 'reasonableness' in law is so great that a list is not an efficient way to describe and demarcate it").

[171] This is not to suggest that all uses of the concept of reasonableness are sound or advisable. There is a considerable literature criticizing various features of reasonableness inquiries. In this piece, we endeavor to tackle the most salient critiques of reasonableness in the context of content moderation practices.

[172] JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 29 (2020). Goldberg and Zipursky contend that tort law is not about setting prices for certain activity or allocating costs to cheapest cost avoider. *Id.* at 46–47.

a process to deal with complaints about illegal activity? What did that process entail? The assessment of reasonable content-moderation practices would take into account differences among content platforms. A blog with a few postings a day and a handful of commenters is in a different position than a social network with millions of postings a day. The social network could not plausibly respond to complaints of abuse immediately, let alone within a day or two, whereas the blog could. On the other hand, the social network and the blog could deploy technologies to detect and filter content that they previously determined was unlawful.[173]

Suppose a porn site is sued for public disclosure of private facts and negligent enablement of a crime. The defendant's site, which hosts hundreds of thousands of videos, encourages users to post porn videos. The defendant's terms of service (TOS) ban nonconsensual pornography and doxing (the posting of someone's contact information). In the complaint, the plaintiff alleges that her nude photo and home address were posted on the defendant's site without her consent. Following this disclosure, strangers came to the plaintiff's house at night demanding sex. One of those strangers broke into her house. Although the plaintiff immediately reported the post as a TOS violation, defendant did nothing for three weeks.

Defendant moves to dismiss the complaint on Section 230 grounds. It submits evidence showing that it has a clear policy against nonconsensual pornography and a process to report abuse. Defendant acknowledges that its moderators did not act quickly enough in plaintiff's case, but maintains that generally speaking its practices satisfy the reasonableness inquiry. However, defendant offers no evidence showing its engagement in any content moderation at all.

Is there sufficient evidence that the defendant engaged in reasonable content moderation practices so that the court can dismiss the case against it? Likely no. Yes, the defendant has clearly stated standards notifying users that it bans nonconsensual pornography. And yet the site has provided no proof that it has a systematic process to consider complaints about such illegality.[174] In assessing reasonableness, it would matter to the court that the site has thousands of videos to moderate. The volume of the content is relevant to the likelihood of potential harm and the requirements to address such harm. The absence of a

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[173] *See id.* (discussing Facebook's hashing initiative to address nonconsensual distribution of intimate images).

[174] Nonconsensual pornography here would likely amount to tortious activity—the public disclosure of private fact. Also, nonconsensual pornography is now a crime in 46 states, D.C., and Guam. *See 46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIV. RTS. INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws/ [https://perma.cc/KH69-YV7T].

systematic process to respond to complaints of nonconsensual pornography shows the absence of reasonableness in the site's practices writ large.[175]

A reasonableness standard would not "effectively 'lock in' certain approaches, even if they are not the best or don't apply appropriately to other forms of content," as critics suggest.[176] The promise of a reasonableness approach is its elasticity. As technology and content moderation practices changes, so will the reasonableness of practices. As new kinds of harmful online activity emerge so will the strategies for addressing them. At the same time, a reasonableness approach would pave the way for the development of norms around content moderation practices, such as having clear policies in place, accessible reporting systems, and content moderation practices tailored to particular forms of illegality.

A reasonable standard of care will reduce opportunities for abuse without discouraging further development of a vibrant internet or turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem of addressing online abuse by setting an appropriate standard of care readily allows differentiation among different kinds of online actors. Websites that solicit illegality or that refuse to address unlawful activity that clearly creates serious harm should not enjoy immunity from liability. On the other hand, platforms that have safety and speech policies that are transparent and reasonably executed at scale should enjoy the immunity from liability as the drafters of Section 230 intended.

V. CONCLUSION

Reforming Section 230 is long overdue. With Section 230, Congress sought to provide incentives for "Good Samaritans" to engage in efforts to moderate content. That goal was laudable. But market pressures and morals are not always enough, and they should not have to be.

A crucial component in any reform project is clear-eyed thinking. And yet clear-eyed thinking about the internet is often difficult. The Section 230 debate is, like many other tech policy reform projects, beset by misconceptions. We have taken this opportunity to dispel myths

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[175] We take this example from an interview that one of us (Citron) recently conducted in connection with a book project on sexual privacy. A woman's nude photo was used in a deepfake sex video, which was posted on a porn site. The porn site had a policy against nonconsensual pornography but did nothing when victims reported abuse. *See* Danielle Keats Citron, *The End of Privacy: How Intimacy Became Data and How to Stop It* (unpublished manuscript) (on file with author).

[176] *See* Masnick, *supra* note 119.

around Section 230 so that this reform moment, a long time coming and anticipated, is not wasted or exploited.

Is There an Anti-Democracy Principle in the Post-*Janus v. AFSCME* First Amendment?

Charlotte Garden[†]

I. INTRODUCTION

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[1] the Supreme Court held that union-represented public sector workers could not be compelled to pay money to the union that represents them. However, even as the Court affirmed that public sector labor-relations systems could remain "exactly as they are"[2] as long as they did not mandate union dues or fees, the Court also hinted in dicta that it might not be finished announcing new First Amendment principles regarding public sector union arrangements. Specifically, the five-Justice majority also observed that the exclusive representation system—in which an elected union represents every employee in a bargaining unit—"substantially restricts the rights of individual employees."[3]

This observation was enough to prompt dozens of new lawsuits challenging exclusive representation in the public sector. These cases, which have uniformly and rightly failed, differ in their specific legal theories. But they all target collective bargaining and not other public sector workplace management systems under the First Amendment. For example, those who argue that exclusive representation by a labor union is unconstitutional do not—and presumably would not—argue that it would be unconstitutional for a public employer to hire a management consulting firm to assist it in determining pay and other benefits for groups of workers. Likewise, if employers simply empowered an internal human resources department to set wages and working conditions, that department would face few constitutional constraints

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[1] 138 S. Ct. 2448 (2018). The respondent's name is frequently shortened to "AFSCME."

[2] *Id.* at 2485 n.27.

[3] *Id.* at 2460.

regarding whether or to what extent it permitted employee input into its decisions.

What is the constitutional objection to collective bargaining with an exclusive representative? As I explain in Part III, the lawyers bringing these cases imply that the answer lies either in the fact that collective bargaining representatives are elected by employees themselves, or that unions commit themselves to representing the interests of workers, rather than management. If that is right, then there is a central irony at the crux of these cases: plaintiffs often couch their arguments in terms of rights to speech and association, but success could imply that workers have a constitutional right not to more democratic participation in their workplaces, but instead to have their wages and working conditions determined unilaterally by their employers.

This Article explores the current wave of First Amendment challenges to the exclusive representation system and other aspects of public sector labor relations, arguing that these systems are constitutional as a matter of both law and of logic. Part II begins with an overview of the relevant Supreme Court case law, which mainly dates to the 1970s and 1980s. It then discusses the Court's more recent cases holding that public employees cannot be compelled to pay union fees as a condition of keeping their jobs—these cases do not concern exclusive representation, but their existence helps to explain why some union opponents have chosen now to attempt to unsettle the constitutionality of exclusive representation. Part III analyzes some of the arguments common to the new round of challenges to exclusive representation. This section focuses first on the arguments that collective bargaining displaces a right to bargain individually with a public employer, or creates the appearance that represented workers support their union, arguing that neither premise is accurate. It then turns to the argument that unions are engaged in state action when they set membership requirements or determine internal decision-making criteria. This argument—which the Article argues is unfounded—is the predicate to a set of arguments that unions cannot exclude nonmembers from their own internal deliberations, leadership, or benefits.

II. THE CHALLENGE TO EXCLUSIVE REPRESENTATION

A. The First Challenges to Exclusive Representation

Public-sector collective bargaining became widespread in the United States in the 1960s and 1970s.[4] Both then and today, virtually

[4] SETH D. HARRIS ET AL., MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS 64–65 (2d ed. 2016).

all jurisdictions that permit public sector collective bargaining use what is known as the exclusive representation system, in which an elected union is charged with representing every worker in the bargaining unit.[5] In turn, the union owes each represented worker what is known as the duty of fair representation, which requires the union to treat workers fairly and not to discriminate based on workers' individual characteristics such as race, gender, or union membership.[6]

The rapid growth of public sector unionization was followed by litigation, including several cases challenging aspects of public sector collective bargaining under the First Amendment. This section recounts and analyzes those cases. The bottom line is that the Court mostly affirmed that governments were free to decide to handle labor relations with their public sector workforces through collective bargaining with an elected exclusive representative. The main exception, in which the Court imposed limits on states' choices, involves union dues and fees. In *Abood v. Detroit Board of Education*,[7] the Court limited how unions could finance certain expenses, but it did not question the constitutionality of the underlying logic or structure of bargaining.

This subsection considers the relevant cases chronologically. Collectively, they establish that workers have a right to associate with a labor union even in the absence of a collective bargaining statute,[8] but also a right to criticize publicly union proposals or the collective bargaining process.[9] On the other hand, states also have considerable flexibility: they may adopt the exclusive representation system without even implicating employees' First Amendment rights,[10] bar rival unions from accessing channels of communication reserved for the exclusive representative,[11] or refuse to permit union participation in any or all aspects of workplace governance.[12] Finally, in the now-overruled *Abood v. Detroit Board of Education*,[13] the Court limited how unions could finance activities other than collective bargaining, though it agreed that governments and unions could jointly require represented workers to pay for their share of union representation.

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[5] *See* Clyde W. Summers, Exclusive Representation: A Comparative Inquiry Into a "Unique" American Principle, 20 COMP. LAB. L. & POL'Y J. 47 (1998).

[6] For a more detailed discussion of the relationship between the exclusive representation system and the duty of fair representation, see Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 206–07 (2015).

[7] 431 U.S. 209 (1977).

[8] Smith v. Ark. State Highway Emps., Local 1315, 441 U.S. 463 (1979).

[9] City of Madison v. Wis. Emp't. Relations Comm'n, 429 U.S. 167 (1976).

[10] Minnesota State Bd. of Cmty. Colls. v. Knight, 465 U.S. 271, 274 (1984) ("*Knight II*").

[11] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[12] *Smith*, 441 U.S. at 463–64.

[13] 431 U.S. 209 (1977), *overruled by* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

The first of these cases, *Madison v. Wisconsin Employment Relations Commission*, arose after a union-represented teacher spoke at a school board meeting in opposition to certain union bargaining proposals, including that represented teachers be required to pay agency fees. In an administrative complaint, the union alleged that "the board had engaged in negotiations with a member of the bargaining unit other than the exclusive collective-bargaining representative," thereby violating a provision of state law forbidding city employers from striking individual employment contracts with union-represented employees.[14] The Wisconsin Employment Relations Commission agreed that the school board had committed an unfair labor practice, and ordered that it "immediately cease and desist from permitting employees, other than representatives of Madison Teachers, Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."[15] The Supreme Court of Wisconsin affirmed the Commission's decision, writing that "[t]he principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts . . . . But the gravity of that evil was considered outweighed by the necessity to avoid the dangers attendant upon relative chaos in labor-management relations."[16]

The U.S. Supreme Court reversed, citing earlier cases holding that public employees did not "relinquish the First Amendment rights they would otherwise enjoy as citizens."[17] Then, the Court distinguished speaking at a school board meeting—something that any citizen of Madison was free to do—with true union negotiations.[18] "Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."[19] Likewise, the Court observed that teachers who objected to union representation could express their views in other available fora, such as the news media.[20]

The key here is the Court's focus on where the relevant speech occurred—at a public-school board meeting—and whether union-represented teachers were disadvantaged as compared to other citizens. In a

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[14] *City of Madison*, 429 U.S. at 172, 173 n.4.

[15] *Id.* at 172–73.

[16] City of Madison Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n, 231 N.W.2d 206, 212–13 (1975), *rev'd and remanded sub nom.* City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp't Relations Comm'n, 429 U.S. 167 (1976).

[17] *City of Madison*, 429 U.S. at 175 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

[18] *Id.*

[19] *Id.* at 176.

[20] *Id.* at 176 n.10.

concurrence joined by Justice Marshall, Justice Brennan emphasized this point, writing that public employers could hold "closed bargaining sessions" in which only union representatives could be heard.[21]

Next, in *Abood v. Detroit Board of Education*, the Court held that union-represented public employees could not be required to contribute toward the cost of a union's activities outside of its role as bargaining representative.[22] A large number of scholarly articles discuss *Abood* and cases that rely on it, and I will not retread their discussions of *Abood*'s holding or consequences. For purposes of this Article, I want to make only two points about *Abood* and the exclusive representation system. First, the decision treated the fact of exclusive representation as a reason that mandatory union agency fees were justifiable,[23] as part of what Cynthia Estlund has called labor law's "quid-pro-quo."[24] But, as Estlund also describes, under this view, it is the exclusive representation system (coupled with the duty of fair representation, which prohibits unions from discriminating against represented nonmembers) that offers one basis for agency fees, not the other way around.[25] In other words, even though agency fees help the exclusive representation system function well, *Abood* did not suggest that agency fees are a prerequisite to the constitutionality of exclusive representation.

Second, the *Abood* Court addressed an argument that bears more directly on one iteration of the current day challenges to exclusive representation. The Court noted that "[t]he appellants' complaints also alleged that the Union carries on various 'social activities' which are not open to nonmembers."[26] The Court made this observation in the course of discussing an issue it ultimately left for another day—which union activities fell into the category of expenses that were germane to its role as representative, and were therefore chargeable. But with the allegation left undeveloped, the Court simply noted that "[i]t is unclear to what extent such activities fall outside the Union's duties as exclusive representative or involve constitutionally protected rights of association.[27] The Court did not say whose rights of association were at issue,

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[21] *Id.* at 178.

[22] 431 U.S. at 236 (discussing "drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited").

[23] *Id.* at 221–22 ("The designation of a union as exclusive representative carries with it great responsibilities . . . . A union-shop arrangement has been though to distribute fairly the cost of these activities among those who benefit . . . .").

[24] Estlund, *supra* note 6, at 206.

[25] *Id.* at 217–218 (describing the "free rider" problem that would result from a system in which unions are required to fairly represent each worker in a bargaining unit, but foreclosed from requiring them to pay their share).

[26] *Abood*, 431 U.S. at 236 n.33.

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

but it would have been logical for the Court to think that a union, as a private association, had a First Amendment right to refuse to associate socially with represented nonmembers.[28]

Next, the Court addressed whether the First Amendment required public employers to allow a role for public sector unions in workplace governance. In *Smith v. Arkansas State Highway Employees, Local 1315*,[29] the Court rejected a union's argument that it violated the First Amendment for the State Highway Commission to refuse to "consider a grievance unless the employee submits his written complaint directly to the designated employer representative."[30] While observing that the Commission's rule would be inconsistent with labor statutes applicable in other jurisdictions, the Court held that it did not violate—or even implicate—the First Amendment. "[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond to, or in this context, to recognize the [union] and bargain with it."[31]

However, in the course of ruling against the union, the Court also wrote that the Commission did not "prohibit[] its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas." If it had, the Court continued, it would give rise to a "claim of retaliation or discrimination proscribed by the First Amendment."[32] This language suggests that public sector employers may not refuse to hire or otherwise retaliate against public employees based on their union membership. Likewise, it suggests that, at a minimum, unions and public employees have the right to advocate on workplace issues in whatever fora are available to them, even though public employers are not required to open channels that are otherwise closed for communication.

The Court again dealt with the relationship between closed channels of communication and union representation in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[33] There, a rival union challenged a provision in a collective bargaining agreement that required the district to allow its teachers' elected exclusive representative access to the in-school mail delivery system, while denying access to competing unions.[34]

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[28] Other cases confirm this right to exclude. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000) (discussing contours of this right).

[29] 441 U.S. 463 (1979).

[30] *Id.* Arkansas demanded that employees themselves handle the potentially stressful process of submitting a grievance, instead of allowing the union to take that step. *Id.*

[31] *Id.* at 465.

[32] *Id.*

[33] 460 U.S. 37 (1983).

[34] *Id.* at 40–41.

This time, the Court found that the rival union's First Amendment rights were implicated by the differential access policy,[35] but then turned to the characteristics of the mailboxes themselves. The Court held that the mailboxes were a "nonpublic forum," which meant that the school could "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[36] Viewing the case through the lens of state-as-property-owner,[37] the Court held that as long as the district did not convert the mailboxes to a designated public forum by allowing indiscriminate access for the public, the school district was free to privilege an exclusive representative's access over a rival union's. And while a state's discretion to exclude would-be speakers from a nonpublic forum does not extend to viewpoint discrimination, the Court held that the exclusion was viewpoint neutral; this conclusion was buttressed by the fact that the employees, not the school, were charged with choosing the exclusive representative that would in turn receive mailbox access. At the same time, the Court observed that "exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools," and deterring "inter-union squabbles."[38]

Perry Education Association is different than some of the other cases discussed in this section because it involved state control over one channel of communication between a union and teachers, rather than communication between the union and the state itself. In *Smith* and *Madison*, the Court grappled with when the state, itself an unwilling audience, was free to close its metaphorical ears to an unwanted message. *Perry* more directly involved listeners' rights in addition to speakers' rights—some teachers may have liked to hear from the Local Educators' Association, while others would have tossed its missives in the trash.

A closely related concern prompted a dissent by four justices who would have held that the mailbox restriction was viewpoint discriminatory.[39] But the dissenting justices focused on the Perry Education Association's likely reason for wanting to exclude the Local Education Association,[40] raising the question of whether or when it is appropriate to

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[35] *Id.* at 44 ("There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system.").

[36] *Id.* at 46.

[37] *Id.* ("[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (internal quotation marks omitted).

[38] *Id.* at 52.

[39] *Id.* at 65.

[40] *Id.* ("On a practical level, the only reason for the petition to seek an exclusive access policy

impute the reasoning of the union—a private organization that by definition cannot violate the First Amendment—to the school district.

The last case in the series discussed in this Section is also the one that deals with exclusive representation most directly. *Minnesota State Board for Community Colleges v. Knight*[41] involved a challenge by a public employee to a "meet and confer" statute that required the state to discuss topics that fell outside of the state's collective bargaining process with its employees' union or (if there was no union) other representative.[42] Inversely, the statute prohibited state employers from either negotiating or conferring with employees individually or with other representatives.[43] The plaintiffs in *Knight* were state university employees who wanted their own seat at the bargaining table and in the "meet and confer" process.[44]

Knight made two trips to the Supreme Court. In the first, the Court summarily affirmed a decision of a three-judge district court that it was lawful for the state to exclude parties other than elected union representatives from collective bargaining.[45] In the second, the Court upheld Minnesota's meet-and-confer statute in an opinion that focused on public employers' rights to control which parties may participate in nonpublic forums.[46]

The plaintiffs in *Knight* objected to the fact that the statute also restricted public employers from either bargaining or conferring with represented employees except through their elected representative—that is, the suit challenged the state's decision to create a channel of communication to which only an elected representative would have access.[47] On the other hand, the state did not limit what represented public employees could say in public settings or private settings to which they could gain access; for example, they were free to criticize employer or union positions on topics of collective bargaining or collective conferencing in any available forum.[48]

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is to deny its rivals access to an effective channel of communication.").

[41] 465 U.S. 271 (1984).

[42] *Id.* at 274. Unlike the state's separate collective bargaining law, the meet-and-confer statute did not require the state to bargain in good faith over covered topics. Rather, the statute created a channel for employees to provide input through their chosen representatives. *Id.*

[43] *Id.*

[44] *Id.* at 278.

[45] Knight v. Minn. Cmty. Coll. Faculty Ass'n, 460 U.S. 1048 (1983) ("*Knight I*").

[46] *Knight II*, 465 U.S. at 280.

[47] *Id.* at 275.

[48] *Id.* (noting that "nothing in PELRA restricts the right of any public employee to speak on any 'matter related to the conditions or compensation of public employment or their betterment' as long as doing so 'is not designed to and does not interfere" with the exclusive representative's rights or duties).

The *Knight II* Court upheld the collective conferencing statute, ultimately writing that the plaintiffs' argument was less compelling than the (also unsuccessful) challenge in *Perry Education Association*.[49] The difference was that, whereas *Perry Education Association* involved a claim of access to a nonpublic forum, the *Knight* plaintiffs "claim[ed] an entitlement to a government audience for their views."[50] The Court emphasized that government bodies are free to decide whom to consult, and that the decision to solicit "outside" advice from one voice does not create an obligation to listen to competing outside views.[51] The alternative, the Court continued, could create an unworkable morass for both policymaking parts of government and for the courts, because "[g]overnment makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard."[52] Thus, the Court's conclusion rested on two premises. First, that as a doctrinal and theoretical matter, the First Amendment does not guarantee a government audience—there is no such thing as a First Amendment right to participate in private deliberations of government. And second, that as a practical matter, "the government could not work" if the First Amendment required it to listen to either nobody or everybody.[53]

Finally, the Court also rejected two arguments that—as Part III discusses—also appear in the new set of challenges to exclusive representation. First, the fact that the Faculty Association did not choose the plaintiffs—individuals who objected to the Association's positions—to represent it in its deliberations with the state "no more unconstitutionally inhibits [plaintiffs'] speech than voters' power to reject a candidate for office inhibits the candidate's speech."[54] And second, the meet-and-confer statute did not violate the plaintiffs' associational rights, even though its functioning meant that they "may well feel some pressure to join the exclusive representative" in order to participate in its advocacy.[55]

Knight II was not unanimous—Justices Brennan, Stevens, and Powell dissented, with Justices Brennan and Stevens writing separate opinions. Justice Brennan saw the case through the lens of academic freedom, and he objected to the faculty's choice either to join the Faculty

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[49] *Id.* at 281.

[50] *Id.* at 282.

[51] *Id.* at 284–85.

[52] *Id.* at 285.

[53] *See generally* Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1 (2019) (discussing cases in which the Court has reasoned that its outcome is necessary to the government's ability to function).

[54] *Knight II*, 465 U.S. at 289.

[55] *Id.* at 289–90.

Association, or be excluded from meet-and-confer sessions.[56] It is unclear whether he would have dissented from a similar majority opinion involving non-academic workers, or even public school teachers who worked in a K-12 setting. Justice Brennan also emphasized that his objection did not extend to collective bargaining settings, because of "the state's compelling interest in reaching an enforceable agreement, an interest that is best served when the state is free to reserve closed bargaining sessions to the designated representative of a union selected by public employees."[57]

Justice Stevens's dissent, which Justices Brennan and Powell each joined in part, reasoned that "the First Amendment does not permit any state legislature to grant a single favored speaker an effective monopoly on the opportunity to petition the government."[58] Thus, Justice Stevens would have required the state to satisfy strict scrutiny before excluding the plaintiffs from the meet-and-confer process. However, he also noted that collective bargaining was different, citing *Abood*.[59]

Knight II settled things for almost 30 years. As the next section discusses, in 2012, the Supreme Court's conservative-leaning justices suggested they were open to new arguments regarding public sector labor relations. That suggestion arose in a case that, like *Janus*, was focused on union dues and fees. But union opponents soon began to push against other aspects of public-sector labor relations, including the exclusive representation system. Outside of the agency fee context, these arguments have gotten nearly no traction, although they have been percolating in dozens of cases.

B. New Challenges to Exclusive Representation

In 2012, the Supreme Court held in *Knox v. Service Employees International Union, Local 1000*[60] that union-represented public workers who were not union members had to affirmatively consent before they could be charged a mid-year fees increase.[61] I have criticized *Knox* in detail elsewhere,[62] but its main significance for this Article was as a triggering mechanism. By signaling that the Court was open to expanding the rights of union-represented nonmembers,[63] *Knox* prompted a new round of exclusive representation challenges.

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[56] *Id.* at 295–96 (discussing "the free exchange of ideas at institutions of higher learning").

[57] *Id.* at 299.

[58] *Id.* at 301.

[59] *Id.* at 315–16.

[60] 567 U.S. 298 (2012).

[61] *Id.* at 321.

[62] *See, e.g.*, Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855 (2014).

[63] *Knox*, 567 U.S. at 311 (referring to *Abood* as an "anomaly"). But perhaps more importantly,

One of those challenges became the Supreme Court's next major decision concerning public sector unions, *Harris v. Quinn*.[64] The *Harris* Court held that union-represented "partial-" or "quasi-" public employees could not be required to pay agency fees to their elected union representative.[65] In the District Court and the United States Court of Appeals for the Seventh Circuit, the case focused on this issue, in addition to procedural and justiciability issues that are not relevant to this Article.[66] However, the Seventh Circuit issued its decision in 2011, and the Supreme Court did not grant certiorari in the case until 2013—shortly after the Court's decision in *Knox*.

In the Supreme Court, the *Harris* plaintiffs sought to raise the constitutionality of exclusive representation alongside their agency fee arguments. For example, they wrote in their opening brief that "requir[ing] providers to accept [an elected union] as their 'exclusive representative' . . . infringes on their associational rights, as it inextricably affiliates them with the Union's petitioning, speech, and policy positions."[67] This argument proceeded in two steps. First, the plaintiffs argued that their First Amendment rights were implicated because a mandatory agency relationship links union-represented workers to the union's speech. Then—echoing both the *Knight* plaintiffs and Justice Stevens's dissent in that case—the *Harris* plaintiffs argued that the State was required to satisfy strict scrutiny in order to justify infringing associational rights, but that "[t]he State has no interest in suppressing providers' ability to petition it through diverse associations."[68] Here, the *Harris* plaintiffs analogized collective bargaining to lobbying, arguing that "the expressive activity is *identical*."[69]

The argument seemed to get off to a rocky start for the *Harris* plaintiffs, with Justice Scalia asking a series of skeptical-sounding questions about whether public sector employees really had a First Amendment right to demand that their employers listen to them:

Knox gave the petitioners more relief than they requested, signaling that union objectors should make more ambitious requests of the Court. For a more detailed accounting of the litigation in *Knox*, see Garden, *supra* note 62 at 876–77.

[64] 573 U.S. 616 (2014).

[65] *Id.* at 656. "Partial" or "quasi" public employees are those who are jointly employed by a government and a private individual or organization; for example, the plaintiffs in *Harris* were home healthcare providers who were paid by the state but directed in their day-to-day work by individual customers.

[66] *See* Harris v. Quinn, No. 10-cv-02477, 2010 WL 4736500, at *1 (N.D. Ill. Nov. 12, 2010), *aff'd in part, remanded in part*, 656 F.3d 692 (7th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 573 U.S. 616 (2014), *and rev'd in part sub nom*, Harris v. Rauner, 601 F. App'x 452 (7th Cir. 2015) (listing issues presented in the case); Harris v. Quinn, 656 F.3d 692, 693–94 (7th Cir. 2011) (same).

[67] Brief for Petitioners at 37, Harris v. Quinn, 573 U.S. 616 (2014) (No. 11-681).

[68] *Id.* at 39.

[69] *Id.* at 41 (emphasis in original).

> Suppose you have a policeman who . . . is dissatisfied with his wages. So he makes an appointment with the . . . police commissioner, and he goes in and grouses about his wages. He does this . . . 10 or 11 times. And the commissioner finally is fed up, and he tells his secretary, I don't . . . want to see this man again. Has he violated the Constitution?[70]

Counsel for Harris replied, "No, because . . . with an individual speaking, it's . . . a matter of private or internal proprietary matter that, under this Court's precedents, [doesn't] rise to a matter of public concern."[71] Later, Justice Sotomayor asked whether there was "anything wrong with the State saying, 'we're not going to negotiate with any employee who's not a member of the union?'"[72] Harris's counsel answered "no," and he later elaborated that "[u]nder *Knight*, the State can choose who it bargains with."[73]

Perhaps because of that exchange, the *Harris* Court did not ultimately discuss the briefed exclusive representation argument at all, instead stating that "Petitioners do not contend that they have a First Amendment right to form a rival union. Nor do they challenge the authority of the [elected union] to serve as the exclusive representative of all of the personal assistants."[74]

The Court's next (and most recent) case about public sector unions is *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[75] *Janus* overruled *Abood*, holding that public sector employers and unions could not require represented workers to pay an agency fee as a condition of employment. As in *Knox* and *Harris*, Justice Alito wrote for the majority. Of significance for this Article, the majority opinion assumed the existence of exclusive representation, asserting repeatedly that unions would continue to serve as exclusive representatives for groups of employees even without agency fees.[76] Further, the majority wrote that—aside from having to discontinue mandatory agency fees—"[s]tates can keep their labor-relations systems exactly as they are."[77] Given that the *Janus* opinion spent considerable time discussing exclusive representation, this statement suggests that the majority did not see that aspect of labor relations systems as legally problematic.

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[70] Transcript of Oral Argument at 6, Harris v. Quinn, 573 U.S. 616 (2014) (No. 11-681).

[71] *Id.*

[72] *Id.* at 11.

[73] *Id.*

[74] *Harris*, 573 U.S. at 649.

[75] 138 S. Ct. 2448 (2018).

[76] *See, e.g.*, *id.* at 2480, 2483.

[77] *Id.* at 2486 n.27.

On the other hand, the majority also sent two contradictory signals. First, the opinion stated that exclusive representation "substantially restricts the rights of individual employees," because "this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer."[78] Later, it characterized exclusive representation as "a significant impingement on associational freedoms that would not be tolerated in other contexts"[79]—a statement that is reminiscent of the *Knox* majority's characterization of *Abood* as "something of an anomaly—one that we have found to be justified by the interest in furthering 'labor peace.' But . . . an anomaly nonetheless."[80] However, the *Janus* majority did not elaborate on either of these statements, and it did not cite *Knight II* or other cases on associational freedoms—in fact, *Knight II* is not cited a single time in *Janus*.

Knox, *Harris*, and *Janus* offer at least a tentative signal to union objectors and opponents that the Court's conservative majority is open to arguments that various aspects of public sector labor relations violate the First Amendment. Unsurprisingly, this has led to a large number of new cases arguing that exclusive representation is unconstitutional. The next subsection discusses the main arguments in those cases. To be clear, these arguments have rightly received a chilly reception in the federal courts so far—but the same was true of cases arguing that *Abood* should not be applied to home healthcare workers, or should be overturned, until conservative Supreme Court majorities in *Harris* and *Janus* adopted those positions. Thus, the remainder of this Article offers an analysis of, and conceptual rejoinder to, those arguments.

III. ASSESSING THE NEW ARGUMENTS ABOUT EXCLUSIVE REPRESENTATION

There are dozens of post-*Knox* cases that challenge aspects of exclusive representation in the public sector.[81] Rather than attempting to catalogue each of them, this section discusses a handful of representative cases, focusing on two lines of argument in particular.[82] The first

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[78] *Id.* at 2460.

[79] *Id.* at 2478.

[80] Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012).

[81] This Article focuses on First Amendment challenges, but some cases also raise other arguments, such as an argument that exclusive representation violates federal antitrust law. *See, e.g.*, Crockett v. NEA-Alaska, 376 F. Supp. 3d 996, 1009–10 (D. Alaska 2019) (describing and rejecting an antitrust argument).

[82] These cases also vary in terms of the workers involved. Some follow the *Harris* Court's distinction between regular public employees and "partial" or "quasi" public employees who are paid by the state but directed in their day-to-day duties by private organizations or individual clients. *See, e.g.*, Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043

line insists that the First Amendment is violated when a public employer designates a union as representative for an employee, because doing so puts the union's words in the employee's mouth. These arguments focus mainly on the relationship between the union and the employer, but fail to make a legal and factual case that the link between a union and a represented worker counts as compelled association, or its appearance. Second, other cases argue that union membership incentives or other practical constraints on workers' choices about union membership violate the First Amendment. These cases argue that exclusive representation requires unions to grant represented nonmembers all the same rights and benefits that usually come with union membership, including rights to participate in union governance. This argument faces the opposite difficulty from the first set—it links the union and its members, but excludes the government, meaning that the state action necessary to trigger constitutional protection is not present.

A. Exclusive Representation as Compelled Speech or Association?

Uradnik v. Inter Faculty Organization[83] is representative of the first set of arguments. In a petition for a writ of certiorari that the Supreme Court denied in April 2019, the petitioner echoed the *Harris* plaintiffs in arguing that the problem with exclusive representation is that it requires "compelled representation" of public sector workers,[84] and that it results in workers being "forced to accept [a union's] speech, made on their behalf by a state-appointed representative, as their own."[85]

The petitioner in *Uradnik* was a professor employed by a public university in Minnesota. Uradnik challenged the Minnesota Public Employment Labor Relations Act[86]—the same statute that was at issue in *Knight*[87]—although she focused on the collective bargaining provision that had been summarily approved by the Supreme Court in *Knight I* rather that the meet-and-confer provision that was discussed in greater detail in *Knight II*.

(2019) (exclusive representation challenge involving home healthcare providers). In the next Section, I note a few instances in which plaintiffs develop arguments that the First Amendment analysis should turn on their partial public employee status.

[83] No.18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *summarily aff'd*, No. 18-3086 (8th Cir. Dec. 3, 2018), *cert. denied*, 139 S. Ct. 1618 (2019).

[84] Petition for a Writ of Certiorari at 1, Uradnik v. Inter Faculty Org., 139 S. Ct. 1618 (2019) (No. 18-719) https://www.supremecourt.gov/DocketPDF/18/18-719/74002/20181204095722857_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf [https://perma.cc/2GE5-8G8N].

[85] *Id.* at 2–3.

[86] MINN. STAT. § 179A.06–08 (2019).

[87] *Id.* at 10.

Uradnik's petition began by attempting to distinguish *Knight*, arguing that although *Knight* upheld a state's ability to exclude persons from a meet-and-confer session, it had not approved "compelled representation," because the plaintiffs had focused only on the former and not the latter. The main problem with this system, according to Uradnik, was that Minnesota law treated an elected union as the "representative" of all employees in a bargaining unit, whether or not each employee actually agreed with the union's positions.[88] Or, as Uradnik put it, "when the Union speaks, it is speaking for the Petitioner, putting words in her mouth."[89] This representation, Uradnik reasoned, violated the Court's precedents about compelled speech and compelled association because exclusive representation could not be justified by any sufficiently compelling interest, nor was it narrowly tailored to any such potential interest.[90]

Each iteration of this argument is premised on the idea that exclusive representation either actually compels or restricts public employees' speech or association, or that it creates the false appearance of speech or association by, for example, causing third parties to believe the employee is a union supporter. But that premise is flawed as both a matter of case law and of logic. A union's relationship to represented workers is more like a voter's relationship to an elected government than it is to a lawyer's relationship to a client. No reasonable observer would attribute a government's views to each voter—of course, the voter might have preferred different representatives. In the same way, no reasonable observer would assume that every union-represented worker supports the union's positions.

Many courts have correctly relied on *Knight II* to conclude that exclusive representation does not involve actual compelled speech or association.[91] The key is that unions may not require represented workers to join them, nor may they bar represented workers from joining other organizations. Likewise, unions cannot compel represented workers to tow the metaphorical line during negotiations, or to walk the literal picket line during a strike. As the *Knight II* Court put it, exclusive representation "in no way restrained appellees' . . . freedom to associate or not to associate with whom they please, including the exclusive

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[88] *Id.* at 14 (citing MINN. STAT. § 179A).

[89] *Id.*

[90] *Id.* at 16–17.

[91] *See, e.g.*, Mentele v. Inslee, 916 F.3d 783, 788–89 (9th Cir. 2019); Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019); Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 866 (7th Cir. 2017); Jarvis v. Cuomo, 660 F. App'x 72, 74 (2d Cir. 2016); D'Agostino v. Baker, 812 F.3d 240, 244 (1st Cir. 2016); Thompson v. Marietta Educ. Ass'n, 371 F. Supp. 3d 431 (S.D. Ohio 2019).

representative."[92] That much is underscored by the Court's holding in *Madison v. WERC* that a union-represented employee had the same freedom as any other citizen (or as any other public employee) to express her views in any available forum, including views that her employer should reject union bargaining proposals.[93]

Even beyond the fact that union representation does not limit represented workers' rights to join other organizations or express themselves in opposition to the union, there are also multiple senses in which union representation enhances—rather than detracts from—opportunities for workers to make themselves heard, even if they are union opponents. First, there is the fact that unions are elected (and can later be rejected) through a democratic process, and if a union is elected then collective bargaining replaces other methods by which employers impose wages and working conditions, which are often unilateral and autocratic.[94] Second, as a practical matter, union representation tends to lead to working conditions that are conducive to employee speech. For example, union-represented workers tend to earn a wage premium, and union contracts often contain provisions related to job security, seniority, scheduling, and other matters that make work more predictable and less precarious.[95] Perhaps most important, collective bargaining agreements usually limit the grounds on which an employee can be fired, and include a disciplinary process. These conditions usually aren't a formal "right to speak out," but they are speech-enhancing. For example, predictable schedules make it easier for workers to plan to attend government town-halls and other fora, campaign for a preferred candidate, and otherwise participate in civic life.[96] And protections against arbitrary termination can help workers feel confident that they won't be retaliated against at work if they take an unpopular position, either in the public square, or in water-cooler conversation with co-workers.

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[92] Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 288 (1984).

[93] 429 U.S. at 174–75.

[94] *See* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 57 (2017) (discussing scope of employer power over wages and working conditions).

[95] *See* Benjamin I. Sachs, *Agency Fees and the First Amendment*, 131 HARV. L. REV. 1046, 1067 (2018) (discussing the union wage premium in the context of represented workers' First Amendment rights); *see also* Estlund, *supra* note 6, at 218 (observing that if a union represented employee "is *more* free to express his views—or at least has more money with which to do so out of the larger paycheck that comes with union representation") (emphasis in original).

[96] For a more extended discussion of how unions can promote represented workers' engagement in civil society, see Charlotte Garden, *Labor Values are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617, 2652–58 (2011).

1. Does collective bargaining displace a right to individual bargaining?

Opponents of exclusive representation sometimes frame their challenge in a way that suggests that union representation means objectors are losing the right to negotiate on their own behalf. For example, the employee plaintiffs in *Branch v. Commonwealth Employment Relations Board*,[97] discussed further in the next subsection, wrote that "the government . . . extinguishes the Educators' right to represent themselves with their employers."[98] Similarly, the challengers in another recent case, *Bierman v. Dayton*, "allege[d] that [exclusive representation] violates their First Amendment right to choose who speaks for them in their relations with the State."[99]

If public employees truly had a legal right to negotiate with their employer, then it would follow that electing an exclusive representative extinguished an opportunity for speech that public employees would otherwise have had. But recent Supreme Court cases have rejected that premise.[100] For example, in *Borough of Duryea v. Guarnieri*,[101] the Court held that the First Amendment right to petition—like the First Amendment right to free speech—does not protect a public employee's complaints and requests of their employer unless those complaints or requests are about a matter of public concern.[102] And in *Connick v. Myers*,[103] the Court made clear that most workplace problems—including those related to "confidence and trust . . . in various supervisors, the level of office morale, and the need for a grievance committee"[104]—do not rise to the level of matters of public concern.

Further, there are no signs that the Court is likely to shift on this point. To the contrary, Justice Alito—the author of the majority opinions in *Knox*, *Harris*, and *Janus*—emphasized during oral argument that public employees have no First Amendment right to seek better treatment from their supervisors: "I suppose that [a public sector

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[97] Branch v. Dep't of Labor Relations, Commonwealth Emp't Relations Bd., 120 N.E.3d 1163 (Mass. 2019), *cert. denied* 140 S. Ct. 858 (2020).

[98] Petition for Writ of Certiorari at 6, Branch v. Dep't of Labor Relations, Commonwealth Emp't Relations Bd., 140 S. Ct. 858 (2020) (No. 19-51).

[99] Appellants' Brief at *I, Bierman v. Dayton, 900 F.3d 570 (8th Cir. 2018) (No. 17-1244).

[100] To be clear, I am not suggesting that it would be constitutionally *impermissible* for a public employer to negotiate with an individual employee, or that public employers never voluntarily negotiate with individual employees or job applicants. My point is simply that the alternative to a system of exclusive representation is not necessarily one in which individual employees negotiate with their employers.

[101] 564 U.S. 379 (2011).

[102] *Id.* at 382–83.

[103] 461 U.S. 138 (1983).

[104] *Id.* at 148.

employer] has a perfect right to say: Enough is enough; I don't want to meet with you for the fifth time *or for the first time*."[105] Then, in *Janus*, the Court majority took care to avoid calling into question *Guarnieri*, *Connick*, and other cases concerning the limited First Amendment rights of individual public employees. Instead, the Court wrote that while it is a matter of only private concern when a single employee requests a raise, "a public-sector union's demand for a 5% raise for many thousands of employees it represents" would qualify as a public concern because of the potential budgetary effects, were the employer to agree to such a demand.[106] As a result, public employers would not violate the First Amendment if they decided to ignore or even punish employees attempting to use workplace channels to negotiate on their own behalves.[107]

2. Does exclusive representation create an appearance of union support?

Even if exclusive representation does not restrict speech or association, it might still implicate the First Amendment if it creates the false appearance that represented workers were union supporters.[108] For example, the plaintiffs in *Harris* argued that the fact that an exclusive representative union owed them the duty of fair representation was enough to "affiliate[] them with the Union's petitioning, speech, and policy positions."[109] In their reply brief, the plaintiffs similarly argued that Illinois had "dictate[d] . . . who shall speak for every provider by designating an exclusive representative to petition for them . . . thrust[ing] providers into a fiduciary relationship with" the union.[110] The lynchpin of that argument seems to be the "fiduciary relationship" between a

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[105] *Supra* note 70, at 10 (emphasis added).

[106] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2472–73. (2018). The correctness of the Court's approach is beyond the scope of this Article, but I have critiqued it elsewhere. *See* Charlotte Garden, *Speech Inequality after* Janus v. AFSCME, 95 IND. L.J. 269, 288–89 (2020).

[107] Many states that allow public sector collective bargaining also protect by statute the ability of union-represented workers to raise grievances directly with their employers. For example, Massachusetts law states that an "employee may present a grievance to his employer and have such grievance heard without intervention by the exclusive representative," though the public employer cannot resolve the grievance in a way that is inconsistent with an applicable collective bargaining agreement. MASS. G.L. c. 150E § 5.

[108] *See* Seana V. Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW U. L. REV. 839, 851–52 (discussing First Amendment "rulings [that] protect individuals from having to attest to beliefs that they reject and thus from having others wrongly associate them with those beliefs").

[109] Brief for Petitioners at 37, Harris v. Quinn, 573 U.S. 616 (2014) (No. 11-681), https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/11-681_pet.authcheckdam.pdf [https://perma.cc/38UX-2QC4].

[110] Reply Brief for Petitioners at 11, Harris v. Quinn, 573 U.S. 616 (2014) (No. 11-681), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/11-681-Harris-v.-Quinn-Reply-2.pdf [https://perma.cc/P5RC-UTP9].

union and represented workers, which the *Harris* plaintiffs argued was enough to "inextricably affiliate[] them with the union's petitioning and policy positions."[111] The petitioner in *Uradnik* made a similar argument, focused on statutory language referring to an elected union as the "representative" of employees in the bargaining unit, and reasoning that a "representative" speaks for the person they represent.[112]

In other words, the argument is: if a union can truthfully say it is a worker's "representative," then others would assume that the union's positions are also the positions of the represented worker. But that argument relies on a specific version of "representation," similar to that undertaken by lawyers or hired spokespeople. But elected representatives also "represent" their constituents—though they do not speak for them. Only the first type of "representative" can reasonably be regarded as speaking for those they represent—for example, judges and opposing counsel will attribute an attorney's statements to their client, and a client whose attorney makes an admission or concedes a point during oral argument cannot usually take a different position later. Instead, their remedy is usually to assert in a later court proceeding or a bar complaint that the attorney breached their duty as the client's representative.

If union representation worked like attorney representation, then it would make sense to argue that the union's speech put words in the mouths of represented workers. But union representation is crucially different. First, recall that neither private- nor public-sector unions may compel represented workers to join the union as a condition of keeping their job, and in the public sector (as well as in states with "right-to-work" laws), unions also cannot compel represented nonmembers to pay anything towards the costs of the costs of union representation. And, while unions have a duty of fair representation to all represented workers, their performance of their duty is evaluated according to a flexible standard that recognizes that some represented workers may flatly disagree with some or all union decisions.[113] This disagreement can be both forceful and public—for example, the union's brief opposing certiorari in *Uradnik* cited evidence reflecting Uradnik's frequent and public opposition to the union's positions.[114]

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[111] *Id.*

[112] Petition for a Writ of Certiorari at 1, Uradnik v. Inter Faculty Org., 139 S. Ct. 1618 (2019) (No. 18-719).

[113] *See, e.g.,* Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65 (1991) (holding that union duty of fair representation under the Railway Labor Act required that union not act in arbitrary, discriminatory, or bad faith manner, but that union did not breach duty by negotiating strike settlement that may have placed represented workers in a worse position than if the union had unilaterally ended the strike without a settlement).

[114] Brief in Opposition of Respondent Inter Faculty Org., at 4, Uradnik v. Inter Faculty Org.,

Further, unions negotiate collective bargaining agreements in their own names; workers are third-party beneficiaries rather than parties.[115] This means that although workers benefit from union-negotiated collective bargaining agreements, they cannot be bound by the union to honor its provisions. For example, a union that calls a strike in violation of a no-strike clause can be enjoined[116]—but an employer cannot successfully sue striking employees for breach of contract, even if they are covered by a collective bargaining agreement that contains a no-strike clause.[117] In contrast, a lawyer who negotiates a contract is typically doing so on behalf of a client, who will then become a party with obligations that can be enforced by the other party.

These differences make attorney representation a poor analogy for union representation. Instead, as the First Circuit observed in the course of rejecting a challenge to exclusive representation, "once [a union] becomes the exclusive bargaining agent for a bargaining unit, [it] must represent the *unit* as an entity . . . solely for the purposes of collective bargaining."[118] This makes representation by an elected official a closer analogy. Voters are entitled to vote for or against a candidate, but they will be stuck with the results of the election unless they move out of the jurisdiction. The winning candidate will then have significant (but not unlimited) latitude to implement their policy preferences; there is no legally enforceable duty of fair representation, but elected officials generally may not discriminate or retaliate against their opponents' supporters.[119]

Given these rules, it would be irrational to think that everyone who lives in a jurisdiction supports their elected officials—inevitably, some

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139 S. Ct. 1618 (2019) (No. 18-719), https://www.supremecourt.gov/DocketPDF/18/18-719/93384/20190327130415676_18-719_bio_Inter_Faculty_Organization.3.27.19.pdf [https://perma.cc/4A9K-ACJ8] ("Petitioner's disagreements with the IFO and its views are well known on campus.").

[115] *See* Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 538–39 (1969) ("Professor Corbin treats collective agreements as contracts made for the benefit of third persons, and quite properly so. The union and the employer clearly intend to provide benefits for the individual employees, and the individual employees acquire legally enforceable rights under the agreement.").

[116] Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 254–55 (1970).

[117] *See* Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 408–09 (1981) (holding that the employer was not entitled to recover damages from employees who engaged in strike that was in violation of a contractual no-strike clause); United Food and Commercial Workers Union Local 951 v. Mulder, 31 F.3d 365, 370 (6th Cir. 1994) (discussing ability of employees to sue—but not be sued—as third party beneficiaries to a collective bargaining agreement).

[118] Reisman v. Associated Faculties of the Univ. of Me., 939 F.3d 409 (1st Cir. 2019) (emphasis in original).

[119] *See, e.g.*, O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 714–15 (1996) ("Although the government has broad discretion in formulating its contracting policies, we hold that the protections of *Elrod* and *Branti* extend to an instance . . . where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.").

voters would have preferred different candidates. In the same way, it would be irrational to assume that an elected union that owes a duty of fair representation to each worker in a bargaining unit is in fact taking positions that each worker prefers. Rather, the union is each worker's representative in the political sense—it is the representative chosen in a likely contested election, and it is bound to advocate for its view of what workplace conditions will advance workers' interests within the confines of the duty of fair representation.

3. Do union elections trigger First Amendment scrutiny where autocratic alternatives do not?

Finally, there is also a more intuitive reason to reject the argument that exclusive representation either restricts speech or association or creates the appearance of such a restriction. Consider a non-union public employer facing new budget constraints that compel cuts. The employer might choose to hire a management consultant to give advice about issues such as whether it would be better to make layoffs or cut benefits. The consultant—either at the employer's request or on its own initiative—might then ask workers about their views and preferences, and take those views into account when making its recommendations. In turn, the employer could give negligible or decisive weight to the employees' views as reported by the consultant.

In much the same way, another public employer that faces a significant amount of workplace turnover might ask a human-resources professional to conduct a series of focus-group-style interviews with current workers. Based on what the employees say in these meetings, the human resources professional might make recommendations about what to do, for example that the employer should improve pay, add a tuition benefit, or change the promotion process.

Do these scenarios give rise to a First Amendment problem? If the *Uradnik* and *Harris* plaintiffs are right about exclusive representation, then the answer should be yes: both hypothetical employers have asked others to aggregate and then make representations about employees' preferences. These employers have also declined to allow employees either to opt out of this process, or to form their own competing advisory groups. However, that argument seems obviously wrong under the case law discussed in Part I, and as a matter of logic.

There are two differences on which objector employees would likely rely to distinguish her arguments from the one in the previous paragraph. First, during collective bargaining, the employer is committed to bargain over union proposals, rather than to take the consultant's or the employees' recommendations into account to whatever degree it

chooses.[120] But that difference places us squarely back in *Knight II* territory, by focusing on the employer's own choice about how to engage with an employee representative. Second, there is the fact that a union is elected by employees themselves, and then it owes those employees a duty of fair representation. That is the difference on which the *Harris* and *Uradnik* plaintiffs focused—implying that, from their perspective, a First Amendment problem arises only when a public employer does not behave *autocratically enough*, instead allowing workers to elect a bargaining representative. We might then recharacterize the First Amendment arguments in these cases as seeking a right for public employees to have their wages and working conditions set unilaterally by their employers.

These arguments should fail, but if they were to succeed, some plaintiffs might hope that public employers respond by allowing multiple bargaining representatives to sit at the table. First, this approach would likely serve to empower employers rather than employees.[121] And employers could also respond in at least two other ways. First, they could decide that bargaining with one or more unions on a members-only basis is too complicated, and respond by eliminating collective bargaining altogether. Second, they could bargain with an elected union on a members-only basis. But this scenario would not mean that public employers would permit other employee representatives or individual employees to bargain for different working conditions. Far more likely, employers would find it expedient to unilaterally extend collectively-bargained-for working conditions to cover non-members.[122] This

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[120] *See* Electromation, Inc., 309 NLRB 990 *10–11 (1992) (distinguishing "bilateral" negotiation from other ways that management might solicit input from employees in context of deciding whether employer had created unlawful "dominated" union).

[121] This likelihood is illustrated by Tennessee's recent experience with "collaborative conferencing," a system adopted in 2011 to set working conditions for public school teachers. TENN. CODE ANN. § 49-5-605 (2011). Under this system, teachers first vote on whether to engage in conferencing with their school districts, and then on their desired representative. TENN. CODE ANN. § 49-5-605(b). Any representative chosen by at least fifteen percent of teachers may participate in conferencing, with the right to participate apportioned among multiple organizations according to their vote share. *Id.* During conferencing, school boards discuss statutorily specified topics with representatives of multiple organizations; if the parties do not reach agreement, school boards determine working conditions unilaterally.

This system means that school boards can end up conferencing with a panel of teacher representatives whose members radically disagree about both teachers' working conditions, and the desirability of collective bargaining and teachers' unions. Thus, even though Tennessee's collaborative conferencing process is triggered when a majority of teachers vote to engage in it (and therefore to have compensation set through a process that involves discussion with a collective representative), subsequent conferencing sometimes entails a three-way split between school districts, teachers' unions, and organizations that want to weaken teachers' unions. *See* Chris Brooks, *The Cure Worse Than the Disease: Expelling Freeloaders in an Open-Shop State*, NEW LABOR FORUM (Aug. 2017), https://newlaborforum.cuny.edu/2017/08/24/the-cure-worse-than-the-disease/ [https://perma.cc/7UB6-NKK4].

[122] This is already how some public employers choose to handle employees who are excluded

outcome would leave objectors with less security in their working conditions by depriving them of a contractual guarantee, while also giving them fewer opportunities to exercise voice at work. In other words, both the formal structure of this argument against exclusive representation, and its likely effect if it is accepted by courts, tends to undermine their proponents' abilities to have input over workplace conditions.

This section has argued that exclusive representation neither compels public employees' speech or association, nor creates the appearance of compulsion. The next section turns to an argument that does not argue directly that exclusive representation is unconstitutional, but instead challenges union membership incentives or restrictions, on the theory that they influence public employees' choices about whether or not to become union members.

B. State Action in Worker-Union Relations?

This set of arguments focuses on the relationship between unions and represented workers. It is exemplified by the petition for certiorari filed in *Branch v. Commonwealth Employment Relations Board*.[123] The *Branch* employees focused on the advantages of union membership over represented nonmember status, arguing that unions used the services and benefits offered as a condition of membership to coerce membership.[124] The Branch plaintiffs focused on the fact that represented nonmembers could not participate in union democracy, such as voting for union leadership, voting on certain decisions that the union put to its membership, and participating in internal union deliberations over topics like negotiation strategies.[125] Employees in another case, *Bain v. California Teachers Ass'n*, made a similar argument, but focused in part on union membership incentives such as insurance benefits for which only union members were eligible.[126]

These arguments depend on the success of two linked claims: first, that a public sector union's relationship with represented workers involves state action, even when the union is not interacting with the government employer but instead setting the terms on which workers may join; and second, that unions in this posture violate the First Amendment when they constrain represented workers' choices by excluding

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from a bargaining unit for other reasons, such as that they are designated "management and confidential" employees.

[123] Petition for Writ of Certiorari at 6, Branch v. Dep't of Labor Relations, Commonwealth Emp't Relations Bd., 140 S. Ct. 858 (2020) (No. 19-51), https://www.supremecourt.gov/DocketPDF/19/19-51/107367/20190708132424467_Branch%2019-__PetitionForAWritOfCertiorari.pdf [perma.cc/672X-2Y49].

[124] *Id.* at 2.

[125] *Id.* at 3, 5.

[126] 891 F.3d 1206 (9th Cir. 2018).

them from union participation rights or other benefits if they do not join the union.

The *Branch* plaintiffs made two arguments on this point. First, that "[i]f an organization can engage in a specific activity only by government empowerment, then that activity . . . must be one committed by the government."[127] And second, that the state government "grants monopoly representation power to the union," while making "'direct dealing' between government employers and individual employees unlawful."[128] The *Branch* plaintiffs also argued that *Knight* should control the state action question. They reasoned that because *Knight* assumed that there was state action when a public employer excluded organizations other than an elected union from its meet-and-confer process, state action would also be present when "employees seek a voice and a vote in the collective bargaining process," including the pre- or post-bargaining stage in which the union consults with its members about bargaining positions. In addition, they argued that the union is "entwined" with the public employer because state law sets the parameters of the state-union relationship, and that the union is a state actor because it performs functions that have traditionally been performed exclusively by government.

The *Bain* plaintiffs made a somewhat different argument about why a union's decision to offer a membership incentive involved state action. They posited that "unions intentionally decline to bargain with school districts for certain critical job benefits that are within their state-conferred exclusive authority to bargain, and which (if bargained) would apply to *all* teachers."[129] In other words, the argument is premised on the allegation that the *Bain* plaintiffs' union conspired with the state to leave "gettable" benefits on the bargaining table so that the union could instead offer those benefits as a membership incentive.

The state action inquiry is a famously flexible one, and it is beyond the scope of this Article to analyze each line of doctrine that the plaintiffs invoke in various cases. Instead, this Article is limited to two more conceptual points. First, the argument that public sector unions are state actors is in tension with *Harris* and *Janus*. Second, unions' adversarial role in public systems of collective bargaining makes them less likely to qualify as state actors, not more; in this way, public sector unions are analogous to public defenders, who are treated as state actors only when they directly cause courts to act.

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[127] *Supra* note 123, at 6.

[128] *Id.*

[129] Appellants' Opening Brief at 3–4, Bain v. Cal. Teachers Ass'n, 891 F.3d 1206 (9th Cir. 2018) (No. 16-55768), 2016 WL 6649995 at *3–4.

In *Harris*, the majority emphasized that the union was a private organization, likening it to trade groups that "advocate on behalf of the interests of persons falling within an occupational group," and asking why only unions were empowered to charge agency fees.[130] And when the *Janus* Court addressed the argument that unions should be permitted to charge agency fees because they (unlike other voluntary associations) owed a duty of fair representation to non-members, it wrote that "it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers."[131] By focusing on employers'—not unions'—potential constitutional violations, this formulation differentiates and remains silent about a different question—whether it would be a constitutional violation for a union to suggest that an employer discriminate against nonmembers.

There also is a deeper inconsistency between the decisions in *Harris* and *Janus*, and the argument that a public sector union is a state actor. In *Johanns v. Livestock Marketing Ass'n*,[132] the Court held that a program requiring beef producers to pay a mandatory fee to finance generic beef advertising was constitutional because the advertisements were attributable to the government.[133] This was because, in the Court's words, citizens "have no First Amendment right not to fund government speech."[134] The *Johanns* Court specifically distinguished *Abood*—the then-controlling case on public sector agency fees—on the basis that *Abood* concerned "exactions to subsidize speech . . . of an entity other than the government itself."[135] In other words, *Johanns* stands for the proposition that individuals can be charged an assessment that funds government speech, but not private speech. Applying this rule, either public sector unions are state actors, and there is no constitutional problem with agency fees—which would mean that *Harris* and *Janus* were wrongly decided; or they are private actors, whose dealings with represented workers do not involve state action as a general rule, although particular instances of union conduct could still qualify as state action.

Public defenders are a useful comparison. Public defender offices can be government departments, or they can be private attorneys or agencies that contract with the government to provide services. But in either case, they are not generally considered to be state actors, even though there are limited circumstances under which specific actions by

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[130] Harris v. Quinn, 573 U.S. 616 (2014).

[131] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2468 (2018).

[132] 544 U.S. 550 (2005).

[133] *Id.* at 561–62.

[134] *Id.* at 562.

[135] *Id.* at 559.

public defenders might be treated as state action. That was the holding in *Polk County v. Dodson*, in which the Court held that even public defenders who were employed directly by the county did not necessarily act under color of state law just because they were funded by the state.[136] That is in part because they were "not amenable to administrative direction in the same sense as other employees of the State."[137] Instead, public defenders were bound by duties to their clients to exercise "professional independence" not subject to state control, and typically in an adversarial posture to other state interests.[138]

On the other hand, public defenders are treated as state actors when they exercise government power. Thus, public defenders' peremptory challenges are treated as state action because those challenges involve "wielding the power to choose a quintessential government body."[139] Or, to put it another way, by exercising a peremptory challenge, a public defender triggers action by the government body—in that case, by prompting a judge to excuse a prospective juror. But the fact that public defenders' peremptory challenges count as state action does not convert the other things public defenders do into state action.

Public sector unions are similar: even though state law generally empowers them to engage in collective bargaining if they are elected as the exclusive representative of a group of workers, the government cannot direct the positions that unions take in bargaining or grievances, or the tactics they use to try to convince government employers to agree to those positions.[140] As in the public defender example, this is one reason that unions are not generally state actors—and in fact, the case for treating public defenders as state actors is much stronger than the case for treating public sector unions as state actors, because unions are never organized as state agencies. In fact, states that allow public sector collective bargaining often also bar government employers from exercising control over how the unions operate.[141]

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[136] Polk Cty. v. Dodson, 454 U.S. 312, 321 (1981). In a later case, the Court stated that the constitutional state actor inquiry is the same as the question whether an entity acts under color of state law. *See* Georgia v. McCollum, 505 U.S. 42, 54 n.9 (1992); *see also* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (characterizing Dodson as having held that public defenders were not state actors); Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 304–05 (2001) (discussing *Dodson* and observing that "[t]he state-action doctrine does not convert opponents into virtual agents").

[137] *Dodson*, 454 U.S. at 321.

[138] *Id.*

[139] *McCollum*, 505 U.S. at 54.

[140] For a more extensive discussion of relevant differences and similarities between unions and public defenders, see Aaron Tang, *Life After* Janus, 119 COLUM. L. REV. 677, 710–15 (2019).

[141] *See, e.g.*, OHIO REV. CODE ANN. § 4117.11(A)(2) (West 2020); 115. ILL COMP. STAT. 5/14(a)(2) (2019).

In contrast, the state-action requirement is satisfied in public-sector agency-fee cases like *Harris* and *Janus* because either state law or a collective bargaining agreement signed by a public employer requires union-represented employees to pay the fees. The ability to require a public-sector employer to take that step is equivalent to exercising a peremptory challenge, compelling a government entity to dismiss a juror. Likewise, in *Knight*, state action was present when the Minnesota government enforced its statute foreclosing anyone other than an elected union from participating in its conferencing process. However, a union's decisions about its own membership requirements or internal decision-making are more like the public defender's decisions about how to represent her clients. The public defender and the union may hope these decisions will ultimately contribute to a favorable government decision on either a set of wages and working conditions or her clients' lack of criminal culpability, but they do not have the power to compel a favorable government decision.

Not only would it be inconsistent with unions' purposes and structures to treat every union decision as occurring under color of state law, but unions' own associational rights militate in favor of allowing unions to set requirements for membership and to exclude those who do not qualify. As Catherine Fisk and Erwin Chemerinsky have detailed, the Supreme Court has protected a robust right of associations to exclude.[142] And while the Court has permitted or required some incursions on that right to protect dissenting members,[143] those incursions have all come in contexts discussed above—those in which the union is directly engaged with determining the public employer's treatment of individual workers. By contrast, unions' internal deliberations and other internal functions both more squarely implicate the core of unions' own associational interests.

IV. CONCLUSION

This Article has discussed the new generation of challenges related to union exclusive representation. So far, these challenges have—appropriately—failed to gain a toehold, and therefore they have had few real-world consequences. But if these challenges ultimately succeed, they have the potential to significantly disrupt labor relations in the public sector. Moreover, it is possible that a holding that exclusive representation is unconstitutional in the public sector would translate into

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[142] Catherine L. Fisk & Erwin Chemerisky, *Political Speech and Association Rights After* Knox v. SEIU Local 1000, 98 CORNELL L. REV. 1023, 1062–63 (2013).

[143] *See generally id.* (discussing tensions between the Court's agency fee case law and its cases on associational freedoms).

the private sector, where it could be used by anti-union employers to undermine union contracts.

At the same time, these cases generally suffer from one or more major conceptual flaws. Some attempt to limit *Knight*'s reach—but end up arguing for a worker-disempowering right not to have a say in setting working conditions. Others recast unions as entities that always act under color of state law—an argument that must seem incomprehensible to the public employers sitting across the bargaining table. For these reasons, courts should continue to reject the new challenges to exclusive representation.

Must Free Speech be Harmful?

Leslie Kendrick[†]

INTRODUCTION

Must free speech be harmful? That is, must the freedom of speech protect harmful speech? Popular discourse in the United States often assumes that it must.[1] Discussions about hate speech or false speech frame harm as the price we pay for freedom. Meanwhile, several distinguished scholars have also asserted that the right of freedom of speech must include protection for harmful speech.[2] They claim that, in order to be either conceptually or normatively significant, any plausible speech right must protect harmful speech.[3] In other words, freedom of speech must include harm. If it does not, it is not doing its job.

This assertion has the distinction of being at once an old saw, a sophisticated philosophical argument, and a fairly stunning claim. A right that must encompass harmful conduct? Why would people say that harm protection is a necessary feature of a right? And are they correct?

Protection of harmful conduct is not a necessary feature of any right, including a free speech right. Considering the relationship between free speech rights and harm clarifies the structure of rights and shows that, conceptually speaking, there is no reason to conclude that free speech must protect harmful conduct in order to be meaningful. That is our choice, and one that few other cultures make, at least in such strong terms.[4] This is not to say that protection for harmful

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[1] *See, e.g.*, Garrett Epps, *Free Speech Isn't Free*, THE ATLANTIC (Feb. 7, 2014), https://www.theatlantic.com/politics/archive/2014/02/free-speech-isnt-free/283672/ [perma.cc/V7UL-73JJ].

[2] *See infra* Part I.

[3] *Id.*

[4] *Compare* Féret v. Belgium, App. No. 15615/07, Eur. Ct. H.R. (July 16, 2009), http://hudoc.echr.coe.int/eng-press?i=003-2800730-3069797 [https://perma.cc/FX88-EXTT] (holding that there was no violation of Article 10 (freedom of expression) of the European Convention on Human

conduct is never justified. It is just not inevitable in the ways commonly asserted by judges, scholars, and the citizenry. Here, I will identify the arguments made in support of the view that free speech must include harm, argue that protection for harmful conduct is not inherent in the structure of rights generally, and argue finally that special rights such as freedom of speech need not include protection for harmful conduct.

I. PERSPECTIVES ON RIGHTS AND HARM

Various important thinkers have asserted that freedom of speech must protect activity that risks causing harm to other people. In various ways, they have asserted such protection as a necessary criterion for any plausible free speech right. Some identify particular activities and conclude that any plausible free speech principle must protect them, whether because of their relationship to democratic self-governance, or to autonomy, or to some other value. Some of the identified activities involve risks of harm. For example, lawyers and scholars commonly conclude that freedom of speech must protect dangerous or incendiary political speech.[5] Such speech carries obvious risks of physical and other types of harm, risks of the kind that make other conduct regulable. Despite these risks, many stipulate that freedom of speech *must* protect incendiary political speech—not necessarily to the level of immunity, but to a higher degree than similarly risky non-speech activity. These types of arguments have a long doctrinal pedigree, back to Justice Holmes's shift from treating subversive speech like any other subversive conduct to reformulating the "clear and present" danger test to protect speech to a higher degree.[6] The result of such reasoning is that

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Rights for convicting appellant based on distributed leaflets publicly inciting discrimination and hatred) *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (prohibiting laws restricting incitement to hatred or violence unless the words or expression at issue create a serious and imminent risk of harmful conduct). *See also* Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

[5] *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) ("[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."); *see also* Mary Ellen Gale and Nadine Strossen, *"The Real ACLU,"* 1 YALE J. L. & FEMINISM, 161, 173 (1989) ("If free speech is to have meaning, it must encompass 'freedom for the thought that we hate,' freedom for the idea, opinion or expression that is unpopular, divergent, degraded, derided, dangerous, or even pornographic or obscene."); JOHN RAWLS, POLITICAL LIBERALISM 348–56 (1993) (arguing that political speech merits protection unless it poses a clear and present danger to the democratic order); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285 (2011) ("[A] decent regime of freedom of speech must provide a principled and strong form of protection for political speech and, in particular, for incendiary speech.").

[6] *Compare* Frohwerk v. United States, 249 U.S. 204 (1919), Debs v. United States, 249 U.S. 211 (1919), *and* Schenck v. United States, 249 U.S. 47 (1919), *with* Abrams v. United States, 250

some speech that carries a risk of harm—a high enough risk to justify regulation of non-speech conduct—will be protected. When that risk manifests in harm, the speaker will be insulated from liability. This is one way in which the freedom of speech can require protection of harmful conduct.

Others begin by developing conceptual criteria for a free speech right and conclude that freedom of speech *must* include protection for harmful conduct.[7] One version of this argument contends that free speech that does not protect harm is not very meaningful. For example, Professor Thomas Scanlon, in discussing immunity for harm-causing speech, says that it is "the existence of such cases which makes freedom of expression a significant doctrine."[8] Similarly, in considering whether to "accept the principle that speech may be restricted when it causes harm to others," Frederick Schauer concludes: "[y]et then what [would be] the point of a principle of free speech?"[9] On this view, if freedom of speech did not protect harmful conduct, it would not be a significant right.

Kent Greenawalt makes a similar argument and places it in the context of a larger theory of rights. Greenawalt begins with a minimal principle of liberty, which protects all harmless conduct. Within that context, he develops criteria for a free speech right:

> As far as speech is concerned, the minimal principle of liberty establishes that the government should not interfere with communication that has no potential for harm. To be significant, a principle of freedom of speech must go beyond this, positing constraints on the regulation of speech which are more robust.[10]

On this view, a free speech right that did not protect harmful conduct would not just be insignificant; it would be superfluous.

Like Greenawalt, Ronald Dworkin reasons from a general theory of rights to the conclusion that free speech must protect harmful

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U.S. 616 (1919) (Holmes, J., dissenting).

[7] *See, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 208 (1972); RONALD DWORKIN, RELIGION WITHOUT GOD 131 (2013).

[8] Scanlon, *supra* note 7, at 204.

[9] *See* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1294 (1983); *see also* Frederick Schauer, *Free Speech on Tuesdays*, 34 L. & PHIL. 119, 135 (2015) (stating that a plausible free speech right must protect harmful conduct, while reserving judgment on whether such a right can ultimately be successfully delineated); Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 652 (concluding that, if a free speech right principle exists, it necessarily entails protection for activity that causes harm).

[10] KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 10 (1989).

speech.[11] Dworkin defines free speech as a "special right," one that pertains to a limited set of activities, in contrast to a "general right" that covers all activities.[12] Mill's liberty principle, which protects all activity to the extent that it does not cause harm, is a prime example of a general liberty right.[13] Dworkin explains:

> Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a "compelling" justification. Speakers may not be censored even when what they say may well have bad consequences for other people . . . The right to free speech can be abridged only in emergencies: only to prevent, again in a phrase beloved of American lawyers, a clear and present—and, we might add, grave—danger.[14]

Dworkin's framework thus contemplates that free speech will protect harmful conduct, because only a compelling justification can support a restriction of speech, and a compelling justification generally requires something like a clear, present, and grave danger. Risks that do not meet this bar go unregulated, and protected speech therefore may cause harm to others.[15]

These scholars range in their approaches. Dworkin appears to make protection of harmful conduct an inevitable feature of a special right such as freedom of speech. The others do not suggest that a free speech right covering only harmless conduct is conceptually impossible, just that such a right would be essentially meaningless.[16] What all these claims have in common, however, is the idea that freedom of speech should protect harmful conduct. If a free speech right does not, it is either a conceptual failure or insignificant.

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[11] *See* DWORKIN, *supra* note 7, at 129–31.

[12] *Id.* at 129–30.

[13] JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS 15 (Mark Philp & Frederick Rosen, ed. 2015) ("[T]he principle [of liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.").

[14] DWORKIN, *supra* note 7, at 131–32.

[15] *Id.*

[16] *See, e.g.*, Scanlon, *supra* note 7, at 204; Schauer, *supra* note 9, at 1294.

II. ON RIGHTS AND HARM

Must rights protect harmful conduct? If so, then freedom of speech must include protection of harmful speech. The short answer is, no, rights need not protect harmful conduct. A right may exist for reasons having nothing to do with protection for harmful conduct, and limits on governmental action can constrain the government without affording direct protection for harmful conduct. A Millian general liberty right to engage in harmless conduct is an example: it expressly does not extend to harmful conduct but is a right nonetheless.[17]

Yet perhaps it is not so simple. Much depends on what "harm" means. Every right has a correlative of some kind that places limitations on other actors: a Hohfeldian claim-right correlates with a duty toward the rightsholder; an immunity correlates with a disability.[18] When the right in question is a right held against the government, the existence of the right inevitably limits the government's scope of action in some way. Perhaps it prevents the government from regulating certain conduct at all; perhaps, more modestly, it requires the government to give certain types of justifications or to withstand heightened scrutiny for its actions.[19] One could argue that any limitation on governmental action involves harm because it reduces the government's ability to achieve an interest. If this is the case, then not only do free speech rights protect harmful conduct: all rights protect harmful conduct.

I raise this possibility to set it aside. Limitations on the government's means of pursuing an interest may reduce its ability to achieve that interest. Such limitations on government, however, do not inherently count as "harms" in the sense of setbacks to interests. Thus, for example, a free speech right that protects people's ability to post political signs on their property will frustrate the government's pursuit of its interest in reducing visual clutter.[20] In this case, the freedom of speech reduces the ability of government to pursue a legitimate objective, but it does not involve harm in the sense of setbacks to interests. It seems implausible, then, to say that all rights cause harm because they limit the government's ability to pursue its objectives.

But what if any limitation on the government's ability to pursue its interests necessarily posed harm to third parties, even if indirectly? If this were so, then rights generally would cause harm, because rights

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[17] MILL, *supra* note 13, at 165.

[18] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (describing different types of rights and their correlatives).

[19] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 573 (1980) (requiring government regulations of commercial speech to pass intermediate scrutiny).

[20] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43 (1994) (invalidating residential signage ban).

would place limitations on the government, which would inevitably, though indirectly, pose harm to others. For example, Fourth Amendment rights against unreasonable search and seizure and Fifth Amendment rights against self-incrimination both limit how the government may pursue its interest in law enforcement. This could well mean that some private individuals are harmed, for example by becoming victims of someone who was not convicted. If every governmental interest ultimately worked to protect third parties from harm, then all rights would indirectly risk harm to others.

The problem is that the premise is not true: not all government interests ultimately protect third parties from harm. The government's asserted interest in reducing visual clutter is one example.[21] So are many other interests that the government has advanced in the First Amendment context: administrative interest in accurate recordkeeping,[22] interest in protecting the flag as a symbol of national unity,[23] and interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition."[24] Protecting such interests bears no necessary relation to preventing harm in the sense of setbacks to individual interests, and constraining the government's pursuit of these interests bears no necessary relation to harm creation.

Thus, harmful conduct is not a necessary feature of all rights. Even if one were to conclude, contrary to my argument above, that the limitation on pursuit of the government's interests constitutes "harm," or that all rights *do* pose indirect risks of harm to third parties, commentators' contentions about free speech are still different. Those who claim free speech must protect harmful conduct have in mind conduct that poses obvious, direct risks of harm, mostly physical harm, to individuals. The typical examples—incendiary speech,[25] false speech,[26] advocacy of law violation,[27] speech that poses risks short of a clear and present danger[28]—all contemplate risk of physical harm to other people. As Dworkin puts it, what speakers say "may well have bad consequences for other people" and yet still is protected by freedom of speech.[29] The

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[21] *See id.*; *see also* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 795 (1984); Reed v. Town of Gilbert, 576 U.S. 155, 171–72 (2015).

[22] *See* United States v. O'Brien, 391 U.S. 367, 379–80 (1968).

[23] *See* Texas v. Johnson, 491 U.S. 397, 410 (1989); United States v. Eichman, 496 U.S. 310, 314 (1990).

[24] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 288 (1984).

[25] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 888–89 (1982).

[26] *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012).

[27] *See* Brandenburg v. Ohio, 395 U.S. 444, 477 (1969).

[28] *See* Schenck v. United States, 249 U.S. 47 (1919).

[29] DWORKIN, *supra* note 7, at 131.

basic claim is that the freedom of speech protects conduct that poses direct harm to third parties and that this feature is crucial to the significance of the right.

III. ON FREE SPEECH AND HARM

When articulated in this way—that free speech must affirmatively protect conduct that poses direct and obvious risks of harm to other people—the contention starts to sound unusual. Protection of harmful conduct is not a predicate for other rights, such as voting rights, rights of sexual intimacy, or rights of religious exercise. Some of these rights, as implemented, may lead to harm, and some conceptions of them may have harm as an unavoidable incidental effect. No one, however, starts from the premise that these rights *must* protect harmful conduct or else they have no meaning. It is a curious feature of free speech rights that people regularly describe them this way.[30]

Is there something special about a free speech right that requires protection of harmful conduct in order for it to be significant? It seems not. It is possible to conceive of something properly deemed a speech right that does not protect harmful conduct and that would still be meaningful. For example, one could frame speech as a positive right, which would require the government to provide speech opportunities. A government could be obligated to provide speech opportunities for citizens without protecting their speech when it causes harm. Or imagine formulating a free speech right in a primary or secondary school setting. One valuable part of an education is for students to learn how to formulate ideas and arguments and to learn how to listen to others. A classroom might be obligated to provide these opportunities to students. At the same time, however, students might have no right to be disruptive of the educational endeavor or derogatory or cruel toward each other. Both the civic formulation and the classroom formulation involve rights properly designated as free speech rights, and those rights seem significant enough to identify and discuss. Perhaps we might think that a free speech right in civil society should go farther than this, and certainly American free speech jurisprudence does.[31] But it need not in order to be worth talking about. Indeed, many nations around the world subject free speech rights to proportionality and balancing tests that come much closer to limiting free speech with some kind of Millian

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[30] *See* Scanlon, *supra* note 7, at 208; DWORKIN, *supra* note 7, at 131.

[31] *See supra* notes 22–24 and accompanying text.

harm principle, and yet those nations still find free speech worth singling out.[32]

One argument for the harm-protecting view is that protecting harmful conduct is necessary to differentiate free speech from a general liberty right. Greenawalt, for example, contends that, in order to be significant, a free speech right must protect conduct that would otherwise not be protected by a general liberty principle.[33] For Greenawalt, this translates into protection for harmful speech. Dworkin also seems to take for granted that speech rights must afford *more* protection than general rights, and for him, like Greenawalt, this seems to translate into protection for harmful conduct.[34] Note that, if this is true, it is true of all special rights, not just speech rights: all of them would have to be differentiated from general liberty through protection of harmful conduct.

This is not true, however, for two reasons. First, even if we accept Dworkin and Greenawalt's premise that special rights have to serve some function above and beyond general liberty, that could take forms other than protection for harmful conduct. Again, a positive right is an example: an affirmative obligation to provide speech opportunities would do something beyond what a general liberty right does, without protecting harmful conduct. If it is important to Greenawalt and Dworkin that a special right do something more than a general liberty right, there are other things for it to do besides protect harmful conduct.

Second, and more importantly, special rights need not do more than general rights. If a right has a special relationship to a particular value, it may be important to single it out in order to identify that special relationship, regardless of whether the right ultimately affords additional protection. For example, one might think that certain sexual activities are not harmful—say, the decision to use contraception or to engage in fully consensual sexual activity between adults. If such activity is not harmful, then it will be protected by a general liberty right. But we might still want to recognize a special right of sexual autonomy, rather than lumping this conduct in with all the other harmless activity covered by general liberty. We might think a right of sexual autonomy should be recognized for historical or pragmatic reasons—that is, because the state has a distinctive history of attempting to regulate this

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[32] *See*, *e.g.*, Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291, 295–96 (2012) (noting that the German constitutional model, which protects fundamental freedoms but simultaneously empowers the legislature to limit it, has been exported to most European countries, as well as Israel, Canada, and South Africa).

[33] *See* GREENAWALT, *supra* note 10, at 10.

[34] *See* DWORKIN, *supra* note 7, at 130–31.

particular harmless conduct.[35] Alternatively, we might think sexual autonomy bears a special relationship to a larger underlying value—personal autonomy, self-development, or the like. For either reason, we could rightfully conclude that our taxonomy of rights should identify a special right of sexual autonomy. Recognition of such a right is appropriate, regardless of whether it protects any more conduct than would otherwise be protected. Recognition of the special right makes clear that violating that right infringes freedom in more than one way: it implicates the values underlying the general right of liberty *and* those underlying a special right of, say, sexual autonomy. Thus, regulating consensual sexual activity is wrongful in a different way from regulating, say, harmless activities such as hopscotch or handball.

We might also think about rights of religious free exercise. Imagine a view that religious observance is distinctive from other forms of activity (a commonly held view that I am simply stipulating here). Imagine a right of religious free exercise that protects religious observance, but not when a particular practice poses harm to other people. Suppose further that the state will not make positive provisions for free exercise opportunities because of establishment concerns. Incidentally, this is a fairly accurate description of American jurisprudence. Regulation that incidentally burdens religion is permitted when justified by legitimate government interests; preventing harm to third parties is an obviously legitimate governmental interest.[36] In addition, the Establishment Clause has placed limits on statutory religious accommodations that would burden third parties.[37]

Against the backdrop of a right of general liberty, this free exercise right accomplishes exactly nothing: it protects no more activity than general liberty already protects, and it imposes no additional positive obligations on the state. If, however, we think that free exercise of religion is importantly distinctive, then it deserves to be singled out for special recognition, even if that recognition does not result in additional protection. If we think that prohibiting harmless religious activity is more wrongful than, or wrongful in a different way from, prohibiting harmless activity generally—for example, that banning the wearing of a yarmulke while playing handball is wrongful in a different way from banning the playing of handball—then we have reason to recognize a

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[35] *See* Schauer, *Free Speech on Tuesdays*, *supra* note 9 (considering historical and pragmatic reasons for singling out special rights).

[36] Emp't Div. v. Smith, 494 U.S. 872, 883 (1990).

[37] *See, e.g.*, Estate of Thornton v. Caldor, 472 U.S. 703, 710–11 (1985); *see also* Micah Schwartzman, Nelson Tebbe, and Richard Schragger, *The Costs of Conscience*, 106 KY. L. J. 781, 788 (2017).

right of religious free exercise. Doing so articulates that targeting harmless religious free exercise implicates another value besides whatever value supports the right of general liberty. Regulation that targets harmless religious practice is impermissible not only because it fails the general liberty principle but also because—given the distinctiveness of religion—targeting harmless *religious* practice is a particularly wrongful thing for the government to do.

The fact that two rights protect the same activity to the same degree does not make one of the rights superfluous. The fact that harmless speech—or harmless religious exercise or sexual activity—would be protected by a general liberty right does not make the special right meaningless and unnecessary. The question is whether we have a reason to identify the activity as distinctive—to distinguish it from the other activities covered by the general right. Whether a special right is appropriate will depend upon the distinctiveness of the activity, not upon whether the special right would ultimately afford more robust protection. This approach makes clear that, even if there were no general liberty right (or other broad principle encompassing the conduct), the narrower right would still exist. This approach also pushes us to identify all the reasons we have for recognizing rights. This seems like a salutary feature for a conception of rights.[38]

IV. CONCLUSION

Must free speech protect harmful conduct? No—not in order for the right to qualify as a special right, and not for it to be significant enough to discuss. Yes, the more robust a free speech right is, the more attention it is likely to demand, but that is not the same as being significant. Free speech can be a sufficiently significant doctrine without requiring protection for harmful conduct. Deductions to the contrary are not correct.

That leaves us with the inductive approach—the conclusion of some jurists and scholars that certain forms of harmful conduct, such as

[38] A further argument might be that a special right necessarily offers further protection because it requires a higher level of scrutiny than a general right. This is not necessarily true, for the reasons I outline in Kendrick, *supra* note †, 108–09. It is possible for the requirements of both a general and a special right to be satisfied by a single justification, and in a world of perfect information, no additional scrutiny would be required to ensure that the justification was as sincere and satisfactory for the special right as for the general right. To the extent that courts impose higher scrutiny on special rights (which they do not always do), this could be a matter of institutional design in response to imperfect information. Thus, in practice, special rights might receive more scrutiny, but it is not at all clear that they conceptually *must* in the way that, say, Dworkin seems to contemplate. *See* DWORKIN, *supra* note 7, at 131.

incendiary speech, must be protected by any plausible speech right.[39] This approach does not begin with the premise that free speech must protect harmful conduct in order to be meaningful. It looks for speech activities that require protection and finds that some include harmful conduct. This is reasoning not from the structure of rights but from the particular types of speech that seem normatively worthy of protection. Some of these intuitions might bear out: the proposition that the government should not be able to deny people benefits based on their political affiliation—finally embraced by the Supreme Court after many years of struggle—may seem an important commitment, even if it does have the tendency to risk certain types of harm.[40] Other harm-causing propositions may be less defensible. The point is that these are discrete normative judgments, which should be continually questioned and defended, and which should not find refuge in general statements that free speech inevitably involves harm.

Our free speech tradition involves strong protections, including protections for various forms of harmful conduct. My point here is not to say that all of those protections are unjustified; it is simply to say that they are not inevitable. Despite our societal insistence to the contrary, a right of free speech need not include protection for harmful conduct. Nothing about the structure of rights generally compels that, and nothing about the structure of free speech rights does either. Our insistence that free speech must protect harmful conduct is a product of our weighing of speech and harm, weighing that deserves the same level of "uninhibited, robust, and wide-open" inquiry that the First Amendment prescribes for other subjects.[41]

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[39] Shiffrin, *supra* note 5, at 285.

[40] *Compare* United States v. Robel, 389 U.S. 258 (1967) (rejecting the contention that defense facility employment could be predicated on mere political affiliation) *with*, *e.g.*, Speiser v. Randall, 357 U.S. 513 (1958) (upholding denial of state tax exemption for veterans to veteran who refused to attest to political affiliation).

[41] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Uncommon Law: The Past, Present and Future of Libel Law in a Time of "Fake News" and "Enemies of the American People"

Jane E. Kirtley[†]

I. INTRODUCTION

After many years of comparative quiet, the United States is experiencing a growth in libel suits brought by both public officials and private figures. President Donald Trump has claimed that our current libel laws "are a sham and a disgrace and do not represent American values."[1] Is it time to "open up our libel laws," as he has called for?[2]

Doing away with the *New York Times v. Sullivan*[3] rule is a dictator's dream. Because government can control and manipulate information, any determination of truth or falsity that fails to recognize the fundamental right of the people to criticize government and to make their own independent interpretations is fundamentally flawed. The marketplace of ideas is imperfect, but essential to facilitate the search for truth. In fact, it is the essence of American values.

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[1] *See* Brian Naylor, *Trump Again Blasts Libel Laws, Calling Them 'A Sham'*, NPR (Jan. 10, 2018), https://www.npr.org/2018/01/10/577100238/trump-again-blasts-libel-laws-calling-them-as-a-sham [https://perma.cc/9ZLS-NVP7].

[2] *See* Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016), https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [https://perma.cc/3SSL-4F3B].

[3] 376 U.S. 254 (1964).

Should the *New York Times v. Sullivan* actual malice standard[4] be overturned, as suggested by Justice Thomas in February 2019?[5] Should states curtail the fair and accurate reporting privilege protecting accurate accounts of government actions?[6] Should the United States adopt standards of other countries around the globe that are less protective of free speech and more concerned with "truth"?[7]

Many would argue that governments have a duty to protect their citizens from "fake news."[8] But can we trust the government to define what is "true"? Recent initiatives abroad to enact laws to censor "fake news" in the wake of the COVID-19 pandemic demonstrate how problematic this can be.[9] We must be careful not to cede those determinations to a governmental entity, nor to assume that their findings on a controversial issue are the truth.

II. BACKGROUND

Until 1964, libelous speech—that is, speech that is false and defamatory—enjoyed no legal protection under the First Amendment to the U.S. Constitution.[10] Common law libel, derived from English common law,[11] permitted each state to decide for itself what the burden of proof would be. However, in 1931, the high court dipped its toe into the murky waters of defamation law, striking down a state statute that

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[4] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[5] McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring).

[6] *See, e.g.*, Larson v. Gannett Co., 940 N.W.2d 120, 125 (Minn. 2020), *reh'g denied* (Mar. 30, 2020) (concluding that "the fair and accurate reporting privilege protects news reports about statements on a matter of public concern made by law enforcement officers at an official press conference and in an official press release").

[7] *See, e.g.*, 25 P.R. Laws Ann. 3654(a), (f) (2020); Katherine Jacobsen, *Amid COVID-19, the Prognosis For Press Freedom is Dim. Here Are 10 Symptoms to Track*, COMMITTEE TO PROTECT JOURNALISTS, https://cpj.org/reports/2020/06/covid-19-here-are-10-press-freedom-symptoms-to-track/ [https://perma.cc/A2X8-3CMZ].

[8] *See infra* Part III.

[9] *See* Shibani Mahtani, *Singapore Introduced Tough Laws Against Fake News. Coronavirus Has Put Them to The Test.*, WASH. POST (Mar. 16, 2020), https://www.washingtonpost.com/world/asia_pacific/exploiting-fake-news-laws-singapore-targets-tech-firms-over-coronavirus-falsehoods/2020/03/16/a49d6aa0-5f8f-11ea-ac50-18701e14e06d_story.html [https://perma.cc/YAV6-PW9G] (including examples in Thailand, Nigeria, Indonesia, and other countries, as well as Singapore).

[10] *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 715 (1931) ("But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions.").

[11] This inheritance included the concept of seditious libel, which, during the colonial period, criminalized criticism of the Crown or its officials. A notable example was the trial of New York printer John Peter Zenger, which resulted in an early example of jury nullification, when the jurors acquitted Zenger of charges of sedition for publishing statements that criticized the colonial governor. *See generally* RICHARD KLUGER, INDELIBLE INK: THE TRIALS OF JOHN PETER ZENGER AND THE BIRTH OF AMERICA'S FREE PRESS (2016).

permitted "a malicious, scandalous and defamatory newspaper, magazine or other periodical" to be enjoined from publication.[12] The majority found that allowing government to censor allegations of official misconduct in advance of publication would undermine the central purposes of the First Amendment—specifically, public oversight and government accountability."[13]

And, indeed, it was a lawsuit predicated on accusations of official misconduct that led to the watershed case of *New York Times v. Sullivan* in 1964, at the height of the Civil Rights movement. Following publication of a full-page fundraising advertorial in *The New York Times*, headlined "*Heed Their Rising Voices*," which decried what was characterized as a "wave of terror" against African Americans and others who engaged in nonviolent protests in the American South, Montgomery, Alabama Commissioner L.B. Sullivan sued the newspaper, as well as several signatories to the advertorial, for libel.[14] Although Sullivan was not named in the publication, he claimed that a paragraph describing actions of law enforcement at a historically black college campus, including that officers had surrounded the campus and padlocked the dining hall "in an attempt to starve [the students] into submission," could be imputed to him because his duties as commissioner included supervision of the police.[15] Sullivan proved, *inter alia*, that the incident described in the advertorial had not occurred, and that there were other factual errors in the narrative as well.[16] The trial judge concluded that the false statements constituted libel per se under state law, as "tend[ing] to injure a person . . . in his reputation" or to "bring [him] into public contempt" so as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . ."[17] The jury returned a verdict of $500,000 and the Alabama Supreme Court affirmed.[18]

Before the Supreme Court of the United States, the *Times*'s counsel argued that the Alabama libel law was equivalent to the Sedition Act of 1798—a statute championed by the Federalists that punished criticism of government officials, and, according to First Amendment scholar Geoffrey Stone, was "perhaps the most grievous assault on free speech in the history of the United States."[19] Between 1798 and 1801,

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[12] *Near*, 283 U.S. at 701–702 (quoting Mason's Minn. Stat., §§ 10123-1 to 10123-3 (1927)).

[13] *See id.* at 721.

[14] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256–57 (1964).

[15] *Id.* at 258.

[16] *See id.* at 258–59.

[17] *Id.* at 267.

[18] N.Y. Times Co. v. Sullivan, 144 So. 2d 25 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964).

[19] GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 19 (2004).

approximately 25 Republican editors and writers were arrested, and 10 were ultimately tried and convicted under the statute.[20] Popular opinion was outraged, with John Quincy Adams observing that the Sedition Act had "operated like oil upon the flames."[21] After the Republicans prevailed in the contentious election of 1800, the statute was allowed to expire, and consequently was never tested in the Supreme Court.[22]

Herbert Wechsler, a Columbia law professor who represented the *Times*, invoked the Sedition Act when he contended that misstatements of fact about public officials could not be the basis for a libel judgment because that would deter legitimate commentary by citizens and the press.[23] And in his opinion for the Court, Justice William Brennan agreed:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, 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. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official 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.[24]

The ruling in *New York Times v. Sullivan* changed the shape of libel law. It was "an occasion for dancing in the streets," a sentiment attributed to First Amendment scholar Alexander Meiklejohn.[25] No longer could government officials successfully sue for defamatory statements made in the course of good faith criticism by simply claiming that the statements were false. Although the Court declined, in the same

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[20] *See id.* at 63.

[21] *Id.* at 71.

[22] *See id.* ("The Sedition Act expired on March 3, 1801, the final day of Adams's term of office."); *see also Sullivan*, 376 U.S. at 276.

[23] *See* ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 52 (2007).

[24] *Sullivan*, 376 U.S. at 279–80 (citation omitted).

[25] 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 (internal quotation marks omitted) (quoting Alexander Meiklejohn).

term, to declare unconstitutional all criminal libel laws,[26] it nevertheless held that truth must always be a defense in complaints brought by public officials.[27]

In succeeding years, the progeny of *New York Times v. Sullivan* expanded the actual malice standard to include public figures,[28] though leaving to the states to establish whatever fault standard they chose in cases brought by private figure plaintiffs, "so long as they do not impose liability without fault."[29] And the Court declared that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[30] As a consequence of these rulings, public officials faced an almost insurmountable barrier to successful libel litigation.

But things changed in the late 1980s. Punitive damages awards against the news media escalated, causing alarm among news organizations.[31] Even if successful in gaining reversal on appeal, they were likely to expend enormous sums in legal fees in the course of defending themselves. This situation, coupled with the findings of a 1987 study concluding that most libel plaintiffs sue to vindicate their reputations, rather than for the money,[32] prompted prominent scholars, judges, and free press advocates to argue for new approaches to libel law that would focus on truth or falsity, not fault.

In a 1988 *Harvard Law Review* article, Judge Pierre N. Leval, then of the Southern District of New York, advocated for creation of what he called the "no-money, no-fault" libel suit.[33] Under Leval's system, plaintiffs could sue to obtain a declaratory judgment of falsity.[34] The fault requirements of *Sullivan* and its progeny would not apply, because, Leval claimed, "the sole purpose" of the *Sullivan* standard was to protect the press from crippling monetary awards.[35] He also argued that these "no-money, no-fault" trials would be simpler, more efficient, less expensive, and would protect the media from inquiries into their news-

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[26] *See* Garrison v. Louisiana, 379 U.S. 64 (1964).

[27] *See id.* at 73.

[28] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[29] *Id.* at 347.

[30] *Id.* at 339–40.

[31] *See generally* Charles Rothfeld, *The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 19 YALE L. & POL'Y REV. 165 (2000) (discussing the trend of substantial libel damages verdicts against media defendants).

[32] Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 792 (1986)

[33] *See* Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping* Sullivan *in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

[34] *See id.* at 1288.

[35] *Id.* at 1302.

gathering practices.[36] They would provide plaintiffs with a far greater chance of vindicating their reputations, which is really what most of them want, he wrote.[37]

Also in 1988, the Libel Reform Project at Northwestern University issued the *Annenberg Proposal*.[38] Under the Annenberg model, a libel "victim" would have to request a retraction or opportunity to reply within 30 days of publication.[39] If the defendant complied, any further legal action would be barred.[40] If not, either the plaintiff or the defendant could compel any libel suit to be converted into a "no-fault, no-damages" declaratory judgment proceeding, where the only issue would be truth or falsity.[41] A traditional suit for actual damages would remain an option, but only if the defendant agreed to it.[42]

Neither of these proposals was adopted at the state level. However, in 1993, the Uniform Law Commission promulgated the Uniform Correction or Clarification of Defamation Act ("UCCDA"), making a correction or clarification request a prerequisite to a libel suit.[43] Under the UCCDA, if, after a correction or clarification was published, the case still went to trial, a prevailing plaintiff could recover only economic losses, not punitive damages.[44] As of 2018, only North Dakota, Texas, and Washington had adopted the UCCDA.[45]

The common link between these initiatives was the goal of shifting the focus of libel litigation from fault to "truth." But one problem with them is that they presume that truth is something that can be concretely determined through an adversarial proceeding. Of course, First Amendment theory, notably the "marketplace of ideas,"[46] presumes

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[36] *Id.* at 1287–1288, 1295.

[37] *Id.* at 1293.

[38] NW. UNIV., THE ANNENBERG WASHINGTON PROGRAM PROPOSAL FOR THE REFORM OF LIBEL LAW (1988). For further discussion of the proposal, see Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989).

[39] *See* Smolla & Gaertner, *supra* note 38, at 32–33.

[40] *Id.* at 33.

[41] *Id.*

[42] *Id.* at 34.

[43] *See Correction or Clarification of Defamation Act*, UNIFORM LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=6ba5d1ed-8924-48aa-81e9-1ed0f7a9f47d [https://perma.cc/234A-6RG3].

[44] *See id.*

[45] *See id.*

[46] Generally attributed to John Stuart Mills's 1859 essay, *On Liberty*, the "marketplace of ideas" has been invoked by the U.S. Supreme Court. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, Jr., J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

"that the test of the truth or acceptance of ideas depends on their competition with one another and not on the opinion of a censor, whether one provided by the government or by some other authority."[47] It is therefore troublesome when a governmental or quasi-governmental entity is tasked with determining what is "the truth."

III. TRUTH VERSUS "FAKE NEWS"

Which brings us, inevitably, to the question: if determining "truth" is the goal, what is the value of so-called "fake news"? Politicians and their supporters frequently accuse those in the mainstream media of peddling "fake news," a term President Donald Trump claimed he invented.[48] In fact, he didn't. Perhaps the most notorious use of the equivalent term, "Lüegenpresse" or "lying press," was invoked by the Nazis in the 1930s and revived by far-right anti-immigration activists in Germany in 2014 and by Trump supporters during the 2016 campaign to undermine public confidence in the mainstream media.[49] But other groups across the political spectrum have used the term as well. As one example, the left-leaning Center for Democracy & Technology's PR Watch has been "reporting on spin and disinformation since 1993"[50] with its various campaigns to "stop fake news."[51]

Although Trump did not invent the term, he has been one of the most prolific users of it. During his candidacy and since his election, he has applied the label of fake news to virtually any media—the "failing" *New York Times*, NBC, ABC, CBS, CNN, among others—he disagrees with.[52] This view is shared by many of his supporters, and, in fact, by others as well. A poll conducted by Monmouth University reported that three out of four Americans believe that the media routinely

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[47] David Schulz, *Marketplace of Ideas*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas [https://perma.cc/J2WG-HR5X] (updated by David L. Hudson 2017).

[48] Chris Cillizza, *Donald Trump Just Claimed He Invented 'Fake News'*, CNN (Oct. 26, 2017), https://www.cnn.com/2017/10/08/politics/trump-huckabee-fake/index.html [https://perma.cc/3ZDD-RBJQ].

[49] Rick Noack, *The Ugly History of 'Lügenpresse,' a Nazi Slur Shouted at a Trump Rally*, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/10/24/the-ugly-history-of-luegenpresse-a-nazi-slur-shouted-at-a-trump-rally/ [https://perma.cc/DHU6-7NGY].

[50] *See Profile on PR Watch*, INDEP. AUSTRALIA, https://independentaustralia.net/profile-on/pr-watch,530 [https://perma.cc/5CJ4-FHJQ].

[51] Diane Farsetta, *Fake TV News: Widespread and Undisclosed*, PR WATCH (Mar. 16, 2006), https://www.prwatch.org/fakenews/execsummary [https://perma.cc/W8YZ-PPKP]; *No Fake News*!, PR WATCH, https://www.prwatch.org/nofakenews [https://perma.cc/U49Y-TLZY].

[52] *See*, *e.g.*, Brett Samuels, *Trump ramps up rhetoric on media, calls press 'the enemy of the people,'* HILL (Apr. 5, 2019), https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people [https://perma.cc/M57C-JA9U].

reports fake news.[53] The phrase has become so ubiquitous that *Washington Post* columnist Margaret Sullivan has argued that it should be discarded because its original meaning—"fraudulent or misinformation meant to deceive"—has been distorted beyond recognition.[54]

Yet, the fake news label persists. Trump's inaugural "Fake News Awards," published on the Republican National Committee's website in January 2018, included several cases where news outlets had corrected themselves and apologized—actions that would not fit the traditional definition of fake news.[55] In April 2018, more than 170 television stations owned by conservative-leaning Sinclair Broadcast Group were ordered to use local anchors to produce a scripted "must-run" commentary decrying fake news.[56] Responding to criticism from others in the industry that the segment *itself* was fake news intended to deceive viewers, Trump tweeted that "The Fake News Networks, those that knowingly have a sick and biased AGENDA, are worried about the competition and quality of Sinclair Broadcast."[57]

Yet despite Trump's incendiary tweets calling "the FAKE NEWS media . . . the enemy of the American People,"[58] his actual power to take action to curtail their activities has, to date, been limited to largely unsuccessful attempts to exclude credentialed reporters from press briefings and "gaggles."[59] But as Joel Simon of the Committee to Protect

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[53] MONMOUTH UNIVERSITY POLL, NATIONAL: 'FAKE NEWS' THREAT TO MEDIA; EDITORIAL DECISIONS, OUTSIDE ACTORS AT FAULT (2018), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_040218.pdf/ [https://perma.cc/4BQE-A95B].

[54] Abby Adcock, "*Fake News" Has Lost its Meaning and Punch, Post's Margaret Sullivan Says*, NEWS LAB, https://newslab.org/fake-news-has-lost-its-meaning-and-punch-posts-margaret-sullivan-says/ [https://perma.cc/K8HX-ZV7E].

[55] Team GOP, *The Highly-Anticipated 2017 Fake News Awards*, GOP (Jan. 17, 2018), https://gop.com/the-highly-anticipated-2017-fake-news-awards/ [https://perma.cc/M8CC-KBXK].

[56] *See* David Folkenflik, *Sinclair Broadcast Group Forces Nearly 200 Station Anchors to Read Same Script*, NPR (Apr. 2, 2018), https://www.npr.org/2018/04/02/598916366/sinclair-broadcast-group-forces-nearly-200-station-anchors-to-read-same-script [https://perma.cc/6CHN-U264].

[57] Donald Trump (@realDonaldTrump), TWITTER (Apr. 3, 2018, 5:34 AM), https://twitter.com/realDonaldTrump/status/981117684489379840 [https://perma.cc/A93X-89BM]; *see also* Chris Morris, *Trump Calls Out CNN, NBC, ABC, and CBS in Wake of Sinclair's 'Fake News' Promos*, FORTUNE (Apr. 3, 2018), https://fortune.com/2018/04/03/trump-tweets-sinclair-fake-news/ [https://perma.cc/N7AC-Y662]; Paul Farhi*, As Sinclair's Sound-Alike Anchors Draw Criticism for 'Fake News' Promos, Trump Praises Broadcaster*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/lifestyle/style/as-sinclairs-sound-al . . . adcaster/2018/04/02/a1be67e8-367a-11e8-9c0a-85d477d9a226_story.html?arc404=true [https://perma.cc/HR7H-NSSM].

[58] Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 3:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065 [https://perma.cc/2NLB-ESW2]; *see also* William P. Davis, '*Enemy of the People': Trump Breaks Out This Phrase During Moments of Peak Criticism*, N.Y. TIMES (July 19, 2018), https://www.nytimes.com/2018/07/19/business/media/trump-media-enemy-of-the-people.html [https://perma.cc/3498-TWR7].

[59] *See* Sabrina Siddiqui, *Trump Press Ban: BBC, CNN and Guardian Denied Access to Briefing*, GUARDIAN (Feb. 25, 2017), https://www.theguardian.com/us-news/2017/feb/24/media-blocked-white-house-briefing-sean-spicer [https://perma.cc/W6EM-FVNG]; *see also* David Bauder, *White House Excludes CNN From Trump Session, With No Protest*, AP NEWS (Feb. 4, 2020),

Journalists observed, Trump's words provide authoritarian leaders in countries with less robust protections than the First Amendment such as Kenya, Venezuela, Somalia, Thailand, and the Philippines the ammunition to suppress opposition media, even as they spread fake video clips and stories of their own through paid commentators and bots.[60]

This legislation to curtail fake news is proliferating, often citing national security concerns or the need to stamp out misinformation about COVID-19 as justification. The Poynter Institute documents the adoption of these statutes around the world,[61] including in Singapore[62] and Albania.[63] By contrast, although Malaysia enacted the Anti-Fake News Act in April 2018, which provided that anyone convicted of creating or circulating fake news online or on social media could face imprisonment for up to six years or fines in excess of $120,000, the statute was repealed in October 2019 on the grounds that it stifled dissent.[64] The Committee to Protect Journalists also reported that between 2012 and 2019, 65 journalists around the world have been imprisoned on false-news charges; as of the end of 2019, 30 of them were still in jail.[65]

Even mature democracies struggle with the issue of fake news. On January 1, 2018, Germany announced that it would begin to enforce a law, known as NetzDG,[66] requiring social media sites to remove hate speech and fake news within 24 hours or face fines of up to €50 million.[67] In March 2018, the European Commission's High Level Group on fake

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https://apnews.com/2e437582d7fe86d1058ce6363938be3a [https://perma.cc/Z3F7-D64E].

[60] *See* Joel Simon, *Trump is Damaging Press Freedom in the U.S. and Abroad*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html [https://perma.cc/ZW78-LBF3].

[61] *See* Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions Around the World*, POYNTER, https://www.poynter.org/ifcn/anti-misinformation-actions/ [https://perma.cc/X6GL-F6KH].

[62] *See* Mahtani, *supra* note 9.

[63] *See* Armand Mero, *In Quake-Rattled Albania, Journalists Detained on Fake News Charges After Falsely Warning of Aftershocks*, VOA NEWS (Sept. 23, 2019), https://www.voanews.com/europe/quake-rattled-albania-journalists-detained-fake-news-charges-after-falsely-warning [https://perma.cc/W8JM-A6M4]; *see also* Llazar Semini, *Albanian Lawmakers Pass Fake News Laws Over Media Protests*, AP NEWS (Dec. 18, 2019), https://apnews.com/dd6a3063803a116f4ff109a90fca250a [https://perma.cc/4PDJ-GQHB].

[64] *See* Reuters Staff, *Malaysia Parliament Scraps Law Penalizing Fake News*, REUTERS (Oct. 9, 2019), https://www.reuters.com/article/us-malaysia-politics-fakenews/malaysia-parliament-scraps-law-penalizing-fake-news-idUSKBN1WO1H6 [https://perma.cc/7CKZ-Q3CQ].

[65] Miriam Berger, *There's a Worrying Rise in Journalists Being Arrested for 'Fake News' Around the World*, WASH. POST (Dec. 12, 2019), https://www.washingtonpost.com/world/2019/12/12/theres-worrying-rise-journalists-being-arrested-fake-news-around-world/ [https://perma.cc/2E5A-BDUF].

[66] Netzdurchsetzunggesetz [NetzDG][The Network Enforcement Act], Sept. 1, 2017, FED. LAW GAZETTE I at 3352 (Ger.).

[67] HEIDI TWOREK & PADDY LEERSSEN, TRANSATLANTIC WORKING GRP., AN ANALYSIS OF GERMANY'S NETZDG LAW (2019), https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf [https://perma.cc/S84P-784R].

news and online disinformation issued a report concluding that although disinformation may not necessarily be illegal, it nevertheless is harmful to democratic values.[68] Although ostensibly eschewing "any form of censorship, either public or private," it advocates greater self-regulation in the short term, with a long-range goal of developing a Code of Practices to encourage transparency, media literacy, diversity, the development of tools to "tackle" disinformation, and further research to monitor and assess the sources and impact of fake news.[69] On the other hand, also in March 2018, the Dutch Parliament voted to repudiate EUvsDisinfo.eu, a European Union website created by the East StratCom Task Force[70] in 2015 to report disinformation and fake news allegedly spread by Russian actors.[71] Its Dutch opponents characterize it as a state publication that "passes judgments whether a publication in the free media contains the correct views or not. If your publication ends up in its database, you're officially labeled by the EU as a publisher of disinformation and fake news."[72]

Meanwhile in Puerto Rico, the ACLU filed suit to challenge a pair of Puerto Rican laws, passed in 2017 and 2020, which make it a felony to raise "a false alarm in relation to" a catastrophe, or to "[t]ransmit or allow [another person] to transmit . . . through any social network or mass media, false information with the intention of creating confusion, panic, or collective public hysteria, regarding any proclamation or executive order decreeing a state of emergency or disaster or curfew."[73] Punishment could include imprisonment or a fine of up to $5,000, or both.[74]

The case arose after Governor Wanda Vázquez-Garced declared a state of emergency and issued a series of executive orders aimed at controlling the spread of COVID-19 in March 2020.[75] They included

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[68] *See* EUROPEAN COMM'N, A MULTI-DIMENSIONAL APPROACH TO DISINFORMATION 5 (2018), https://op.europa.eu/en/publication-detail/-/publication/6ef4df8b-4cea-11e8-be1d-01aa75ed71a1 [https://perma.cc/59J3-NSJL]; *see also* EUROPEAN COMM'N, FINAL REPORT OF THE HIGH LEVEL EXPERT GROUP ON FAKE NEWS AND ONLINE DISINFORMATION (2018), https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation [https://perma.cc/UJJ4-DRYZ].

[69] *See* EUROPEAN COMM'N, FINAL REPORT OF THE HIGH LEVEL EXPERT GROUP ON FAKE NEWS AND ONLINE DISINFORMATION, *supra* note 68.

[70] *See generally Questions and Answers about the East StratCom Task Force*, EUROPEAN UNION EXTERNAL ACTION, https://eeas.europa.eu/headquarters/headquarters-homepage/2116/questions-and-answers-about-east-stratcom-task-force_en [https://perma.cc/LT39-P7TP].

[71] *See* Andrew Rettman, *Dutch MPs in Plan to Shut EU Website on Russian Propaganda*, EUOBSERVER (Mar. 16, 2018), https://euobserver.com/foreign/141350 [https://perma.cc/4BZC-A5VQ].

[72] Arjen Nijeboer, *Why the EU must close EUvsDisinfo*, EU OBSERVER (Mar. 28, 2018), https://euobserver.com/opinion/141458 [https://perma.cc/P8M4-9JPF].

[73] Complaint at 1–2, Rodríguez-Cotto v. Vázquez-Garced, No. 3:20-cv-01235 (D.P.R. May 20, 2020).

[74] *Id.* at 6.

[75] *Id.*

imposition of an island-wide curfew and a variety of business restrictions.[76] According to the complaint, a minister, Pastor José Luis Rivera Santiago, was charged with disseminating false information via WhatsApp about an executive order that would close all businesses.[77] The government claimed that his speech resulted in a rush on the island's supermarkets.[78] Eventually Governor Vázquez-Garced did order the closure of businesses, which in turn resulted in another run on supermarkets.[79] At that point, the Court of San Juan ruled that the government had failed to establish probable cause to prosecute Rivera Santiago.[80]

Nevertheless, the ACLU decided to challenge the statutes. The named plaintiffs are two Puerto Rican journalists, Sandra Rodríguez and Rafelli González. Both have a history of tangling with the government. Rodríguez, a syndicated radio host, and blogger, and a former president of the Oversea Press Club, challenged Puerto Rico's criminal defamation law prior to its repeal,[81] and her reporting and commentary helped trigger protests that led to the resignation of the former Governor, Ricardo Rosselló.[82] González, an independent journalist, has reported on undercounting of the island's COVID-19 fatality rate.[83] He received thousands of threatening messages via social media and, according to the complaint, his house was broken into "under mysterious circumstances."[84] Both plaintiffs claim the statutes are so vague that their sources are discouraged from speaking to them, and that they themselves fear prosecution, even if they have multiple sources, citing the chilling effect of the prosecution of Pastor Rivera Santiago.[85]

Accordingly, the ACLU complaint alleges that the statutes violate the First Amendment as overbroad, specifically by making it a crime to share false information, but not requiring the government to demonstrate that the speaker acted with actual malice.[86] Moreover, the language in the statutes does not clearly define what types of speech are

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[76] *Id.*

[77] *Id.* at 7.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *See* Mangual v. Rotger-Sabat, 317 F.3d 45 (1st Cir. 2003). The statute was struck down in 2003. *Id.* at 69.

[82] Complaint, *supra* note 73, at 4.

[83] *Id.* at 10.

[84] *Id.*

[85] *Id.* at 8–9, 12; *see also* Dánica Coto, *ACLU Files Lawsuit Against Puerto Rico's 'Fake News' Laws*, WASH. POST (May 20, 2020) https://www.washingtonpost.com/world/the_americas/aclu-files-lawsuit-against-puerto-ricos-fake-news-laws/2020/05/20/cad15392-9b00-11ea-ad79-eef7cd734641_story.html [https://perma.cc/SWG6-Z8FE].

[86] Complaint, *supra* note 73, at 13.

criminalized. "Without a well-defined standard of criminal responsibility, law enforcement officers and factfinders are given nearly unfettered discretion to apply their own standards," the complaint alleges.[87]

These examples illustrate how problematic it can be when governmental entities become arbiters of what is true and what is fake. As the Dutch critics of EUvsDisinfo.eu argued, governments should be loath to interfere in freedom of the press because "it makes it impossible for the truth to emerge in the public debate."[88]

IV. THREATS TO THE FAIR REPORT PRIVILEGE

It is indisputable that the public must have accurate data about what its government is up to in order to engage in informed debate and for democracy to function properly. Curiously, however, in recent years, the long-standing common privilege—the "fair report" privilege,[89] which protects news organizations from libel suits when they accurately report pronouncements and actions of government—has been under fire.

For example, in February 2020, the Minnesota Supreme Court ruled in *Larson v. Gannett Co.*[90] that the fair report privilege protects fair and accurate reporting of information about matters of public concern derived from official law enforcement press conferences and press releases, therefore holding that several statements published by television station KARE 11 and the *St. Cloud Times* were not actionable.[91] However, the Court also ordered a new trial, finding that the jury lacked sufficient information to adequately determine whether the privilege could be defeated in relation to five particular statements published about the incident.[92]

The case arose following a 2012 fatal shooting of police officer Tom Decker behind a bar in Cold Spring, Minnesota.[93] Decker was in the process of performing a welfare check on the plaintiff, Ryan Larson, who lived above the bar and was reportedly suicidal.[94] Police arrested Larson soon after the shooting, and the following day, senior local and state law enforcement officials held a press conference and issued a press

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[87] *Id.* at 14.

[88] Nijeboer, *supra* note 72.

[89] *See generally* Larson v. Gannett Co., 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020).

[90] 940 N.W.2d 120 (Minn. 2020).

[91] *See id.* at 126.

[92] *Id.*

[93] *Id.*

[94] *See* Larson v. Gannett Co., Inc., 915 N.W.2d 485, 488 (Minn. Ct. App. 2018), *aff'd in part and rev'd in part*, 940 N.W.2d at 120, 127–28 (Minn. 2020).

release about the incident.[95] The press release said that a SWAT team had arrested Larson "[w]ithin an hour" of the shooting and that he "was booked into the Stearns County Jail on murder charges."[96]

Based on the law enforcement press conference and press release, numerous news organizations, including KARE 11 and the *St. Cloud Times*, reported on the fatal shooting, investigation, and arrest of Larson.[97] However, days after his arrest, Larson was freed because authorities lacked sufficient evidence to prosecute him, and he was formally eliminated as a suspect in August 2013.[98] Investigators had identified a different man, Eric Thomes, as a lead suspect in January 2013, but Thomes committed suicide when agents sought to question him.[99] Nonetheless, after the ordeal, Larson reportedly quit his job, dropped out of school and moved away so he could avoid further "embarrassment and humiliation," according to the Minneapolis *Star Tribune*.[100]

On May 28, 2015, Larson sued KARE 11 and the *St. Cloud Times*, alleging they published 11 defamatory statements about his arrest.[101] Five of the statements were attributed to law enforcement, three statements referenced accusations against Larson, and three additional statements discussed his criminal history or community members' opinions about the case.[102] In April 2014, Larson sued KSTP-TV and WCCO's TV and radio stations, each of which settled.[103]

The district court granted partial summary judgment in favor of KARE 11 and the *St. Cloud Times*, ruling in May 2016 that "to the extent the news conference and news release only communicated the fact of Mr. Larson's arrest or of the charge of crime made by the officer in making or returning his arrest, these sources are entitled to the [fair report] privilege."[104]

However, the court amended the ruling during trial in November 2016 to find that the fair report privilege did not cover the five

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[95] *Larson*, 940 N.W.2d at 126–27.

[96] *Id.* at 127 (internal quotation marks omitted).

[97] *Id.* at 127–29.

[98] *Id.* at 129.

[99] *See* Rochelle Olson, *Minnesota Supreme Court Orders New Defamation Trial for Cold Spring Man Arrested, Cleared in Police Officer's Killing*, STAR TRIB. (Feb. 26, 2020), https://www.startribune.com/supreme-court-orders-new-trial-for-cold-spring-man-who-lost-defamation-lawsuit/568218802/ [https://perma.cc/6U7A-FTGG].

[100] *See id.*

[101] *See* Larson v. Gannett Co., 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020).

[102] *See id.*

[103] Brandon Stahl, *Man Cleared in Cold Spring Killing Loses Defamation Case, Jurors Decide in Lawsuit*, STAR TRIB. (Nov. 21, 2016), https://www.startribune.com/man-cleared-in-cold-spring-killing-loses-defamation-case/402284915/ [https://perma.cc/RWQ5-U7KP].

[104] *Larson v. Gannett Co.*, No. 27-CV-15-9371, 2016 WL 7163036, at *5 (Minn. Dist. Ct. May 19, 2016).

statements attributed to law enforcement and that the three statements referencing accusations against Larson were not substantially accurate.[105] Only claims based on the last three statements at issue, which discussed Larson's criminal history and community members' opinions about the case, were dismissed because the court found they were incapable of a defamatory meaning.[106]

A jury then found that that the eight remaining statements were defamatory, but that the news organizations were immunized from liability because the statements were not false.[107] Larson moved for a new trial following the jury verdict, asserting that the jury did not properly apply the law. The district court granted Larson a new trial for all 11 statements, finding that the statements exceeded "the mere fact of arrest or charge" and were false and defamatory as a matter of law.[108]

On May 7, 2018, a three-judge panel of the Minnesota Court of Appeals reversed the district court, holding that the fair report privilege covers "fair and accurate reports of statements by law enforcement during an official press conference and in an official news release."[109] The panel held that the district court erroneously concluded that the fair report privilege did not apply, writing that Minnesota "has recognized the fair-report privilege for over a century."[110] Most recently, in 2000, the Minnesota Supreme Court held in *Moreno v. Crookston Times Printing Co.*[111] that the privilege applies to an "accurate and complete report or a fair abridgement of events that are part of the regular business of a city council meeting."[112] The Court held that the privilege was premised on two principles: a fair and accurate report of a city council meeting would "simply relay information to the reader that she would have seen or heard herself were she present at the meeting,"[113] and second, that there is an "obvious public interest in having public affairs made known to all."[114] The Court therefore concluded that the news media should be able to cover meetings when they are open to the public and

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[105] Larson v. Gannett Co., 915 N.W.2d 485, 490 (Minn. Ct. App. 2018), *review granted* (July 17, 2018), *aff'd in part, rev'd in part,* 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020), *cert. denied sub nom. Gannett Co. v. Larson*, No. 20-252, 2020 WL 6037250 (U.S. Oct. 13, 2020).

[106] *Id.*

[107] Larson v. Gannett Co. Inc., No. 27-CV-15-9371, 2016 WL 9709979, at *1 (Minn. Dist. Ct. Dec. 05, 2016).

[108] Larson v. Gannett Co., No. 27-CV-15-9371, 2017 WL 4220968, *1, 2 (Minn. Dist. Ct. June 13, 2017).

[109] Larson v. Gannett Co., 915 N.W.2d 485, 491 (Minn. Ct. App. 2018).

[110] *Id.* at 492.

[111] *See* Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000).

[112] *See id.* at 333.

[113] *Id.* at 331.

[114] *Id.* (citing Restatement (Second) of Torts § 611) (internal quotation marks omitted).

are related to matters of public interest without fear that doing so might subject them to litigation.[115]

In its February 2020 opinion in the *Larson* case, the Minnesota Supreme Court affirmed the Court of Appeals in part, reversed in part, and remanded the case back to the district court for a new trial.[116] Justice Margaret Chutich, writing for the majority, concluded that the privilege applied to seven statements the media published based on the press conference and press release, that the jury instructions and a special verdict form failed to sufficiently inform the jury of the factors that should be used to assess whether the privilege can be defeated, and that although four of the statements were not covered by the privilege, they were not actionable.[117]

Chutich began her analysis by explaining the majority's reasoning as to why the privilege should apply to the media statements based on the press conference and press release. Larson had disputed that *Moreno* supported extending the privilege to law enforcement press conferences and press releases.[118] However, Chutich found that "principles recognized in *Moreno* and the values underlying the First Amendment warrant applying the fair and accurate reporting privilege" to the facts of the case.[119] Chutich wrote that the Court was taking an "incremental approach" in expanding the privilege, holding only that it protects "news reports that accurately and fairly summarize statements about a matter of public concern made by law enforcement officers during an official press conference and in an official news release."[120]

First, Chutich found that the press conference and press releases were public.[121] Larson had argued that the press conference was not public because only invited journalists were allowed to attend, and the public was not provided with advance notice.[122] However, the majority rejected this argument, concluding that such a view is "far too narrow" for when proceedings can be deemed public.[123] "The clear purpose of the press conference was to convey information to the community, and the community was able to view the press conference live on television or through the subsequent media coverage," Chutich wrote.[124] She further held that the press must be provided with "some leeway in its depiction

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[115] *See id.* at 333.

[116] Larson v. Gannett Co., 940 N.W.2d 120 (Minn. 2020), *reh'g denied* (Mar. 30, 2020).

[117] *Id.*

[118] *Id.* at 132.

[119] *Id.*

[120] *Id.* at 133.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* at 133–34.

and reporting of public events."[125] Chutich wrote, "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations."[126]

Second, Chutich concluded that the press conference and press release were a matter of public concern. "The citizens of Cold Spring and surrounding communities had a great need to be informed about matters affecting their safety and their ability to go about their daily activities without fear," she wrote.[127] "And under some circumstances, such as when a suspected criminal remains at large, it is important for the public to be so informed and for the government to be able to caution the public and solicit pertinent information."[128] Furthermore, Chutich ruled that reporting such information advances the "key values of transparency and accountability," namely facilitating communication between officials and the public, but also allowing the public to evaluate the officials' actions.[129]

Third, Chutich found that reporting about the press conference and press release were covered by the privilege as an official action or proceeding because they were organized by senior officials of law enforcement agencies.[130]

The majority also rejected Larson's argument that extending the privilege to police press conferences and press releases would prejudice juries. Although Chutich recognized that there can be a tension between press freedom and fair trials, she said that because of the strong public interest in fair and accurate reporting about matters of public interest derived from public proceedings, it would not be appropriate to extend ethical rules prohibiting lawyers from making public statements to non-lawyer public officials.[131] The majority also said changes to *voir dire* or moving the venue could also be used to find an unbiased jury.[132]

Finally, Chutich explained that a report is fair and accurate when it "simply relay[s] information to the reader that she would have seen or heard herself were she present" at the official proceeding.[133] However, Chutich added that because the district court erroneously held

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[125] *Id.* at 134.

[126] *Id.* (citing Cox Broad. Corp. v. Cohn 420 U.S. 469, 491–92 (1975)).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 135.

[131] *Id.* at 138.

[132] *Id.*

[133] *Id.* at 139 (citing Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 331 (Minn. 2000)) (internal quotation marks omitted).

that the privilege did not apply, the district court did not tell the jury how to assess whether the privilege has been defeated.[134] Therefore, the district court's jury instructions were not adequate because they focused only on whether the statements were substantially accurate and did not assess fairness.[135] A report may be unfair if it omits or misplaces information or adds context that changes the meaning of the statements in a material way, she wrote.[136]

Thus, the majority ordered a new trial to decide whether the privilege can apply to five statements at issue.[137] KARE 11 published four statements: "Police say that man—identified as 34-year-old Ryan Larson—ambushed officer Decker and shot him twice—killing him"; "Investigators say 34-year-old Ryan Larson ambushed the officer, shooting him twice. Larson is in custody"; "He [Officer Decker] was the good guy last night going to check on someone who needed help. That someone was 34-year-old Ryan Larson who investigators say opened fire on Officer Tom Decker for no reason anyone can fathom"; and "Investigators believe he fired two shots into Cold Spring Police Officer Tom Decker, causing his death."[138] The *St. Cloud Times* published the fifth statement: "Police say Larson is responsible for the shooting death of Cold Spring-Richmond Police Officer Tom Decker."[139]

Regarding the remaining statements, Chutich concluded that two—"Ryan Larson, the man accused of killing Officer Decker, could be charged as early as Monday," and "Man faces murder charge"—were fair and accurate as a matter of law.[140] Chutich held that four additional statements were not actionable because they were not capable of a defamatory meaning, were opinion, or were true.[141]

In an opinion concurring in part and dissenting in part, Justice G. Barry Anderson, joined by Chief Justice Lorie S. Gildea, agreed with the majority's conclusion that four media statements were not actionable.[142] However, he disagreed with the rest of the majority's decision, writing that the Court "tip[ped] [the] balance too far . . . in favor of the press, effectively immunizing the press from liability for falsely accusing a private citizen of murder."[143]

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[134] *Id.* at 141–42.
[135] *Id.* at 142.
[136] *Id.*
[137] *Id.* at 144.
[138] *Id.* at 127–28, 129.
[139] *Id.* at 129.
[140] *Id.* at 145.
[141] *Id.* at 147.
[142] *Id.* at 148 n.1 (Anderson, J. concurring in part, dissenting in part).
[143] *Id.* at 148.

Anderson first argued that the majority's holding made the fair and accurate report privilege "expansive and limitless," and that the privilege should not apply to a law enforcement press conference and press release.[144] He observed that the Minnesota Constitution entitles residents to a specific remedy for reputational harm.[145] Furthermore, Anderson concluded that expanding the privilege "is neither consistent with the history of defamation law nor wise under our existing jurisprudence."[146] He questioned why the press conference and press release would be considered "official" for purposes of the privilege.[147]

Anderson criticized the majority's holding that reporting about the press conference and press release were covered by the privilege as "an official action or proceeding" because the conference and release were organized by senior officials of law enforcement agencies.[148] However, he argued that "[u]nder that logic, the media has immunity to report on any press conference held by any government employee and the scope of the fair and accurate reporting privilege is effectively limitless,"[149] adding that "[b]ecause of the court's broad rule, any government official or employee will be able to call a press conference or disseminate a press release that defames private individuals and the press, with impunity, will be able to widely circulate that defamation."[150] Such immunity, he wrote, contradicts the Court's own precedent and the Restatement (Second) of Torts.[151]

Moreover, Anderson questioned the majority's invocation of the First Amendment. Its "values and principles," he wrote, "have little to do with the facts here."[152] He found that the case was not about government misconduct or defamation of a government employee, but instead concern[ed] "a private citizen who was falsely accused by certain media representatives of shooting and killing a police officer."[153] Although acknowledging that the murder of a police officer and the expenditure of public money to investigate such a crime are of public concern, he concluded that the identity of someone who is solely the target of a police investigation "cannot be said to be of sufficient public concern to

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[144] *Id.* at 149.

[145] *Id.* ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character . . . .") (citing MINN. CONST. Art. 1, § 8).

[146] *Id.* at 150.

[147] *Id.* at 151 n.4.

[148] *Id.*

[149] *Id.* at 151.

[150] *Id.*

[151] *Id.* (citing Restatement (Second) of Torts § 611 (1977)).

[152] *Id.* at 153.

[153] *Id.*

warrant the application of the immunity the media seeks here."[154] As such, he would find that eight of the media statements were false and would remand back to the district court to determine the negligence of KARE 11 and the *St. Cloud Times*, as well as damages.[155]

This case is illustrative of another thorny aspect of the "truth" problem: is information "true," simply because the government reports it? Is it "reckless" for the press to report without independently verifying what is said? The answer may be different, depending upon whether the question is considered from a legal or ethical perspective. As reporter Bob Collins wrote in a 2014 post on his blog *NewsCut*, a Minnesota Public Radio (MPR) hosted opinion blog, "There was never any real evidence against Larson, but that didn't stop reporters from racing to show his mug shot and name him as a suspect only on the strength of what police said."[156] He added, "'We just reported what the cops said' is a solid First Amendment defense in cases like this. But cases like this should remind all of us that we should be better and more careful. Our job isn't to be stenographers. It's to get the story right."[157]

V. ACTUAL MALICE REDUX

An explosion of public figure libel cases has roiled the press in recent months, providing an opportunity for courts to reexamine the actual malice standard. Litigants have included Sarah Palin,[158] Joe Arpaio,[159] Harvard law professor and former presidential candidate Lawrence Lessig,[160] and many others—all public figures who would be required to prove knowledge of falsity or reckless disregard of the truth on the part of the publisher. Not least among these is President Donald Trump, whose reelection campaign has sued, among others, *The New*

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[154] *Id.*

[155] *Id.* at 155–56.

[156] Bob Collins, *Ryan Larson Case Shows Damage of Reporting 'Just the Facts'*, MPR NEWS (Apr. 29, 2014), https://blogs.mprnews.org/newscut/2014/04/ryan-larson-case-of-reporting-just-the-facts/ [https://perma.cc/T82Z-E4G6].

[157] *Id.*

[158] *See* Palin v. N.Y. Times Co., 940 F.3d 804 (2d Cir. 2019).

[159] *See* Arpaio v. Zucker, 414 F. Supp. 3d 84 (D.D.C. 2019); *see also* Jessica Campisi, *Judge Tosses Out Joe Arpaio's $300M Defamation Lawsuit Against CNN, Other Media Outlets*, HILL (Nov. 1, 2019), https://thehill.com/regulation/court-battles/468562-federal-judge-tosses-joe-arpaios-300m-defamation-lawsuit-against-cnn [https://perma.cc/AN6C-5DMQ].

[160] *See* Lessig v. N.Y. Times Co., No. 1:20-cv-10060-NMG, 2020 WL 203334 (D. Mass Jan. 13, 2020). On April 13, 2020, Reuters reported that Lessig had withdrawn his lawsuit. *See* Jonathan Stempel, *Harvard Professor Withdraws NY Times Defamation Lawsuit Over Jeffrey Epstein Story*, REUTERS (Apr. 13, 2020), https://www.reuters.com/article/people-jeffrey-epstein-new-york-times-la/harvard-professor-withdraws-ny-times-defamation-lawsuit-over-jeffrey-epstein-story-idUSL2N2C10ZN [https://perma.cc/3BYG-K4YK].

York Times.[161] As media attorney Theodore Boutrous observed, "The lawsuit is a transparent misuse of the judicial branch as a political and fundraising stunt. The lawsuit also plainly aims to chill freedom of speech and freedom of the press when it comes to Trump."[162]

But even before his election, Trump had complained that libel law is stacked against the rich and powerful. As he told the *Washington Post* editorial board in March 2016, "I want to make it more fair from the side where I am, because things are said about me that are so egregious and wrong, and right now according to the libel laws I can do almost nothing about it."[163] And it appears he may have an ally in Associate Justice Clarence Thomas. In a concurring opinion filed in *McKee v. Cosby*[164] in February 2019, Thomas called for the Court to revisit the actual malice standard.[165]

In December 2014, petitioner Kathrine McKee accused actor and comedian Bill Cosby of sexually assaulting her in the 1970s, one of many #MeToo cases that surfaced during that time.[166] She alleged that Cosby's attorney responded by writing and leaking a letter that deliberately distorted her personal background in order to "damage her reputation for truthfulness and honesty, and further to embarrass, harass, humiliate, intimidate, and shame [her]."[167]

On October 18, 2017, the U.S. Court of Appeals for the First Circuit upheld the district court's decision to grant Cosby's motion to dismiss, finding that McKee was a public figure and could not prove actual malice.[168] On February 19, 2019, the Supreme Court denied *certiorari* in the case.[169]

In his concurring opinion, Thomas wrote that although he agreed with the Court's decision to deny *certiorari* in the case, he also called for the high court, in an appropriate case, to reconsider the actual

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[161] *See* Donald J. Trump For President, Inc. v. N.Y. Times Co., No. 152099/2020, 2020 WL 962293 (N.Y. Sup. Feb. 26, 2020).

[162] Theodore J. Boutrous Jr., *Why Trump's Frivolous Libel Lawsuit Against the New York Times is Dangerous*, WASH. POST (Feb. 29, 2020), https://www.washingtonpost.com/opinions/2020/02/29/why-trumps-frivolous-libel-lawsuit-against-new-york-times-is-dangerous/ [https://perma.cc/E5FH-D46].

[163] Post Opinions Staff, *A Transcript of Donald Trump's Meeting with The Washington Post Editorial Board*, WASH. POST (Mar. 21, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/03/21/a-transcript-of-donald-trumps-meeting-with-the-washington-post-editorial-board/ [https://perma.cc/M7VZ-43SM].

[164] 139 S. Ct. 675 (2019).

[165] *See* McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring).

[166] *See id.* at 675.

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

[168] *See* McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017).

[169] *See McKee*, 139 S. Ct. 675. (Thomas, J., concurring).

malice standard.[170] He contended that *Sullivan* and subsequent decisions extending the standard were "policy-driven decisions masquerading as constitutional law."[171]

He continued, "[t]he states are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm," adding that "[t]here appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment."[172]

Part of Thomas's disquiet seems to be based on concerns about recourse for individuals who are not obviously classified as public figures but are thrust into the public eye as a result of their involvement in matters of public concern.[173] The #MeToo complainants, like those in *McKee*, are one such group. But perhaps the poster child for this dilemma is Nicholas Sandmann, a Covington Catholic High School student who became the subject of a viral video involving an alleged confrontation with a Native American activist Nathan Phillips.[174]

The litigation stemmed from reporting about an incident on January 18, 2019, when numerous news organizations and social media accounts circulated photos and videos of a confrontation between Sandmann and Phillips during two separate rallies taking place at the National Mall in Washington, D.C.[175] Sandmann had traveled to Washington, D.C. from a suburb of Cincinnati to participate in a march on the National Mall opposing abortion.[176] As the students were waiting for a bus to pick them up at the Lincoln Memorial, they were approached by Phillips and other participants of the Indigenous Peoples March.[177] Many of the students, including Sandmann, were wearing "Make America Great Again" hats.[178] Early reporting about the incident

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[170] *Id.* at 676.

[171] *Id.*

[172] *Id.* at 682.

[173] *See id.* at 675–76.

[174] *See* Cameron Knight, *Nick Sandmann and CovCath: It's a Year Later. Where Do Things Stand, and What Have We Learned?*, CINCINNATI ENQUIRER (Jan. 23, 2020), https://www.cincinnati.com/story/news/crime/crime-and-courts/2020/01/23/nick-sandmann-and-covcath-its-year-later-where-things-stand-now/4465864002/ [https://perma.cc/HAM4-R7PN].

[175] *See* Sarah Brookbank, *Analysis: Breaking Down the Full Video with Covington Catholic Students*, USA TODAY (Jan. 22, 2019), https://www.usatoday.com/story/news/nation/2019/01/22/covington-catholic-analyzing-video-incident-indigenous-peoples-march/2644511002/ [https://perma.cc/MYU8-RTSW].

[176] *See id.*

[177] *See* Michael E. Miller, *Viral Standoff Between a Tribal Elder and a High Schooler Is More Complicated Than It First Seemed*, WASH. POST (Jan. 20, 2019), https://www.washingtonpost.com/local/social-issues/picture-of-the-conflict-on-the-mall-comes-into-clearer-focus/2019/01/20/c078f092-1ceb-11e9-9145-3f74070bbdb9_story.html [https://perma.cc/EB3Q-D7H].

[178] *See* Brookbank, *supra* note 175.

alleged that Sandmann was blocking Phillips as Phillips chanted and beat a drum.[179] However, Sandmann later disputed that characterization and said he was not trying to interfere with Phillips's movements.[180]

On February 19, 2019, Sandmann sued *The Washington Post*, alleging that video the news organization had posted of the incident was "selectively edited" in order to show Sandmann as the aggressor and that "the *Post* actively, negligently and recklessly participated in making the [video] go viral on social media," without investigating the validity of the video or the Twitter account.[181] The complaint further asserted that the *Post* ignored journalistic standards when interpreting the incident.[182] Media experts opined that Sandmann would face challenges in winning the case.[183]

On March 12, 2019, the Sandmann family filed a similar lawsuit against CNN, making largely the same claims as the complaint against the *Post*.[184] The complaint asserted that CNN would have known its reporting of the incident contained false accusations against Sandmann if it had "undertaken any reasonable efforts to verify their accuracy before publication."[185] The complaint also claimed that CNN sought to advance an anti-Trump agenda.[186] "Contrary to its 'Facts First' public relations ploy, CNN ignored the facts and put its anti-Trump agenda first in waging a 7-day media campaign of false, vicious attacks against Nicholas."[187]

The complaint claimed that Sandmann was defamed in four CNN television broadcasts and nine online articles published on the CNN website, pointing particularly to claims that Sandmann and his classmates acted with a "mob mentality," "looked like they were going to lynch" other protestors, and were "racist."[188] The lawsuit sought $75

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[179] *See* Knight, *supra* note 172.

[180] *Id.*

[181] Complaint at 10, Sandmann v. WP Co. LLC, 401 F. Supp. 3d 781 (E.D. Ky. 2019) (No. 19-CV-19 WOB-CJS).

[182] *See id.*

[183] Max Londberg, *Nick Sandmann of CovCath May Face Challenges in Proving Defamation, Experts Say*, CINCINNATI ENQUIRER (Feb. 11, 2019), https://www.cincinnati.com/story/news/2019/02/11/nick-sandmann-covcath-lacks-obvious-defamation-claim-experts-say/2757343002/ [https://perma.cc/N79V-WLXM].

[184] *See* Complaint, Sandmann v. Cable News Network, Inc., No. 2:19-cv-00031-DLB-CJS (E.D. Ky. Mar. 12, 2019).

[185] *Id.* at 4.

[186] *Id.* at 5.

[187] *Id.* at 2.

[188] *Id.* at 3.

million in compensatory damages and $200 million in punitive damages.[189]

On July 26, 2019, federal District Judge William O. Bertelsman dismissed the complaint against the *Post* "in its entirety."[190] He held that several of the alleged defamatory statements by the *Post* were "protected opinion" under the First Amendment.[191] He also found that other alleged defamatory statements were not "about" or "concerning" Sandmann, or did not constitute defamation per se, meaning statements that accuse an individual of crimes or immoral acts and are presumed to be harmful.[192]

However, on October 28, 2019, Bertelsman partially reinstated the suit against the *Post* and wrote that he would allow the plaintiffs to begin discovery based on three statements in the *Post*'s coverage.[193] Although Bertelsman had previously found that it was Phillips's opinion that he was being blocked and not allowed to retreat, and that he had conveyed those beliefs to the newspaper, he ruled that this "should . . . be the subject of proof."[194] Bertelsman wrote, "Suffice to say that the Court has given this matter careful review and concludes that 'justice requires' that discovery be had regarding these statements and their context. The Court will then consider them anew on summary judgment."[195]

Meanwhile, on November 21, 2019, Bertelsman similarly ruled that a separate, $275 million libel lawsuit the Sandmann family filed against NBC Universal could move forward.[196] Bertelsman wrote, "[T]he court finds that the statements that plaintiff 'blocked' Phillips or did not allow him to retreat, if false, meet the test of being libelous per se . . ."[197]

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[189] *Id.* at 6–7.

[190] Sandman v. WP Co. LLC, 401 F. Supp. 3d 781, 797 (E.D. Ky. 2019).

[191] *Id.* at 792.

[192] *Id.* at 791–93; *see also* Richard Leiby, *Judge Dismisses Libel Suit Against Washington Post Brought by Covington Catholic High School Student*, WASH. POST (July 26, 2019), https://www.washingtonpost.com/lifestyle/style/judge-dismisses-libel-suit-against-washington-post-brought-by-covington-catholic-high-school-student/2019/07/26/d02fd6ce-afd3-11e9-8e77-03b30bc29f64_story.html [https://perma.cc/RVK6-6J7Z].

[193] Paul Farhi, *Federal Judge Reinstates Libel Lawsuit Filed by Covington Catholic Teen Against Washington Post*, WASH. POST (Oct. 28, 2019), https://www.washingtonpost.com/lifestyle/style/federal-judge-reinstates-libel-lawsuit-filed-by-covington-catholic-teen-against-washington-post/2019/10/28/30155c52-f9ae-11e9-ac8c-8eced29ca6ef_story.html [https://perma.cc/B3XC-2J].

[194] *Id.*

[195] *Id.*

[196] *See* Adrian Mojica, *Judge Rules Kentucky Student's Lawsuit Against NBCUniversal Can Proceed*, FOX17 (Nov. 25, 2019), https://fox17.com/news/local/judge-rules-kentucky-students-lawsuit-against-nbcuniversal-can-proceed [https://perma.cc/8Y8S-NAR7].

[197] *See* Valerie Richardson, *Covington Catholic teen's $275 million lawsuit against NBCUniversal can proceed, judge rules*, WASH. TIMES (Nov. 21, 2019), https://www.washingtontimes.com/

On January 7, 2020, CNN Business reported that the media outlet had reached a settlement with Sandmann, though it did not provide the details of the settlement.[198] However, the outlet noted that the settlement would "allow CNN to avoid a lengthy and potentially unpredictable trial."[199] In July 2020, the *Washington Post* reported that the newspaper had also settled the Sandmanns' lawsuit, quoting one of their attorneys who stated that the plaintiffs had agreed to end the litigation "because the Post was quick to publish the whole truth – through its follow-up coverage and editor's notes."[200]

In early March 2020, Sandmann filed lawsuits against five additional defendants in the U.S. District Court for the Eastern District of Kentucky, seeking $450 million in total, including $195 million from Gannett, which publishes *USA Today*, the *Cincinnati Enquirer*, and numerous other local newspapers; $95 million from ABC News; $65 million from *The New York Times*; $60 million from CBS News; and $35 million from *Rolling Stone* magazine.[201] The complaints identified multiple articles and social media posts by Gannett and ABC News as allegedly containing libelous material.

A critical question as the cases proceed will be determining whether Sandmann is a public figure and therefore obliged to prove actual malice. Opinion on this is divided, with some arguing that he is, at most, an involuntary public figure who found himself caught up in a controversy unrelated to the rally he had traveled to attend.[202] As the Supreme Court observed: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[203]

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news/2019/nov/21/nick-sandmann-covington-catholic-teen-nbcuniversal/ [https://perma.cc/58YZ-6Z4U].

[198] Oliver Darcy, *CNN Settles Lawsuit with Nick Sandmann Stemming from Viral Video Controversy*, CNN BUS. (Jan. 7, 2020), https://www.cnn.com/2020/01/07/media/cnn-settles-lawsuit-viral-video/index.html [https://perma.cc/JV2B-LRWQ].

[199] *Id.*

[200] Paul Farhi, *Washington Post settles lawsuit with family of Kentucky teenager*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/lifestyle/style/washington-post-settles-lawsuit-with-family-of-kentucky-teenager/2020/07/24/ae42144c-cdbd-11ea-b0e3-d55bda07d66a_story.html [https://perma.cc/GE8Y-J3RR].

[201] *See* Sandmann v. N.Y. Times Co., No. 20-cv-23-WOB-CJS, 2020 WL 1022600 (E.D. Ky. Mar. 2, 2020); Sandmann v. CBS News, Inc., No. 20-cv-24-WOB-CJS, 2020 WL 1022675 (E.D. Ky. Mar. 2, 2020); Sandmann v. ABC News, Inc., No. 20-cv-25-WOB-CJS, 2020 WL 1022677 (E.D. Ky. Mar. 2, 2020); Sandmann v. Gannett Co., No. 20-cv-26-WOB-CJS, 2020 WL 1022678 (E.D. Ky. Mar. 2, 2020); Sandmann v. Rolling Stone, LLC., No. 20-cv-00027-WOB-CJS, 2020 WL 1022676 (E.D. Ky. Mar. 2, 2020).

[202] *See* MLRC MediaLawLetter, *Hot Topics Roundtable:* Sandmann v. The Washington Post, March 2019.

[203] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 n.23 (1974).

But regardless of his status as a public figure, Sandmann's claims for punitive damages would need to be supported by proof of actual malice. In his case, much of the allegedly libelous material he complains of may be otherwise protected, such as by the opinion or fair comment privileges. But ultimately, they constitute reporting or commentary that reflects badly on Sandmann, and that he does not like, and which he and his supporters undoubtedly consider to be "fake news."[204]

VI. WHO DECIDES: COVID-19 AND MISINFORMATION

Which brings us back to the core question of who will determine what is true, and what is false? The answer to that question becomes even more critical in the wake of the COVID-19 pandemic, where disinformation and fake news abounds. In a March 8, 2020 story, *The New York Times* reported that misinformation and conspiracy theories about the coronavirus "ha[d] spread across the world" prompting different efforts by social media and technology companies "to prevent its dissemination."[205]

Public Knowledge, a nonprofit organization promoting freedom of expression and access to information online, listed several efforts by Facebook to address false information on its platform related to the virus, including partnering with the "International Fact-Checking Network (IFCN) to support the fact-checking community by broadening the #CoronaVirusFacts Alliance, the COVID-19 related misinformation effort, with a budget of $1 million in grants."[206]

Facebook announced on April 7, 2020 that it was investing an additional $100 million into the "news industry," including "$25 million in emergency grant funding for local news through the Facebook Journalism Project, and $75 million in additional marketing spend to move money over to news organizations around the world."[207] It also temporarily banned ads and listings for medical masks, hand sanitizer, surface disinfecting wipes, and COVID-19 testing kits.[208]

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[204] Barry Richards, *Sandmann Defeats Fake News CNN*, 1420 WBSM (Jan. 8, 2020), https://wbsm.com/sandmann-defeats-fake-news-cnn-opinion/ [https://perma.cc/UG35-X4XN].

[205] Sheera Frenkel, Davey Alba & Raymond Zhong, *Surge of Virus Misinformation Stumps Facebook and Twitter*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/03/08/technology/coronavirus-misinformation-social-media.html [https://perma.cc/57HF-KUNT].

[206] Lisa Macpherson, *How Are Platforms Responding to This Pandemic?*, PUBLIC KNOWLEDGE (May 27, 2020), https://misinfotrackingreport.com/ [https://perma.cc/BXK8-QE7Z].

[207] *The Facebook Journalism Project COVID-19 Local News Relief Fund*, FACEBOOK, https://www.facebook.com/journalismproject/programs/grants/coronavirus-local-news-relief-fund [https://perma.cc/R2SV-P5VC].

[208] Kim Lyons, *Facebook Temporarily Bans Ads for Medical Face Masks to Prevent Coronavirus Exploitation*, VERGE (Mar. 7, 2020), https://www.theverge.com/2020/3/7/21169109/facebook-instagram-bans-ads-face-masks-coronavirus [https://perma.cc/B558-QBG6].

For its part, Google also took several actions to address COVID-19 misinformation, including, like Facebook, blocking all ads "capitalizing on the coronavirus," according to Public Knowledge. Google also pledged $6.5 million to fund fact-checkers, news organizations, and others to improve research and reporting on the virus to help curtail the spread of misinformation related to COVID-19.[209]

Twitter also announced that it would remove tweets about the coronavirus that could cause a "direct risk to people's health or well-being."[210] The company claimed that it was broadening its guidance on "unverified claims that have the potential to incite people to action, could lead to the destruction or damage of critical infrastructure, or cause widespread panic/social unrest," which were "considered a violation of our policies," and that it would begin placing labels and warning messages on tweets containing disputed or misleading information related to COVID-19.[211]

However, the issue is complicated when government officials are themselves spreading misinformation.[212] For example, although Facebook CEO Mark Zuckerberg has stated that promoting bleach as a cure for COVID-19 constituted "misinformation that has imminent risk of danger," Facebook, as well as several other social media sites, including Twitter, declined to remove comments by President Donald Trump on April 24 suggesting that disinfectants and ultraviolet light were possible treatments for the virus.[213]

The New York Times reported that although Facebook, Twitter, and YouTube declined to remove the statements because President Trump "did not specifically direct people to pursue the unproven treatments," his comments nevertheless "led to a mushrooming of other posts, videos and comments about false virus cures with UV lights and disinfectants that the companies have largely left up."[214] The *Times*

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[209] Asian News International, *COVID-19: Google Pledges USD 6.5 Million to Fight Misinformation*, BUS. STANDARD, https://www.business-standard.com/article/news-ani/covid-19-google-pledges-usd-6-5-million-to-fight-misinformation-120040201617_1.html [https://perma.cc/GTT5-ZWML] (Updated Apr. 2, 2020).

[210] Bobby Allyn, *Twitter Now Labels 'Potentially Harmful' Coronavirus Tweets*, NPR (May 11, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/05/11/853886052/twitter-to-label-potentially-harmful-coronavirus-tweets [https://perma.cc/MLN7-CS69].

[211] *Coronavirus: Staying Safe and Informed on Twitter*, TWITTER (Apr. 3, 2020), https://blog.twitter.com/en_us/topics/company/2020/covid-19.html [https://perma.cc/4Z95-VG9Q].

[212] Aaron Blake, *Twitter Removes David Clarke's Tweets as He and Other Trump Allies Sow Coronavirus Conspiracy Theories and Doubts*, WASH. POST (Mar. 16, 2020), https://www.washingtonpost.com/politics/2020/03/16/twitter-takes-down-david-clarkes-tweets-he-other-trump-allies-seed-coronavius-conspiracy-theories-doubt/ [https://perma.cc/NX4W-9JX3].

[213] Sheera Frenkel & Davey Alba, *Trump's Disinfectant Talk Trips Up Sites' Vows Against Misinformation*, N.Y. TIMES (Apr. 30, 2020), https://www.nytimes.com/2020/04/30/technology/trump-coronavirus-social-media.html [https://perma.cc/CSC8-CG7K].

[214] *Id.*

found "780 Facebook groups, 290 Facebook pages, nine Instagram accounts and thousands of tweets pushing UV light therapies that were posted after Mr. Trump's comments and that remained on the sites . . . . Only a few of the posts have been taken down."[215] The *Times* also found "more than 45,000 tweets discussing bleach and UV light cures for the coronavirus that stemmed from the president's comments. Many of the posts said Mr. Trump was right about his suggested treatments."[216] Renee DiResta, a technical research manager at the Stanford Internet Observatory, told the *Times* that most tech companies crafted policies addressing misinformation "with the expectation that there would be a competent government and reputable health authority to point to," and therefore were unprepared to handle false information coming from the White House.[217]

VII. CONCLUSION

And indeed, what are the media—or for that matter, the public—to do in the face of such false information? Ironically, the fair report privilege, for the most part, will protect the press when it repeats even patently untrue government pronouncements. Yet if they choose to critically but accurately report on controversial actions of public officials or figures, they are vulnerable to lawsuits. That vulnerability will only increase if the actual malice standard is modified or eliminated.

Writing in *The Federalist* in March 2016, Political Editor John Daniel Davidson wrote that then-candidate Trump's musings about "open[ing] up the libel laws" "should alarm all Americans who care about freedom of speech and freedom of the press." He continued:

> Does [Trump] care about freedom of speech and freedom of the press, or understand why those things are sacrosanct in American public life? Freedom of speech is a rare thing, after all. It's one of the big differences between the United States and a place like Cuba . . . . Cuba has no freedom of the press—or rule of law. Libel is whatever the regime says it is. Does Trump realize the slippery slope in front of him?[218]

That is the slippery slope in front of all of us. Presuming that the government is operating in good faith is a prerequisite for civil society. But

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] John D. Davidson, *Donald Trump Doesn't Understand Libel Laws*, FEDERALIST (Mar. 22, 2016), https://thefederalist.com/2016/03/22/donald-trump-doesnt-understand-libel-laws/ [https://perma.cc/6E8R-ZQFD].

that trust must be earned and is always subject to independent verification. Allowing the government to arbitrate and determine what is true and what is false undercuts the essential teaching of *New York Times v. Sullivan*: that without the actual malice standard, "would-be critics of official conduct may be deterred from voicing their criticism, 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."[219]

There is no question that the defense of libel suits can be very costly, and that news organizations, facing significant financial challenges of their own, may well be deterred from investigative reporting if they fear that crippling legal expenses, or even bankruptcy, may follow.[220] But the true cost of libel suits, and of fake news legislation, is the loss of individual autonomy. It undermines the right of citizens to seek and find truth for themselves, without fear of retaliation or censorship. The marketplace of ideas is imperfect, but essential to facilitate that search. Eliminating it would imperil nothing less than democracy itself.

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[219] N.Y. Times Co. v. United States, 376 U.S. 254, 279 (1964).

[220] *See, e.g.*, Christine Hauser, *ABC's 'Pink Slime' Report Tied to $177 Million in Settlement Costs*, N.Y. TIMES (Aug. 10, 2017), https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html [https://perma.cc/EE6C-GRH6]; *see also* Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html [https://perma.cc/R4WA-FPDF].

The First Amendment as a Procrustean Bed?: On How and Why Bright Line First Amendment Tests Can Stifle the Scope and Vibrancy of Democratic Deliberation

Ronald J. Krotoszynski, Jr.[†]

I. INTRODUCTION

In Greek mythology, Procrustes was a notorious bandit who would abduct travelers and then offer them a rather macabre form of hospitality.[1] Procrustes would provide his "guests" with rich food and drink. When it came time for sleep, he would require his victims to "sleep" in a bed that he promised would provide a perfect fit. Procrustes achieved this perfect fit by stretching those too short to fit the bed or by lopping off the limbs of those who were too tall to fit it.[2] From this myth comes the concept of the "Procrustean Bed," which involves either ignoring relevant factors (lopping them off) or placing too much weight on considerations that do not adequately support an argument (stretching the truth, if you will).[3]

If, as First Amendment theorists, such as Alexander Meiklejohn, have argued with such persuasive force,[4] the freedom of speech is

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[1] THOMAS BULLFINCH, BULLFINCH'S MYTHOLOGY: THE AGE OF FABLE 136 (2019) (originally published 1800).

[2] *See id.*; *see also* NASSIM NICHOLAS TALEB, THE BED OF PROCRUSTES: PHILOSOPHICAL AND PRACTICAL APHORISMS xi-xii (2010) (noting that an alternative version of this myth exists in which Procrustes has not one, but two, beds that he uses to murder his victims, with the short bed for tall victims and the long bed for short victims).

[3] *See* TALEB, *supra* note 2, at xii & xii n.*.

[4] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government."); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 119

essential to the project of democratic self-government,[5] the federal courts should not value predictability and consistency of results over the inclusiveness and vibrancy of the political marketplace of ideas. First Amendment doctrine must not become a Procrustean bed. Instead, the constitutional tests used to frame and decide First Amendment cases must be sufficiently open-ended to permit judges to take all relevant factors and considerations into account.

To be sure, consistency of outcomes across the run of cases presenting similar facts constitutes an important virtue—not a vice—in the adjudication of constitutional rights because it promotes the appearance of fairness. In First Amendment cases, however, consistency and the appearance of fairness cannot serve as the only relevant values that judges take into consideration. Instead, First Amendment rules should advance, rather than impede, the process of democratic deliberation.[6]

Unfortunately, a great deal of contemporary First Amendment law arguably resembles a Procrustean bed. This is because in its search for tests that will yield consistent outcomes on a predictable basis, the Supreme Court has adopted a great many doctrinal tests that either disregard relevant factors or place undue weight on factors that, although relevant, should not be deemed controlling. Free speech cases will *always* fit the tests—even if the tests themselves fail reliably to advance and secure core First Amendment values (such as facilitating, on a wide-spread basis, the ability of ordinary citizens to participate actively in the process of democratic deliberation).

Over time, the Roberts Court, and the Rehnquist Court before it, has worked assiduously to make First Amendment jurisprudence more predictable by rejecting doctrinal approaches that vest judges with broad discretion to select free speech winners and free speech losers. As explained below, salient examples include access to government property for speech activity, the speech rights of government employees, transborder speech, and the speech rights of students and teachers in the nation's public schools, colleges, and universities.[7] In these varied

(1993) (arguing that the "overriding goal" of the Free Speech Clause of the First Amendment should be "to reinvigorate processes of democratic deliberation, by ensuring greater attention to public issues and greater diversity of view[s]" and positing that "[t]he First Amendment should not stand as an obstacle to democratic efforts to accomplish these goals").

[5] SUNSTEIN, *supra* note 4, at 18 (arguing that "a well-functioning system of free expression" is essential to attaining "the central constitutional goal of creating a deliberative democracy"). According to Sunstein, maintaining the project of democratic self-government must include "an important deliberative feature" that provides voters with "new information and perspectives" so that "both collective and individual decisions can be shaped and improved." *Id.* at 19.

[6] MEIKLEJOHN, *supra* note 4, at 89–91. Professor Meiklejohn posits that "[t]he unabridged freedom of public discussion is the rock on which our government stands." *Id.* at 91.

[7] *See infra* text and accompanying notes 9 to 14, 44 to 49, 64 to 104.

and important contexts, the Supreme Court has, over time, reduced rather than expanded the scope of First Amendment rights.

In this Essay, I will argue that this approach is mistaken because safeguarding the process of democratic deliberation requires that some play in the joints exist. What is more, the use of bright line, categorical rules, rather than the open-ended balancing tests that the Warren Court, and to some extent the Burger Court, embraced, has a disparate impact on the ability of ordinary citizens to participate in the process of democratic deliberation. For ordinary citizens, possessed of average financial means, it has been getting harder over time, rather than easier, for them to speak their versions of truth to power.[8] Access to public property for speech activity provides a particularly telling, and egregious, example of this trend.

First, the Supreme Court has narrowly defined the scope of government property that must be presumptively available for speech activity (so-called "traditional public forums").[9] Second, even with respect to government property that constitutes a traditional public forum, the Supreme Court has deployed the time, place, and manner doctrine to convey broad discretion on the government to limit access to public property for speech activity.[10] The combination of these doctrinal threads leads to puzzling lower federal court decisions. For example, the U.S. Court of Appeals for the District of Columbia (bizarrely) held that the broad marble plaza in front of the Supreme Court, which is otherwise open to the public 24 hours a day, seven days a week, is not a public forum.[11] So too, it turns out, the government may close all access to the Jefferson Memorial for First Amendment activity.[12] Even in a large park, in the central core of a major American city (St. Louis, Missouri), extending for over a half-mile and comprising almost 100 acres, the government may severely restrict any and all speech activity—banishing it to a handful of small designated areas.[13] If democratic deliberation and engagement are essential to making elections meaningful, all of these decisions are deeply misguided.[14]

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[8] RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT 9–21 (2019).

[9] *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992) (holding that an airport concourse does not constitute a "public forum" and, accordingly, that the government may impose any "reasonable" speech regulations that restrict or prohibit speech activity within the concourse area—even though the particular airport concourses at issue, in New York City, otherwise functioned in many respects as de facto government-owned and operated shopping malls).

[10] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 719–21, 725–30 (2000).

[11] Hodge v. Talkin, 799 F.3d 1145, 1150, 1165 (D.C. Cir. 2015).

[12] Oberwetter v. Hilliard, 639 F.3d 545, 552–54 (D.C. Cir. 2011).

[13] United States v. Kistner, 68 F.3d 218, 222 (8th Cir. 1995).

[14] KROTOSZYNSKI, *supra* note 8, at 22–26, 35–46.

Of course, the standard narrative holds that the First Amendment's scope of application has never been broader.[15] For example, Professor Kathleen Sullivan posits that the Roberts Court's strongly libertarian vision for the First Amendment "emphasizes that freedom of speech is a negative command that protects a system of speech, not individual speakers, and thus invalidates government interference with the background system of expression no matter whether a speaker is individual or collective, for-profit or nonprofit, powerful or marginal." From this vantage point, free speech has moved in a single direction—toward ever broader, arguably "*Lochnerian*"[16] protection of an ever-expanding array of human behaviors and activities.[17]

Professor Gregory Magarian expresses similar concerns.[18] Although straightforwardly acknowledging growth in the scope of the First Amendment's application over time,[19] Magarian argues that the Roberts Court has adopted a "managed speech" approach to the First Amendment, under which the Supreme Court routinely favors powerful corporate speakers and the government itself over marginalized speakers who seek to advance the causes of political minorities. He warns that "[m]anaged speech lets select government actors and powerful speakers manage the content and scope of public debate."[20] He suggests that, in an ideal world, the federal courts would "shift [their] center of First Amendment gravity from powerful and well-financed speakers to dissenters and outsider speakers."[21]

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[15] Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 143–46, 155–63 (2010) (discussing the Roberts Court's libertarian gloss on the Free Speech Clause as a proscription against government efforts to control the marketplace of ideas by regulating either speakers or their messages).

[16] Lochner v. New York, 198 U.S. 45 (1905).

[17] For relevant critiques of this trend of interpreting and applying the First Amendment to protect and ever-broader spectrum of human activity, see Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015) and Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. MARY L. REV. 1613 (2015). However, not everyone agrees with the ever-expanding First Amendment thesis. *See, e.g.*, Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 723–34 (2011). Dean Chemerinsky argues that if one considers "the overall pattern of Roberts Courts rulings" on the First Amendment, it becomes crystal clear that the Roberts Courts "is not a free speech court." *Id.* at 734.

[18] *See* GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT xiv–xxii, 235–53 (2017).

[19] *Id.* at xiii–xiv, 157–91.

[20] *Id.* at 242.

[21] *Id.* at 243; *see also* STEVEN F. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 128 (2000) (positing that "the First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition"). Professor Shiffrin argues that marginalized dissenters, like flag burners, should enjoy the most robust First Amendment protection, whereas "business corporations and commercial speakers have less of a claim to be at the heart of the First Amendment then they would if the marketplace of ideas was our guiding metaphor." *Id.*

Concerns of this sort enjoy support with at least some current members of the Supreme Court. As decision after decision has expanded the First Amendment's scope of application to potentially invalidate laws involving, for example, commercial advertising practices involving credit card fees,[22] sitting Justices have warned against the federal courts *Lochner*izing via the First Amendment—and more specifically by continually expanding the amendment's scope of application over time. For example, Justice Stephen Breyer invoked the *Lochner* bugbear in his dissenting opinion in *Sorrell v. IMS Health, Inc.*[23]

In *Sorrell*, Justice Breyer vociferously objected to the invalidation of a Vermont personal data protection law that prohibited the sale of physicians' prescription data for marketing purposes.[24] He warned that the majority's application of strict scrutiny to the state law threatened to open a jurisprudential "Pandora's Box"[25] by "reawaken[ing] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."[26]

In *Expressions Hair Design v. Schneiderman*, Breyer struck another cautionary note against the specter of using the First Amendment as a generic constitutional tool for undoing various and sundry government social and economic regulations. In a concurring opinion, he observed—quite accurately—that "virtually all government regulation affects speech" and "[h]uman relations take place through speech."[27] If this is so, then the First Amendment's scope of application could encompass "virtually all government regulation."[28]

The prospect of applying strict judicial scrutiny to virtually all government social and economic regulations does bear more than a passing resemblance to *Lochner*. To the extent that government regulations affect communications related to the sale of goods or services, the potential risk of *Lochner*izing is obvious.[29]

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[22] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

[23] Sorrell v. IMS Health, Inc., 564 U.S. 552, 585–86, 591–92, 602–03 (2011) (Breyer, J., dissenting).

[24] *See id.* at 587–91, 602–03.

[25] *Id.* at 602.

[26] *Id.* at 603. For a thoughtful critique of the majority's decision and First Amendment analysis in *Sorrell*, see Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 856, 870–80 (2012).

[27] *Expressions Hair Design*, 137 S. Ct. at 1152 (Breyer, J., concurring).

[28] *Id.*

[29] *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). Professor Schauer observes that although "[t]here have been many important disagreements about what rules should apply when a law or practice infringes upon the First Amendment," that "far fewer disagreements [have arisen] about whether, as a threshold matter, the First Amendment is even implicated at all." *Id.* at 1766. The problem is a serious one because despite occasional consideration of the First Amendment's proper scope of application, more often than not, "the boundary disputes have been

More than a little irony exists in this trend; conservative judges who regularly warn about the dangers of judicial overreach in cases raising substantive due process[30] or equal protection[31] claims have no difficulty exercising judicial review in a maximalist way to enforce the Free Speech Clause of the First Amendment. It is far from self-evident why women, sexual minorities,[32] and would-be school children[33] should have to rely on voluntary self-restraint by state legislatures or the Congress, whereas would-be corporate speakers enjoy the active and eager protection of the federal courts. If judicial modesty is appropriate in safeguarding minorities' (however defined) fundamental rights, shouldn't the same deferential approach apply when Consolidated Edison[34] or Hobby Lobby[35] appear at bar to invoke the First Amendment?

At least arguably, the Supreme Court should be more deferential to democratically-elected legislatures seeking to regulate subjects such as corporate campaign expenditures[36] or to provide public support to seriously underfunded candidates for public office running against self-

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invisible." *Id.* at 1768.

[30] Lawrence v. Texas, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (observing that "I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means," arguing that LGBTQ persons should seek protection of their fundamental rights from the state legislatures and not from the courts, and concluding that the courts should "leav[e] regulation of this matter to the people").

[31] United States v. Virginia, 518 U.S. 515, 569–70 (1996) (Scalia, J., dissenting) (rejecting an equal protection challenge to VMI's official policy of categorically excluding women from matriculating based on their gender because states traditionally maintained all-male, single-sex institutions, observing that "[t]he all-male constitution of VMI comes squarely within such a governing tradition," and objecting that "change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court").

[32] Obergefell v. Hodges, 576 U.S. 644, 686–88 (2015) (Roberts, C.J., dissenting) (arguing that the federal courts should not extend marriage rights to sexual minorities because "this Court is not a legislature," positing that "[w]hether same-sex marriage is a good idea should be of no concern to us," and concluding that "in our democratic republic, that decision should rest with the people acting through their elected representatives"). *But cf.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (opining that if a state or federal law abridges or denies a fundamental right or reflects "prejudice against discrete and insular minorities," the normal presumptions of constitutionality should not apply and instead the Constitution mandates a "more searching judicial inquiry"). How Chief Justice Roberts manages to reconcile his dissenting opinion in *Obergefell*, which would commit sexual minorities to the tender mercies of the Mississippi or Alabama state legislatures, with the central meaning and import of footnote 4 of *Carolene Products* is something of a mystery.

[33] Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) (opining that "[w]ere it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education," positing that "it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language," but nevertheless concluding that "[w]e trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today").

[34] Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).

[35] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[36] *But cf.* Citizens United v. FEC, 558 U.S. 310 (2010).

funding millionaires with virtually unlimited campaign war chests.[37] Whatever the merits of these arguments, we tend to see aggressive use of the power of judicial review in cases where a government seeks to regulate private speech. The Supreme Court has shown little, if any, reticence to "say what the law is" in this context.[38]

From this vantage point, free speech claims, of any and all stripes, will receive a sympathetic hearing—and favorable treatment—at the Supreme Court.[39] In many important contexts, this predictive judgment holds true. First Amendment doctrinal rules against content-, viewpoint-, and speaker-based discrimination have never been more robustly defined and applied.[40] Speech designed to inflict serious emotional harm enjoys generous constitutional protection because the First Amendment "protect[s] even hurtful speech on public issues to ensure that we do not stifle public debate."[41] Even intentionally false speech, absent a showing of specific harm, enjoys strong constitutional protection.[42] Thus, the First Amendment has been something of a growth stock during the Roberts and Rehnquist Courts.[43]

On the other hand, in several important areas, expressive freedoms have actually been contracting, rather than expanding, over time. For those seeking to use government property to speak,[44] government employees who seek to speak out about matters of public concern,[45] persons engaged in news gathering and reporting,[46] students and faculty at the

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[37] *But cf.* Arizona Free Enter. Club v. Bennett, 564 U.S. 721 (2011); Davis v. FEC, 554 U.S. 724 (2008).

[38] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

[39] *See* Ronald L.K. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 412–13 (2012) (arguing that Supreme Court has afforded "near absolute protection to expression" and positing that the Roberts Court "has re-conceptualized the way we think about certain free speech issues").

[40] *See, e.g.*, Nat'l Instit. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); Reed v. Town of Gilbert, 576 U.S. 155 (2015); McCullen v. Coakley, 573 U.S. 464 (2014); Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786 (2011); Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011); United States v. Stevens, 559 U.S. 460 (2010).

[41] *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54–56 (1988) (holding that intentionally outrageous, offensive parody, designed to inflict emotional damage on the subject, enjoys robust First Amendment protection because imposing civil liability for outrageous parodies "has 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").

[42] United States v. Alvarez, 567 U.S. 709 (2012).

[43] *But cf.* Chemerinsky, *supra* note 17, at 725–34 (arguing that the Roberts Court has been inconsistent in enforcing core First Amendment values).

[44] Pleasant Grove v. Summum, 555 U.S. 460, 464–68 (2009); Hodge v. Talkin, 799 F. 3d 1145, 1159–62 (D.C. Cir. 2015); Oberwetter v. Hilliard, 639 F. 3d 545, 552–54 (D.C. Cir. 2011).

[45] Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

[46] Animal League Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018); *see also* Alan K. Chen

nation's public schools, colleges, and universities,[47] and persons and organizations engaged in transborder speech activities,[48] free speech rights have been declining, rather than expanding, in the contemporary United States.[49]

Some very capable First Amendment scholars, including, as noted earlier, Kathleen Sullivan and Gregory Magarian,[50] have made precisely this argument, positing that the contemporary Supreme Court simply favors wealthy would-be speakers over less well-off would-be speakers who require some kind of government assistance in order to speak.[51] In other words, the Supreme Court has adopted a form of social Darwinism that reposes broad, if not unlimited, faith in private speech markets. Private individuals, organizations, and even publicly-traded corporations—not the government—will structure, if not control, the political marketplace of ideas.[52] However, could an alternative thesis provide a better account for the Justices' behavior under Chief Justices John G. Roberts, Jr. and William H. Rehnquist?

Such an account does exist and consists of precisely this: the Roberts and Rehnquist Courts consistently have abjured First Amendment doctrinal tests that vest judges with broad discretionary authority to vindicate, or reject, free speech claims on a case-by-case basis. Rather than a laissez-faire *Lochnerian* approach, the modern Supreme Court has sought to wring out virtually all discretion from the adjudication of First Amendment claims by adopting and applying bright line, categorical rules that strictly limit the ability of judges to select free speech winners and free speech losers. By way of contrast, the Warren Court,[53] and to some extent, the Burger Court as well,[54] both developed and deployed open-ended tests that required trial courts and appellate courts alike to balance free speech claims against the government's claims of managerial necessity.

& Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1439–40, 1466–71 (2015).

[47] Morse v. Frederick, 551 U.S. 393 (2007).

[48] Holder v. Humanitarian Law Project, 561 U.S. 1, 33–40 (2010); *see also* Ronald J. Krotoszynski, Jr., *Transborder Speech*, 94 NOTRE DAME L. REV. 473 (2018).

[49] KROTOSZYNSKI, *supra* note 8, at 18, 215–18, 223–25 (2019).

[50] *See supra* text and accompanying notes 15 to 21.

[51] *Id.*

[52] Citizens United v. FEC, 558 U.S. 310, 339–42 (2010); *see also* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).

[53] *See, e.g.*, Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966).

[54] Houchins v. KQED, 438 U.S. 1, 16–18 (1978) (Stewart, J., concurring); Branzburg v. Hayes, 438 U.S. 665, 709–10 (1972) (Powell, J., concurring); Flower v. United States, 407 U.S. 197 (1972) (per curiam).

Balancing tests can give rise to an appearance of content, viewpoint, or even speaker discrimination because reasonable jurists can and will reach conflicting results in cases featuring very similar facts.[55] Bright line rules, by way of contrast, will produce consistent and predictable results in such cases. Consistent results in cases presenting similar facts is certainly desirable—but so is "uninhibited, robust, and wide-open"[56] public debate about government officials, candidates for public office, public figures, and matters of public concern.[57]

Free speech rules that require judges to exercise discretion will produce free speech winners and losers who have similar, if not identical, constitutional claims. But, this approach, which was a hallmark of the free speech jurisprudence of the Warren Court,[58] has the virtue of broadly facilitating the democratic discourse essential to making elections an effective means of securing government accountability.[59] Balancing tests usually will protect more speech than categorical tests that almost always favor the government in circumstances where a would-be speaker is seeking the government's assistance in order to speak; in such circumstances, a bright line rule will almost invariably favor the government's legitimate managerial interests.[60]

Accordingly, and drawing on the title of this symposium—"What's the Harm?: The Future of the First Amendment"—the "harm" of First Amendment bright line rules is a less vibrant, open, and inclusive marketplace of political ideas. This harm also constitutes a cost that the Roberts Court needs to address more directly and forthrightly when it jettisons balancing tests in favor of categorical free speech rules in contexts where doing so protects fewer speakers and less speech.

An important caveat at the outset: it would be mistaken to posit that First Amendment jurisprudence should not feature *any* bright line

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[55] KROTOSZYNSKI, *supra* note 8, at 35–46.

[56] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (observing that the First Amendment exists to ensure that the public debate about public officials and matters of public concern is "uninhibited, robust, and wide-open").

[57] MEIKLEJOHN, *supra* note 4, at 22–27, 88–91.

[58] KROTOSZYNSKI, *supra* note 8, at 15–17.

[59] MEIKLEJOHN, *supra* note 4, at 88 (arguing that "if men are to be their own rulers" then "whatever truth may become available shall be placed at the disposal of all citizens of the community" and that the First Amendment's primary purpose "is to give every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal").

[60] *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164–65 (1996). Professor Post observes that "[w]ithin managerial domains, the state organizes its resources so as to achieve specified ends" and that these governmental managerial domains are "necessary so that a democratic state can actually achieve objectives that have been democratically agreed upon." *Id.* at 164. For an extended discussion of the problems and difficulties of disentangling the government's legitimate managerial domains from the operation of the free and open democratic discourse essential to maintaining a system of self-government, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995).

rules. Bright line rules can and do play an important role in safeguarding the process of democratic deliberation from ham-fisted government efforts to censor or even simply reshape the political marketplace of ideas.[61] Even so, however, bright line rules are not enough.

The federal courts should work to create a bifurcated system of free speech jurisprudence that provides a floor, safeguarded by categorical rules that strictly limit the government's ability to engage in censorship of political speech (for example, the categorical First Amendment doctrinal rules against prior restraints, viewpoint discrimination, and content discrimination), and also a ceiling, that involves more open-ended free speech rules that permits courts to require the government to facilitate speech activity when it has the means to do so without undue inconvenience or disruption, but lacks the will to facilitate speech activity by ordinary citizens who require governmental assistance in order to participate in the process of democratic self-government.[62] This approach would establish and protect an important free speech baseline (the "floor" created by categorical rules) but also leave open the possibility of a broader and more vibrant political marketplace of ideas (via the "ceiling" created through the use of balancing tests that permit case-by-case, context sensitive, evaluations of efforts by would-be speakers to seek and obtain the government's assistance to facilitate their speech activity).

II. THE ROBERTS AND REHNQUIST COURTS EMBRACE CATEGORICAL RULES, NOT BALANCING TESTS, IN FIRST AMENDMENT CASES

In a variety of areas, the Warren and Burger Courts embraced open-ended balancing tests to frame and decide First Amendment cases, whereas the Rehnquist and Roberts Courts consistently adopted bright line, categorical rules. Examples include cases involving access to public property for speech activity, the speech rights of government employees, and the speech rights of students in the nation's public schools.[63] This section will demonstrate how the Warren Court broke

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[61] *See* Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–56 (1985). Professor Blasi suggests that "[i]n crafting standards to govern specific areas of first amendment dispute, courts that adopt the pathological perspective should place a premium on confining the range of discretion left to future decisionmakers" and that "[c]onstitutional standards that are highly outcome-determinative of the cases to which they apply are thus to be preferred." *Id.* at 474.

[62] *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 260 (1961) (positing that "universal discussion is imperative" and lamenting "how inadequate, to the degree of non-existence, are our public provisions for active discussions among the members of our self-governing society"); *see also* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA, ix (2017) (arguing that "[m]embers of a democratic public will not do well if they are unable to appreciate the views of their fellow citizens").

[63] *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509–11 (1969)

important new First Amendment ground by requiring the government to use its vast resources to support, rather than to impede, civic discourse. In all of these areas, however, the Warren Court found it essential to take the government's legitimate managerial necessities into account—and doing so required the adoption of open-ended balancing tests rather than categorical rules.

A. A Presumption of Access to Public Property for Speech Activity Versus the Public Forum Doctrine

The Warren Court, as well as the Burger Court, adopted a general presumption that government property otherwise suitable for expressive activity should be available for such activity—even if the property's principal purpose had nothing to do with exercising First Amendment rights. For example, a public library is not self-evidently a logical forum for collective, public protest activity, but the Warren Court held that civil rights protesters could engage in a silent protest in a racially segregated Louisiana public library.[64] The conclusion followed because the protest, which lasted around 15 minutes,[65] did not disrupt the library's regular operation.[66] On these facts, the Supreme Court invalidated breach of the peace convictions, essentially holding that the protesters possessed a First Amendment right to use the public library for their silent protest.[67]

The Burger Court also followed this general approach—by, for example, holding that the U.S. Army could not close Fort Sam Houston, a San Antonio, Texas military base, to leafletters who sought to promote

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(vindicating public school students' free speech claims under an open-ended balancing test that weighs a free speech claim against the risk that student speech activity will substantially and materially disrupt a public school's regular educational activities) *with* Morse v. Frederick, 551 U.S. 393, 403, 408–10 (2007) (rejecting a public high school student's First Amendment claim using a categorical test that vests school officials with broad authority to proscribe even nonsense speech that could arguably have been interpreted to advocate the use of marijuana) *and* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (applying a categorical test to deny *any* First Amendment protection to a student's vulgar or scatological speech at a school-sponsored event). It bears noting that Justice Clarence Thomas has argued that *Tinker*'s open-ended balancing approach should be completely jettisoned in favor of a categorical approach that would sustain virtually any and all government restrictions on students' speech. *See Morse*, 551 U.S. at 422 (Thomas, J., dissenting) (objecting to the growing "patchwork of exceptions" to the *Tinker* standard and calling for *Tinker* to be overruled in favor of a categorical rule favoring the government).

[64] Brown v. Louisiana, 383 U.S. 131, 142 (1966) (observing that "[i]t is an unhappy circumstance that the locus of these events was a public library—a place dedicated to quiet, to knowledge, and to beauty" but nevertheless concluding that the silent protest in the public library constituted a "lawful, constitutionally protected exercise of their fundamental rights").

[65] *Id.* at 135–38.

[66] *Id.* at 142 ("Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. . . . Were it otherwise, a factor not present in this case would have to be considered.").

[67] *See id.* at 143.

an anti–Vietnam War protest rally.[68] In a three-page, per curiam opinion, rendered without full briefing and oral argument, the 6-3 majority held that "[t]he base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street."[69]

To be sure, the Burger Court also issued the decision *Greer v. Spock*,[70] which denied Dr. Benjamin Spock, the People's Party candidate for president in 1972, access to the Fort Dix Military Reservation, a U.S. Army base in New Jersey, for a campaign rally.[71] However, Justice Potter Stewart's First Amendment analysis did not begin and end with a declaration that Fort Dix was a non-public forum and therefore could be closed categorically to any and all First Amendment activity. Justice Stewart required the army to justify the ban on political activity on the base, and found that the army had a persuasive rationale for allowing most speech activity on base—but with the exception of partisan political activity.[72] In other words, the *Greer* majority engaged in a balancing exercise that considered Spock's interest in speaking against the army's interest in closing the base property to partisan campaign activity—and concluded that the constitutional balance favored the government on these facts.

Today, however, all three cases would be decided differently and on a much more summary basis. A military base is a non-public forum and any reasonable regulations would be deemed constitutional.[73] A public library is, at most, a limited purpose public forum and the government could limit the kinds of First Amendment activity that it permits to occur in such spaces.[74]

Professor Timothy Zick correctly observes that "[u]nder current forum analysis, the library, like most contested places, would most likely be considered a 'non-public' forum."[75] This is so because the Supreme

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[68] Flower v. United States, 407 U.S. 197, 198–99 (1971).

[69] *Id.* at 198.

[70] 424 U.S. 828 (1976).

[71] *Id.* at 830–35.

[72] *Id.* at 839 (observing that "[w]hat the record shows . . . is a considered Fort Dix policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind," thus ensuring that "the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates.").

[73] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797, 802–06 (1985).

[74] Perry Ed. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45–46 (1983) (discussing the concept of a limited purpose public forum in which the government limits access to government property based on speakers, speech content, or both); *see also* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (holding that government support for student organizations at a government-operated law school created a limited purpose public forum that could impose restrictions on membership rules as a condition of using the forum).

[75] Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV.

Court has used a very narrow, tradition-bound test to identify "traditional public forums"; the Roberts and Rehnquist Courts have essentially categorically excluded government property associated with activities that did not exist in 1791 (such as commercial airports).[76] Lower federal courts have found that government property, such as national parks and monuments, do not constitute traditional public forums.[77] Thus, as Zick posits, contemporary First Amendment analysis would "fail[ ] to place the library [at issue in *Brown*] in local and more general historical perspective"[78] and would permit the government to arrest, try, and convict civil rights protestors who had engaged in unauthorized speech activity in a public library.

A categorical approach to making public property available has the effect of closing most government property to speech activity—even when the government, with little if any inconvenience, could make the property available. This provides a clear example of how a balancing test can and would protect more speech activity than a categorical test. More specifically, a balancing exercise would open up more public spaces to First Amendment activity than a categorical approach. Courts will not—and should not—permit would-be protesters to commandeer at will any and all public property that they wish to use for speech activity. However, it is entirely possible to imagine a First Amendment world in which courts require the government to provide a plausible reason for denying access to specific public property for speech activity. The Warren Court, and to a lesser degree, the Burger Court, took exactly this approach—whereas the Rehnquist and Roberts Courts have not.

439, 497 (2006).

[76] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 682 (1992) (holding that an airport concourse does not constitute a traditional public forum and, in consequence, that the First Amendment permits any and all "reasonable" government regulations restricting speech activity in airports); *cf.* Stephen G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1634 (1998) (arguing that the government should always bear a burden of justification that shows proposed speech activity is inconsistent with the regular uses of particular government property and that "only if the speech would otherwise significantly interfere with the government's ability to carry out its legitimate duties" should a court not require the government to make the property available for First Amendment activity).

[77] *See, e.g.*, Hodge v. Talkin, 799 F. 3d 1145, 1159–62 (D.C. Cir. 2015); Oberwetter v. Hilliard, 639 F. 3d 545, 552–54 (D.C. Cir. 2011); Boardley v. U.S. Dep't of the Interior, 615 F. 3d 508, 515 (D.C. Cir. 2010).

[78] Zick, *supra* note 75, at 497.

B. Government Employee Speech About Matters of Public Concern Versus the Government's Managerial Necessities as an Employer

In *Pickering v. Board of Education*,[79] the Warren Court pioneered First Amendment protection for government employees who speak out about a matter of public concern. Justice Thurgood Marshall, writing for a unanimous bench on this point, explained that "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[80]

In other words, federal courts must weigh a government employee's interest in speaking out about a matter of public concern against the risk that the speech activity could disrupt the government's workplace. In *Pickering*, the balance favored Marvin L. Pickering, a public school teacher in Illinois, and the Supreme Court held that the First Amendment protected his public comments about the school district's efforts to get local voters to approve a bond issue to improve the local public schools.[81] This conclusion held true, moreover, even though Pickering's speech, a letter to the editor published in a local newspaper, contained some factual errors.[82]

The Roberts Court, by way of contrast, took a different approach in *Garcetti v. Ceballos*[83]—and adopted a categorical rule that systematically favors government employers over government employees. Richard Ceballos, an assistant district attorney, objected both orally and in an office memorandum to the office permitting a law enforcement officer to provide allegedly false information to a state court judge in order to obtain a search warrant.[84] Ceballos believed that he suffered official retaliation as a result of these actions and sought the protection of the First Amendment under *Pickering*.[85]

The Supreme Court held that the First Amendment provided Ceballos with literally no protection against official retaliation for his

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[79] 391 U.S. 563 (1968).

[80] *Id.* at 568.

[81] *Id.* at 572–73 (observing that school board failed to show that Pickering's speech had "in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally" and that on these facts "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public").

[82] *Id.* at 570–73.

[83] 547 U.S. 410 (2006).

[84] *Id.* at 412–15.

[85] *Id.* at 413–15.

whistleblowing speech.[86] Justice Anthony M. Kennedy, writing for the 5-4 majority, found that government employees enjoy no First Amendment protection for speech about a matter of public concern if that speech falls within the scope of their official duties.[87] Simply put, "[t]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."[88] Thus, "[b]ecause Ceballos' memo falls into this category," the majority concluded that "his allegation of unconstitutional retaliation must fail."[89]

In *Pickering*, the Warren Court adopted a balancing test that would lead to meaningful First Amendment protection for at least some government employees, some of the time. The test is problematic because it incorporates a heckler's veto: an adverse reaction by a government employee's co-workers may serve as a valid basis for firing the government employee who speaks out about a matter of public concern.[90] However, weak or imperfect First Amendment protection in this context is probably unavoidable because of the government's legitimate managerial concern in maintaining functional offices.

The Roberts Court, by way of contrast, has embraced a categorical approach that wrings out judicial discretion to validate government employee speech claims when the speech arguably relates to the employee's official duties. The *Garcetti* approach will lead to very consistent and predictable outcomes—but the outcomes will consistently favor the government over would-be speakers. Consistency of this sort comes at simply too high a price. Government employees should be permitted to participate in the process of democratic deliberation.[91] Moreover, whistleblowing speech by government employees could well be essential to empowering voters to hold government accountable through their ballots.[92]

To be sure, the Warren Court's balancing approach in *Pickering* will require judges to exercise discretion in an open and transparent way. However, if the effective choice is between an open-ended balancing test that may from time to time under-protect government

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[86] *See id.* at 420–24.

[87] *Id.* at 424–26.

[88] *Id.* at 424.

[89] *Id.*

[90] KROTOSZYNSKI, *supra* note 8, at 88–90.

[91] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.").

[92] KROTOSZYNSKI, *supra* note 8, at 91–94.

employees, but will protect at least some government employees who speak out about a matter of public concern and deter official government retaliation against employees who embrace speech over silence, and a categorical rule that provides no protection at all to government employees, core First Amendment values would be best served by adopting and applying the balancing approach. If the First Amendment exists to facilitate the process of democratic deliberation, then more speech activity should be preferred to less speech activity.

C. Decreasing First Amendment Protection for Speech Activity in the Nation's Public Schools, Colleges and Universities

The Warren Court pioneered First Amendment protection for students and faculty in the nation's public schools. In *Tinker v. Des Moines Independent Community School District*,[93] Justice Abe Fortas, writing for a 7-2 majority, held that high school and middle school students enjoyed a First Amendment right to wear black armbands, while on campus, to protest the Vietnam War.[94]

Perhaps most famously, Justice Fortas observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[95] In addition, however, he carefully explained that public school officials must tolerate political speech by their students in order to vindicate core First Amendment values:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[96]

This stirring celebration of the First Amendment, however, does not actually provide the governing legal test.

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[93] 393 U.S. 503 (1969).

[94] *See id.* at 504, 513–15.

[95] *Id.* at 506.

[96] *Id.* at 511.

Despite this soaring and relatively absolute language, the *Tinker* test actually involves an open-ended balancing exercise. More specifically, school officials may proscribe on-campus speech if the speech plausibly presents a risk of materially and substantially interfering with the regular daily operations of the school.[97] On the facts at bar, the Des Moines public school officials failed to show such a risk existed and, accordingly, the students were entitled to engage in their protest of the Vietnam War while on campus.[98]

The Burger, Rehnquist, and Roberts Courts, unlike the Warren Court, limited the jurisprudential scope of *Tinker* by adopting categorical rules that permitted school administrators to ban ribald speech,[99] comprehensively regulate curricular speech,[100] and proscribe speech that supposedly advocated the use of marijuana.[101] When a student engages in ribald speech while on campus, speaks incident to an official curricular activity, or speaks ambiguously about illegal drugs, no balancing exercise applies and school officials may censor the student's speech with an entirely free hand (including punishing a student for uttering it by suspending her, denying her the right to participate in extracurricular activities, or banning the student from commencement exercises).

The categorical approach the Justices adopted and deployed in *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick* will produce very consistent results on a predictable basis. But, these cases essentially zero out a public school student's interest in speaking out about matters of public concern without the government having to shoulder any meaningful burden of justification for censoring the student's speech. *Tinker* requires judges to weigh facts and circumstances on a case-by-case basis—and judges deciding cases with similar facts will reach different conclusions. But one cannot gainsay that the *Tinker* balancing approach will facilitate more speech activity related to the process of democratic self-government than the categorical approach of *Fraser*, *Kuhlmeier*, and *Morse*.

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[97] *Id.* at 509–10.

[98] *Id.* at 511 (upholding the right of the school students to wear the black arm bands on campus and explaining that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible").

[99] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). *Fraser* was decided by the Burger Court.

[100] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). The Rehnquist Court decided *Kuhlmeier*.

[101] Morse v. Frederick, 551 U.S. 393 (2007). The Roberts Court handed down *Morse*.

The Warren Court routinely embraced open-ended balancing tests. This had the effect of protecting more expressive activity than would have been the case under a less flexible approach. Moreover, reliance on balancing tests to decide First Amendment claims tended to benefit marginalized speakers who lacked the financial wherewithal to disseminate a message using their own money or property.

Whenever government has a legitimate managerial justification for withholding its assistance to would-be speakers, a balancing approach permits courts to weigh carefully the competing, and conflicting, interests in a specific context.[102] At least in some cases, this exercise will result in a court ordering a government defendant to facilitate speech activity when it would rather not do so.[103] Because democratic deliberation is essential to the legitimacy of our governing institutions, requiring the government to facilitate speech when it can do so would represent a better approach than hewing to categorical rules that treat all would-be speakers equally—but equally badly.[104]

III. BALANCING TESTS OR CATEGORICAL RULES?: CONSIDERING THE POTENTIAL VIRTUES AND VICES OF BOTH APPROACHES TO FRAME AND DECIDE FIRST AMENDMENT DISPUTES.

As explained in the previous Part, in cases involving expressive freedoms the Rehnquist and Roberts Courts—unlike the Warren and Burger Courts—have not routinely embraced tests that require the open exercise of discretion by federal judges. This raises the question:

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[102] Brown v. Louisiana, 383 U.S. 131, 141–42 (1966); *see also* Gey, *supra* note 76, at 1566–76 (arguing that federal courts have failed to make sufficient public space available for First Amendment activities and positing that a more functional approach to public forum analysis would help to address this failure successfully).

[103] *See, e.g.*, Williams v. Wallace, 240 F. Supp. 100, 106–09 (M.D. Ala. 1965) (requiring the federal and state governments to facilitate a mass, five-day march from Selma, Alabama to Montgomery, Alabama to protest a state-wide system of official disenfranchisement of African American voters). Judge Frank M. Johnson, Jr. recognized that the proposed five-day march, over the main regional highway, would be highly disruptive to those seeking to use the road for local and interstate travel. He explained that the right to engage in disruptive protest should be, at least to some extent, commensurate with the "enormity" of the wrongs being protested and petitioned against:

> [I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.

Id. at 106.

[104] Gey, *supra* note 76, at 1536–38, 1542–55, 1576–77. Professor Gey argues that the government should be allowed to deny access to public property for speech activity "only if the speech would otherwise significantly interfere with the government's ability to carry out its legitimate duties" and posits that "[r]igorous enforcement of this interference standard would stem the current trend toward a narrowing of the public forum." *Id.* at 1634.

What is objectionable, if anything, about using open-ended balancing tests to decide First Amendment disputes?

Balancing is quotidian in other areas of the law. For example, in deciding whether the government has satisfied the requirements of procedural due process federal courts apply a three part balancing test that considers the nature of the private interest at stake, the government's interest in using the procedures that it voluntarily provided, and the probability that additional process would reduce the risk of error.[105] To be sure, some members of the Supreme Court rejected this approach because it can produce inconsistent results.[106] However, the Justices who raised these objections to *Mathews v. Eldridge* balancing have done so exclusively in *dissenting* opinions.

Is there something particularly problematic with discretion in the context of free speech cases? Arguably, there is: the open exercise of discretion in First Amendment cases can give rise to an appearance of content-, viewpoint-, or even speaker-based discrimination. What's more, balancing tests will produce conflicting results in cases featuring very similar facts. Federal judges, attempting to decide close cases in good faith, will reach different outcomes that will be difficult to reconcile (precisely because reasonable minds can and will differ about how to fix the balance in close cases).

A fair-minded observer might posit that these different outcomes are the product of judicial sympathy—or antipathy—toward particular would-be speakers.[107] Thus, play in the joints in First Amendment cases—meaning a non-trivial risk of courts reaching different outcomes

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[105] *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (reviewing precedent and holding that procedural due process analysis "generally requires consideration of three distinct factors" that include (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

[106] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 561–62 (1985) (Rehnquist, J., dissenting).

[107] *Compare NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–15 (1982) (holding protected a boycott that included the use of threats because "the boycott clearly involved constitutionally protected activity" and "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment"), *and* Cox v. Louisiana, 379 U.S. 559, 568–75 (1965) (holding protected a large civil rights protest proximate to a local courthouse), *with* Hill v. Colorado, 530 U.S. 703, 719, 725–30 (2000) (sustaining a highly targeted Colorado law aimed at preventing protest near abortion clinics and suggesting that the speech ban did not even regulate speech at all but rather was "a regulation of the places where some speech may occur"), *and* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762–64, 769–71 (1994) (sustaining, in part, an injunction that prohibited anti-abortion protests near a family planning clinic). Dissenting in *Hill*, Justice Scalia observed that "it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum, *Hill*, 530 U.S. at 748, and objected that "[r]estrictive views of the First Amendment that have been in dissent since the 1930s suddenly find themselves in the majority," *id.* at 765.

in cases presenting substantially identical facts—could give rise to the appearance of bias by federal and state judges. This, in turn, could easily have a corrosive effect on public confidence in the courts—and thus undermine their legitimacy with the body politic.[108]

By way of contrast, categorical rules—rules that strictly limit judicial discretion—will generate consistent outcomes across a decentralized system of federal and state courts.[109] Consistent results in free speech cases, that are the product of categorical, bright-line rules, avoid the risk of judges appearing biased toward, or against, particular would-be speakers. But, at what price?

Bright line rules will provide less protection for free speech generally, at least in circumstances where the government possesses, to use Professor Robert Post's wonderful turn of phrase, a legitimate claim over its managerial domain.[110] A categorical rule, in the context of access to public property, the government's workplace, and in public schools, colleges, and universities, will almost inevitably favor the government over would-be speakers.

Professor Post argues that "[t]he constitutional question in each case is whether the authority to regulate speech is necessary for the achievement of legitimate institutional objectives."[111] Post predicts, correctly, that federal judges will be wary of "second-guessing [a government supervisor's] managerial authority regarding speech."[112] If a court did this, "that authority would *pro tanto* diminish."[113] Accordingly, the risk of this kind of "damage" means "that before engaging in judicial review a court must determine whether such review would itself diminish the authority at issue to such an extent as to impair the ability of the bureaucracy to attain its legitimate ends."[114] The requisite analysis

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[108] Claims of this sort have been made with respect to the Supreme Court's state action doctrine decisions prior to the enactment of comprehensive federal civil rights laws; these decisions sometimes seemed to strain in order to find state action in order to proscribe racially discriminatory behavior and policies. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29–31 (1959) (objecting to a state action decision finding state court enforcement of a racially restrictive covenant running with the land to constitute state action for purposes of applying the Equal Protection Clause); *see also* Jonathan D. Varat & Vikram D. Amar, CONSTITUTIONAL LAW: CASES AND MATERIALS 1071 (15th ed. 2017) (observing that "[b]y the end of World War II through 1968, all Supreme Court decisions that reached the question whether unconstitutional state action was present decided that it was" but "[s]ince 1970, most Supreme Court decisions considering the same issue have not found unconstitutional state action" in cases that do not involve racial discrimination).

[109] Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021 (2014).

[110] Post, *Subsidized Speech*, *supra* note 60, at 164–67.

[111] POST, CONSTITUTIONAL DOMAINS, *supra* note 60, at 237.

[112] *Id.*

[113] *Id.*

[114] *Id.*

involves careful consideration of "the relationship between the practice of judicial review and the nature of the managerial authority at issue."[115]

Accordingly, even very progressive jurists, such as Justice Thurgood Marshall and Abe Fortas, were unwilling to completely disregard the government's need to achieve its programmatic objectives. A categorical First Amendment rule that requires the government to *always* accommodate would-be speakers would be unacceptably disruptive to the government's legitimate managerial plans and interests. If federal courts are to validate speech claims in these contexts, there simply must be balancing of the government's interest in achieving its managerial objectives efficiently against the value of private citizens engaging in First Amendment activity.[116]

The balancing is also difficult—and fraught—because of the incommensurable values at stake. How does a federal district judge weigh the risk of disruption in a public school facing serious racial tensions if a middle school principal prohibits students from wearing both "Trump/Pence 2020" and "Black Lives Matter" t-shirts while on campus? A reasonable school administrator could anticipate that both shirts would result in material and substantial disruption to the school's operations—and accordingly proscribe the wearing of both.[117] On the other hand, a "Tom Steyer 2020" t-shirt probably would not present a similar risk of disruption. To permit the Steyer shirt while banning the others, however, could reasonably be perceived as a form of content- or viewpoint-based discrimination. In reality, however, it is not.[118]

Nevertheless, in order to avoid an appearance of censorship, a risk-averse school administrator might attempt to ban all clothing that carries a political message while on campus. This zeroes out both potentially disruptive and wholly innocuous speech (e.g., "I Support the World Wildlife Fund")—but it avoids any appearance of political or ideological favoritism. Federal courts cannot be faulted too harshly for taking the same approach when the government can identify a non-speech related managerial reason for refusing to accommodate First Amendment activity.

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[115] *Id.*

[116] *See id.* at 235–39.

[117] *See, e.g.*, West v. Derby Unified Sch. Dist. No. 260, 206 F. 3d 1358, 1365–66 (10th Cir. 2000) (holding that a school district could reasonably conclude that a hand-made drawing of a Confederate battle flag could present a substantial and material risk of disruption to the school's operations and explaining that the school's administration "had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone").

[118] KROTOSZYNSKI, *supra* note 8, at 113–15.

Of course, the Warren Court recognized the risk of appearing to play favorites among speakers—but more often than not would insist that government incur inconvenience and expense in order to facilitate more speech. Or, to be more precise, the Warren Court adopted tests that routinely required lower state and federal courts to consider carefully whether the balance of equities in a particular case favored the would-be speaker over the government.[119]

Categorical rules in times of national tumult and distress are even more potentially pernicious in exacerbating the chasm between free speech haves and free speech have nots. As Professor Christina Wells has persuasively argued, judges are not any more immune to mass panic and irrational fear than everyone else.[120] Drawing on social psychology research, Wells warns that "[t]o the extent that individuals perceive a group as threatening due to ostensible risks associated with it, we know that substantial errors in risk assessment occur in particular circumstances."[121] This effect also correlates strongly with the perceived nature of the risk: "The potentially catastrophic nature of the threat can further exacerbate the tendency to overestimate the likelihood of an event. Social influences often reinforce this skewed risk assessment through the phenomena of informational and reputational cascades, which can cause widespread, though erroneous, beliefs regarding the likelihood of an event."[122]

Wells concludes that taking affirmative doctrinal steps to attempt to address the risk of judges holding irrational fears during times of national stress and tumult will not be enough. This is so because, allowing these perceived risks to cloud their judgment, "[j]udges may still fall prey to fear and prejudice or they may simply make the strategic determination that they do not wish to involve themselves in these matters."[123]

Thus, at the very moments when, under Professor Vincent Blasi's "pathological perspective,"[124] the process of democratic self-government most requires judicial courage,[125] Wells's research suggests that the judges are most apt to be AWOL. We may want judges to exhibit civic

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[119] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 & 559 (1965).

[120] Christina E. Wells, *Fear and Loathing in Constitutional Decision Making*, 2005 WIS. L. REV. 115, 117 ("Judges are, after all, human. They remain subject to the same passions, fears, and prejudices that sweep the rest of the nation.").

[121] *Id.* at 170.

[122] *Id.* at 170–71.

[123] *Id.* at 222.

[124] Blasi, *supra* note 61, at 449–52.

[125] *Id.* at 452–56.

courage in such times,[126] and Professor Blasi's normative argument has much to recommend it—the process of democratic deliberation is obviously most critical at times of national crisis. When the stakes are potentially astonishingly high, "We the People" must engage in careful, thoughtful, and well-informed public discourse.[127]

Wells tells us that although this may be what we want and also what a democratic polity needs, it is not likely to be what we will get from the courts.[128] From this perspective, and as Blasi argues in his iconic article, it might be desirable to adopt and enforce strict bright line rules that delimit judicial discretion—and hence make it arguably harder for frightened judges to shirk their constitutional duties.[129] As Blasi states his case in chief, "[t]he adjudicative methodologies and doctrines that can best protect the core commitments of the first amendment in pathological periods are those that are consciously designed to counteract the unusual social dynamics that characterize such periods."[130]

Even so, however, the most likely potential beneficiaries of these categorical rules are would-be speakers who have the financial means to speak. In good times and bad times alike, categorical rules will burden marginalized speakers more heavily than wealthy and socially-empowered speakers—at least when the categorical rule implicates the government's managerial domain. For example, if courts permit the government to restrict access to government property for speech activity based on "security" concerns,[131] the categorical rule will fence out both wealthy and poor would-be speakers. But wealthy speakers have

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[126] Vincent A. Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 692–96 (1988).

[127] *Id.* at 686 (observing that for Justice Louis Brandeis and Thomas Jefferson "the key to a successful democracy lies in the spirit, the vitality, the daring, the inventiveness of its citizens"); *see also* ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE FIRST AMENDMENT 39–42 (2012) (discussing, in some detail, the importance of democratic deliberation to the project of democratic self-government). Post observes that "[f]or the last eighty years, First Amendment jurisprudence has been founded on the premise that 'speech concerning public affairs is . . . the essence of self-government.'" *Id.* at 40.

[128] Wells, *supra* note 120, at 117–18, 168–72, 214–22.

[129] Blasi, *supra* note 61, at 467–68 (arguing that "one of the most important ways in which adjudication in ordinary times might influence the course of pathology would be by helping to promote an attitude of respect, devotion, perhaps even reverence, regarding those central norms" and suggesting that "an emphasis in adjudication during normal times on the development of procedures and institutional structures that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics" would be helpful in safeguarding free speech in times of national stress).

[130] *Id.* at 513.

[131] *See, e.g.*, Bl(a)ck Tea Soc'y v. Boston, 378 F.3d 8 (1st Cir. 2004). The federal courts are all too credulous when the government argues that "there might be trouble" if speech activity occurs proximate to incumbent government officials and high-ranking party officials. *See* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 31–54 (2012).

the option of simply renting or buying real property for the purpose of engaging in First Amendment activity; poor speakers do not have the luxury of renting or buying space for public protest.[132]

In sum, bright line rules—such as those against content- or viewpoint-based regulations of speech, or prior restraints—facilitate the ability of those with the property necessary to speak to do so. But what if a would-be speaker needs access to government property, a government job, a high school or college education, or a license from the state? Categorical rules will almost never favor would-be speakers over the government in these circumstances. The social cost of categorical rules will be distributed against financially marginal speakers—and particularly those who espouse highly unpopular causes.[133]

If we actually believe in the equality of all citizens as participants in the process of democratic self-government,[134] then this outcome should be completely unacceptable. A vision of equality limited to the equal voting weight of all ballots is both empty and unduly formalistic.[135] The ability to participate meaningfully in the process of democratic deliberation that informs the act of voting must be part of the overall constitutional picture.

IV. CAN FIRST AMENDMENT RULES SUCCESSFULLY ACCOMMODATE "PLAY IN THE JOINTS"?

Does a solution exist to the problem of judges incurring an unacceptable risk of the appearance of bias if the Supreme Court were to once again regularly embrace balancing tests rather than categorical rules in First Amendment cases? In this brief Essay, I cannot hope to address this question in a comprehensive fashion across all areas of First Amendment law.[136] It is possible, however, to sketch out some preliminary thoughts that should inform the answers to this question. Despite the scope of the question and the difficulty in formulating satisfactory answers to it, the problem is one that merits sustained consideration and engagement.

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[132] KROTOSZYNSKI, *supra* note 8, 1–18, 22–26, 238–39 n.2.

[133] *See* SHIFFRIN, *supra* note 21, at 110–18, 124–30. Professor Shiffrin posits that "the First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition." *Id.* at 128.

[134] Reynolds v. Sims, 377 U.S. 533, 558, 560–63 (1964); Gray v. Sanders, 372 U.S. 368, 381 (1962).

[135] KROTOSZYNSKI, *supra* note 8, at 215–18.

[136] My recent book, THE DISAPPEARING FIRST AMENDMENT, engages these questions at some length and in some detail, and proposes specific doctrinal reforms in several discrete areas of First Amendment jurisprudence that would, quite literally, create more space and opportunity for ordinary citizens to participate meaningfully in the process of democratic self-government. *See* KROTOSZYNSKI, *supra* note 8, passim.

Many, if not most, serious theories of the First Amendment place the relationship of freedom of expression to the process of democratic self-government at the epicenter of the First Amendment. Leading free speech scholars, including Alexander Meiklejohn,[137] Harry Kalven, Jr.,[138] Owen Fiss,[139] Cass Sunstein,[140] and Vincent Blasi,[141] all posit that speech merits judicial protection because of its integral relationship to the process of democratic self-government. Accordingly, we should be open to the idea that the First Amendment imposes not only negative limitations on the ability of the government to censor speech, but also affirmative duties to facilitate speech related to the process of democratic deliberation.[142] As I will explain below, expanding the First Amendment "ceiling" need not imply abandoning a serious commitment to protect, through robust judicial enforcement of mandatory, categorical rules, a First Amendment "floor." The federal courts could, at least in theory, pursue both goals concurrently; were they to do so, our democracy would be the better for it.

A bifurcated First Amendment jurisprudence that creates a First Amendment "floor" that automatically safeguards speech through categorical rules, but also includes a "ceiling" that offers expanded First Amendment rights when necessary to facilitate the ability of ordinary citizens of average, or below average, means to participate freely in the process of democratic deliberation that informs the casting of ballots on election day could provide a viable potential solution to the problems associated with relying solely on categorical free speech rules. One certainly cannot gainsay that categorical rules play an important role in safeguarding the process of democratic deliberation. As Professor Blasi has observed, bright line, categorical rules make it easier for judges to vindicate First Amendment claims by unpopular speakers seeking to advocate for disliked causes.[143] Judges are able to attempt to deflect responsibility for controversial free speech decisions by invoking the bright line rule: "I wish I could do otherwise, but my hands are tied!"[144]

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[137] MEIKLEJOHN, *supra* note 4, at 22–27, 89–91.

[138] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 89–105 (Jamie Kalven ed., 1988); HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–45 (1965).

[139] OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–16 (1986).

[140] SUNSTEIN, *supra* note 62, at ix-xi, 44–48, 202–06; SUNSTEIN, *supra* note 4, at 19–22.

[141] Blasi, *supra* note 61, at 449–52.

[142] SUNSTEIN, *supra* note 62, at ix ("The idea of free speech has an affirmative side.").

[143] Blasi, *supra* note 61, at 468–73.

[144] Justice Kennedy took this approach in Texas v. Johnson, 491 U.S. 397 (1989), the Supreme Court's landmark First Amendment decision that held flag burning to be protected expressive conduct. In his concurring opinion, Kennedy noted that his vote in the case "exact[ed] a personal toll," *id.* at 420, and more-or-less apologized for it:

As Professor Fred Schauer has explained, judges are always responsible for their decision—and whether to apply, modify, or abolish a legal precedent.[145] He observes that "[w]hen lawyers argue and when judges write opinions, they seek to justify their conclusions, and they do so by offering reasons."[146] Reasons provide legitimacy for an outcome: "Having given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason."[147]

There's a danger, however, to framing rules in the present to govern the future because, "[i]f the reasons provided by courts constrain future decisions, then giving reasons can be opposed as undesirably encouraging courts to influence decisions arising in contexts at which they can only guess."[148] The more specific and categorical a judge's reason, the greater the risk of making a blown call. Schauer explains that "giving reasons requires decisionmakers to decide cases they can scarcely imagine arising under conditions about which they can only guess, in a future they can only imperfectly predict."[149] Because of this effect—limiting the discretion of future judges to decide a case using the best possible justifications—giving reasons (i.e., creating categorical rules) creates potential social costs that have to be considered when evaluating their utility.[150]

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Id. In other words, Justice Kennedy felt obliged to publicly apologize for vindicating the application of the First Amendment bright line rule against the government engaging in content-based (and arguably viewpoint-based) censorship of core political speech. If the Constitution lacked a First Amendment with a Free Speech Clause, would Justice Kennedy have voted the same way? Of course, it is impossible to know the answer to this question. The constitutional text—and the categorical rule associated with that text—clearly made it more difficult for Kennedy to follow his heart rather than his head. *But cf. id.* at 439 (Stevens, J., dissenting) (arguing that "[t]he ideas of liberty and equality have been an irresistible force in motivating . . . the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach" and positing that "[i]f those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration"). It bears noting that Justice Stevens permitted his personal reverence for the U.S. flag and what it symbolized for him to color his legal judgment. *See id.* at 437 (Stevens, J., dissenting) ("The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate.").

[145] *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

[146] *Id.* at 635.

[147] *Id.* at 656.

[148] *Id.* at 654.

[149] *Id.* at 658.

[150] *See id.* (observing that "the advantages of giving reasons come at a price" and explaining

These observations have some immediate relevance in considering the desirability of categorical rules over balancing tests in First Amendment law. Even if categorical rules are helpful in constraining judicial discretion in future cases, and are necessary to secure important First Amendment values, we should nevertheless remain open to the possibility of open-ended balancing exercises that provide judges with the flexibility to permit "as applied" challenges to otherwise constitutionally-valid speech regulations.[151] In other words, one could imagine a more subtle, nuanced First Amendment world in which categorical rules play an important role in constraining the government's censorial impulses—but which operate in conjunction with more open-ended balancing tests of the sort embraced by the Warren Court.[152]

Categorical rules, such as the rules against content and viewpoint-based speech regulations and the rule against prior restraints, play an important role in facilitating open access to the political marketplace of ideas. Accordingly, it would be a mistake—and a big one—to posit that categorical rules have no role to play in interpreting and applying the First Amendment. Categorical rules do important work vindicating expressive freedoms. But to acknowledge the potential of categorical rules is not to rule out the possibility of balancing tests adding something important to the adjudication of free speech disputes. A dual system of rules that incorporates a mix of categorical rules and balancing tests could better secure expressive freedoms than a system that relies exclusively on only one kind of decisional rule.

Access to public property provides an example of an area of First Amendment jurisprudence where such a bifurcated system could be implemented in a fashion that would do considerably more good than harm to core First Amendment values. Cases like *Flower* v. *United States*,[153] *Brown* v. *Louisiana*,[154] and *Williams v. Wallace*[155] all demonstrate that it is entirely possible to imagine a First Amendment world in which the government could be required to make non-public forums available for speech activity without undue disruption or inconvenience.[156]

Yet, the Supreme Court's more recent decisions, such as *United States v. Kokinda*[157] and *International Society for Krishna*

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that "[n]ot only does giving reasons take time and sometimes open up conversations best kept closed, it also commits the decisionmaker in ways that are rarely recognized").

[151] KROTOSZYNSKI, *supra* note 8, at 29–31, 40–42.

[152] *See supra* text and accompanying notes 64 to 104.

[153] Flower v. United States, 407 U.S. 197 (1971).

[154] Brown v. Louisiana, 383 U.S. 1 (1966).

[155] Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

[156] KROTOSZYNSKI, *supra* note 131, at 194–202, 204–05.

[157] United States v. Kokinda, 497 U.S. 720 (1990).

Consciousness v. Lee,[158] adopt and apply a rigid categorical approach that removes literally *any* burden of justification from the government for banning speech activity on a military base, at a post office, or using a main regional highway. If government property constitutes a nonpublic forum, then that is that—would be speakers enjoy no First Amendment rights of access to it.

Would it be wholly unreasonable to imagine a First Amendment world in which *some* would-be speakers—but not *all* would-be speakers—might be able to access a military base for that expressive activity? Suppose that serious allegations of sexual harassment arise against a base commander (borrowing the facts of *Greer* for this hypothetical) and persons wish to protest the base commander's failure to fully and fairly address these allegations. Public outrage erupts. In the age of the #MeToo movement, would a mass public protest on the base's property related to the base commander's indifference to the allegations be entirely unthinkable? Should a protest on base property directed against the failure to investigate the allegations—hybrid speech that implicates not only the freedoms of speech, association, and assembly, but also the right of petition,[159] be permitted via an appropriate judicial order?[160]

In my view, would-be speakers who can establish a nexus between particular property for speech activity and protest should have an opportunity to make their case—even if, in general, military base property is not available for public protest activity.[161] Over time courts would work out an analytical framework that establishes clear rules of the road (so to speak); as decisions accrete over time, one would expect to see greater consistency of results. This is, in important respects, the essence of the common law method of adjudication.[162] Inconsistency of results, in theory, should decline with the passage of time.

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[158] Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[159] KROTOSZYNSKI, *supra* note 131, at 1–10, 208–16.

[160] *See, e.g.*, *Williams*, 240 F. Supp. at 106–109.

[161] *See* Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on partisan political rallies on a New Jersey military base). *But cf.* Flower v. United States, 407 U.S. 197 (1971) (permitting leafletting on a Texas military base notwithstanding the base commander's desire to prohibit it).

[162] Some federal agencies have used case-by-case adjudication, rather than quasi-legislative rulemaking, using so-called notice and comment informal procedures, to establish regulatory policies. The National Labor Relations Board (NLRB) provides perhaps the best example of a federal agency taking this approach—using adjudication rather than rulemaking to establish major regulatory policies. *See* Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991). The reason is obvious—virtually *all* NLRB cases involve the need to balance carefully an employer's interest in operating a workplace efficiently against labor organizers or unions seeking to exercise collective bargaining rights. *See generally* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1467 (2015).

Professor Tim Zick has written lucidly and persuasively about the importance of place to public protest.[163] Place and spatial topography can be essential to the ability of would-be speakers to disseminate a message to a particular audience.[164] First Amendment doctrinal rules should be sufficiently flexible to take this important reality into account.

In fact, in the wider world, constitutional courts routinely engage in balancing exercises to determine whether the government may enforce a law or regulation that abridges a fundamental right.[165] As one group of legal scholars has explained, "[t]o speak of human rights is to speak of proportionality."[166]

Proportionality analysis generally involves a two-step process: First, a plaintiff seeking to invoke a constitutional right must establish that the government's actions violate an established constitutional right. Once the plaintiff successfully invokes a constitutionally-protected right, the burden shifts to the government to establish that the abridgment of the right is prescribed by law and demonstrably necessary in a free and democratic society, which means that the measure advances an important or pressing government interest, does so directly, and is narrowly tailored to achieve the government's objective (i.e., constitutes a "minimal impairment" of the right).[167]

Simply put, there's no good reason why the First Amendment could not reflect and incorporate a kind of balancing exercise that vests judges, federal and state alike, with the discretion to require the government to facilitate speech activity when it has the ability—but not the will—to do so. The First Amendment, like the Roman god Janus, could have two faces: a negative scope of application (which would encompass categorical rules against content- and viewpoint-based discrimination, the ban on prior restraints, and the invalidity of press licensing measures) and, at the same time, a positive aspect that imposes affirmative obligations on the state to empower ordinary people to

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[163] TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2009).

[164] KROTOSZYNSKI, *supra* note 131, at 4–10, 50–54, 197–216.

[165] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., 2012); Vicki C. Jackson, *Constitutional Law in the Age of Proportionality*, 124 YALE L.J. 3094 (2015).

[166] Grant Huscroft, et al., *Introduction* in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 1, 1 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014). These legal scholars posit that "[i]t is no exaggeration to claim that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship." *Id.* For a thoughtful explanation and overview of the centrality of proportionality review to securing fundamental rights in many democratic polities, see *id.* at 1–4.

[167] R. v. Oakes, [1986] 1 S.C.R. 103, 112 (Can.); *see also* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 804 (2004) ("Canada has played a particularly influential role in the transnational development of proportionality testing in constitutional law.").

access and engage the political marketplace of ideas. The negative aspect would constitute a kind of "floor," whereas the positive aspect would serve as a kind of "ceiling."

Adopting this approach would not level down any would-be speaker currently protected under existing doctrinal rules; it would not suffer from the vice of diminishing any existing First Amendment rights. At the same time, taking this approach would have the distinct First Amendment virtue of expanding the universe of protected expression by facilitating more speech related to the process of democratic self-government. If free speech is integral to the process of democratic self-government, then interpreting and applying the First Amendment to impose affirmative duties on the government to facilitate speech of this kind would be good for democracy. Accordingly, federal courts should embrace, not reject, doctrinal innovations that make it easier for more citizens to speak their version of truth to power. Moreover, they should do so even if this requires the courts to embrace an affirmative role for the First Amendment in literally creating the space necessary for democracy to function.

Taking this approach would, of course, involve the risk of judges appearing to favor some speakers over others. But this holds true in any context where a judge must openly and transparently exercise discretion to resolve a pending dispute.[168] The amount of discretion associated with proportionality review is quite broad and open-ended. It vastly exceeds the more limited scope of discretion that this Essay proposes as a new aspect of First Amendment jurisprudence. Moreover, constitutional courts in liberal democracies that practice proportionality review, such as Canada, Germany, and South Africa, nevertheless enjoy broad public confidence and institutional legitimacy.[169] This suggests that the presence of judicial discretion in the process of enforcing constitutional

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[168] KROTOSZYNSKI, *supra* note 8, at xiii-xiv, 217–18, 223–25; KROTOSZYNSKI, *supra* note 131, at 202–07.

[169] It bears noting that Justice Stephen Breyer has tentatively endorsed the use of proportionality analysis—and has done so specifically in the context of the First Amendment. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 367 (2009) (Breyer, J., dissenting) (arguing that the federal courts, when deciding a First Amendment question, should ask "whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve," observing that "[c]onstitutional courts in other nations also have used similar approaches when facing somewhat similar problems," and citing and describing cases from Canada, Israel, South Africa and the European Court of Human Rights that use proportionality analysis in cases involving expressive freedoms); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting) ("In this case I would ask whether Vermont's regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives."); United States v. Playboy Entm't Group, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting) (arguing that "a judge [should] not . . . apply First Amendment rules mechanically" but instead "decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection)").

rights need not be antithetical to the reputations of judges as honest brokers (or neutral adjudicators). Discretion need not seriously diminish, much less destroy, public confidence in the federal courts.

If free and open democratic deliberation is an essential condition for elections to serve as an effective means of securing government accountability, and also the principal means of conveying democratic legitimacy on the elected institutions of government, the ability to participate in this process must be self-evidently open to any and all citizens. Simply put, elections conducted without free and open public debate cannot convey democratic legitimacy on the institutions of government. To the extent that the process of democratic deliberation is more open and inclusive, democracy will be the stronger for it.

V. CONCLUSION

Alexander Meiklejohn famously argued for public subsidies to support and facilitate the process of democratic deliberation.[170] He suggested "[i]n every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy."[171] It might be unrealistic to expect the government to build free speech community centers for the purpose of engaging in democratic discourse. Nevertheless, the First Amendment has a positive, or affirmative, role to play in securing the process of democratic deliberation.[172]

Our doctrinal First Amendment rules should facilitate, not impede, the ability of ordinary citizens to participate meaningfully in the process of democratic self-government. If this is our objective, we have a lot of work left to do—yet, unfortunately, the needle seems to be moving in the wrong direction. Rather than pressing the government to facilitate speech when it has the ability to do so without undue inconvenience or disruption to its operations, the Supreme Court instead seems quite content to permit the government to manage its resources more or less like a private citizen or corporation.[173] In a polity that purports to

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[170] Meiklejohn, *supra* note 62, at 260–61.

[171] *Id.* at 260.

[172] SUNSTEIN, *supra* note 4, at 20–23.

[173] *See* Davis v. Commonwealth, 167 U.S. 43, 47–48 (1897) ("The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control . . . and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State."). Thus, the government, like a private property owner, enjoys the right to decide who may use its property for speech activity. *See id.* at 48 (holding that "[t]he right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser").

maintain a serious commitment to the equality of all citizens—"one person, one vote" in the words of the Supreme Court[174]—we can and must do better to enable ordinary citizens of average means to participate in the political marketplace of ideas.

In conclusion, contemporary First Amendment jurisprudence all too often has come to resemble a Procrustean bed. In its efforts to exorcise judicial discretion from cases involving expressive freedoms, the Roberts Court has disregarded relevant facts—while at the same time, stretched certain relevant legal and policy considerations beyond their ability to support a result.[175] The Aristotelean virtuous mean[176] lies between the vicious extremes of embracing a First Amendment universe featuring only unfettered judicial discretion or categorical rules that produce consistent results on a predictable basis, but sanction far-reaching government efforts to stifle or squelch dissenting voices. The truth—if the Roberts Court could but find the wisdom to see it—is that a democratic polity requires *both* categorical rules *and* balancing tests to ensure that democratic discourse is "uninhibited, robust, and wide open."[177]

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[174] Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."); *see also* SUNSTEIN, *supra* note 4, at 20 (positing that "the system of deliberative democracy is premised on and even defined by reference to the commitment to political equality" and "[a]t least in the public sphere, every person counts as no more or less than one").

[175] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 425–26 (2006) (rejecting "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties" and refusing to extend any First Amendment protection to government employees for such statements because "[o]ur precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job"). *Garcetti* clearly constitutes a First Amendment Procrustean bed: It fails to acknowledge or engage in the complexities presented by circumstances in which a government employee speaks out incident to her official duties. A more nuanced, context-specific approach would take into account the relevance of the speech to the ability of voters to hold the government accountable; speech of a whistleblowing cast should have a stronger claim on the First Amendment than proselytizing while on the job at the DMV. *See* KROTOSZYNSKI, *supra* note 8, at 88–94 (advocating enhanced First Amendment protection for "whistleblowing speech" by government employees and distinguishing it from more generic forms of government employee speech about matters of public concern).

[176] Aristotle, THE NICHOMACHEAN ETHICS 42-53, paras. 1106a5–1109b (Terence Irwin trans., Hackett Publishing Co. 1985); *see also* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 286–88 (1996) (describing and discussing the Aristotelian concept of the "virtuous mean" and noting that it lies between problematic extreme forms of behavior that reflect either a surfeit or a shortage of a particular character trait).

[177] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be *uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.") (emphasis added).

Defending Speech Crimes

Judith Miller[†]

The First Amendment is supposed to provide important protections against criminal prosecutions for speech crimes. In practice, however, those protections are inadequate: in a world of vanishing trials, criminal defendants lack meaningful opportunities to litigate often fact-bound First Amendment questions. Through the lens of prosecutions for false speech, this article proposes refocusing First Amendment protections in criminal cases on criminal procedure rather than substantive questions about what the First Amendment protects. It suggests two procedural reforms—revitalizing the indictment and unanimity requirements—to help make the First Amendment's ostensible protections more of a reality for criminal defendants.

I. INTRODUCTION

In *United States v. Alvarez*[1] the Supreme Court expressly held, for the first time, that false speech is entitled to First Amendment protection in its own right. The Court concluded that the First Amendment requires any such prohibition either to map onto a common law crime (e.g., fraud, defamation) or to criminalize only a narrow slice of speech or conduct, focused specifically on the harm to be avoided.[2] Subsequent *Alvarez* litigation and the related academic analysis focus almost entirely on the substantive question of what kinds of false expression the First Amendment allows the state to prohibit.[3] Questions in First Amendment criminal case law and academic literature more broadly

[†] Tremendous thanks go out to my extraordinarily patient editors at the *University of Chicago Legal Forum* and to the other participants in the autumn false speech symposium, my devoted and insightful research assistant Elisabeth Mayer, and also to William Baude, Genevieve Lakier, David Owens, Erica Zunkel, Andrew Mackie-Mason, and Max Samels.

[1] 567 U.S. 709 (2012) (plurality opinion).

[2] *Id.* at 709; Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 665–70 (2018).

[3] *See, e.g.*, Chen & Mereau, *supra* note 2; Louis W. Tompros et al., *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-*Alvarez*, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65 (2017); David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70 (2012).

likewise reflect this focus on substantive questions of just what the First Amendment protects or prohibits.[4]

These substantive questions about the reach of the First Amendment are largely orthogonal to the world of actual criminal practice. In criminal practice, substantive First Amendment questions are typically as-applied challenges—that is, questions of the form "Does criminalizing this or that alleged misconduct violate the First Amendment?" These questions are litigated almost exclusively mid-trial or post-trial: mid-trial, at a jury instruction conference, after the evidence is in, or post-trial, via a sufficiency of the evidence challenge.[5]

But by then the First Amendment offers little protection. Post-trial motions offer the most thorough place to litigate the issue, but of course

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[4] Take, for example, the last decade of Supreme Court criminal cases involving the First Amendment and related statutes: Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (finding that a state statute prohibiting registered sex offenders from accessing social networking sites violated the First Amendment); Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (holding that negligence could not support conviction for transmitting threats); *Alvarez*, 567 U.S. at 730 (concluding "[t]he Stolen Valor Act infringes upon speech protected by the First Amendment."); United States v. Stevens, 559 U.S. 460, 482 (2010) (holding that a statute criminalizing depictions of animal cruelty violated the First Amendment). Leading First Amendment articles in the last decade are the same. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011). Research reveals only sporadic exceptions, further underscoring the axiom that the exceptions prove the rule. *See, e.g.*, Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215 (1987) (arguing for a revised approach to procedural law in First Amendment libel law); *cf.* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1476 (2005) (examining interplay between First Amendment values and defendants' silence in criminal cases).

[5] *See* FED. R. CRIM. P. 29. A defendant challenges the sufficiency of the evidence via motion under Federal Rule of Criminal Procedure 29. The motion can be raised up to three times: first, at the close of the government's case, second, at the close of evidence but before the jury's verdict, and third, after the verdict. FED. R. CRIM. P. 29(a), (c). However, judges may reserve ruling on either the first or second form of the motion until the evidence is complete, the jury is deliberating, the jury is discharged without a verdict, or even after the jury has returned a verdict. FED. R. CRIM. P. 29(b). As a practical matter, this means that there is often effectively only one sufficiency of the evidence challenge, litigated via a post-trial motion.

Declaratory judgments are unlikely to fix this problem. To be sure, plaintiffs who suspect themselves to be a likely target for criminal prosecution can in theory seek out a declaratory judgment declaring the law (or the law as applied) unconstitutional. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 15–16 (2010). But that is no solution for run of the mill criminal defendants, who are largely indigent and less sophisticated than the plaintiffs in cases such as *Humanitarian Law Project*. Approximately ninety-three percent of federal criminal defendants need appointed counsel. *See* 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 17 (2018), https://cjastudy.fd.org/ [https://perma.cc/FGV3-GDJD]. Even when repeat-player appointed defense attorneys recognize a statute's weakness to a class of clients, they may face serious institutional challenges in bringing such a challenge, *see, e.g.*, *id.* at 71, 89–92, 104, if their statutory underpinnings even allow such challenges. *See, e.g.*, *id.* at 67–69.

a post-trial motion requires a trial—a rare event in our world of vanishing trials.[6] Moreover, judges are understandably reluctant to disturb a jury's verdict. And, in any event, the legal standard substantially favors the prosecution by prohibiting the judge from reversing a conviction unless the judge concludes that no "rational trier of fact could have found the essential elements of [the] crime beyond a reasonable doubt," evaluating the evidence "in the light most favorable to the prosecution[.]"[7]

Jury instructions fare little better. The court finalizes jury instructions at a jury instruction conference after the close of evidence and before closing arguments.[8] There, either party can object to the court's proposed instructions and any refusals to present party-proposed instructions.[9] In relevant part, the parties can raise as applied challenges to prevent the jury from convicting or acquitting for unconstitutional reasons raised by the evidence.[10] But case law, again, puts a thumb on the scale against issuing such instructions: district courts are typically safe from reversal for instructional error where the instructions "read as a whole . . . completely and correctly state[] the law."[11] And even when an appellate court finds constitutional error, another level of deference still requires affirming the verdict when the error is ostensibly harmless beyond a reasonable doubt.[12] Jury instructions, too, are thus not an especially effective mechanism for enforcing the First Amendment in criminal cases.

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[6] The "vanishing trial" is a widely used shorthand that refers to the dramatic decrease in the percentage of civil and criminal cases resolved via trial, as opposed to settlement (civil), guilty pleas, or other means. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUD. 459 (2004).

[7] *See* United States v. Mohamed, 759 F.3d 798, 803 (7th Cir. 2014) (internal quotation marks omitted).

[8] *See* FED. R. CRIM. P. 30. Note that experienced practitioners will prepare and even submit key jury instructions before trial, especially instructions about the elements of the offense. *See generally* F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* § 49:3 (2019). However, a judge need not rule on the proposed instruction until before closing arguments, per FED. R. CRIM. P. 30(b), and in any event can revise earlier rulings at that time. *See id.* For an overview of the many stages of jury instructions in a criminal trial, see 6 Wayne R. Lafave et al., *Principles of Criminal Procedure: Investigation* § 24.8(a) (4th ed. 2019).

[9] FED. R. CRIM. P. 30(d); Lafave et al., *supra* note 8, at § 24.8(b).

[10] An example may be illustrative for those unfamiliar with the intricacies of trial practice. Take United States v. White, 698 F.3d 1005, 1012, 1018–20 (7th Cir. 2012), a solicitation case. After defense objection, the district court issued a First Amendment instruction outlining some of the relevant *limits* to criminal solicitation that the government's evidence raised, in addition to issuing standard solicitation instruction setting out the elements of the offense. *See White*, 698 F.3d at 1012, 1018–20.

[11] United States v. Anzaldi, 800 F.3d 872, 880 (7th Cir. 2015) (quoting United States v. DiSantis 565 F.3d 354, 359 (7th Cir. 2009)).

[12] There are different standards of appellate review for the different ways in which these issues could come up, but all include *some* deference to the trial verdict. *See infra* Part V.B.

Ultimately, substantive litigation, at trial and after, over what the First Amendment prohibits provides inadequate protection against unconstitutional convictions. In response, this paper proposes expanding opportunities for First Amendment litigation throughout the criminal process by shifting focus from substantive to procedural litigation. Expanding sites for meaningful First Amendment litigation strengthens First Amendment protections by offering not only more opportunity to raise such issues but also greater variety of such challenges.

In a world of vanishing trials, such expansion is especially critical. First Amendment cases are often especially fact-intensive. Abandoning any analysis of the facts of a charge until trial in effect means abandoning most meaningful First Amendment challenges. A turn to criminal procedure helps solve this problem.

This article explores this shift to procedure through the lens of false speech cases. These cases provide relative clarity about what a more procedurally oriented First Amendment could look like, as well as the challenges facing criminal defendants under the current doctrine. That is because *Alvarez* gives constitutional weight to the "non-lying" elements of any offense involving false expression. In other words, following *Alvarez*, any legally valid false speech charge *must* involve more than simply a claim that an offender is lying; lying as such cannot be criminalized.[13]

This article focuses on two procedural mechanisms for strengthening the First Amendment within the criminal legal system: robust grand jury/indictment and unanimity requirements. These requirements help vindicate the First Amendment by testing the facts of a case against the constitutionalized elements of the offense. Specifically, they require the government to offer up specific *facts* that meet each and every one of the elements of an offense—including, for false speech, the constitutionalized "non-lying" elements.

Under the Fifth Amendment, a grand jury cannot return an indictment charging someone with a crime unless the grand jury finds facts constituting probable cause to believe that a defendant has violated each and every element of an offense.[14] The Sixth Amendment requires that the resulting indictment inform a defendant of the key facts of the charges against him—the "nature and cause" of the charges.[15] And, finally, Due Process and the Sixth Amendment require that a federal

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[13] United States v. Alvarez, 567 U.S. 709, 715 (2012) (plurality opinion).

[14] U.S. CONST. amend. V; *see, e.g.*, United States v. Gonzalez, 259 F.3d 355, 361 n.3 (5th Cir. 2001), *on reh'g en banc sub nom.* United States v. Longoria, 298 F.3d 367 (5th Cir. 2002) (requiring "assurance that the grand jury found probable cause for each of the elements of an offense").

[15] U.S. CONST. amend. VI.

trial jury's verdict be unanimous on the facts demonstrating the central elements of an offense.[16]

The existing law of grand juries/indictments and unanimity already goes part of the way to providing considerable procedural protections for criminal defendants charged with false speech crimes. A First Amendment overlay serves to strengthen what doctrine already ostensibly requires; it does not require a radical transformation of criminal procedure. Part II of this article explains how, following *Alvarez*, criminal prohibitions on false speech are unconstitutional unless they are coupled with elements limiting the scope of that prohibition. Part III then shows how the intertwined grand jury/indictment requirements carry those First Amendment limitations from the text of the statute to the initiation of a criminal case: the grand jury must determine whether the government has evidence supporting those constitutionally required First Amendment limits, and the indictment notifies a defendant how the resulting case complies with the First Amendment requirement. Part IV, in turn, argues that convicting someone requires a petit jury to unanimously conclude that those First Amendment limiting facts—and not some others—occurred beyond a reasonable doubt, and that they make out the applicable limiting elements. Finally, Part V takes a step back and responds to counterarguments. It argues, first, the First Amendment provides ample reason to reinvigorate criminal procedure's sometimes empty formalisms, and, second, that trial level procedural changes like these matter.

II. FALSE SPEECH'S LIMITING ELEMENTS

In *United States v. Alvarez*, the Supreme Court struck down the Stolen Valor Act of 2005[17] as an unconstitutional prohibition on protected speech.[18] *Alvarez* was an impersonation case, and a sad one. Mr. Alvarez was convicted of claiming to be a Congressional Medal of Honor recipient when he was not. He had introduced himself at a public water board meeting as a Medal recipient, but he made no attempt to obtain any benefits or privileges reserved for Medal holders.[19] As the Supreme Court observed, his false claims "were but a pathetic attempt to gain respect that eluded him."[20]

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[16] U.S. CONST. amends. V, VI; *see also* Richardson v. United States, 526 U.S. 813, 817 (1999) ("[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.").

[17] Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat 3266 (2006), *invalidated by Alvarez*, 567 U.S. 709.

[18] *Alvarez*, 567 U.S. at 715.

[19] *Id.*

[20] *Id.*

A divided Court struck down the Stolen Valor Act, which prohibited such lies.[21] Writing for a four-justice plurality, Justice Kennedy applied "the most exacting scrutiny" to conclude that the Stolen Valor Act was unconstitutional.[22] Justice Breyer and Justice Kagan agreed that the Act was unconstitutional but applied intermediate scrutiny.[23]

Although no opinion garnered a majority, the upshot from both opinions was similar: lies are not categorically outside the protection of the First Amendment. Instead, the state can criminalize lies only when they falls into a categorically unprotected category of speech (e.g., fraud, etc.) or when the elements of the offense require not only a lie but also "some other legally cognizable harm."[24] Those elements, in the words of the concurring judges, impose "limitations on . . . scope" that narrow the offense to "lies most likely to be harmful or . . . contexts where such lies are most likely to cause harm."[25]

The absence of these limiting elements distinguished the unconstitutional Stolen Valor Act from the parade of federal and state statutes that the government and amici complained would be jeopardized by striking down the Act.[26] To the plurality and concurring justices, the Stolen Valor Act was different because it criminalized "all false statements" on a given subject "in almost limitless times and settings.".[27]

Constitutionally valid "false statements" statutes avoided the bogeyman of criminalizing mere lies by adding additional limiting elements. The Court illustrated this principle by walking through the limiting elements in the three statutory categories the government claimed would be put at risk if the Court found false speech to be constitutionally protected—false statements to officials (Section 1001), perjury, and impersonation. First and foremost, federal law prohibits making a false statement to federal officials, in violation of 18 U.S.C. § 1001. But § 1001 punishes only *materially* false statements made to government

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[21] *Id.* at 715; *id.* at 730 (Breyer, J., concurring).

[22] *Id.* at 724 (plurality opinion) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)).

[23] *Id.* at 732 (Breyer, J., concurring). In addition to the plurality and concurrence, Justices Alito, Scalia, and Thomas also dissented. *Id.* at 739 (Alito, J., dissenting).

[24] *Id.* at 717–19 (plurality opinion).

[25] *Id.* at 737–38 (Breyer, J., concurring).

[26] The government, for example, highlighted false statements (18 U.S.C. § 1001), perjury, and the various statutes criminalizing falsely representing oneself to be acting on behalf of the government. Brief for Petitioner at 29–32, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-210). First Amendment scholars Eugene Volokh and James Weinstein listed no less than thirteen categories of federal and state offenses, many with multiple subcategories—all of which would be implicated in finding First Amendment protection for false speech. Brief for Professors Eugene Volokh and James Weinstein as Amicus Curiae in Support of Petitioner at 3–11, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-120).

[27] *Alvarez*, 567 U.S. at 723; *see also id.* at 736 (Breyer, J., concurring) ("[F]ew statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter.").

officials, about official matters; it does not punish mere false statements.[28] Second, perjury prosecutions do not punish mere false speech as such but, rather material false speech under oath, in an official proceeding or document, in violation of 18 U.S.C. §§ 1621, 1623.[29] There is little risk that prosecuting such false speech, under oath, will impinge on "lies not spoken under oath and simply intended to puff up oneself."[30] Finally, impersonation statutes, too, are distinct from mere false speech in that they require showing that the communication appears to hold some kind of official authorization and "implicate fraud or speech integral to criminal conduct."[31]

The logic of *Alvarez* is not 100% pellucid, but its takeaway is much more so: a statute criminalizing false expression is unconstitutional unless it falls into a category of historically unprotected speech, or its elements meaningfully limit its scope. The exact contours of these limiting elements are defined by statute, but they are nonetheless required by the Constitution. The rest of this paper explores what it means to enforce the limits these constitutionalized elements impose.

III. INDICTMENTS AND GRAND JURIES

For better or worse, our criminal system is one of vanishing trials. Only two percent of federal cases go to trial.[32] As the Supreme Court famously recognized, "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials."[33] The absence of trials is self-reinforcing in cases that raise potential First Amendment issues: the constitutional limits of such offenses aren't tested because so few cases go to trial, and few such cases go to trial because trial is even more risky when the contours of the offense are unknown. Following *Alvarez*, one would have expected extensive litigation over the

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[28] *See id.* at 720 (plurality opinion); *see also id.* at 734–35 (Breyer, J., concurring).

[29] *See id.* at 721 (plurality opinion); *see also id.* at 734 (Breyer, J., concurring).

[30] *Id.* at 721 (plurality opinion).

[31] *See id.* The elements of federal impersonation, in violation of 18 U.S.C. § 912, are much more controverted than the elements of perjury and § 1001 violations. The plurality and concurring opinions thus agree less as to the nature of the limiting element for a § 912 case than they do for perjury and § 1001 violations. Both opinions agree, however, that the limiting elements—whatever they are—play an important role. *See id.* at 735 (Breyer, J., concurring) (quoting United States v. Lepowitch, 318 U.S. 702, 704 (1943)). The plurality quotes in the text above would require elements analogous to fraud or speech integral to criminal conduct, while the concurrence focuses on "acts of impersonation, not mere speech" that "may require a showing that, for example, someone was deceived into following a 'course [of action] he would not have pursued but for the deceitful conduct.'" *Id.* (citing *Lepowitch*, 318 U.S. at 704).

[32] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/K9T7-YU6S].

[33] Lafler v. Cooper, 566 U.S. 156, 170 (2012).

contours of the limiting elements in false statement offenses.[34] But that hasn't happened: a review of all federal criminal cases citing *Alvarez* reveals few cases even challenging criminal prohibitions on false expression, and just one case striking down a statute.[35]

The prospect of defendants facing unconstitutional charges until a trial that never happens is itself a First Amendment problem. Just the *threat* of an improper conviction chills speech, regardless of whether the speech is ever prosecuted, and regardless of whether the speech is even prohibited.[36] As the Court has observed, the threat of criminal sanctions "may well cause speakers to remain silent rather than communicate" potentially lawful "words, ideas, and images."[37] And "[e]ven the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."[38] In a world of vanishing trials, that threat is real.

Shifting focus to pretrial procedure is one mechanism for breaking this vicious cycle. But there is no need to invent new procedural steps. To charge someone with a crime, the government must already produce facts supporting each and every element of the charges and informing the defendant of the gist of the resulting charges. Specifically, a federal

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[34] The Court takes only important cases. *See* SUP. CT. R. 10. And, as noted above, the government and amici argued that striking down the Stolen Valor Act would topple a host of other federal and state statutes. *See supra* Part II. In addition, *Alvarez*'s lengthy discussion of the limiting elements of existing "false statements" offenses provides ample opportunity for defense lawyers to argue that their case falls outside the limiting elements as defined in *Alvarez*.

[35] Unsuccessful challenges: United States v. Bonin, 932 F.3d 523, 536 (7th Cir. 2019) ("Because the acts-as-such clause prohibits more than mere lies, it falls outside the scope of *Alvarez*'s holding."); United States v. Nabaya, 765 Fed. Appx. 895, 899 (4th Cir. 2019) (upholding federal statute prohibiting retaliating against federal employees and officers by filing a false lien or encumbrance); United States v. Ackell, 907 F.3d 67, 76–77 (1st Cir. 2018) ("[W]e are unconvinced that we must administer the 'strong medicine' of holding the statute facially overbroad."); United States v. Glaub, 910 F.3d 1334, 1338 (10th Cir. 2018) ("The Supreme Court, however, has held that the submission of a false claim to the government is not protected by the First Amendment.") (citing *Alvarez*, 567 U.S. at 723); United States v. Baumgartner, 581 Fed. Appx. 522, 530–31 (6th Cir. 2014) (finding that federal misprision statute did not violate the First Amendment); United States v. Tomsha-Miguel, 766 F.3d 1041, 1049 (9th Cir. 2014) (holding that 18 U.S.C. § 912 did not violate the First Amendment); United States v. Harkonen, 510 Fed. Appx. 633, 636 (9th Cir. 2013) ("The First Amendment does not protect fraudulent speech . . . ."); United States v. Chappell, 691 F.3d 388, 393–94 (4th Cir. 2012) (upholding a state personation statute); United States v. Hamilton, 699 F.3d 356, 374 (4th Cir. 2012) (holding that *Alvarez* does not call the constitutionality of federal insignia statutes into question); United States v. Keyser, 704 F.3d 631, 639–40 (9th Cir. 2012) (finding that defendant's hoax speech was not protected speech); United States v. Williams, 690 F.3d 1056, 1064 (8th Cir. 2012) (holding that federal statutes were constitutional regulations of true threats).

Successful challenge: United States v. Swisher, 811 F.3d 299, 303–04 (9th Cir. 2016) (en banc) (striking down 18 U.S.C. § 704(a), a federal statute prohibiting unauthorized wearing of military medals).

[36] Reno v. ACLU, 521 U.S. 844, 871–72 (1997).

[37] *Id.* at 872.

[38] Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

felony case typically begins when a grand jury returns an indictment.[39] The grand jury can do that only when the government's evidence provides probable cause to believe that the individual charged committed each and every element of an offense, including, in the case of false speech offenses, the constitutionalized limiting elements.[40] The grand jury returns those charges in the form of indictment, which itself provides notice of the charges against a defendant—both the elements and "essential facts" of the offense.[41]

When analyzed through a First Amendment lens, these intertwined grand jury and indictment requirements enable part of First Amendment challenges to be litigated before trial, circumventing the vanishing trial problem. The grand jury already is supposed to evaluate whether the government has produced facts supporting the critical limiting elements of a false speech offense. In theory, the grand jury thus helps prevent defendants from being indicted for conduct that is protected by the First Amendment. Including those constitutionally salient facts in the resulting indictment would demonstrate that the grand jury did, in reality, find such facts.[42] The indictment would then also provide notice to a defendant of the nature of the pending charges, and, critically, would ensure from the outset of a proceeding that the constitutional facts underpinning the government's charges actually comply with the applicable First Amendment limits. Already, notice must involve the "essential facts" underpinning a charge.[43] In a post-*Alvarez* world, those "essential facts" should include the facts found by the grand jury to support the constitutionally relevant limiting elements. The government is then held to that notice at trial.[44]

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[39] Federal criminal cases can also be commenced via complaint or continued with an information. *See* FED. R. CRIM. P. 3, 7(b). However, both are subject to significant limitations such that their use is largely limited to cases involving early guilty pleas. *See* FED. R. CRIM. P. 5.1, 7(b).

[40] This is a foundational principle on which the grand jury operates. *See, e.g.*, United States v. Cole, 784 F.2d 1225, 1227 n.1 (4th Cir. 1986) ("If the grand jury had not found all elements of the offense, the indictment is invalid . . . .")

[41] FED. R. CRIM. P. 7(c)(1); *see also* United States v. Resendiz-Ponce, 549 U.S. 102 (2007).

[42] Grand juries have famously been criticized for being willing to indict a ham sandwich. *See* Josh Levin, *The Judge Who Coined 'Indict a Ham Sandwich' Was Himself Indicted*, SLATE (Nov. 25, 2014), https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html [https://perma.cc/98GF-ABBD] (providing history of "indict a ham sandwich" phrasing).

[43] FED. R. CRIM. P. 7(c)(1); *see also Resendiz-Ponce*, 549 U.S. 102.

[44] *See* Stirone v. United States, 361 U.S. 212, 218–19 (1960).

A. The Law of Grand Juries and Indictments

The Fifth Amendment's grand jury requirement and the Sixth Amendment's indictment requirement are supposed to work in tandem to protect federal defendants.[45]

The grand jury serves a dual role as a "sword" investigating and charging crime and as a "shield" protecting the accused from "unfounded criminal prosecutions."[46] The grand jury is thus centrally concerned with assessing *facts*—"whether there is adequate basis for bringing a criminal charge."[47] Any resulting indictment defines the scope of the government's trial case: the Fifth Amendment demands that the "allegations in the indictment and the proof at trial match . . . ."[48] The remedy for a fatal variance is dismissal for violation of a defendant's Fifth Amendment rights.[49] The prosecution thus has every incentive to persuade the grand jury to return as broad an indictment as possible so as to provide maximum flexibility over the evidence presented at trial.

The Sixth Amendment and Federal Rule of Criminal Procedure's Rule 7(c)(1) requirements for what an indictment must contain limit the breadth of that indictment.[50] Under the Sixth Amendment, an indictment must provide notice of "the nature and cause" of the charges against a defendant.[51] Notice is not an elaborate affair. The Federal Rules of Criminal Procedure require only a "plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ."[52] The Sixth Amendment likewise demands only the elements of the offense, and adequate facts to "fairly inform[]" the defendant of the charge(s), with sufficient specificity to protect against future double jeopardy problems.[53] In addition, an indictment serves the corollary purpose of informing "the court" about the facts alleged, "so that

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[45] When this article began, the indictment and grand jury requirement had not been incorporated against the states. *See* Hurtado v. California, 110 U.S. 516 (1884). Since then, the Supreme Court reversed course and concluded that juror unanimity is now incorporated against the states. Ramos v. Louisiana, 140 S. Ct. 1390 (2020). It is too soon to say with confidence what effect, if any, this will have on the unincorporated indictment requirement.

[46] *See* Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 101 (4th ed. 2010); *see also* United States v. Calandra, 414 U.S. 338, 343 (1974).

[47] United States v. Williams, 504 U.S. 36, 51 (1992).

[48] United States v. Trennell, 290 F.3d 881, 888 (7th Cir. 2002).

[49] *Stirone*, 361 U.S. at 218–19.

[50] U.S. CONST. amend. VI; FED. R. CRIM. P. 7(c)(1).

[51] U.S. CONST. amend. VI.

[52] FED. R. CRIM. P. 7(c)(1).

[53] U.S. CONST. amend. VI.; *see also* United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)).

it may decide whether they are sufficient in law to support a conviction . . . ."[54]

All the action, so to speak, is in the second part of the Sixth Amendment test, which seemingly overlaps with Rule 7(c)(1): which elements require factual specificity in order to "fairly inform[]" a defendant of the charges? The Supreme Court's two most recent cases seem to say that, in most cases, simply reciting the language of the statute (or the elements of the offense) and providing the date and location of the offense will typically suffice.[55] On the other hand, the Court's third leading indictment case, *United States v. Russell*, recognizes that certain charges and elements "depend so crucially upon . . . a specific identification of fact" as to demand additional specificity.[56]

The appellate courts have elaborated on this tension by requiring an indictment to contain *some* facts that "pin[] down the specific conduct at issue," without imposing overly strict limits on the government's case.[57] Any "essential element of the offense" thus must be charged with some factual specificity.[58] But, even then, "a defendant is not entitled to know all the evidence the government intends to produce [at trial], but only the theory of the government's case."[59]

B. Indictments After *Alvarez*

As discussed in Part II, *Alvarez* frames valid "false speech" cases in terms of two components: the lie and limiting element(s) that bring the statute within the ambit of the First Amendment.[60] Both must be set out with some factual specificity in the indictment. Doing so meaningfully ensures—from the beginning of a case—that the grand jury does not authorize charges that violate the prohibition on prosecuting bare lies, that the government does not pursue an unconstitutional case, and of course that a defendant does not face such. Without such protection, there is little way to ensure such a result until trial—which likely will never happen in our world of vanishing trials.

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[54] Russell v. United States, 369 U.S. 749, 768 (1962).

[55] *Hamling*, 418 U.S. at 117 ("It is generally sufficient that an indictment set forth the offense in the words of the statute . . . ."); *see also Resendiz-Ponce*, 549 U.S. at 102 (recognizing language of statute "coupled with the specification of the time and place" of offense satisfied indictment requirement).

[56] *Russell,* 369 U.S. at 764 (finding indictment insufficient).

[57] United States v. Smith, 230 F.3d 300, 305 (7th Cir. 2000).

[58] United States v. Locklear, 97 F.3d 196, 199–200 (7th Cir. 1996).

[59] United States v. Kendall, 665 F.2d 126, 135 (7th Cir. 1981) (quoting United States v. Giese, 597 F.2d 1170, 1181 (9th Cir. 1979)).

[60] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

1. The misrepresentation element

Even before *Alvarez*, courts largely agreed that an indictment must specify the *lie* in a false speech case. Impersonation cases provide perhaps the clearest example. As far back as the nineteen-teens the Supreme Court in *United States v. Barnow* recognized that "the mischief to be cured" in an impersonation case "is the false pretense."[61] The next year, it concluded that an impersonation indictment must contain the lie: the "name and official character of the officer whom the accused [is] charged with having falsely personated."[62] Practice conforms to the rule. In the Seventh Circuit, for example, every indictment available on PACER as of fall 2017 complies with the requirement to specify the lie.[63]

The case law of other false speech statutes is perhaps not quite as neat, but nonetheless reaches the same conclusion: an indictment for false speech must factually specify the false statement. Indeed, though indictments are rarely found insufficient, a handful of cases have reversed convictions in false speech cases for failing to comply with this requirement. In *United States v. Nance*, for example, the D.C. Circuit overturned a conviction for ten counts of obtaining something of value by false pretenses when none of the counts set out the applicable false representations.[64] In *United States v. Frankel*, the Third Circuit likewise affirmed the dismissal of mail fraud and wire fraud charges where the alleged underlying false statement was not, in fact, a false statement.[65] And even the United States Attorneys' Manual concedes that a perjury indictment must specify the false statement, just as a mail fraud or wire fraud indictment must set out the fraudulent scheme—the lie—on which the charges depend.[66]

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[61] United States v. Barnow, 239 U.S. 74, 78 (1915).

[62] Lamar v. United States, 241 U.S. 103, 116 (1916).

[63] *See* Table 1, Appendix. There is one exception: In *United States v. Bonin*, the government filed a superseding indictment with one impersonation charge that did not specify the lie. *See* Superseding Indictment, United States v. Bonin, No. 1:15-cr-00022, (N.D. Ill. Mar. 21, 2017), Dkt. 138. My colleague Professor Erica Zunkel, my students, and I challenged the sufficiency of that indictment for that charge based on the legal theory described in the text above. *Id.* at Dkt. 184 (N.D. Ill. Oct. 16, 2017). The government dismissed the charges ten days later without responding, after the coincidental death of a witness. *Id.* at Dkts. 186 (N.D. Ill Oct. 24, 2017), 188 (N.D. Ill. Oct. 26, 2017).

[64] United States v. Nance, 533 F.2d 699, 700–01 (D.C. Cir. 1976) (per curiam). Note that the underlying statute was a District of Columbia offense, and therefore not one of the usual enumerations of federal false expression offenses. *Id.* The principle still stands, however.

[65] United States v. Frankel, 721 F.2d 917, 917–19 (3d Cir. 1983).

[66] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1755 (4th ed. 1997) ("The indictment must set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review."); *id.* at § 971 ("[A] mail fraud or wire fraud indictment should contain a reasonably detailed description of the particular scheme the defendant is charged with devising to ensure that the defendant has sufficient notice of the nature of the offense.") (collecting cases).

2. The limiting element

But, of course, no one can be prosecuted merely for lying; that is the upshot of *Alvarez*. From the defendant's perspective, an indictment that fails to factually specify the constitutionally relevant facts underpinning the limiting element(s) effectively prosecutes him or her simply for lying. Such an indictment provides no evidence that the grand jury considered whether or how the defendant did more than just lie. It likewise fails to notify the defense as to how this particular case avoids the *Alvarez* problem, nor can the court make such an assessment. And it sets out no limits on the government's case at trial besides the lie itself and the language of the statute.

Following *Alvarez*, the better course is to require a "false expression" indictment to specify not only the false expression but also the facts supporting the constitutionally critical limiting element(s). That is because guilt in a false expression case depends not only on the specific false expression but also on whether (or how) that false expression is cabined by the facts supporting constitutionalized limiting element. Following *Alvarez*, not just the lie but also the limiting element are the "very core of criminality" of the charges.[67] Pinning down the "specific conduct at issue" in a given case—as opposed to just false expression that otherwise would be constitutionally protected—thus requires an indictment that specifies that conduct.[68] Without such specificity, not only the defendant but also the court are at sea until trial.

Alvarez confirms that the First Amendment harm of potentially criminalizing mere lies applies pretrial: "[T]he mere *potential*" exercise of government power to criminalize lies as such creates "a chill the First Amendment cannot permit."[69] And that is what happens with an indictment that omits facts supporting the constitutionally relevant limiting elements. The only thing defendants would learn about what, exactly, they did to violate the law is that they told a lie (and perhaps the date and location). In a false statements charge (§ 1001), that would be the lie absent materiality or jurisdiction; in a perjury charge, the lie absent any specific sworn proceeding; in an impersonation charge, the lie absent any particular actions to enact it. To be sure, any *conviction* presumably would have to rely on facts fulfilling the limiting elements of the offense. But in our criminal system without trials, the indictment alone may be all the government ever has to show. Such indictments thus chill speech in the fashion *Alvarez* contemplated—risking prosecution on the basis of no other misconduct (or mis-speech) than lies alone.

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[67] *Id.* at 764.

[68] United States v. Smith, 230 F.3d 300, 305 (7th Cir. 2000).

[69] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

The *Russell* test would reach the same conclusion: when "guilt depends . . . crucially upon such a specific identification of fact" the indictment must include that fact.[70] In *Russell* itself guilt depended, first, on refusing to answer questions from Congress[71] (which may well have been protected by the First Amendment) where, second, those questions were about a subject matter on which Congress was holding a hearing.[72] The Court accordingly concluded that the indictment must specify that limiting factor, the subject matter at issue.[73]

Moreover, an indictment that omits the First Amendment's necessary limiting facts (materiality, etc.) side-steps the relationship between the Sixth Amendment's indictment requirement and the Fifth Amendment's grand jury requirement. That is, if the indictment does not specify the limiting facts, then there is no evidence that the grand jury ever considered such facts. Or, even if it did, then there is no guarantee that those facts in reality survive constitutional scrutiny, much less that the theory of guilt on which the grand jury relied will be the same theory presented at trial. To be sure, criminal prosecutions routinely lack such protections. But First Amendment prosecutions—and especially such prosecutions for lying—are different because of the unique harms created by the mere *threat* of improper charges.

Some prosecutors may well be complying with *Alvarez*'s constitutional limitations already. The law already requires them to present evidence to grand juries about the constitutionally salient limiting factors for false expression cases, and there is no evidence that they have failed to do so. But neither is there evidence they comply with the constitutional limitations. Worse yet, courts have not yet required that the indictment—the sole consistent public documentation of the grand jury's decision-making—demonstrate compliance.[74]

In any event, relying on prosecutorial discretion does not solve the problem. "[T]he First Amendment protects *against* the Government."[75] No less than the Supreme Court recognizes the circularity of relying on

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[70] Russell v. United States, 369 U.S. 749, 764 (1962).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 771–72.

[74] Grand jury proceedings are secret. FED. R. CRIM. P. 6(e)(2)(B). A transcript is kept, but it cannot be produced except under two relevant circumstances. First, and most importantly, the defense is entitled to grand jury testimony of a witness testifying at trial or certain other proceedings who previously testified before the grand jury about the same subject. FED. R. CRIM. P. 26.2; 18 U.S.C. § 3500. However, such transcripts need not be produced until trial itself. 18 U.S.C. § 3500(a). Second, defendants are entitled to their own grand jury testimony early in a case. *See* FED. R. CRIM. P. 16(a)(1)(B)(iii). However, given the rarity of a defendant testifying before the grand jury, that entitlement offers little assistance in solving the problem.

[75] United States v. Stevens, 559 U.S. 460, 480 (2010).

prosecutorial "restraint" to protect against the risk of improper prosecutions in First Amendment cases.[76] Far from helping solve the First Amendment problem, relying on prosecutorial discretion risks exacerbating it because of the concomitant risk of "discriminatory enforcement"—itself a separate First Amendment problem in criminal law.[77]

C. Consequences

Robust enforcement of the intertwined grand jury and indictment requirements is straightforward, with system-supportive effects. Unlike other procedural protections, doing so provides meaningful pretrial protections without any concomitant risk of releasing defendants on a "technicality."

On the one hand, the government suffers little from a marginally more robust indictment requirement. The government likely will have little problem meeting a robust indictment requirement in the first place, and, in the rare cases where it does not, it gets a free "do-over" until it gets the indictment right. Assuming prosecutors are already following the law, there is little more work to do before the grand jury because the prosecution is *already* presenting the relevant evidence. That is, the government has already worked through the facts of its case before presenting that case to the grand jury, which should make it easy to draft an indictment that includes the constitutionally critical limiting facts.

Even if a case is ultimately dismissed for an insufficient indictment, the remedy—re-filing the case with a superseding indictment—also imposes little cost on the government. That is because such a dismissal is typically "without prejudice," meaning that the government can simply to re-file a corrected indictment.[78] Moreover, the government has six months to file the new indictment, even if the limitations period has already run.[79]

On the other hand, robust enforcement could provide real protection for defendants and the law. An indictment that includes additional facts constrains the prosecution at trial to a case matching those facts.[80] Though an indictment need not include facts supporting each and every element of the offense, it is critically important to do so for the constitutionally mandatory elements of the offense—the limiting elements.

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[76] *Id.*

[77] Reno v. ACLU, 521 U.S. 844, 872 (1997).

[78] *See* FED. R. CRIM. P. 48(a); Wright & Miller, *supra* note 46, at § 801.

[79] 18 U.S.C. §§ 3288–3289.

[80] United States v. Trennell, 290 F.3d 881, 888 (7th Cir. 2002).

An indictment that spells out the facts underpinning those limiting elements also provides the defense with critical information for moving to dismiss charges that fail to comply with the constitutionally relevant requirements of a false expression charge. This may result in more litigation, or it may have a hydraulic effect of prompting the government to avoid bringing cases that risk such challenge. Regardless, *Alvarez*'s prohibition on prosecuting mere lies will have a real effect if robust grand jury and indictment procedures in fact block such prosecutions.

IV. UNANIMITY

Opportunities for vindicating First Amendment interests also arise in trial procedure—as distinct from the substantive First Amendment jury issues also litigated at trial. The Fifth and Sixth Amendments, and Federal Rule of Criminal Procedure 31(a), require that a criminal jury verdict must be unanimous not just as to guilt but also as to the facts underpinning the elements of the offense.[81] "[I]t is an assumption of our system of criminal justice . . . that no person may be punished criminally save upon proof of some *specific* illegal conduct."[82]

Unanimity matters. Non-unanimity can cover up "wide disagreement among the jurors about just what the defendant did, or did not, do."[83] Non-unanimity likewise encourages jurors presented with a wide array of evidence to convict just because "where there is smoke[,] there must be fire."[84]

This kind of equivocation about what a defendant did or did not do is anathema to First Amendment-required elements. Following *Alvarez*, the point of the limiting elements is to limit—to constrain. They fail in that function when they fail to meaningfully cabin jurors' decision-making; they become no more than "statutory afterthoughts."[85]

Juror unanimity in a false speech case is indisputably required as to the specific facts of misrepresentation element(s). Requiring unanimity for a statute's constitutionally mandated limiting element(s) would further ensure that the limiting elements in fact bar prosecutions for bare lies.

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[81] U.S. CONST. amend. V, VI; FED. R. CRIM. P. 31(a). As discussed above, the right to juror unanimity was not incorporated against the states when this article was first presented but has been since then. *See* discussion in *supra* note 45. Exactly how this change will apply to the unanimity issues discussed in the text above is still an open question. That said, the most straightforward inference is that the unanimity issues discussed in the text above now apply to the state as well as federal charges.

[82] Schad v. Arizona, 501 U.S. 624, 633 (1991) (emphasis added).

[83] Richardson v. United States, 526 U.S. 813, 819 (1999).

[84] *Id.*

[85] United States v. Griggs, 569 F.3d 341, 344 (7th Cir. 2009).

Requiring juror unanimity as to facts supporting the limiting elements also supports the broader goal of protecting the First Amendment by providing opportunities for litigating First Amendment issues outside of substantive fights over jury instructions and as-applied trial issues.[86] To be sure, unanimity is a jury instruction issue that is litigated at trial. But it differs from fine-grained substantive litigation over the elements and how they apply to the conduct in a particular case because it is wholly independent of the alleged misconduct in any particular case. *Whatever* misconduct the government claims happened, it must show that *that particular misconduct* actually occurred—rather than something else entirely. Moreover, unanimity need never be relitigated. Once established, it serves as a First Amendment guardrail over the course of a case: From the moment charges are filed, the government and defense both know that the petit jury must agree unanimously on the conduct that distinguishes a specific case from a conviction for mere lies. That knowledge will undoubtedly affect their decision-making from the outset.[87] Firmly settling unanimity on the side of the First Amendment thus strengthens the First Amendment not only before the petit jury but also throughout the entirety of the criminal legal process.

A. The Law of Unanimity

Current legal doctrine requires unanimity for some elements of an offense but not all: "[A] federal jury need not always [agree] . . . which of several possible means the defendant used to commit an element of the crime."[88] The question is always: which elements require unanimity and which do not. In the classic hypothetical, a jury could convict a defendant of robbery by force even if the jury disagreed about the means by which the government proved the force element—say, with a knife or a gun.[89] But there are also constitutional limits: Justice Scalia famously observed, "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on

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[86] The line—or lack thereof—between procedure and substance is much discussed. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004). This article is not trying to stake a claim about that distinction. Rather, it characterizes as "substance" questions about what the statute prohibits and everything else as "procedural." That distinction may or may not be "correct" for other areas, but it is the relevant one here.

[87] For an excellent discussion of how the "shadow of the law" literature applies in criminal cases, see William J. Stunz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

[88] *Richardson*, 526 U.S. at 817.

[89] *Id.*

Wednesday . . . ."[90] This Section sets out the legal framework in broad strokes. The following Sections argue that unanimity must be required for the facts underlying both the misrepresentation element(s) and the limiting element(s) in false expression cases.

Courts and commentators have struggled—to put it mildly—to develop a clear test for determining when jurors must be unanimous about the facts underpinning an offense, and when those facts are nothing more than mere "means."[91] The problem is a certain "indetermina[cy]" in determining when "differences between means" amount to "separate offenses."[92] Rather than rest on "metaphysical" distinctions, the Supreme Court instead asks courts to use statutory interpretation, fairness, history, and practice to determine which elements of the offense require juror unanimity about the underlying facts, and which do not.[93]

The two leading Supreme Court cases are illustrative: in *Schad v. Arizona*, the Supreme Court focused on history, practice, and moral reasoning to conclude that a defendant could properly be convicted of first degree murder even if the jury did not unanimously agree on whether his mental state amounted to that of premeditated murder or felony murder—factually, very different scenarios.[94] The common law, the criminal code in many American jurisdictions, and a wide variety of state Supreme Courts had equated the two mental states, and they likewise "reasonably reflect notions of equivalent blameworthiness or culpability[.]"[95]

Nearly twenty years later, in *Richardson v. United States*, the Court returned to tradition and fairness, as well as statutory interpretation, to conclude that a jury must be unanimous about which specific violations of the drug laws constituted the "continuing series of violations" elements of the federal continuing criminal enterprise statute.[96] Here, close analysis of the statute yielded the opposite result as in *Schad*: there was no legal tradition reading "violations" to avoid unanimity, and the breadth of the potential "violations" varied greatly in culpability from, for example, possession of a controlled substance to endangering life while manufacturing a controlled substance.[97]

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[90] Schad v. Arizona, 501 U.S. 624, 651 (1991) (Scalia, J., concurring).

[91] *See*, *e.g.*, Stephen E. Sachs, *Alternative Theories of the Crime*, 22–23 (Nov. 10, 2019) (unpublished manuscript) (available at https://ssrn.com/abstract=1501628 [https://perma.cc/TJ2P-4Y5N]) (summarizing debate).

[92] *Schad*, 501 U.S. at 633–34.

[93] *Id.* at 635, 637; *Richardson*, 526 U.S. at 818–20.

[94] *Schad*, 501 U.S. at 640–643.

[95] *Id.*

[96] *Richardson*, 526 U.S. at 815.

[97] *Id.* at 818–20.

B. The Misrepresentation Element

The circuits vary widely as to which elements of which offenses require unanimity and which do not. There is strikingly little variation, however, on how to treat the misrepresentation or "false expression" element of the core false statement offenses.[98] In circuit after circuit, the "false statement" is the gravamen of these offenses, and a jury must therefore be unanimous as to which statement, specifically, was false. In *United States v. Fawley*, for example, the Seventh Circuit reversed a conviction where a jury verdict in a perjury case may not have been unanimous as to which of the defendant's false statements "formed the basis" of the conviction.[99] The First and Fourth Circuits reached the same conclusion.[100] The Fifth Circuit, joined by the Second and Fourth Circuits, likewise concluded that unanimity was required as to the false statement at issue in each count of the crime of false statement to federal officials; allowing a single count to contain multiple false statements would "embrace[] two or more separate offenses."[101]

The only substantive point of disagreement is over the level of generality. For example, some circuits characterize *each fraudulent wire transaction* as an individual wire fraud offense, rather than *each false statement* contained in a given wire transaction.[102] Those circuits accordingly don't require unanimity as to "a particular false statement within a wire" but rather unanimity that a specific transaction was indeed fraudulent, even if the jurors disagree as to which part of it was false.[103] Other circuits characterize the false statement itself as the offense, in which case unanimity is required.[104] The focus on falseness or fraud never varies, however. The government must always prove that a specific statement or transaction was false or fraudulent; it is never enough to gesture vaguely at a series of lies.

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[98] *See* 18 U.S.C. §§ 1621, 1623 (perjury), 18 U.S.C. § 1001 (false statement to federal official).

[99] 137 F.3d 458, 461 (7th Cir. 1998).

[100] *See* United States v. Sarihifard, 155 F.3d 301, 310 (4th Cir. 1998) (perjury, false statements); *see also* United States v. Glantz, 847 F.2d 1, 9 (1st Cir. 1988).

[101] United States v. Holley, 942 F.2d 916, 927 (5th Cir. 1991) (false statements); *Sarihifard*, 155 F.3d at 310 (perjury, false statements); *see also* United States v. Crisci, 273 F.3d 235 (2d Cir. 2001).

[102] United States v. Nanda, 867 F.3d 522, 529 (5th Cir. 2017).

[103] *See id.*; *see also* United States v. LaPlante, 714 F.3d 641, 647 (1st Cir. 2013) (characterizing "the specific false statement" as merely the "means" by which offender carried out the "fraudulent scheme").

[104] *Compare* United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988) (requiring unanimity for each false statement in charges for making and preparing a false tax return under 26 U.S.C. §§ 7206(1), (2)), *with* United States v. Fairchild, 819 F.3d 399 (8th Cir. 2016) (allowing non-unanimity as to the "means" of accomplishing each false tax return because the offense is return by return).

C. The Limiting Element

No case appears to have addressed how—if at all—*Alvarez* adds to the analysis. But it must. Following *Alvarez*, the core of a false expression charge is not only the false statement or transaction but also the limiting element.[105] Without that limiting element, the statute itself would be unconstitutional. But an element is only as good as its facts. Allowing any number of different factual "means" to serve as the limiting element allows for "wide disagreement among the jurors about just what the defendant did, or did not, do."[106] Indeed, coupling a verdict that doesn't even purport to be unanimous on the facts of the limiting element, with an indictment that similarly fails to specify the precise conduct at issue, would raise a serious question about whether the limiting element limits much of anything at all.

1. Perjury, false statement to federal officials (Section 1001)

Requiring unanimity for the limiting elements may not prove especially burdensome for some offenses. As discussed above, perjury, for example, already requires unanimity as to the specific false statement at issue. As a practical matter, once the jury agrees on which statement is at issue, then the jury also almost necessarily agrees on some of the other central facts—whether the statement was under oath and the proceeding during which the statement was made.[107] Likewise with a false statement to a federal officer under 18 U.S.C. § 1001: once the false statement itself is identified, then the government branch to whom the statement was directed almost immediately follows.[108]

Perjury and § 1001's shared "materiality" requirement presents only marginally more of a challenge.[109] A false statement is "material" when it has "a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed."[110] Unanimity as to materiality therefore means that the jury must agree on the facts underpinning the statement's materiality, even where the government presents multiple ways in which it could have been material.[111]

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[105] *Supra* Part II.

[106] Richardson v. United States, 526 U.S. 813, 819 (1999).

[107] *See* 18 U.S.C. § 1623.

[108] 18 U.S.C. § 1001(a) (prohibiting false statements made "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

[109] Perjury prohibits making or using a "false material declaration." 18 U.S.C. § 1623(a). The criminal prohibition on false statements to officials prohibits three different kinds of false statements, all of which require that the falsehood is "material." 18 U.S.C. §§ 1001(a)(1), (2), (3).

[110] Kungys v. United States, 485 U.S. 759, 770 (1988) (definition).

[111] *See* United States v. Gaudin, 515 U.S. 506, 523 (1995) (holding that materiality is a jury

Practically speaking, once the false statement itself is specifically identified, there may well be a very limited range of ways in which it could be material. Unanimity would carry some small bite only for those prosecutions involving a false statement where prosecutors propose multiple theories of materiality.[112]

But that is what *Alvarez* implies. The upshot of *Alvarez* was that the constraining elements of false speech offenses must *actually constrain* false speech prosecutions, else the offenses risk the same problems as the unconstitutional Stolen Valor Act. Non-unanimity would mean that half the jurors could conclude that the prosecution proved one set of constraining facts, and the other half could reject that conclusion in favor of wholly different set of facts. Such disagreement over the core facts is hardly a meaningful constraint on false expression prosecutions.

Nor does statutory interpretation lend itself to reading materiality as an element for which the facts don't especially matter. Materiality is a unifying feature of the statement itself, whereas other elements of the offense are expressly listed as disjunctive means. Thus, one can violate § 1001 if one, for example, "falsifies, conceals, or covers up" a material fact "by any trick, scheme, or device."[113] One likewise violates it by making a materially "false fictitious, or fraudulent" misrepresentation or by making or using a false document containing any "materially false, fictitious, or fraudulent statement."[114]

Perjury has a similar structure: materiality is the unifying element across the multiple means of committing perjury. Thus, one violates the law by making a "false material declaration" by book, paper, document, record, recording, or other material. To the degree unanimity is required for the false statement itself—which the courts unanimously find—the statement's materiality cannot be disentangled.

The common-law history of § 1001, perjury, and related statutes such as mail and wire fraud further confirms the centrality of "materiality" to the offenses. "Materiality" is a concept with a long-standing common-law history, and a relatedly "uniform understanding" in the numerous federal statutes that incorporate it.[115] It has been central to

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question).

[112] The indictment itself also limits how much of a change this might make. As discussed above, variance between an indictment and the proof presented at a federal trial violates the Fifth Amendment's grand jury guarantee. To the degree the facts underpinning the limiting elements already must be specified in the indictment, then there is no question that unanimity is required at trial. The question of unanimity arises only when the facts need *not* be specified in the indictment.

[113] 18 U.S.C. § 1001(a)(1).

[114] *Id.* at §§ 1001(a)(2), (3).

[115] *Kungys,* 485 U.S. at 770 (1988).

the historical understanding of the various "false statements to federal officials" offenses such as § 1001 and perjury, dating back to the common law.[116] Even related misrepresentation offenses such as mail and wire fraud, which lack any express "materiality" requirement, are nonetheless interpreted to incorporate a materiality element based on the common law history.[117] It is not a "statutory afterthought;" rather, failing to agree on materiality means that "the jury fails to agree on the crime that the defendant committed."[118]

Requiring factual unanimity not just for a defendant's misrepresentation—the false statement or document—but also for the related constraint of materiality further disaggregates the First Amendment substantive questions into a mixture of substance and procedure. The materiality limiting element is much more limiting when jurors must agree on its facts. The further the jury is from unanimity, the less the materiality element actually prevents a general prohibition on lies. Here, the question is easy; even setting *Alvarez* aside, text, history, and constitutional avoidance all point in the same direction, supporting unanimity. There is thus little reason for the courts to allow juries to disagree about the facts underlying the materiality elements of perjury, § 1001, and related offenses.

2. Impersonation

Impersonating a federal officer is the third core "false statements" statute addressed in *Alvarez*. Some of the same logic applies as in perjury and § 1001: impersonating a federal agent in violation of 18 U.S.C. § 912 has two parts (1) the impersonation (the lie), and (2) an act (the limiting element).[119] First, an offender impersonates a federal officer when he "falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof."[120] Second, the offense is complete when an offender either "acts as such" or "in such pretended character demands or obtains any money, paper, document, or thing of value . . . ."[121] Impersonation plainly requires unanimity for the first part, for the same reasons as all the other false statement offenses. Indeed, it would be a gross anomaly to allow conviction for impersonating a federal agent by a jury that was not unanimous on the false statement or impersonation itself.

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[116] *Id.* at 769–70.

[117] *See, e.g.*, Neder v. United States, 527 U.S. 1 (1999) (holding that materiality was an implied element of federal mail and wire fraud statutes based on a common law understanding of fraud).

[118] United States v. Griggs, 569 F.3d 341, 344 (7th Cir. 2009).

[119] *See* 18 U.S.C. § 912.

[120] *Id.*

[121] *Id.*

But unanimity also must be required for a defendant's "act," just as unanimity is required for the limiting element for the other false expression offenses. An impersonation statute that criminalized falsely claiming to be a federal agent, without more, would prohibit "all false statements on this one subject in almost limitless times and settings," in violation of *Alvarez*.[122] The statute's "act" element is what prevents this unconstitutional outcome.

The best counterargument is unavailing. At least three circuits have rejected juror unanimity requirements for federal conspiracy's "overt act" requirement.[123] If impersonation's "act" element is analogous to that "overt act" element, then the logic of the conspiracy cases means that impersonation's "act" can be fulfilled by any number of different means. But that analogy fails.

Conspiracy's "overt act" requirement is a "statutory afterthought."[124] The reason for requiring an "overt act" is to show that the conspirators did something—anything—to put the conspiracy in motion.[125] The core of the offense is still the conspiracy itself. Indeed, other federal conspiracy statutes do not even include *any* overt act requirement.[126]

Impersonation's "act" requirement is totally different. It is not an afterthought; following *Alvarez*, it's part of the core of the offense. Without the "act," the statute would violate the First Amendment. Impersonation's parallel false expression statutes likewise differ from conspiracy. Where the federal conspiracy statutes only sometimes include an overt act requirement, *all* the parallel false speech statutes require proof of their limiting elements. Indeed, a statute that didn't require such proof would be unconstitutional.

V. RESPONSE TO OBJECTIONS

The arguments in this paper are not without their detractors. Indeed, my students and I spent approximately five years litigating these and other issues in the federal courts, to little avail. Here I address the most significant of these objections. First, it is fair to ask why my students and I lost if, as this paper argues, we were right that *existing* law largely supports us. Moreover, a critic might argue, this article seems

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[122] United States v. Alvarez, 567 U.S. 709, 722–23 (2012) (plurality opinion).

[123] United States v. Kozeny, 667 F.3d 122, 131–32 (2d Cir. 2011); *Griggs*, 569 F.3d at 343; United States v. Sutherland, 656 F.2d 1181, 1202 (5th Cir. 1981).

[124] *Griggs*, 569 F.3d at 341.

[125] *See* Yates v. United States, 354 U.S. 298, 334 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

[126] Most famously, federal drug conspiracy has no overt act requirement. 21 U.S.C. § 846.

to argue for substantively different procedural rules in First Amendment criminal cases—an argument that directly contradicts our system of trans-substantive criminal procedure. Second, one might question about whether any of this article's mucking about in trial practice on the front end makes a meaningful difference; perhaps the higher courts catch everything that matters on the back end. In other words, is there a real problem here? I respond in two ways:

A. The First Amendment Matters

First, the First Amendment matters. This article applies existing criminal procedural rules and standards in the context of the First Amendment. Criminal procedure is indeed trans-substantive,[127] but there is nothing substantive, distinct, or unusual about the bog-standard point that broad legal rules and standards apply differently, depending on the different contexts in which they apply.[128] Here, that context is the First Amendment, or, in the more specific example of this article, false speech.

Accounting for the First Amendment does not require modifying the test for what goes in an indictment, what requires unanimity, or anything else. It requires only recognizing that the First Amendment must be accounted for in applying those tests. And there is ample reason to think that it must be. There is *Alvarez* itself, for all the reasons previously discussed in this article. There are also the broader constitutional doctrines that emphasize the uniqueness of the First Amendment context—de novo review of so-called constitutional facts and doctrinal skepticism of prosecutorial discretion in First Amendment cases, for example.[129]

A turn to the First Amendment also follows the courts' lead. There is a disquietingly empty formalism to much of criminal procedure's ostensible protections: the formal rules may protect important rights, but

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[127] *See, e.g.*, Russell L. Christopher, *Appointed Counsel and Jury Trial: The Rights That Undermine the Other Rights*, 75 WASH. & LEE L. REV. 703, 715–16 (2018) ("Most [procedural] rights are transsubstantive: the rights to a public trial, to be informed of the nature and cause of the accusation, to confront one's accusers, to compulsory process for obtaining favorable witnesses, to cross-examine adverse witnesses, to a speedy trial, to have the prosecution provide proof of each element of the offense beyond a reasonable doubt, to due process, and to equal protection of the laws.").

[128] *See, e.g.*, David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 2003–04 (2013) (arguing that "nominally trans-substantive rules can lend themselves to patterns of application organized around antecedent regimes").

[129] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 453 (2011) (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) ("[I]n [ ] First Amendment cases, the court is obligated 'to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."'")); *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974)) (recognizing that the threat of criminal prosecution chills speech).

they too often serve as fig leaves for the real rule, namely, "defendant loses."[130] In the Seventh Circuit, for example, stacks of precedent over decades of cases reject all but two modern-era indictment challenges.[131] Lower courts cannot help but get the message.

That empty formalism does not extend to the First Amendment. The First Amendment requires *and is regularly given* robust protection. As many scholars have recently observed, recent Supreme Court decisions have profoundly expanded the First Amendment's reach.[132] But even before that, courts recognized the First Amendment's role in protecting a robust debate on public issues,[133] democratic self-governance,[134] and freedom of thought,[135] among other things, regardless of any distaste for the speaker.[136]

Courts have not yet worked out how to handle the intersection of criminal procedure and the First Amendment, but a resurgent First Amendment demands respect. The argument of this article is that the robust enforcement of procedural rights helps provide that respect—even where the courts have previously derogated such enforcement in mine-run criminal cases.[137]

B. Trial-Level Procedures Matter

To say that the higher courts will catch all important problems means *at best* accepting the blunt devastation the criminal legal system imposes on each criminal defendant, and the societal cost of processing

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[130] *See* Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1439–40 (2002) (describing how the Burger Court used procedural tools like harmless error to undermine Warren Court's criminal procedure precedents); Akhil R. Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1125 (1996) (outlining the history of the decline of defense-protective constitutional criminal procedure).

[131] The two exceptions are: *United States v. Locklear*, 97 F.3d 196 (7th Cir. 1996) and *United States v. Hinkle*, 637 F.2d 1154 (7th Cir. 1981). Notably, even the most recent of these exceptions is over twenty years old.

[132] *See* Shanor, *supra* note 4, at 191–93 (discussing the expansion of the scope of protected speech); *see also* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1243 (2020).

[133] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[134] *See, e.g.*, Brown v. Hartlage, 456, U.S. 45, 52 (1982).

[135] *See, e.g.*, Ashcroft v. Free Speech Coal., 535, U.S. 234, 253 (2002).

[136] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 423 (1996).

[137] This article owes a debt to James Burnham's important piece calling for more factually robust criminal indictments so as to enable criminal defendants to file motions to dismiss much like civil defendants. *See generally* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347 (2015). Burnham's article is compelling and, in this author's view, correct. But it offers little reason for the same courts that have undermined defendants' procedural rights to change course and adopt what is ultimately a pro-defendant procedural innovation. This article, too, argues for the reinvigoration of largely dead-letter procedural rules. It roots that renewal, however, not in criminal procedure alone but rather in the resurgent First Amendment.

so many people, their friends and families, and communities through its maw. Let's assume that the higher courts catch all First Amendment-related flaws in a prosecution. Even so, higher courts' deference to a trial level guilty verdict puts a significant thumb on the scale against reversing convictions for conduct that was at least potentially protected by the First Amendment. And even in the nearly-nonexistent case where a higher court finds error *and* the conviction is vacated, that still ignores the damage done by the trial and appellate process itself. Finally, given our system of pleas, relying on appellate review simply ignores the countless individuals who pled guilty when their conduct may not even have been a crime at all.

Higher courts are required to defer to lower courts, even in cases involving First Amendment problems. Setting aside facial challenges, there are, in essence, two forms of First Amendment challenges: constitutional errors (e.g., omitting an element of the offense or misinstructing the jury on an element of the offense) and sufficiency of the evidence challenges.[138] For the former, even where an appellate court finds constitutional error, it must nonetheless *uphold* the guilty verdict if it determines the error was harmless beyond a reasonable doubt.[139] As to the latter, appellate courts will not even find error unless a jury could not find guilt beyond a reasonable doubt when "view[ing] the evidence in the light most favorable to the government . . . [and] 'defer[ing] to the credibility determination of the jury[.]'"[140] Either way, the First Amendment problem in the original proceeding does not necessarily mean a new trial. And, as many have pointed out, even the supposedly defendant-friendly "harmless beyond a reasonable doubt" standard still puts

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[138] A sufficiency of the evidence challenge can be an as-applied First Amendment challenge in that it asks whether the evidence presented at trial rises to the level of a statutory violation, where the statute is interpreted through the lens of the First Amendment. *See, e.g.*, United States v. Bagdasarian, 652 F.3d 1113, 1117, 1123–24 (9th Cir. 2011) (reversing conviction for threatening the President because insufficient evidence of intent to threaten, as understood through First Amendment lens). There is a third form of First Amendment challenge, namely, a facial challenge. In a facial challenge generally, a defendant argues that the statute is unconstitutional in all applications or "lacks any 'plainly legitimate sweep.'" United States v. Stevens, 559 U.S. 460, 472 (2010) (quoting Washington v. Glucksberg, 521 U.S. 739, 745 (1987)). First Amendment also allow for facially invalidating a law as overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)). A successful facial challenge requires vacating the conviction altogether. *Id.* at 482 (affirming the vacation of defendant's conviction after successful First Amendment facial challenge). As a practical matter, however, successful facial challenges in the appellate courts are extraordinarily rare; the action is in as-applied challenges.

[139] Neder v. United States, 527 U.S. 1, 18 (1999) (holding that under harmless error review, courts ask whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"). The Court in *Neder* held that harmless error applies to the omission of elements. *Id.*

[140] *Id.* (quoting United States v. Blassingame, 197 F.3d 271, 284 (7th Cir. 1999)).

a substantial thumb on the scale in favor of the prosecution.[141] For many defendants, the limited appellate review comes too late to ensure real First Amendment protection.

Moreover, even where an individual defendant's conviction is vacated by the higher courts, that doesn't undo the harm caused by the criminal process itself. When defendants are detained pretrial, they may lose their health, jobs, homes, and sometimes their children.[142] And even when defendants are released on bond, they face enormous process costs associated with going to trial.[143] Courts easily recognize the severe process costs imposed by the civil system in the context of qualified immunity in civil cases.[144] That is why there are special procedures in place to help accused officials avoid those costs where possible.[145] In the criminal context, consequences and costs are even more severe, and the remedies proposed in this paper more limited.

Relatedly, vacating an individual conviction does nothing for the scores of other defendants who already pled guilty. As discussed above, the "vanishing trial" means that our criminal legal system has become a sea of guilty pleas. Defendants may wisely choose to plead guilty to a crime that has a First Amendment defense rather than undergo the risks of trial.[146]

The upshot is: The higher courts may or may not catch all important First Amendment problems that come their way. (My guess is that they don't.) But the answer to that question doesn't much matter. By the time the question gets to a higher court, enormous and irreparable damage has already been done.

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[141] Scholars frequently criticize the constitutional harmless error doctrine. *See*, *e.g.*, Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277 (2020); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 (2002); David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483 (2000).

[142] Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, CHAMPION (forthcoming 2020) (manuscript at 5) (on file with author).

[143] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132–34 (2008) (discussing the personal and financial costs defendants face such as legal fees, lost wages, anxiety, and reputational damage).

[144] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[145] *See* David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation against Public Officials*, 83 N.Y.U. L. REV. 911, 927–932 (2008) (discussing qualified immunity and procedural alternatives to protect officials from litigation costs).

[146] *See id.* at 1134 ("In low-stakes cases, process costs dominate, and plea bargaining is a potential way out."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 1010 YALE L.J. 1909, 1928 (1992) (arguing that indigent defendants would be at a worse disadvantage in the criminal process without plea bargains).

VI. CONCLUSION

This paper originated with a federal impersonation case that my students, colleagues, and I litigated from its initial charge through a petition for certiorari over the course of five years.[147] The arguments I raise in this paper rose out of ones we made in district court—to little avail. Some of our substantive arguments about how the statute must be interpreted in light of the First Amendment were ultimately vindicated by the Court of Appeals. But that decision came over four years after our client was charged with a federal felony—his first and only felony. And by the time the Court of Appeals concluded that we had been right all along, the trial evidence had long been in. The appellate court had little difficulty quickly and easily concluding that the error was harmless—erroneously, in my opinion.

The dispiriting experience left me convinced that the only real chance my client and others like him have to avoid losing years and years of their lives to unconstitutional charges and their significant collateral consequences is to shift the locus of First Amendment litigation more pervasively throughout the case, away from the substantive trial and post-trial issues. The constraining elements upon which *Alvarez* relies to save false statement statutes are meaningful only to the degree they *actually constrain* prosecutions for lying. The indictment constrains the grand jury and the prosecutor (and, to a limited degree, the petit jury). The unanimity requirement constrains the petit jury at trial, and awareness of this very real constraint would have influenced the government and my decision-making throughout the criminal process. Focusing exclusively on a substantive First Amendment misses these critical moments for shaping a criminal case to protect the First Amendment. A procedural First Amendment highlights them.

[147] Although his consent was not required, my client authorized me to draft this paper referencing his litigation.

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TABLE 1

Caption	**Case Number**	**Court**	**Indictment Language**
US v. Baer	15-cr-30036	C.D. Ill.	"a Special Agent of the Department of Homeland Security"
US v. Wheeler	15-cr-10048	C.D. Ill.	"a United States Marshal"
US v. Wallace	16-cr-54	N.D. Ill.	"an employee of the Federal Housing Administration"
US v. Harrison	14-cr-576	N.D. Ill.	"the United States Marshals Service"
US v. Rozycki	14-cr-13	N.D. Ill.	1: "an employee of the United States Marshals Service" 2: "an employee of the United States Marshals Service"
US v. Cortes	14-cr-13	N.D. Ill.	"an employee of the United States Marshals Service"
US v. Hoffer	13-cr-928	N.D. Ill.	2: "an employee of the Federal Bureau of Investigation"
US v. Butler	13-cr-918	N.D. Ill.	1: "an officer of the United States Air Force"
US v. Walsh	09-cr-1049	N.D. Ill.	"a special agent of the United States Department of State"
US v. Abbas	09-cr-840	N.D. Ill.	2: various, including "United States Department of Housing and Urban Development"
US v. Hemphill	06-cr-747	N.D. Ill.	2: "the Federal Bureau of Investigation" 2s: "the Federal Bureau of Investigation"
US v. Muhammad	06-cr-548	N.D. Ill.	1: "an officer and employee acting under the authority of the United States, and acted as such at Midway International Airport by signing the TSA Armed Law Enforcement Officer's Log" 2: "a federal law enforcement officer for the Department of Justice"

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Caption	Case Number	Court	Indictment Language
US v. Limane	05-cr-834	N.D. Ill	10: "an employee of the U.S. Citizenship and Immigration Services" 11: "an employee of U.S. Citizenship and Immigration Services"
US v. Gaylor	05-cr-199	N.D. Ill	1: "an agent of the Federal Bureau of Investigation" 2: "an agent of the Federal Bureau of Investigation"
US v. Guzman et al.	03-cr-1020	N.D. Ill	"an employee of the Drug Enforcement Administration"
US v. Jamaleddin	02-cr-366	N.D. Ill	"an agent of the United States Immigration and Naturalization Service"
US v. Lovejoy	01-cr-791	N.D. Ill	1: "an agent of the United States Immigration and Naturalization Service" 2: "an agent of the United States Immigration and Naturalization Service" 3: "an agent of the United States Immigration and Naturalization Service"
US v. Hancock	17-cr-15	N.D. Ind.	1: "an agent of the Department of Homeland Security" 2: "an agent of the Department of Homeland Security"
US v. Mitschelen	12-cr-40	N.D. Ind.	"a Deputy of the United States Marshal Service"
US v. Mohammed	11-cr-169	N.D. Ind.	1: "an employee of the Internal Revenue Service"
US v. Marcotte	13-cr-30053	S.D. Ill.	5: "a duly authorized representative of the United States as a warranted contracting officer"
US v. Lowery	07-cr-30181	S.D. Ill.	2: "a United States Marshal" 3: "a United States Marshal"
US v. Eads	11-cr-239	S.D. Ind.	4: "a Special Agent of the Federal Bureau of Investigation"
US v. Eicher	16-cr-17	W.D. Wis.	"Special Agent of the Federal Bureau of Investigation

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Caption	**Case Number**	**Court**	**Indictment Language**
US v. McLaughlin	14-cr-20019	C.D. Ill	(transfer of jurisdiction for supervision, no indictment)
US v. McLaughlin	12-mj-7214	C.D. Ill	(extradition/transfer to EDNC, no indictment)
US v. Ottley	03-cr-40093	C.D. Ill	(indictment not available on PACER)
US v. Toran	01-cr-30011	C.D. Ill	(indictment not available on PACER)
US v. Coe	98-cr-20031	C.D. Ill	(indictment not available on PACER)
US v. Clay	14-mj-454	E.D. Wis.	(dismissed before indictment)
US v. Alberts	98-cr-231	E.D. Wis.	(indictment not available on PACER)
US v. Treloar	98-cr-35	E.D. Wis.	(indictment not available on PACER)
US v. Gendreau	16-cr-50057	N.D. Ill.	(extradition/transfer to SDNY, no indictment in NDIL file)
US v. Neal	07-cr-279	N.D. Ill.	(extradition/transfer to SDFL, no indictment)
US v. Al-Arouri	07-cr-184	N.D. Ill.	(dismissed before indictment)
US v. Ventura	07-cr-70	N.D. Ill.	(extradition/transfer, dismissed)
US v. Rizzo	04-cr-733	N.D. Ill.	(indictment waived)
US v. Akram	00-cr-968	N.D. Ill.	(indictment waived)
US v. Urschel	13-cr-75	N.D. Ind.	(indictment waived)
US v. Davis	07-mj-110	N.D. Ind.	(dismissed before indictment)
US v. Parisi	04-cr-15	N.D. Ind.	(indictment waived)
US v. Grissom	04-cr-43	W.D. Wis.	(indictment not available on PACER)

Discrimination, the Speech That Enables It, and the First Amendment

Helen Norton[†]

Imagine that you're interviewing for your dream job, only to be asked by the hiring committee whether you're pregnant. Or HIV-positive. Or Muslim. Does the First Amendment protect your interviewers' inquiries from government regulation? This Article explores that question.[1]

Antidiscrimination laws forbid employers, housing providers, insurers, lenders, and other gatekeepers from relying on certain characteristics in their decision-making.[2] Many of these laws also regulate those actors' speech by prohibiting them from inquiring about applicants' protected class characteristics;[3] these provisions seek to stop illegal discrimination before it occurs by preventing gatekeepers from eliciting information that would enable them to discriminate. Although

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[1] I explored related issues in earlier work. Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727 (2003). As this Article explains, a great deal has since changed. Among other things, legislatures increasingly regulate gatekeepers' reliance on and inquiries about certain characteristics to achieve equality and other public welfare goals. *See infra* notes 22–52 and accompanying text. And the antiregulatory turn in First Amendment law increasingly inspires certain litigants to attack related efforts. *See infra* notes 60–72 and accompanying text.

[2] In this Article, I use the terms "gatekeepers" and "decisionmakers" interchangeably to describe those individuals and institutions empowered to select among applicants for important opportunities and services.

[3] In this Article, I use the terms "protected characteristic" and "protected class status" interchangeably to refer to attributes that a legislature has protected from discrimination by forbidding gatekeepers from relying on those attributes when distributing important opportunities and services.

these laws generated little if any First Amendment controversy for decades, they now face new constitutional attacks inspired by the antiregulatory turn in the Supreme Court's Free Speech Clause doctrine.[4]

Part I of this Article starts by describing how gatekeepers' inquiries about applicants' protected characteristics enable illegal discrimination. It then outlines the wide variety of efforts by federal, state, and local legislatures to tackle thorny problems of inequality by restricting gatekeepers' inquiries about applicants' protected characteristics. Next, it identifies the potential collision course between these measures and the recent antiregulatory turn in First Amendment law and litigation.

Part II examines the theory and doctrine that support these laws' constitutionality, explaining why the government's restriction of the speech that enables conduct that the government has legitimately regulated triggers no First Amendment scrutiny. More specifically, the First Amendment permits the government to restrict speech that initiates or accomplishes conduct that the government has regulated—speech that *does* something and not just says something, to use legal scholar Kent Greenawalt's vocabulary.[5] As an illustration of speech that is unprotected because it initiates or accomplishes illegal conduct, the Court has repeatedly pointed to gatekeepers' speech that enables illegal discrimination: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."[6]

In other words, a gatekeeper's statement "White Applicants Only" is unprotected because it declares certain transactions and opportunities as off limits to protected class members; precisely because of gatekeepers' power, their speech in these transactional settings thus *does* something and not just *says* something. Once we understand why the First Amendment does not protect those statements, we can see that the First Amendment similarly permits the government to regulate gatekeepers' transaction-related inquiries about candidates' protected class status—inquiries that enable illegal discrimination by deterring candidates based on their protected class status as well as by eliciting the information that facilitates gatekeepers' discriminatory decisions.

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[4] *See infra* notes 60–72 and accompanying text for a discussion of this turn.

[5] *See* KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 6 (1995); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 59 (1989).

[6] Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47, 66 (2006); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (offering "White Applicants Only" as an example of speech that is unprotected by the First Amendment as incidental to illegal conduct).

Part II next explains how the Court's longstanding commercial speech doctrine captures these insights by holding that the First Amendment does not protect commercial speech related to illegal activity. It then applies this doctrine to the antidiscrimination laws identified in Part I, concluding that the government's restriction of gatekeepers' inquiries about applicants' protected class status triggers no First Amendment scrutiny because those inquiries constitute commercial speech related to the illegal activity of discriminatory employment, housing, and other transactions.

Part III briefly considers the First Amendment implications of other antidiscrimination provisions that regulate transactional parties' speech in various ways, sometimes by restricting speech and sometimes by requiring it. It shows how here too the Court's commercial speech doctrine provides the relevant analysis, with its focus on protecting speech that furthers listeners' First Amendment interests while permitting the regulation of speech that frustrates those interests.

I. ANTIDISCRIMINATION LAWS THAT PROHIBIT GATEKEEPERS' RELIANCE ON, AND INQUIRIES ABOUT, APPLICANTS' PROTECTED CHARACTERISTICS

As this Part explains, gatekeepers' inquiries that elicit candidates' protected class status facilitate illegally discriminatory decisions about important opportunities and deter candidates from pursuing those opportunities.[7] Legislatures thus often enact laws prohibiting gatekeepers not only from relying on, but also from inquiring about, applicants' protected class status to stop illegal discrimination before it happens. Legislatures' interest in stopping discrimination before the fact is especially strong because after-the-fact enforcement is frequently slow, costly, and ineffective.

A. How Gatekeepers' Inquiries About Applicants' Protected Characteristics Enable Illegal Discrimination

Information about applicants' protected characteristics enables gatekeepers to discriminate, intentionally or otherwise, against those applicants. When gatekeepers know (or think they know) candidates' race, gender, or other protected characteristic, they too often rely on that information to discriminate in their decisions about jobs, housing, credit, and other opportunities and services.[8] Consider, for instance, a

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[7] *See infra* notes 8–21 and accompanying text.

[8] *See* Ignacio N. Cofone, *Antidiscriminatory Privacy*, 72 SMU L. REV. 139, 149–51 (2019) (describing when and how gatekeepers' access to information about candidates' protected class status fosters discrimination); Jessica L. Roberts, *Protecting Privacy to Prevent Discrimination*, 56 WM.

Harvard Business School study, which found that Airbnb hosts used information collected and shared by Airbnb to discriminate against prospective guests with "distinctively African-American names."[9] In the same vein, Facebook recently settled complaints filed by nonprofit civil rights organizations alleging that Facebook used information about its users' protected class status to enable housing providers to steer users to—or away from—certain housing opportunities based on that status.[10]

Gatekeepers often acquire the information that enables discrimination by asking candidates about their protected class status in applications, interviews, negotiations, and more. Sometimes decisionmakers intentionally seek information about candidates' protected characteristics to inform their discriminatory decision-making. For example, a Congressional committee report on the Americans with Disabilities Act (ADA) explained:

> Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer—before their ability to perform the job was even evaluated.[11]

Even when gatekeepers seek this information for benign rather than nefarious purposes, that information, once obtained, remains available

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& MARY L. REV. 2097, 2143–46 (2015) (offering examples of how decisionmakers have used previously unknown information about applicants' age, religion, national origin, disability, gender at birth, and other protected characteristics to discriminate against those applicants).

[9] Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence From a Field Experiment*, 9 AM. ECON. J. APPLIED ECON. 1, 1–2 (2017) (finding that prospective guests "with distinctively African-American names are 16 percent less likely to be accepted relative to identical guests with distinctively white names"); *see also* OLIVIER SYLVAIN, DISCRIMINATORY DESIGNS ON USER DATA 13–14 (2018) (describing how Airbnb elicited information from prospective guests that permitted prospective "hosts" to rely on "illicit biases—against, say, Latinos or blacks—that do not accurately predict a prospective guest's reliability as a tenant. In this way Airbnb's service directly reinforces discrimination when it requires users to share information that suggests their own race").

[10] *See Settlement Agreement and Release*, Nat'l Fair Hous. All. v. Facebook, Inc., No. 18 Civ. 2689 (S.D.N.Y. 2018), https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf [https://perma.cc/MRJ7-4LE6]; *Summary of Settlements Between Civil Rights Advocates and Facebook*, AM. CIVIL LIBERTIES UNION (Mar. 19, 2019), https://www.aclu.org/sites/default/files/field_document/3.18.2019_joint_statement_final_0.pdf [https://perma.cc/K93A-XAZH].

[11] H.R. REP. NO. 101-485, pt. 2, at 72 (1990).

for the gatekeeper's later use, consciously or unconsciously, in screening, selecting, or compensating applicants.[12]

And once discrimination does occur, efforts to identify and rectify it after the fact are notoriously slow, costly, and difficult. Complaint-driven enforcement—that is, an enforcement regime that relies on individuals to file claims *after* they believe they have suffered illegal discrimination—is poorly-equipped to redress discriminatory selection practices and other front-end discrimination. In part, this is because an applicant denied a job or an apartment seldom receives a reason for her rejection from a potential employer or landlord and is unlikely ever to learn the successful candidate's identity, much less his comparative qualifications or other relevant attributes.[13] Other factors that contribute to the ineffectiveness of after-the-fact enforcement include the limitations of overworked and underfunded enforcement agencies, challengers' difficulties in securing legal representation, and a wide range of procedural, evidentiary, and doctrinal barriers to proving a decisionmaker's discriminatory intent.[14] For these reasons, legal scholar Cynthia Estlund describes antidiscrimination law's dependence on after-the-fact enforcement as its "Achilles' heel."[15] The greater the barriers to effective after-the-fact enforcement of civil rights protections, the greater the value in preventing discrimination before the fact by denying gatekeepers the information that enables them to discriminate. As

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[12] *See* Roberts, *supra* note 8, at 2122 ("If an employer cannot access a particular kind of information, she cannot discriminate on the basis of that information. However, once an employer acquires the ability to discriminate, the knowledge of an employee's protected status may influence the employer's decisions in conscious, as well as unconscious, ways.").

[13] *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1492 (1996) ("In the absence of an obvious motive or a relevant comparison group, potential plaintiffs have a difficult time recognizing that disparate treatment in hiring has occurred, let alone convincing a court of that fact.").

[14] *See, e.g.*, ELLEN BERREY, ROBERT L. NELSON, & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 13 (2017) (documenting how and why "only a tiny fraction of possible targets of workplace discrimination take formal action [and when they do] they are likely to settle or lose"); Charlotte S. Alexander, *#MeToo and the Litigation Funnel,* 23 EMP. RTS. & EMP. POL'Y J. 17 (2019) (documenting plaintiffs' difficulties in winning claims under Title VII); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009) (finding that Title VII plaintiffs who file in federal court are less successful than plaintiffs in other types of cases); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282–83 (2012) ("Indeed, of every 100 discrimination plaintiffs who litigate their claims to conclusion (i.e., do not settle or voluntarily dismiss their claims), only 4 achieve any form (*de minimis* or not) of relief."); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1409–10 (1998) (explaining "the ironies of a complaint-based [approach to civil rights enforcement], namely that many, perhaps even a majority, of discrimination claims are missed because the discrimination occurs in the contract formation when claims are significantly less likely to be filed").

[15] Cynthia Estlund, *Truth, Lies, and Power at Work*, 101 MINN. L. REV. HEADNOTES 349, 349 (2016).

law professor Ignacio Cofone observes, "[d]iscrimination is better avoided than compensated."[16]

Moreover, because these inquiries are generally made of a less powerful applicant by a more powerful gatekeeper, a candidate's response may be coerced: either she gives the requested information and risks discrimination if the gatekeeper relies on that information to withhold opportunities, or she refuses to provide the information only to be rejected for the opportunity altogether.[17] For instance, one employer declined to hire an applicant after she refused to answer an interview question about her plans to have a family; one of the interviewers responded to her reticence by stating that he "did not want to hire a woman who would get pregnant and quit."[18] Another employer fired a worker when she refused to answer questions about her reproductive choices, questions that included "whether she was pregnant, had ever been pregnant, or was planning to become pregnant; whether she had ever had an abortion, miscarriage, or live birth, and if so, how many times; and whether she was on birth control and, if so, what type."[19]

Inquiries of this sort can also deter applicants from pursuing important opportunities by signaling the decisionmakers' discriminatory preferences.[20] Think, for instance, of an applicant with a disability: confronted by an employer's questions about her medical status or use of prescription drugs, she may well conclude that the job is unavailable to those with certain medical conditions.[21]

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[16] Cofone, *supra* note 8, at 140; *see also* Lior J. Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 374 (2008) ("Information-based antidiscrimination policies will be most effective at combating statistical discrimination when traditional enforcement methods are least effective.").

[17] *See* Adam M. Samaha & Lior J. Strahilevitz, *Don't Ask, Must Tell—And Other Combinations*, 103 CALIF. L. REV. 919, 969 (2015) ("Don't Ask, May Tell examples are often linked to one-sided worries about the vulnerability of respondents to questioner power."); *id.* at 938 ("[O]ne simple reason for Don't Ask is to prevent unwelcome pressure.").

[18] Barbano v. Madison Cty., 922 F.2d 139, 141 (2d Cir. 1990) (concluding that the hiring committee's acquiescence to these questions supported the conclusion that the employer had illegally discriminated on the basis of pregnancy in its hiring decision).

[19] Garlitz v. Alpena Reg'l Med. Ctr., 834 F. Supp. 2d 668, 679 (E.D. Mich. 2011).

[20] *See* Samaha & Strahilevitz, *supra* note 17, at 926 ("Questions are themselves telling, in the sense that statements correctly formulated as questions usually reveal something about the questioner's interests or beliefs."); *id.* at 929 ("A question is a special device for information collection: it is an interactive call for information that alerts an audience to the collection effort and that usually reveals something about the questioner . . . . Questions reveal somebody's interest in and comfort with additional information on a given topic . . . .").

[21] *See* Fredenburg v. Contra Costa Cty. Dep't of Health, 172 F.3d 1176, 1182 (9th Cir. 1999) (explaining that the ADA's restriction on pre-employment medical inquiries and examinations "prevents employers from using HIV tests to deter HIV-positive applicants from applying"); *see also* SCOTT SKINNER-THOMPSON, AIDS AND THE LAW 3–79 (6th ed. 2020) (explaining how the ADA protects applicants from having to disclose private medical information that makes them "vulnerable to discrimination").

B. How Legislatures Regulate Gatekeepers' Inquiries That Enable Illegal Discrimination

Legislatures often seek to prevent illegal discrimination *before* it happens by not only forbidding decisionmakers from relying on certain characteristics (that is, from using information about protected class status) in their decision-making, but also by forbidding decisionmakers from eliciting that information.[22] Thus, antidiscrimination laws often regulate both gatekeepers' conduct—that is, their decisions about how and to whom to distribute opportunities and services—as well as the speech that enables them to engage in discriminatory conduct.[23]

Many of these antidiscrimination laws include provisions that prohibit decisionmakers from making certain inquiries altogether.[24] For example, Pennsylvania's state law bars employers from relying on a variety of protected characteristics in their employment decisions and also forbids them from "[e]licit[ing] any information . . . concerning the race, color, religious creed, ancestry, age, sex, national origin, past handicap or disability" of any applicant.[25] After the Pregnancy Discrimination

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[22] *See, e.g.*, Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 936 (2014) ("[The ADA was] designed to prohibit discrimination in employment preemptively. The ADA focuses on regulating the transmission of potentially stigmatizing data during the hiring phase because, as studies have found, the most common form of discrimination against individuals with disabilities is the denial of a job for which the individual is qualified, followed by the refusal of an interview on the basis of a disability.").

[23] As Part III discusses, legislatures can and do make different choices when drafting antidiscrimination laws. *See infra* notes 151–176 and accompanying text.

[24] Unless and until a statute provides otherwise, the default rule in American jurisdictions permits employers to ask whatever they wish of applicants. Other countries choose different default rules. *See* Matthew W. Finkin, *Pay Privacy in Comparative Context*, 22 EMP. RTS. & EMP. POL'Y J. 355, 368 (2018) ("In Germany, out of concern for employee privacy, the employer bears the burden to prove the *question* is necessary under a strict standard of relatedness to job qualification. In America, out of concern for managerial liberty, the state bears the burden to prove the *restriction* is necessary to further a specific public end grounded in labor market outcomes.").

[25] 43 PA. STAT. AND CONS. STAT. ANN. § 955(b)(1) (West 2019). For a few of the many other examples, see ALASKA STAT. ANN. § 18.80.240(3) (West 2019) (prohibiting landlords and real estate agents from making "a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property"); COLO. REV. STAT. § 24-34-502(1)(a) (2019) (same); LA. REV. STAT. ANN. § 46:2254(C)(6) (2019) (prohibiting owners or others engaging in a real estate transaction from making "a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination" based on an unrelated disability); ME. REV. STAT. ANN. tit. 5, § 4581-A(1)(A) (2019) (prohibiting landlords, owners or agents who are renting or selling housing from making "any written or oral inquiry concerning the race or color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status of any prospective purchaser, occupant or tenant"); NEB. REV. STAT. § 20-318(5) (2019) (making it unlawful to "cause to be made any written or oral inquiry or record concerning the race, color, religion, national origin, handicap, familial status, or sex of a person seeking to purchase, rent, or lease any housing"); N.J. STAT. ANN. § 10:5-12(c) (West 2019) (prohibiting employers' inquiries into "race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual

Act[26] amended Title VII of the Civil Rights Act to make clear that illegal job discrimination "on the basis of sex" includes discrimination based on "pregnancy, childbirth, or related medical conditions,"[27] the Equal Employment Opportunity Commission interpreted the statute to prohibit most employer inquiries about applicants' pregnancy status.[28] As another illustration, the decades-old Equal Credit Opportunity Act regulations forbid lenders from asking about applicants' race, national origin, sex, religion, marital status, and reproductive decisions to prevent illegally discriminatory credit decisions.[29]

Some antidiscrimination laws instead regulate inquiries about protected characteristics at certain key junctures in the decision-making process. The Americans with Disabilities Act (ADA), for instance, prohibits employers from relying on disability status in their decision-making, and prohibits certain disability-related inquiries at various stages in the employment process to prevent discrimination from infecting employers' ultimate decision-making. More specifically, the ADA starts by forbidding employers from asking "whether such applicant is an individual with a disability or as to the nature or severity of such disability" before extending any job offer; instead, an employer "may make preemployment inquiries into the ability of an applicant to perform job-related functions."[30] After an applicant receives a conditional job offer but before she begins work, her employer may pose disability-related inquiries regardless of their job-relatedness, so long as the employer makes the same inquiries of all new employees in the same job category.[31] Finally, after an employee has started work, an employer may

orientation, gender identity or expression, disability, nationality, pregnancy or breastfeeding, or sex" or military status); OR. REV. STAT. ANN. § 659A.030(1)(d) (West 2019) (same).

[26] Civil Rights Act of 1964, § 701(k), as amended, 42 U.S.C.A. § 2000e(k).

[27] 42 U.S.C. § 2000e(k) (2012).

[28] 29 C.F.R. § 1604.7 (2019) ("Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification."); *see also* King v. Trans World Airlines, Inc., 738 F.2d 255, 258 n.2 (8th Cir. 1984) ("[Q]uestions about pregnancy and childbearing would be unlawful per se [under Title VII] in the absence of a bona fide occupational qualification."); Snyder v. Yellow Transp., Inc. 321 F. Supp. 2d 1127, 1131 (E.D. Mo. 2004) (denying defendant employer's motion for summary judgment in light of evidence that it had asked questions about the plaintiff's marital status, parental status, and plans to have children, questions that constituted a per se Title VII violation).

[29] 12 C.F.R. § 1002.5(b) (2019) ("A creditor shall not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction."); 12 C.F.R. § 1002.5(d)(1) (2019) (prohibiting inquiries into the marital status of applicants for certain types of credit); 12 C.F.R. § 1002.5(b)(2) (2019) (prohibiting inquiries into applicants' sex); 12 C.F.R. § 1002.5(d)(3) (2019) (prohibiting inquiries into applicants' "birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children").

[30] 42 U.S.C. § 12112(d)(2) (2012).

[31] 42 U.S.C. § 12112(d)(3) (2012). An employer may then rescind an individual's conditional offer only when the exclusionary decision is job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6) (2012).

ask only those disability-related questions that are "job-related and consistent with business necessity."[32]

Some antidiscrimination laws prohibit not only gatekeepers' direct inquiries of applicants, but also their efforts to learn about applicants' protected characteristics from other sources. For instance, the federal Genetic Information Nondiscrimination Act (GINA)[33]—which bars health insurers and employers from relying on, and asking about, genetic information in making insurance and employment decisions—"generally prohibits employers from seeking to obtain genetic information at any time during employment and, notably, the GINA's implementation regulations explicitly apply to the Internet."[34] Similarly, some states forbid employers from "seek[ing] [or] obtain[ing]" applicants' protected class information "from any source."[35]

Although many of these antidiscrimination laws prohibit decisionmakers' reliance on, and often their inquiries about, characteristics long thought immutable (like race or national origin),[36] newer measures reflect legislatures' expanding understanding of the wide variety of barriers to equality. A growing number of state and local jurisdictions now prohibit employers from relying on, and asking about, applicants' sexual orientation and gender identity.[37] Commentators hail GINA—

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[32] 42 U.S.C. § 12112(d)(4)(A) (2012).

[33] 42 U.S.C. § 2000ff-1(b) (2012) (limiting employers' ability to "request, require, or purchase genetic information" of potential employees and current employees or their family members); *see also id.* (defining genetic information to include genetic test results for applicants and their family members as well as family medical history); CONN. GEN. STAT. ANN. § 46a-60(b)(11) (West 2019) (prohibiting employers' inquiry into applicants' genetic information); DEL. CODE ANN. tit. 19, § 711(e) (2019) (same).

[34] Paul-Emile, *supra* note 22, at 937; *see also id.* at 938 ("This provision includes searches of court records and medical databases. Although the law outlines certain limited exceptions, including inadvertent acquisition, the EEOC regulations emphasize that receipt of genetic information will not generally be considered inadvertent unless the employer instructs the source of the material to exclude genetic information. The law also includes safe harbor language for commercial or publicly available information; however, covered employers are precluded from searching such sources with the intention of acquiring an individual's genetic information.").

[35] *See* MINN. STAT. § 363A.08 subd. 4(2) (2017) (prohibiting an employer from "seek[ing] and obtain[ing] for purposes of making a job decision, information from any source that pertains to" the applicant's protected characteristics).

[36] *See* Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 476 (2010) ("When invoked within antidiscrimination law, immutability stands for the proposition that entities should not discriminate on the basis of traits that a person did not choose and cannot change or control without serious cost.").

[37] *E.g.*, CAL. GOV'T CODE § 12940(a), (d) (West 2019) (prohibiting reliance on, and inquiries into, an applicant's or employee's sexual orientation, marital status, and other protected characteristics); COLO. REV. STAT. § 24-34-402(1)(a), (d) (2017) (prohibiting reliance on and inquiries into an applicant's sexual orientation); HAW. REV. STAT. ANN. § 378-2(a)(1)(A), (C) (West 2019) (prohibiting reliance on and inquiries into an applicant's sexual orientation and gender identity); MASS. ANN. LAWS ANN. ch. 151B, § 4(1), (3) (West 2018) (same); MINN. STAT. §§ 363A.03 subd. 44, 363A.08 subd. 2, subd. 4(a)(1) (2017) (same); 28 R.I. GEN. LAWS § 28-5-7(1)(i), (ii), (4)(i), (iii) (2017) (same).

enacted by Congress in 2008 with a near-unanimous vote—as particularly innovative in its determination to stamp out genetic discrimination *before* a discriminatory culture had the time to develop by prohibiting decisionmakers' reliance on, and inquiries about, applicants' genetic information.[38] And many other recent antidiscrimination laws prohibit gatekeepers' reliance on, and often inquiries about, certain life experiences like applicants' marital or reproductive choices,[39] current unemployment status,[40] credit histories,[41] status as domestic violence victims,[42] certain arrest records,[43] and veteran status.[44] Some bar reliance on, or inquiries about, these sorts of characteristics to achieve public policy objectives in addition to equality goals. For example, "ban-the-box" laws limit employers' inquiries about applicants' criminal record at various points in the employment process in part because of the evidence that ex-offenders' unemployment strongly predicts their risk of recidivism.[45]

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[38] *See* Roberts, *supra* note 36, at 441 ("[GINA's proponents presented the legislation] as a unique opportunity to stop discrimination before it starts. It is this preemptive nature, basing protection on future—rather than past or even present—discrimination, that truly makes GINA novel."); *see also id.* at 472–73 ("[T]he fear of genetic-information discrimination was preventing many potential research subjects from participating in studies, thereby slowing the rate at which genetic technology could progress" and "supporters of genetic antidiscrimination legislation also maintained that the fear of genetic tests was harming the general public—people were not seeking diagnoses and treatments that could improve or sustain their health. For example, one-third of the women offered a genetic test related to breast cancer declined, citing potential discrimination as the reason.").

[39] *E.g.*, ALASKA STAT. ANN. § 18.80.220(a)(3) (West 2019) (forbidding employers' inquiries into employees' marital status); CAL. GOV'T CODE § 12940(d) (West 2019) (same); DEL. CODE ANN. tit. 19, § 711(j) (2016) (prohibiting employers from discriminating against applicants or employees based on their reproductive health decisions); St. Louis, Mo., Ordinance 70459 (Feb. 1, 2017) (prohibiting employers' reliance on and inquiries into applicants' "reproductive health decisions or pregnancy").

[40] *E.g.*, D.C. CODE § 32-1362 (2012) (prohibiting employers from discriminating against applicants because of their current unemployment); N.Y.C., N.Y., CODE § 8-107(21) (2019) (same).

[41] *E.g.*, OR. REV. STAT. ANN. § 659A.320 (West 2018) (prohibiting employers' inquiries into applicants' credit history).

[42] *E.g.*, MD. CODE ANN., INS. § 27-504 (West 2014) (prohibiting insurers from discriminating against applicants because they have been victims of domestic violence); N.Y. REAL. PROP. LAW § 227-d (McKinney 2016) (prohibiting housing providers from discriminating against applicants because they have been victims of domestic violence).

[43] *E.g.*, HAW. REV. STAT. ANN. § 378-2(a)(1)(A), (C) (West 2019) (prohibiting reliance on and inquiries into applicants' arrest records); OR. REV. STAT. ANN. § 659A.030(1)(a), (b), (d) (West 2017) (prohibiting reliance on and inquiries into an applicant's expunged juvenile record).

[44] *E.g.*, 38 U.S.C. § 4311 (2012) (prohibiting employers from discriminating against members of the uniformed services by relying on military status when making employment decisions).

[45] *See* Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1082 (2019) (explaining that "ban-the-box" laws seek to address the "grim situation [that] has emerged in which the very people who most need to work—both for their own benefit and for the benefit of society as a whole—often experience tremendous difficulty finding gainful employment"); *see also* Genevieve Douglas, *'Ban the Box' Laws Finding Inroads in Red States, Too*, BLOOMBERG LAW NEWS (Dec. 3, 2019), https://news.bloomberglaw.com/daily-labor-report/ban-the-box-laws-finding-inroads-in-red-states-too [https://perma.cc/TB7T-A5ZY] ("Nearly one in three adults in the U.S.

As another illustration, state and local legislatures have recently begun to deploy related strategies when wrestling with tenacious gender- and race-based pay disparities.[46] More specifically, a growing number of jurisdictions now prohibit employers from relying on, and inquiring about, applicants' salary history in making decisions about hiring and pay. Concluding that candidates' prior pay too often reflects race or gender discrimination or other factors unrelated to merit,[47] these policymakers challenge many employers' reliance on the (often inaccurate) assumption that prior pay is an accurate measure of a candidate's skill, experience, and responsibility to reject applicants whose past salaries are perceived as too low.[48] These policymakers also seek to address the even more common practice in which employers base workers' starting pay on how much those workers earned at their last job[49]—a practice that ensures that pay disparities continue to follow women and people of color from job to job.[50] For all these reasons, these policymakers reject

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has an arrest or conviction record that can show up on an employment background check, according to the National Employment Law Project. That makes the potential impact on the labor market huge for more widespread ban the box measures.").

[46] *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows & The Future of Pay Equity*, 120 COLUM. L. REV. 547, 553 (2020) ("According to the latest report from the U.S. Census Bureau, American women still earn an average of 80 to 83 cents for every dollar earned by their male counterparts."). The pay gap is even greater for women of color. *Id.*

[47] *E.g.*, CAL. LAB. CODE § 432.3(a), (b) (West 2019) (prohibiting reliance on and inquiries into an applicant's "salary history information"); DEL. CODE ANN. tit. 19, § 709B(b) (West 2017) (prohibiting reliance on and inquiries into an applicant's "compensation history"); HAW. REV. STAT. ANN. § 378-2.4(a) (West 2019) (prohibiting reliance and inquiries into an applicant's "salary history"); MASS. GEN. LAWS ANN. ch. 149, § 105A(c)(2) (West 2018) (prohibiting reliance on and inquiries into an applicant's "wage or salary history"); N.Y. LAB. LAW § 194-a(1) (McKinney 2020) (prohibiting all employers from seeking, requesting or relying upon "wage or salary history" from an applicant); VT. STAT. ANN. tit. 21, § 495m(a) (West 2018) (prohibiting reliance on and inquiries into an applicant's "current or past compensation"). Similar legislation is currently pending in Congress and several other states and localities. *E.g.*, Paycheck Fairness Act, H.R. 7, 116th Cong. § 10 (2019) (proposing to prohibit employers from relying upon "wage, salary, and benefit history" in their hiring or pay decisions and from seeking prospective employees' "wage, salary, and benefit history").

[48] *See* Brief for Chamber of Commerce of the United States, et al. as Amicus Curiae supporting Appellee/Cross-Appellant at 8, Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020) (Nos. 18-2175 & 18-2176) ("By prohibiting employers from inquiring about [or relying on] pay history, [Philadelphia's salary history law] denies them useful information for evaluating the quality of candidates during the hiring process.").

[49] *See* PAYSCALE, THE SALARY HISTORY QUESTION: ALTERNATIVES FOR RECRUITERS AND HIRING MANAGERS 3 (2017) (reporting the study's results that showed 43 percent of job applicants were asked about prior pay at some point during the application process); Elizabeth Lester-Abdalla, *Salary History Should be Her Story: Upholding Regulations of Salary History through a Commercial Speech Analysis*, 60 WM. & MARY L. REV. 701, 703 (2018) ("When hiring a new employee, Fresno County takes the new hire's most recent salary and increases it by about 5 percent to place them on a level within the County's salary classification bracket."); Valentina Zarya, *Amazon Joins Growing List of Employers That Won't Ask About Your Salary History*, FORTUNE (Jan. 18, 2018), https://fortune.com/2018/01/18/amazon-salary-history-wage-gap/ [https://perma.cc/9NKL-CDQY] (explaining how Google and other large companies are no longer asking about applicants' salary history, sometimes in response to jurisdictions' enactment of salary history laws).

[50] *See, e.g.*, Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male*

the assumption that a worker's salary history necessarily reflects an accurate assessment of, and reward for, her job performance.[51]

In sum, all of these antidiscrimination laws reflect legislatures' conclusions that relying on (and thus asking about) certain characteristics or experiences when distributing important opportunities is morally wrong, instrumentally unwise, or both.[52]

C. New First Amendment Challenges to These Laws

Hundreds of federal, state, and local laws now protect certain characteristics from discrimination by prohibiting gatekeepers from both relying on, and also asking about, those characteristics. Sometimes these measures generate heated political opposition from regulated entities who resist regulation they characterize as disruptive.[53] This is nothing new. As one of many examples, some employers opposed the enactment of Title VII of the Civil Rights Act of 1964, the federal law barring job discrimination based on race, sex, color, national origin, and religion.[54] And some business owners and associations opposed enactment of the Americans with Disabilities Act, including its protections for HIV-

Students, 109 PROCEEDINGS OF THE NAT. ACADEMY OF SCI. 16474 (2012) (describing the results of a randomized double-blind study that found that decisionmakers often pay women less than men even from the very beginning of their careers when there are no differences in male and female workers' experience, education, or family caregiving responsibilities: the study's participants offered an average starting salary of approximately $30,000 for the male candidate but only about $26,000 for the identically-qualified female candidate).

[51] *See* BENJAMIN HARRIS, THE HAMILTON PROJECT, INFORMATION IS POWER: FOSTERING LABOR MARKET COMPETITION THROUGH TRANSPARENT WAGES 9 (2018) (citing research that employers' initial wage offers were higher by nine percent when those employers could not ask about applicants' salary history); Lobel, *supra* note 46, at 573 ("The first negotiation difference, which I call the *negotiation deficit*, is that women negotiate less frequently and ask for less when they do. This deficit can be mitigated, though not erased, with a salary inquiry ban. The salary inquiry ban has the potential to positively shift the process from letting job applicants lead with a starting point figure to employers implementing a practice of more actively suggesting a fair salary."); *id.* ("Salary inquiry bans can also counteract the negative assumptions employers may make when women refuse to reveal their prior salary in a regime that allows salary inquiry. This is a separate effect, which I call the *negative inference*—when employers assume women who refuse to disclose their pay earn less.").

[52] And the more that legislatures address arbitrary barriers to employment and other important opportunities, the more inclusive their choices become, and the more those choices may appeal to those on both the political right and the left. *See* ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 83 (2019) (urging that we embrace a broader understanding of the civil right to employment as one that should not be denied for any irrational reason unrelated to performance).

[53] *See infra* notes 62–72 and accompanying text (describing certain business associations' opposition to Philadelphia's salary history law).

[54] *See* CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 220 (2014) (describing the U.S. Chamber of Commerce's warning that Title VII "could be seriously harmful to the conduct of American business" and requesting "that Title VII be stripped from the [Civil Rights Act]; if that was not possible, then it should be limited to a role of conciliation and persuasion").

positive workers.[55] Yet disrupting gatekeepers' practices that legislatures have identified as harmful is precisely the point of these efforts. Recall Justice Brandeis's memorable explanation of the power and value of legislative experimentation in responding to pressing problems:

> [T]here must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts. To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[56]

Indeed, the Supreme Court has consistently recognized legislatures' constitutional power to challenge and change longstanding practices judged to be unjust, inefficient, or both. This includes state and local jurisdictions' constitutional power to regulate the terms and conditions of employment and other transactions (subject only to rational basis scrutiny),[57] as well as Congress's Article I interstate commerce clause

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[55] *See* LENNARD J. DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST U.S. MINORITY ITS RIGHTS 161–216 (2015) (describing some business owners' and associations' opposition to the ADA); *id.* at 171–73, 204–16 (describing some business owners' and associations' opposition to extending ADA protections to HIV-positive workers).

[56] New State Ice. Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The majority opinion's abrogation was recognized in Wolverine Fireworks Display v. Towne, No. 12-10426, 2012 U.S. Dist. LEXIS 63259 (E.D. Mich. 2012).

[57] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1728 (2018) ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."); Energy Reserves Grp., Inc. v. Kansas Power and Light Co., 459 U.S. 400, 416–17 (1983) (rejecting a constitutional challenge to a Kansas law that regulated gas prices as a proper use of police power based on "significant and legitimate state interests . . . to protect consumers"); Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc., 372 U.S. 714, 722 (1963) (concluding that state antidiscrimination law does not unconstitutionally burden interstate commerce); Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 423–25 (1952) (rejecting a constitutional challenge to a Missouri law that prohibited employers from deducting wages from employees for taking time out for voting); Railway Mail Ass'n. v. Corsi, 326 U.S. 88, 94 (1945) (holding that there is "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed"); West Coast Hotel

power to regulate these matters through federal legislation (again, subject only to rational basis review).[58] When a legislature bars gatekeepers from relying on certain characteristics in distributing opportunities and services, it requires those gatekeepers to use what it believes to be better indicia of candidates' ability and merit. Regardless of whether one agrees with a specific legislature's conclusions, whether and when legislatures *should* choose to regulate employers', lenders', insurers', and housing providers' decision-making is a policy question rather than a constitutional question. In other words, legislatures' constitutional power to regulate decisionmakers' reliance on credit history, salary history, or certain other experiences and histories is no different from its constitutional power to regulate decisionmakers' reliance on characteristics like race, religion, or gender.

Again, antidiscrimination law prohibits gatekeepers from relying on information about certain characteristics in their decision-making when the legislature concludes that such reliance is unfair, unwise, or both. And once legislatures so regulate, it then makes sense for them to restrict gatekeepers' inquiries eliciting the information that enables what is now illegal discrimination.[59]

Co. v. Parrish, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.").

[58] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Congress's Article I power to prohibit public accommodations from discriminating on the basis of race); Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964) (same); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress's Article I power to regulate the terms and conditions of employment through the National Labor Relations Act).

[59] Note that the Supreme Court's decision in *Masterpiece Cakeshop* did not resolve the question whether a baker has a Free Speech Clause right to discriminate on the basis of his customers' sexual orientation in providing certain (arguably expressive) goods and services. *See Masterpiece Cakeshop*, 138 S. Ct. at 1719 (concluding instead that state agency had demonstrated hostility towards the baker's religious beliefs in violation of the Free Exercise Clause). If (and only if) some decisionmakers do have a constitutional right to discriminate in some circumstances, then presumably they would then have the constitutional right to speak in related ways, perhaps by asking applicants and customers questions about their protected class status. But, as the Court has repeatedly made clear, gatekeepers generally do *not* have a constitutional right to discriminate on the basis of protected characteristics. *E.g.*, Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (rejecting law firm's claim that Title VII's requirement that it refrain from sex discrimination in its partnership decisions violated its First Amendment rights); Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (rejecting nonprofit organization's claim that state law prohibiting discriminatory conduct by public accommodations violated its First Amendment rights); Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam) (rejecting business owner's constitutional challenge to the Civil Rights Act's bar on racial discrimination in public accommodations based on his view that racial integration "contraven[ed] the will of God"). The Supreme Court has recognized exceptions to this general rule in certain limited circumstances outside of the commercial setting. *See* Boy Scouts of America v. Dale, 530 U.S. 640, 640 (2000) (holding that the First Amendment's implied freedom of association permitted the Boy Scouts of America to exclude gay Scoutmasters despite state public accommodations law that prohibited discrimination on the basis of sexual orientation).

Until very recently these laws generated little, if any, constitutional controversy. But the contemporary antiregulatory turn in First Amendment law and litigation has emboldened new attacks on governmental efforts to address sticky problems of inequality through the sorts of antidiscrimination laws described above. This turn—characterized by some as the "weaponization" of the First Amendment[60]—has been described at length elsewhere,[61] and includes corporate and other commercial entities' increasingly successful efforts to resist regulation in a variety of settings.

Most relevant to this Article, the Greater Philadelphia Chamber of Commerce [hereinafter "Philadelphia Chamber"] recently challenged Philadelphia's salary history law that prohibits employers from relying on, and asking about, applicants' prior pay when making hiring and compensation decisions.[62] In so doing, the Philadelphia Chamber and other industry associations made several sweeping arguments inspired by the Court's antiregulatory turn, arguing that the First Amendment protects gatekeepers' ability both to rely on, and ask about, salary history when choosing among and compensating applicants for available job opportunities.[63] If accepted, these arguments would also threaten many other antidiscrimination laws, both longstanding and new.

Most aggressively, the Philadelphia Chamber claimed that Philadelphia's law unconstitutionally restricted employers' ability to express their view—through their actual employment decisions—that salary history is relevant to workers' merit. As its brief argued, "[a]n employer who relies on an applicant's wage history when formulating a proposed salary is communicating a message about how much that applicant's

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[60] *See, e.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (describing the majority as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2161 (2018) ("The Supreme Court's 'weaponized' First Amendment has been its strongest antiregulatory tool in recent decades, slashing campaign-finance regulation, public-sector union financing, and pharmaceutical regulation, and threatening a broader remit.").

[61] *See, e.g.*, Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016).

[62] *See* Principal and Response Brief for Appellee/Cross-Appellant, Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. Nov. 21, 2018) (Nos. 18-2175 & 18-2176).

[63] The Third Circuit recently denied the Philadelphia Chamber's request for a preliminary injunction of the city's provision forbidding employers from relying on prior pay in hiring and compensation decisions as well as the city's provision forbidding employers from asking about applicants' prior pay. Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116, 132–36 (3d Cir. 2020). I note that I served pro bono as co-counsel on behalf of amici civil rights organizations defending Philadelphia's law. *See* Brief for Women's Law Project, et al. as Amicus Curiae supporting Philadelphia, Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020) (Nos. 18-2175 & 18-2176).

labor is worth to the employer: the higher the proposed salary, the more valuable the applicant is to the employer."[64] The Philadelphia Chamber thus characterized the government's regulation of employers' *reliance* on information in its hiring and pay decisions as the regulation of *speech* that should trigger, and fail, heightened scrutiny.[65] Indeed, the lawsuit described the entire statute not as a regulation of commercial conduct that triggers only rational basis review, but instead as a regulation of speech based on "disagreement with employers' message that an employer's assessment of a prospective employee's appropriate salary, as reflected in the employer's salary offer, can be informed by the prospective employee's salary history."[66] In other words, the Philadelphia Chamber's lawsuit attacked the government's constitutional power to regulate discriminatory conduct by restricting gatekeepers' *use* of certain information in distributing important opportunities.

Some businesses and employers in 1964 similarly resisted enactment and enforcement of the Civil Rights Act because they felt that requiring them not to discriminate on the basis of race interfered with their ability to communicate their views about race.[67] And some employers argued that their assessment of an applicant's suitability or value is, and should be, informed by sexual orientation or other characteristics now increasingly protected from discrimination by law.[68] Many employers believed the same about pregnancy or disability or age because they felt that those characteristics predict workers' cost or ability; some continue to believe it.[69] And some employers no doubt think the same about credit history or arrest record or salary history—i.e., they believe

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[64] Principal and Response Brief for Appellee/Cross-Appellant, *supra* note 62, at 29.

[65] *Id.* at 25–27.

[66] *Id.* at 16. But as described *infra* notes 94, 99, 100, 102–104 and accompanying text, the Supreme Court has repeatedly emphasized that the First Amendment does not protect a gatekeeper's statement "White Applicants Only," even though this speech also communicates a message about the value a prospective employer places on certain applicants because of their protected class status.

[67] *See* Newman, *supra* note 59 (rejecting business owner's constitutional challenge to the Civil Rights Act's bar on racial discrimination in public accommodations based on his view that racial integration "contraven[ed] the will of God").

[68] As an illustration, a 1950 U.S. Senate Subcommittee report argued just this. *See* SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. No. 81-241, at 3–4 (1950) ("In the opinion of this subcommittee homosexuals and other sex perverts are not proper persons to be employed in Government for two reasons; first, they are generally unsuitable, and second, they constitute security risks. . . . [I]t is generally believed that those who engage in overt acts of perversion lack the emotional stability of normal persons. In addition, there is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.").

[69] *See supra* notes 18–19 and accompanying text (discussing cases in which employers declined to hire women they feared might become pregnant).

that those characteristics are important to hiring and compensation decisions because they might predict candidates' ability. As we've seen, however, the Court has long made clear that legislatures have the constitutional power to prohibit gatekeepers' reliance on such characteristics in distributing opportunities and services once those legislatures conclude that such characteristics are not—or should not be—relevant to decision-making.[70] The Third Circuit recognized this when it denied the Philadelphia Chamber's request to preliminarily enjoin the provision of Philadelphia's law that forbids employers from relying on applicants' salary history in hiring and compensation decisions.[71]

The Philadelphia Chamber also specifically challenged legislatures' power to restrict gatekeepers' inquiries that enable illegal discrimination. Although deployed so far to challenge laws regulating employers' inquiries about salary history, these arguments would apply with equal force to the wide range of federal, state, and local statutes described above that prohibit gatekeepers' questions about religion, national origin, disability, pregnancy, sexual orientation, and many other protected characteristics. We may anticipate similar challenges to other statutes, perhaps starting with laws of relatively recent vintage like statutes prohibiting employers from asking about, and relying upon, applicants' genetic information, credit history, and reproductive decisions.[72]

As the next Part explains, these challenges should not succeed. Once a legislature prohibits certain transactions as illegally discriminatory, First Amendment theory and doctrine support the legislature's choice also to restrict the speech that enables this now-illegal conduct, including but not limited to gatekeepers' inquiries about applicants' protected class status.

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[70] *See supra* notes 57–58 and accompanying text. An employer illegally relies on salary history when it pays a salary that relies on the candidate's prior salary, not when it communicates this decision to the applicant. If communicating a salary offer that relies on a protected characteristic is protected speech, then the same would be true of communicating a salary offer that relies on other protected characteristics like religion, race, or gender.

[71] Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116, 132–36 (3d Cir. 2020).

[72] As law professor Charlotte Garden has observed, "[A]lthough many of these theories are a stretch for now, individual deregulatory First Amendment cases should not be viewed as outliers: the outward push is occurring simultaneously on multiple fronts, and its standard-bearers include some exceedingly well-respected and influential lawyers." Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 325 (2016); s*ee also id.* at 362 ("[E]ven First Amendment arguments that are unlikely to be accepted can matter; for example, Chicago reportedly considered a minimum wage ordinance modeled on Seattle's, but abandoned it in light of [an industry group's unsuccessful First Amendment challenge to Seattle's increase in its minimum wage, alleging that the increase would leave its members with less resources available to spend on speech activities]. . . . Thus, one problem with the emerging deregulatory First Amendment is that it can accomplish some of its aims without the courts ever adopting it; the increasingly real threat of expensive litigation by high-profile litigators can stay regulators' hands.")

II. WHY THE FIRST AMENDMENT DOES NOT PROTECT SPEECH THAT ENABLES ILLEGALLY DISCRIMINATORY TRANSACTIONS

This Part starts by examining why the First Amendment does not protect speech that initiates or accomplishes conduct that the government has regulated—in other words, speech that *does* something and not just says something. It then explains how the speech that enables illegal conduct more generally—as well as the speech that enables illegal discrimination more specifically—exemplifies speech that does something and not just says something. Next, this Part demonstrates how the Supreme Court's commercial speech doctrine has long captured this insight by holding that the First Amendment does not protect commercial speech related to illegal activity such that the government's regulation of such speech triggers no First Amendment scrutiny. It closes by describing this doctrine's application to the laws described in Part I, concluding that the First Amendment does not protect gatekeepers' inquiries about applicants' protected class status because those inquiries constitute commercial speech related to the illegal activity of discriminatory employment, housing, and other transactions.

A. Why the First Amendment Does Not Protect Speech That Enables Regulated Conduct More Generally

The government routinely, and in a variety of settings, restricts speech that enables regulated conduct without triggering any First Amendment scrutiny. Antitrust law, for instance, "restricts the exchange of accurate market, pricing, and production information, as well as limits the advocacy of concerted action in most contexts; yet it remains almost wholly untouched by the First Amendment."[73] Nor does the First Amendment protect solicitations of, and conspiracies to engage in, illegal activity.[74]

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[73] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1781 (2004); s*ee also id.* at 1770 ("[N]o First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices with their competitors, whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival, or whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool.").

[74] *See* United States v. Williams, 553 U.S. 285, 297–98 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection. . . . Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities."); New York v. Ferber, 458 U.S. 747, 761 (1982) (holding that the First Amendment does not protect the "advertising and selling of child pornography" because they "provide an economic motive for and

A number of thoughtful commentators have considered this dynamic, explaining it as involving a sufficiently close relationship between speech and regulated conduct that leaves us confident that the government has targeted conduct rather than ideas. Kent Greenawalt, for instance, identifies a universe of what he calls "situation-altering" speech that falls outside of the First Amendment's protection because it *does* something rather than just *says* something. In other words, this speech "dominantly represent[s] commitments to action" rather than "assertions of facts or values or expressions of feeling" that have First Amendment value.[75] Under this view, "communications whose dominant purpose is to accomplish something rather than to say something are not reached by a principle of free speech or are reached much less strongly than are ordinary claims of fact and value."[76] This approach explains why, for example, offers and agreements to commit a crime receive no First Amendment protection.[77]

Expression's capacity to *do* something rather than just *say* something can increase with the power of the speaker. This is the case, for example, of comparatively powerful speakers' threats and orders: "[a]nother kind of situation-altering utterance is when a boss gives a direct order of behavior to a subordinate. That is effectively a way for the boss to get done what he has ordered."[78] "Such situation-altering utterances," Greenawalt concludes, "are not the sort of speech that warrants protection under a guarantee of free speech."[79] Targeting actions rather than ideas, the government's restriction of such threats and orders triggers no First Amendment scrutiny.[80]

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are thus an integral part of the production of such materials, an activity illegal throughout the Nation"); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (stating that the First Amendment does not protect speech that is an "integral part" of illegal conduct); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 388 (2009) ("Fraud and crime-facilitating speech, for example, are thought to be entirely outside the bounds of the Amendment, and no balancing is required to suppress them in a given case.").

[75] GREENAWALT, FIGHTING WORDS *supra* note 5; *see also* GREENAWALT, THE USES OF LANGUAGE, *supra* note 5 ("Thus, with some roughness, we can speak of assertions of fact and value as making claims about what already exists in the listener's world. Situation-altering utterances purport to change that world."); *id.* at 239 (describing "communications that I claim fall outside the coverage of the First Amendment" as "too far removed from ordinary statements of fact and value to deserve even moderately stringent constitutional protection").

[76] GREENAWALT, THE USES OF LANGUAGE, *supra* note 5, at 40.

[77] GREENAWALT, FIGHTING WORDS, *supra* note 5.

[78] *See* Kent Greenawalt, *Speech and Exercise by Private Individuals and Organizations*, 72 SMU L. REV. 397, 400 (2019).

[79] GREENAWALT, FIGHTING WORDS, *supra* note 5, at 79.

[80] *See* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 732 (2016) ("[W]hen speech begins to resemble conduct, such as when it impairs discrete, material interests through direct processes and through the fault mostly of the speaker, then courts should consider those conduct-like harms in their consequentialist calculus.").

The government's routine regulation of contractual and other transaction-related speech offers another illustration of this broader dynamic where the government restricts speech because it does something, and not just says something. Indeed, contract law regularly regulates transactional speech without raising First Amendment discussion, much less litigation.[81] As law professor Rod Smolla explains, "[A] statement of transaction is the use of language to propose or conclude some form of transaction[,] [such as] 'I will rent to you this apartment if you will pay me $300 per month.' . . . . Because virtually all transactions are effectuated through language, freedom of speech never has been thought to encompass all use of language."[82] In other words, once the government exercises its constitutional power to regulate certain transactions, this inevitably requires the regulation of the speech that makes those transactions possible: "To regulate the language is to regulate the transaction."[83]

Legal scholar Daniel Farber makes a similar point about speech that serves a contractual function, observing that "[c]ontract law consists almost entirely of rules attaching liability to various uses of language."[84] To help us determine whether the government's regulation of transactional speech impermissibly targets ideas or instead permissibly targets conduct, Professor Farber proposes the following test:

> A justification for regulating the seller's speech relates to the contractual [as opposed to informational, and thus constitutionally protected] function of the speech if, and only if, the state

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[81] *See* Schauer, *supra* note 73, at 1773 (observing as a descriptive matter that "the speech with which we make contracts is, in general, not within the scope of 'the freedom of speech' and thus not covered by the First Amendment"); G. Edward White, *Falsity and the First Amendment,* 72 SMU L. REV. 513, 525 (2019) ("No current court would find that the First Amendment shields false or misleading speech affecting the creation of a contract from exposing the speaker to contract damages, or speech asking another to commit a murder from criminal sanctions.").

[82] Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE. L. REV. 171, 186–87 (1990); s*ee also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456–57 (1978) (describing the government's constitutionally permissible regulation of "a business transaction in which speech is an essential but subordinate component"); GREENAWALT, FIGHTING WORDS, *supra* note 5, at 83 ("Smolla's core idea of 'statements of transaction' is very close to what I have called situation-altering utterances, remarks that do something rather than tell something.").

[83] Smolla, *supra* note 82, at 187; s*ee also id.* (explaining that "the laws governing the language that must appear on a negotiable instrument[] never have been thought to implicate freedom of speech"). Note that transactions may or may not be commercial, depending on whether they involve the exchange of goods and services for compensation. *See* United States v. Williams, 553 U.S. 285, 298 (2008) ("Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection. It would be an odd constitutional principle that permitted the government to prohibit offers to sell illegal drugs, but not offers to give them away for free.").

[84] Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386 (1979).

> interest disappears when the same statements are made by a third person with no relation to the transaction. If the same interest is implicated by the third party's speech, the interest obviously cannot relate to any contractual aspect of the speech, since the third party is not involved in the contract.[85]

Law professor Jane Bambauer suggests a related approach for parsing the government's permissible regulation of speech that *does* something from its impermissible regulation of speech because it *says* something, observing that "[w]hen the state has a legitimate, non-speech-related reason to manage a relationship, it will typically manage many non-speech aspects of the relationship as well."[86] And that's what we see with respect to the government's regulation of gatekeepers' speech, as the government regularly regulates the conduct of employers, lenders, housing providers, and other commercial actors to prevent discrimination and promote fairness and efficiency.[87]

B. Why the First Amendment Does Not Protect Speech That Enables Illegal Discrimination More Specifically

So far, we've seen that the First Amendment does not protect speech that accomplishes illegal conduct, nor does it protect speech that performs a contractual function: both involve speech that does something, not just says something. The speech that enables illegally discriminatory transactions thus involves two sets of circumstances "where the regulation of expressive activities seems incontrovertibly outside the ambit of First Amendment concerns: speech in the formation of contracts and speech solicitaing [sic] [illegal] activity."[88]

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[85] *Id.* at 388–89.

[86] Jane R. Bambauer, *The Relationships between Speech and Conduct*, 49 U.C. DAVIS L. REV. 1941, 1948 (2016).

[87] As Kent Greenawalt explains: "The argument against the relevance of a free speech principle is strongest when the information disclosed is so narrowly specific that no significant subject of discussion or learning is involved. [The reasons for free speech protections] apply less strongly if speaker and listener care only about an immediate practical objective and not about any increase in general understanding or expression of personal feelings and attitudes." GREENAWALT, THE USES OF LANGUAGE, *supra* note 5, at 47; s*ee also* Schauer, *supra* note 73, at 1801 (interpreting Greenawalt's argument to distinguish between speech that is "face-to-face, informational, particular, and for private gain" from speech that "is public rather than face-to-face, when it is inspired by the speaker's desire for social change rather than for private gain, when it relates to something general rather than to a specific transaction, and when it is normative rather than informational in content" and concluding that the First Amendment is "irrelevant" to the former, and "plainly" implicated in the latter); Eugene Volokh, *Crime-Facilitating Speech,* 57 STAN. L. REV. 1095, 1102–05 (2005) (suggesting that the First Amendment affords greater protection to "dual-use" information that provides information to a wide public audience even if it enables some listeners to commit illegal acts than it does to single or limited use information that enables the parties in one-on-one conversations to commit illegal acts).

[88] White, *supra* note 81, at 525.

For example, courts and commentators have long recognized (without constitutional controversy) that quid pro quo harassment—in which an employer threatens on-the-job punishment or offers an on-the-job reward based on a worker's response to unwelcome sexual advances—is unprotected by the First Amendment.[89] As Greenawalt explains more generally, "Since someone who orders another is not engaging in expression, but is attempting to have his way through power or authority, a political principle of freedom of speech is no impediment to forbidding undesirable orders."[90] In other words, the First Amendment permits the government to bar quid pro quo threats and promises because they seek to change the terms and conditions of employment through the speaker's power over the employment relationship.

For decades the Court has also recognized that harassing workplace speech warrants the government's constraint when sufficiently severe or pervasive to create a hostile work environment based on protected class status.[91] Think, for instance, of workers regularly forced to endure an onslaught of racial or sexual slurs that alter the terms and conditions of their employment and signal certain job opportunities as off-limits to targeted individuals based on protected class status.[92] For these reasons, the Court has stated that the First Amendment permits the content-based regulation of such verbal harassment as "incidental" to the government's permissible regulation of discriminatory conduct:

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[89] *See* Nadine Strossen, *The Tensions between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 704 (1995) ("Even the most diehard free speech absolutist recognizes that the speech involved in quid pro quo harassment is tantamount to threats or extortion, expression that has long been punishable without raising substantial free speech concerns in any context."); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1800 (1992) (stating that quid pro quo harassment "would seemingly be as unprotected by the First Amendment as any other form of threat or extortion").

[90] GREENAWALT, THE USES OF LANGUAGE, *supra* note 5, at 85.

[91] *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Sys., Inc. 510 U.S. 17 (1993).

[92] *See Meritor,* 477 U.S. at 67 ("Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.") (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)); *see also* Cynthia Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment,* 75 TEX. L. REV. 687, 689–90 (1997) ("A hostile work environment imposes serious discriminatory burdens on female employees and helps to maintain sexual segregation of many segments of the workforce by marking certain workplaces or certain levels of the workplace hierarchy off-limits to women. Similarly, harassment targeting racial minorities, such as persistent racial taunts, ridicule, or threats, retards progress toward racial integration and equality in the workforce and burdens the work lives of minority employees . . . ."); Volokh, *Workplace Harassment*, *supra* note 89, at 1809 ("When women and minority employees suffer such intolerable abuse, the abuse both interferes with their ability to make a living, and creates barriers for them that others in the workplace do not have to overcome.").

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.[93]

Along the same lines, on multiple occasions the Court has made clear that the First Amendment poses no bar to laws that forbid gatekeepers' statements of discriminatory preference like "White Applicants Only"[94] or "Jobs Of Interest to Men."[95] In so doing, the Court has identified these laws as exemplifying the government's constitutionally permissible regulation of speech that enables the *doing* of something that the government has legitimately regulated.[96]

Consider, for instance, *Rumsfeld v. Forum for Acad. & Inst. Rights*.[97] There the Court held that the First Amendment permits Congress to regulate certain conduct by requiring universities to provide military recruiters with the same access to campus facilities as they provide other employers—even though this law also regulated speech by requiring universities to send emails or post notices on recruiters' behalf:

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[93] R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (citations omitted).

[94] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47 (2006).

[95] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 379 (1973) (holding that the First Amendment did not protect employers' statements of discriminatory preference in the form of advertisements of "Jobs—Male Interest"); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (citing the facts in *Pittsburgh Press* as an example of commercial speech unprotected by the First Amendment because of its relationship to illegal commercial activity).

[96] *See Rumsfeld*, 547 U.S. at 62–66. Note that laws that prohibit gatekeepers' discriminatory advertisements or other statements of discriminatory preference are almost as prevalent as laws that prohibit gatekeepers' inquiries about applicants' protected class status; *e.g.*, 42 U.S.C. § 3604(c) (2012) (prohibiting housing providers from "indicat[ing] any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin"); 42 U.S.C. § 2000e-3(b) (2012) (making it unlawful "to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin"); 29 U.S.C. § 623(e) (2012) ("It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in [such an organization or] classification or referral . . . by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age."); *see also* Norton, *You Can't Ask (Or Say) That*, *supra* note 1, at 732–33 (canvassing state and local laws that prohibit gatekeepers' discriminatory advertisements or other statements of discriminatory preference).

[97] 547 U.S. 47 (2006).

> As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*. . . . The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[98]

As an illustration of speech that is unprotected because it "initiates" or "carries out" illegal conduct (in other words, speech that does something and not just says something), the *Rumsfeld* Court pointed to gatekeepers' speech that enables illegal discrimination: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."[99]

In *Sorrell v. IMS Health, Inc.*, the Court again offered "White Applicants Only" as an example of speech unprotected by the First Amendment because it does something and not just says something.[100] There, a 5-4 Court held that Vermont violated the First Amendment when it restrained the exchange of information (about doctors' prescribing practices) that would inform disfavored but legal marketing practices (phar-

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[98] *Id.* at 60–62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). As the Court notes, speech can "initiate" or "carry out" illegal conduct; such is the case of threats, offers, agreements, statements of discriminatory preference, and other "situation-altering" statements. In this Article, I use the terms "enable" or "facilitate" to describe these connections between certain speech and regulated conduct. The Court also notes the use of speech as "evidence" of a speaker's illegal motive for its conduct, which describes a slightly different relationship between speech and illegal conduct, and one that is also endemic throughout the law. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 125–26 (1993) (explaining that a letter saying, "You're fired, because I won't let blacks work here" is "simply evidence of what is unlawful, a discharge based on discrimination. Use of the letter to prove discriminatory motive is hardly unconstitutional even if the letter is speech.") (internal quotation marks omitted). Indeed, a challenger can offer a decisionmaker's question about a candidate's protected class status as evidence of the ultimate decision's discriminatory motive and thus its illegality. *See* EEOC v. Wal-Mart Stores, Inc., 11 F. Supp. 2d 1313, 1328 (D.N.M. 1998), *aff'd*, 187 F.3d 1241 (10th Cir. 1999) ("[I]t is reasonable to infer from the testimony presented at trial that the asking of the question [about disability status] set off a chain of events that ultimately led to Wal-Mart's discriminatory conduct of refusing to hire [the plaintiff].").

[99] *Rumsfeld*, 547 U.S. at 62.

[100] 564 U.S. 552, 567 (2011).

maceutical companies' marketing of brand-name drugs directly to doctors).[101] Yet in so holding, the majority distinguished unprotected speech that the government may restrict free from First Amendment scrutiny because of its close relationship to illegal conduct:

> It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on non-expressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove "White Applicants Only" signs . . . .[102]

In other words, "White Applicants Only" is unprotected because it declares certain transactions and opportunities as off limits to protected class members. Precisely because of gatekeepers' power, their speech in these transactional settings thus *does* something and not just *says* something.[103] By deterring applicants from pursuing available opportunities based on protected class status, gatekeepers' statements of discriminatory preference like "White Applicants Only" enable illegal discrimination and thus can be regulated without triggering First Amendment scrutiny.[104]

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[101] *Id.* at 557.

[102] *Id.* at 567; *see also* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) ("[A] law requiring all New York delis to charge $10 for their sandwiches . . . would simply regulate the amount that a store could collect. In other words, it would regulate the sandwich seller's conduct. To be sure, in order to actually collect that money, a store would likely have to put '$10' on its menus or have its employees tell customers that price. Those written or oral communications would be speech, and the law—by determining the amount charged—would indirectly dictate the content of that speech. But the law's effect on speech would be only incidental to its primary effect on conduct . . . ."); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018) (identifying malpractice and informed consent requirements as examples of the government's constitutionally permissible "regulations of professional conduct that incidentally burden speech").

[103] GREENAWALT, THE USES OF LANGUAGE, *supra* note 5, at 244 (defining a situation-altering order as a statement "by someone in authority, concerning acts as to which his authority generally extends").

[104] *See* Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 652 (6th Cir. 1991) ("Without the regulation of advertisements, realtors could deter certain classes of potential tenants from seeking housing at a particular location, effectively discriminating against these classes without running afoul of the FHA's prohibition against discriminatory housing practices. Congress obviously recognized the key role housing advertisements play in potential real estate transactions and concluded that the regulation of real estate advertisements is warranted."); Ragin v. N.Y. Times Co., 923 F.2d 995, 999–1000 (2d Cir. 1991) ("[W]e read [the Fair Housing Act's bar on discriminatory advertisements] to describe any ad that would discourage an ordinary reader of a particular race from answering it."); Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 795 (1992) (explaining that law treats speech like "Whites Only Need Apply" as "'discriminatory practices' and outlaw[s] them under federal and state civil rights legislation because they are more than speech").

Once we understand why the First Amendment does not protect gatekeepers' statements of discriminatory preference like "White Applicants Only," we can see the implications for other speech that enables illegal discrimination. Gatekeepers' inquiries about applicants' protected class status, like their statements of discriminatory preference, take place in an environment in which their speech does something and not just says something precisely because of their power in that transactional setting. More specifically, these inquiries can both deter certain candidates from pursuing available opportunities and also elicit the information that makes illegal discrimination possible. First, because the gatekeeper's query signals a preference for a term of the proposed transaction where the speaker has the functional power to insist on that term, a gatekeeper's inquiries about candidates' protected class status deters certain listeners from pursuing important opportunities. Think, for example, of an employer's questions about an applicant's religion, HIV-status, or pregnancy. Just as is the case when a decisionmaker announces its preference for "White Applicants Only," these inquiries communicate certain opportunities as off limits to protected class members and are made by decisionmakers who have the power to enforce those limits. Second, gatekeepers' inquiries about applicants' protected class status also make illegal discrimination possible by eliciting information that remains available, consciously or unconsciously, for later use in their decision-making about available opportunities. These inquiries *do* something rather than just *say* something because they enable the speakers to limit their targets' opportunities through their power over the transaction, rather than through the power of their ideas.

The next section explains how the Court's modern commercial speech doctrine captures these insights by holding that the First Amendment does not protect commercial speech related to illegal activity, including commercial speech that enables illegal discrimination.

C. Why the First Amendment Does Not Protect Commercial Speech Related to Illegal Activity, Including Commercial Speech Related to Illegal Discrimination

By prohibiting employers, insurers, housing providers, lenders, and other gatekeepers from denying opportunities and services based on protected class status, antidiscrimination law regulates the use of certain information in determining the terms and conditions of commercial activity (i.e., the exchange of money for labor, credit, housing, insurance, and more). And when legislatures forbid commercial actors from relying on certain characteristics in their decision-making, those

actors' inquiries about candidates' protected characteristics then constitute commercial speech that is unprotected by the First Amendment because it facilitates illegal commercial activity.[105]

1. Commercial speech related to illegal activity more generally

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[106] the Court held for the first time that the Free Speech Clause provides some protection for commercial speech, striking down Virginia's law that forbade pharmacists from advertising their prescription drug prices.[107] The majority underscored the expression's value to vulnerable prescription drug consumers like "the poor, the sick and particularly the aged," observing that those consumers share an "interest in the free flow of commercial information[] that . . . may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate."[108] In so holding, the Court explained that free speech protections are "enjoyed by the appellees [i.e., the consumers] as recipients of the information, and not solely, if at all, by the advertisers themselves."[109]

Shortly thereafter, the Court again described commercial expression's First Amendment value (and thus its protection from the government's regulation) as turning primarily on its ability to facilitate listeners' informed decision-making about legal activities. Under this framework, commercial speech that is false, misleading, or related to illegal activity offers no constitutional value to listeners and is thus unprotected from the government's regulation, subject only to rational-basis review.[110] As the Court explained in *Central Hudson Gas & Electric Corp. v. Public Service Commission*:

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[105] Despite the contemporary antiregulatory turn in its Free Speech Clause doctrine, the Court continues to apply this commercial speech framework. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1763–65 (2017) (discussing commercial speech doctrine with respect to the government's regulation of trademarks); *Expressions Hair Design*, 137 S. Ct. 1144, 1151 (2017) (discussing commercial speech doctrine with respect to the government's regulation of retailers' communication about prices).

[106] 425 U.S. 748 (1976).

[107] *Id.* (overruling Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)).

[108] *Id.* at 763.

[109] *Id.* at 756.

[110] *See* Schauer, *supra* note 73, at 1776 n.49 ("The *Central Hudson* approach demands a threshold inquiry into whether the speech is misleading. Thus, misleading commercial advertisements are akin to legally obscene materials in that they are regulable under minimal rational basis scrutiny without regard to First Amendment standards or values. Indeed, misleading commercial speech is arguably simply not covered by the First Amendment."); White, *supra* note 81, at 527 ("False commercial speech falls outside the coverage of the First Amendment and can be regulated with impunity.").

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.[111]

In contrast, accurate commercial speech about legal activity (like accurate speech about prescription drug prices) is valuable to listeners, and thus the government's regulation of such speech triggers First Amendment suspicion in the form of heightened—that is, intermediate—scrutiny.[112]

Although the Court has yet to offer a precise definition of commercial speech, the term includes commercial advertising and other speech that does "no more than propose a commercial transaction."[113] Because the speech that proposes a commercial transaction includes the speech involved in communicating and negotiating the terms and conditions of that transaction,[114] the Court has recognized speech other than advertisements as commercial for First Amendment purposes, like speech that communicates the price of goods and services.[115] As legal scholar Felix Wu explains, "[w]hat makes speech commercial is the extent to

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[111] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980) (striking down governmental ban on electric utilities' promotion of electricity consumption) (citations omitted).

[112] *Id.*; *see also id.* at 562 (noting that the Court's "decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'") (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

[113] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). The Court has also characterized commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561.

[114] *See* Smolla, *supra* note 82 and accompanying text.

[115] *E.g.*, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (characterizing New York law as a regulation of commercial speech because it regulated retailers' communication of the price of goods and services); Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (characterizing product demonstrations in campus dormitory rooms as commercial speech); Beeman v. Anthem Prescription Mgmt., LLC, 315 P.3d 71, 74–75 (Cal. 2013) (characterizing a regulation requiring "prescription drug claims processors to compile and summarize information on pharmacy fees and to transmit the information to their clients" as the regulation of commercial speech); Carrico v. City of San Francisco, 656 F.3d 1002 (9th Cir. 2011) (describing a law prohibiting landlords from coercing tenants to vacate their homes through offers of payment, accompanied by threats and intimidation, as the regulation of commercial speech); Nat'l Cable & Telecomms. Ass'n v. FCC, 555 F.3d 996, 996 (D.C. Cir. 2009) (characterizing the government's regulation requiring carriers "to obtain opt-in consent from a customer before disclosing that customer's information to a carrier's joint venture partner" as regulating commercial speech); Trans Union Corp. v. FTC, 267 F.3d 1138 (D.C. Cir. 2001) (characterizing consumer credit reports as commercial speech).

which the speech should be understood to be part of a commercial transaction. Pricing information is quintessential commercial speech, because pricing is a key component of any commercial transaction."[116]

Recognizing that the employment relationship is a type of commercial relationship in which a worker exchanges her labor and talent for pay, the Supreme Court has identified job advertisements as "classic examples" of commercial speech.[117] Lower courts regularly apply this reasoning to conclude that employers' recruitment efforts, interviews, and negotiations about the terms and conditions of employment also constitute commercial speech that initiates and completes commercial transactions.[118] Along the same lines, gatekeepers' inquiries about applicants' protected characteristics—along with gatekeepers' statements like "White Applicants Only"—take place in the context of communicating and negotiating about potential commercial transactions.[119]

Again, the Court's commercial speech doctrine provides that commercial speech is unprotected by the First Amendment when it is false, misleading, or "related to illegal activity."[120] In that case, such speech is entirely open to the government's regulation subject only to rational-basis scrutiny—as recounted in Part I, the Court has long recognized legislatures' constitutional power to regulate commercial transactions, which includes their power to prohibit decisionmakers from enforcing discriminatory terms or conditions in providing opportunities and services.[121] And when a legislature exercises its constitutional power to prohibit certain commercial activity, speech that facilitates that now-illegal activity loses its First Amendment value to listeners, and thus its constitutional protection. Examples include speech that advertises or inquires about the availability of goods and services that legislatures

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[116] Felix T. Wu, *Commercial Speech Protection as Consumer Protection*, 90 U. COLO. L. REV. 631, 644 (2019).

[117] *Pittsburgh Press Co.*, 413 U.S. at 385 ("Each [job advertisement] is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.").

[118] *E.g.*, Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 868 F.3d 104 (2d Cir. 2017) (characterizing potential employers' solicitation of day laborers as commercial speech because it involves advertisements and negotiations for work); Valle Del Sol, Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013) (same); Nomi v. Regents for Univ. of Minn., 796 F. Supp. 412, 417 (D. Minn. 1992) ("[Military job] recruiting proposes a commercial transaction; the purpose of recruiting is to reach an agreement under which services will be exchanged for compensation."), *vacated as moot*, 5 F.3d 332 (8th Cir. 1993); Amalgamated Acme Affiliates, Inc. v. Minton, 33 S.W.3d 387, 394 (Tex. App. 2000) (concluding that speech asserting that a former employee was subject to, and in violation of, a non-compete agreement was commercial speech).

[119] Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020) (concluding that employers' inquiries about candidates' salary history in the context of job applications and negotiations constituted commercial speech).

[120] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–64 (1980).

[121] *See supra* notes 57–58 and accompanying text.

have prohibited, like drugs and drug paraphernalia, prostitution, and income tax evasion services.[122]

As an illustration, the production and sale of any particular substance remains legal commercial activity unless and until a legislature chooses to make it illegal. Until that time, advertisements for, inquiries about, and negotiations over the price and availability of that substance constitute commercial speech related to legal activity, with the government's regulation of such speech subject to intermediate scrutiny. But once a legislature chooses to prohibit the production and sale of that substance (and recall that its regulation of such commercial activities generally triggers only rational-basis scrutiny[123]), advertisements for, inquiries about, and negotiations over the availability of that product then constitute commercial speech that is unprotected by the First Amendment because of its relationship to what is now illegal activity. (To be sure, some listeners very much want to receive such information as potential purchasers of illegal drugs or illegal services—but once the legislature makes that activity illegal, that interest is no longer protected by the Constitution.)

2. Commercial speech related to illegal discrimination more specifically

Along the same lines, a characteristic does not become "protected" from private parties' discrimination as a legal matter unless and until a legislature passes a statute prohibiting gatekeepers from relying on that characteristic in their decision-making. For example, gatekeepers' discriminatory reliance on pregnancy (or disability or religion or salary history, etc.) in their decision-making does not become illegal unless and until a legislature enacts a statute to that effect.[124] Upon such a

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[122] *See, e.g.*, United States v. Benson, 561 F.3d 718, 725–26 (7th Cir. 2009) (characterizing the advertising of materials that advocated not filing federal income tax returns as unprotected commercial speech related to illegal activity); Wash. Mercantile Ass'n v. Williams, 733 F.2d 687 (9th Cir. 1984) (characterizing drug paraphernalia advertisements as unprotected commercial speech related to illegal activities); New England Accessories Trade Assocs., Inc. v. City of Nashua, 679 F.2d 1 (1st Cir. 1982) (same); Fla. Businessmen for Free Enter. v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982) (same); Kan. Retail Trade Coop. v. Stephan, 695 F.2d 1343 (10th Cir. 1982) (same); State v. Johnson, 324 N.W.2d 447 (Wis. Ct. App. 1982) (characterizing advertisements for prostitution as unprotected commercial speech related to an illegal commercial transaction); Washington v. Clark Cty. Liquor and Gaming Licensing Bd., 683 P.2d 31 (Nev. 1984) (same); *see also* United States v. Williams, 553 U.S. 285, 297–98 (2008) (holding that offers to provide, and requests for, child pornography are unprotected by the First Amendment because the distribution and possession of child pornography is itself illegal).

[123] *See supra* notes 57–58 and accompanying text.

[124] This Article focuses on statutes that protect certain characteristics from discrimination by nongovernmental or governmental employers and other gatekeepers. Of course, apart from any statutory requirements, the Supreme Court has interpreted the Equal Protection Clause to prohibit the government from discriminating based on certain characteristics in its decisions. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down the government's race-based segregation

statute's enactment, however, gatekeepers' inquiries about candidates' protected class status then constitute commercial speech that is unprotected by the First Amendment because they relate to—that is, enable—the now-illegal activity of relying on those characteristics when making key decisions.

Indeed, in *Central Hudson* itself, the Court offered gatekeepers' speech that enables illegal job discrimination as an illustration of commercial speech unprotected by the First Amendment because of its relationship to illegal commercial activity.[125] More specifically, it cited its holding in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, a decision rejecting a First Amendment challenge to a local anti-discrimination law that not only prohibited sex-based employment decisions, but also prohibited gatekeepers' publication of "any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of . . . sex."[126] The *Pittsburgh Press* Court held that sex-segregated job advertisements constituted unprotected commercial speech because they proposed the illegal commercial transaction of discriminatory hiring. In so holding, the Court analogized the contested job listings (which consisted of columns headed "Jobs—Male Interest" and "Jobs—Female Interest") to constitutionally unprotected advertisements for illegal drugs or prostitution.[127] As it explained, "Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance . . . . The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."[128] In other words, advertising that "I've got a job for a man" or stating that "Only whites need apply" is just as related to illegal activity for commercial speech purposes as advertising that "I've got cocaine for sale."

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of public schools on equal protection grounds); United States v. Virginia, 518 U.S. 515 (1996) (striking down the government's exclusion of women from the state's Virginia Military Institute on equal protection grounds).

[125] *Central Hudson*, 447 U.S. at 564.

[126] 413 U.S. 376, 378 (1973).

[127] *Id.* at 388 ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes Wanted' rather than stated within the four corners of the advertisement.").

[128] *Id.* at 388–89.

All of these statements facilitate illegal commercial transactions. All thus do something, and not just say something.

So too is the case of gatekeepers' inquiries about candidates' religion, sexual orientation, pregnancy, prior pay, credit history, or other characteristics protected from discrimination by the relevant jurisdiction. Asking an applicant if she's pregnant (or HIV-positive, or Muslim) is not meaningfully distinguishable for these purposes from saying "No pregnant [or HIV-positive, or Muslim] people need apply," as the query deters applicants based on protected class status and elicits information that facilitates illegal decision-making.

The doctrinal recognition that the First Amendment does not protect commercial speech related to illegal activity thus separates the government's constitutionally permissible interest in regulating commercial transactions from the government's constitutionally impermissible interest in censoring a message it disfavors. This insight also explains why laws regulating gatekeepers' speech that enables illegal discrimination (like laws regulating commercial speech related to illegal activity more broadly) do not trigger First Amendment scrutiny even though they target certain speech by certain speakers.[129] As the Court has recognized, the First Amendment permits these distinctions because only certain speakers have the power to engage in the conduct that the legislature has regulated. In other words, only employers and other gatekeepers have the power to make illegally discriminatory decisions, and only some of their inquiries and statements enable that illegal conduct.[130]

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[129] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015) (stating that the government's content-based or speaker-based regulation of speech generally triggers strict scrutiny). But as many thoughtful commentators have observed, the Court's First Amendment doctrine justifiably includes numerous exceptions (including but not limited to its commercial speech doctrine) in which it upholds the government's speaker- and content-based distinctions without applying strict scrutiny. *E.g.*, Goldberg, *supra* note 80, at 695 (canvassing precedent to conclude that "free speech consequentialism, more than being ubiquitous, is in fact inevitable"); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1100 (2004) In summary, the popular view that all content-based restrictions on speech are presumptively unconstitutional unless the speech falls within some unprotected category is not an accurate snapshot of First Amendment doctrine. Speech is too ubiquitous with too many real-world consequences for there to be any such rule. Rather, the strong presumption against content discrimination operates only within a limited (albeit extremely important) domain.

[130] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (noting that the First Amendment permits the government to regulate gatekeepers' statements of discriminatory preference like "White Applicants Only" that initiate or carry out illegal discrimination); Rumsfeld v. Forum for Acad. & Inst. Rights, 547 U.S. 47 (2006) (noting that the First Amendment permits the government to regulate gatekeepers' statements of discriminatory preference that are incidental to the government's regulation of "commerce or conduct"); R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) ("[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up

For related reasons, the Court's commercial speech framework also explains why its decision in *Sorrell* is inapposite to antidiscrimination laws that restrict gatekeepers' inquiries about candidates' protected class status. Recall that *Sorrell* held unconstitutional a Vermont law that restricted the transmission of specific information (individual doctors' prescribing practices) to prevent that information's use in disfavored but legal choices (marketing brand-name pharmaceuticals to individual doctors).[131] Contrast antidiscrimination laws that instead restrict gatekeepers' questions that elicit specific information about individual candidates' now-protected characteristics to prevent that information's use in illegally discriminatory conduct.[132]

Recall too Daniel Farber's proposal for parsing the government's permissible targeting of speech for its contractual functions from its impermissible targeting of speech because of the ideas expressed. We can be confident that the former is at work if the government's regulatory interest in those statements or inquiries disappears when made by those who are not parties to a potential transaction.[133] The antidiscrimination provisions discussed herein apply only to speech by one party to a potential job, housing, or other transaction about the terms of that transaction because only that party has the power to engage in the regulated conduct. In other words, the government regulates these inquiries because they do something and not just say something.[134]

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incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.") (citations omitted).

[131] *See Sorrell*, 564 U.S. at 578–79 ("The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

[132] For a more accurate parallel to *Sorrell* in the antidiscrimination context, consider instead *Linmark Associates, Inc. v. Township of Willingboro*, where the Court upheld a First Amendment challenge to a law that barred "For Sale" and "Sold" signs on real estate to prevent "panic" selling by whites who feared that the town's racial integration would drive down property prices; such sales remained legal even though disfavored by the town. 431 U.S. 85, 85 (1977). Note that *Linmark* predates *Central Hudson*; under the *Central Hudson* framework, the law at issue in *Linmark* would now be understood as a regulation of accurate commercial speech related to legal activity and thus subject to intermediate scrutiny. The Court has generally rejected the government's paternalistic regulation of speech for fear that listeners will make unwise, yet legal, decisions. But the antidiscrimination laws described in Part I apply to gatekeepers' inquiries that enable illegally discriminatory transactions, and thus restrict speech that the First Amendment does not protect.

[133] *See* Farber, *supra* note 84, at 400 (describing the government's regulation of discriminatory job advertisements as "relat[ing] to the contractual function of the ads [as offers of employment], rather than to the suppression of the free flow of information").

[134] Furthermore, the limitations of after-the-fact enforcement of antidiscrimination laws mean that alternatives—like simply prohibiting reliance on (i.e., use of information about) protected class status in decision-making—will not effectively achieve the government's objectives. Nor would prohibiting only inquiries made with the intent to inform illegal conduct: not only does advance screening of "innocent" inquiries from those related to illegal decisions pose an unmanageable challenge, but even "innocent" queries can deter applicants from continuing to seek the opportunity at stake and can elicit information about protected class status that remains available,

Contrast inquiries by a speaker who does not hold power over the listener: such inquiries that "do not accomplish a significant change in normative relations or other aspects of the listener's environment" because they are "not accompanied by inducements or threats or made in circumstances where a positive response is obligatory."[135] Think, for instance, of how the government's antidiscrimination interest in questions about an applicant's pregnancy (or disability or religion or salary history or other protected characteristic) evaporates when the question is asked by a friend or neighbor rather than by an employer or other transacting party. For these reasons, gatekeepers' statements or inquiries that are not "in connection with" or "with respect to" a regulated transaction do not implicate the government's interest in the enforcement of antidiscrimination law, and thus these laws appropriately do not extend to communications outside of the transactional context.[136] For instance, the Equal Credit Opportunity Act's regulations limit only inquiries into protected class status made "in connection with a credit transaction,"[137] Title VII regulations address similar inquiries only "in connection with prospective employment,"[138] and the Fair Housing Act prohibits discriminatory statements "with respect to the sale or rental of a dwelling."[139] Gatekeepers (and everybody else) remain free to express any political, moral, religious, or other opinion outside the transactional context through letters to the editor, testimony, lobbying, and more. As the Court emphasized in *Pittsburgh Press*, "Nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment."[140]

Some may contest the closeness of the relationship between gatekeepers' inquiries about applicants' protected characteristics and gatekeepers' illegal reliance on those characteristics.[141] For instance, some

consciously or unconsciously, for later use in decision-making. *See supra* notes 12–21 and accompanying text.

[135] GREENAWALT, THE USES OF LANGUAGE, *supra* note 75, at 68.

[136] *See* Stewart v. Furton, 774 F.2d 706, 710 n.2 (6th Cir. 1985) (observing the First Amendment problem if the Fair Housing Act prohibited housing providers' statements of discriminatory preference that did not relate "to a specific discriminatory and illegal transaction"); IMDB.com, Inc. v. Becerra, 962 F.3d 1111 (9th Cir. 2020) (striking down, on First Amendment grounds, California law that prohibited the general publication of truthful age-related information about those in the entertainment industry when the law did not regulate the conduct and speech of parties engaged in a commercial transaction).

[137] 12 C.F.R. § 1002.5(b) (2019).

[138] 29 C.F.R. § 1604.7 (2002).

[139] 42 U.S.C. § 3604(c) (2000).

[140] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973).

[141] *See* Tung Yin, *How the Americans with Disabilities Act's Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment*, 17 LAB. LAW. 107, 118–19 (2001)

may argue that asking an applicant about her religion or whether she has a disability does not carry the same deterrent effect as saying "No Jews" or "No folks with disabilities need apply"—or that asking an applicant about her age or salary history does not mean that the gatekeeper will rely on her answer to make hiring and compensation decisions.[142] (Note, however, that the challengers to Philadelphia's salary history law acknowledged that they sought to rely on those answers to make hiring and compensation decisions.[143]) But the Court has never required that commercial speech related to illegal activity lead inevitably and only to that activity to lose First Amendment protection. Consider *Pittsburgh Press*, where the defendant argued that because sex-segregated advertisements did not expressly deny employment to women, they were not inevitably, and thus sufficiently, related to illegal discrimination to lose First Amendment protection.[144] The Court rejected this argument, emphasizing that listing job openings in sex-segregated columns signaled that employers were "likely" to discriminate and thus would deter at least some women from applying for male-designated jobs (and vice versa).[145] So too do gatekeepers' inquiries about

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(accepting *Pittsburgh Press's* analysis with respect to discriminatory advertisements while arguing that the ADA's prohibitions on disability-related inquiries do not "automatically deter" certain applicants in the way that sex-segregated job advertisements do).

[142] The Third Circuit denied the Philadelphia Chamber of Commerce's request to preliminarily enjoin both the reliance and the inquiry provisions of Philadelphia's salary history law. Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020). Although I agree with the appellate court's decision to deny the injunctions, I disagree with the portion of its analysis where it declined to describe employer inquiries about prior pay as "related to" illegal activity even though reliance on the answer constituted illegal activity under Philadelphia's law. There the appellate court mistakenly (in my view) asserted that contested speech must always, and only, be related to illegal conduct to lose First Amendment protection under *Central Hudson*'s framework. *Id.* at 141–42. The court instead characterized the provision as regulating commercial speech about legal activity, applied intermediate scrutiny, and then found that the provision survived such scrutiny. *Id.* at 142–57.

[143] *See* Brief for Chamber of Commerce of the United States, et al., *supra* note 48, at 8 ("By prohibiting employers from inquiring about [or relying on] pay history, [Philadelphia's salary history law] denies them useful information for evaluating the quality of candidates during the hiring process.").

[144] *Pittsburgh Press*, 413 U.S. at 388 ("The illegality in this case may be less overt [than advertisements for the sale of illegal drugs] but we see no difference in principle here."); *see also id.* at 381 n.7 (recounting the defendant's argument that sex-segregated advertisements simply reflected men's and women's relative interest in certain job categories and that women might find them helpful in their search for employment); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496–97 & n.9 (1982) (describing ads marketing pipes and other paraphernalia as unprotected commercial speech related to the illegal sale of drugs even though those products could also have been used for lawful activity other than drug use); *id.* at 497 ("[T]he overbreadth doctrine does not apply to commercial speech.").

[145] *Pittsburgh Press*, 413 U.S. at 389 ("The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions."); *see also* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 150–52 (1996) (observing that even if the *Pittsburgh Press* ads did not explicitly exclude women from applying for male-designated jobs, they made such applications substantially less likely).

candidates' protected class status signal that the answers are likely to influence gatekeepers' choices and deter some applicants—especially when we recall that once a jurisdiction has prohibited reliance on pregnancy or other characteristics in commercial transactions, there's no constitutional value in commercial actors' inquiries about those characteristics.

Indeed, both theory and doctrine have long recognized that the First Amendment provides no protection to the speech that enables illegal conduct even if that speech does not *always* accomplish such conduct. Speech that solicits, or conspires to engage in, illegal conduct is not protected by the First Amendment even though it doesn't always lead to illegal conduct, as the solicitation may be rejected or the conspiracy may not succeed.[146] For instance, the First Amendment does not protect A's inquiry as to whether B has cocaine for sale or if B would be willing to eliminate A's enemy for a certain price—even if B declines A's offer or fails to deliver on a promised exchange. What matters is that those inquiries are likely to accomplish illegal conduct. For the same reason, the First Amendment does not protect gatekeepers' statement "White Applicants Only;" it is likely to deter nonwhite applicants even though it may not always succeed in so doing.

Gatekeepers' inquiries about applicants' protected class status are especially likely to enable illegal discrimination (and thus lose First Amendment protection) when they do not elicit information that is valuable apart from its ability to inform illegal discrimination, or when that information is available through other means or in other settings that do not threaten to infect gatekeepers' decision-making about specific candidates on illegal bases. Recall, for, example, that the challengers to Philadelphia's law argued that salary history inquiries not only informed their hiring and compensation decisions, but also permitted them to identify applicants with unaffordable salary expectations and to learn about prevailing pay scales for certain jobs.[147] But employers can and do obtain more accurate information about the market for wages through other, aggregate sources outside of negotiations with a specific applicant for a specific transaction.[148] And employers can learn

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[146] *See* Kristina E. Music Biro et al., *Solicitation generally*, 21 AM. JUR. 2D CRIMINAL LAW § 153 (Nov. 2019) ("Solicitation is complete once the request to join in a crime is made and is punishable irrespective of the reaction of the person solicited; therefore, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability when otherwise he would be a conspirator or an accomplice."); John Bourdeau, *Nature and extent of liability—Liability of person joining existing conspiracy*, 16 AM. JUR. 2D CONSPIRACY § 21 (Nov. 2019) ("One becomes a member of an existing conspiracy by knowingly cooperating to further the object of the conspiracy. One may join a conspiracy by word or by deed.").

[147] *See* Brief for Chamber of Commerce of the United States, et al., *supra* note 48, at 9.

[148] *See* HARRIS, *supra* note 51, at 4 ("[M]any employers use compensation surveys to know precisely where their workers fall in the distribution of wages."); Joanne Sammer, *Banning Salary*

whether they can afford a specific applicant simply by telling her the job's salary or by asking for her salary expectations—just as the ADA permits employers to ask applicants if they can perform a job's functions with or without a reasonable accommodation while forbidding employers from asking applicants whether they have a disability.[149]

In sum, legislatures regulate commercial activity when they prohibit commercial actors from relying on certain characteristics in their decision-making, and those actors' inquiries about candidates' protected characteristics then constitute commercial speech that is unprotected by the First Amendment because it facilitates illegal commercial activity—in other words, because it does something and not just says something.

III. THE FIRST AMENDMENT IMPLICATIONS OF OTHER ANTIDISCRIMINATION PROVISIONS THAT REGULATE COMMERCIAL PARTIES' SPEECH

This Part briefly considers the commercial speech framework's application to antidiscrimination provisions that regulate commercial speech in ways other than those discussed in Parts I and II—in other words, in ways apart from forbidding gatekeepers' discriminatory statements of preference and inquiries about candidates' protected class status when reliance on the answer is illegal. As we'll see, some statutes prohibit decisionmakers' inquiries about applicants' characteristics without forbidding decisionmakers from relying on those characteristics in their decision-making. Other statutes require decisionmakers to disclose certain accurate information about the terms and conditions of available opportunities. Finally, some statutes forbid gatekeepers' reliance on certain protected characteristics for some reasons and not others, and thus forbid gatekeepers' inquiries for some purposes and not others.

History Questions: A Game Changer?, SOC'Y FOR HUMAN RES. MGMT. (Oct. 6, 2016), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/banning-salary-history.aspx [https://perma.cc/MPL9-YWP9]. When managers base salary offers on a combination of an applicant's current salary and what the pay budget allows—rather than on what the market is paying for a given position, skills and experience—the hiring process is less likely to yield the best candidate. With no access to applicant salary information, employers have an opportunity to move toward a broader approach to hiring.").

[149] *See* PAYSCALE, *supra* note 49, at 7 (suggesting alternatives for employers like asking "[w]hat are your salary expectations?" or describing their pay range to applicants). Note that although laws like Philadelphia's bar employers from relying on an applicant's prior pay for decision-making purposes, they permit employers to rely on, and ask about, an applicant's salary expectations in their hiring and compensation decisions. *E.g.*, DEL. CODE ANN. tit. 19, § 709B(d) (West 2017) (allowing inquiries into "compensation expectations" so long as the employer does not inquire into "compensation history").

An exhaustive treatment of these statutes is beyond the scope of this Article.[150] Here, I simply show how the Court's longstanding commercial speech doctrine again provides the relevant analysis. Recall that this doctrine exemplifies a listener-centered approach to certain First Amendment problems by protecting commercial speech that furthers listeners' interests (like accurate commercial speech about lawful activity) while permitting the regulation of commercial speech that frustrates those interests (like false or misleading commercial speech, or commercial speech related to illegal activity)—in other words, by privileging listeners' interests over commercial actors' interests as speakers when their interests collide.[151] The Court's commercial speech doctrine itself thus relies on speaker- and content-based distinctions precisely because those distinctions are relevant to commercial expression's potential for First Amendment harm and First Amendment value.[152]

A. Antidiscrimination Laws That Regulate Decisionmakers' Inquiries About Certain Characteristics Without Prohibiting Reliance On Those Characteristics

First, some laws prohibit or delay gatekeepers' inquiries about certain characteristics *without* ultimately prohibiting gatekeepers' reliance on those characteristics. In other words, sometimes legislatures block (or delay) gatekeepers' inquiries to candidates about certain characteristics when gatekeepers' *use* of that information is *not* illegal. For example, some states and localities have enacted "ban-the-box" laws

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[150] I explored related issues in *Truth and Lies in the Workplace, supra* note 61 (urging that we understand employers' speech about the terms and conditions of employment as both protected and regulated to the extent that it furthers or frustrates workers' First Amendment interests as listeners).

[151] *See supra* notes 106–23 and accompanying text; Wu, *supra* note 116, at 631–32 ("Commercial speech doctrine cares primarily about informing consumers, and that is the lens through which courts should determine how much scrutiny to give to a commercial speech restriction. In commercial speech cases, courts should not be applying the kind of speaker-focused approaches they would be using in cases involving noncommercial speech.").

[152] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (noting that its "decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'") (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)); R.A.V. v. City of St. Paul, 505 U.S. 377, 389–90 (1992) ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. . . . [T]o take a final example, a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection), is in its view greater there.") (citations and internal references omitted).

that "generally prohibit employers from inquiring about a job applicant's criminal record until later in the hiring process, such as after an initial interview or once a conditional employment offer is made" in hopes that employers will be more likely to hire qualified ex-offenders if they assess candidates *before* learning of any criminal record.[153]

Because gatekeepers' inquiries about characteristics that are not protected from discrimination do not enable illegal activity, they do not fall within *Central Hudson*'s categories of commercial speech that are entirely unprotected by the First Amendment. This means that the government's restrictions of such inquiries must satisfy intermediate scrutiny. Recall *Central Hudson's* holding that the government's regulation of accurate commercial speech related to legal activity triggers a form of intermediate scrutiny because that speech has constitutional value for listeners:

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[154]

In assessing whether the government's means directly advances its ends, the Court has applied *Central Hudson* intermediate scrutiny to permit the government to rely on "studies[,] anecdotes[,] . . . history, consensus, and 'simple common sense'" to justify its choice, emphasizing that the standard requires "a reasonable," rather than a perfect, fit.[155] Relatedly, the Court has also declined to require the government's

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[153] Flake, *supra* note 45, at 1084. To be sure, some jurisdictions prohibit both reliance on, and inquiries about, certain arrest or other criminal records. *See supra* note 43 and accompanying text. And although, as discussed in Part I, many jurisdictions prohibit both reliance on, and inquiries about, applicants' salary history, some prohibit inquiries about salary history *without* prohibiting reliance on such information in employment decisions. *E.g.*, OR. REV. STAT. § 659A.357 (West 2017).

[154] *Cent. Hudson Gas*, 447 U.S. at 564 (1980).

[155] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555–56 (2001). There the Court considered a challenge to a state law that restricted the use of billboards to advertise tobacco products within 100 feet of schools and parks to discourage young people from using tobacco. It found that the state had demonstrated a sufficiently direct link between tobacco advertising and minors' tobacco use. *Id.* at 561. But it ultimately concluded that the law failed the narrow tailoring requirement because those restrictions operated as essentially a complete ban on advertising a product lawfully

regulation to be the "least restrictive" alternative, but instead requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."[156] In other words, in these settings the government's regulation does trigger First Amendment scrutiny. Nevertheless, appropriately designed antidiscrimination provisions that delay or block gatekeepers' access to certain information about candidates where reliance on that information is not directly prohibited may survive such scrutiny.[157]

B. Antidiscrimination Laws That Require or Permit Certain Disclosures

Next, antidiscrimination laws sometimes require employers, housing providers, lenders, insurers, and other commercial actors to make certain accurate disclosures to expose or deter discrimination, or to achieve other equality goals. For example, as part of their efforts to ameliorate stubborn and unjustified pay disparities, some legislatures have enacted laws that require employers to disclose their pay scales and practices.[158] These measures seek to address asymmetries in information about pay, where employers know what they pay their own workers but workers generally don't know what their colleagues are

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used by adults (due to urban density, for example, no space within the city of Boston would be available for tobacco billboards under the statute). *Id.* at 561, 565.

[156] *See* Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478, 480 (1989) ("[This Court has] not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests . . . . and [the Court has] been loath to second-guess the Government's judgment to that effect.") (citations omitted).

[157] *See, e.g.*, King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303 (E.D. Pa. 2012) (holding that Fair Credit Reporting Act requirement that credit reports exclude outdated arrest record information regulates accurate commercial speech and thus triggers *Central Hudson* intermediate scrutiny, and then upholding the provision under that scrutiny); *see also* Greater Phila. Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020) (holding that the city's law prohibiting employers' inquiries about applicants' salary history survived *Central Hudson* intermediate scrutiny); Lester-Abdalla, *supra* note 49 (proposing that salary history laws should trigger, and survive, intermediate scrutiny).

[158] *See* CAL. LAB. CODE § 432.3(c) (West 2019) (requiring employers to provide information about their pay scales upon an applicant's reasonable request); Rebecca Greenfield, *Making Salary Information Public Helps Close the Gender Pay Gap*, BLOOMBERG LAW NEWS (Dec. 5, 2018), https://www.bloomberg.com/news/articles/2018-12-05/making-salary-information-public-helps-close-the-gender-pay-gap [https://perma.cc/5W7E-QHJP] (citing a study by Columbia University and University of Copenhagen researchers that found a seven percent reduction in the pay gap between men and women after Danish law required employers to disclose pay data by gender).

paid.[159] As legal scholar Sylvia Law observes, "[e]very story of a successful challenge to the gender wage gap begins with a woman discovering that she is earning less than a male colleague who does similar, or less demanding, work."[160] Other examples of required disclosures for anti-discrimination purposes include laws that require employers and other gatekeepers to disclose truthful information about applicants' legal rights.[161]

These sorts of disclosures have a long pedigree throughout the commercial speech context more broadly, where the government routinely requires commercial actors to make certain accurate disclosures to inform and further listeners' decision-making.[162] Consumer protection law and securities law, for example, rely on an array of information-forcing mechanisms to address informational asymmetries between speakers and their listeners.[163]

Again, the Court's commercial speech doctrine supplies the relevant First Amendment analysis. As it explained in *Zauderer v. Office of Disciplinary Counsel,* "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."[164] For this reason, the Court has applied only deferential review to laws requiring commercial speakers

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[159] *See* HARRIS, *supra* note 51, at 4 ("In the U.S. labor market, information on wages and compensation is decidedly asymmetric. Employees frequently do not know how their pay compares to comparable workers, either within or outside their firm, and are reluctant to seek this knowledge out of fear of retaliation, social norms, or general inertia. In stark contrast, many employers use compensation surveys to know precisely where their workers fall in the distribution of wages. In other markets characterized by asymmetric information, the entity with more complete information maintains a distinct advantage."); Lobel, *supra* note 46, at 549 ("[A] central innovation of the new laws is to reverse information flows in the wage market. Efforts to eradicate wage discrimination have failed in large part due to information asymmetries and difficulties in identifying and proving discrimination.").

[160] Sylvia A. Law, *Income Disparity, Gender Equality, and Free Expression*, 87 FORDHAM L. REV. 2479, 2494 (2019).

[161] *See* Norton, *supra* note 61, at 32–33.

[162] *See* Leslie G. Jacobs, *Compelled Commercial Speech as Compelled Consent Speech*, 29 J.L. & POL. 517, 522 (2014) ("This government regulatory power to require the disclosure of facts material to informed consent is not limited to commercial contracts. Consent is a crucial element that renders many types of transactions legal and enforceable. Governments have always had the authority to define the facts that must be communicated and the circumstances that must exist to create this critical element of consent."); Andrew Tutt, *Commoditized Speech, "Bargain Fairness," and the First Amendment*, 2017 BYU L. REV. 117, 148 (2017) ("Commentators have been puzzled for decades by the fact that some areas of intensely content-based speech regulation remain subject to, at best, modest First Amendment scrutiny. But a judicial concern for ensuring bargain fairness readily explains the lack of rigor. The purpose of the measures in question is to level the bargaining positions of the parties, thereby helping individuals to obtain a better deal in circumstances of significant information asymmetry.").

[163] *See* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1631 (2017) ("The law of consumer protection has long concerned itself with information and power asymmetries among market participants.").

[164] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

to make accurate disclosures to their listeners to protect those listeners from deception, upholding such requirements when they are "reasonably related to the State's interest in preventing deception of consumers."[165] Lower courts have also often applied this deferential review to disclosure requirements intended to inform consumers even when the regulated commercial speakers have not engaged in deception.[166] The sorts of antidiscrimination laws described above[167] that require truthful disclosures by commercial actors will generally survive this review.

Despite its more recent antiregulatory turn, the Court has yet to repudiate *Zauderer's* deferential review as applied to required commercial disclosures.[168] In any event, the disclosures described above can also satisfy *Central Hudson*'s intermediate scrutiny standard. As I've written elsewhere, "[G]overnment requirements that employers disclose truthful information about workers' rights and other working conditions can provide considerable value to workers as listeners while imposing little, if any, expressive costs. They thus can readily satisfy not only rational-basis scrutiny but also intermediate or even exacting scrutiny when appropriately drafted to achieve the government's strong interest in informing and protecting workers."[169]

Relatedly, note that some antidiscrimination laws that forbid gatekeepers from asking candidates about their protected class status nevertheless sometimes permit candidates to disclose that status to achieve equal opportunity. Think, for example, of the Americans with Disabilities Act, which forbids employers from inquiring into workers' disability status while permitting—indeed, encouraging—workers to disclose their disability status to explore possibilities for reasonable accommodations.[170] Think too of laws that protect workers from their employers'

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[165] *Id.*

[166] *E.g.*, CTIA v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019) (applying *Zauderer* analysis to permit the government to "compel truthful disclosure in commercial speech as long as the compelled disclosure is 'reasonably related' to a substantial government interest, and involves 'purely factual and uncontroversial information' that relates to the service or product provided") (citations omitted); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009).

[167] *See supra* notes 158–61 and accompanying text.

[168] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer* as permitting government to require commercial actors to disclose factual and uncontroversial information).

[169] Norton, *supra* note 61, at 75–76*; see also* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 438–39 (2016) (urging that compelled commercial disclosures receive heightened scrutiny but concluding that many such disclosures will survive such scrutiny, especially when motivated by government's substantial interests in consumer protection or regulatory enforcement).

[170] *See* Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 643 (2011) ("The ADA is, by and large, an antisubordination statute. It seeks to elevate the status of a particular historically disadvantaged group: people with disabilities."); *id.* at 646 (explaining that prohibiting employer inquiries about workers'

punishment for sharing their salary information with other workers.[171] For purposes of First Amendment analysis, gatekeepers' inquiries about disability or other protected characteristics are distinguishable from candidates' disclosure of those characteristics when the former are related to illegal discrimination while the latter enable reasonable accommodation and other equality goals.[172] These measures change the dynamic from one where gatekeepers have all the information and power to one where applicants have some too. As noted above, these sorts of measures to address informational asymmetries between transactional parties have a long pedigree in the commercial speech context.[173]

C. Antidiscrimination Laws That Permit Gatekeepers to Collect (And Sometimes Rely on) Information About Protected Characteristics

Finally, some antidiscrimination laws permit gatekeepers to collect information about applicants' protected class status in certain circumstances to achieve equality objectives. More specifically, some antidiscrimination laws permit gatekeepers to collect data about applicants' protected characteristics to assess the success of their equal opportunity efforts or to determine whether their selection practices have an illegally disparate impact. For example, Title VII (unlike some other anti-

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disability status while permitting workers to disclose their status helps achieve both anticlassification and antisubordination goals). Legal scholar Bradley Areheart has advocated a similar approach to the Genetic Information Nondiscrimination Act in which gatekeepers would be forbidden from inquiring about applicants' genetic information to prevent discrimination, but applicants could disclose such information when doing so enabled reasonable accommodation or other equality goals. Bradley A. Areheart, *GINA, Privacy, and Antisubordination*, 46 GA. L. REV. 705, 706 (2012).

[171] *See* DEL. CODE ANN. tit. 19, § 711(i) (making it unlawful for employers to forbid employees from talking about their pay with other workers); *see also* Lobel, *supra* note 46, at 590 ("Taken together, the salary history inquiry *ban* and salary co-worker inquiry *protection* also correct a long-existing non-gender specific, double standard—employers often demand secrecy from their employees and usually do not reveal the pay scale of their employees when they interview but demand salary history.").

[172] *See* Cofone, *supra* note 8, at 165 ("[A possibility] for making this method compatible with affirmative action and other tools that address diversity concerns under an antisubordination logic . . . would be to condition the information flow instead of banning it directly. When dealing with explicitly diversity-concerned decision-makers, information could be released under the condition of a specific use: if active diversity measures are to be established."); Roberts, *Protecting Privacy to Prevent Discrimination, supra* note 8, at 2168–69 (stating that this approach "capture[s] the best of both worlds[:] [i]ndividuals could maintain *autonomy* by deciding how and when to disclose information related to protected status, and potential discriminators would be unable to ask about protected status unless the inquiry were explicitly designed to accommodate or to cultivate diversity").

[173] *See* Calo & Rosenblat, *supra* note 163, at 1631 ("The law of consumer protection has long concerned itself with information and power asymmetries among market participants.").

discrimination statutes) specifically forbids disparate impact discrimination in addition to intentional discrimination,[174] and the Supreme Court has interpreted Title VII to permit employers to consider candidates' race or gender as part of an affirmative action plan so long as the plan's purpose mirrors that of Title VII and does not unnecessarily trammel the rights of nonbeneficiaries.[175] For this reason, the EEOC explains:

> Employers may legitimately need information about their employees['] or applicant['s] race for affirmative action purposes and/or to track applicant flow [for purposes of complying with Title VII's disparate impact provisions]. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that it is not used in the selection decision.[176]

IV. CONCLUSION

Antidiscrimination law regulates commercial conduct when it prohibits gatekeepers from relying on certain characteristics in setting the terms and conditions of employment and other transactions. As theory and doctrine both make clear, the First Amendment permits the government to restrict the speech that initiates or accomplishes this conduct—that is, speech that *does* something and not just says something. More specifically, this includes commercial actors' speech that enables illegally discriminatory transactions, such as gatekeepers' statements

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[174] *See* 42 U.S.C. § 2000e-2(k)(A)(i) (prohibiting an employer from using an employment practice that disproportionately excludes or disadvantages protected class members unless the employer can "validate" the practice—i.e., unless it can show that the practice is "job related for the position in question and consistent with business necessity").

[175] *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616 (1987) (upholding county's consideration of sex or race as a plus-factor in promotions to remedy substantial underrepresentation of women and people of color in traditionally segregated jobs); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (upholding collective bargaining agreement's dedication of a certain percentage of openings in training programs to African-American workers to break down longstanding patterns of racial hierarchy within those jobs).

[176] *Facts About Race/Color Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/publications/fs-race.cfm [https://perma.cc/27C7-5Y47]; *see also Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1995), www.eeoc.gov/policy/docs/preemp.html [https://perma.cc/U8E5-BN9S] (explaining that the ADA permits federal contractors to invite applicants or employees to voluntarily self-identify as individuals with disabilities for purposes of complying with federal law that requires federal contractors to engage in affirmative action that may require the collection of applicant data).

like "White Applicants Only" as well as inquiries about candidates' protected class status. Because these inquiries enable illegal discrimination by deterring candidates based on their protected class status and by eliciting the information that facilitates gatekeepers' discriminatory decisions, the First Amendment poses no bar to the government's regulation of them.

Free Speech Overrides

Frederick Schauer[†]

I. INTRODUCTION

The notion of an "absolute" First Amendment has been around for generations.[1] First Amendment absolutism was championed, although not with exactly that term, by Justices Hugo Black and William O. Douglas.[2] And numerous commentators, perhaps Alexander Meiklejohn most prominently,[3] have joined the absolutist parade.[4]

Talk of an absolute First Amendment, however, is just that—talk. Even putting aside the obvious and by-now familiar point that the First Amendment's Free Speech Clause does not even come close to covering all speech,[5] the protection the Free Speech Clause offers even to

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[1] *See* NORMAN DORSEN ET AL., EMERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 45 (4th ed. 1976).

[2] *See*, *e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 456–57 (1969) (Douglas, J., concurring); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140–44 (1959) (Black, J., dissenting); Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Hugo L. Black & Edmond Cahn, *Justice Black and First Amendment "Absolutes," A Public Interview*, 37 NYU L. REV. 549 (1962); Lucas A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974). In *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), Solicitor General Erwin Griswold, apparently addressing Justice Douglas, famously argued as follows: "You say that 'no law' means 'no law' and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law,' and I would seek to persuade the Court that that is true." *Transcript of Oral Argument in Times and Post Cases Before the Supreme Court*, N.Y. TIMES, Jun. 27, 1971, at 24. Justice Black was of the opinion, however, that Griswold's statement was addressed to him. *See* GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 431 (1977).

[3] Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

[4] *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 125–93 (1992); Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CON. L. 817 (2018); Solveig Singer, *Reviving First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279 (1999). The idea persists. *See* Tony Woodlief, *Free Speech Absolutism Killed Free Speech*, WALL ST. J., Aug. 31, 2020, at A17.

[5] A great deal of communication, linguistic and otherwise, simply does not implicate the First Amendment at all. In my preferred terminology, such communication (much of which is "speech" in ordinary English) is not *covered* by the First Amendment, which is to be distinguished from

communications within its scope—the communications that the First Amendment does cover—is not absolute now, has never been absolute in the past, and will not be absolute in the future. Rather, the protections of freedom of speech and freedom of the press—like the protections, prohibitions, and guarantees of other constitutional rights—are subject to being overridden by other considerations if those other considerations present themselves with sufficient weight and immediacy. In the context of equal protection, due process, and the free exercise of religion, for example, the threshold for overriding under the so-called strict scrutiny approach is typically the familiar "compelling interest" standard.[6] Much the same applies in many contexts to speech covered by the First Amendment,[7] and has ever since Oliver Wendell Holmes gave us the idea of "clear and present danger."[8]

Recent events, with the one in my own city of Charlottesville being tragically the most notorious,[9] make it important to think carefully about the kinds of dangers—harms—that can override what are undoubtedly rights under the First Amendment. At least as a matter of settled American free speech doctrine, for example, neo-Nazis,[10]

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those communications that are covered but wind up not being *protected* after the application of some First Amendment–inspired test. *See* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); Frederick Schauer, *Every Possible Use of Language? in* THE FREE SPEECH CENTURY 33 (Geoffrey R. Stone & Lee C. Bollinger eds., 2019); Amanda Shanor, *First Amendment Coverage*, 93 NYU. L. REV. 318 (2018).

[6] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (holding that the government must meet the "compelling interest" standard when fundamental rights under the due process clause are infringed); Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (holding that race–based distinctions are permissible under the equal protection clause only if they serve a compelling governmental interest); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (same); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (holding that restrictions targeted at religious practices are permissible only if narrowly tailored to serve a compelling governmental interest).

[7] *See, e.g.*, Riley v. Nat'l Fed'n of Blind, Inc., 487 U.S. 781, 798 (1988) (restrictions on charitable solicitations); Williams–Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015) (restrictions on speech of candidates in judicial elections); Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 125 (1989) (restrictions on allegedly indecent speech); Reed v. Town of Gilbert, 576 U.S. 155, 162–63 (2015) (content–based restrictions generally). Slightly more complex is *New York v. Ferber*, 458 U.S. 747, 761 (1982), in which the Supreme Court used the language of "compelling" interest to justify restrictions on non–obscene child pornography, and thus announced the general permissibility of such restrictions, but did not require a showing of a compelling interest in particular applications.

[8] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[9] For accounts of the events arising out of the *Unite the Right* rally in August 2017, see HUNTON & WILLIAMS LLP, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA (2017), https://www.huntonak.com/en/news/final-report-independent-review-of-the-2017-protest-events-in-charlottesville-virginia.html [perma.cc/3787-LYKV]; *see also* Complaint, Sines v. Kessler, 324 F. Supp. 3d 765 (W.D. Va. 2018) (No. 3:17–CV–00072); Kessler v. City of Charlottesville, No. 3:17CV00056, 2017 WL 34754071 (W.D. Va. 2017); Frederick Schauer, *In the Shadow of the First Amendment*, *in* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 65 (Louis P. Nelson & Claudrena Harold eds., 2018).

[10] Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

Klansmen,[11] white supremacists,[12] homophobes,[13] puppy torturers,[14] and endorsers of sexual violence,[15] among others, have a right to publish their views and voice them in the public forum. Typically, as these examples illustrate, attempts to restrict such speakers have been met with the usually successful response that the speakers can only be restricted if the state can show that the speech would produce a harm of the greatest magnitude and immediacy, and that the harm could not be alleviated by any approach less restrictive of a speaker's First Amendment rights.[16] Importantly, governments have almost universally been unable to establish such a showing.[17] Accordingly, it seems appropriate in light of recent events, especially those involving hostile audiences,[18] to survey the existing doctrine and offer some guideposts as to what it would take actually to override the First Amendment in areas of its central coverage.

Yet if the rights to freedom of speech and freedom of the press can on occasion be overridden,[19] then it follows that the possessors of such rights may sometimes wind up losing what the rights purport to give them. This in itself is hardly remarkable, as this conclusion flows logically from the nonabsolutism of the underlying right. But what is more noteworthy is that those whose First Amendment rights are overridden, even when properly so, wind up losing something—they lose what the First Amendment guarantees them. Yet despite having lost the opportunity to exercise their First Amendment rights, they still receive nothing to acknowledge their loss, and certainly nothing to compensate them for that loss.

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[11] Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992).

[12] *See* HUNTON & WILLIAMS LLP, *supra* note 9.

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

[14] United States v. Stevens, 559 U.S. 460 (2010).

[15] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[16] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (holding that restrictions on content of violent interactive videogames could be restricted only if the particular restriction was "necessary" to serve a "compelling interest").

[17] Thus, each of the cases cited in *supra* notes 10, 11, 13, 14, 15, and 16 was one in which the government's justification for its attempted restriction was invalidated. For recent examples, see *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

[18] *See* Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671 (2019). For accounts of recent events, many on or near university campuses, see Jamal Greene, *Constitutional Moral Hazard and Campus Speech*, 61 WM. & MARY L. REV. 223 (2019); JD Hsin, *Defending the Public's Forum: Theory and Doctrine in the Problem of Provocative Speech*, 69 HASTINGS L. J. 1099 (2018); Timothy E. D. Horley, *Rethinking the Heckler's Veto after Charlottesville*, 104 VA. L. REV. ONLINE 8 (2018).

[19] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (using the exact language of "override").

Although such non-compensation or other redress for the loss of the ability to exercise a constitutional right seems so familiar as to fail to even generate concern, it does stand in contrast to how we treat those who have given up their property rights for the public good. In those instances, the so-called Takings Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment,[20] provides that those whose property is taken by eminent domain, even if the taking is justified, are nevertheless entitled to "just compensation."[21] But if those whose property rights are taken for the public good are entitled to compensation for their loss, then why are not those whose First Amendment rights are similarly taken (or restricted) for the public good also entitled to compensation? That is a puzzle, and a secondary goal of this Article—although one that emerges directly from the phenomenon of the override—is to present and examine this puzzle.

II. IT ALL STARTED WITH HOLMES

When Oliver Wendell Holmes first used the now-familiar phrase, "clear and present danger,"[22] it was for him not a carefully considered choice of words at all. In *Schenck v. United States*,[23] and then in *Debs v. United States*[24] and *Frohwerk v. United States*[25] only months later, Holmes treated the prosecutions as largely controlled by existing principles of criminal law. As in the criminal law, the defendant's intent was crucial, but Holmes, having found that Charles Schenck, Eugene Debs, and Jacob Frohwerk all possessed the necessary intent to sustain their convictions,[26] did not treat the First Amendment claims of all three of these defendants as worthy of serious consideration. So when Holmes mentioned that speech could be restricted when a clear and present danger existed, it was, at the time, little more than an aside.[27] That Holmes wrote for the Court in upholding all three convictions

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[20] *See* Chi., B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897); Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896).

[21] U.S. CONST. amend. V.

[22] Schenck v. United States, 249 U.S. 47, 52 (1919).

[23] 249 U.S. 47 (1919).

[24] 249 U.S. 211 (1919).

[25] 249 U.S. 204 (1919); *see also* Schauer, *supra* note 9.

[26] For contrasting views on the relevance of speaker's intent under the First Amendment, see LARRY ALEXANDER, IS THERE A RIGHT TO FREEDOM OF EXPRESSION? 76 (2005); Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMM. 24 (1995); Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013).

[27] *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 102–03 (2013). Indeed, the accompanying "shouting fire in a crowded theater" example was not even original with Holmes, having first appeared in the prosecutor's closing argument in the *Debs* trial. *Id.* at 91.

underscores that he did not imagine that the idea of a clear and present danger imposed very much of an impediment to a conviction that was permissible under standard criminal law principles. Indeed, the fact that a variant of clear and present danger appears in Holmes's subsequent change of heart in *Abrams v. United States*[28] only in the disjunctive[29] further emphasizes that at the beginning of the modern First Amendment the idea of clear and present danger did not do very much work.

Given the results in *Schenck*, *Debs*, and *Abrams*, the idea of a clear and present danger appears as a highly permissive standard.[30] In theory, it need not be so. After all, under the "rational basis" test, the test that is generally applicable to the evaluation of government restrictions on conduct not covered by the First Amendment,[31] the state is permitted to take actions against dangers that are neither clear nor present. Rational basis review allows the state to speculate with respect to dangers that are not clear and to regulate for future dangers that are not present. Few would argue these days, for example, that government may not regulate the sale of electronic cigarettes or foods made with genetically manufactured organisms (GMOs), even though the alleged dangers of such products, being contested and speculative, are certainly not clear.[32] Even more obviously, the government plainly may take restrictive actions to combat the dangers of climate change, even though the clear dangers of climate change are not "present" under any ordinary understanding of that word.[33] As a result, and contrary to the actual results in the 1919 cases, it seems now safe to conclude, as the Supreme Court and other courts concluded in the 1960s,[34] that the idea of a clear

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[28] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[29] *Id.* at 629 ("Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper . . . .").

[30] *See* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 212–18 (1987).

[31] *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152–53 (1938); *see also* Ferguson v. Skrupa 372 U.S. 726 (1963); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

[32] For information on GMOs, see Barbara de Santis et al., *Case Studies on Genetically Modified Organisms (GMOs): Potential Risk Scenarios and Associated Health Indicators*, 117 FOOD & CHEMICAL TOXICOLOGY 36 (2018). For information on electronic cigarettes, see Jennifer Couzin–Frankel, *How Safe is Vaping? New Human Studies Assess Chronic Harm to Heart and Lungs*, *Science Magazine*, SCIENCE (Nov. 26, 2019), https://www.sciencemag.org/news/2019/11/how-safe-vaping-new-human-studies-assess-chronic-harm-heart-and-lungs [perma.cc/6MAP-NWET].

[33] On the tolerance of the rational basis test for speculation, see *Heller v. Roe*, 509 U.S. 312, 320 (1993); Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1399 (2018); John A. Robertson, *Science Disputes in Abortion Law*, 93 TEX. L. REV. 1849, 1853 (2015). On the distinction between First Amendment standards and rationality review, see Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005, 2036 n.145 (2017).

[34] Noto v. United States, 367 U.S. 290, 297–98 (1961); Scales v. United States, 367 U.S. 203, 229 (1961); Yates v. United States, 354 U.S. 298, 316 (1957); United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

and present danger is such as to require for the regulation of speech covered by the First Amendment a showing of gravity, immediacy, and specificity substantially greater than the showing sufficient to justify the regulation of non-covered behavior.[35] It is far too late in the doctrinal day to believe that speech is protected because it is harmless, and thus that any harm-producing speech loses its protection for that reason.[36] Rather, even harmful speech is routinely protected, and the import of the clear and present danger idea is that the harms must be especially great and especially immediate for the protection typically available for harmful speech to be forfeited.

III. CLEAR AND PRESENT DANGER REVISED—AND NOT

In *Schenck,* "clear and present danger" may have been little more than the relatively casual observation that the First Amendment was not absolute, but it soon became an actual test or criterion against which restrictions on covered speech were to be measured. Initially, the view that "clear and present danger" was a constitutional test rather than merely an observation emerged in a series of dissents. First was the dissenting opinion of Justice Brandeis, joined by Justice Holmes, in *Schaefer v. United States*,[37] explicitly referring to "clear and present danger," in objecting to the majority's affirmation of the conviction of a wartime dissenter.[38] And Brandeis relied on the then-recent article by Zechariah Chafee for the proposition that clear and present danger should properly be understood as the test for the constitutionality of a restriction on advocacy, even in times of war.[39] To much the same effect, shortly thereafter was *Pierce v. United States*,[40] where Brandeis, again joined by Holmes, once more used explicit "clear and present danger" language[41] in departing from the majority's conclusion that Pierce's pamphlets were intended to produce military insubordination as their "proximate result"[42] and that a jury could find that those pamphlets could have a "material influence"[43] on such insubordination. And in the same year, Brandeis still again dissented, here in *Gilbert v.*

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[35] *See* Frederick Schauer, *Is It Better to Be Safe Than Sorry? Free Speech and the Precautionary Principle*, 36 PEPPERDINE L. REV. 301 (2009).

[36] *See* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011).

[37] 251 U.S. 466 (1920).

[38] *Id.* at 483, 486 (Brandeis, J., dissenting).

[39] Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 963 (1919). On Chafee's connections with Hand and Holmes at the time, see STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 369, 385, 393 (2019).

[40] 252 U.S. 239 (1920).

[41] *Id.* at 255, 271, 272 (Brandeis, J., dissenting).

[42] *Id.* at 250.

[43] *Id.*

Minnesota,[44] continuing to use "clear and present danger" as the description of the test from which he believed that the majority had departed.[45] Brandeis reiterated that position several years later in his enduring "concurring" opinion in *Whitney v. California*.[46] In *Whitney*, Brandeis seemed to follow Holmes's decision in *Gitlow v. New York,*[47] where Holmes referred to "clear and present danger" in no uncertain terms as the "criterion" and "test" for all restrictions on advocacy,[48] not only those in which a speaker was prosecuted under a general statute not restricted to speech, as in *Schenck*, but also those in which the legislature had made a finding of the dangers resulting from speech of a certain kind.[49]

The post-*Schenck* version of the clear and present danger standard appeared to have been discarded when a Supreme Court plurality in *Dennis v. United States*[50] relied on the "gravity of the evil discounted by its improbability" standard employed by Judge Learned Hand in the decision below.[51] However, it in fact persisted after *Dennis*: Something very close to a strong version of the clear and present danger idea, arguably strengthened even further, was to be found in *Yates v. United States*[52] in 1957, and then in *Scales v. United States*[53] and *Noto v. United States*,[54] both decided in 1961. And although *Yates*, *Scales*, and *Noto* were undeniably more speech-protective than *Dennis* and *Gitlow*, the standard they embodied was still not absolute and the idea that behavior covered by the First Amendment could still be regulated, and thus that First Amendment rights could be overridden under some circumstances, still persisted.

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[44] 254 U.S. 325 (1920).

[45] *Id.* at 335, 336, 338 (Brandeis, J., dissenting).

[46] 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring). For more on the increasing divergence between Holmes and Brandeis on the exact limits of freedom of speech and thus on the precise understanding of "clear and present danger," see POLENBERG, *supra* note 30, at 265–71.

[47] 268 U.S. 652 (1926).

[48] *Id.* at 672 (Holmes, J., dissenting).

[49] *See id.* at 673. *Gitlow*'s relaxed, so–called "bad tendency test" was based, in part, on the view that clear and present danger was the appropriate test for evaluating the prosecution of speech under a statute not aimed directly or specifically at speech as such, but that a test of less stringency was appropriate where the legislature, in targeting speech of a certain kind or with a certain effect, had already made a determination about the danger of the speech to which the statute was addressed. *See* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970); Yosal Rogat, *Mr. Justice Holmes: Some Modern Views—The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

[50] 341 U.S. 494 (1951).

[51] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

[52] 354 U.S. 298 (1957).

[53] 367 U.S. 203 (1961).

[54] 367 U.S. 290 (1961).

In a narrow sense, *Schenck* is no longer good law. The specific context in which the clear and present danger standard first arose in *Schenck*—the advocacy of unlawful conduct—was and remains superseded by the test that emerged from *Brandenburg v. Ohio*.[55] The *Brandenburg* standard, arguably incorporating some version of the requirement of explicit incitement first introduced by Judge Hand a half-century earlier in *Masses Publishing Co. v. Patten*[56] and still retaining (and strengthening) the evidentiary ("clear") and temporal ("present") dimensions of the clear and present danger idea,[57] superseded *Schenck* and remains the applicable rule today.[58] Indeed, to the extent that lower courts have tended to apply *Brandenburg* to civil cases involving negligent causation of unlawful acts,[59] the case has emerged as an even broader and stronger protection of speech bearing a relationship to subsequent acts of illegality. Even so, however, the test is not absolute, and it remains possible, at least in theory, for even *Brandenburg* to permit the First Amendment to be overridden in cases of intentional, explicit, advocacy of immediate substantial illegality when such illegality is likely to occur.[60]

IV. THE PERSISTENCE OF CLEAR AND PRESENT DANGER

Although the test set forth in *Brandenburg* has superseded clear and present danger as the standard to be applied to putative restrictions on the advocacy of unlawful conduct, it would be a mistake to assume that *Brandenburg* represents the complete demise of the clear and present danger test as an actual standard to be applied today to actual restrictions. In some number of domains, the clear and present danger standard persists, largely because the basic idea of requiring reasons of special strength to override the First Amendment remains

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[55] 395 U.S. 444 (1969). On the ins and outs of the *Brandenburg* test, see Larry Alexander, *Inciting, Requesting, Provoking, or Persuading Others to Commit Crimes: The Legacy of* Schenck *and* Abrams *in Free Speech Jurisprudence*, 72 S.M.U. L. REV. 389, 392–95 (2019); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); Linde, *supra* note 49; Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg*—and Beyond*, 1969 SUP. CT. REV. 41 (1969).

[56] 244 F. 535 (S.D.N.Y. 1917).

[57] *See* 395 U.S. at 447 ("[The] State [may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[58] *See, e.g.*, Higgins v. Ky. Sports Radio, LLC, 951 F.3d 728, 736 (6th Cir. 2020); United States v. Daley, 378 F. Supp. 3d 539, 555–56 (W.D. Va. 2019).

[59] *See* Eugene Volokh, *Crime–Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F.2d 1264 (D. Colo. 2002).

[60] Not everything that is ex ante likely to happen actually happens, and thus *Brandenburg* would sometimes permit sanctions against a speaker urging immediate violent actions even if those actions did not in fact occur.

central, even though not all reasons of special strength fit the *Brandenburg* formula, designed as it is to deal with the specific problem of advocacy of unlawful conduct.

Consider, for example, the line of cases dealing with speech that has the potential of interfering with the judicial process. It is now wisely as well as widely accepted that newspaper and other public comments about trials and judges, even during the pendency of the trial, are protected by the First Amendment.[61] In reaching this conclusion, the Supreme Court has explicitly established that clear and present danger to the administration of justice is the relevant standard.[62] And although the cases so holding predate *Brandenburg*, it seems plain that the *Brandenburg* formula would fit poorly with a situation in which the potential danger is to the impartiality of judges and jurors, and is not that some reader or listener will engage in unlawful acts against those judges or jurors (or litigants). When the Court in *Cox v. Louisiana*[63] suggested that physical parading and picketing outside a courtroom or a courthouse might be governed by different standards,[64] it appeared implicitly to reaffirm that clear and present danger would be the standard applied to so-called pure speech about pending trials.

Although the *Cox* majority treated the physical aspect of parading and picketing as grounds for its ambivalence about the applicability of the clear and present danger standard, that ambivalence seems a bit surprising. Twenty-five years earlier, in *Thornhill v. Alabama*,[65] the Court did indeed discuss clear and present danger as the standard appropriate to a situation in which the petitioners' labor-related picketing was held to be protected.[66] *Cox* thus appears as a slight anomaly, and a fair conclusion to be drawn from the cases just discussed—none of which have been overruled or questioned—is that clear and present danger still has its place even after *Brandenburg*, and that the *Brandenburg* formulation—for all of its enduring importance—still might be understood as an exception to a more pervasive and persistent clear and present danger approach.[67]

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[61] *See* Wood v. Georgia, 370 U.S. 375 (1962); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[62] *See* Wood, 370 U.S. at 384–87; *Pennekamp*, 328 U.S. at 346; *Bridges*, 314 U.S. at 263; *see also* Craig v. Harney, 331 U.S. 367, 377 (1947).

[63] 379 U.S. 559 (1965).

[64] *Id.* at 562–65.

[65] 310 U.S. 88 (1940).

[66] *See id.* at 104–05. See also, in the same year, Carlson v. California, 310 U.S. 106, 113 (1940), and, a year later, Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941). And, slightly earlier, Herndon v. Georgia, 295 U.S. 441, 447–48, 454 (1935) (Cardozo, J., dissenting), followed by Herndon v. Lowry, 301 U.S. 242, 261–64 (1937).

[67] For a thorough exploration of the idea of clear and present danger as a "fall back" approach, see Leslie Kendrick, *On "Clear and Present Danger*," 94 NOTRE DAME L. REV. 1653, 1655, 1662–63

Much more importantly, however, clear and present danger retains continuing—indeed, increasing—vitality in the context of what has come to be understood as the problem of the hostile audience.[68] The paradigm application of *Brandenburg*, a paradigm going back to *Schenck*, is to a speaker (or writer) addressing an actually or potentially sympathetic audience and urging that audience to action. Charles Schenck, Eugene Debs, Jacob Frohwerk, and Jacob Abrams, for example, each tried to persuade those who were already inclined to share their socialist or anarchist or anti-war proclivities to put those proclivities into action by resisting the draft or in other ways interfering with the war effort.[69] And Clarence Brandenburg, speaking to his fellow Klansmen (and maybe some cows) on a field in southern Ohio, was prosecuted for, again, encouraging predisposed followers to unlawful action.[70]

What makes this characterization of the line of cases from *Schenck* to *Brandenburg* interesting here is precisely the fact that not all danger-producing speakers produce that danger by encouraging, urging, or inciting their sympathetic followers to take socially detrimental and typically unlawful actions. Even putting aside the cases typically applying *Brandenburg* to civil actions seeking to hold speakers (or, typically, publishers) liable for negligently inspiring or facilitating unlawful action,[71] there are many instances in which violence is the genuinely unintended (by the speaker) and truly undesired (by the speaker) byproduct of an otherwise lawful speech. Typically this occurs when an

(2019). For a concern about precisely this state of affairs, see Ronald J. Krotoszynski, Jr., *The Clear and Present Dangers of the Clear and Present Danger Test:* Schenck *and* Abrams *Revisited*, 72 S.M.U. L. REV. 415 (2019).

[68] *See generally* Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671 (2019). Contemporary conflicts on college campuses have generated a recent and growing corpus of commentary. *See, e.g.*, Suzanne B. Goldberg, *Free Expression on Campus: Mitigating the Costs of Contentious Speakers*, 41 HARV. J. L. & PUB. POL'Y 163 (2018); Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459 (2019); Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. J. 411 (1999); Christina E. Wells, *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub–Legal First Amendment*, 89 U. COLO. L. REV. 533 (2018); *see also* Feiner v. New York, 340 U.S. 315, 320 (1951); Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949).

[69] On the activities of defendants Schenck, Debs, Frohwerk, and Abrams leading to their prosecutions, see HEALY, *supra* note 27; POLENBERG, *supra* note 30; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 135–234 (2004)

[70] *See* Brandenburg v. Ohio, 395 U.S. 444, 445 (1969); *see also* Steve Kissing, Brandenburg v. Ohio, CINCINNATI MAG., Aug. 2001, at 14–15.

[71] *See* Volokh, *supra* note 59; James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F.2d 1264 (D. Colo. 2002); *see also* Rice v. Paladin Enter., 128 F.3d 233 (4th Cir. 1997); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888 (Ct. App. 1981). *See generally* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002); Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973 (2005).

audience reacts violently to what a speaker non-violently has said, and this, in a nutshell, is the problem of the hostile audience.

The hostile audience problem has been around and generating Supreme Court opinions for almost a century. Early on, *Feiner v. New York*[72] held it permissible to restrict the speaker in order to prevent violence brought about by an audience angry *at* the speaker (and thus not incited or encouraged by the speaker).[73] But a series of cases in the 1960s involving civil rights demonstrators and marchers effectively overruled *Feiner*, and required that restrictive actions in cases of hostile and potentially (or actually) violent reactions to speakers be directed not against the speaker, but against those who engaged in or threatened to engage in the reactive violence.[74]

As recent events have made clear, the problem of the hostile audience is not only still with us, but increasing at a rapid rate.[75] And thus the question persists—in an age of burgeoning listener violence—as to when speakers might be restricted in order to deal with audience violence, or, more commonly, when an entire event might be shut down, thus restricting the speakers as well as the audience.

Here again, it turns out that the clear and present danger standard may still be with us. In what is perhaps the first hostile audience case, *Cantwell v. Connecticut*,[76] the Supreme Court explicitly used clear and present danger as the standard to be applied when violence is threatened by those who react negatively to a speaker's speech.[77] And not only did *Terminiello v. City of Chicago*[78] nine years later employ the same standard,[79] but in the same year so also did *Feiner v. New York*, even if the subsequent cases of the 1960s have made clear that the *Feiner* Court's toothless application of that standard could not satisfy the requirements of the First Amendment.

The fact that neither *Cox*, nor *Edward*s, nor *Gregory* employed clear and present danger language in casting grave doubts on *Feiner* suggests that the best conclusion, in light of *Cantwell* and *Terminiello*,

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[72] 340 U.S. 315 (1951).

[73] I put aside the complexities created by speakers who intentionally provoke or attract a hostile audience, and thus who can be said to encourage or desire angry listeners in just this sense.

[74] *See* Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992), which held unconstitutional an attempt by the county to require the speakers the bear the financial costs of increased security occasioned by the hostile audience, can be understood as reaffirming the basic thrust of *Gregory*, *Cox*, and *Edwards*, and thus as reaffirming the interment of *Feiner*.

[75] For more on recent events, of which that in Charlottesville is the most well–known, see the commentaries cited in note 68.

[76] 310 U.S. 296 (1940).

[77] *See id.* 311.

[78] 337 U.S. 1 (1949).

[79] *See id.* at 4.

is simply that the question remains open. And that conclusion is supported by the way in which lower courts have wrestled with the issue, with some of those courts concluding that clear and present danger remains the test for when a speaker or an event can be closed down because of the reactions of a hostile audience,[80] while other courts and judges do not mention clear and present danger in the process of protecting speakers from restrictions arising out of the reactions of a hostile audience.[81]

Although the law remains unfortunately unclear on the issue, it is hard to imagine that speakers (or the events at which they are speaking) can never be restricted because of the actual or potential reactions of a hostile audience. As a result, perhaps the best we can imagine as a workable standard is some version of a clear and present danger test combined with a least restrictive alternative approach. Consider, for example, a clear and present danger of violence that comes from the reaction of a hostile audience to a speaker who did not intentionally provoke that audience. Such a scenario, increasingly common, might justify not the immediate arrest of the speaker, but instead a dispersal order by law enforcement, the disobedience of which might then, and only then, justify actions against a speaker who disobeyed that order.[82] Or, similarly, the existence of that clear and present danger might be grounds—subject to judicial review—for ordering speakers to change locations or times in the least restrictive way possible while still avoiding the danger, with, again, further restrictions on speakers (including prosecution) being permissible only if those orders to change times and/or places are disobeyed. And whether the exact language of "clear and present danger" is employed or not, a fair conclusion seems to be that at least some version of that idea must persist. When the just-described less restrictive alternatives cannot prevent audience violence, and when existing law enforcement resources are unable to do the same, then it would be hard to imagine that the ability of speakers to speak when and where they choose, even in the face of violence that reasonable law enforcement efforts cannot contain, is required by the First Amendment. And whether it is clear and present danger or some variant thereof that represents the standard, it is equally hard to imagine

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[80] *See* Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975); Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia, 751 F. Supp. 218, 220 (D. D.C. 1990).

[81] For an example, see the thorough and complex opinions on both sides of the issue in *Bible Believers v. Wayne Cty.*, 805 F.3d 228 (6th Cir. 2015).

[82] Indeed, *Feiner* itself is slightly unclear on the issue. Irving Feiner had disobeyed several police requests (and then, seemingly, orders) to stop speaking before he was finally arrested. *See* Feiner v. New York, 340 U.S. 315, 317–18 (1951). The question remains, and neither *Feiner* nor any of the subsequent cases answer it, whether the standards for a non–punitive order (the disregard of which might then provide the basis for punishment) are or should be different from the standards applicable to an immediate arrest or citation.

that *Brandenburg*, designed for a very different kind of problem, would be the starting or ending point of the analysis.

V. THE QUESTION OF REDRESS

There is much more that could be said about the problem of the hostile audience, and in light of recent events much of that is likely to be said in the near future by both courts and commentators. But rather than engage in further speculation, I want to examine a particular consequence of understanding First Amendment rights as overridable, and thus of understanding the holder of First Amendment rights as vulnerable to losing the ability to exercise those rights because of overriding circumstances. More particularly, I want to expose an anomaly in how we treat overridden rights, an anomaly especially apparent in hostile audience situations.

Whether it be by use of the clear and present danger test or with some other test yet to be developed, it seems plain that there are at least some instances in which speeches, parades, demonstrations, rallies, and the like can be ordered to close down or to move because of the reactions of a hostile audience. As a matter of state law, such responses by state and local law enforcement authorities are typically effectuated by means of a declaration of an unlawful assembly,[83] but the exact details are not important here. What is important is that there are, and have been instances in which some of the consequences of actions by a hostile audience are such that speakers who would otherwise have First Amendment rights to say what they are saying will have those First Amendment rights restricted in some way because of the actual or potential reactions of their unsympathetic listeners.

Under such circumstances, we might then ask what is owed to those, including many whose moral profile is vastly superior to the "Unite the Right" demonstrators in Charlottesville, whose First Amendment rights have been curtailed through no fault of their own.[84] If by virtue of what is now commonly labeled the "heckler's veto"[85] a group of speakers is justifiably restricted in the exercise of what would otherwise

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[83] *See, e.g.*, VA. CODE ANN. § 18.2–406 (West 2018).

[84] I do not ignore the extent to which—especially these days—speakers, protesters, picketers, paraders, and demonstrators often deliberately provoke the hostile audience, and often do so in the hopes of a violent reaction. But this is not and need not always be so. Sometimes, not surprisingly, speakers prefer not to be assaulted, and sometimes prefer that violence not occur as a result of their activities.

[85] *See* R. George Wright, *The Heckler's Veto Today*, 68 CASE WEST. RES. L. REV. 159 (2017). The phrase originated in HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–65 (1965) and made its first appearance in the *United States Reports* in *Brown v. Louisiana*, 383 U.S. 131 (1966).

be within their First Amendment rights, then what rights of redress or compensation do the restricted speakers have?

As should be apparent, the answer to this question, as a matter of existing law and existing political practice, is "nothing." If the reactions of a hostile audience rise to the level of a genuine clear and present danger, and thus if law enforcement is constitutionally justified in restricting the speakers by, for example, declaring an unlawful assembly and bringing the event to a close, the prevailing practice is that the restricted speakers are entitled to no compensation or other redress. Law enforcement having, by hypothesis, done the right thing, the state's obligations come to an end.

But compare this scenario to the taking of land by eminent domain. If the state takes (or even, sometimes, restricts the use of[86]) someone's land by eminent domain, then the land-owner who has been deprived of her land (and therefore her property rights) is entitled to "just compensation" by order of the Fifth Amendment, and that is so even if the taking was entirely justified.

The anomaly should now be apparent: the land-owner whose property rights are overridden for the public good is compensated, but the speaker or demonstrator whose First Amendment rights are overridden or restricted is entitled to nothing.

This anomaly might be explained in some number of ways. Perhaps the anomaly is a function of the longstanding belief that property is tangible and valuable in ways that rights are not.[87] Perhaps it is a function of the ability to place a monetary value on the property taken in ways that would be far less possible for the deprivation of free speech rights.[88] Or perhaps it is simply a matter of historical path-dependence or the power of the we've-never-done-it-before-so-we shouldn't-do-it-now argument.

If none of these explanations are persuasive (and I offer them as explanations and not as justifications), then perhaps the anomaly between how we treat rightful property deprivations and how we treat

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[86] *See* Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341 (2018) (explaining how the law in some states provides compensation even for impairments that do not rise to the level of takings).

[87] The prevailing view now is that property is best understood as a "bundle of rights" and not a physical thing. *See* Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 LEG. 1 (2014) (defending the bundle of rights account). But the longstanding lay belief that property is defined by its physical presence has its contemporary academic defenders. *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996).

[88] This explanation—the monetization explanation—seems odd, however. If the state wrongly deprives someone of her free speech rights, she can bring a civil rights action to seek monetary compensation for what she has lost. *See generally* JOHN C. JEFFRIES, JR., ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION (4th ed., 2018). And if this is possible, then it is difficult to see why there could not similarly be a monetary value attached to a rightful restriction.

rightful free speech deprivations could be "cured" in some way. Assuming that the Constitution prohibits limiting the right to compensation for takings of land, then the only other way to lessen the gap between what we do for property takings and what we do for speech takings is to at least think about compensating those who in some way have had their free speech rights diminished for the public good. And although we rarely think about this possibility—the possibility of compensating those whose free speech rights are overridden—it is a possibility that finds support from two other areas of thought.

One of these areas of thought is in private law, where the questions about *Vincent v. Lake Erie Transportation Co.*[89] are about whether one who justifiably injures another's property is required to compensate the owner of the damaged property despite the justifiability of the action. If, as in *Vincent*, someone who justifiably damages another's dock in order to keep from foundering in a storm must nevertheless compensate the dock-owner for the damages caused, nevertheless, does the state analogously owe damages to those whose rights are justifiably overridden for the public good?

Once the question is posed this way, it becomes clear that there is also a relevant domain of philosophical thinking. Many of the philosophers who have thought about nonabsolute (and thus overridable) rights—Judith Thomson,[90] Frances Kamm,[91] and Walter Sinnott-Armstrong,[92] for example—have argued that when rights are rightfully overridden there is a *moral residue*,[93] such that the infringer still owes something by way of compensation or other redress to the right-holder whose rights have been overridden. If these and other philosophers[94] are right, then is there a constitutional residue when constitutional rights are overridden, such that the overrider—the state—similarly owes compensation even though the state has done the right thing?

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[89] 124 N.W. 221 (Minn. 1910) (suggesting, even if not directly holding, that a shipowner who justifiably saved his ship in a storm at the cost of damage to someone else's dock would owe compensation to the dock-owner). Somewhat similar is *Ploof v. Putnam*, 71 A. 188 (Vt. 1908), concluding that the shipowner in an analogous situation was not liable in trespass. For commentary on these cases and the issues they raise, see George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L. J. 975 (1999); John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 765 n.89 (2016).

[90] *See* JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 84–86, 93–96 (1990); JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 59–60, 71–72, 76–77 (1986).

[91] F.M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 249–60 (2007).

[92] WALTER SINNOTT–ARMSTRONG, MORAL DILEMMAS 44–53 (1988).

[93] This is the term used by THOMSON, THE REALM OF RIGHTS, *supra* note 90, and SINNOTT–ARMSTRONG, *supra* note 92. KAMM, *supra* note 91, calls it "negative residue."

[94] *See also* Rex Martin & James W. Nickel, *Recent Work on the Concept of Rights*, 17 AM. PHIL. Q. 165 (1980).

In the context of this article and this symposium I do not propose to answer these questions here. But if we apply those questions specifically to free speech rights under the First Amendment, it turns out that the questions raised by *Vincent v. Lake Erie Transportation Co.* and the aforementioned philosophers are very real, especially in the context of the problem of the hostile audience.

One qualification is worth noting. In many instances of speeches or demonstrations that are justifiably restricted, it is the restricted speaker who has triggered the restriction, and it might seem odd to think that such a speaker is entitled to redress. If a modern-day Clarence Brandenburg intentionally and explicitly urges his audience to take specific and immediate violent action against African-Americans and Jews,[95] he can be restricted according to the *Brandenburg* standard, but it would seem odd indeed to think that Brandenburg is entitled to compensation. But, to use another hypothetical (and decidedly counterfactual) scenario, if the hostile audience reactions against a modern-day Reverend Elton Cox[96] are such that his otherwise protected demonstration must be curtailed, it seems less odd to think he might be entitled to something. Under existing doctrines and practices, however, Reverend Cox would get nothing. Civil rights actions would provide redress if the restriction were wrongful, but when the restrictions are rightful there is no route to a remedy, even if the injury to him—not being able to speak—is the same.

VI. CONCLUSION

I have unsatisfyingly ended with a question to which I do not purport to provide an answer. Nor do I think that the question and the anomaly that generates it are the most important things to consider when we are addressing the kinds of issues that arise from the way in which free speech rights can be overridden. But the anomaly and the questions about how, if it all, to resolve them represent at least one potentially interesting corner of the larger question of free speech overrides generally. Given that the baseline free speech standards have become ever more speech protective, as the progression from *Schenck* to *Brandenburg* shows, it is easy to lose sight of the nonabsolute character of even the most highly speech-protective doctrines. But the hostile audience problem—no longer restricted to the epiphenomenal factual scenarios that characterized cases like *Cantwell*, *Terminiello*, and *Feiner*—is no longer an epiphenomenal problem, and considering the standards

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[95] This was not the exact language he used. *See* Brandenburg v. Ohio, 395 U.S. 444, 446 (1969).

[96] From *Cox v. Louisiana*, 379 U.S. 536 (1965).

and consequences of the way in which free speech rights may be overridden turns out to be more germane than it was in the 1960s or even in the more recent past.

Free Speech and the "Unique Evils" of Public Accommodations Discrimination

Elizabeth Sepper†

INTRODUCTION

For over a hundred years, the U.S. Supreme Court—and an array of state supreme courts—consistently rejected arguments that businesses open to the public have a constitutional right to provide less than the full and equal services required by antidiscrimination laws.[1] The Supreme Court made clear that public accommodations law "does not, on its face, target speech or discriminate on the basis of its content."[2] First Amendment claims involving unusual applications of public accommodations law have sometimes met success.[3] But the Court drew a sharp contrast between expressive associations—safeguarded from application of the law—and "commercial relationship[s] offered generally or widely"—entitled to no First Amendment protection.[4] First

† Professor of Law, University of Texas at Austin School of Law. I'm grateful to Kathryn Garza for excellent research assistance and to the participants in the University of Chicago Law School's *Legal Forum* Symposium, *What's the Harm? The Future of the First Amendment*, for their comments and suggestions. I thank Nika Arzoumanian, Rebecca Boorstein, Austin Kissinger, Daniel Simon, Anna Porter, James Gao, Rebecca Roman, Claire Lee, Qi Xie, and the rest of the journal staff for their superb organizing and editorial assistance.

[1] *E.g.*, W. Turf Ass'n v. Greenberg, 204 U.S. 359, 364 (1907); Messenger v. State, 41 N.W. 638, 639 (Neb. 1889); People v. King, 18 N.E. 245, 248–49 (N.Y. 1888).

[2] Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995) (observing that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments").

[3] *Hurley*, 515 U.S. at 572 ("In the case before us, however, the Massachusetts law has been applied in a peculiar way."); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000) (distinguishing entities like "taverns, restaurants, [and] retail shops" from non-commercial membership organizations like the Boy Scouts that "may not carry with them open invitations to the public").

[4] Runyon v. McCrary, 427 U.S. 160, 189 (1976) (Powell, J., concurring); *Hurley*, 515 U.S. at 571; *Dale*, 530 U.S. at 657 (distinguishing entities like "taverns, restaurants, [and] retail shops" from organizations that "may not carry with them open invitations to the public" or are not "clearly commercial entities"); Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (observing constitutional "dichotomy" between the rights of expressive and commercial organizations).

Amendment claims from businesses failed, regardless of whether they were framed as rights of free speech, free association, or free exercise.[5]

But over the last decade, a movement for exemptions from antidiscrimination laws has taken hold.[6] For-profit businesses refuse to take photos or videos, bake cakes, print invitations, rent accommodations, or arrange flowers for same-sex couples out of religion-based objections to same-sex relationships. While religion motivates business owners, public accommodations laws easily meet the Free Exercise Clause's requirements of neutrality and general applicability.[7] These laws were adopted to eradicate discrimination, not target religion, and are generally applicable, usually applying to every place open to the public.[8] As a result, the question at the heart of these cases is whether cake baking, flower arranging, wedding hosting, or invitation lettering is speech. Objectors argue that requiring businesses to sell goods and services on equal terms to a same-sex couple compels them to speak in favor of the marriage.

Court after court rejected these arguments.[9] But then, in 2019, the Court of Appeals for the Eighth Circuit and the Arizona Supreme Court became the first courts to hold that wedding businesses have a free speech (and free exercise) right to refuse service.[10] Two justices of the U.S. Supreme Court, Thomas and Gorsuch, have indicated their agreement.[11] In the near future, the Court will likely take up the issue. So—as this symposium asks—what's the harm?

Thirty-five years ago, the Supreme Court instructed that "unique evils" inhered in discrimination in public commerce.[12] In this essay, I

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[5] *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973) (noting that no court has ever granted "affirmative constitutional protections" to private discrimination).

[6] Sarah Posner, *The Christian Legal Army Behind Masterpiece Cakeshop*, NATION (Nov. 28, 2017), https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/ [perma.cc/R7FH-RA5L].

[7] Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that neutral laws of general applicability do not offend the Free Exercise Clause).

[8] *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638–62 (2016) (describing the scope and limited exceptions from these laws).

[9] Elane Photography, LLC v. Willock, 309 P.3d 53, 68 (N.M. 2013); Gifford v. McCarthy, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 438–39 (Ariz. Ct. App. 2018) ("The items [calligraphers] would produce for a same-sex or opposite-sex wedding would likely be indistinguishable to the public."), *rev'd*, 448 P.3d 890, 895 (Ariz. 2019); State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019), *petition for cert. filed*, No. 19-333 (Sept. 12, 2019); Klein v. Or. Bureau of Labor & Indus., 289 410 P.3d 1051 (Or. Ct. App. 2017).

[10] Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); *Brush & Nib Studio*, 448 P.3d at 895.

[11] *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgement).

[12] Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984).

evaluate what might be unique about public accommodations within the civil rights framework. As Part I describes, by inviting the general public, public accommodations generate expectations of service, expectations always realized by the in-group—often defined by race, religion, and gender—and sometimes denied to minorities. Unlike employment, housing, and other spheres of antidiscrimination, public accommodations operate according to accepted conventions of nonselectivity. The public expects businesses to deliver goods and services on a first-come, first-served basis, to charge the same prices, and to treat people with respect for their status as consumers.

As Part II argues, the status of consumer entitles would-be patrons to a modicum of respect for their dignity. By contrast to discrimination in employment and housing, discrimination in consumer goods imposes trivial monetary damages on any particular individual, even as it has large aggregate effects in the market. But, as the law governing public accommodations has understood, public-facing businesses have particular power to inflict damage to one's status as a consumer and citizen. Under the common law, courts recognized dignitary damages in order to enforce businesses' obligations to the public. Given the absence of significant money damages for failing to honor a movie ticket or sell a hamburger, dignitary damages provided an otherwise missing deterrent effect. They ensured marginalized groups would no longer have to participate in the performance of their own inferiority before the audience inherent to businesses that welcome the public.

The final two Parts sketch the import of the unique evils of public accommodation discrimination for free speech. Part III argues that this arena manifests unified conventions of the consumer marketplace. The law of public accommodations shapes a consumer capitalist market that operates with an ideal of neutrality toward identity traits and aspires to frictionless transactions and movement. The result is a consumer marketplace where people and money flow freely in low-information, low-stakes transactions.

Part IV indicates an overlooked asymmetry in the communicative potential of service and denial. Because of social expectations of service, a business communicates little, if anything, when it provides a good or service to any particular customer. The wedding vendor signals no approval of the person or the use of the goods by its service. By contrast, denial of service powerfully expresses that a person (or group) does not merit status as a consumer. The message conveyed by breaking uniform conventions of service does not depend on the artistic or bespoke nature of the product sold or the celebration of any particular event. Free speech claims built around denial of service cannot be so cabined.

I. CONSUMER STATUS AND THE EXPECTATION OF SERVICE

Most spheres of life governed by civil rights laws—whether employment, housing, or credit—manifest selectivity. Consider employment, the focus of most antidiscrimination scholarship. Employers use discretion and often subjective criteria in choosing among applicants. They gather ample information, ranging from resumes and references to personality tests and credit checks. People find themselves denied jobs for an array of legitimate reasons—a lack of experience, bad interview, improper fit, or preference for alumni of the boss's alma mater.

Our expectations of employment are rejection and disappointment or, at best, uncertainty about the direction of decision making. Applicants neither anticipate nor receive any response from many jobs to which they apply. Employers routinely reject applicants, deny promotions, and turn down requests for raises.

By contrast, public-facing businesses—from restaurants to grocery stores, from ballparks to theaters, from flower shops to bakeries—welcome all comers. People rarely offer their names, let alone personal details, in these places. The business tends to inquire only as to the method of payment. Customers rarely anticipate or receive rejection without good reason that the tables are booked or the tickets sold out. Even rejection often serves as invitation to reserve for a future date or to return for a later game.

Unlike employers, public accommodations do not have an interest in, or practice of, choosiness.[13] The business is organized around abstract customers—any member of the public is welcomed to deal.[14] This invitation generates expectations of service, expectations consistently realized by the in-group—whether white, male, or heterosexual—and sometimes denied to minorities. Over the twentieth century, the enactment and enforcement of public accommodations law secured consumer status for increasing numbers of people. Today, proprietors and consumers alike assume a convention of equal access.

These expectations derive from a long history of business duties to consumers. Even before the first public accommodations statute was

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[13] *See* Charles L. Black, Jr., The Supreme Court, 1966 Term *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 102 (1967) ("It is not a warranted assumption of our civilization that a lunch-counter proprietor will practice a general choosiness about his customers, or that the law is expected to leave him alone in this regard."); James M. Oleske, *"State Inaction," Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1, 50 (2016) ("[T]he law did not assume bakers, florists, and caterers had such an interest in being selective about their customers before same-sex couples requested equal service.").

[14] Amnon Reichman, *Professional Status and the Freedom to Contract: Towards a Common Law Duty of Non-Discrimination*, 14 CANADIAN J.L. & JURIS. 79, 108 (2001) ("The profession is organized around an interaction with an abstract customer, any member of the public, and hence is organized around serving the public. Consequently, equal access to the services provided by the business as such is intrinsic to the profession.").

passed, the common law required equal access to businesses open to the public. As Joseph Singer has demonstrated, prior to the Civil War the common law rule dictated that "[t]hose who hold themselves out as ready to serve the public thereby make themselves public servants and have a duty to serve."[15] The rule appears to have applied broadly, to barber shops, victuallers, bakers, tailors, and traders.[16] Having invited consumers in, a business could not exclude any one of them without good cause.

Under the common law, the status as a consumer was closely linked to citizenship. Thus, after the Civil War, it briefly seemed that newly freed slaves would gain full and equal access to public businesses under the common law.[17] The Mississippi Supreme Court, for example, observed that the common law had "always" demanded that inns, common carriers, and "public shows and amusements" be open to all "unless sufficient reason were shown."[18] During Reconstruction, state supreme courts often concluded that that even in the absence of a statute, black people were due equal treatment.[19] And when the U.S. Supreme Court struck down the federal Civil Rights Act in 1883, it too assumed that state common law—and the duty of equal access it encompassed—would still govern.[20] But as Reconstruction ended, legislatures in the South rejected the duty-to-serve rule in favor of a right, and eventually duty, of businesses to exclude black people.[21] And in many states, courts came to interpret common law to permit segregation even by core common carriers like trains and inns.[22]

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[15] *See generally* Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1321 (1996) (reviewing American and English treatises, case law, and custom).

[16] *Id.* at 1327–31.

[17] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 515 (1985) ("At the time the fourteenth amendment was ratified, it still was believed that the common law provided protection against private interference with individual rights.").

[18] Donnell v. State, 48 Miss. 661, 680–81 (1873).

[19] Decuir v. Benson, 27 La. Ann. 1, 5 (1875) ("In truth the right of the plaintiff to sue the defendant for damages would be the same, whether [the act] existed or not . . . ."), *rev'd on other grounds sub nom*. Hall v. DeCuir, 95 U.S. 485 (1877); Ferguson v. Gies, 46 N.W. 718, 720 (Mich. 1890) ("The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places.").

[20] The Civil Rights Cases, 109 U.S. 3, 17 (1883); *id.* at 25 ("Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation[s] to all unobjectionable persons who in good faith apply for them.").

[21] Singer, *supra* note 15, at 1388 (noting that by 1900, every state in the former Confederacy and in Kentucky had statutes requiring segregation).

[22] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 89 (2004) ("Common-law challenges to racially unequal railroad accommodations had frequently succeeded through the mid-1880s, but such cases virtually disappeared thereafter.").

Slowly, however, the class of persons entitled to consumer status expanded. White men had enjoyed access so long as they could pay. White women were marginal actors, whose status in the consuming public grew beginning in the mid-nineteenth century and fluctuated through much of the twentieth.[23] Racial minorities had a much more tenuous grasp on consumer status. Although many Northern states enacted public accommodations statutes prohibiting race and color discrimination after the Civil War, these laws often were honored in the breach into the early twentieth century.[24]

To be sure, minority groups were purchasers of goods and services. In some places, they had ample choices.[25] Retail stores solicited the trade of black customers even in the Deep South.[26] But service came with mistreatment and norms that gave priority to white customers. At other times, disfavored minorities were restricted to a market niche. For example, before the Civil Rights Era, Mexican, Asian, and Sikh farm laborers in California might frequent the one market willing to serve them, while otherwise encountering signs reading "White Trade Only."[27] Parallel markets sometimes developed as groups launched their own businesses. In South Texas, Mexicans could shop in "their own dry goods stores, grocery stores, meat markets, tailor shops and a number of other shops."[28] Minority groups had access to goods and services, but their status as consumer-citizens entitled to move and spend freely was denied.[29]

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[23] LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 136, 147 (2003) (noting that after WWII, "female consumers withdrew from the civic arena as wartime citizen consumers and even to some extent as post war purchasers as citizens" as female homemaking became the contrast to male worker-citizen-consumer).

[24] Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–40 (1978); *see also* THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 134 (2008) (noting that antidiscrimination laws were frequently ignored in Northern cities and states).

[25] Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 708 (1965) (observing that black people "have patronized theaters, restaurants, amusement parks, and public conveyances, in some locales [in Ohio], to such an extent that their presence is unnoted"); JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 109–10 (1959) (examination found virtually no discrimination in restaurants in D.C. and New York City in 1954); Charles Abrams, "*. . . Only the Very Best Christian Clientele*," COMMENTARY, Jan. 1, 1955, at 15 (reporting that half of resorts in Maine, Vermont, and New Hampshire allowed Jews as guests).

[26] GREENBERG, *supra* note 25, at 113.

[27] NAT'L PARK SERV., CIVIL RIGHTS IN AMERICA: RACIAL DESEGREGATION OF PUBLIC ACCOMMODATIONS 92–93 (2009).

[28] DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986 167 (1987).

[29] *E.g.*, NAT'L PARK SERV., *supra* note 27, at 116 (noting that throughout the twentieth century, "there was uneven consistency in how and when denials of services" confronted Asian American residents); GRACE E. HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE

The importance of one's status as a consumer grew over the twentieth century. As historian Lizabeth Cohen explains, engagement in commerce served as an increasingly important mark of citizenship as the United States became a "consumers' republic."[30] After World War II in particular, ideals of economic abundance and democratic freedom aligned to create a civic responsibility of mass consumption.[31] As histrion Thomas Sugure observes, "[a]ccess to consumer goods—the right to buy—was a defining characteristic of what it meant to be an American citizen."[32]

The black civil rights movement against segregation in stores and restaurants claimed black people's status as consumers. While it would eventually become viewed as a struggle for integration, "what first drove blacks who challenged discrimination in public accommodations after World War II was a demand for equality of access."[33] Some civil rights leaders explicitly sought to reclaim the antebellum view of the common law.[34] Protestors targeted the theaters, restaurants, and pools that represented "the promise of American consumer culture."[35] They asserted "the right to eat and drink, to spend their money, where they pleased."[36]

In this period, black activists and their allies secured the passage, amendment, and enforcement of city and state laws against public accommodations discrimination.[37] And after sustained protests and bloody attacks, they won the passage of federal public accommodations law—Title II of the Civil Rights Act of 1964[38]—that would end consumer segregation in the South. As historian Louis Hyman explains, this movement proved so successful in part due to its inherently conservative claim of a right to spend money.[39]

SOUTH, 1890–1940 Loc. 3791–3800 (2010) (noting black access in practice to most commercial establishments in 1930s Southern towns with a "constant uncertainty").

[30] *See generally* COHEN, *supra* note 23 (analyzing the crucial significance of consumption to ideals of citizenship, from the Great Depression through the late twentieth century).

[31] COHEN, *supra* note 23, at 127.

[32] SUGRUE, *supra* note 24, at 135.

[33] COHEN, *supra* note 23, at 174.

[34] GREENBERG, *supra* note 25, at 81–87, 96–101.

[35] SUGRUE, *supra* note 24, at 135, 143.

[36] *Id.* at 143.

[37] David F. Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1101–02 (2011) (discussing numerous successful race discrimination suits in Northern and Western states in the 1930s and 1940s); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259–60 (1964) (noting that by the year of the Civil Rights Act's passage, thirty-two states had public accommodations laws).

[38] 42 U.S.C. § 2000a (2018).

[39] Gaby Del Valle, *How the Sears Catalog Transformed Shopping Under Jim Crow*, VOX (Oct. 19, 2018), https://www.vox.com/the-goods/2018/10/19/18001734/sears-catalog-bankruptcy-jim-

Over the twentieth century, an increasing number of people—women, people with disabilities, and LGBTQ people—demanded this right and their status as consumers.[40] They too secured legal reform. Today, nearly all states guarantee "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" without regard to race, color, national origin, religion, sex, or disability.[41] Many jurisdictions also reach gender identity and sexual orientation discrimination.[42] Reinforced by these laws, shared norms today dictate that public businesses will serve the customer at the front of the line first. People anticipate being able to purchase goods in all shops, not just some shops.

II. DIGNITY AND THE POWER OF THE PUBLIC

Many antidiscrimination laws primarily safeguard access to economically important opportunities. Each individual transaction has economic weight—the job, apartment, loan, or insurance policy denied. Individual economic damages can be significant.

The individual injury of public accommodations discrimination, however, is not primarily economic. As defendants have often argued, not even "five cents damages" can be said to be inflicted by a restaurant that serves a black man the same food as his white friends, alone and in the kitchen.[43] Or the movie theater that seats Mexican-Americans on one side.[44] Even where service is denied altogether, the monetary loss seems trivial. The denial of a cake for a wedding, a lunch at the counter, or a drink at the bar imposes minimal cost. But as civil rights activist

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crow-racism-mail-order [perma.cc/3HX9-F24H]; *see also* COHEN, *supra* note 23, at 127 (observing that one appeal of the Consumer's Republic was that "it promised the socially progressive end of economic equality without requiring politically progressive means of redistributing existing wealth").

[40] Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 107–08 (2019) (describing the feminist movement's use of this language in the late 1960s and 1970s).

[41] *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601 (West 2014); *State Public Accommodations Laws*, NAT'L CONF. ST. LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/SHN6-JMZF].

[42] NAT'L CONF. OF STATE LEGISLATURES, *supra* note 41. In many states without such protections, city ordinances typically bar sexual orientation and/or gender identity discrimination in the major cities. *See Local Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances [https://perma.cc/C8RK-5MLV].

[43] Crosswaith v. Bergin, 35 P.2d 848, 848–49 (Colo. 1934) (rejecting the argument).

[44] Movie theaters in the West and Southwest into the 1940s kept Mexican Americans from the center seats—an experience Cesar Chavez recalls as launching his fight against discrimination. ALLISON VARZALLY, MAKING A NON-WHITE AMERICA: CALIFORNIANS COLORING OUTSIDE ETHNIC LINES, 1925–1955 164 (2008); *see also* Guy v. Tri-State Amuse. Co., 40 Ohio C.C. 77, 80 (Ohio Ct. App. 1917) (rejecting defendant's argument that black plaintiffs "had just as good an opportunity to see the pictures or vaudeville performance . . . seated on the right hand side, as if they were seated in the center section").

Ella Baker declared, this sort of discrimination is about "something much bigger than a hamburger or even a giant-sized Coke."[45]

Denial of equal treatment in public accommodations expresses an ideology of a group's inferiority, not merely an ordinary civil injury.[46] The indignity—or humiliation—is different in kind from mere insult or hurt feelings. Following Martha Nussbaum, this conception of dignity is deeply tied to respect.[47] When a business denies service or provides unequal treatment, it expresses disrespect for the would-be patron's status as a consumer. As Deborah Hellman convincingly argues, wrongful discrimination, unlike differentiation, demeans its targets. It requires both expression—that the person is less worthy of equal respect—and power or status—that the person expressing disrespect is in a position to subordinate the other.[48] In this regard, the publicness of the refusal further distinguishes public accommodations. Although some discrimination takes place one-on-one, the presence of an audience of strangers sets public accommodations apart from employment or housing. Before an audience of fellow citizens, the proprietor has the power to impugn the standing of a person to participate in public commerce.

Courts have long conceptualized the denial of equal access as a dignitary harm. In the late nineteenth century, courts recognized that granting a remedy for indignity inflicted by public accommodations was essential, because otherwise the plaintiff would receive mere contract damages—the cost of the ticket, for example—which would not adequately reflect the harm.[49] One court summarized its state's common law, "[e]very person . . . has a right to go to any public place, or visit a resort where the public generally are invited" with "freedom from insult, personal indignities, or acts which subject him to humiliation and disgrace . . . ."[50] In carrying on business with the public generally, a

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[45] Ella Baker, *Bigger Than a Hamburger*, SOUTHERN PATRIOT (May 1960), http://www.crmvet.org/docs/sncc2.htm [perma.cc/B8E3-6N3R].

[46] Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1620 (2001).

[47] MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 31 (2011).

[48] DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG 35 (2008).

[49] Chi. & Nw. Ry. Co. v. Williams, 55 Ill. 185, 190 (1870) (holding that where a common carrier inflicts delay, vexation, and indignity by excluding a passenger, the actual pecuniary damages sustained "would, most often, be no compensation at all"); *see also* Mo., K. & T. Ry. Co. v. Ball, 61 S.W. 327, 329 (Tex. Civ. App. 1901) ("That damages for mental pain, anxiety, distress, or humiliation suffered . . . may be recovered, though unaccompanied with physical injury, pain, or suffering, is now too well settled in this state to admit of question.").

[50] Davis v. Tacoma Ry. & Power Co., 35 Wash. 203, 207 (1904) (where amusement park employee insulted a white plaintiff's character by mistaking her for another woman).

proprietor assumed a duty to treat them with respect for their status as a paying customer.

Public accommodations statutes imported this commitment to consumer dignity. Leading the National Organization for Women's campaign to prohibit sex discrimination by the many male-only public places of the late 1960s, Karen DeCrow wrote, "the most basic right of all may be the right to equal treatment in places of public accommodation. It means the right to human dignity, the right to be free from humiliation and insult, and the right to refuse to wear a badge of inferiority at any time or place."[51] In upholding Title II in *Heart of Atlanta Motel*, the Supreme Court emphasized that its "fundamental object . . . was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access.'"[52] Other courts describe "the injury to an individual's sense of self-worth and personal integrity."[53]

While incivility and disappointment are common in our society, public accommodations have particular power to inflict humiliation for three reasons. First, as common law often recognizes, commercial sellers have the upper hand in their relationships with customers.[54] Their social role dictates that businesses take greater precautions than average individuals must.[55] Free speech doctrine also approaches consumer-business relations with some awareness of power dynamics.[56]

Second, the practice of holding open an invitation to the public increases the likelihood of people encountering indignity unaware. As the Supreme Court has noted, public accommodations laws structure "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[57] The pervasive nature of public accommodations means consumers are vulnerable to discrimination in a way that is unrelenting. Whereas individuals apply to and interact with relatively few potential employers or even landlords, they routinely—even daily—enter businesses open the public. In the absence of

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[51] Sepper & Dinner, *supra* note 40, at 111.

[52] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).

[53] King v. Greyhound Lines, 656 P.2d 349, 352 (Or. Ct. App. 1982).

[54] Some courts have ascribed the duty to avoid indignity and insult to the special relationship between a public accommodation and its customers. *See* Meyer v. Hot Bagels Factory, 721 N.E.2d 1068, 1076–77 (Ohio Ct. App. 2000) (noting that in Ohio, this reasoning was recognized as early as 1911).

[55] Stephen D. Sugarman, *Land-Possessor Liability in the Restatement (Third) of Torts: Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079, 1088 (2009) (explaining why, based on social roles, commercial actors must take greater precautions to protect others than "ordinary folks").

[56] *See, e.g.*, Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 468 (2019) (discussing how free speech doctrine acknowledges disparities in knowledge and sophistication between sellers and consumers—what she calls "expressive inequality"—to permit greater regulation of the offers and exchanges in which they are engaged).

[57] Romer v. Evans, 517 U.S. 620, 631 (1996).

equal access, members of marginalized groups face constant uncertainty about where, when, and how they will access goods and services. People can avoid associating with their enemies, but often will find themselves "invited to an establishment, only to find its doors barred to them."[58]

Third, in public accommodations, the presence of an audience enhances the impact of the business's denial of service. Surveying cases involving offenses to dignity, in 1938, Fowler Harper and Mary McNeely concluded that these denials involved almost uniformly incidents that occurred in public, including accusations of theft and ordering of patrons out of amusement parks, theaters, and trains—in front of an audience of other patrons.[59] Adjudicating claims brought under both the common law and public accommodations statutes, courts often highlighted the size of the crowd of witnesses.[60] The New York Court of Appeals, for example, said, "it is the publicity of the thing that causes the humiliation."[61]

African American legal scholar Patricia Williams recounted her own experience in a law review article.[62] While Christmas shopping in New York City, Williams rang a store buzzer, eager to enter the store and purchase a sweater in the window for her mother. The salesclerk glared and then mouthed "we're closed." Williams was not fooled, "It was one o'clock in the afternoon. There were several white people in the store who appeared to be shopping for things for their mothers." Moved nearly to violence, she recalls, "I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do . . . that would humiliate him the way he humiliated me."[63] She recognized the clerk's power to disrespect her status as a consumer. He would not acknowledge her, Williams says, "even at the estranged level of arm's length transactor."[64]

Public accommodations discrimination requires its victims not merely to listen but to perform. Most obviously, the Jim Crow system of

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[58] Evans v. Ross, 154 A.2d 441, 445 (N.J. Super. Ct. App. Div. 1959).

[59] Fowler V. Harper & Mary Coate McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress*, 1983 WIS. L. REV. 426 (1983).

[60] *See, e.g.*, Weber-Stair Co. v. Fisher, 119 S.W. 195, 197 (Ky. 1909) (noting that theater employees showed "a disposition to oppress and disgrace" a customer made worse by the "presence of a number of persons"); Odom v. E. Ave. Corp., 34 N.Y.S.2d 312, 314 (1942) (observing "the presence of a number of people"), *aff'd*, 264 A.D. 985 (N.Y. App. Div. 1942); Kelly v. Dent Theaters, Inc., 21 S.W.2d 592, 592–93 (Tex. Civ. App. 1929) (noting that when an orderly theatergoer was ejected a crowd "filled the whole sidewalk in front of the building" to watch).

[61] Aaron v. Ward, 96 N.E. 736, 738 (N.Y. 1911).

[62] Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987).

[63] *Id.* at 128.

[64] *Id.*

the South required compliance with a complex set of manners and customs in commercial space.[65] Historian Grace Elizabeth Hale vividly describes one such performance: "[c]limbing above the 'for white men' only restroom between the segregation sign and the Dr. Pepper advertisement, the black man can watch the same movie and drink the same soda as a white patron as long as he declares his race and, by implication as well as the shabby surroundings, his inferiority as he enjoys his purchases."[66] The audience understood what Bruce Ackerman calls the "systematic degradation ritual"[67] by virtue of the two speakers involved—the proprietor and the would-be patron. Public commercial spaces functioned as a "theater" for the contradictions of segregation.[68]

While the minority group invariably is called upon to perform, the conduct or speech compelled varies by time, space, and trait. As a black woman, prominent educator Mary Church Terrell describes being unable to eat in Washington, D.C., "from the Capitol to the White House" unless she "were willing to sit behind a screen."[69] At professional meetings in the 1960s, women of any race would need to peel off from their colleagues or subordinates to go to ladies' entrances and elevators. Gays and lesbians performed the role of heterosexual and took care to wear a minimum number of articles of "gender appropriate" clothing so as to avoid scrutiny.

Unequal treatment by a business sends a message that the patron or would-be patron is not worthy of respect. At mid-century, Jewish groups worked to bar discriminatory signs, recognizing that "such words as 'selected clientele' connote in the public mind that colored persons, Jews and others who are not lily-white need not apply."[70] Two decades later, encounters with the many bars that banned unescorted women and the restaurants that excluded all women during businessmen's lunch hours prompted "the realization that society thought—as one woman said—that 'women don't belong in the outside world.'"[71] In

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[65] This civility demand on the racial minority persisted even as the laws of Jim Crow were taken down. *See generally* Joseph Crespino, *Civilities and Civil Rights in Mississippi*, *in* MANNERS AND SOUTHERN HISTORY 114 (Ted Ownby, ed. 2007) (demonstrating the way white elite weaponized civility against black civil rights movement).

[66] HALE, *supra* note 29, at Loc. 3861.

[67] BRUCE ACKERMAN, THE CIVIL RIGHTS REVOLUTION 138 (2014).

[68] ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 55–75 (1994).

[69] PAULA C. AUSTIN, COMING OF AGE IN JIM CROW DC Loc. 830 (2019).

[70] Camp-Of-The-Pines, Inc. v. N.Y. Times Co., 53 N.Y.S.2d 475, 484 (Sup. Ct. 1945). For more detailed history across the United States, see John Higham, *Social Discrimination Against Jews in America, 1830–1930*, 47 PUBS. AM. JEWISH HIST. SOC'Y 1 (1957).

[71] Georgina Hickey, *Barred from the Barroom: Second Wave Feminists and Public Accommodations in U.S. Cities*, 34 FEMINIST STUD. 382, 389 (2008). For a full exploration of feminist advocacy during the late 1960s and 1970s, see Sepper & Dinner, *supra* note 40, at 80–81.

Masterpiece Cakeshop v. Colorado Civil Rights Commission, the Supreme Court likewise recognized that public accommodations discrimination treated gay couples "as social outcasts or as inferior in dignity and worth."[72] Disfavored groups not only saw their standing fall in a single business but also experienced "community-wide stigma."[73]

Mistreatment by public accommodations—unlike an average social interaction—is able to systematically change a person's standing among their fellows.[74] Charlie Parker, an African American man born in the 1890s in Mississippi, remembered that at banks and post offices when a white person came in, black people "would always get back and let him go first, you come last."[75] These practices let black people know their place in society and the market.[76] It was not only black people in the Jim Crow South who received this message. In the 1960s, public accommodations discrimination affirmed the marginal nature of LGBT people's access to the public. Proprietors forced gay men to sit alone with their back to other customers to eat a meal or to face the bar rather than socialize with one another.[77] That same decade, women too were sometimes literally put in their place. At the National Press Club awards dinner, for example, female journalists were seated with the wives in a separate room.[78] While the type of unequal treatment of each of these groups differed in meaningful ways from each other, public accommodations discrimination designated their proper (and limited) place both literally and figuratively.

Public accommodations thus have an inescapable power to demean would-be customers. The public marketplace contains retail, service, and amusement; it meets needs and wants for commerce and leisure. Where norms of equal access and first-come, first-served are not universally observed, marginalized people live with constant potential for discrimination. They risk conscription into a performance that signals their inferior standing and limited claim to consumption before an audience of their fellow citizens.

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[72] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018).

[73] *Id.*

[74] Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2204–05 (1990) (noting the ways in which discrimination in the private sphere can create a caste system, precluding full political citizenship).

[75] STEPHEN A. BERREY, THE JIM CROW ROUTINE: EVERYDAY PERFORMANCES OF RACE, CIVIL RIGHTS, AND SEGREGATION IN MISSISSIPPI 38 (2015).

[76] *Id.*

[77] David K. Johnson, *LGBTQ Business and Commerce in* LGBTQ AMERICA: A THEME STUDY OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HISTORY 16-1, 16-10 (Megan E. Springate ed. 2016) (describing Julius' in New York City forcing patrons to face the bar lest it be accused of allowing homosexual assembly and closed as a "disorderly house").

[78] Sepper & Dinner, *supra* note 40, at 106.

As the next two Parts explain, the market and dignitary functions of public accommodations laws help explain why doctrine has largely carved out these commercial spaces from the reach of free speech. Conventions of equal-access structure expectations such that service does not communicate a message to consumers and the broader public.

III. FREE SPEECH AND THE CONVENTIONS OF THE CONSUMER MARKET

First Amendment theorists have often puzzled over the boundaries of First Amendment coverage. Speech in schools and public employment, for example, often lies outside the scope of free speech. In commercial settings, laws may target what otherwise might be thought to be covered speech, such as laws requiring disclosure and setting parameters for dealing. Dignitary torts allow plaintiffs to seek damages against speakers.[79]

Courts also have understood public businesses to play a distinct social role, requiring regulation that is largely shielded from First Amendment scrutiny. In *Masterpiece Cakeshop*, for example, Justice Kennedy distinguished public accommodations from realms of freedom of free exercise and expression. He observed that a clergy member would clearly be protected from performing a marriage for a couple, and religious organizations and individuals should be free to hold and "teach the principles that are so fulfilling and so central to their lives and faiths."[80] But the "general rule" was clear: "objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[81] As the Supreme Court held long ago, in this marketplace "open to the public to come and go as they please," the state enjoys broad authority to create rights of public access on behalf of its citizens.[82]

While this article makes no pretense to theorize the First Amendment's scope, it helps clarify why it is that public accommodations laws in particular have long enjoyed a peaceful coexistence with the First Amendment. Consistent with sociological accounts of First Amendment coverage, it argues that public accommodations operate according to

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[79] Frederick Schauer, *The Speech-ing of Sexual Harassment*, *in* NEW DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 349 (Catherine MacKinnon & Reva Siegel eds., 2000) (noting the absence of "moderately workable and well-known doctrinal or theoretical standards to determine the scope of the First Amendment's coverage").

[80] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018) (quoting Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015)) (noting that this exercise of religion "gay persons could recognize and accept without serious diminishment to their own dignity and worth").

[81] *Id.*

[82] Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

fixed social conventions that require service and a modicum of respect from the business toward the consumer. As Amanda Shanor argues, the First Amendment tends not to reach where social norms are cohesive, rather than pluralist, and speech acts are "straightforward in their effect" on the audience.[83] These criteria are particularly likely to exist within commerce. As Daniel Halberstam explains, whereas public debate allows for the construction and challenging of background norms and suffers no bounds, a commercial transaction "does not leave much room for cultural differences or diverging beliefs about the nature of the transacted deal."[84] Engaged in bargaining, the "speakers" seek an agreement, "ultimately objectified in a material transaction[;]" they do not explore each other's beliefs.[85] Constitutional and common law take buyer and seller to share a commitment to the rules governing commercial transactions.[86]

When consumers and proprietors meet in public accommodations—a subset of the commercial world—they too assume a single set of background norms and values. In this "predefined communicative project,"[87] the public accommodation invites all the world to transact business. Because its purpose is to serve the public, equal access is intrinsic to the business. The baseline is that a business will serve "any member of the public who is willing to pay."[88] And, as Parts I and II explained, an expectation of service and respectful treatment attaches.

This taken-for-grantedness of the governing norms is central to the consumer market. Establishing discrimination is relatively straightforward as a result. Unlike in employment, proof that, for example, a black patron was turned away and a white patron was seated would suffice.[89] In *Romer v. Evans*, the U.S. Supreme Court echoed this understanding of rights of equal access, describing them as "taken for granted by most people either because they already have them or do not need them."[90] Indeed, these norms are so uniform among the in-group that when a restaurant or store refuses to sell, consumers demand answers.

Public accommodations may be a space where the First Amendment's hands-off approaches to commercial transactions and to common law torts, respectively, align. As Shanor explains, "the exclusion of

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[83] Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 344–45, 356 (2018).

[84] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 833 (1999).

[85] *Id.* at 833–34.

[86] *Id.* at 834.

[87] *Id.* at 832.

[88] Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 933 (Haw. Ct. App. 2018), *cert. denied*, 139 S. Ct. 1319 (2019).

[89] *See* SUGRUE, *supra* note 24, at 135.

[90] Romer v. Evans, 517 U.S. 620, 631 (1996).

common-law torts safeguards a space of cohesive social norms around what it means to treat others with dignity and respect."[91] For example, Robert Post argues that the tort of invasion of privacy, which has remained largely immune from the First Amendment's reach, does not have purely individualist goals. The tort instead "safeguards rules of civility that in some significant measure constitute both individuals and community."[92] In other words, it redresses individual injury to personality and upholds the norms that generate the community. Common law torts built around equal access and dignified treatment share these functions, constructing a public space of consumption. Originating in these dignitary torts, public accommodations laws promote both individual remedy and market-wide structures.[93]

Unlike plural political debates, public accommodations manifest an orthodoxy of identity-neutral capitalism. Antidiscrimination laws in this area foster low-information exchanges: as a general rule, consumers do not have to provide qualifications to gain access to products. Nor do businesses need to know much about a consumer. Proprietor and patron interact as strangers. The consumer market functions in a race-, sex-, sexual orientation-, and other identity-trait neutral way.[94] Ability to pay becomes the sole concern of the transaction.[95] Dollars are exchanged seamlessly, anonymously, and without need for introducing search or information costs.

The dictates of service and dignity construct a uniform market of full—not just equal—enjoyment. As Hubert Humphrey described Title II, equality in public accommodations meant any customer could go to "the nearest soda fountain," "the nearest restaurant" and take "his pick of the available motels and hotels."[96] More recently, dissenting from the Eighth Circuit's opinion in *Telescope Media v. Lucero*, Judge Kelly explained: these laws do not aim to ensure "access to *some* places of public accommodation. They were passed to guarantee equal access to *all* goods and services otherwise available to the public."[97] Consumers anticipate freely moving and purchasing in all businesses open to the public. There is no room for pluralism as to these ground rules.

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[91] Shanor, *supra* note 83, at 349.

[92] Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959 (1989).

[93] Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70 (2019).

[94] SUGRUE, *supra* note 24, at 135 ("To Cold War-era civil rights activists, the creation of a race-neutral economy was an essential step toward full citizenship.").

[95] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (noting that requirements of nondiscrimination "assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man").

[96] ACKERMAN, *supra* note 67, at 136.

[97] Telescope Media Grp. v. Lucero, 936 F.3d 740, 777 (8th Cir. 2019) (Kelly, J., dissenting).

IV. THE SILENCE OF SERVICE AND THE EXPRESSION OF DENIAL

The unique nature of public accommodations law also adds to our understanding of the "major contest" in the wedding vendor cases—namely, whether the conduct of preparing a wedding service actually communicates anything to the public at large.[98] Until 2019, court after court concluded that public accommodations law regulated wedding vendors' conduct—the baking and sale of a cake, for example. That conduct was not "inherently expressive" so as to be entitled to full First Amendment protections.[99] Regardless of whether the wedding vendors intended to convey a message through their conduct, viewers were unlikely to understand providing a good or service in commerce to express the vendor's message about marriage.[100] Courts worried that any other decision would license "a public accommodation that serves only opposite-sex couples" or other in-groups, and would generate intractable line-drawing problems. [101]

But in 2019, in *Telescope Media*, the Eighth Circuit determined that commercial videography of opposite-sex weddings constitutes expressive conduct conveying the business's own views that marriage is "a divinely ordained covenant" between a man and a woman.[102] Requiring service for a same-sex couple—the court said—would instead compel the owners to speak favorably about same-sex marriage.[103] The First Amendment thus barred the application of public accommodation law. The Arizona Supreme Court soon followed, granting a stationary company protection under the Arizona Constitution.[104] Justices Thomas

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[98] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1225 (Wash. 2019).

[99] Elane Photography, LLC v. Willock, 309 P.3d 53, 68 (N.M. 2013); Gifford v. McCarthy, 137 A.D.3d 30, 42 (N.Y. App. Div. 2016); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 438–39 (Ariz. Ct. App. 2018) ("The items [calligraphers] would produce for a same-sex or opposite-sex wedding would likely be indistinguishable to the public."), *rev'd*, 448 P.3d 890, 895 (Ariz. 2019); *Arlene's Flowers*, 441 P.3d at 121; Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017).

[100] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1750 (2018) (Ginsburg, J., dissenting) ("When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings.").

[101] *Telescope*, 936 F.3d at 763 (Kelly, J., dissenting); *see also Arlene's Flowers*, No. 13-2-00871-5, 2015 WL 720213, at *27 (Wash. Super. Feb. 18, 2015) ("[T]here is no slope, much less a slippery one, where 'race' and 'sexual orientation' are in the same sentence of the statute, separated by only three terms: 'creed, color, national origin . . . .'"). Scholars supporting objectors sometimes argue that "weddings" constitute the limiting factor for free speech claims. But objections frequently have involved instances where the couple had already wed (*Masterpiece Cakeshop*) or where the couple was not marrying but holding a commitment ceremony (*Elane Photography*). This argument further ignores that the bakery in *Masterpiece Cakeshop* denied a range of pre-made baked goods to a same-sex couple. *See Masterpiece Cakeshop*, 138 S. Ct. at 1726.

[102] *Telescope*, 936 F.3d at 751.

[103] *Id.* at 752.

[104] *Brush & Nib Studio*, 247 Ariz. at 303.

and Gorsuch have already expressed their opinion that the sale of custom wedding cakes is expressive conduct that antidiscrimination law cannot reach.[105] The Supreme Court is likely to take up the issue in the near future.[106]

In this kind of litigation, courts have typically presumed a symmetry between the ability of service and denial to communicate. The Supreme Court of Washington, for example, noted that even the objecting florist admitted that service often did not communicate her endorsement of a wedding.[107] She did not understand herself to endorse atheism or Islam by arranging flowers for an atheist or Muslim wedding. Likewise, the court said, refusal could occur for various reasons—ranging from religious objection to insufficient stock.[108] To the court, service and denial were equally non-communicative.

The long-standing conventions governing public commerce, however, indicate an asymmetry in the expressiveness of service and denial. A public business fails to express any message, let alone a particularized one, through mere service, because we expect paying customers to be served. The audience of other patrons discerns no communication from a business pouring a coffee, selling a cake, or cutting a person's hair. We take for granted that the first person in line will be served, and the wedding vendor will provide its usual goods if available.

The provision of service requires no reason giving. When a server brings a meal to a table, they don't explain that it's because "you seem like a nice Christian family." When a photographer agrees to document a wedding ceremony, they don't tell you that they support your wedding or opposite-sex weddings more generally. You understand that the price is right and the date is available.

The fact that a business sells an item to someone does not imply its endorsement. To be sure, serving a particular person might feel expressive of endorsement to the vendor—the baker, florist, etc. But to the majority in-group, service doesn't communicate approval of the customer, of their use of the product, or much of anything else. With fleeting interactions, customers and businesses typically experience little intimacy and acquire little knowledge about one another.[109] Even with

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[105] *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgement).

[106] A cert petition in *Arlene's Flowers* is currently pending. *See* Petition for Writ of Certiorari, State v. Arlene's Flowers, Inc., 441 P.3d 1203 (2019) (No. 19-333).

[107] State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1226 (Wash. 2019).

[108] *Id.* at 1226.

[109] Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 933 (Haw. Ct. App. 2018) ("With respect to selectivity, duration, and congeniality, Aloha B&B generally is not selective about whom it will accept as customers, provides short-term, transient lodging, and does not form lasting relationships with customers."), *cert. denied*, 139 S. Ct. 1319 (2019).

wedding vendors hired for a special day in the lives of the celebrants, the duration of the relationship is quite limited in time, space, and depth. The offer to perform is made without exclusiveness, to one and all. Under these circumstances, the proprietor and customers are not associated with one another or united by any particular views.[110] Whether or not the goods are artistic—a tattoo or handwritten invites—the public's expectations and perceptions remain the same.[111]

To the extent service expresses anything, it might send the message that the customer is entitled to be treated like any other customer—as Sam Bagenstos has pointed out.[112] As he notes, if this is right, then whenever a retail business provides a good, regardless of what is sold, it engages in expression. While Bagenstos sees this message as forceful, it seems muted in contemporary consumer marketplaces. When the social norm was to subjugate a minority group, a business that seated people side by side would indeed powerfully communicate a message of social equality both to the marginalized group and to the audience of consumers. After the enactment of civil rights protections, however, this same act might have expressed mere legal compliance. And with the passage of time and the shift in consumer expectations, service has come to reflect the background norm of treating consumers with dignity and respect. It signifies, as I have suggested, the intrinsic nature of a business organized around serving the public—namely, that all paying customers are served. With decades of experience of the Civil Rights Era settlement, to the extent that service communicates a message of equality, it does so in a whisper.

Denial, by contrast, communicates loudly to both the would-be consumer and a larger audience. Denied flowers for his wedding to Robert Ingersoll, Curt Freed understood the message that "our business is no longer good business."[113] Rejected by a bed and breakfast on their vacation, unmarried same-sex couple Diane Cervelli and Taeko Bufford heard that they were "inferior and unworthy of equal treatment in even a routine business transaction."[114] When a business open to the public

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[110] *See also* Bell v. Maryland, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight."); City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (rejecting argument that "patrons of the same business establishment" are engaged in constitutionally protected association).

[111] Arguably, where expressive goods and services are involved, any audience is more—not less—likely to treat any message as that of the patron, not the seller. We tend to think that the bearer communicates their own message through their tattoos and that the host conveys the message of the invitation ("come celebrate with us").

[112] Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1235–36 (2014).

[113] *Arlene's Flowers*, 441 P.3d at 1211.

[114] Complaint for Injunctive Relief, Declaratory Relief, and Damages, Cervelli v. Aloha Bed &

turns a person away, it powerfully expresses—as these couples understood—that the person does not merit status as a consumer.

Nor does denial invite multiple interpretations as service does. While service requires no justification, denial calls for explanation. Because a refusal to serve or seat a patron is unexpected in light of social norms governing public businesses, it often prompts the would-be patron to demand a reason. The vendor must explain that stock is depleted, a table reserved, or the shop closed.[115] In the absence of a reason that applies to all consumers, the message and meaning of denial is one's inferiority in the consumer marketplace.[116]

Of course, the free speech claims in current litigation could be equally framed as either a denial or a provision of service. A wedding vendor could be said to engage in expressive conduct (or speech) through withholding a cake or invitations—sending a message that the would-be patron's wedding is lesser. But objectors to same-sex marriage have explicitly framed their expression in terms of service to customers who they prefer not to serve. They argue that nondiscrimination requires them to speak in favor of same-sex marriage. On this construction, it is service to the couple—whether preparing a cake or arranging flowers—that communicates approval or endorsement.

The asymmetry between the messages of service and denial help explain this choice. While service might communicate quietly or not at all, denial as expression sends a clear message of gay inferiority. The desire to express that message would make these business owners less-than-sympathetic standard-bearers for the movement for exemptions from public accommodations laws.

Courts moreover might be more concerned about where exemptions framed to authorize denials of service would lead. Objectors paint their requested free speech exemption as "narrow," applying only to the production of expressive or artistic services.[117] But denial of goods and services—not just expressive goods—powerfully communicates in a way

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Breakfast, 415 P.3d 919, 935 (Haw. Ct. App. 2018) (No. 11-1-3103-12), 2011 WL 10604318.

[115] Public accommodations sometimes—probably often—dissimulate. Historically, they also have used neutral "reasons" that all understood applied only to the disfavored group. Johnson, *supra* note 77, at 16-9 (describing a gay bar turning away African American patrons by using "reserved" signs on tables); Sepper & Dinner, *supra* note 40, at 80 (documenting the use of "reserved" signs to prevent women from sitting).

[116] Indeed, asking for reasons itself can be humiliating for patrons who suspect, but are not sure that they were refused service for discriminatory reasons. My thanks to James Gao for this point.

[117] *Arlene's Flowers*, 441 P.3d at 1228 (quoting objector's argument that the exception will be "narrow," applying to "businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression as opposed to gift items, raw products, or prearranged [items]"); Elane Photography, LLC v. Willock, 309 P.3d 53, 71 (N.M. 2013) ("Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.").

that the provision of even expressive goods does not. Under the conventions that govern the consumer market today, denial speaks louder than service.

CONCLUSION

The line between speech and conduct may not always be clear. But states have long required nondiscriminatory service by public accommodations. Such obligations have co-existed peacefully with *West Virginia Board of Education v. Barnette's* invocation that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[118] The application of public accommodations laws to commercial sales of even expressive goods and services has not, *pace* the Arizona Supreme Court, "compel[led] uniformity of beliefs and ideas."[119] Indeed, public accommodations laws expressly leave the social, private, and political free of restraint. Business owners retain their "individual freedom of mind" and the component rights to speak and refrain from speaking.[120] Only in the licensed, regulated, and surveilled commercial marketplace will duties of equal access apply.

Nor is public accommodation law aimed—as Justice Thomas opined—"to produce a society free of . . . biases" against the protected groups.[121] Its overarching goal is to secure a consumer market of freely moving people and currency. Given power imbalances between business and individual consumers, it requires public-facing businesses to show a modicum of civility and respect for dignity of would-be patrons.

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[118] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Leslie Kendrick, *A Fixed Star in Shifting Skies:* Barnette *and Civil Rights Law*, 13 FIU L. REV. 729 (2019) (arguing that that *Barnette* applies to commercial cake baking "is to reconfigure what has been considered a purely commercial realm subject to civil rights laws into a hodge-podge where some commercial actors can claim immunity to the extent that they can characterize their activities as speech" and describing this as "an extraordinary step").

[119] Brush & Nib Studio, LC v. City of Phoenix, 247 Ariz. 269, 303 (2019) (describing public accommodation law as "effectively cut[ting] off Plaintiffs' right to express their beliefs about same-sex marriage by telling them what they can and cannot say").

[120] Wooley v. Maynard, 430 U.S. 705, 717 (1977) (quoting *Barnette*, 319 U.S. at 637); *see also* Helen Norton, *You Can't Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech*, 11 WM. & MARY BILL RTS. J. 727, 750 (2003) ("[T]ransactional speech and discriminatory conduct are closely linked, while preserving other avenues for decisionmaker expression outside the transactional context.").

[121] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1747 (2018) (alteration in original).

The expansionist project of free speech doctrine has public accommodations laws within its sights. If businesses prevail in their constitutional claims, a number of serious questions arise: What kind of a consumer market will we be left with? In the absence of a shared expectation of service, will we see contestation over norms of the consumer market as we did decades ago? Or will the market become balkanized with stores organized around specific religious or other values rather than abstract customers and their dollars? Will gay identity and relationships be sent back into the closet to be able to access consumer goods? And will other civil rights protections in employment, housing, and education remain unscathed? Is public accommodations discrimination sufficiently distinct in its focus on dignity and its impact on realms of shallow, transient, arms-length relations? Are its "evils" so "unique" that we might distinguish the rest of civil rights law?

What seems clear is that a constitutional privilege against public accommodations law would destabilize longstanding conventions of service and civility in the consumer marketplace. Exceptions—however the lines are drawn—would undermine an identity-neutral marketplace where dollars and people flow freely without the friction of information and search costs. They quite literally would reduce the space for individual dignity.

Lapidation and Apology

Cass R. Sunstein[†]

ABSTRACT

Groups of people, outraged by some real or imagined transgression, often respond in a way that is wildly disproportionate to the occasion, thus ruining the transgressor's day, month, year, or life. To capture that phenomenon, we might repurpose an old word: lapidation. Technically, the word is a synonym for stoning, but it sounds much less violent. It is also obscure, which makes it easier to enlist for contemporary purposes. Lapidation plays a role in affirming, and helping to constitute, tribal identity. It typically occurs when a transgressor is taken to have violated a taboo, which helps account for the different people and events that trigger left-of-center and right-of-center lapidation. One of the problems with lapidation is that it often accomplishes little; it expresses outrage, and allows people to signal their identity, but does no more. Victims of lapidation might be tempted to apologize, but apologies can prove ineffective or even make things worse, depending on the nature of the lapidators. Some forms of lapidation can and should be regulated, consistent with First Amendment principles, but the primary responses must come from the private sector.

This is not a sermon, not exactly, but we begin with a passage from the Gospel according to John:

> *Jesus went unto the mount of Olives.*
> *And early in the morning he came again into the temple, and all the people came unto him; and he sat down, and taught them.*
> *And the scribes and Pharisees brought unto him a woman taken in adultery; and when they had set her in the midst,*
> *They say unto him, Master, this woman was taken in adultery, in the very act.*
> *Now Moses in the law commanded us, that such should be stoned: but what sayest thou?*
> *This they said, tempting him, that they might have to accuse him. But Jesus stooped down, and with his finger wrote on the*

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> *ground, as though he heard them not.*
> *So when they continued asking him, he lifted up himself, and said unto them, He that is without sin among you, let him first cast a stone at her.*
> *And again he stooped down, and wrote on the ground.*
> *And they which heard it, being convicted by their own conscience, went out one by one, beginning at the eldest, even unto the last: and Jesus was left alone, and the woman standing in the midst.*
> *When Jesus had lifted up himself, and saw none but the woman, he said unto her, Woman, where are those thine accusers? hath no man condemned thee?*
> *She said, No man, Lord. And Jesus said unto her, Neither do I condemn thee: go, and sin no more.*[1]

The English language needs a word for what happens *when a group of people, outraged by a real or imagined transgression, responds in a way that is disproportionate to the occasion*, thus ruining the transgressor's day, month, year, or life.[2] I propose that we repurpose an old word: *lapidation*.[3] Technically, the word is a synonym for stoning, but it sounds much less violent. That is a major advantage, but as I understand it here, lapidation need not be literally violent. It might include threats, or provoke threats, and it might even provoke or include violence, but it is hardly actual stoning. The proposed term is also obscure, which is again an advantage; its obscurity makes it easier to enlist it for contemporary purposes.

To see what I have in mind, consider some diverse examples:

1. Ronald Sullivan is a Harvard Law professor who joined the team of lawyers defending Hollywood producer Harvey Weinstein against charges of rape and sexual abuse. A group of students rallied and protested against him, attacked his character, and called for his removal as Faculty Dean at Winthrop House. Their call succeeded. Harvard ended Sullivan's deanship.[4]

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[1] *John* 8:1–11.

[2] It is of course fair to ask what counts as a disproportionate response, and who decides whether it does. I bracket that question here and simply assume that the response counts as disproportionate.

[3] *See generally* Darius Rejali, *Studying a Practice: An Inquiry into Lapidation*, 18 CRITIQUE: CRITICAL MIDDLE E. STUD. 67 (2001).

[4] *See* Kate Taylor, *Harvard's First Black Faculty Deans Let Go Amid Uproar Over Harvey Weinstein Defense*, N.Y. TIMES (May 12, 2019), https://www.nytimes.com/2019/05/11/us/ronald-

2. Noah Carl is a young sociologist who was awarded a fellowship at Cambridge University's St. Edmund's College. Carl has published research on trust and intelligence in well-regarded journals. He has also written some shorter and less formal papers, involving immigration and racial differences, that some readers found offensive. An investigation was duly undertaken, and Carl was asked to leave St. Edmund's.[5]

3. Representative Ilhan Omar made some statements, provocative or perhaps worse, about Israel and its American supporters. The comments provoked a flood of outrage.[6] She ultimately received numerous death threats.[7]

4. At various points in her career, Senator Elizabeth Warren has claimed that she has Native American ancestry. Those claims affected her candidacy for presidency, in part because President Donald Trump refers to her as "Pocahontas."[8]

5. In 2017, former Senator Al Franken was accused of having engaged in sexually aggressive behavior, including unwanted touching. He was essentially forced to resign from the U.S. Senate.[9]

Each of these cases involves lapidation as I understand it here. In some cases, lapidation is based on a lie, a mistake, or a misunderstanding. In such cases, people are lapidated even though they did nothing wrong.[10] They might have made some kind of misstatement and so have been misinterpreted by reasonable listeners. Even so, they did not intend to say what they were heard to say.

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sullivan-harvard.html [https://perma.cc/5VE2-BSRE].

[5] *See* Richard Adams, *Cambridge College Sacks Researcher over Links with Far Right*, GUARDIAN (May 1, 2019), https://www.theguardian.com/education/2019/may/01/cambridge-university-college-dismisses-researcher-far-right-links-noah-carl [https://perma.cc/S6GP-EFU6].

[6] *See* Zack Beauchamp, *The Ilhan Omar Anti-Semitism Controversy, Explained*, VOX (Mar. 6, 2019), https://www.vox.com/policy-and-politics/2019/3/6/18251639/ilhan-omar-israel-anti-semitism-jews [https://perma.cc/8PWQ-GM95].

[7] *See* Associated Press, *Rep. Ilhan Omar Says She's Getting More Death Threats After Trump Tweet*, L.A. TIMES (Apr. 15, 2019), https://www.latimes.com/politics/la-na-pol-ilhan-omar-trump-tweet-9-11-story.html [https://perma.cc/LW4Y-3XVQ].

[8] *See* Gregory Krieg, *Here's the Deal with Elizabeth Warren's Native American Heritage*, CNN (Oct. 15, 2018), https://www.cnn.com/2016/06/29/politics/elizabeth-warren-native-american-pocahontas/index.html [https://perma.cc/888K-2VAC].

[9] *See* Elana Schor & Seung Min Kim, *Franken Resigns*, POLITICO (Dec. 7, 2017), https://www.politico.com/story/2017/12/07/franken-resigns-285957 [https://perma.cc/JJ4H-E6G7].

[10] Readers can make up their own minds about the category in which the cases in text should be taken to fall.

In other cases, the transgression is real, and lapidators have a legitimate concern. They are right to complain and to emphasize that people have been saddened, hurt, or wronged. The problem is that they lose a sense of proportion. They want heads to roll. Someone makes a mistake, or a foolish or offensive comment, and lapidators come out in force, often in a state of frenzy. Usually they are led by *lapidation entrepreneurs*, who have their own agenda. They might be concerned with self-promotion. They might be concerned with promoting a cause or with defeating an opponent, for whom the lapidation victim is taken to stand, or can be made to stand. They may want to make the occasion for lapidation stand for the opponent, so that the opponent, or the cause for which they stand, *is* that occasion. ("He is Spartacus," more or less.) Lapidation entrepreneurs may unleash something horrific. That might be intentional.

To be sure, we can ask hard questions about the precise definition. If there is a small burst of outrage on campus or on social media, ought we to speak of lapidation? If people receive threats in the mail, have they been lapidated? The best answer is that while some cases are de minimis or a matter of trivial concern, lapidation can occur even when the number of participations is low, and the outcry is not exactly loud. Even if a few stones are thrown, people might get hurt. At the very least, they might feel threatened or despised. In some cases, they might lose their reputation, their jobs, their opportunities, and their friends; they might be in some sense "canceled."[11]

Can lapidation be justified? As defined here, it cannot be. No one should doubt that groups of people, offended or outraged by statements or actions, can be entirely right. What they seek, and what they do, may not be disproportionate. Recall that lapidation, as understood here, occurs when a response to a statement or action is disproportionate. We might therefore have hard cases, in which reasonable people dispute whether lapidation is involved. What Senator Franken did was worse than inappropriate. But it might well be doubted that he should have been forced to resign.

In ancient times, people were lapidated for adultery and idolatry.[12] This is a clue to what triggers the practice. Like its old namesake, contemporary lapidation typically occurs when a person or institution *has violated a taboo*. Lapidators operate as a kind of private police force,

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[11] *See, e.g.*, Brakkton Booker, *White Woman Who Called Police on Black Bird-Watcher in Central Park Has Been Fired*, NPR (May 26, 2020), https://www.npr.org/2020/05/26/862230724/white-woman-who-called-police-on-black-bird-watcher-in-central-park-placed-on-le [https://perma.cc/9KFF-5V88].

[12] *See* Vincent J. Rosivach, *Execution by Stoning in Athens*, 6 CLASSICAL ANTIQUITY 232, 232 (1987); Catherine E. Winiarski, *Adultery, Idolatry, and the Subject of Monotheism*, 38 RELIGION & LITERATURE 41, 44 (2006).

enforcing some intensely held moral or political commitment that (in their view) is at risk.[13] That explains why lapidation comes in such diverse shapes and sizes, and why lapidation helps signal and constitute tribal identity. People with different moral or political values, and different kinds of affiliations, will be inclined to lapidate in accordance with those values and affiliations. Cases that seem, to some people, to be self-evidently justified and proportionate responses will seem, to other people, to be unambiguous lapidations.

Left-of-center lapidators typically point to what they see as racist, sexist, and homophobic behavior.[14] #MeToo produced some lapidation. To be sure, some of the #MeToo movement was justified and hence does not count as lapidation at all; consider the case of Harvey Weinstein.[15] But other cases are much less clear. Identification of those cases would produce a great deal of controversy, but if what is involved is highly inappropriate flirting, and a suggestion of a fully consensual relationship (without any hint of sanctions for a refusal), a very strong collective response might plausibly be counted as lapidation.

Right-of-center lapidators tend to focus on what they see as disloyalty, disrespect for authority, a despicable lack of patriotism, or hypocrisy (a particular favorite, for especially interesting reasons). In his work on moral foundations, Jonathan Haidt contends that conservatives place a far greater emphasis than liberals on authority, loyalty, and purity.[16] Haidt's work illuminates the distinctly right-of-center nature of some kinds of lapidation. When someone suggests some kind of disloyalty, particularly to the nation itself, right-wing lapidators tend to come out in force.

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George Orwell's *1984* is unquestionably the greatest fictional account of lapidation – the most astute, the most precise, the most attuned to human psychology.[17] One of its defining chapters explores the Two Minutes Hate, which helps to establish and maintain Big Brother's regime.[18] As Orwell describes it, the Hate begins with a flash of a face on a large screen. It is Emmanuel Goldstein, the Enemy of the People.

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[13] *See, e.g.*, Robert F. Worth, *Crime (Sex) and Punishment (Stoning)*, N.Y. TIMES (Aug. 21, 2010), https://www.nytimes.com/2010/08/22/weekinreview/22worth.html [https://perma.cc/J9RM-F3D7].

[14] *See, e.g.*, Booker, *supra* note 11.

[15] *See generally Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (May 24, 2019), https://www.bbc.com/news/entertainment-arts-41594672 [https://perma.cc/7DNM-N8Y4].

[16] *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2014).

[17] *See* GEORGE ORWELL, 1984 15–20 (1949).

[18] *Id.*

Goldstein produces fear and disgust. He was once a leader in the Party, but he abandoned it and became a counterrevolutionary. Condemned to death, he managed to escape and to disappear. "He was the primal traitor, the earliest defiler of the Party's purity."[19] Goldstein was ultimately responsible for heresies and treacheries of all kinds. In the first thirty seconds of the Hate, Goldstein's voice is heard, as he denounces the party and calls for freedom of multiple kinds.[20]

The result is to produce rage and fear in the audience, and to do so immediately. Somehow Goldstein managed to remain a serious threat. Wherever he was, he commanded a kind of shadow army, a network of conspirators. He was the author of a terrible book, including all the heresies.[21]

In the second minute of the Hate, people become frenzied. They leap and shout, trying to drown out Goldstein's maddening voice. Children join in the shouting. Orwell's hero, Winston, finds himself unable to resist. He too begins to shout, and also to kick violently. On his part, this was no mere show. "The horrible thing about the Two Minutes Hate was not that one was obliged to act a part, but, on the contrary, that it was impossible to avoid joining in."[22] No pretense was necessary: "A hideous ecstasy of fear and vindictiveness, a desire to kill, to torture, to smart faces with a sledgehammer, seemed to flow through the whole group of people like an electric current, turning one even against one's will into a grimacing, screaming lunatic."[23]

Despite loathing Big Brother, Winston felt his feelings "changed into adoration, and Big Brother seemed to tower up, an invincible, fearless protector, standing like a rock" against various threats. And as his hatred mounts, it turns sexual. Winston fantasizes about raping and murdering the girl who is standing behind him.[24]

At that point, the Hate rises to its climax. Goldstein's voice becomes that of an actual bleating sheep, and for a moment, his face is transformed into that of a sheep. Big Brother's face then fills the screen, powerful, comforting, and mysteriously calm. Big Brother's actual words are not heard, but they are felt, as a kind of reassurance. At that point the Party's three slogans appear on the screen:

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[19] *Id.* at 15.

[20] *See id.* at 16.

[21] *Id.* at 17.

[22] *Id.* at 17–18.

[23] *Id.* at 18.

[24] *Id.* at 18–19.

WAR IS PEACE

FREEDOM IS SLAVERY

IGNORANCE IS STRENGTH.[25]

A member of the audience seems to pray to Big Brother. For thirty seconds the audience chants in his honor, in "an act of self-hypnosis, a deliberate drowning of consciousness by means of rhythmic noise."[26] Winston chants with the rest, for "it was impossible to do otherwise."[27]

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What makes lapidation possible? A lot of the answer is provided by the process of "group polarization," which means that when like-minded people speak with one another, they tend to go to extremes.[28] (By like-minded people, I mean people who tend to agree with one another.) More specifically, groups of people, engaged in deliberation together, typically end up in a more extreme position in line with the tendencies of group members before deliberation began. This is the phenomenon known as group polarization. Group polarization is the usual pattern with deliberating groups, having been found in numerous studies involving many countries.[29]

It follows that a group of people who think that immigration is a serious problem will, after discussion, think that immigration is a horribly serious problem; that those who dislike the Affordable Care Act will think, after discussion, that the Affordable Care Act is truly awful; that those who approve of an ongoing war effort will, as a result of discussion, become still more enthusiastic about that effort; that people who dislike a nation's leaders will dislike those leaders quite intensely after talking with one another; and that people who disapprove of the United States, and are suspicious of its intentions, will increase their disapproval and suspicion if they exchange points of view. Indeed, there is specific evidence of the latter phenomenon among citizens of France.[30] When like-minded people talk with one another, they usually end up thinking a more extreme version of what they thought before they started to talk. It should be readily apparent that enclaves of people, inclined to rebellion or even violence, might move sharply in that

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[25] *Id.* at 19.

[26] *Id.* at 20.

[27] *Id.*

[28] *See* Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175, 176 (2002). I draw on that treatment here.

[29] ROGER BROWN, SOCIAL PSYCHOLOGY 200–48 (2d ed. 1986)

[30] *See id.* at 224.

direction as a consequence of internal deliberations. Political extremism is often a product of group polarization.

Suppose that people begin with the thought that Ronald Sullivan probably ought not to have agreed to represent Harvey Weinstein, or that Al Franken did something pretty bad. If so, their discussions will probably make them more unified and more confident about those beliefs, and ultimately more extreme. A key reason involves the dynamics of outrage.[31] Whenever some transgression has occurred, many people want to appear at least as appalled as others in their social group.[32] That can transform mere disapproval into lapidation.

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Why do people lapidate? Consider this claim from Sandra Cason, a protestor in the 1960s:

> If I had known that not a single lunch counter would open as a result of my action I could not have done differently than I did. If I had known violence would result, I could not have done differently than I did. I am thankful for the sit-ins if for no other reason than that they provided me with an opportunity for making a slogan into a reality, by turning a decision into an action. It seems to me that this is what life is all about.[33]

This is a claim about the *expressive* nature of some political action. It captures something important about lapidation—a sense that consequences are irrelevant. Note Cason's proud suggestion that she "could not have" acted differently even if her action were futile, and even if her action were productive of violence and in that sense perverse.

We can better understand the expressive nature of some political actions by reference to a distinction, often made within behavioral science, between two families of cognitive operations in the human mind: System 1, which is fast, automatic, and intuitive, and System 2, which is slow, calculative, and deliberative.[34] When people recognize a smiling face, add two plus two, or know how to get to their bathroom in the middle of the night, System 1 is at work. When people first learn to drive, or multiply 563 times 322, people must rely on System 2. System 1 tends to be expressive; System 2 tends to focus on consequences.

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[31] *See* Craig McGarty et al., *Collective Action as the Material Expression of Opinion-Based Group Membership*, 65 J. SOC. ISSUES 839, 851 (2009).

[32] *See* David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000).

[33] JAMES MILLER, DEMOCRACY IS IN THE STREETS: FROM PORT HURON TO THE SIEGE OF CHICAGO 52 (1987).

[34] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

System 1 is also associated with identifiable behavioral biases. People often show "present bias," focusing on the short-term and downplaying the future.[35] For better or for worse, most people tend to be unrealistically optimistic.[36] In assessing risks, people use heuristics, or mental shortcuts, that often work well, but that sometimes lead them in unfortunate directions.[37] With respect to probability, people's intuitions go badly wrong, in the sense that they produce serious mistakes, including life-threatening ones.[38] Lapidation is typically a matter of System 1—quick, automatic reaction to a real or perceived transgression.[39] In behavioral terms, Cason's action was the product of System 1.

Compare these words from Herbert Simon:

> We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions.[40]

Lapidation is often expressive, not based on a judgment about its effects on institutions. When people lapidate, they may think that they are achieving something important. Even if lapidation is a grossly disproportionate response to the action in question, in the sense that it is based on a lie or a falsehood, or is an excessive response to an admitted wrong, maybe lapidators are bringing about desirable social change. By targeting someone, and making that person stand for some kind of evil, lapidators might be able to attract widespread attention and spur reform.

At a minimum, lapidators may succeed in ruining a reputation or forcing a resignation. When their cause is just, that may be valuable and in a sense good, and it might lead to much more. But if social change is the goal, it is reasonable to ask whether the immense amount of time and emotional energy expended on lapidation would be better spent elsewhere—especially because a real person, or real people, are being

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[35] For references and discussion, see CASS R. SUNSTEIN, WHY NUDGE?: THE POLITICS OF LIBERTARIAN PATERNALISM (2015).

[36] *See* TALI SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN (2011).

[37] *See* Kahneman, *supra* note 34.

[38] For a powerful demonstration, see Daniel L. Chen et al., *Decision-Making Under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires*, 131 Q.J. ECON. 1181 (2014).

[39] *See* Daniel Kahneman & Cass R. Sunstein, *Indignation: Psychology, Politics, Law* (John M. Olin Law & Economics, Working Paper No. 36, 2000).

[40] *See* HERBERT A. SIMON, MODELS OF MY LIFE 281 (1991).

hurt in the process. Recall that by definition, lapidation is a disproportionate response to the action in question, and in general, it is best to live in accordance with the principle that the good ends do not generally justify bad means.

For its victims, lapidation can be a horror, a kind of living nightmare. In some cases, they receive death threats. Even when their security is not at risk, they carry a stamp of shame. They may never fully recover.

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In response, what should the objects of lapidation do? A tempting answer is simple: They should apologize. Put to one side the moral question and assume that their goal is solely strategic: to make it stop. Is an apology a good idea?

It might be. An apology might give the lapidators a sense that they have won. At least this is so if the apology is taken as not merely an admission of wrongdoing but also as a kind of self-abasement, groveling, a way of begging for forgiveness.[41] Lapidators might think: We have achieved what we want to achieve. Now let us move on.

But there is an alternative possibility. Lapidators might smell blood. They might think that they have received the equivalent of a confession, which means that lapidation will continue until there is some kind of execution (a retreat from public life, a forced resignation, even a criminal prosecution). Everything depends on the distribution of emotions and beliefs on the part of lapidators – on how merciful and focused they are inclined to be.

It is important and true that lapidators might feel, or be, quite weak, or relatively powerful, and they might be using whatever tools they have. They might think that collective outrage is all they have. They might be right. But the consequence might be to ruin individual lives, for a short or long time, and the victims of lapidation might not be able to do much about it.

There is not a great deal of empirical work on this topic, but some evidence suggests that this admittedly vague account is broadly correct, and that apologies will often fail. Richard Hanania conducted an experiment in which respondents were given two versions of real-life events in which public figures made controversial statements (and were lapidated).[42] In one version, the offender apologized; in the other, he did not.

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[41] *Cf.* Michael P. Haselhuhn et al., *How Implicit Beliefs Influence Trust Recovery*, 21(5) PSYCHOL. SCI. 645 (2010).

[42] *See* Richard Hanania, *Does Apologizing Work? An Empirical Test of the Conventional Wisdom*, BEHAVIOURAL PUB. POL'Y (2015), https://www.cambridge.org/core/journals/behavioural-public-policy/article/does-apologizing-work-an-empirical-test-of-the-conventional-

The first event involved Senator Rand Paul, who seemed to suggest that the Civil Rights Act of 1964 was wrong to forbid private discrimination on the basis of race.[43] The second event involved Lawrence Summers, at the time president of Harvard University, who offered controversial statements about why there were so few women scientists and engineers.[44]

For example:

Version 1 (Apologetic):

> *In response, Rand Paul quickly took an apologetic tone and backtracked, saying he would never repeal the Civil Rights Act. In the years since, observers argue that he has been bending over backwards to make up for his original statements, particularly through minority outreach. He now says he does not question any aspect of the Civil Rights Act. Paul won his Senate seat, and still serves to this day*.[45]

Version 2 (Non-apologetic):

> *In the days after the controversy, Paul refused to explicitly apologize for his statements. He went on the offensive, claiming that his opponents were engaging in unfair political attacks. In response to one interviewer, he said "What is going on here is an attempt to vilify us for partisan reasons. Where do your talking points come from?" Paul won his Senate seat, and still serves to this day*.[46]

After respondents were shown one or the other version of the story, they were initially asked: "How offensive did you find Paul's comments when reading about them?" They were also asked whether the controversy made them less likely to vote for Paul. For Summers, the experiment was similar, except respondents were asked, "Should Summers have faced negative consequences for his statements?"[47]

For Paul, the apology had no effect in aggregate. For liberals, the apology appeared to have a negative effect, but it fell short of

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wisdom/D34F1D89E6FF6A6E32C22C75F0C5FE24 [https://perma.cc/5N32-46C4].

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

significance. For Summers, the apology turned out to have a (significant) negative effect in aggregate. Disaggregating across groups in the Summers case, the negative effect was especially large among women and liberals; there was no significant effect one way or the other among men, conservatives, and moderates. For both Summers and Paul, the effect of an apology was to make women more supportive of punishment, but there was no effect on men. There was *no* group, in either case, that was less inclined to punish the offender as a result of an apology.[48]

It is not clear how to generalize these intriguing findings. Suppose that a politician offends the political right, by saying (for example) that the United States is a force for evil in the world and should own up to its misdeeds; that those who want to regulate abortion believe in male supremacy, and are seeking to preserve it; that hunting should be banned; or that no white person can possibly understand what it is like to be African American. We might imagine something like the mirror image of the findings just described: Perhaps conservatives would seek more punishment while liberals would be unmoved. Or perhaps an apology would have a beneficial effect, leading people, on average, to be less inclined to favor punishment.

To obtain further perspective on these questions, I conducted a survey on Amazon's Mechanical Turk, presenting four scenarios on a random basis to different groups of 400 Americans, and asking whether an apology would make people more inclined to support a public official, less so, or neither:

1. Suppose that a recent nominee for the position of Secretary of State said, a few years ago, "I think the United States should apologize for the many terrible things that it has done in the world." Suppose that the comment has caused a great deal of controversy. If the nominee said, "I apologize for that statement; it was foolish of me to say that," would you be:

2. Suppose that a presidential candidate said, a few years ago, "People who want to ban abortion just don't care about women." Suppose that the comment has caused a great deal of controversy. If the candidate said, "I apologize for that statement; it was foolish of me to say that," would you be:

3. Suppose that a presidential candidate has been accused, by a number of women, of inappropriate touching—of getting too close to them, of hugging them too much, of hugging them

[48] Hanania, *supra* note 42.

too long. Some of the women have said, "I felt violated." If the candidate said, "I apologize for what I did; it was not right, and I will cease and desist," would you be:

4. Suppose that a nominee for the position of Attorney General said, a few years ago, "Gays and lesbians are violating God's will. Marriage should be between Adam and Eve, not Adam and Steve." Suppose that the comments have become controversial. If the nominee said, "I apologize for that statement; it was offensive, hurtful, and wrong," would you be:

In all four questions, the general tendency was for people to become less rather than more inclined to support a political figure as a result of an apology. In the first question, 41.5 percent said that they would be less inclined to support; 23 percent said that they would be more inclined to support; 35.5 percent said neither. In the second question, 41.5 percent said that they would be less inclined to support; 23 percent said that they would be more inclined to support; 35.5 percent said neither. In the second question, 36.5 percent said that they would be less inclined to support; 19.95 percent said that they would be more inclined to support; 43.55 percent said neither. In the third question, 29.38 percent said that they would be less inclined to support; 24.94 percent said that they would be more inclined to support; 45.68 percent said neither. In the fourth question, 36.84 percent said that they would be less inclined to support; 21.8 percent said that they would be more inclined to support; 41.35 percent said neither.

In a diverse set of cases, then, an apology tended to decrease rather than to increase support for people who said or did offensive things. To be sure, there were interesting demographic differences. In the first question, Democrats were far more likely to be less inclined to support (50.29 percent as opposed to 17.71 percent), whereas Republicans were equally divided (33 percent as opposed to 32 percent), and independents were in the middle (37.19 percent as opposed to 23.97 percent). In the second question, apologies made both Democrats and independents less inclined rather than more inclined to support (42.35 percent/17.87 percent for Democrats, 43/15 for Republicans), whereas Republicans were made more inclined rather than less inclined to support (24 percent less inclined to support, 32 percent more inclined to support). In the third question, both Democrats and Republicans were equally likely to become less inclined or more inclined to support, but puzzlingly, independents were made more inclined to support (42/22). In the fourth questions, Democrats (33/26.9), independents (41.5/13.3), and Republicans (36.5/24) were *all* inclined to be less supportive.

The differences here are intriguing, but the general lesson is clear. Across the relevant populations, apologies did not make people more inclined to support wrongdoers. To be sure, they did affect significant numbers of people in a positive way, and we could certainly devise scenarios in which the most relevant group would be moved in a positive direction by an apology. But to date, we have little evidence for the proposition that apologies are generally effective at decreasing the opprobrium directed at real or imagined wrongdoers.

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Is lapidation protected by the First Amendment? To answer that question, we need to know some details. Are lapidators engaging in libel? Is what they are saying true or false? In my view, the constitutional issue deserves extended attention, with an emphasis on the inadequacies of existing constitutional law.[49] For present purposes, some general points will have to suffice; I will paint with a very broad brush.

There is no lapidation exception to the First Amendment. A vehement but factual attack on a public official or private citizen, not containing falsehoods, will almost certainly receive constitutional protection.[50] Sarcasm and satire are certainly protected, and even if the line is crossed to hatred and rage, the same conclusion follows.[51] It follows that under existing doctrine, a central question—and, usually, the central question—is whether the lapidation contains falsehoods. If it is, it might be defamatory, and regulable under the current constitutional standards, sharply distinguishing between public and private figures.[52] Under the familiar test: For public figures, a lapidator might be held liable if he or she knew that what was said was false, or acted with reckless indifference to the question of truth or falsity.[53] Some lapidations are indeed defamatory, and objects of lapidation can obtain compensation under existing constitutional standards. It is a fair question whether those standards should be rethought in the modern era, so as to allow more people to recover than currently can.[54]

There is also a question whether some forms of lapidation might be counted as "fighting words."[55] By definition, we are speaking of personal

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[49] For a start, see Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. L. & TECH. 388 (2020).

[50] Hustler Magazine, Inc. V. Falwell, 485 U.S. 46, 55 (1988).

[51] *Id.*

[52] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–81 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974).

[53] *Sullivan*, 376 U.S. at 279–81.

[54] For an argument to this effect, see CASS R. SUNSTEIN, LIARS: FREE SPEECH IN AN AGE OF DECEPTION (forthcoming 2021).

[55] *See generally* Chaplinsky v. New Hampshire, 315 U.S. 569 (1942); Gooding v. Wilson, 405

attacks, and even if they do not contain falsehoods, they might amount to a form of bullying, potentially falling within what was, at one point, an unprotected category, and what might still qualify as that.[56] Here, it might seem, is an opportunity for constitutional restrictions on the most extreme forms of lapidation. On the other hand, the fighting words doctrine was created before the post-1960 flowering of free speech doctrine, and it is doubtful that current law would permit much regulation of attacks on public figures that do not contain falsehoods. The reason is that in general, such attacks do not count as fighting words, which means that such figures must respond with their own words, and not by invoking courts.[57] Still, it is a fair question whether some highly personal lapidations can be seen as fighting words; here is an area that deserves further attention.

If lapidation is generally protected by the First Amendment, notwithstanding the multiple harms that it causes, there is all the more reason for private institutions, including social media providers, to reduce or even stop it, including under the rubric of prevention of bullying and also the spread of misinformation.[58] We could easily imagine more aggressive standards, designed to protect against bullying as such. We could also imagine reforms from social media companies, designed to reduce the dissemination of falsehoods that are part and parcel of

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U.S. 518 (1972). Note that the "fighting words doctrine," as it is sometimes called, has not received serious attention from the Supreme Court for many decades. Modern forms of personal attack, and bullying, would appear to justify new attention.

[56] *See Chaplinsky*, 315 U.S. at 572.

[57] *See Hustler Magazine*, 485 U.S. at 57.

[58] *See* Sunstein, *supra* note 49; *see also Community Standards, Bullying and Harassment*, FACEBOOK, https://www.facebook.com/communitystandards/bullying [https://perma.cc/7UCR-XMWT], and in particular this excerpt, which is an excellent start:

> Bullying and harassment happen in many places and come in many different forms, from making threats to releasing personally identifiable information, to sending threatening messages, and making unwanted malicious contact. We do not tolerate this kind of behavior because it prevents people from feeling safe and respected on Facebook.
>
> We distinguish between public figures and private individuals because we want to allow discussion, which often includes critical commentary of people who are featured in the news or who have a large public audience. For public figures, we remove attacks that are severe as well as certain attacks where the public figure is directly tagged in the post or comment. For private individuals, our protection goes further: we remove content that's meant to degrade or shame, including, for example, claims about someone's sexual activity. We recognize that bullying and harassment can have more of an emotional impact on minors, which is why our policies provide heightened protection for users between the ages of 13 and 18.
>
> Context and intent matter, and we allow people to share and re-share posts if it is clear that something was shared in order to condemn or draw attention to bullying and harassment. In certain instances, we require self-reporting because it helps us understand that the person targeted feels bullied or harassed. In addition to reporting such behavior and content, we encourage people to use tools available on Facebook to help protect against it.

Id.

lapidation. To be sure, there are hard line-drawing problems here. But an understanding of the problem of lapidation casts new light on the debate over misinformation on social media,[59] and underlines the importance of new steps to reduce the spread of falsehoods.[60] Community standards might well be rethought with lapidation in mind.

We should not lapidate lapidators. But we might remind them of the words of a great opponent of lapidation: "He that is without sin among you, let him first cast a stone."[61]

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[59] Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146 (2018).

[60] *See* Philip Lorenz-Spreen et al., *How Behavioural Sciences Can Promote Truth, Autonomy and Democratic Discourse Online*, 4 NAT. HUM. BEHAV. 1102 (2020).

[61] *John* 8:1–11.

The Majoritarian Press Clause

Sonja R. West[†]

INTRODUCTION

In early 2018, stories began circulating that something troubling was happening at the United States—Mexico border. The reports claimed that the United States government was separating migrant families and then holding children (as well as adults) by the thousands in crowded, possibly inhumane environments. There were alarming accounts of children who were sick, dirty, hungry, neglected, and sleeping on concrete floors.[1]

Americans, of course, demanded answers: What was happening at these migrant detention centers? Why was it happening? What were the official policies involved? Were the government's actions appropriate? Were they legal? In other words, this was a textbook example of an issue crying out for an "uninhibited, robust, and wide-open"[2] public debate.

But before that could happen, the public needed to know what, exactly, was going on. The limited and sporadic information made it difficult for concerned citizens to understand the issues, and the often-unfamiliar sources behind these reports led to confusion about who or what to believe. What the public needed at this moment, it seemed, was a group of trusted, nongovernmental actors who could shed light on the situation—skilled professionals with the necessary resources to gather the pertinent information and disseminate it broadly. Ideally, these third-party actors would also supplement this information with expert analysis and place it in historical, social, and political context.

In the United States, we are fortunate enough to have such third-party entities—the press. According to Justice Potter Stewart, the press

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[1] *See generally* Simon Romero, et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html [https://perma.cc/2HMM-FXSG]; Caitlin Dickerson, *'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html [https://perma.cc/NB44-K5CX].

[2] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

is "the only organized private business that is given explicit constitutional protection."[3] The First Amendment singles out the press, the United States Supreme Court has explained, because its members serve as the public's "agent[s],"[4] "surrogates,"[5] and "eyes and ears."[6] Yet despite this explicit constitutional shout-out, there was little that journalists could do when the government refused to grant them to access to the migrant detention centers. Indeed, very few members of the press were ever allowed inside the centers,[7] and those who did gain access received only brief, heavily restricted tours that were limited to a small part of the facilities.[8] They also were prohibited from talking to any children or taking photographs or videos.[9]

Thanks to these policies, the public was left without any images of the insides of these centers that were taken by photojournalists.[10] The only available photos, rather, came from an entirely different source—the government. And the government's officially curated images, it turned out, were not of the "horrific"[11] or "tragic"[12] living conditions that some reports had suggested. They instead showed bright-colored bedrooms decked out with stuffed animals,[13] game rooms complete with Ping-Pong and air-hockey tables,[14] and meals of pizza and cookies.[15] The

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[3] Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) (providing an excerpt from an address on November 2, 1974, at the Yale Law School Sesquicentennial Convocation in New Haven, Connecticut).

[4] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 609 (1978).

[5] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (plurality opinion).

[6] Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978).

[7] David Bauder, *Media Fight Access Restrictions on Child Detention Centers*, PBS NEWSHOUR (June 26, 2018), https://www.pbs.org/newshour/nation/media-fight-access-restrictions-on-child-detention-centers [perma.cc/3VRQ-EGJB].

[8] Paul Farhi, *Migrant Children Are Suffering at the Border. But Reporters Are Kept Away From the Story*, WASH. POST (June 25, 2019), https://www.washingtonpost.com/lifestyle/style/migrant-children-are-suffering-at-the-border-but-reporters-are-kept-away-from-the-story/2019/06/24/500313a2-9693-11e9-8d0a-5edd7e2025b1_story.html [https://perma.cc/Q4Q5-Y29Q].

[9] *Id.*

[10] It does not appear that any independent photojournalists have ever been allowed to document the conditions inside one of these facilities. *See* Julia Waldow & Emily Kohlman, *This is Why There Are So Few Pictures of Migrant Children*, CNN (June 20, 2018), https://money.cnn.com/2018/06/20/media/media-press-photos-migrant-children/index.html [perma.cc/H9GG-RBJP].

[11] Isaac Chotiner, *Inside a Texas Building Where the Government is Holding Immigrant Children*, NEW YORKER (June 22, 2019), https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children [https://perma.cc/GU3M-KN5S].

[12] Cedar Attanasio, Garance Burke, & Martha Mendoza, *Attorneys: Texas Border Facility Is Neglecting Migrant Kids*, AP NEWS (June 21, 2019), https://www.apnews.com/46da2dbe04f54adbb875cfbc06bbc615 [https://perma.cc/KM4Q-V39Q].

[13] U.S. Dept. of Health & Human Services, *Bristow VA: IMG_8498*, FLICKR (June 20, 2018), https://www.flickr.com/photos/hhsgov/albums/72157696959343 49 [https://perma.cc/BR3F-8GZQ].

[14] *Id.*

[15] U.S. Dept. of Health & Human Services, *San Diego: 033A5759*, FLICKR (June 20, 2018), https://www.flickr.com/photos/hhsgov/albums/72157698632559615 [perma.cc/LB76-Q9KZ].

government's photos showed children playing soccer, going to classes, and doing crafts.[16]

The news media (and, by extension, the public) can thank the United States Supreme Court for putting them at the mercy of government officials for entry to these centers. In a series of decisions, the Supreme Court has refused to recognize a constitutional right for the press to access to many government-controlled places, including places of detention like jails and prisons.[17] The Court has instead insisted that the press has no unique constitutional rights or protections beyond those awarded to the general public.[18] Of course, journalists do enjoy the same powerful First Amendment protections to speak that we all have,[19] including key safeguards from prior restraints[20] and content-based regulations by the government.[21] But the Supreme Court has repeatedly refused to recognize virtually any unique constitutional protection for the distinct roles of reporters as newsgatherers, government watchdogs, and public informants.

The Court's stance might come as a surprise to some, especially when considered in light of the First Amendment's explicit guarantee of press freedom—a guarantee that mirrors the Constitution's much-celebrated protection for freedom of speech. It might become even more surprising when viewed in light of the historical evidence of the origins of the First Amendment's protections for the freedoms of speech and

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[16] U.S. Dept. of Health & Human Services, *Homestead Florida: 6e9Cb9TgQ5243YlhepVhtA*, FLICKR (June 20, 2018), https://www.flickr.com/photos/hhsgov/albums/72157668713957787 [https://perma.cc/4UMZ-JG6Z].

[17] *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Wash. Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

[18] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 352 (2010) (stating that the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers") (internal quotation marks omitted); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784 (1985) (Brennan, J., dissenting) ("[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."); Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978) (rejecting the argument that newspapers have special immunity from search warrants); Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

[19] *See* Stewart, *supra* note 3, at 633 (noting that the press is "guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause").

[20] *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (striking prior restraint on media coverage of a criminal trial); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (striking prior restraint on publication of the Pentagon Papers); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 723 (1931) (striking prior restraint against anti-Semitic newspaper).

[21] *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 827 (2000) (striking a law requiring cable operators to "scramble" sexually explicit programming); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (striking a law imposing financial burden on works describing author's crimes); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987) (striking a content-based magazine tax).

press. This historical evidence suggests that rather than prioritizing the freedom of speech, as we do today, members of the framing generation were primarily focused on the protection of press freedom. Also, in contrast to how we now tend to think of our First Amendment rights, the historical evidence reveals that early Americans saw press freedom less as a highly individualized right and more as a necessary structural safeguard that protects the community at large. Indeed, the framing generation valued the press because it fulfilled structural roles of public informant and government watchdog—the very same roles that modern journalists fulfill today when they undertake these public-serving activities.[22] Yet despite these historical understandings, the Supreme Court has nonetheless spent much of the last century focusing its attention on the Speech Clause (not the Press Clause) and most often as an individual expressive right (not as a collective structural protection). In other words, when it comes to allowing the Press Clause to fulfill its intended constitutional role as a structural defender of the public's collective interests, it appears that we somehow got off track.

Not only has the Press Clause been overshadowed by the Speech Clause, but it has also been absorbed into the same individual rights paradigm through which we primarily view speech rights. Classifying press freedom as an individually held liberty as opposed to understanding its role as a communally shared protection is problematic. For one, it makes the Press Clause a mere redundancy when it comes to the protection of individual expressive rights, because these rights are now viewed as fully protected by the Speech Clause. But, more importantly, it leaves us with a Press Clause that is powerless to address significant gaps in the constitutional protection of key structural press functions.

This essay thus proposes a new way of thinking about the Press Clause in which we reframe the Clause's primary constitutional role. Rather than continuing to view the Press Clause as merely the Speech Clause's toothless counterpart in the protection of individual expressive rights, I suggest that, for purposes of constitutional analysis, we cede this job entirely to the Speech Clause.[23] Mentally jettisoning off the Press Clause's duties to protect personal expressive rights frees us to focus on its *other* constitutionally assigned task—safeguarding our collective, majoritarian right to a republican form of government. The "Majoritarian Press Clause," as I call this newly energized understanding of the First Amendment's guarantees, advances this shared structural interest by concentrating our attention on the importance of two primary goals: protecting the expansive flow of information to the public

[22] *See infra* notes 34–41 and accompanying text.

[23] *See infra* Part III.

on matters of communal concern and facilitating effective government scrutiny.

I explore these ideas in three parts. First, in Part I, I discuss the historical underpinnings of the First Amendment's Press Clause and the evidence revealing that members of the founding generation valued press freedom as a primary and significant structural protection. In Part II I describe how, contrary to this historical background, the U.S. Supreme Court has instead focused almost exclusively on the Speech Clause as an individual right, effectively leaving the Press Clause with no constitutional role. Finally, in Part III, I explain how the Majoritarian Press Clause can provide a new framework for thinking about press freedom that respects its historic significance, while also working with (rather than against) our modern speech-centered First Amendment jurisprudence.

I. THE HISTORICAL EVIDENCE OF A STRUCTURAL PRESS CLAUSE

To understand the Press Clause's proper role, we start with the historical evidence. When it comes to the question of the Press Clause's original meaning, scholars and historians are sure of one thing—the framing generation cared deeply about protecting press freedom.[24] James Madison referred to liberty of the press as one of the "choicest privileges of the people" and proposed language to make press freedom "inviolable."[25] Thomas Jefferson described it as one of the "fences which experience has proved peculiarly efficacious against wrong."[26] John Adams praised the ways "[a] free press maintains the majesty of the people."[27] The Virginia Declaration of Rights, written by George Mason,

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[24] *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 214–15 (1960) ("Freedom of the press was everywhere a grand topic for declamation."); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983) ("[F]reedom of the press, whatever it meant, was a matter of widespread concern."); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1288 (1998) ("Among the most important of these rights [needing specific protection], Antifederalists contended, were freedom of speech and press, which they characterized as inalienable rights of human nature and invaluable bulwarks against tyranny.").

[25] JEFFERY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 166 (1988) (quoting a letter from James Madison to Edmund Randolph (May 31, 1789) *in* 5 THE WRITINGS OF JAMES MADISON 1787–1790, at 372, 377, 380 (Gaillard Hunt ed., 1904)).

[26] Letter from Thomas Jefferson to Noah Webster (Dec. 4, 1790) *in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 342 (Leonard W. Levy ed., 1966).

[27] WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT 153 (2016) (quoting John Adams *in* CLYDE A. DUNIWAY, THE DEVELOPMENTS OF FREEDOM OF THE PRESS IN MASSACHUSETTS 143–44 (1906)).

declared that "the freedom of the Press is one of the great bulwarks of liberty, and can never be restrained but by despotic Governments."[28]

Beyond this basic understanding of press freedom's historical meaning, however, the picture grows far murkier. Unfortunately, we only have a "sketchy history" of the Press Clause's framing.[29] There is little evidence that the first Congress engaged in any real debate over its meaning or reach,[30] and other potential sources of historical evidence are likewise sparse.[31] Many scholars have concluded that the historical meaning is hazy because, in the words of judicial philosopher Zechariah Chafee, the framers themselves "had no very clear idea as to what they meant by 'the freedom of speech or of the press.'"[32] Benjamin Franklin all but confessed to as much when he described the liberty of the press in 1789 as a freedom "which every Pennsylvanian would fight and die for; tho' few of us, I believe, have distinct Ideas of its Nature and Extent."[33]

History, therefore, gets us only so far in our mission to uncover the proper role of the Press Clause, and this brief essay is not intended to provide a comprehensive overview of the original understanding of press freedoms. Nevertheless, there are two key takeaways from the

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[28] VA. DECLARATION OF RIGHTS of 1776, § 12.

[29] Anderson, *supra* note 24, at 487; *see also* LEVY, *supra* note 24, at 4 ("The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us [as the Free Speech and Press Clause]."); Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 640–41 (1975) ("History casts little light on the question here posed.").

[30] S. DOC. NO. 112–9, at 1128 n.362 (2013); Anderson, *supra* note 24, at 485–86.

[31] Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 18 (2011) (noting the "paucity of surviving evidence").

[32] Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 898 (1949) (reviewing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)); *see also* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 42 (2004) ("In fact, the framers of the First Amendment had no common understanding of its 'true' meaning. They embraced a broad and largely undefined constitutional principle, not a concrete, well-settled legal doctrine."); LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 23 (1991) ("[I]t is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of freedom of the press."); DAVID A. STRAUSS, THE LIVING CONSTITUTION 52 (2010) ("[T]he actual views of the drafters and ratifiers of the First Amendment are in many ways unclear."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) ("History tells us little . . . about the precise meaning contemplated by those who drafted the Bill of Rights.").

[33] Benjamin Franklin, *An Account of the Supremest Court of Judicature in Pennsylvania, viz., The Court of the Press, 12 Sept. 1789, Writings 10:36–40*, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 130, 130 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/amendI_speechs16.html [https://perma.cc/LRS2-CVQ8]; *see also* Stephen Botein, *"Meer Mechanics" and an Open Press: The Business and Political Strategies of Colonial American Printers*, *in* IX PERSPECTIVES IN AMERICAN HISTORY 127, 206 (Donald Fleming & Bernard Bailyn eds., 1975) ("There is no reason to believe that many or even any printers in colonial America thought deeply or systemically about [press liberties].").

historical evidence that we do know with a fair amount of certainty and that are vital to our understanding of its purpose.

The first is that between freedom of speech and freedom of the press, the members of the framing generation were focused on the latter. In an influential 1983 article, David Anderson detailed the evolution of the constitutional right of press freedom from the pre-Revolutionary era through the first Congress.[34] While acknowledging that the framers lacked a "comprehensive theory of freedom of the press,"[35] Anderson concluded that their principal concern was press freedom—not speech rights.[36] By the time of the framing, press freedom had attained a widely embraced significance, yet freedom of speech was a far more nebulous concept.[37] Speech rights, according to Leonard Levy, evolved only later "as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion—the freedom to speak openly on religious matters."[38]

The early state founding charters are perhaps one of the best illustrations of this separate and favored status of press freedom over speech rights. Of the eleven revolutionary state constitutions, nine specifically protected the freedom of the press,[39] which made it one of the most commonly recognized state rights.[40] Yet only one of the original states, Pennsylvania, also protected the freedom of speech.[41]

It is likewise notable that the primary original drafter of the Bill of Rights, James Madison, included among his proposed amendments a provision that would have limited the power of the states to infringe on only three rights, which he referred to as "the great rights."[42] In his original wording, Madison declared the freedom of the press as one of these great rights, but not freedom of speech.[43] While it was not

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[34] Anderson, *supra* note 24, at 455.

[35] *Id.* at 536.

[36] *Id.* at 508 ("The textual antecedents of the first amendment reflect a greater concern with press than with speech.").

[37] *See id.* at 487 ("As Levy showed, freedom of speech, unlike freedom of the press, had little history as an independent concept when the first amendment was framed.").

[38] LEVY, *supra* note 24, at 5; *see also* Anderson, *supra* note 24, at 487 ("The hypothesis that the Press Clause was merely 'complementary to and a natural extension of Speech Clause liberty,' advanced by Chief Justice Burger, is not supported by the historical evidence. Epistemologically, at least, the press clause was primary and the speech clause secondary.") (footnote omitted).

[39] Anderson, *supra* note 24, at 487.

[40] *See* BIRD, *supra* note 27, at 27 (noting that only freedom of religion and the right to a jury trial were more prevalent).

[41] PA. DECLARATION OF RIGHTS, 1776, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 262, 263, 266 (1971).

[42] 4 ANNALS OF CONG. 934 (1794), http://press-pubs.uchicago.edu/founders/documents/amendI_speechs14.html [https://perma.cc/5KER-VDYQ]; *see also* Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131, 1148 (1991).

[43] 4 ANNALS OF CONG. 934, *supra* note 42. The other two "great rights" were the equal rights

ultimately adopted, Madison later referred to this state-restricting provision as "the most valuable amendment in the whole list."[44]

The second key lesson from the history of the Press Clause starts with the understanding that the framing generation saw press freedom as having two distinct functions—an individual, self-expressive function and a structural, government-monitoring function.[45] To see this important distinction, we can return to Pennsylvania's first state Constitution, which contained not one but *two* provisions protecting press freedom.[46] The first appeared in the document's statement of rights and declared, "the people have a right to freedom of speech, and of writing, and publishing their sentiments: therefore the freedom of the press ought not to be restrained."[47] Both freedoms of speech and of the press appear in this provision as protections for individual rights. Listed alongside other individual freedoms, such as the "right to worship," "the right to bear arms for the defence [sic] of themselves and the state," and the "right to assemble together,"[48] this version of press freedom protected the ability of the people simply to express "their sentiments" regardless of the context.

Pennsylvania's second provision referencing press freedom, however, suggested an entirely different purpose. In this provision, press freedom was included among the more-structural provisions in the document, such as the vesting of the legislative and executive powers, the creation of courts, and the detailing of election procedures. In this section, titled "Plan or Frame of Government for Commonwealth or State of Pennsylvania," this second provision declared that "[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."[49] Thus, in contrast to reference to press freedom as an individual expressive right, here press freedom is assigned a specific task—protecting those who scrutinize the government.[50] Also in contrast to the first reference, the

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of conscience and the right to a trial by jury in criminal cases. *Id.*

[44] *Id.*

[45] *See* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1954) ("There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action, but carry it out in the wisest way.").

[46] PA. DECLARATION OF RIGHTS, 1776, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 266, 273 (1971).

[47] *Id.* at 266.

[48] *Id.* at 264, 266.

[49] *Id.* at 273; *see also* Stephen A. Smith, *The Origins of the Free Speech Clause*, 29 FREE SPEECH Y.B. 48, 62 (1991) (noting the committee draft of this provision continued to state "and the House of Representative shall not pass any Act to restrain it: Nor shall any Printer be restrained from printing any Remarks, Strictures, or Observations on the Proceedings of the General Assembly, or any Branch of Government, or any public proceeding whatever") (citation omitted).

[50] Timothy E. Cook, *Freeing the Presses: An Introductory Essay, in* FREEING THE PRESSES: THE

second provision does not include a generalized protection for speech rights, which serves to emphasize the unique importance of press freedom as a structural safeguard.

We can also again return to Madison's initial proposal for the Bill of Rights, in this case to the provision that ultimately became the First Amendment. Madison's language in his proposal likewise suggests separate meanings for the protections of speech and press, as well as a distinction between the press functions of individual liberty and a structural safeguard. His proposed text stated: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[51] Like the Pennsylvania Constitution, Madison's language indicates two separate rights. There is recognition of both an individual right of the people "to speak, to write, or to publish their sentiments" and a second right of "the freedom of the press." This second right, moreover, is notably distinct from the first; it is separated by a semicolon and is itself the subject of the independent clause. It is this guarantee that is alone identified for its structural role as "one of the great bulwarks of liberty" and declared to be "inviolable."[52]

The historical evidence thus tells us that members of the founding generation viewed press freedom as furthering both an individual expressive function and a structural function. It further suggests that between the two, they appeared to be more focused on the structural role.[53] Indeed, the early rhetoric on the significance of press freedom abounds with descriptions of its vital role in protecting the security of the republic and the collective endeavor of self-government.[54] Whether it was by "discussing the propriety of public measures and political

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FIRST AMENDMENT IN ACTION 1, 7 (Timothy E. Cook ed., 2005) (noting that the first section "values the press as a public forum open to all" and the second "highlights the watchdog function"); *see also* Anderson, *supra* note 24, at 489–90 (stating that Pennsylvania's second Press Clause is "unmistakable" evidence of "the right to examine government").

[51] 1 ANNALS OF CONGRESS 451 (1789).

[52] *Id.*; *accord* Amar, *supra* note 42, at 1149.

[53] *See* Anderson, *supra* note 24, at 490–91 ("Throughout the formative period, the focus of discussion was on the role of the press in relation to the government. The Quebec Address shows some awareness that the press also had a role in advancing 'truth, science, morality, and arts in general,' but the primary thrust of that document, and the exclusive thrust of all other official declarations, was that freedom of the press was a necessary concomitant of self-government."); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977) ("There can be no doubt, however, that one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them.").

[54] Yet press freedom was rarely discussed as a matter of individual expressive value. *See* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 744 (1977) ("The colonists were not thinking as intently as we do now in terms of protecting the individual against the manifold pressures of the collective.").

opinions"[55] or "scanning the conduct of administration, and shewing the tendency of it,"[56] the framing generation saw the free press as having an essential job to do in the safeguarding of democracy. As William Cushing wrote to John Adams in 1789, press freedom required constitutional protection because of its power to "save a state and prevent the necessity of a revolution, as well as bring one about, when it is necessary."[57]

II. THE MODERN FATE OF THE PRESS CLAUSE

A. The Supreme Court and the Press Clause

In light of the early understanding of the Press Clause as a provision of primary importance, it is striking that today it is viewed as a seemingly secondary right with no meaningful role independent from the Speech Clause. Yet that is precisely how our First Amendment jurisprudence has evolved.

Despite the textually similar standing of the Press and Speech Clauses, the Supreme Court hardly could have treated these First Amendment neighbors more differently. On the one hand, the Speech Clause has grown over time into a constitutional powerhouse. Its reach has continually expanded and adapted to ever-changing circumstances. The justices brag about protecting it.[58] The public reveres it.[59] Litigants search for ways to cloak their legal claims within it.[60]

The Press Clause, on the other hand, has been routinely sidelined.[61] At best, the Court has relegated the Press Clause to a narrow role as

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[55] Smith, *supra* note 25, at 11 (quoting Benjamin Franklin).

[56] WENDELL BIRD, PRESS AND SPEECH UNDER ASSAULT 155 (2016) (quoting a letter from William Cushing to John Adams (Feb. 18, 1789)).

[57] *Id.* (alteration in original) (quoting a letter from William Cushing to John Adams (Feb. 18, 1789)).

[58] *See* Tony Mauro, *Roberts Declares Himself First Amendment's 'Most Aggressive Defender' at SCOTUS,* NAT'L L. J. (Feb. 13, 2019), https://www.law.com/nationallawjournal/2019/02/13/roberts-declares-himself-first-amendments-most-aggressive-defender-at-scotus/ [https://perma.cc/9VBN-2LG9] (quoting Chief Justice John Roberts as referring to himself as "probably the most aggressive defender of the First Amendment on the court now").

[59] *See Americans Say Freedom of Speech is the Most Important Constitutional Right, According to FindLaw.com Survey for Law Day, May 1*, PR NEWSWIRE (Apr. 30, 2015), https://www.prnewswire.com/news-releases/americans-say-freedom-of-speech-is-the-most-important-constitutional-right-according-to-findlawcom-survey-for-law-day-may-1-300074847.html [https://perma.cc/7ND9-CLQV].

[60] *See* Marcia Coyle & Tony Mauro, *It's Not Free Speech as Usual at SCOTUS*, NAT'L L. J. (Feb. 28, 2018) https://middleborореviewetal.blogspot.com/2018/02/the-1st-amendment-playbook-its-not-just.html [https://perma.cc/2EH3-3UDU] (discussing the broader range of cases raising free speech claims at the Supreme Court).

[61] *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2436 (2014) (describing the Supreme Court's different treatment of the Speech and Press Clauses); *see also* Anderson, *supra* note 24, at 457 ("[N]o Supreme Court decision has rested squarely on the press clause,

the Speech Clause's trusty sidekick, a subsidiary right tasked merely with ensuring the ability of speakers to publish and disseminate their speech.[62] This reading, however, appears to make the Press Clause redundant in light of the Court's opinions empowering the Speech Clause to protect the entire communicative act, including the freedom of speakers to choose their messages[63] and to broadly distribute their speech,[64] as well as the audiences' rights to receive it.[65] As a result, the modern Press Clause cannot claim any explicitly recognized constitutional right or protection as its own.[66]

The differing treatment of the two clauses raises crucial questions of First Amendment jurisprudence. Chief Justice John Marshall admonished us that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect."[67] Yet the Press Clause seems to have become just that—if not "mere surplusage,"[68] then little more

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independent of the speech clause."). *But see id.* at 459 ("If the Court has never given the press clause independent significance, neither has it foreclosed the possibility." (footnote omitted)).

[62] First Nat'l Bank v. Bellotti, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) ("The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly. . . ."). *But see* Associated Press v. NLRB, 301 U.S. 103, 137 (1937) (Sutherland, J., dissenting) ("When applied to the press, the term freedom is not to be narrowly confined; and it obviously means more than publication and circulation.").

[63] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) ([T]he fundamental rule of protection under the First Amendment[] [is] that a speaker has the autonomy to choose the content of his own message").

[64] *See Bellotti*, 435 U.S. at 800 (Burger, C.J., concurring) ("[T]here is no fundamental distinction between expression and dissemination."); *see, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010) (deciding a case about the right to broadly disseminate a documentary film solely under the Speech Clause); Reno v. ACLU, 521 U.S. 844 (1997) (finding that a law that restricts the dissemination of certain content on the internet violates the freedom of speech but not mentioning the freedom of the press); Ashcroft v. ACLU, 542 U.S. 656 (2004) (same).

[65] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) (holding that the Speech Clause's protections extend "to the communication, to its source and to its recipients both").

[66] *See* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press."); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) ("The Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech."); *see also* David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 69–70 (2006) (explaining that while early press cases did rely explicitly on the Press Clause, over time the Court's cases reveal an "abandonment of the Press Clause as a specific source of constitutional authority" as "the Court gave the press whatever rights it recognized under the Speech Clause").

[67] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803); *accord* District of Columbia v. Heller, 554 U.S. 570, 643 (2008) (Stevens, J., dissenting); *see also* Nimmer, *supra* note 29, at 640 ("As nature abhors a vacuum, the law cannot abide a redundancy. The presumption is strong that language used in a legal instrument, be it a constitution, a statute, or a contract, has meaning, else it would not have been employed.").

[68] *Marbury*, 5 U.S. (1 Cranch) at 174.

than an extension of the Speech Clause, an afterthought, a side dish to the main constitutional entree.[69]

B. What's the Harm?

The topic of this volume asks the question, "What's the harm?" And it is a question worth asking—what is the harm of allowing our Press Clause to lie dormant? What is the harm of adopting a speech-only focus to the protection of our expressive liberties? Members of the press, after all, enjoy the same robust speech rights that we all do, which happen to be some of the world's strongest. But there is harm, and it comes from our failure to recognize the unique constitutional interest we all share in the protection of the press's public-serving functions. In particular, this interest arises in a small, but significant, category of cases where it might not make sense to recognize a particular First Amendment right for all speakers, yet where our failure to recognize the right for the press harms our collective interest in a well-informed populace and a monitored government.

More practically, we see this harm in the everyday experiences of American journalists. Journalists, for example, have no First Amendment rights of access to many government-controlled places,[70] meetings,[71] or documents.[72] In addition to the limited access to migrant detention centers discussed earlier, there have also been recent

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[69] *See, e.g.*, *Bellotti*, 435 U.S. at 800 (Burger, J., concurring) (describing the press freedom as "complementary to and a natural extension of Speech Clause liberty").

[70] *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 684–685 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . . .").

[71] *But see* Soc'y of Prof'l Journalists v. Sec'y of Labor, 832 F.2d 1180 (10th Cir. 1987) (vacating and dismissing as moot a lower court decision holding the public and the press have a First Amendment right of access to Mine Safety and Health Administration hearings); *The Government in the Sunshine Act*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/federal-open-government-guide/federal-open-meetings-laws/government-sunshine-act [http://perma.cc/L28S-RXZS] ("The Sunshine Act includes 10 exemptions or reasons that the government can refuse to open an agency meeting."); *accord* 5 U.S.C. § 552b(c)(1)–(10) (2012) (listing exemptions).

[72] *See* 5 U.S.C. § 552b(c)(1)–(10) (2012) (outlining exemptions to government's obligation to release information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552); *Response Times*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/federal-open- government-guide/federal-freedom-information-act/response-times [http://perma.cc/444J-LJB3] ("For journalists, the nearly routine failure of agencies to provide timely access to records has triggered the need to go outside the [Freedom of Information] Act . . . ."). For examples of cases rejecting journalists' FOIA requests under the statutory exemptions, see U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 757, 780 (1989) (rejecting journalist's FOIA request for FBI record of crime figure suspected of bribing congressman); FBI v. Abramson, 456 U.S. 615, 631–32, 634 n.1 (1982) (rejecting journalist's FOIA request for FBI records requested by President Nixon); U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 596, 602–03 (1982) (rejecting newspaper's FOIA request for Iranian nationals' passport application information); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 936 (D.C. Cir. 2003) (rejecting public interest groups' FOIA request for information on thousands of foreign nationals detained during September 11 investigation).

controversies involving the White House stripping reporters of their press passes[73] and selectively banning them from the president's meetings with foreign leaders,[74] White House press briefings, and other events.[75] Journalists also have no, or only uncertain, constitutional protections from being subjected to government subpoenas, [76] searches,[77] or surveillance.[78] We saw striking examples of this when it was revealed in 2018 that federal prosecutors had seized years' worth of a *New York Times* reporter's telephone and email records,[79] and when we learned in 2020 that the Department of Homeland Security had compiled "intelligence reports"—the type typically reserved for suspected terrorists and violent actors—on two American journalists covering highly contentious protests in Portland, Oregon.[80] Finally, there is likewise no official constitutional role in legal actions, such as civil lawsuits[81] or even

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[73] Paul Farhi, *Reporter Sues White House Over 30-day Suspension of Press Pass Following Confrontation*, WASH. POST (Aug. 20, 2019), https://www.washingtonpost.com/lifestyle/style/reporter-sues-white-house-over-30-day-suspension-of-press-pass-following-confrontation/2019/08/20/e0d0b768-c384-11e9-b5e4-54aa56d5b7ce_story.html [https://perma.cc/D5E3-FN9B]; Amy B. Wang & Paul Farhi, *White House Suspends Press Pass of CNN's Jim Acosta After His Testy Exchange with Trump*, WASH. POST (Nov. 8, 2018), https://www.washingtonpost.com/politics/2018/11/08/white-house-suspends-press-pass-cnns-jim-acosta-after-testy-exchange-with-trump/ [https://perma.cc/7U4K-F2VA]; David R. Lurie, *Trump's Cold War with the White House Press Corps*, SLATE (Aug. 8, 2019), https://slate.com/news-and-politics/2019/08/trump-cold-war-white-house-press-gorka.html [https://perma.cc/TG4P-S2FV]; Mathew Ingram, *White House Revokes Press Passes for Dozens of Journalists*, COLUM. JOURNALISM REV. (May 9, 2019), https://www.cjr.org/the_media_today/white-house-press-passes.php [https://perma.cc/DS93-WJLG].

[74] Julie Hirschfeld Davis, *Trump Bars U.S. Press, but Not Russia's, at Meeting with Russian Officials*, N.Y. TIMES (May 10, 2017), https://www.nytimes.com/2017/05/10/us/politics/trump-russia-meeting-american-reporters-blocked.html [https://perma.cc/ABP5-3YKL].

[75] Joe Concha, *White House Excludes CNN from Annual SOTU Media Lunch*, HILL (Feb. 4, 2020), https://thehill.com/homenews/media/481378-white-house-excludes-cnn-from-annual-sotu-media-lunch [perma.cc/RT3V-QRC6]; *NPR Reporter Removed from Pompeo Trip in 'Retaliation', Says Press Group*, GUARDIAN (Jan. 27, 2020), https://www.theguardian.com/us-news/2020/jan/27/npr-reporter-removed-from-pompeo-trip-in-retaliation-says-press-group [perma.cc/8S5P-VGLB].

[76] *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1145–50 (D.C. Cir. 2006) (upholding contempt orders against journalists for refusing to comply with subpoena).

[77] *See, e.g.*, 42 U.S.C. § 2000aa(b) (2012) (setting forth situations where police may seize media's "documentary materials"); Zurcher v. Stanford Daily, 436 U.S. 547, 552–53 (1978) (rejecting a Fourth Amendment challenge to police search of student newspaper office for photographs), *superseded by statute*, 42 U.S.C. § 2000aa, *as recognized in* Sennett v. United States, 667 F.3d 531 (4th Cir. 2012).

[78] Cora Currier, *Government Can Spy on Journalists in the U.S. Using Invasive Foreign Intelligence Process*, INTERCEPT (Sept. 18, 2018), https://theintercept.com/2018/09/17/journalists-fisa-court-spying/ [https://perma.cc/X9RB-ESVW].

[79] Adam Goldman, Nicholas Fandos, & Katie Benner, *Ex-Senate Aide Charged in Leak Case Where Times Reporter's Records Were Seized*, N.Y. TIMES (June 7, 2018), https://www.nytimes.com/2018/06/07/us/politics/times-reporter-phone-records-seized.html [https://perma.cc/S6YZ-ZXD7].

[80] Shane Harris, *DHS Compiled 'Intelligence Reports' on Journalists who Published Leaked Documents*, WASH. POST (July 30, 2020), https://www.washingtonpost.com/national-security/dhs-compiled-intelligence-reports-on-journalists-who-published-leaked-documents/2020/07/30/5be5ec9e-d25b-11ea-9038-af089b63ac21_story.html [https://perma.cc/JY5X-6UM7].

[81] *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (holding that journalists who lie on employment applications to gain access to private facilities or use

criminal prosecutions, for evidence that a defendant is a journalist who was engaged in an act of newsgathering or reporting. In 2010, for example, the Department of Justice took the unprecedented step of naming a reporter as a co-conspirator under the Espionage Act for his newsgathering efforts—a charge that carries a sentence of up to 10 years in prison.[82] More recently, the U.S. Press Freedom Tracker identified more than 600 reports of law enforcement officers arresting, detaining, or engaging in acts of physical aggression against journalists who were attempting to report on the nationwide demonstrations against racially discriminatory police violence.[83]

This is all happening, moreover, at the same time that most American news organizations are facing significant new struggles. The Court's refusal to recognize any constitutional differences between members of the press and other speakers might have appeared for decades to be at most harmless error. Because, as it just so happened, the Court determined much of the law in this area during the era that turned out to be the high-water mark of the American press's strength. The press, during this period, was financially strong, enjoyed the public's goodwill, and benefited from a mutually dependent relationship with government officials.[84] It was further bolstered by established norms dictating that government officials will show the press at least a minimum amount of respect.[85] The press of that era, therefore, was an institution that had the resources to aggressively defend itself as well as the political capital to demand certain basic levels of accommodation.

Today, however, the American press stands on far shakier ground. The newspaper industry is in a free fall thanks to declining advertising revenues, challenges brought by the Internet age, and a public that has become accustomed to getting its news for free.[86] At the same time, the

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secret cameras for newsgathering activities are not protected by the First Amendment and may be liable for trespass or other offenses).

[82] Ryan Lizza, *The Justice Department and Fox News's Phone Records*, NEW YORKER (May 21, 2013), https://www.newyorker.com/news/news-desk/the-justice-department-and-fox-newss-phone-records [https://perma.cc/KLS7-HB6G].

[83] *See* U.S. PRESS FREEDOM TRACKER, https://pressfreedomtracker.us [https://perma.cc/JRC4-PP8T] (last visited Sept. 19, 2020) (tracking arrests and detentions of journalists); Paul Farhi & Elahe Izadi, *'The Norms Have Broken Down': Shock as Journalists are Arrested, Injured by Police While Trying to Cover the Story*, WASH. POST (May 31, 2020), https://www.washingtonpost.com/lifestyle/media/journalists-at-several-protests-were-injured-arrested-by-police-while-trying-to-cover-the-story/2020/05/31/bfbc322a-a342-11ea-b619-3f9133bbb482_story.html [https://perma.cc/9R6V-GCPS] (discussing "a number of incidents," in which "journalists were injured, harassed or arrested even after identifying themselves as reporters" during the protests).

[84] *See* RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 575–576 (2017).

[85] *Id.*

[86] Pew Research Center, *Newspaper Fact Sheet*, JOURNALISM.ORG (July 9, 2019), https://www.journalism.org/fact-sheet/newspapers/ [https://perma.cc/ZR2C-J6ZU].

public's trust in the press has hit all-time lows,[87] and government actors are now far less dependent on the press in order to convey their messages to the public. Notably, this was the state of affairs even before the election of a president who has declared a "running war" with the news media,[88] referred repeatedly to the press as "the enemy of the people," [89] and has run roughshod over all the traditional norms of respect for the essential role of a free press in our democracy.

The modern American press, therefore, is far weaker than in the past and less able to rely on non-legal sources of strength. There might be one helpful aspect, however, of this shift in the press's relative powers, which is that it sharpens our understanding of the importance of constitutional and legal protections for the press. The Supreme Court's stance that the Constitution is, for basically any practical purpose, blind to the role of the press versus other types of speakers is simply far less tenable today.

III. THE MAJORITARIAN PRESS CLAUSE

Something funny happened on our way to securing the constitutional guarantee of press freedom—this "inviolable" right, our "great bulwark of liberty," one of the most significant rights in our Constitution. It happened gradually and often with the best of intentions, but at some point, we lost our way. Times changed, technology changed, and professional identities changed, as did our understandings of individual liberties, expressive freedoms, and equality.[90] The result is that this freedom of preeminent historical importance, which was designed as a key structural support for the republic and as a collectively shared security, is now being treated as though it were penned in disappearing ink.

It is necessary, therefore, that we adjust our framework for thinking about press freedom in a way that respects its prominent historical role while also reflecting the modern recognition of expansive individual speech rights. The first step is to openly acknowledge that the Speech Clause now dominates the job of protecting individual expressive rights.

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[87] Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx [perma.cc/WNH9-2TDB].

[88] *Trump CIA Speech Transcript*, CBS (Jan. 23, 2017), http://www.cbsnews.com/news/trump-cia-speech-transcript/ [https://perma.cc/G6L5-PPQP]

[89] *Remarks by President Trump at the Conservative Political Action Conference*, WHITE HOUSE (Feb. 24, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-conservative-political-action-conference/ [https://perma.cc/PB43-TBAH].

[90] *See* Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 89–104 (2016) (discussing the interwoven evolution in journalism, mass communication technology and First Amendment doctrine).

While there might have once been a vibrant role for the Press Clause to play in this task, that is simply no longer the case.

Yet the Press Clause's duties do not end there; it still has important work to do in its other role as protector of our shared structural rights. Modern First Amendment jurisprudence, however, has trained us reflexively to view press freedom through the same individual rights paradigm that we apply to speech. We thus need a new way of thinking about press freedom that emphasizes its collective function. I refer to this new framework as the "Majoritarian Press Clause."

A. The Majoritarian Press Clause Framework

Our discussion so far has been centered on the two primary functions of press freedom, which are protecting individual rights and providing structural safeguards. Closely related to this basic dichotomy is another important dividing line—the difference between the Press Clause's majoritarian and counter-majoritarian functions. In Federalist No. 51, James Madison warned us of these two separate constitutional concerns: the need to guard "one part of the society against the injustice of the other part" (a counter-majoritarian protection) as well as to shield "society against the oppression of its rulers" (the majoritarian protection).[91]

When we consider individual expressive rights, our focus tends to be on counter-majoritarian protections.[92] These protections are counter-majoritarian in that they shield individuals, often minority or unpopular speakers, against the majority (a majority who might be using the levers of a representative democracy as a means to silence them).[93] To be clear, counter-majoritarian expressive protections are extremely important. They further essential values, such as personal self-realization[94] and a richly diverse public dialogue.[95] These counter-majoritarian

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[91] THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

[92] *See* McCutcheon v. FEC, 572 U.S. 185, 206 (2014) ("The whole point of the First Amendment is to afford individuals protection against such infringements [by the will of the majority]."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("[T]he purpose behind the Bill of Rights, and of the First Amendment in particular [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."); Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority. . . .").

[93] *See* United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-not free thought for those who agree with us but freedom for the thought that we hate."); Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Recognizing the occasional tyrannies of governing majorities, [the framers] amended the Constitution so that free speech and assembly should be guaranteed.").

[94] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that the freedom of speech serves the sole value of individual self-realization).

[95] *See* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression

protections also often have the incidental effect of benefiting the public as a whole. But it is the protection of the individual as against all others that typically lies at their core.

Under the Majoritarian Press Clause framework, we allow the Speech Clause to continue to do this counter-majoritarian work by robustly protecting individual speakers from potentially antagonistic coalitions of their fellow citizens. The Press Clause, meanwhile, can then focus on safeguarding our collective ability to challenge a potentially tyrannical government and secure our communal right to a republican form of government. By protecting separate, nongovernmental checks to government power,[96] the Majoritarian Press Clause's primary mission is to ensure that our representative government is, indeed, reflecting the popular will of its constituents[97]— a mission it achieves through the journalistic mechanisms of a well-informed populace and vigorous government scrutiny. Once we shift our attention to the Press Clause's role of protecting the collective power of the public writ large as against the government, it becomes easier to see how press freedom can complement, not compete with, speech rights.

Not only is this approach more faithful to the original understanding of press freedom, but it also helps to clarify the constitutional work that the Press Clause can and should be doing today. Arguments against giving practical meaning to the Press Clause typically suggest that it would be too difficult to determine both what Press Clause protections should be recognized and which speakers should be allowed to claim them.[98] Underlying these assertions is usually a sense of inequality—the fear that recognizing any unique press rights would be akin to bestowing special privileges on a favored class at the expense of everyone else. This reaction, of course, makes sense. We have been trained to think about speech rights from a counter-majoritarian angle. Most of us

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is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").

[96] *See* Blasi, *supra* note 53, at 538 (stating that "one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them").

[97] *See* Amar, *supra* note 42, at 1147 (noting that the First Amendment's "historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress").

[98] *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) ("The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition."); Branzburg v. Hayes, 408 U.S. 665, 703–704 (1972) (stating that "[t]he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order" and that the Court was "unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination").

thus naturally bristle at the notion that some speakers might be able to claim a constitutional right while others could not. In the speech context, for example, we often demand that courts treat each idea, viewpoint, and speaker the same. We expect identical rights, because we view speech through the individual rights lens, which dictates that it is the right of each person to speak (or not to speak) and to weigh the value of others' messages.[99]

Yet this concern of inequality, while crucial in the counter-majoritarian context, is misplaced when considering majoritarian safeguards. The Majoritarian Press Clause helps us see the difference by moving our focus to the public's collective interest in a truly representative government and how the free press advances this majoritarian endeavor through effective government scrutiny and broad dissemination of information. Depending on the circumstances, constitutional protection for these press functions may or may not necessitate treating all individual speakers the same. With this understanding in mind, determining which rights and speakers to recognize becomes, while maybe still not an easy task, certainly an easier and more palatable one. The ultimate job for the Court becomes recognizing the constitutional tools that are needed by those speakers who are best suited to work on the public's behalf in this effort to fortify our democracy.

B. The Majoritarian Press Clause in Practice

To better illustrate how the Majoritarian Press Clause would function, let us use as an example the case of *Houchins v. KQED*, [100] the last in a trio of cases from the 1970s in which the Supreme Court denied the requests of journalists to access jails and prisons for newsgathering purposes.[101] In *Houchins*, a broadcasting station sought "reasonable access" to a local county jail[102] as part of an investigation into an inmate suicide[103] as well as reports of rapes,[104] beatings,[105] and generally "shocking and debasing" conditions.[106]

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[99] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) (noting that when it comes to judging the value of speech, "[w]hat the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority").

[100] 438 U.S. 1 (1978).

[101] *See id.*; Saxbe v. Wash. Post, Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

[102] *Houchins,* 438 U.S. at 3. Specifically, the journalists-plaintiffs sought access to the "Little Greystone" portion of the jail and to be able to "interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television." *Id.*

[103] *Id.*

[104] *Id.* at 5.

[105] *Id.*

[106] Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972) (discussing the judge's

The Court held that the journalists did not have any special constitutional right to access the jail beyond the access granted to the general public.[107] When viewed through the individual rights paradigm, this holding is understandable. On the surface, providing special access to members of the press looks a lot like favoring certain powerful speakers over other speakers. Our counter-majoritarian instincts tell us that this must be unconstitutional. But if we put on our collective rights hat, the analysis changes. The Majoritarian Press Clause instructs us to ask different questions, such as: Does the claimed right further a structural press function? And if so, are these speakers likely to utilize the right on the public's behalf?

The answer to both questions in the *Houchins* case was clearly "yes." The reporters were seeking access to information about a matter of significant public concern for the purposes of disseminating it to the public and holding the government accountable.[108] These are classic structural press functions that aid the public in forming intelligent opinions and acting as a restraint on misgovernment. Conditions of prisons and jails, the *Houchins* Court acknowledged, "are clearly matters of great public importance."[109] As Justice Lewis Powell pointed out in his dissent in another of the prison-access cases, a prohibition on press access "precludes accurate and effective reporting on prison conditions and inmate grievances,"[110] including "[t]he administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein."[111]

It is worth noting, moreover, that the Court simply recognizing that a constitutional right involves a structural press function does not mean that the government's interests in limiting press access would become immaterial or that the government would be forced to grant access to any speaker who sought information. As Chief Justice Earl Warren observed, "[t]here are few restrictions on action which could not be clothed

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personal visit to the jail and his observations that the conditions there "constituted cruel and unusual punishment for man or beast," and led him to the "inescapable conclusion was that [the jail] should be razed to the ground").

[107] *Houchins*, 438 U.S. at 16.

[108] *See* Affidavit of Melvin S. Wax at ¶ 3, *Houchins*, 438 U.S. 1 (No. 76-1310) ("We believe that jails and prisons are public institutions managed by public officials who are accountable to the public, and therefore information concerning such institutions should be reported by the news media.").

[109] *See Houchins*, 438 U.S. at 8 (quotation marks omitted).

[110] Saxbe v. Wash. Post, 417 U.S. 843, 854 (1974).

[111] *See id.* at 861; *see also Houchins*, 438 U.S. at 37 (Stevens, J., dissenting) (noting that the public's interest in the criminal justice system "survives the judgment of conviction and appropriately carries over to an interest in how the convicted person is treated during his period of punishment and hoped-for rehabilitation").

by ingenious argument in the garb of decreased data flow."[112] Under the Majoritarian Press Clause, as with other First Amendment rights, courts would still weigh the collective public interest at stake against the government's interests.[113] The government, for example, might have a substantial interest[114] in prohibiting press access to confidential or privileged information[115] or when unique factors would make press access to the jail unusually dangerous.[116]

Thus, the Majoritarian Press Clause has helped us determine that press access to the jail in *Houchins* is the type of right that courts should recognize as guaranteed by the First Amendment. But what about the question of which speakers should be able to claim the right? The question of definition—who is or is not the press—is a difficult one. To some, in fact, this definitional problem is practically fatal to assertions of unique constitutional rights for the press.[117] The Majoritarian Press Clause approach, however, brings clarity to this potentially thorny issue.

In circumstances where recognizing a press right for all speakers is feasible, both individual and structural First Amendment interests dictate that the courts should do just that.[118] It is in situations where it

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[112] Zemel v. Rusk, 381 U.S. 1, 16–17 (1965).

[113] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 586 (Brennan, J., concurring) ("Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.").

[114] Determining the level of heightened scrutiny that the Court should apply is beyond the scope of this essay, but in *Saxbe* the Court rejected the argument that the government must show "some substantial justification" for restricting access. *Saxbe*, 417 U.S. at 856 (Powell, J., dissenting); *see also id.* at 861 ("I believe that this sweeping prohibition of prisoner-press interviews substantially impairs a core value of the First Amendment.").

[115] *See id.* at 861.

[116] Mem. and Order Granting Motion for Preliminary Injunction at 70, Houchins v. KQED, Inc., 438 U.S. 1 (1978) (No. 76-1310) (The district court noted in its order granting a preliminary injunction allowing press access to the jail that "[o]f course, should a situation arise in which jail tensions or other special circumstances make such implementation dangerous, defendant can restrict media access for the duration of such circumstances").

[117] *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 796–802 (1978) (Burger, C.J., concurring) (arguing that "the very task" of defining the press would be "reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country").

[118] *See, e.g.*, *Richmond Newspapers*, 448 U.S. 555 (concluding that there is a general First Amendment right of access to criminal trials for the public and the press). *But see id.* at 573 (acknowledging that "people now acquire [information about trials] chiefly through the print and electronic media"); *id.* (noting that providing the news media with "special seating and priority of entry so that they may report what people in attendance have seen and heard" aids the "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system." (quotation omitted)); *id.* at 581, n.18 (noting that because "courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives."); *id.* at 586, n.2 (Brennan, J., concurring) (observing that "[a]s a practical matter . . . the institutional press is the likely, and fitting, chief

is not workable to include everyone, however, that the Majoritarian Press Clause framework is useful in determining the proper claimants of a press right or protection. It is of little use to recognize a collective, structural press right, after all, if the party or parties claiming the right would not use it to further the public's interest in representative government.

Under the individual rights view, there is no constitutional difference between members of the press and any random person who might knock on the prison door.[119] In the speech context, our counter-majoritarian instincts have primed us to balk at the prospect of the government deciding which speakers are allowed to speak. Speech rights should not—indeed often cannot—be doled out based on who the speaker is,[120] what they have said in the past,[121] or what they are likely to say in the future.[122] If we transfer this individual centered view to the Press Clause, then the logical conclusion is that we must similarly resist the idea of awarding press rights based on the identity of the claimant.[123] The individual rights approach, therefore, boxes the Court into a stark binary choice—we either all have the right or none of us do.

But in the context of jails and prisons, it is not practical to recognize access rights for everyone. Valid concerns about safety and prison administration are generally incompatible with a right of unfettered public access.[124] So when the Court is forced by the individual rights framework to choose between access for everyone or for no one, then it is left with little choice but to deny access to everyone, including to members of the press. When considered in light of the Press Clause's historical and textual mandates, however, this conclusion is illogical. It fails both at protecting the public's interest in receiving information about the jail

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beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals").

[119] *See Saxbe*, 417 U.S. at 846–47 (upholding a blanket prohibition on press interviews with individual inmates based, in part, on the fact that the policy "is applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, may enter the prisons to visit friends or family members. But, again like members of the general public, they may not enter the prison and insist on visiting an inmate with whom they have no such relationship").

[120] *See* Citizens United v. FEC, 558 U.S. 310, 350 (2010) ("[T]he First Amendment generally prohibits the suppression of political speech based on the speaker's identity.").

[121] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 712, 723 (1931) (holding unconstitutional a statute that subjected newspaper to prior restraint if it previously published "malicious" material).

[122] *Id.*

[123] *See* Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91 (2018) (arguing that the Press Clause supports speaker classifications favoring the press).

[124] *See Saxbe*, 417 U.S. at 864 (Powell, J., dissenting) ("For good reasons, unrestrained public access [to the prison] is not permitted.").

and in ensuring that possible government malfeasance is effectively investigated.

The Majoritarian Press Clause framework, on the other hand, once again guides us toward a more fitting solution by reminding us that the objective is not necessarily to treat all speakers the same but to identify those speakers who are fulfilling the unique public-serving press functions.[125] The appropriate query, therefore, is not whether the speakers before the Court are receiving special treatment (the counter-majoritarian concern) but, rather, whether the speakers are effectively working to further the public's interests (a majoritarian role). The plaintiffs in *Houchins* easily met this standard—they were experienced journalists[126] with an established audience and a proven record reporting on issues related to jails and prisons in their area.[127] They were seeking access, moreover, in order to the gather and broadly disseminate information about a matter of significant public concern.[128] If the choice is between recognizing a right of access for these plaintiffs or for no one, the majoritarian framework exposes how our collective First Amendment interests are best served by granting the journalists access.[129]

The *Houchins* case further illustrates how a member of the press can be a proper trustee of the public's shared right to information. In that case, two local branches of the National Association for the Advancement of Colored People (NAACP) joined the lawsuit as co-plaintiffs with the news station, KQED. Filing the complaint "on their own behalf and on behalf of black people generally,"[130] the NAACP chapters did not seek access to the jail for any of their individual members. They claimed, instead, that by blocking the *news station's* access the prison

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[125] *See* Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 749–55 (2014) (drawing on Supreme Court precedent to identify the two main "unique constitutional functions" of the press as (1) news-gathering and dissemination, and (2) checking the government); *see also* Sonja R. West, *Press Exceptionalism*, *supra* note 61, at 2443 ("The quest, therefore, should not be to define the press but rather to train our courts to recognize them in action.").

[126] Mem. and Order at 66–67, Houchins v. KQED, 438 U.S. 1 (1978) (No. 76-1310) (The District Court in the case described the plaintiffs as "a local non-profit, publicly-supported corporation engaged in educational television and radio broadcasting.").

[127] Affidavit of Melvin S. Wax, *supra* note 108, at ¶ 10 (declaring that as "a television journalist with experience in reporting on jail and prison conditions, I believe that it is essential to public understanding of the conditions prevailing at the Greystone facility and the Santa Rita jail in general, that the news media report in detail on the exact nature of such conditions").

[128] Affidavit of William Schechner ¶ 4, *Houchins*, 438 U.S. 1 (No. 76-1310) (describing his reporting on an earlier news story regarding prison conditions and stating that being able to record footage inside San Quentin prison "significantly enhanced my ability to convey to the public, on the news program, the actual conditions at San Quentin").

[129] Questions, of course, will remain about the best methods for identifying speakers who are fulfilling press functions. *See* Sonja R. West, *Press Exceptionalism*, *supra* note 61, at 2453–2462 (discussing useful proxies and a beginning framework for identifying press speakers).

[130] Complaint at ¶ 3, *Houchins*, 438 U.S. 1 (No. 76-1310).

had violated *their* constitutional rights.[131] In the complaint, the NAACP members explained that they "depend on the public media to keep them informed of such conditions so that they can meaningfully participate in the current public debate on jail conditions in Alameda County" and that they "rely regularly on KQED's Newsroom program to keep them informed on these issues."[132]

This press function—serving as proxies for the public—is well recognized.[133] As Justice Stewart observed in his concurring opinion in *Houchins*, "[w]hen on assignment, a journalist does not tour a jail simply for his own edification. He is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons."[134] Unlike the individual rights framework, the Majoritarian Press Clause both allows, indeed requires, the Court to recognize those speakers who are doing this important constitutional work.

IV. CONCLUSION

The First Amendment's guarantee of press freedom is one of our Constitution's most significant accomplishments. The historical evidence shows that the framing generation valued press freedom, even beyond speech rights, as both an individual freedom and as a key structural protection—a shared security of the people vis a vis their government. A free press was a vital tool necessary to ensure the survival of a truly representative government.

Over the last hundred years, however, our focus has shifted from protecting press freedom to securing speech rights more generally. Indeed, when it comes to the job of protecting our individual expressive interests, today's robust speech protections occupy the field. In the process, the Press Clause has been swept aside and treated, contrary to its historical importance, as a superfluous tagalong to the Speech Clause.

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[131] *Id.* at ¶ 12 (asserting that barring the news station's coverage of the jail "deprives the NAACP plaintiffs' members of their right to know and receive information on such conditions and thus to participate meaningfully in the public debate, presently being conducted in Alameda County, with regard to jail reform and the possible construction of new jail facilities").

[132] *Id.* at ¶ 3.

[133] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (plurality opinion) (noting that public reliance on the news media "[i]n a sense, . . . validates the media claim of functioning as surrogates for the public."); *Houchins*, 438 U.S. at 8 ("Beyond question, the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but, like all other components of our society, media representatives are subject to limits."); *see also* Nixon v. Warner Commc'ns, 435 U.S. 589, 609 (1978) (noting that "the press serves as the information-gathering agent of the public").

[134] *Houchins*, 438 U.S. at 17 (Stewart, J., concurring).

The United States' unparalleled leadership in the protection of individual expressive rights is rightly celebrated and often also has the secondary effect of furthering our shared, structural interests. But we must be careful not to confuse the two jobs and, in the process, to fail to understand the situations in which constitutional rights and protections are still needed. The Majoritarian Press Clause approach can help us do just that, by reframing our understanding of when and how unique press functions should be protected in order to benefit society as a whole.

The Supreme Court has recognized that "the Constitution specifically selected the press" for protection "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[135] As the Court has declared, the guarantees of press freedom "are not for the benefit of the press so much as for the benefit of all of us."[136] The Majoritarian Press Clause embraces this understanding and, in the process, shows us how the freedoms of speech and press can work together to more fully realize all of the promises of the First Amendment.

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[135] Mills v. State of Alabama, 384 U.S. 214, 219 (1966); *see also Nixon*, 435 U.S. at 609 (noting that "the press serves as the information-gathering agent of the public").

[136] Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

Climate Change Disclosures After *NIFLA*

Daniel Abrams[†]

I. INTRODUCTION

Climate change[1] represents one of the defining global problems of the twenty-first century.[2] The effects of warming have led to mass displacement, more extreme weather events, and degradation of natural habitat.[3] There is significant discord on the proper means to address this global issue: whether it is the role of government alone or if industry must assume responsibility for its role in climate change.[4] Even within these different camps, there is dispute about the proper means to address such an expansive issue.[5] One method governments have in their repertoire to combat climate change is disclosure requirements related to energy consumption or carbon emissions. Disclosures compel the regulated party to provide information to consumers and the public. The goal is to provide consumers with more information so that they can make an informed choice and drive competition.

In the context of climate change, these disclosures can take many forms. In New York City, as of May 2020, many buildings are required to disclose their energy consumption and post an energy-efficiency

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[1] For the purposes of this comment, I will define "climate change" as the effects of anthropogenic emission of greenhouse gases, or human caused warming of the planet through the discharge of carbon, methane, and other pollutants.

[2] *Global Issues: Climate Change*, UNITED NATIONS, https://www.un.org/en/sections/issues-depth/climate-change/ [https://perma.cc/Y5LR-F68G] (last visited Sept. 3, 2020) ("Climate Change is the defining issue of our time and we are at a defining moment.").

[3] *Climate Impacts*, UNION OF CONCERNED SCIENTISTS, https://www.ucsusa.org/climate/impacts [https://perma.cc/CUE8-EZUT] (last visited Sept. 3, 2020).

[4] *See, e.g.*, *Should Fossil-Fuel Companies Bear Responsibility for the Damage Their Products Do to the Environment?*, WALL ST. J. (Nov. 19, 2019), https://www.wsj.com/articles/should-fossil-fuel-companies-bear-responsibility-for-the-damage-their-products-do-to-the-environment-11574190219 [https://perma.cc/SSE3-3968].

[5] *See* Saabira Chaudhuri, *Companies Say They Want to Save the Planet—but They Can't Agree How*, WALL ST. J. (Dec. 10, 2019), https://www.wsj.com/articles/companies-say-they-want-to-save-the-planetbut-they-cant-agree-how-11575973800 [perma.cc/VC5C-4ZYE]; Lisa Friedman, *On Climate Change, Biden Has a Record and a Plan. Young Activists Want More.*, WALL ST. J. (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/climate%20/climate-change-biden.html%20 [https://perma.cc/D4SH-F3Y6].

rating in a conspicuous place to inform the public.[6] The logic behind this plan is to increase competition between buildings to decrease their energy consumption and promote public pressure to stimulate behavioral change through circulation of greater information. Japan has attempted a similar tactic by requiring food packaging to carry a carbon footprint label.[7] In the same vein, the Japanese food packaging disclosure requirement promotes more informed choices from consumers, who may value a like product higher if it required less energy to manufacture. While disclosures are not the only method for governments to address climate change, they can be successful while effectuating minimum intrusion on regulated parties by raising collective consciousness and using the market to drive better behavior from regulated industries.

The government's ability to force disclosures from private parties is not unlimited. In the United States, the First Amendment can be a barrier to implementing a climate change disclosure requirement. The First Amendment cabins government efforts to restrict or compel speech.[8] However, its reach is not absolute. There are certain instances where the government has the ability to regulate speech or compel a factual disclosure. One instance occurs when there is "dissemination of commercial speech that is false, deceptive, or misleading."[9] Under the standard created by *Zauderer v. Office of Disciplinary Counsel*,[10] government regulation of commercial speech in the form of compelled disclosure is appropriate when (1) there is a substantial state interest to which the regulation is reasonably related, (2) the regulation addresses deception, (3) the information compelled is "factual and uncontroversial," and (4) the regulation is not unduly burdensome. This standard has come to be known as the *Zauderer* test. The *Zauderer* test has morphed over time,[11] and has been used to both invalidate and to approve of government attempts at regulating commercial speech.[12]

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[6] Devin Gannon, *Starting Next Year, Big NYC Buildings Will Display Letter Grades Based on Energy Efficiency*, 6SQFT (Nov. 21, 2019), https://www.6sqft.com/starting-next-year-big-nyc-buildings-will-display-letter-grades-based-on-energy-efficiency/ [https://perma.cc/354V-T67P].

[7] Justin McCurry, *Japan to Launch Carbon Footprint Labelling Scheme*, GUARDIAN (Aug. 20, 2008), https://www.theguardian.com/environment/2008/aug/20/carbonfootprints.carbonemissions [https://perma.cc/QES8-EPFR].

[8] U.S. Const. amend. I.

[9] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

[10] Id.

[11] *See generally* Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972 (2017) (discussing how Zauderer's scope and strictness have changed over time).

[12] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 849 (9th Cir. 2019) (providing an example of a disclosure that was upheld because it properly addressed a public health concern); Entm't Software v. Blagojevich, 469 F.3d 641 (7th Cir. 2006) (providing an example of a disclosure that was invalidated as not rationally related to the harm).

Compelled disclosure jurisprudence underwent "a profound shift"[13] in 2018, when the Supreme Court passed down *National Institute of Family & Life Advocates v. Becerra (NIFLA)*.[14] The Court's ruling in *NIFLA* specifically changed the landscape around the *Zauderer* prong of "factual and uncontroversial" by holding that disclosures related to abortion were controversial.[15] Whether the prong now excludes all political controversies, ideological or scientific disagreements, or any subject with opposing viewpoints is now up for debate.[16]

The impact of the changes in compelled disclosure standards and the scope of *NIFLA* could have effects on federal, state, and local governments' ability to inform the public about the threat associated with greenhouse gas emissions and climate change.[17] Like abortion, climate change is a much-discussed, much-debated issue, that could colloquially be considered controversial. Were the Court to take this position, it would limit the government's ability to create regulations addressing the effects of climate change.

In Part II, this Comment will address the history of compelled disclosure jurisprudence in order to understand the case law that persists after *NIFLA* and the changes to the *Zauderer* standard as a result of *NIFLA*, including what "factual and uncontroversial" means today. Part III will distinguish climate change from abortion in order to set any climate change disclosure apart from the disclosures in *NIFLA*. Part IV will identify a pathway for a government regulation compelling disclosure to overcome the new higher burden imposed by *NIFLA* with regard to greenhouse gas emissions and climate change. Part IV will take a step-by-step approach through the *Zauderer* test and will argue that a climate change disclosure requirement should easily survive challenges under the first and second *Zauderer* prong under settled case law. This analysis will utilize the New York and Japanese disclosures, referenced above, as examples against which to test potential environmental disclosures that might be enacted in the United States, consistent with First Amendment disclosure law. Further, Part IV will argue that through a focus on scientific certainty, and the distinction from abortion, climate change disclosure regulations can survive the third and fourth prongs of *Zauderer*, which have shifted since the *NIFLA*

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[13] *The Supreme Court 2017 Term—Leading Case, First Amendment—Freedom of Speech—Compelled Speech*—National Institute of Family & Life Advocates v. Becerra, 132 HARV. L. REV. 347, 351 (2018).

[14] 138 S. Ct. 2361 (2018).

[15] *Id.* at 2372.

[16] *See* Lauren Fowler, *The "Uncontroversial" Controversy in Compelled Commercial Disclosures*, 87 FORDHAM L. REV. 1651, 1676 (2019).

[17] *See* Lauren Sherman, *A Warning for Environmental Warnings*, 27 N.Y.U. ENVTL. L. J. 240, 294–95 (2019).

decision. Government entities must distinguish climate change from abortion and emphasize the scientific certainty and "uncontroversiality" of the issue. This Comment will ultimately argue that the government *can* overcome *NIFLA*'s high bar by reframing the argument as a debate about means to combat the ends, rather than the existence of climate change.

II. THE HISTORY OF COMPELLED DISCLOSURE, *ZAUDERER,* AND *NIFLA*

A. Recognizing Commercial Speech

The Supreme Court first recognized a distinct category of speech, "commercial speech," in 1942. However, at the time the Court found it ineligible for First Amendment protection.[18] It took another three decades for the Court to afford commercial speech any level of constitutional protection.[19] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[20] the Supreme Court defined commercial speech as "speech which does 'no more than propose a commercial transaction.'"[21] In striking down the law in that case, the Court pointed to the fact that suppression of commercial information hurts vulnerable populations the most.[22] The Court also recognized the First Amendment ideal of a free flow of information that improves and benefits the market.[23] While the court found the statute in question unlawful, it held that the state could regulate advertising but could not create an outright prohibition on the advertisements.[24]

In the wake of *Virginia Pharmacy Board*, the Supreme Court took up the regulation of commercial speech again in 1980 in *Central Hudson Gas v. Public Service Commission of New York*.[25] In *Central Hudson*, a utility company challenged the state Public Service Commission's prohibition on promotional advertising by electrical utilities.[26] The Supreme Court found the company's advertisements to be commercial

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[18] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no such restraint as respects purely commercial speech.").

[19] *See* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 58 (1999).

[20] 425 U.S. 748 (1976).

[21] *Id.* at 762 (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

[22] *Id.* ("Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged.").

[23] *Id.* at 765.

[24] *Id.* at 771.

[25] 447 U.S. 557 (1980).

[26] *Id.* at 559–60.

speech[27] and, in the process, identified the value of such speech for informing the listener and for contributing to larger societal interests.[28] At the same time, the Court held that the First Amendment extends less protection to commercial speech than to other constitutionally guaranteed expression, a distinction the Court referred to as being based on common sense.[29] In articulating the *Central Hudson* test, the Court stated that "[f]irst, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[30] The Court noted that if the regulation only indirectly advanced the state interest, it would not survive. Also, if the regulatory technique employed exceeded the interest, the regulation also would not survive.[31] The *Central Hudson* test has come to represent an intermediate scrutiny test for the regulation of commercial speech.[32] Over time, the *Central Hudson* test has been cabined to apply to cases where the government prohibits or restricts commercial speech. The case to follow, *Zauderer v. Office of Disciplinary Counsel*,[33] has been applied to compelled commercial speech.

B. *Zauderer* & Lower Constitutional Scrutiny

In contrast to the regulation in *Central Hudson*, in *Zauderer*, the Supreme Court was presented with a government attempt to compel information from a commercial entity.[34] While the Court found in *Central Hudson* that the government needed to pass a heightened level of scrutiny in order to regulate factual communications by commercial entities,[35] *Zauderer* dealt with the state's interest in supplementing information in order to avoid misleading or potentially deceptive communication.[36]

The controversy in *Zauderer* related to several attorney advertisements in Ohio, which violated the existing professional guidelines in

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[27] *Id.* at 560 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").

[28] *Id.* at 560.

[29] *Id.* at 562–63.

[30] *Id.* at 564.

[31] *Id.* at 565.

[32] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019).

[33] 471 U.S. 626 (1985).

[34] *Id.* at 629.

[35] *Cent. Hudson*, 447 U.S. at 564.

[36] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637–38 (1985).

the state.[37] The Court held the prohibition on factual advertisements unconstitutional under the framework of *Central Hudson* and cited the benefits to the public from the free flow of information.[38] However, the Court also found that the other advertisements in question were potentially deceptive and that the state had an interest in regulating deceptive advertising.[39] The Court went on to lay out a test that required a lower level of scrutiny than *Central Hudson*.[40] It justified this lower level of scrutiny as follows:

> [T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides[;] appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [W]e have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[41]

The Court went on to add that the disclosure requirement could not be "unduly burdensome" so that it chilled protected commercial speech.[42] Additionally, the disclosure requirement only had to be "reasonably related to the State's interest in preventing deception of consumers."[43] In the process, the Court recognized that disclosures are a less intrusive means to achieve the state's interest and thus required a lower level of scrutiny.[44] At the same time, even under this lower standard, the state could still overreach and chill constitutionally protected commercial speech.[45]

Out of *Zauderer* came the test for compelled disclosure that persists today. That test can be summarized in four prongs. To survive a First Amendment challenge, a disclosure must (1) address a substantial state

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[37] *Id.* at 631.

[38] *Id.* ("Appellant also put on the stand two of the women who had responded to his advertisements, both of whom testified that they would not have learned of their legal claims had it not been for appellant's advertisement.").

[39] *Id.* at 650.

[40] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (referring to Zauderer as a standard requiring "less exacting scrutiny").

[41] *Zauderer*, 471 U.S. at 651 (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982)) (internal citations omitted).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 650.

[45] *Id.* at 651.

interest, which the regulation is reasonably related to, (2) address consumer deception, (3) be factual and uncontroversial and (4) not be unduly burdensome.[46] Courts have debated, redefined, or limited the scope of these requirements over the years, but from *Zauderer* came a stable body of law interpreted by the circuit courts to give the government some latitude in requiring factual disclosures to benefit consumers and the general society.

C. Interpreting *Zauderer*

Zauderer stood as the definitive statement on compelled disclosure up until *NIFLA v. Becerra*.[47] While *NIFLA* has changed the landscape, it is still informative to understand the case law built up in the circuit courts around *Zauderer*, much of which still stands as good law after *NIFLA*.[48] This section will continue to utilize the New York energy-efficiency score and the Japanese food-labelling examples to help guide the analysis.

1. Prong one: substantial state interest

The first *Zauderer* prong requires that a compelled disclosure regulation address a substantial state interest.[49] Stated differently, in order for the government to restrict constitutionally protected speech, the state must have a substantial interest in the policy it seeks to advance through regulation. Dating back to *Virginia Pharmacy Board*, courts have recognized the goal of combatting deception as a valid state interest in regulating and compelling speech.[50] In *Zauderer*, that interest was "preventing deception of consumers."[51] One potential avenue for success in any government compelled climate change disclosure would be to argue that disclosures are necessary to combat the well-documented practice of deceptive advertising and misinformation campaigns by fossil fuel companies.[52]

Another set of well-established state interests that justify compelled disclosure in the eyes of the courts is protection of public health

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[46] *Id.*

[47] 138 S. Ct. 2361 (2018).

[48] Fowler, *supra* note 16, at 1689–91 (2019).

[49] *Zauderer*, 471 U.S. at 650.

[50] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976); *see also* Ibanez v. Fla. Dep't of Bus. and Pro. Reg., Bd. of Accountancy, 512 U.S. 136, 141 (1994); *In re* R.M.J., 455 U.S. 191, 200 (1982); Dwyer v. Cappell, 762 F.3d 275, 281 (3rd Cir. 2014).

[51] *Zauderer*, 471 U.S. at 651.

[52] *See* Miriam A. Cherry & Judd F. Sneirson, Chevron*, Greenwashing, and the Myth of "Green Oil Companies"*, 3 WASH. & LEE J. ENERGY, CLIMATE & ENV'T. 133 (2012).

and safety.[53] Courts have used this broad category to validate disclosures related to mercury poisoning in light bulbs[54] and the risk of radiation exposure from cellphones.[55] A government entity could rest justification for climate change disclosure on the substantial health and safety concerns associated with the impacts of climate change.[56] These effects include "increased respiratory and cardiovascular disease, injuries and premature deaths related to extreme weather events, changes in the prevalence and geographical distribution of food-and water-borne illnesses and other infectious diseases, and threats to mental health."[57]

When courts have struck down disclosures based on the first *Zauderer* prong, it has often been because the state interest cited and the harm addressed were not reasonably related. Examples of voided disclosures include a label related to milk from cows injected with growth hormones (no scientific evidence supported harm caused by the milk) [58] and a disclosure of conflict diamonds harvested from the Democratic Republic of the Congo (unclear link between diamond disclosure and resolving civil strife in Congo).[59] In both cases, the courts rejected any link between the disclosure and the harm it attempted to remedy. To survive a First Amendment challenge, any climate change disclosure will have to overcome this hurdle.

For both climate-related disclosures previously mentioned—the New York building score, where each building's energy consumption is posted at the entrance and the Japanese labels, where the carbon footprint in the supply chain of the product is listed—the government could argue the harm is excessive energy use, which translates to greenhouse gas emissions and exacerbates issues associated with climate change. This would fit the disclosure comfortably in the health and safety context, which is a valid state interest.

The takeaway from the "substantial state interest" prong of *Zauderer* is that a regulation is more likely to succeed when it addresses deception or a health-and-safety concern affecting consumers. That harm must be fully realized and not be merely "speculation or conjecture."[60] Additionally, a state regulation must reasonably connect the regulation to the interest it purports to advance. Thus, climate change

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[53] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 844 (9th Cir. 2019); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

[54] *Sorrell*, 272 F.3d at 115.

[55] *CTIA*, 928 F.3d at 844.

[56] *Climate Effects on Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 2019), https://www.cdc.gov/climateandhealth/effects/default.htm [https://perma.cc/ZR99-QALN].

[57] *Id.*

[58] Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 73 (2d Cir. 1996).

[59] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 525–27 (D.C. Cir. 2015).

[60] *Edenfield v. Fane*, 507 U.S. 761, 770 (1994).

disclosures designed to address health and safety through reduced emissions and energy consumption will likely succeed on this prong.

2. Prong two: addressing deception

The second prong of the *Zauderer* test asks whether the regulated behavior is false, deceptive, or misleading.[61] In the event that the regulated speech is not found to be misleading, false, or deceptive, the analysis shifts to *Central Hudson* and intermediate scrutiny applies. At that point, the government is regulating truthful content.[62] This distinction was clear when the opinion in *Zauderer* was written, but the interpretation of the *Zauderer* standard and the line between it and *Central Hudson* has changed.[63]

While *Zauderer* initially covered only deception, circuit courts have expanded this prong to reach a broader set of behavior that includes potentially misleading disclosures, or disclosures that serve a public interest in providing information. In *Discount Tobacco City & Lottery v. United States*,[64] a tobacco industry trade group challenged a disclosure requirement on cigarette packs.[65] The Sixth Circuit noted that even "potentially misleading"[66] speech regulation would fall under *Zauderer* rather than *Central Hudson*. The Second Circuit went a step further in *National Electrical Manufacturers Ass'n v. Sorrell*,[67] where plaintiffs challenged a mercury-poisoning disclosure requirement.[68] The court rejected the requirement to show deception to conduct the *Zauderer* analysis, although it admitted that the disclosure in question was not motivated by the need to dispel deception but rather to "better inform consumers about the products they purchase."[69]

Sorrell was decided in 2001 and, in wake of the move by the Second Circuit, other circuit courts followed suit.[70] The D.C. Circuit in *American Meat Institute v. USDA*[71] held, similarly to the Second Circuit, that "*Zauderer* in fact does reach beyond problems of deception."[72] The Ninth Circuit held the same in *CTIA–The Wireless Ass'n v. City of Berkeley*,

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[61] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[62] *Id.* at 646.

[63] *See* Am. Meat Inst. v. U.S. Dep't of Agriculture, 760 F.3d 18, 22 (D.C. Cir. 2014).

[64] 674 F.3d 509 (6th Cir. 2012).

[65] *Id.* at 524.

[66] *Id.*

[67] 272 F.3d 104 (2d Cir. 2001).

[68] *Id.* at 107.

[69] *Id.* at 115.

[70] *See CTIA*, 928 F.3d at 842; *Am. Meat*, 760 F.3d at 22.

[71] *Am. Meat*, 760 F.3d 18 (D.C. Cir. 2014).

[72] *Id.* at 20.

noting that "[u]nder *Zauderer* as we interpret it today, the government may compel truthful disclosure in commercial speech as long as the compelled disclosure is reasonably related to a substantial government interest."[73] Any case resolving a dispute over climate change disclosure would likely survive the second *Zauderer* prong, particularly because of the recent expansion beyond deception. As the Ninth Circuit held, the government must emphasize the reasonable relation of the disclosure to the interests in public health and safety associated with climate change.[74]

Due to the shift in scope of *Zauderer* away from deception toward a more comprehensive look at compelled speech, courts have also reinterpreted *Central Hudson* to cover cases where speech was restricted.[75] The *Sorrell* Court identified a binary decision between application of *Central Hudson* and *Zauderer*.[76] The court held that *Zauderer* controls cases of compelled disclosure while *Central Hudson* governs cases of restrictions or prohibitions on speech.[77] The Second Circuit configuration was echoed by the D.C. Circuit in *American Meat Institute v. FDA*[78] and the Ninth Circuit in *American Beverage v. City of San Francisco*.[79]

The dispute over whether *Central Hudson* or *Zauderer* governs is a battleground of litigation. It is often the plaintiff who argues that *Central Hudson* controls, thus compelling an intermediate scrutiny analysis, while the government entity argues for *Zauderer* and its looser standard.[80]

Climate change disputes are no exception. There is no Supreme Court precedent declaring that *Zauderer* or *Central Hudson* applies. This dispute would ultimately relate to how the deciding court views the second prong of *Zauderer*, whether the disclosure address deception. If, as the test was originally designed, the lower standard is only called for when the government is regulating deception, the Court may be more likely to analyze a disclosure law under *Central Hudson*. If the Court takes a more expansive view of *Zauderer* similar to what the D.C., Second and Ninth Circuits have adopted, the government will have more success in arguing for the lower *Zauderer* standard.

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[73] *CTIA*, 928 F.3d at 842.

[74] *Id.*

[75] *See Am. Meat*, 760 F.3d at 22.

[76] Nat'l Electrical Mfr.'s Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (stating that *Zauderer* provides the test for compelled commercial speech and *Central Hudson* provides the test for restricted commercial speech).

[77] *Id.*

[78] *Am. Meat*, 760 F.3d at 22.

[79] 916 F.3d 749, 755 (9th Cir. 2019).

[80] *See id.* at 755; Dwyer v. Cappell, 762 F.3d 275, 280 (3rd Cir. 2014); *Am. Meat*, 760 F.3d at 22.

3. Prong three: factual and uncontroversial

The third prong of the *Zauderer* test asks whether the government-required disclosure is "factual and uncontroversial."[81] The Court explained in the context of its body of decisions on the First Amendment that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[82] Circuit court interpretations have shed light on what the *Zauderer* decision may have meant by the factual and uncontroversial prong. While these interpretations have largely been superseded and controverted by the holding of *NIFLA*,[83] they still provide color to the new questions that have emerged after *NIFLA*.

Courts and legal scholars have debated "factual and uncontroversial" and come to a number of different conclusions as to the meaning of the phrase. In *American Meat,*[84] the D.C. Circuit treated "factual" and "uncontroversial" as separate requirements under *Zauderer*.[85] The D.C. Circuit took for granted that country-of-origin labelling was factual.[86] The court also found that the labelling requirement was not controversial.[87] It explained, "[W]e also do not understand country-of-origin labelling to be controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy."[88] Interestingly, current Supreme Court Justice Kavanaugh wrote a concurrence in *American Meat* which could portend future compelled disclosure cases at the highest Court. Then-Judge Kavanaugh identified the confusion in the "uncontroversial" prong at the time, writing that it "may be difficult in some compelled commercial speech cases in part because it is unclear how we should assess and what we should examine to determine whether a mandatory disclosure is controversial."[89] Rather than resolve the difficult question, then-Judge Kavanaugh found the disclosure in question "straightforward, evenhanded."[90]

Other circuit courts have taken a range of approaches to the third *Zauderer* prong. At one time, the Sixth Circuit did not include the

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[81] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[82] *Id.*

[83] NIFLA v. Becerra, 138 S. Ct. 2361 (2018).

[84] *Am. Meat*, 760 F.3d at 18.

[85] *Id.* at 27.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 34 (Kavanaugh, J., concurring).

[90] *Id.*

factual-and-uncontroversial prong in its *Zauderer* analysis,[91] while the Seventh Circuit, prior to *NIFLA*, treated the prongs as one combined factor.[92]

Legal scholars have proposed several different readings of "uncontroversial" in this context, both before and after *NIFLA*.[93] One reading is that "factual and uncontroversial" refers simply to accurate, undisputed factual information.[94] Even within this interpretation, scholars have varying opinions as to the amount of disagreement allowed that still qualifies within the threshold of "accurate"—whether that is any disagreement, reasonable disagreement, or a completely unverified scientific claim.[95] Another interpretation seemingly supported by *NIFLA* and *Zauderer* requires both factual accuracy and that the disclosure not "convey ideology."[96] There is enough uncertainty in *NIFLA* and *Zauderer* that either of these interpretations, and their various sub-readings, could be possible.

The factual-and-uncontroversial inquiry will be critical to the success of any climate-change disclosure. If "factual and uncontroversial" refers to accuracy and consensus, a climate-change disclosure will be far more likely to succeed; if, however, "factual and uncontroversial" means a compelled disclosure that does not convey ideology, there will be a harder path to success. At its root, much of the debate or dialogue around climate change today is based around responses to the problem, not the existence of the problem in the first place.[97]

4. Prong four: unduly burdensome

The fourth prong of the *Zauderer* test asks whether the compelled disclosure is "unjustified or unduly burdensome" in such a way that it would chill protected commercial speech.[98]

Disclosure is often considered the least intrusive form of government compelled speech and is thus more likely to survive a First Amendment challenge.[99] In *Discount Tobacco City & Lottery v. United*

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[91] Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 559 n.8. (6th Cir. 2012).

[92] Entm't Software v. Blagojevich, 469 F.3d 641, 652–53 (7th Cir. 2006).

[93] *See* Fowler, *supra* note 16, at 1674.

[94] *Id.* at 1676.

[95] *Id.*

[96] *Id.*

[97] John Schwartz, *Fossil Fuels on Trial: New York's Lawsuit Against Exxon Begins*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/climate/new-york-lawsuit-exxon.html [https://perma.cc/BJH7-GDQ4] (In ongoing litigation, Exxon's lead attorney has asserted the company "has long acknowledged that climate change is real").

[98] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[99] *See id.* at 650 ("[D]isclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech. . . .").

States, the Sixth Circuit cited the fact that, even with a disclosure, the company can still make "direct comments on public issues."[100] This idea fits with the First Amendment values of the marketplace of ideas and the free flow of information. It is the government's burden to prove that a compelled disclosure is justified and not overly burdensome to the regulated party.[101]

When determining whether a disclosure is unduly burdensome, courts look to the magnitude of the disclosure compared to the content it is regulating, as well as the source of the disclosure, and the viewpoint it expresses.[102] Courts have previously struck down disclosures that required an interest group to convey ideas "expressly contrary to their views,"[103] disclosures where the government had not justified the size or scope of the disclosure,[104] and disclosures with sets of facts that indicated there were other means to accomplish the government's desired outcome without compelling speech.[105]

For a climate change disclosure to succeed, the government entity must be able to demonstrate the public benefit of the disclosed information. The disclosures suggested in Part I—the requirement that New York City skyscrapers post energy-efficiency scores in a conspicuous place[106] and the Japanese requirement that the carbon footprint of food production be posted on the packaging[107]—both benefit the public by providing it with additional information. In theory, the market functions better when consumers have more information, and producers whose process is energy intensive would lose market share or be forced to modify their supply chain.

D. *NIFLA*: A Sea Change in Compelled Disclosure

The Supreme Court addressed compelled disclosures head-on during the 2018 Term in *NIFLA v. Becerra*.[108] In *NIFLA*, a group of anti-abortion groups, including crisis pregnancy centers,[109] challenged a

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[100] Discount Tobacco City & Lottery v. United States, 674 F.3d 509, 559 n.8. (6th Cir. 2012).

[101] *See* Am. Beverage Ass'n v. City of San Francisco, 916 F.3d 749, 757 (9th Cir. 2018).

[102] *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2377 (2018).

[103] Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 71 (2d Cir. 1996).

[104] *See Am. Beverage*, 916 F.3d at 757; Public Citizen v. La. Attorney Disciplinary Bd., 632 F.3d 212, 229 (5th Cir. 2011).

[105] Entm't Software v. Blagojevich, 469 F.3d 641, 652–53 (7th Cir. 2006).

[106] *See* Gannon, *supra* note 6.

[107] *See* McCurry, *supra* note 7.

[108] 138 S. Ct. 2361 (2018).

[109] *See* WATTERS ET AL., PUB. LAW RES. INST., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 4 (2011). Crisis Pregnancy Centers are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling and other services to individuals that visit a center." *Id.*

California disclosure requirement[110] that mandated the disclosure of available public programs providing comprehensive medical services.[111] The law distinguished between licensed[112] and unlicensed facilities,[113] and laid out different required disclosures for each. The groups challenged the laws as an infringement on their First Amendment rights. Both the district court and the Ninth Circuit denied the plaintiffs a preliminary injunction under the existing *Zauderer* standard.[114] The Supreme Court granted certiorari and reversed the Ninth Circuit on the notice requirements for both the licensed and unlicensed facilities.[115]

The Court, in a majority opinion written by Justice Thomas, held the disclosure requirement for the licensed facilities presumptively unconstitutional as a content-based speech regulation.[116] In this case, the Court determined that the requirement that crisis pregnancy centers promote state-provided abortion services regulated the content of pregnancy centers' speech.[117] The Court rejected the Ninth Circuit's formulation of a category of speech called "professional speech" and applied strict scrutiny to the licensed-facility disclosure.[118]

While the Court found that *Zauderer* did not apply, it noted that even if it had, the California licensed-facility disclosure requirement would fail on two prongs.[119] First, "the notice in no way relates to the services that licensed clinics provide."[120] This fits into the first prong of *Zauderer:* whether there is a substantial state interest reasonably related to the regulation. Secondly, and crucially for future compelled disclosure cases, the Court weighed in on the factual-and-controversial prong of *Zauderer*. The Court found that the disclosure "requires these clinics to disclose information about *state* sponsored services—including

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[110] Cal. Health & Safety Code Ann. § 123470 et seq. (West 2020). The requirement comes from the FACT Act—the stated purpose of which was "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." NIFLA v. Becerra, 138 S. Ct. 2361, 2369 (2018).

[111] *NIFLA*, 138 S. Ct. at 2368.

[112] *See id.* at 2369. The facilities had to disseminate a government-drafted notice that read: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.*

[113] *See id.* Unlicensed facilities had to disseminate a government drafted notice on site that read: "[T]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.*

[114] *Id.* at 2370.

[115] *Id.*

[116] *Id.* at 2371.

[117] *Id.*

[118] *Id.* at 2371–72.

[119] *Id.* at 2372.

[120] *NIFLA*, 138 S. Ct. at 2372.

abortion, anything but an 'uncontroversial' topic. Accordingly, *Zauderer* has no application here."[121]

While it may seem obvious that abortion is controversial, the disclosure in *NIFLA* is now a guidepost against which future disclosures will be measured. Abortion could be controversial for a number of different reasons, and the lack of specificity at which the Court addressed the issue has left the meaning of "uncontroversial" vague. Simply put, the holding in *NIFLA* provides no direction on the future of how "uncontroversial" will be interpreted going forward, and under which understanding of the word the Court found abortion to be "uncontroversial."

The *NIFLA* Court also analyzed the unlicensed-facility disclosure under *Zauderer*, but its analysis differed from that of the lower courts.[122] The state bore the burden of showing that the disclosure requirement was narrowly tailored to its interest so as not to chill protected speech.[123] The Supreme Court found the state did not meet its burden.[124] Not only was the statute not narrowly tailored, but the Court found that the state's interest was purely hypothetical.[125] The Court noted that the state justification was ensuring that "pregnant women in California know when they are getting medical care from licensed professionals,"[126] but also that California already made it a crime for unlicensed facilities to practice medicine.[127] This spoke to the fact that the state had other means to police their interest and that the disclosure was superfluous.

While the Supreme Court upended compelled disclosure law in *NIFLA*, particularly the factual-and-uncontroversial prong of *Zauderer*, the Court attempted to reassure lower courts and the public that the prior fifty years of commercial speech case law was not lost. It wrote, "[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[128] This dicta within *NIFLA* provides hope of stability for many longstanding disclosures, as well as the possibility that future government efforts to compel disclosure, including efforts to curb climate change, will be upheld.

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[121] *Id.*
[122] *Id.* at 2377.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 2376.

A four-justice dissent written by Justice Breyer challenged the majority on virtually every ground. Justice Breyer questioned how the issues at stake were not related to health and safety, as the majority contended.[129] It is worth noting that Justice Breyer also left open a window to narrow *NIFLA* to the subject of abortion, calling the issue "special."[130] Finally, Justice Breyer defined the scope of the disclosure differently than the majority, shifting away from abortion to a larger critique: "[A]bortion is a controversial topic and a source of normative debate, but the availability of state resources is not a normative statement or a fact of debatable truth."[131] Breyer also critiqued the majority for its hypocritical approach to disclosure—where information about fetal heartbeats was allowed previously[132]—but information about health and resources available to patients was disallowed in the case before the Court.[133]

E. How *NIFLA* Changes the Analysis

NIFLA has yet to be widely interpreted by most lower courts. Since *NIFLA*, however, the Ninth Circuit has considered the constitutionality of compelled disclosure.[134] In *CTIA–The Wireless Ass'n v. City of Berkeley*, the Ninth Circuit stressed a reading of *NIFLA* that brought the meaning of "factual and uncontroversial" to the forefront of the court's analysis.[135] The court noted that "*NIFLA* thus stands for the proposition that the *Zauderer* standard applies only if the compelled disclosure involves 'purely factual and uncontroversial' information."[136] The court went on to explain that it did "not read the Court [in *NIFLA*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason, controversial."[137] For the Ninth Circuit, what distinguished *NIFLA* from *Zauderer* was that "[w]hile factual, the compelled statement [in *NIFLA*] took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its [crisis pregnancy center's] mission."[138]

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[129] *Id.* at 2388 (Breyer, J., dissenting).

[130] *Id.*

[131] *Id.*

[132] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882–84 (1992); *see also infra* Part III for further discussion.

[133] *NIFLA*, 138 S. Ct. at 2383.

[134] *See* CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019).

[135] *Id.* at 845.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 845.

Outside of *CTIA*, no other circuit court cases have addressed the impact of the *NIFLA* ruling on compelled disclosures. One journal article on the subject proposed that, in a pre-*NIFLA* world, there were two interpretations of "factual and uncontroversial."[139] One stated that the information simply needed to be factual, and the other held that the information needed to be factual and also not implicitly convey an ideology.[140] Another legal scholar called the impacts of *NIFLA* "seismic."[141] In his view, the opinion left the scope of the government's power to compel disclosure "an uncertainty."[142] The *Harvard Law Review* called the decision "a profound shift in the Court's treatment of compelled commercial disclosures."[143] The Harvard article predicted that "[t]he way the *NIFLA* Court applied intermediate scrutiny would also seem to preordain failure for almost all consumer-protective regulations."[144]

This Comment argues that the alarm and uncertainty stressed by other legal scholars overemphasizes the impact of *NIFLA* on compelled disclosure law. The Court signaled its intention not to upset the "legality of health and safety warnings long considered permissible."[145] It remains to be seen how courts will treat *NIFLA* going forward, but considering the limited intrusion and effectiveness of disclosure, it is unlikely to cause the seismic change some predict. Instead, *NIFLA* can likely be limited to the issue of abortion; other disclosures aimed at public health and safety will survive.

III. COMPARING CLIMATE CHANGE TO ABORTION

A government entity arguing that a climate change disclosure is lawful after *NIFLA* will have the difficult task of distinguishing climate change from abortion. *NIFLA* is now the most recent word from the Supreme Court on compelled disclosures and the *Zauderer* standard. Thus, any future compelled disclosures will be measured against the "controversiality" of abortion. For a climate change disclosure to survive a First Amendment challenge, the government entity must be able to distance climate change from *NIFLA* and the controversy associated with abortion. At its root, this argument will come down to the basic facts around climate change and its effects juxtaposed against abortion,

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[139] Fowler, *supra* note 16, at 1676.

[140] *Id.*

[141] Robert McNamara & Paul Herman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 220 (2018).

[142] *Id.*

[143] *First Amendment—Freedom of Speech—Compelled Speech*—National Institute of Family & Life Advocates v. Becerra, *supra* note 13, at 351.

[144] *Id.* at 354.

[145] NIFLA v. Becerra, 138 S. Ct. 2361, 2376 (2018).

a topic that has loomed large in America's consciousness for half a century.[146]

Abortion relates to unknowable moral issues: when life begins, personal autonomy, and the rights of a fetus. Abortion concerns religious and moral convictions and opposing worldviews that are seemingly impossible to reconcile.[147] There will certainly be those who disagree with this basic premise, yet, even if science were to distill when life begins, or the consciousness of a fetus, it is not clear that this would resolve the deep-seated issues around abortion. Abortion pits the concerns of the unborn versus the right to dictate life choices on behalf of the mother. The opposing viewpoints on abortion are likely unresolvable because both sides harbor interests so immutable that they will not compromise. This is unlike climate change, which does not elicit the same moral reactions, and is more akin to the evolving science on tobacco use in the mid-twentieth century.[148]

Conversely, climate change is not a disagreement about morals as much as a dispute about scientific projections and the proper means to address the threat. Climate change relates to the amount of carbon dioxide in the atmosphere and the resulting effects on our planet. Climate change is measurable and observable, no matter the level of obfuscation and denial that opponents bring to meeting the problem head on.[149] The evidence for and against abortion, such as when life begins or the moral implications of abortion, may never be before the Court; the same cannot be said for climate change. We know how fast sea levels are rising,[150] how fast glaciers are melting,[151] the rate of deforestation,[152] and the forced migration of populations as a result. Even more critically, we

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[146] *See* Robert Post & Riva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 406–09 (2007) (describing the sweeping, organized, and ongoing nature of conservative opposition to Roe v. Wade).

[147] *See* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (stating that abortion regulations implicate "imponderable values" such as "the potentiality of human life," "the health of the woman," and "the woman's liberty interest in defining her own concept of existence, of meaning, of the universe, and of the mystery of human life") (internal quotation marks omitted).

[148] *See* Allan M. Brandt, *Inventing Conflicts of Interest: A History of Tobacco Industry Tactics*, 102 AM. J. PUB. HEALTH 63 (2012).

[149] Suzanne Goldenberg, *Leak Exposes how Heartland Institute Works to Undermine Climate Science*, GUARDIAN (Feb. 14, 2012), https://www.theguardian.com/environment/2012/feb/15/leak-exposes-heartland-institute-climate [https://perma.cc/M68H-HUF5].

[150] Rebecca Lindsey, *Climate Change: Global Sea Level*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (Nov. 19, 2019), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level [https://perma.cc/3AE3-RABY].

[151] Daniel Glick, *The Big Thaw*, NAT'L GEOGRAPHIC, https://www.nationalgeographic.com/environment/global-warming/big-thaw/ [https://perma.cc/647M-U3SU].

[152] *What is the Relationship Between Deforestation and Climate Change*, RAINFOREST ALLIANCE (Aug. 12, 2018), https://www.rainforest-alliance.org/articles/relationship-between-deforestation-climate-change [https://perma.cc/GNE2-YJAE].

know what causes these global shifts.[153] Unlike abortion, climate change is supported by evidence courts can weigh. Courts can then determine the validity of a compelled disclosure tailored to these issues. While there is certainly a vocal minority opposed to the idea of climate change, which this article addresses in Part IV.C, the science has progressed beyond this viewpoint to the point of academic consensus.[154] Whereas people with opposing viewpoints on abortion may never reach consensus on the unknowable or resolve differences between deeply held worldviews, climate change data is at our fingertips.

To reiterate, regardless of whether one believes in climate change or its dangers, there is *actual evidence* of its veritable existence—its probability of harm—that the Court can weigh against a general public policy in favor of speech. Denial of this evidence, and a lack of belief in climate change, will not prevent a court from appropriately weighing the evidence. In abortion, there is no such counterbalance. As mentioned above, even if the science on abortion were clearer, it is not obvious that this would dissuade either side from their respective views. Abortion is unresolvable on a moral level; there will always be disagreement between those who favor a woman's autonomy and those who advocate for the life of the unborn fetus. One way to see this is to look at the fundamental differences in how courts treat these two topics.

The Supreme Court has taken vastly different approaches to the issues of climate change and abortion. The Supreme Court has walked a careful line in dealing with abortion in the many cases it has handled, while in climate change cases the Court has shown a much greater willingness to rely on scientific expertise, partially because of the measurable data related to climate change that is far less clear in the abortion context.[155] Also, while abortion litigation often pits two sides with diametrically opposed moral convictions, the same cannot be said about climate change. In many cases, the question is not whether it exists, but what is the proper means to address it.[156]

The way the Supreme Court has addressed climate change is best exemplified in the most high-profile climate change case yet to come before the Court.[157] In *Massachusetts v. EPA*,[158] the Commonwealth

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[153] *See supra* notes 146–148.

[154] *Scientific Consensus: Earth's Climate is Warming*, NASA, https://climate.nasa.gov/scientific-consensus/ [https://perma.cc/A5AU-8VZ4] (last visited Sept. 6, 2020).

[155] *See* Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007); *cf.* Roe v. Wade, 410 U.S. 113, 116 (1973); Planned Parenthood of Southeast Pa. v. Casey, 505 U.S. 833, 851 (1992).

[156] *See* Schwartz, *supra* note 97.

[157] RICHARD LAZARUS, THE RULE OF FIVE: MAKING CLIMATE CHANGE HISTORY AT THE SUPREME COURT 1 (2020) (calling Massachusetts v. EPA "the most important environmental law case ever decided by the Court").

[158] 549 U.S. 497 (2007).

sought judicial review of the EPA's refusal to regulate greenhouse gas emissions.[159] Justice Stevens began his opinion with a matter-of-fact assessment of the situation:

> A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflect heat. It is therefore a species—the most important species—of a "greenhouse gas."[160]

Significantly, the Supreme Court held that the states had standing to challenge the EPA's decision not to promulgate a rule on greenhouse gases,[161] a "win" in the long game for environmental advocacy and the fight against climate change.[162]

Throughout the opinion, Justice Stevens relied on bureaucratic expertise to demonstrate the threat of continued greenhouse gas emissions and climate change.[163] At various points in the opinion, he cited the National Research Council,[164] the Intergovernmental Panel on Climate Change,[165] and the United Nations Framework Convention on Climate Change.[166] While the fight in *Massachusetts v. EPA* centered on the delegated authority to the EPA and administrative law principles,[167] at no point in the arguments did either party refute the science

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[159] *Id.* at 505.

[160] *Id.* at 504–05.

[161] *Id.* at 526.

[162] *See* Jonathan Z. Cannon, *The Significance of* Massachusetts v. EPA, 93 VA. L. REV. ONLINE 53 (2007) ("The decision was an enormous if narrow, victory for environmentalists . . . ."); Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, with Some Limits*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html [https://perma.cc/S74V-QDJE] ("[The Court] nevertheless granted the Obama administration and environmentalists a big victory by agreeing that there are other ways for the EPA to reach its goal of regulating the gases that contribute to global warming."); Emily Atkin, *The Growing Movement to Take Polluters to Court Over Climate Change*, THE NEW REPUBLIC (Dec. 20, 2017), https://newrepublic.com/article/146326/growing-movement-take-polluters-court-climate-change [https://perma.cc/2EUY-QYRD] ("The success of Massachusetts v. Environmental Protection Agency keeps corporate attorneys up at night.").

[163] *Massachusetts v. EPA*, 549 U.S. at 508–09.

[164] *Id.* ("The Council's response was unequivocal: 'If carbon dioxide continues to increase, the study group finds no reason to doubt that climate change will result and no reason to believe that these changes will be negligible. . . . A wait-and-see policy may mean waiting until it is too late.'").

[165] *Id.* ("The IPCC concluded that 'emissions resulting from human activities are substantially increasing the atmospheric concentrations of greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface.").

[166] *Id.*

[167] *Id.* at 511.

underlying climate change.[168] Justice Stevens put it bluntly when he described the injury to the challenging states, writing, "[t]he harms associated with climate change are serious and well recognized."[169]

This contrasts with the Court's approach to abortion, which it has treated in a careful, measured way, wary of upsetting individuals of all viewpoints. The Court's signature ruling on abortion was *Roe v. Wade*[170] in 1973.[171] The *Roe* Court acknowledged a woman's right to an abortion, while at the same time recognizing the state's interest in the health and safety of the mother and the fetus.[172] *Roe* attempted to juggle these competing interests and find a middle ground on a very difficult issue. Writing for the Court, Justice Blackmun did not shy away from the diametrically opposed viewpoints on the issue and the gravity of the controversy before the court. In the second paragraph of his opinion he wrote:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and *seemingly absolute* convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[173]

Justice Blackmun's acknowledgment of the high stakes set the tone for the opinion, which walked a fine line by acknowledging the convictions on both sides. Further into the opinion, Justice Blackmun addressed the unknowable question of when life begins and the difficulty faced by a court in tackling such issues.[174] Blackmun's approach highlighted the high-level moral and philosophical questions that abortion raised. As

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[168] *Id.* at 523 ("[The] EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming.").

[169] *Id.* at 521.

[170] 410 U.S. 113 (1973).

[171] Kathrine Kubak et al., *Abortion*, 20 GEO. J. GENDER & L. 265, 265–68 (2019).

[172] In *Roe*, the Court held that the right to personal privacy, which it located in the Due Process Clause, is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. At the same time, the Court recognized that "certain compelling state interests—primarily protecting women's health and the potential life of fetuses—[can] justify the regulation of abortion. Kubak, *supra* note 171, at 267 (citing *Roe*, 410 U.S. at 154).

[173] *Roe*, 410 U.S. at 116.

[174] *Id.* at 159 ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

he made clear, the Court's role in a dispute of such magnitude is to attempt to find a line of compromise; the Court is not to play expert on the moral and the metaphysical. Instead, Blackmun ended with the sentiment that "[t]his holding, we feel, is consistent with the relative weights of the respective interests involved."[175]

The way the Court handled these two opinions could not be more disparate. These cases represented the Supreme Court's first chance to dictate the law on issues important to the country. In *Massachusetts v. EPA*, Justice Stevens acknowledged at the outset the harms associated with climate change and the risks it posed.[176] In *Roe*, Justice Blackmun sought a middle ground and conceded the unknowable questions at the root of abortion.[177] While the *Roe* opinion trod carefully on existential questions, *Massachusetts v. EPA* treated climate change tactically, as an evident problem that the government *must* address.[178]

The Supreme Court has revisited both issues since these first cases, and the trajectories of jurisprudence have continued along their initial paths.[179] Climate change was before the court again in *American Electric Power Company v. Connecticut*,[180] four years after *Massachusetts v. EPA*. Like the dispute in *Massachusetts v. EPA*, the dispute in *American Electric Power* was not centered on the existence, threat, or scientific fact of climate change.[181] Rather, in *American Electric Power*, the question centered on choice-of-law rules.[182] At points, the Court cited EPA rulemaking on climate change as authority, stating:

> [The] EPA concluded that "compelling" evidence supported the "attribution of observed climate change to anthropogenic" emissions of greenhouse gases. Consequent dangers of greenhouse gas emissions, [the] EPA determined, included increases in heat-related deaths; coastal inundation, and erosion caused by melting icecaps and rising sea levels; more frequent and intense hurricanes, floods, and other "extreme weather events" that cause death and destroy infrastructure; drought due to reductions in mountain snowpack and shifting precipitation patterns;

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[175] *Id.* at 165.

[176] Massachusetts v. EPA, 549 U.S. 497, 508–09 (2007).

[177] *Id.* at 116.

[178] Massachusetts v. EPA, 549 U.S. 497 (2007).

[179] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[180] 564 U.S. 410 (2011).

[181] *Id.* at 415.

[182] *Id.* at 420.

> destruction of ecosystems supporting animals and plants; and potentially "significant disruptions" of food production.[183]

The Court cited the EPA rule as persuasive authority supporting the agency's role in regulating greenhouse gases and the threat of climate change.[184] At the same time, in a footnote, the Court gave some credence to the opposing viewpoint.[185] It stated, "For views opposing [the] EPA's . . . , [t]he Court, we caution, endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change."[186] This was somewhat of a shift from the Court's position four years earlier in *Massachusetts v. EPA*, where it strongly supported the executive branch's conclusions on climate change.[187]

Unlike the deference afforded to government regulators in the climate change context, the Court's abortion jurisprudence has continued the careful balancing act staked out in *Roe*. Nineteen years after the Supreme Court decided *Roe*, it revisited the standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[188] Justice O'Connor wrote portions of the Court's opinion in *Casey*[189] and elaborated on Justice Blackmun's sensitivity to the topic. She wrote:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.[190]

Justice O'Connor acknowledged that no court decision can resolve the existential dispute and that the "moral and spiritual implications" of abortion were unresolvable.[191] Justice O'Connor's opinion explicitly accepted that disagreement about abortion is inevitable.[192] At various points throughout her opinion, Justice O'Connor described the singularity of the issue. She stated that "abortion is a unique act," placing

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[183] *Id.* at 417 (quoting 74 Fed. Reg. 66496, 66518, 66524–66535) (codified at 40 C.F.R. pt. 1 et seq.) (internal citations omitted).

[184] *Id.*

[185] *Id.* at 417 n.2.

[186] *Id.*

[187] *See supra* notes 158–60.

[188] 505 U.S. 833 (1992).

[189] *Id.* at 844.

[190] *Id.* at 851.

[191] *Id.*

[192] *Id.* at 878 (stating that "some disagreement is inevitable" and that disagreement is "to be expected in the application of a legal standard which must accommodate life's complexity").

the issue of abortion, and the *Roe* line of cases, in rarefied territory.[193] Justice O'Connor compared the abortion issue to the Court's opinion in *Brown v. Board of Education*,[194] which overruled *Plessy v. Ferguson*[195] and the separate-but-equal-doctrine.[196] The comparison came from the importance of the issue, as well as the critical need for the Court not to overturn the fragile *Roe* precedent.[197] In comparing *Roe* to *Brown*, Justice O'Connor clearly articulated the role of the court in such divisive matters:

> It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.
>
> The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.[198]

Both Justices Blackmun and O'Connor's views of the significance of the issue lives on in the national consciousness and the current dialogue on the issue.[199] It can be seen in Justice Thomas's *NIFLA* majority opinion, which held that abortion is "anything but an 'uncontroversial' topic."[200] The thread continued through Justice Breyer's *NIFLA* dissent that labeled the issue "special."[201]

While *American Electric Power* shifted away from complete acceptance of climate change as an undeniable fact,[202] it still stands far afield from the tone and caution with which the Supreme Court has addressed abortion. *Roe* and *Casey* invoked the metaphysical, the spiritual, and the philosophical.[203] Justice O'Connor compared the fragile

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[193] *Id.* at 853.

[194] 347 U.S. 483 (1954).

[195] 163 U.S. 537 (1896).

[196] *Casey*, 505 U.S. at 867.

[197] *Id.*

[198] *Id.*

[199] Amy Harmon, *'Fetal Heartbeat' v. 'Forced Pregnancy': The Language Wars of the Abortion Debate*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/us/fetal-heartbeat-forced-pregnancy.html [https://perma.cc/5FBY-QS6G].

[200] NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018).

[201] *Id.* at 2388 (Breyer, J., dissenting).

[202] *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 417 n.2 (2011).

[203] Roe v. Wade, 410 U.S. 113, 116 (1973); *Casey*, 505 U.S. at 851.

precedent of *Roe* to *Brown*,[204] a comparison that puts the issue in rare historical company. On the other hand, climate change is handled with basic statement of facts, and deference to agency expertise.[205] The Court does not grapple with the existence of climate change in the way that is apparent in both *Roe* and *Casey*.

This analysis, and the difference between the two lines of cases, helps to provide context for *NIFLA* and what it will mean for compelled disclosure going forward. Based on how the Supreme Court has handled abortion over the last fifty years, it should not be a surprise that Justice Thomas found abortion "anything but an 'uncontroversial' topic."[206]

This was in contrast to the way the Court has viewed climate change. In *Massachusetts v. EPA*, the Court treated it simply as a problem to be solved. In *American Electric Power,* while recognizing the opposition, the Court still cited the serious threats climate change posed to the nation.[207] It stands to reason that a climate change disclosure would be judged in the light of the evidence before the court. Climate change is a subject that is inherently knowable in a way that abortion is not today, and may never be. Opinions on abortion reflect a comprehensive worldview that may never be reconciled between opponents. Disputes on climate change are limited to facts and different strategies to approach the problem. They relate to tradeoffs between short-term and long-term gains, not deeply seated world views. Abortion relates to other constitutional considerations like the Establishment Clause and the Ninth Amendment right to privacy. Though great in importance, at its core, climate change is simply a policy issue. Abortion is not only about matters of life and death, but bodily integrity; it is conceived of as an individual liberty, a quality that climate change does not share.

IV. ASSESSING CLIMATE CHANGE DISCLOSURES UNDER *ZAUDERER*

Aside from differentiating itself from abortion, a successful defense of any climate change disclosure will have to survive the *Zauderer* standard on its own merits. This standard certainly looks different after *NIFLA*, but a government entity can still stress the scientific strength of the case for plans to address climate change as well as the one-sided health and safety consequences that merit the disclosures and a change in consumer behavior. This Part will analyze climate change disclosures under each *Zauderer* prong, address counterarguments, and demonstrate that under most, if not all, conceptions of the *Zauderer* standard

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[204] *See Casey*, 505 U.S. at 862–64.

[205] *See* Massachusetts. v. EPA, 549 U.S. 497, 504–05 (2007).

[206] *NIFLA*, 138 S. Ct. at 2372.

[207] *Am. Elec. Power*, 564 U.S. at 417.

after *NIFLA*, a climate change disclosure should survive review. Where helpful, this analysis will incorporate the examples referenced previously, the New York energy efficiency score posted on buildings and the Japanese carbon footprint on food labels.

A climate change disclosure should easily pass *Zauderer* prong one, which requires that the disclosure reasonably relate to a substantial state interest. While prong two is arguably no longer relevant to the analysis, it is still illustrative of the tension between a Court's choice to apply *Zauderer* or *Central Hudson*. Prong three, "factual and uncontroversial" is the most difficult to pass after *NIFLA*. However, with a proper conception of "uncontroversial," and a focus on scientific certainty, a climate change disclosure can survive. Finally, prong four requires the disclosure not be unduly burdensome. So long as the disclosure remains facially neutral and avoid pitfalls of past failed disclosures, it should survive.

A. Prong One: Substantial State Interest

Any climate change disclosure should be able to meet the first *Zauderer* prong requiring that the regulation be reasonably related to a substantial state interest. As mentioned earlier, health, safety and the environment are the traditional realms of government interests that can lead to valid compelled disclosures.[208] The Supreme Court has also previously recognized the substantial state interest in regulating greenhouse gases in *Massachusetts v. EPA*.[209] Once a substantial interest is identified, the government entity must argue that the disclosure reasonably relates to that interest. The party arguing for the disclosure simply must link the effects of climate change to the energy consumed by the skyscraper in the New York example, or the supply chain in the food labelling context. In both cases, there is a bedrock of science to support energy consumption and the contribution of power plants to the increase in greenhouse gases in the atmosphere and the effects of climate change.[210]

Parties fighting the regulation will compare this case to cases that have failed on this prong, such as the conflict diamond labelling disclosure, where the disclosure was only tenuously linked to the civil war in the Democratic Republic of the Congo.[211]

So long as the government grounds its argument in the long-established precedent of a state interest in health and safety, a disclosure

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[208] *See supra* part II.C.1.

[209] 549 U.S. 497 (2007).

[210] *Sources of Greenhouse Gas Emissions*, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/R32D-L5K9] (last visited Sept. 6, 2020).

[211] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

will survive prong one. The Japanese labelling scheme and the New York building score share much in common with the mercury labelling in *Sorrell*,[212] or the risk of radiation in *CTIA–The Wireless Ass'n v. City of Berkeley*.[213] Another data point that could help the disclosure survive a First Amendment challenge is the Congressional intent articulated in the Clean Air Act that identifies the substantial state interest in mitigating climate change.[214] Given this strong background and the ability to point to congressional will, it is likely that a climate change disclosure would pass the first *Zauderer* prong.

B. Prong Two: Addressing Deception

While the second prong of the *Zauderer* test originally required deception, both the D.C. Circuit and the Ninth Circuit have found that the test sweeps far beyond deception.[215] Therefore, any climate change disclosure will not have to prove that it addresses deception. However, the regulated parties challenging any disclosure could attempt to argue using the remnants of this prong that nondeceptive communication should be governed by *Central Hudson* and its intermediate scrutiny test rather than *Zauderer*. The government entity will argue for the lower standard that *Zauderer* brings, which is more deferential to the government interest. While this analysis would change depending on the disclosure before the court, given the expansion of *Zauderer* beyond deception, it is likely that a government entity would prevail, and the disclosure would be analyzed under *Zauderer*.

C. Prong Three: Factual and Uncontroversial

The third *Zauderer* prong, which requires the disclosure be "factual and uncontroversial," will be where the majority of the argument around a climate change disclosure takes place. After *NIFLA*, we know this prong does not simply mean factual, and that both words operate to define the limits of the government's ability to compel disclosure.[216] But does "factual and uncontroversial" mean the regulation cannot convey an ideology? Does a lack of scientific controversy survive? Or is it politically controversial? I argue that, under any of these standards, a climate change disclosure can survive the post-*NIFLA Zauderer*

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[212] 272 F.3d 104 (2d Cir. 2001).

[213] CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019).

[214] *See* 42 U.S.C. § 7411; *The Clean Air Act and GHG Emissions*, CTR. FOR CLIMATE STRATEGIES, http://www.climatestrategies.us/clean-air-act-and-ghg-emissions [https://perma.cc/WND4-RMAF].

[215] *See CTIA*, 928 F.3d at 842; Am. Meat Institute v. USDA, 760 F.3d 18, 22 (D.C. Cir 2014).

[216] NIFLA v. Becerra, 138 S. Ct. 2361, 2372 (2018).

analysis. The government must argue using the analysis above, which differentiates abortion from climate change, on all of these levels to show that climate change is not "controversial" in the way that abortion is.

If, as one scholar suggests, "factual and uncontroversial" means that a disclosure must not "convey a controversial ideology,"[217] a climate change disclosure can survive by focusing on the information to be disclosed, which will narrow the scope of inquiry. The government can also argue that the movement to respond to climate change is *not* an ideology. If the challenge is directed at a carbon footprint disclosure, like the New York building score or the Japanese scheme, then the government can defend the disclosure by arguing that, unlike the *NIFLA* disclosure, this does not express an ideology.

At this stage it is important to differentiate the "conveyance" of an ideology from tacit support for an ideology. Of course, climate change disclosures can be linked to a variety of ideologies, but under that standard, all disclosures on any range of topics, would be unconstitutional. What separates the *NIFLA* disclosures from Japanese nutritional labels or a New York energy efficiency score is that the content of the disclosure *is* the ideology. While one can feel however they want about nutrition or energy consumption, the *NIFLA* disclosures required the speakers to advocate for abortion services, which were antithetical to the speakers' worldview.

Requiring a carbon footprint disclosure in itself is not a value judgment on the amount of energy used to deliver a product to the consumer. On the other hand, the *NIFLA* disclosures specifically disclaimed the services provided by the regulated entities, thus conveying an ideology that state-operated services (which provided abortion services) were a superior form of medical care.[218] A climate-change-related disclosure simply intends to provide more extensive information to consumers in order to improve the marketplace.

It can be instructive to consider the harm inflicted by requiring the speech in each case, as well as the ability to counter the compelled speech. In the case of the *NIFLA* disclosure, the state was requiring the speakers to express a view completely inapposite of their beliefs, and the mission of their organization.[219] No ability for the speaker to counter that speech with their own beliefs could take away from the dignitary harm inflicted by the disclosure requirement. However, in the example of the New York building score, it is hard to fathom how displaying

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[217] Fowler, *supra* note 16, at 1679.

[218] *NIFLA*, 138 S. Ct. at 2377.

[219] *Id.* at 2379 (Kennedy, J., concurring) (stating that the disclosure law at issue "compels individuals to contradict their most deeply held beliefs").

energy consumption is in and of itself antithetical to any worldview. Even if a building owner believes climate change is a hoax, the disclosure simply requires display of energy efficiency. Furthermore, the building owner could counter the compelled disclosure with their own information.

On a broader level, efforts to mitigate the effects of climate change are not an ideology in the same way that either pro-life or pro-choice segments of society are. Much argument about climate change relates to the best institutions, and best means to resolve the issue, as opposed to whether climate change is, in fact, a problem at all. For example, in litigation between Exxon and the State of New York regarding Exxon's knowledge of climate change and alleged fraudulent disclosures, none of the argument centered on the existence of climate change, instead it concerned who should address the problem and how.[220]

In contrast, in the abortion context, a crisis pregnancy center and a Planned Parenthood condemn the fundamental objectives that each seeks to carry out. This is an example of polar opposites in ideology, whereas the effects of climate change do not inform a worldview in the same way. Regardless of how we feel about climate change, the seas will continue to rise. A government argument grounded in science can succeed in differentiating itself from deeply held personal beliefs like the morality of abortion rights.

If "factual and uncontroversial" can be proven through a lack of scientific controversy, then a climate change disclosure should certainly survive. The overwhelming consensus among scientists globally is that human activity is contributing to an unprecedented warming of the planet.[221] While the Supreme Court identified a possible difference in opinion in a footnote in *American Electric Power*,[222] when the source of the criticism of climate change is put in proper context, it becomes far easier to dismiss. The majority of academic work that questions climate change has been funded by the Heartland Institute, an organization funded by the fossil fuel industry.[223] When the overwhelming majority[224] is stacked against the miniscule dissent to the facts of climate change, it is hard to identify the argument as "controversial."

If "uncontroversial" can be established through scientific consensus, a climate change disclosure is likely to survive. Courts are adept at hearing technical evidence and making critical determinations, and differentiating fact from falsehood, a space where the science in support of

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[220] *See* Schwartz, *supra* note 97.

[221] NASA, *supra* note 154.

[222] Am. Elec. Power v. Connecticut, 564 U.S. 410, 417 n.2 (2011).

[223] *See* Goldenberg, *supra* note 149.

[224] *See* EPA, *supra* note 210.

climate change overwhelms. Unlike abortion, where disagreements cannot be resolved by marshalling more evidence, courts can resolve questions related to the warming of the planet, its effects, and reasonable ways to mitigate the harm.

If "factual and uncontroversial" relates to the political controversy of the disclosure, while more of an uphill battle, a climate change disclosure can still survive this analysis by pointing to public opinion and agency expertise. This is a particularly fascinating analysis under the Trump administration, which has worked diligently to deregulate and deconstruct executive branch attempts to combat climate change.[225] If "factual and uncontroversial" relates to political disagreement, it may be the hardest standard to overcome, particularly under the Trump administration. However, a government entity could point to public support for addressing climate change. A Yale study on climate change from 2019 shows that 67 percent of Americans polled believe that "global warming is happening," and 60 percent believe that the President and Congress "should do more to address global warming."[226] If that is not compelling to a court, the government entity can point to the consensus among agencies about climate change and the need to address it, despite what political appointees say.[227] In this way, the case can be compared favorably to *American Beverage*, where the disclosure was ruled invalid because the FDA did not agree with the regulators.[228] However, in this case, we can see at least fourteen prominent executive agencies with a published policy plan to address climate change.[229] Still, if the court were to emphasize the controversy on a political level, as a debate framed and governed by the political process, a court may find the disclosure "controversial."

On the other hand, the fact that a legislature or city government passed the disclosure requirement in the first place should demonstrate the political viability of the disclosure in the first place. It seems implausible that a change in federal political control could result in creating a controversy out of scientific consensus. For instance, if the next president were to say that cigarettes have medicinal value, would that

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[225] Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES, https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html [https://perma.cc/N5PE-BU8F] (last updated July 15, 2020).

[226] *Yale Climate Opinion Maps 2019*, YALE PROGRAM ON CLIMATE CHANGE COMM. (Sept. 17, 2019), https://climatecommunication.yale.edu/visualizations-data/ycom-us/ [https://perma.cc/TL98-FBKA].

[227] *Climate Change Adaptation: What Federal Agencies Are Doing*, CTR. FOR CLIMATE & ENERGY SOLUTIONS (Feb. 2012), https://www.c2es.org/site/assets/uploads/2012/02/climate-change-adaptation-what-federal-agencies-are-doing.pdf [https://perma.cc/N852-79YQ].

[228] Am. Beverage Ass'n v. City of San Francisco, 916 F.3d 749, 761 (9th Cir. 2018).

[229] *See* EPA, *supra* note 210.

make their regulation controversial? At the same time, courts can rest on the fact that local legislatures are politically accountable, therefore not insulated from the costs of promulgating "controversial" policy. In this regard, while politics may be a factor, it is likely judges are looking for something more to create controversy.

D. Prong Four: Unduly Burdensome

The fourth prong of *Zauderer* requires the disclosure not be unduly burdensome to the regulated party. The *NIFLA* disclosure was unduly burdensome because it required antiabortion advocates to deliver a script antithetical to their views.[230] The *NIFLA* court also found that there were other means to accomplish the goals of the disclosure.[231] The proposed disclosure in *American Beverage* was unduly burdensome because it required too large an area of the packaging to be devoted to the disclosure.[232]

While this inquiry is more fact based, there are lessons to draw from disclosures that have failed on this prong. First, unlike *American Beverage*, climate change disclosures do not require too much space from the regulated entity's label or advertising, whether that is in the form of a carbon score posted on the side of a New York building, or on a candy bar wrapper. Additionally, most buildings and food manufacturers should have their energy consumption data readily available, as this is a large cost in either business. Therefore, the costs to calculate the score should not be prohibitive. Second, the government must be able to successfully argue that, while there are other means to accomplish this goal, by putting the information before the consumer directly, it has a greater impact. Further, unlike *NIFLA*, the disclosure of this information is not loaded in the same way. Requiring the owners of a skyscraper to disclose their energy footprint is not antithetical to their mission. Courts generally recognize that disclosure is the least intrusive form of compelled government speech, and that determination will play in the government's favor here. In many ways the government can argue that this disclosure looks similar to the nutritional facts already disclosed on many food packages.

V. CONCLUSION

By emphasizing the science and differentiating from the unknowable, deeply held moral beliefs tied to abortion, a climate change disclosure can successfully pass *Zauderer* scrutiny. If a court measures a

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[230] NIFLA v. Becerra, 138 S. Ct. 2361, 2371. (2018).

[231] *Id.* at 2372.

[232] *Am. Beverage*, 916 F.3d at 761.

"controversy" according to the political salience of the issue, it will be a harder argument to make, but public opinion is behind government regulation addressed at climate change. While *NIFLA* has altered the landscape around compelled disclosure, the extraordinary nature of the issue before the Court in that case explains the result. Climate change has been difficult to tackle at the federal level, but local initiatives like the New York building code change can be effective in informing consumers and driving change through a more perfect market.

Disclosure should be a tool that legislators worldwide use to continue to mitigate the harm associated with climate change. While the First Amendment addresses the scope and reach of compelled disclosure, a climate change disclosure that intends simply to inform consumers, rather than persuade as to a correct course of action should be successful under *Zauderer*. Yet, the way in which the Supreme Court resolved *NIFLA* leaves some mystery as to the future direction on the topic. This Comment has attempted to address possible interpretations of "factual and uncontroversial" and the *Zauderer* standard going forward, and under many of those possibilities, a climate change disclosure will survive.

The Practice of Prayer at School Board Meetings: The Coercion Test as a Framework to Determine the Constitutionality of School Board Prayer

Claire Lee[†]

I. INTRODUCTION

Prayer in the public sphere has been part of American daily life since the founding.[1] Historically, both legislative sessions and school days began with Bible readings or prayers to solemnize the day.[2] The constitutionality, or lack thereof, of these prayers lies in the First Amendment's provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . or abridging the freedom of speech."[3] The First Amendment protects individual speech, but it also ensures that the government does not use speech to favor one religion over another. While the Supreme Court in *Engel v. Vitale*[4] found official school prayer in schools violated the First Amendment's Establishment Clause, in *Marsh v. Chambers*,[5] it conversely recognized the constitutionality of legislative prayer, observing that opening legislative bodies with prayer was a practice "deeply embedded in the history and tradition of this country."[6] Lying at the juncture of this conflicting First Amendment jurisprudence are school boards—effectively legislative bodies in the educational setting—that begin meetings with prayer.

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[1] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983); SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491–97 (1902).

[2] *See, e.g.*, *id.*; Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 207–12 (1963).

[3] U.S. CONST. amend. I.

[4] 370 U.S. 421 (1962).

[5] 463 U.S. 783 (1983).

[6] *See id.* at 786; *see also Engel*, 370 U.S. at 424.

While school boards have legislative functions such as setting school district policies and curricula, they are unlike traditional legislatures because they are student focused.[7] Not only do they make decisions that impact students, but frequently students are also in attendance at meetings.[8] Students may be required to attend meetings as student board or student council representatives, or they may attend sporadically when they are recognized by the board, disciplined, or attending to make their voices heard.[9] School boards' hybrid function make them difficult to classify within existing jurisprudence.

While the Third, Sixth, and Ninth Circuits treat school board meetings as extensions of the school setting, making prayer unconstitutional, the Fifth Circuit treats school board prayer as protected under the First Amendment.[10] Further complicating the circuit split, each of the circuits employs a jumble of Establishment Clause tests, leaving no clear authority on which test should be used.[11] While the "historical practices test" dominates legislative prayer jurisprudence,[12] school prayer cases frequently use a combination of tests.[13] School board prayer cases have used the *Lemon*, historical practices, coercion, and endorsement tests to different degrees.[14]

This Comment will explain the prominent Establishment Clause tests utilized by the Supreme Court in Part II and discuss the conflicting jurisprudence of school and legislative prayer in Part III. Part IV will analyze the approaches taken by the various circuits regarding school board prayer. For the purpose of resolving this circuit split, Part V of this Comment will argue in favor of a fact-specific coercion test that gives flexibility and clarity while also protecting students. Additionally, this Part will discuss the shortcomings of using the historical practices, endorsement, and *Lemon* tests in the school board prayer context. All

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[7] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1138–39 (9th Cir. 2018).

[8] *See, e.g.*, *id.*

[9] *See, e.g.*, *id.* at 1138–39 (explaining instances in which students attend school board meetings as part of a disciplinary proceeding, "student showcase," "student recognition," or as a Board student representative).

[10] *Compare* Doe v. Indian River Sch. Dist., 653 F.3d 256, 282 (3d Cir. 2011), Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 383–85 (6th Cir. 1999), *and Chino*, 896 F.3d at 1145 *with* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017).

[11] *See, e.g.*, *Indian River*, 653 F.3d at 283–90 (applying the *Lemon* and endorsement tests and using language from the coercion test); *Coles*, 171 F.3d at 383 (applying the *Lemon* test); *Chino*, 896 F.3d at 1148 (applying the *Lemon* test); *McCarty*, 851 F.3d at 529 (applying the legislative prayer historical practices test).

[12] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–790 (1983); Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[13] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 595 (1992).

[14] *See, e.g.*, *Indian River*, 653 F.3d at 283–90; *Coles*, 171 F.3d at 383; *Chino*, 896 F.3d at 1148; *McCarty*, 851 F.3d at 529.

three overlook important factors present in school board meetings including setting, audience, and history.

II. ESTABLISHMENT CLAUSE TESTS

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[15] Through the Fourteenth Amendment, the Establishment Clause applies not only to federal authorities, but also to state and local authorities such as school boards.[16] While this rule appears simple, courts have historically been far from clear on what counts as establishment.[17] As a result, modern courts apply an assortment of different tests at different times, sometimes even applying multiple tests to decide a single case.[18] The most applicable tests in legislative and school prayer jurisprudence are the *Lemon*, endorsement, coercion, and historical practices tests. These four tests have been used both alone and jointly by the Supreme Court to explain its Establishment Clause school and legislative prayer cases.[19]

A. *Lemon* Test

In 1971, the Court first handed down the three-part *Lemon* test in *Lemon v. Kurtzman*,[20] where it considered the constitutionality of state statutes that provided state funding to secular and religious private schools.[21] Relying on many years of "cumulative criteria," the Court found that a statute passes constitutional muster if (1) it "ha[s] a secular legislative purpose," (2) "its principal or primary effect [is] one that neither advances nor inhibits religion," and (3) "the statute [does] not foster 'an excessive government entanglement with religion.'"[22] The third prong of the *Lemon* test has been interpreted to prohibit a law that has "divisive political potential" or may lead the state to overseeing and meddling in religious affairs.[23]

The "divisive political potential" aspect broadens the *Lemon* test such that policies that are facially neutral toward religion may still be

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[15] U.S. CONST. amend. I.

[16] *See, e.g.*, Everson v. Bd. of Educ. of Ewing Tp., 330 U.S. 1, 8 (1947).

[17] *See* Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (2006).

[18] *See id.* (noting at least ten Establishment Clause standards).

[19] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786–790 (1983); Town of Greece v. Galloway, 572 U.S. 565, 590 (2014); Lee v. Weisman, 505 U.S. 577, 595 (1992); *Indian River*, 653 F.3d at 283–90; *Coles*, 171 F.3d at 383; *Chino*, 896 F.3d at 1148; *McCarty*, 851 F.3d at 529.

[20] 403 U.S. 602 (1971).

[21] *Id.* at 606.

[22] *Id.* at 612–13 (internal citations omitted).

[23] *Id.* at 614–15, 622.

found unconstitutional.[24] In *Santa Fe Independent School District v. Doe*,[25] the Court found unconstitutional a policy of allowing students to vote on who would give invocations at high school football games.[26] The Court emphasized that the voting mechanism would encourage religious divisiveness in a public school setting, which would be at odds with the First Amendment.[27]

Almost as soon as the *Lemon* test was announced, justices on the Court began to erode the doctrine, in part, because of its lack of clarity and malleable nature.[28] As a result, in many of the cases following *Lemon*, the Court either expressly declined to apply the test or ignored it.[29] Recently, a plurality in *American Legion v. American Humanist Association*[30] found that the *Lemon* test should not be used in at least some Establishment Clause cases because it fails to consider that, for historical practices, it may be difficult to determine an original purpose, and purposes may multiply or evolve over time.[31] While the *Lemon* test, if enforced broadly, may remove religion from government spaces, it may do so at the cost of limiting historically supported religious practices.

B. Endorsement Test

Unsatisfied with the shortcomings of the *Lemon* test, Justice O'Connor proposed the endorsement test in *Lynch v. Donnelly*,[32] where the Court considered the legality of a nativity scene on town property.[33]

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[24] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

[25] 530 U.S. 290.

[26] *Id.* at 305–07.

[27] *Id.* at 317.

[28] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081–82 (2019) (finding that there are considerations counseling against the usefulness of *Lemon* in deciding the constitutionality of longstanding monuments, symbols, and practices); McCreary Cty. v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (highlighting that a majority of the justices had "repudiated the brain-spun '*Lemon* test'"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

[29] *See Am. Legion*, 139 S. Ct. at 2080 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Cutter v. Wilkinson, 544 U.S. 709 (2005); Van Orden v. Perry, 545 U.S. 677 (2005); Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012); Town of Greece v. Galloway, 572 U.S. 565 (2014); Trump v. Hawaii, 138 S. Ct. 2392 (2018)).

[30] 139 S. Ct. 2067.

[31] *Id.* at 2082–85.

[32] 465 U.S. 668 (1984).

[33] *See id.* at 670–71, 690 (O'Connor, J., concurring).

Justice O'Connor sought to clarify the *Lemon* test by using endorsement as the focus of analysis. Under this analysis, the first two *Lemon* factors turn on "whether [the] government's actual purpose is to endorse or disapprove of religion . . . [and] whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[34] Justice O'Connor's endorsement test is based on the idea that government endorsement sends a message that is linked to political inclusion.[35] As a result, religious endorsement may make non-adherents of that religion feel like outsiders. The test narrows *Lemon*'s scope while also ensuring that the government does not send a message of inclusion or exclusion based on religion.[36] Given the overlap between the *Lemon* and endorsement tests, courts have used the endorsement test both as a stand-alone analysis and as a "legitimate part of *Lemon*'s second prong."[37]

Like the *Lemon* test, the endorsement test is extremely manipulatable because it assesses endorsement through the eyes of a "reasonable observer."[38] While a "reasonable observer" may appear to be objective, Justice O'Connor notes that this hypothetical person should be "deemed aware of the history and context of the community and forum in which the religious display appears."[39] As such, the results of this analysis will depend on the background and cultural assumptions that a judge gives the "reasonable observer,"[40] thus giving excessive power to the court by way of discretion. Additionally, as a narrowed version of the *Lemon* test, the endorsement test may protect more religious speech instead of staunchly upholding the Establishment Clause.

C. Coercion Test

With the misgivings of the *Lemon* and endorsement tests in mind, courts in school prayer cases have recently turned to the coercion test, which focuses on compelled religious practices' potential effects on

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[34] *Id.*

[35] *See id.* at 688 (O'Connor, J., concurring).

[36] *See* Gey, *supra* note 17, at 738.

[37] Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 850 (7th Cir. 2012) (viewing the endorsement test as a "legitimate part of *Lemon*'s second prong"); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (using the endorsement test to find a school-voucher program constitutional).

[38] *See* County of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgement), *abrogated by* Town of Greece v. Galloway, 572 U.S. 565 (2014).

[39] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgement).

[40] *See* Gey, *supra* note 17, at 739.

growing young minds.[41] In *Lee v. Weisman*,[42] the Court found that the government cannot "coerce anyone to support or participate in religion or its exercise."[43] Unlike the *Lemon* test, the coercion test lacks formal criteria. Instead, it looks to the extent of supervision and social pressures on students to participate in the prayer or religious activity.[44] This means that courts will analyze state action to determine if it directly or indirectly coerces individuals to participate in religious activity.[45] While some, most notably Justice Scalia,[46] have argued that only direct coercion should be considered, precedent currently dictates that even indirect coercion—laws that do not directly coerce religious behavior—may violate the First Amendment.[47]

The coercion test has flexibility of a different kind, providing in the analysis a consideration of time and place not present in the *Lemon* or endorsement analyses. Furthermore, by taking a totality-of-the-circumstances approach, the coercion test provides space to consider that some religiously rooted practices in public spaces may not be coercive. Steven Gey argues that the coercion test, looking at both direct and indirect coercion, is incoherent and unpredictable as every government action is potentially coercive.[48] If the coercion test were instead modified to only consider direct coercion, the resulting predictability would come at the cost of rendering the Establishment Clause redundant.[49] Considering only direct coercion—in Justice Scalia's view, the most egregious and overt actions—it is likely that any government actions violating the Establishment Clause would also run afoul of the Free Exercise or Free Speech Clauses.[50]

D. Historical Practices Exception

Within Establishment Clause jurisprudence, there is an exception to the application of the jumble of tests. The historical practices exception first evolved as the basis for the legislative prayer exception.[51] In *Marsh*, the Court implied that when a practice has a long historical

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[41] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992).

[42] 505 U.S. 577.

[43] *Id.* at 587.

[44] *See id.* at 593.

[45] *See id.* at 588.

[46] *See, e.g.*, *id.* at 640 (Scalia, J. dissenting) (arguing that, historically, coercion only referred to direct "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*").

[47] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 430 (1962).

[48] *See* Gey, *supra* note 17, at 740–42.

[49] *See id.* at 744.

[50] *See id.*

[51] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983).

pedigree, other Establishment Clause tests are either wholly or partially inapplicable.[52] Relying on legislative prayer in the First Congress, the Court stated that historical patterns alone do not justify constitutional violations but do shed light on what the Framers thought comprised unconstitutional conduct.[53]

This exception is still largely undefined as to what practices qualify and how long of a history a practice must have to qualify.[54] While it is uncertain how longstanding a practice must be, Michael McConnell has suggested some characteristics of what the Framers thought were constitutional violations.[55] These characteristics include: government control over the doctrine and personnel of the established church, mandatory attendance in the established church, government financial support of an established church, restrictions on worship in dissenting churches, restrictions on political participation by dissenters, or use of the church to carry out civil functions.[56] Under the historical practices framework looking at practices extending to the founding, practices that do not fit within these characteristics would be constitutional, as the founders would not have considered them violations.

The historical practices exception allows the Court to preserve long-held traditions that may seem to violate the First Amendment but have been ingrained in the American tradition. This may act as a tradeoff between Establishment Clause protections and upholding longstanding religious speech. Such a tradeoff may come at a cost to predictability and constitutionality. Similar to the criticism of other Establishment Clause tests, the exception can also be unpredictable. The jurisprudence does not define how long-standing a practice must be to qualify for the exception, leaving its application to practices outside of legislative prayer uncertain.[57] Additionally, the exception fails to consider that a historical practice may have a long pedigree but nonetheless be considered unconstitutional by modern standards.

III. LEGISLATIVE AND SCHOOL PRAYER

The various Establishment Clause tests and historical practices exception have been applied in different degrees and combinations in school and legislative prayer cases.[58] These two lines of jurisprudence

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[52] *See id.* at 788–92.

[53] *Id.* at 790.

[54] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[55] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131–76 (2003).

[56] *See id.*

[57] *See, e.g.*, *Town of Greece*, 572 U.S. at 590.

[58] *See, e.g.*, *Marsh*, 463 U.S. at 783; *Town of Greece*, 572 U.S. at 590; Lee v. Weisman, 505 U.S.

lead to a divergence in outcomes with school prayer being held largely unconstitutional and legislative prayer being held largely constitutional.[59] To understand the application of these tests to school board prayer—a hybrid of school and legislative prayer—the two lines of jurisprudence must be examined.

A. Religion and Public Schools

Unlike other areas of Establishment Clause jurisprudence, the Supreme Court has been largely consistent in striking down religious expression or involvement in the area of public schools.[60] School prayer jurisprudence began with *Engel v. Vitale* and *School District of Abington v. Schempp*,[61] in which the Court found school-sponsored prayer and Bible readings unconstitutional.[62] The statute in question in *Engel* required students to begin each school day by saying aloud a prayer, while in *Schempp* the challenged statutes required schools to begin each day with readings from the Bible. Both *Engel* and *Schempp* were decided prior to the *Lemon* test, and the Court undertook an analysis focused largely on the concern of mixing religious activity with a government institution by considering coercion, endorsement, and the neutrality of the statute in question.[63] Following the advent of the *Lemon* test, the Supreme Court in *Wallace v. Jaffree*[64] reconsidered required school prayer in the form of a moment of silence for "meditation or voluntary prayer."[65] Relying on *Lemon* and the endorsement tests, the *Wallace* court emphasized that the implicated state statute did not have a secular purpose and thus was unconstitutional.[66]

More recently, the Court has moved away from applying the *Lemon* or endorsement tests in favor of the coercion test in school prayer

577, 595 (1992); Doe v. Indian River Sch. Dist., 653 F.3d 256, 283–90 (3d Cir. 2011); Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 383 (6th Cir. 1999); Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1148 (9th Cir. 2018); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529 (5th Cir. 2017).

[59] *See, e.g.*, *Marsh*, 463 U.S. at 786; Engel v. Vitale, 370 U.S. 421, 424 (1962).

[60] *See, e.g.*, Bruce P. Merenstein, *Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings*, 145 U. PA. L. REV. 1035, 1042 (1997); Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); *Engel*, 370 U.S. 421; Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Wallace v. Jaffree, 472 U.S. 38 (1985); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[61] 374 U.S. 203.

[62] *See id.* at 211; *Engel*, 370 U.S. at 430.

[63] *See, e.g.*, *Engel*, 370 U.S. at 431, 436; *Schempp*, 374 U.S. at 221–26.

[64] 472 U.S. 38 (1985).

[65] *Id.* at 40.

[66] *See id.* at 56.

cases.[67] This became evident in *Lee v. Weisman*,[68] decided in 1992, where the Court employed the coercion test and found prayer at a nonmandatory, public school graduation unconstitutional.[69] The Court emphasized that the school's control of the event placed pressure on students to participate and that the pressure, while indirect, could be as real as overt compulsion.[70]

The Court in *Santa Fe Independent School District v. Doe*[71] similarly found prayer before football games unconstitutional.[72] There, the Court relied on *Lee*'s coercion test while also employing the *Lemon* and endorsement tests to find the practice similar to the unconstitutional prayer in *Lee*.[73] Extending *Lee*, the *Santa Fe* Court contended that prayers in a school setting could be coercive even if attendance was "purely voluntary."[74] The Court utilized all three tests to emphasize that, regardless of which Establishment Clause test was used, the practice was unconstitutional. This analytical choice demonstrates that, while the coercion test is most frequently used in modern analysis, the *Lemon* and endorsement tests are still relevant in school prayer cases. The continued relevance of the *Lemon* and endorsement tests, both inherently hostile toward integrating church and state, may weaken attempts to argue that school prayer is constitutional.[75]

B. Legislative Prayer

Prayer in legislative bodies, on the other hand, is constitutional under the historical practices exception.[76] In *Marsh*, the Supreme Court ruled that legislative prayer could coexist with the First Amendment.[77] There, a state legislator challenged the constitutionality of a practice by the Nebraska legislature of opening each session with prayer by a chaplain paid with public funds.[78] In the Court's ruling, it noted that adults and elected legislators are presumably not vulnerable to religious pressure.[79] *Marsh* relied on the long history of legislative prayer

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[67] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

[68] 505 U.S. 577.

[69] *See id.* at 592.

[70] *See id.* at 593.

[71] 530 U.S. 290 (2000).

[72] *See id.* at 317.

[73] *See id.* at 301–02.

[74] *Id.* at 312.

[75] *See, e.g.*, Gey, *supra* note 17, at 733.

[76] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786 (1983).

[77] *Id.*

[78] *Id.* at 784–85.

[79] *Id.* at 792.

in America to justify its constitutionality.[80] The Court commented that there was an "unambiguous and unbroken history of more than 200 years" leaving "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[81] Relying on the historical practices test, the Court declared that this was not an establishment of religion, but rather a "tolerable acknowledgement of beliefs widely held among the people."[82]

Recently, the Supreme Court revisited this issue in *Town of Greece v. Galloway*,[83] ruling that an opening prayer at a town meeting was constitutional.[84] The opening prayer at issue in *Town of Greece* was given by clergy—unpaid volunteers—selected from congregations listed in a local directory.[85] Relying on its decision in *Marsh*, the Court stated that the historical practices exception applied if the prayer practice "fits within the tradition long followed in Congress and state legislatures."[86] In finding that the prayer in *Town of Greece* fell within the historical practices exception, the Court further noted that the prayer was not coercive because the target audience of the prayer was mature adults not "readily susceptible to religious indoctrination or peer pressure."[87] Justice Kennedy, writing for the fractured court, distinguished *Town of Greece* from *Lee*, finding that mature adults at legislative sessions are free to leave, arrive late, or make protests without being disrespectful.[88] Furthermore, the Court noted that within the context of legislative sessions, it may not even be noticed if someone in attendance wanted to exit the room during a prayer they found distasteful.[89]

Additionally, the Court noted that the prayer took place during the opening, not the policymaking portion of the meeting.[90] The Court found that the prayer delivered during the ceremonial portion of the meeting acknowledged religious leaders and the institutions they represented, without endorsing a religion as a policy of the community.[91]

While the legislative prayer jurisprudence makes clear that prayer at the opening of legislative sessions is constitutional, the Court left

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[80] *See id.* at 783.

[81] *Id.* at 792.

[82] *Id.*

[83] 572 U.S. 565 (2014).

[84] *See id.* at 566.

[85] *Id.* at 570–71.

[86] *Id.* at 577.

[87] *Id.* at 590 (quoting *Marsh*, 463 U.S. at 792).

[88] *See id.*

[89] *Id.*

[90] *See* Town of Greece v. Galloway, 572 U.S. 565, 591 (2014).

[91] *Id.*

open how this might apply to circumstances outside of an elected state legislature.

IV. THE CIRCUIT SPLIT

In light of uncertain Supreme Court precedent, lower courts both before and after *Town of Greece* have considered whether prayers preceding school board meetings are more like school prayer or legislative prayer.[92] Since school and legislative prayer jurisprudence utilize different Establishment Clause tests and lead to diverging outcomes, the determination of whether school board prayer is more like prayer in a classroom or in the legislature is critical to the analysis.

Prior to *Town of Greece*, the Third and Sixth Circuits held that the coercive nature of school board prayer resembled school prayer, finding school board prayer unconstitutional under the *Lemon* test.[93] After *Town of Greece*, the Ninth Circuit held the same.[94] The Fifth Circuit is the only circuit to disagree.[95]

The Third and Sixth Circuits' pre-*Town of Greece* rulings both used the coercion and the *Lemon* tests in their analyses.[96] In *Coles v. Cleveland Board of Education*,[97] the Sixth Circuit rejected the comparison between school boards and legislative sessions.[98] Challenged in *Coles* was a 1992 prayer policy that resulted in each school board meeting opening with either a prayer offered by a local religious leader chosen by the school board president, a moment of silent prayer, or a prayer led by the school board president.[99] These school board meetings were held on school property and provided opportunities for voluntary and required student attendance.[100] The public-comment portion of the meeting allowed students and parents to voice their concerns over school polices and, under certain circumstances, served as a forum for addressing student disciplinary grievances.[101]

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[92] *See, e.g.*, Doe v. Indian River Sch. Dist., 653 F.3d 256 (3d Cir. 2011); Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999); Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018); Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017).

[93] *See Indian River*, 653 F.3d at 282, 290; *Coles*, 171 F.3d at 380–85.

[94] *See Chino*, 896 F.3d at 1150.

[95] *See McCarty*, 851 F.3d at 526.

[96] *See, e.g.*, *Indian River*, 653 F.3d at 282, 290; *Coles*, 171 F.3d at 380–85.

[97] 171 F.3d 369 (6th Cir. 1999).

[98] *Id.* at 381.

[99] *Id.* at 372–74 (noting that prior to 1992, Cleveland school board "meetings were devoid of opening prayer).

[100] *Id.* at 372.

[101] *Id.*

Additionally, student representatives sat on the Cleveland Board of Education to summarize the students' perspective on school activities.[102] The school board also regularly invited students to attend its meetings to acknowledge their academic, athletic, or community service achievements.[103] Considering the presence of the students, the Sixth Circuit reasoned that school board meetings, unlike legislative sessions, risk coercion.[104] Because school board meetings concern students, students have an incentive to attend and, in some cases, are required to attend—local townsfolk have no such compulsion.[105] Further, in contrast to legislators, school board members "are directly communicating, at least in part, to students."[106] While in *Engel* and *Lee* the risk of coercion was enough to make prayer unconstitutional, here, coercion was only enough to trigger the *Lemon* test.[107] Under the *Lemon* test analysis, the prayers were unconstitutional.[108]

The Third Circuit, in *Doe v. Indian River School District*,[109] followed the Sixth Circuit's reasoning.[110] In *Indian River*, the school board had a long-standing policy of praying at regularly scheduled meetings.[111] This policy allowed, on a rotating basis, an adult Board member to offer a prayer or request a moment of silence explicitly stipulating that such prayers were voluntary and no employees, students, or community members in attendance were required to participate.[112] The court noted that school board meetings, whether or not they are mandatory, invite student participation, and, consequently, "bear several markings of . . . implied coercion."[113] Thus, the court held, prayer before school board meetings resembles other in-school prayer and cannot survive the *Lemon* test.[114] Therefore, the

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[102] *Id.*

[103] Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 372 (6th Cir. 1999).

[104] *See id.* at 382.

[105] *Id.* at 383.

[106] *Id.* at 382.

[107] *See id.* at 383.

[108] *Id.* at 385.

[109] 653 F.3d 256 (3d Cir. 2011).

[110] *See id.* at 282.

[111] *Id.* at 261 (highlighting that the school district has recited prayers at meetings since the creation of the district in 1969, but the policy was not formalized until 2004).

[112] *Id.* at 261–62 (noting that the school board went so far as to read a disclaimer prior to the prayer to "ensure that any members of the public in attendance understand the purpose of the prayer policy").

[113] *Id.* at 276–78 (finding recognition of student achievements, attendance at board meetings as a requirement of extracurricular activities, the location of meetings on school property, and the board's complete control over the meeting as markings of implied coercion).

[114] *Id.* at 282–90.

prayers before Indian River School District board meetings were deemed unconstitutional.[115]

The Ninth Circuit's post- *Town of Greece* ruling is the most recent and relevant opinion to the side of the circuit split that finds school board prayer unconstitutional.[116] In *Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education*,[117] the court found that school board prayer failed the *Lemon* test because it lacked a secular purpose.[118] The Chino Valley Unified School District Board's challenged 2013 policy "provide[d] for prayer delivery [opening school board meetings] 'by an eligible member of the clergy or a religious leader in the boundaries of' the district."[119] This prayer usually followed the recitation of the Pledge of Allegiance by a member of the school community and presentation of the colors by the Junior Reserve Officers' Training Corps to begin each meeting.[120] In addition to providing the forum for making decisions on student discipline and district administration, Chino Valley school board meetings featured "student showcase[s]" and "student recognition" involving "students of all ages—from elementary school to high school—who are in attendance."[121] The Board's student representative additionally served as an active contributor at meetings, voting with the Board in open sessions and discussing student issues during the period for comment.[122]

In finding that the prayer policy failed the *Lemon* test, the Ninth Circuit analogized the case to *Santa Fe*, stating that messages other than prayers could serve the stated purpose of having the prayer.[123] This analysis differed slightly from the Third and Sixth Circuit's

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[115] *Id.* at 290.

[116] *See* Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018).

[117] 896 F.3d 1132 (9th Cir. 2018).

[118] *See id.* at 1150 (finding that policy's purported secular purposes were contradicted by public statement of board member that board's goal in enacting prayer policy was furtherance of Christianity); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306–09 (2000) (dismissing solemnizing an event as a valid secular purpose as it "invites and encourages religious messages"); *cf.* Lynch v. Donnelly, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions").

[119] *Chino*, 896 F.3d at 1139.

[120] *Id.* at 1138.

[121] *Id.* at 1138–39 (explaining that "student showcase[s]" encompassed presentations by classes or student groups including second-graders singing folk songs or elementary advanced band students, while "student recognition[s]" highlighted academic and extracurricular accomplishments of students in the district including recognition of science fair winners, recipients of college scholarships, and the high school student with the highest GPA).

[122] *Id.* While the student representative did vote with the Board, their voting was recorded separately, and they did not take part in closed-session disciplinary decisions. *Id.* at 1138.

[123] *Id.* at 1150–51.

approaches by minimizing discussion of coercion in the application of the *Lemon* test.[124] The Ninth Circuit found *Chino* to be dissimilar from *Town of Greece* because it determined that the setting of a board meeting, where schoolchildren are often in attendance and under the control of the board, was unlike a legislative meeting where members have equal status.[125] As a result of these factors, the court found that the large numbers of children and adolescents present made the situation inconsistent with the legislative prayer tradition.[126] The Ninth Circuit's ruling limited the ability of school board members to begin meetings in prayer, but also limited the government from indoctrinating children in attendance with the Christian religion.

In contrast, the Fifth Circuit classified school board meetings as legislative, and consequently held that pre-meeting invocations, often consisting of prayer, were constitutional.[127] In *American Humanist Association v. McCarty*,[128] the Birdville Independent School District opened their public monthly meetings with two students reciting the Pledge of Allegiance, the Texas pledge, and delivering a statement—which sometimes consisted of an invocation.[129] While the school district did not mandate that the invocation include a prayer, frequently students elected to open with a prayer.[130] Like other school boards, students frequently attended meetings to receive awards or for brief performances.[131] In this context, the Fifth Circuit specifically found that a "school board is more like a legislature than a school classroom or event."[132] Even though children are in attendance, the Fifth Circuit stated that that fact was not enough to change a school board meeting prayer case into a school prayer case.[133] Thus, instead of finding school boards to be within school prayer jurisprudence, the Fifth Circuit followed *Town of Greece* and the historical practices exception, finding prayer at school board meetings constitutional.[134] This decision allows school board members to share their religious convictions through

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[124] *See id.* at 1148–51.

[125] *See id.* at 1142.

[126] *See id.* at 1145.

[127] *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).

[128] 851 F.3d 521 (5th Cir. 2017).

[129] *Id.* at 524.

[130] *Id.* at 524 ("From 1997 through February 2015, the student-led presentations were called 'invocations' and were delivered by students selected on merit. In March 2015 . . . [the school district] began referring to them as 'student expressions' and providing disclaimers that the students' statements do not reflect BISD's views. BISD began randomly selecting, from a list of volunteers, the students who would deliver the expressions.").

[131] *Id.*

[132] *Id.* at 526.

[133] *See id.* at 527–28.

[134] *See id.* at 529–30.

prayer, despite the risk that the prayers may persuade the children in attendance.

V. THE COERCION TEST AS A FRAMEWORK FOR ANALYZING SCHOOL BOARD PRAYER CASES

A. The Ninth and Fifth Circuits' Establishment Clause Analyses Are Ill-Suited for School Board Prayer Cases

While the Ninth and Fifth Circuits used two predominant Establishment Clause analyses, both the *Lemon* test and historical practices exception are ill-suited for school board prayer cases.[135] Both have a myriad of issues in development and application in addition to overlooking important considerations.

1. The *Lemon* test is unsatisfactory due to doctrinal shortcomings and waning support

The *Lemon* test has been eroded and avoided by the Court since its inception due to its doctrinal difficulties and extreme malleability.[136] The doctrinal implications of *Lemon* stem from how broadly or narrowly it is interpreted. If interpreted broadly, the *Lemon* test makes it difficult to reconcile the Establishment Clause with the Free Exercise Clause.[137] Taken literally, *Lemon*'s requirement that a statute have a "secular purpose" would foreclose all government actions that account for religious interests.[138] However, past decisions concerning the Religion Clauses make it clear that it is constitutional to, say, excuse Amish schoolchildren from compulsory education laws and religious conscientious objectors from military service.[139] Narrow interpretations, on the other hand, may overprotect religious interests. This flexibility in interpretation gives the Court desirable latitude, but, as the Court itself has conceded, does so at the cost of clarity and predictability.[140] As a result, decisions under the *Lemon* test are difficult to reconcile as a whole.[141]

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[135] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018); *McCarty*, 851 F.3d 521 (5th Cir. 2017).

[136] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081–82 (2019); McCreary Cty. v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in judgment).

[137] *See, e.g.*, Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 501 (2002).

[138] *See id.*

[139] *See, e.g.*, *id.*; Wisconsin v. Yoder, 406 U.S. 205 (1972); Selective Draft Law Cases, 245 U.S. 366, 389–90 (1918).

[140] *See, e.g.*, Comm. for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980).

[141] *See, e.g.*, Choper, *supra* note 137, at 503 n.25 ("*Compare* Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding that government tax benefits to parents whose children attended

This flexibility means that a particular court can mold the *Lemon* test to its desired outcome, leaving school boards without clear guidance on which policies are acceptable and which policies are unconstitutional.

Recently, the Court highlighted the shortcomings of the *Lemon* test in *American Legion*.[142] There, Justice Alito, writing for a majority, explained that in some Establishment Clause cases the *Lemon* analysis is incredibly difficult to undertake.[143] In the case of long-established practices or symbols, he noted, it may be difficult to identify the original purpose.[144] Furthermore, with the passage of time, the original purpose may change or be replaced with multiple purposes.[145] Finally, ending any historical practice will often not appear neutral, making it seem as if the government is hostile toward religion.[146] For these reasons, the Court found the *Lemon* test unsuitable for at least some categories of Establishment Clause cases.[147] Justice Kavanaugh, concurring, argued that the *Lemon* test is not applicable in any Establishment Clause cases due to its shortcomings.[148] Beyond the difficulty in conducting a *Lemon* test analysis, Justice Kavanaugh argued that in modern jurisprudence the *Lemon* test is not good law as the Court does not actually use *Lemon* in its decision-making.[149]

Due to the doctrinal issues, the Court's inconsistent use of the test, and recent hostility toward it, the *Lemon* test is unsuitable for school board prayer cases. As explained in *American Legion*, it fails to consider the historical significance of some practices, a factor relevant in both legislative prayer and school board prayer cases.[150] Furthermore, as a notoriously malleable test, it could be used, as it has been in other Establishment Clause cases, to create inconsistent results that could either over or under protect religious interests depending on the

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nonpublic and predominantly parochial schools violated the Establishment Clause because the effect was to advance religion in the schools . . .), *with* Mueller v. Allen, 463 U.S. 388 (1983) (upholding the constitutionality of a state income tax deduction to all taxpayers for expenses of tuition, transportation, textbooks, instructional materials, and other school supplies in public and nonpublic schools since the purpose and primary effect of the facially neutral law was secular, despite the fact that the great bulk of deductions could be taken *only* by parents of children in parochial schools).").

[142] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082–85 (2019).

[143] *See id.* at 2082.

[144] *Id.*

[145] *Id.* at 2082–84.

[146] *Id.* at 2084–85.

[147] *Id.* at 2085.

[148] *Id.* at 2092 (Kavanaugh, J., concurring).

[149] *Id.* (arguing that instead of the *Lemon* test each category of Establishment Clause cases has its own principles based on history, tradition, and precedent).

[150] *See, e.g.*, Am. Humanist Ass'n v. McCarty, 851 F.3d 521 (5th Cir. 2017); Town of Greece v. Galloway, 572 U.S. 565 (2014).

interpretation of the test.[151] The *Lemon* test undercuts First Amendment protections by not providing clear and coherent guidance on Establishment Clause violations.

In sum, the *Lemon* test fails because of doctrinal shortcomings stemming from its inherent malleability and difficult application. These shortcomings lead to decisions that are difficult to reconcile as a whole. With the *Lemon* test waning in support, as Justice Kavanaugh pointed out, it is not a suitable candidate for reconciling this circuit split.[152]

2. The historical practices exception is unsatisfactory because it fails to consider the context of the practice and changing understandings of what constitutes an Establishment Clause violation

Likewise, the historical practices exception has shortcomings that make it an unsuitable candidate for these cases. The historical practices exception purportedly relies on unbroken history to uphold practices that might otherwise be found to violate the Establishment Clause. However, it assumes that the founders' understanding of constitutional practices holds true today.[153] This fails to consider how the nation and the understanding of the constitution over time has developed. What may have once been considered a religious yet constitutional practice, may today serve as a sign of government-established religion.[154] Furthermore, the requirement of an unbroken history that the exception relies on has been undermined through subsequent decisions. While the practice in *Marsh* was continued for over two hundred years, practices with much shorter histories have also been granted the exception.[155] *American Legion* used historical practices to justify preserving a memorial cross that had been on public land for less than a century.[156] *Town of Greece* used historical practices to justify the decade-old practice of opening town council meetings with prayer.[157] Without an actual

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[151] *See, e.g.*, Choper, *supra* note 137, at 503 n.25 (comparing jurisprudence such as *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) with *Mueller v. Allen*, 463 U.S. 388 (1983) where the *Lemon* test resulted in unreconcilable outcomes).

[152] *See Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring).

[153] *See, e.g.*, Eric J. Segall, *Mired in the Marsh: Legislative Prayers, Moments of Silence, and the Establishment Clause*, 63 U. MIAMI L. REV. 713, 723 (2009).

[154] *See, e.g.*, Michael McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 363 n.4 (1988) (explaining that the conceivable explanations for why the First Congress might not have considered the legislative chaplaincy as a "law respecting the establishment of religion" are either not historically convincing or are inapplicable in modern times).

[155] *See, e.g.*, *Town of Greece*, 572 U.S. 565; *Am. Legion*, 139 S. Ct. 2067.

[156] *See Am. Legion*, 139 S. Ct. at 2074.

[157] *See Town of Greece*, 572 U.S. at 570.

history to rely on, the historical practices exception has no other doctrinal support.[158]

Further, while some school boards can trace their opening prayers back to the nineteenth century, even the oldest traditions of school board prayer do not date back to the founding.[159] The tradition of school boards can be traced back to the seventeenth century, when the Massachusetts Bay Colony passed a law requiring towns to establish and maintain schools, administering these schools through town meetings.[160] It was not until the early nineteenth century that school boards developed as independent bodies from the government.[161] This may be a long enough history of school board prayer, as evidenced by the Court's decisions in *American Legion* and *Town of Greece*, to qualify for the historical practices exception. However, since school boards as independent bodies did not exist at the founding, it is incredibly difficult to surmise what the founders did or did not think of the constitutionality of school board prayer.

Finally, the historical practices exception is unsatisfactory in school board prayer cases because it fails to consider the extraneous circumstances, such as setting and audience, at play in school boards. The prayers in *Engel* and the Bible readings in *Schempp* were historically accepted practices, yet the Court in both cases refused to look at history alone as history could not outweigh the impact on students.[162] Similarly, the setting and audience of a school board present a different picture from both a classroom and a legislature. With the potential for requiring student attendance as representatives and audience members, school boards host more than just developed adult minds. In looking only to history, the historical practices exception misses how a particular practice may lead to a different effect depending on the environment. As a result, the exception fails to fully protect the rights afforded to individuals in the Establishment Clause.

The *Lemon* test and historical practices exception have limitations in their own right. When these limitations are considered in light of the hybrid setting of school boards, it becomes apparent that neither line of analysis provides for the comprehensive consideration of all the factors

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[158] *See, e.g.*, Segall, *supra* note 153, at 723–24.

[159] *See, e.g.*, Marie Elizabeth Wicks, *Prayer is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 30–31 (2015) (noting the historical records in eight states trace school board prayer to the nineteenth century); Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 192 (5th Cir. 2006) (tracing school board prayer to "at least 1973").

[160] *Public Education FAQ*, NAT'L SCH. BD. ASS'N, https://www.nsba.org/About/Public-Education-FAQ [https://perma.cc/2AFJ-Y4SJ] (last visited Sept. 27, 2020).

[161] *Id.*

[162] *See* Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

present in school board prayer cases. With the analyses of the Ninth and Fifth Circuits both unsatisfactory, only the endorsement or coercion tests stand as possible options for reconciling school board prayer cases.

B. The Endorsement Test Is Too Unpredictable

As a narrower version of the *Lemon* test, the endorsement test appears at first to provide the clarity that *Lemon* lacks, and also considers the setting overlooked in the historical practices exception. Nonetheless, the endorsement test is also ill-suited for school board prayer cases because of its unique unpredictability and waning support by the Court.

Narrowing the focus of *Lemon* to endorsement provides some clarity as to what practices qualify as a secular purpose, solving some of the doctrinal flexibility inherent in *Lemon*.[163] Furthermore, the endorsement test overcomes one of the historical practices exception's shortcomings by considering both the history and context of the government action.[164] The endorsement test introduces new unpredictability, however, that leaves it as malleable as the *Lemon* test.

Justice O'Connor calls for endorsement to be assessed through the eyes of a reasonable observer "deemed aware of the history and context of the community and forum in which the religious display appears."[165] This creates an analysis that is fact-specific and lacks clarity.[166] The outcome will necessarily depend on what background knowledge and community awareness a particular judge assumes a reasonable observer to have.[167] This leads to malleability that can be exploited. For a school board prayer case, this unpredictability is even more apparent as outcomes would likely differ depending on whether the reasonable observer is a student or an adult, and whether the meetings had required student attendance or almost no students in attendance. As a result, an endorsement analysis would make it difficult for school districts to make decisions concerning the allowance of religious activities given different environments. Additionally, similar to the *Lemon* test, in some cases an endorsement analysis may be difficult to make if the government's original purpose is difficult to identify or has changed.[168]

Finally, modern incorporation of the endorsement test into the *Lemon* test has resulted in hostility toward the endorsement test.[169] The

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[163] *See* Gey, *supra* note 17, at 737.

[164] *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[165] *Id.*

[166] *See* Gey, *supra* note 17, at 739.

[167] *See id.*

[168] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082–85 (2019).

[169] *See, e.g.*, *id.* at 2080.

Court in *American Legion* mentioned endorsement as a way of evaluating the first and second prongs of *Lemon*, before concluding that the *Lemon* test is unsuitable in some Establishment Clause cases.[170] While not explicitly hostile to the endorsement test as a stand-alone test, the overlap with the *Lemon* test and the unique malleability of the endorsement test does not make it a better candidate for school board prayer cases.

C. The Coercion Test Provides the Best Framework

The coercion test, which considers both direct and indirect coercion, provides the best framework for considering hybrid school board prayer cases. It considers all of the external factors present in school boards, takes into account the intent of the Establishment Clause, and also protects those that are most vulnerable. In doing so, the coercion test takes relevant considerations from the *Lemon* test, endorsement test, and historical practices exception and puts them in context of the environment.

While the *Lemon* test, endorsement test, or historical practices exception might be appropriate for other categories of Establishment Clause cases, they all fail to provide full consideration of the unique school board situation.[171] The coercion test, on the other hand, is able to account both for historical significance and for the impact on a particular audience.[172] As a totality-of-the-circumstances test looking at direct and indirect coercion, the coercion test focuses on whether the state action, school board prayer, is coercing anyone to support or participate in religion.[173] As such, a court can consider the relevance of factors such as the history of the school board's prayer practice, the presence of students at the board meetings as school board members or as student government representatives, and the agency of those present to leave or participate when determining whether coercion is present. A totality-of-the-circumstances approach allows a court to recognize that religion is an important part of society but balances that consideration against the potential harms to society of coercing religious observance. Furthermore, this approach allows flexibility given the environment, while still giving direction to school boards. A court can decide if the historical tradition of legislative prayer is outweighed by the coercive pressures on students present at board meetings.

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[170] *See id.* at 2080, 2085.

[171] *See, e.g.*, Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 525 (5th Cir. 2017) (recognizing that the *Lemon* test, considering endorsement, fails to account for the historical significance of a particular practice); Wicks, *supra* note 159, at 30–31 (noting that school board prayer cannot be traced to the founding, weakening the application of the historical practices exception).

[172] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 593 (1992).

[173] *See id.* at 587, 593.

Additionally, the coercion test recognizes the Framers' intent that it is not only unconstitutional to establish a national religion, but that freedom of conscience should be closely guarded.[174] Unlike other Establishment Clause tests, the coercion test is directly focused on how a particular practice or tradition affects an audience. The coercion test recognizes that some practices, such as the passive acknowledgement of religion, may not be a violation of the Establishment Clause, even though they are religious. Additionally, by focusing on the specific actor, action, and result, this test recognizes that freedom of conscience can be affected to different degrees in different populations. This is useful in school board settings where both young minds, as seen in school prayer cases, and developed minds, as traditionally thought of in legislative prayer cases, are present.[175]

The coercion test is uniquely situated to address cases involving school board meetings, where both young and developed minds are affected.[176] Traditionally, school boards are comprised of elected adult officials making legislative decisions.[177] However, they are also inherently student focused, existing to set policies and procedures for education in a particular community.[178] Not only do school board decisions affect the lives and education of students and parents, some students may regularly serve on school boards, be required to attend meetings as student representatives, or voluntarily attend meetings to voice their concerns.[179] The record of *Chino* demonstrates that at every meeting, students were in attendance to recite the Pledge of Allegiance, to participate in the "student showcase," to be recognized during "student recognition," and to serve as student representatives.[180] In *McCarty*, students frequently attended meetings to receive awards or share brief band or choir performances.[181] As a result, the unique presence of students at school board meetings makes the coercion test uniquely suited to consider how the environment and context of prayer may or may not affect young minds.

Some critics may argue that the coercion test is unnecessary, and that school boards are just legislatures where the historical practices

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[174] *See, e.g.*, Lisa M. Kahle, *Making "*Lemon*-Aid" from the Supreme Court's* Lemon*: Why Current Establishment Clause Jurisprudence Should be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 391 (2005).

[175] *See, e.g.*, *Lee*, 505 U.S. at 592; Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[176] *See, e.g.*, *Lee*, 505 U.S. at 592; *Town of Greece*, 572 U.S. at 590.

[177] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1138 (9th Cir. 2018).

[178] *See, e.g.*, *id.* at 1138–40.

[179] *See, e.g.*, *id.*; Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 524 (5th Cir. 2017).

[180] *See Chino*, 896 F.3d at 1138–40.

[181] *See McCarty*, 851 F.3d at 524.

exception applies.[182] A critic might argue that having students present at school board meetings is no different than having minors present at legislative sessions. The argument is that the mere presence of students should not transform a historical legislative practice into a school prayer.[183] This criticism fails to recognize that while in a legislature the legislative members will always be consenting adults, this is not the case with school boards.[184] Many school boards have student representatives, and even those that do not have a high likelihood that students will be present at school board meetings.[185] This is similar to the cheerleaders and football players in *Santa Fe*, who, due to their extracurricular commitments, were required to be at the games.[186] Furthermore, the Court has found that even at purely voluntary events, such as attending football games as a spectator, coercion can still be present.[187] There must be consideration for the choice with which students are presented between attending school board meetings they find important and avoiding personally offensive or uncomfortable religious rituals.[188] Even in instances where few students are present, these concerns prevail, as students in attendance might be even more vulnerable to pressure to conform to the religious norms of their adult counterparts.

Additionally, critics may claim that school boards are more like legislatures because there is a diminished educational function in school boards. This argument fails to consider that graduations and football games, both only tangentially educational in nature, are considered within the school prayer domain.[189] Just as football games may be part of an extracurricular activity for some students, so too may school board meetings.[190]

Finally, by implementing a totality-of-the-circumstances test, courts are afforded necessary flexibility without too much unpredictability. A totality-of-the circumstances approach does not force courts to apply a rigid rule, which is useful in the school board setting where a particular environment may greatly affect the coercive influence. Critics may argue that this flexibility leads to the same lack of clarity as the other Establishment Clause tests because a totality-of-the-

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[182] *See, e.g.*, Wicks, *supra* note 159.

[183] *See, e.g.*, *id.* at 527–28.

[184] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

[185] *See, e.g.*, *Chino*, 830 F.3d at 1138–40; *McCarty*, 851 F.3d at 524.

[186] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000).

[187] *See id.*

[188] *See id.*

[189] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992); *Santa Fe*, 530 U.S. 290.

[190] *See Santa Fe*, 530 U.S. at 312.

circumstances approach does not make clear what audience members are considered in the coercion analysis nor the bounds of indirect coercion.

When determining which audience members to consider for coercion, the flexibility of the coercion test can be distorted by a court to produce its desired outcome.[191] This could lead to inconsistent results. One court may find school board prayer without student board members but with students present constitutional, while another may find school board prayer with regular student board representatives present unconstitutional. Courts could be drawing incredibly fine lines to distinguish between nearly identical situations. On one hand, this nuance may be preferred, as an invocation's level of coercion on a student board representative and a student audience member may be different. However, such nuance may lead to gameplaying, with some districts making student representative attendance voluntary to allow for constitutional prayers. This could be dealt with by defining the coercion test to only look at the coercive impact on those required, or practically required, to be in attendance. Focusing the coercion test on these individuals ensures that those most likely to be directly or indirectly coerced are considered. A focus on those required to be in attendance also would be congruent with the outcome in legislative prayer. Since legislators are necessarily adults, the coercive power of prayer is diminished.[192]

Furthermore, looking at those required or *practically required* to be in attendance ensures that coercion is not viewed in a rigid, formalistic sense. This idea is further supported by school prayer cases such as *Lee* and *Santa Fe* where students were not required to be at graduation or football games, but, due to social peer and administrative pressures, were practically required to be in attendance as a part of their overall educational experience.[193] This factor allows consideration for students who are in attendance as recognized students, disciplined students, or those who are there as student representatives. For example, a member of the state champion softball team might be practically required to attend the school board meeting as a member of the team being recognized for their accomplishment. By not attending the student may be forfeiting intangible benefits and an opportunity to celebrate their accomplishment.[194] This particular safeguard still gives flexibility for nuance without leading to unpredictability. A school board would then be given notice as to which students are taken into account in the coercion

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[191] *See, e.g.*, Choper, *supra* note 137, at 503.

[192] *See Town of Greece*, 572 U.S. at 590.

[193] *See, e.g.*, *Lee*, 505 U.S. at 593; *Santa Fe*, 530 U.S. at 312.

[194] *See, e.g.*, Doe v. Indian River Sch. Dist., 653 F.3d 256, 276 (3d Cir. 2011) (citing *Lee*, 505 U.S. at 595).

analysis while also preserving flexibility given the different factors in different school boards.

The flexibility of the scope of indirect coercion can be mitigated by using a "reasonable student" to determine if coercion is present given the totality-of-the-circumstances. For those who are incredibly sensitive, virtually any government favoritism toward religion is coercive because it benefits those who choose the favored faith.[195] Such an extreme would make the coercion test just as unpredictable as other Establishment Clause tests. This fault can be reconciled by analyzing coercion through the perspective of a reasonable student in that particular totality-of-the-circumstances, giving some objectivity to the test. Unlike Justice O'Connor's suggestion to give the reasonable student community knowledge and context, the reasonable student under the proposed coercion test will remain objective. Extra community knowledge is unnecessary, not only because it introduces malleable subjectivity, but also because the totality of the environment is already being considered. Under the coercion test, the totality-of-the-circumstances provides useful information on the historical practices of the prayer without turning the coercion test into a subjective test. Furthermore, while some students may be more prone to coercion than others, the test can still remain objective. The school prayer jurisprudence makes clear that the Court is not as concerned with how any particular student feels about religion in schools, but how religious expressions in a school environment result in pressures to conform as perceived by a reasonable student.[196] The Court's decisions around school prayer are not based on how actual students responded to the prayer, but rather the effects that the prayers could have.[197]

The coercion test is the most suitable framework for school board prayer cases. By considering the totality-of-the-circumstances from the point of view of a reasonable student, the test ensures that both the historical significance and the potential coercion of school board prayer are taken into account. Considering more factors gives a more robust view as to the effect school board prayer may have on those in the audience. This test provides flexibility while also ensuring safeguards to give school boards predictability. Since school boards fall at the juncture of school prayer and legislative prayer, incorporating important considerations from both bodies of jurisprudence ensures that the unique environment of a school board is not unnecessarily forced into Establishment Clause tests designed for schools or legislatures.

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[195] *See* Gey, *supra* note 17, at 742.

[196] *See, e.g.*, *Lee*, 505 U.S. at 597–98; *Santa Fe*, 530 U.S. at 312.

[197] *See, e.g.*, *Lee*, 505 U.S. at 597–98; *Santa Fe*, 530 U.S. at 312.

D. Under the Coercion Test, School Board Prayer Is Likely Unconstitutional

Once it is clear that the coercion test is best suited for school board prayer cases, an application will likely lead to a finding that prayers in these cases are unconstitutional. As defined by Justice Kennedy, the coercion test is a totality-of-the-circumstances test looking to the extent of supervision and social pressures to participate to determine if the state "coerce[s] anyone to support or participate in religion or its exercise."[198] School boards—like classrooms, graduation ceremonies, and football games—are controlled and supervised by state actors. The school board, as the government actor, determines its policies and procedures. This is unlike an impromptu decision by students to pray around the flagpole or other student-instigated action. Legislative prayer and school prayer collide in the "social pressure to participate" consideration. In making that determination, a court needs to decide if the historical significance of school board prayer is such that it does not make it coercive. For example, like legislative prayer, if a religious invocation has been used by a school board for centuries, perhaps the practice has become less about religion and more about tradition. On the other side are the pressures that student board members and representatives, unlike adults, may face. Unlike school prayer at graduations, the audience at school boards is likely primarily adults. However, while students may be fewer in number, they may be required to attend the meetings either in an official capacity or to receive recognition.[199] This may place an even higher social pressure on them to conform in an audience primarily comprised of their elders. Furthermore, even if students are not required to attend meetings, this fact may not be dispositive. The Court in *Santa Fe* explained that even purely voluntary events may produce unconstitutionally coercive pressures.[200]

Given all of these considerations, school boards present an opportunity where students in attendance may feel the coercive pressure by those in the audience to pray. As a student in an environment likely filled with adults, this coercion seems unacceptable. In some cases, a historical practice of prayer may reduce the coercive factor. This may occur where the historical practice lends itself to tradition, reducing the level of coercion. However, a historical practice should not easily outweigh coercive concerns. After all, schools had a history of beginning the day with prayer or a Bible verse, and yet the Court found these

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[198] *Lee*, 505 U.S. at 587.

[199] *See, e.g.*, Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1145 (9th Cir. 2018).

[200] *See Santa Fe*, 530 U.S. at 312.

practices too coercive to be constitutional.[201] Since school boards are uniquely positioned to impact the student population and frequently have students in attendance, both in required and voluntary capacities, the unique concerns of coercion of minors indicate that official school board prayer should be found unconstitutional under the coercion test.

Importantly, such an analysis will not prohibit school board members in their individual capacity from joining together privately before a meeting and praying.[202] Such an act of personal choice is not only constitutionally protected, but also does not have the same coercive power as a school board authorized prayer. Instead of acting in their role as government actors, individual school board members can engage in private prayer beforehand, which allows them to practice their own personal beliefs.

VI. CONCLUSION

School board prayer lies at the juncture of diverging school prayer and legislative prayer jurisprudence and does not fit either category. While school boards are legislative bodies making decisions for a community, they are also student centric.[203] Unlike a legislature made up of adult representatives, school boards frequently have student members and representatives.[204] Even those without student representation may have students attend to be recognized or to voice their opinions.[205] This makes a school board outside the confines of both a legislature and a classroom and in need of a suitable Establishment Clause test for this hybrid case.

The circuit split with respect to school board prayer developed as the Ninth and Fifth Circuits attempted to use Establishment Clause tests that failed to consider the entirety of the circumstances. The Ninth Circuit's approach using the *Lemon* test is ill-suited for school board prayer due to its extreme malleability and recent Court hostility toward it.[206] The historical practices exception used by the Fifth Circuit is likewise unsatisfactory because it overlooks the effect of a historical practice in a particular time and place. Additionally, the historical practices exception was developed based on an unbroken history extending back

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[201] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

[202] *See, e.g.*, *Santa Fe*, 530 U.S. at 302 (explaining that private religious speech is protected by the First Amendment).

[203] *See, e.g.*, *Chino*, 896 F.3d at 1138–40.

[204] *Id.*

[205] *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 528 (5th Cir. 2017).

[206] *See, e.g.*, *id.*

to the founding, something that school board prayer cannot claim.[207] Turning to other prominent Establishment Clause tests, the endorsement test likewise is ill-suited for school board prayer cases. While it narrows the scope of *Lemon*, it introduces unnecessary subjectivity through the use of a standard of a reasonable observer aware of the history and context of the community and forum.[208]

Ultimately, the coercion test provides the best framework to consider school board prayer cases. It provides for a full consideration of all the relevant factors not fully considered in either the *Lemon* test, endorsement test, or historical practices exception. As a totality-of-the-circumstances approach, it can look at all of the relevant factors from the view of a reasonable student in the audience to determine if coercion is present. Furthermore, both school and legislative prayer decisions consider coercion as at least a relevant factor.[209] Since *Town of Greece*, legislative prayer has looked at both historical practices and coercion. Furthermore, the coercion test was developed in *Lee* for a school prayer case.[210] It is this common factor of coercion that can unite the diverging jurisprudence and can be used to evaluate the constitutionality of school board prayer.

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[207] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 784–85 (1983).

[208] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[209] *See, e.g.*, Town of Greece v. Galloway, 134 U.S. 565, 590 (2014); Lee v. Weisman, 505 U.S. 577, 592 (1992).

[210] *See Lee*, 505 U.S. at 592.

Preserving a Democratic Shield: First Amendment Challenges to Michigan's Independent Redistricting Commission

Michael Ortega[†]

I. INTRODUCTION

The First Amendment protects speech from the street corner to the ballot box.[1] With a pervasive fear of governmental suppression and a commitment to strong public discourse, courts have forged the modern First Amendment into a democratic shield.[2] Although this shield does not go far enough to protect those who need it,[3] this Comment focuses on a different problem: the warping of a pro-democratic shield into an anti-democratic sword. How should the First Amendment apply when plaintiffs challenge government action that broadens public debate? How should courts address plaintiffs wielding the First Amendment to attack pro-democratic reforms? This Comment addresses these questions by analyzing recent First Amendment challenges to Michigan's independent redistricting commission ("IRC").[4]

Partisan gerrymandering, the manipulation of electoral district lines for partisan gain, is "incompatible with democratic principles."[5]

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[1] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939); *see also* Anderson v. Celebrezze, 460 U.S. 780, 787 (1983).

[2] *See* Stromberg v. California, 283 U.S. 359, 369 (1931).

[3] *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2127 (2018) ("The result [of the Supreme Court's recent jurisprudence] has been to limit the effectiveness of the First Amendment as a tool for protecting the expressive freedom of those at the bottom of the economic and social hierarchies—those whose speech is most likely to be constrained by forces other than the discriminatory animus of government actors.").

[4] S.M., *Republicans Challenge Michigan's Redistricting Commission in Court*, ECONOMIST (Aug. 1, 2019), https://www.economist.com/democracy-in-america/2019/08/01/republicans-challenge-michigans-redistricting-commission-in-court [https://perma.cc/4TN9-G4YV].

[5] Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (quoting Ariz. State Legislature v.

Partisan gerrymanders discriminate against voters on the basis of party affiliation and frustrate the effectiveness of political association, "undermin[ing] the protections of 'democracy embodied in the First Amendment.'"[6] In 2018, sixty-one percent of Michiganders voted to amend the state's constitution to create an independent redistricting commission.[7] The amendment empowers this citizen-led commission to draw congressional and state legislative districts, thus preventing the majority party in the legislature from unilaterally controlling the map-drawing process.[8] Less than a year later, the Michigan Republican Party and a group of Republican political actors (hereafter, "the Michigan plaintiffs") filed complaints on First Amendment grounds seeking to prevent Michigan from implementing the commission.[9]

The First Amendment protects rights that are necessary for democratic self-governance.[10] Courts crafted the doctrines on which the Michigan plaintiffs rely—bans on political patronage, the associational rights of political parties, and viewpoint discrimination—in response to government practices limiting the ability of private actors to participate in public debate.[11] By challenging redistricting reform in this manner, the plaintiffs' claims warp these doctrines; Michigan's IRC expands public discourse rather than contracting it. Moreover, the plaintiffs' success would entail striking down a ballot initiative passed by a supermajority of Michiganders, overturning the results of a public debate. The Michigan plaintiffs seek to distort jurisprudence, forcing the First Amendment to "bit[e] its own tail."[12]

The Supreme Court has closed the federal courthouse door to partisan gerrymandering claims.[13] In doing so, the Court may not have ended these battles so much as shifted the battleground from the maps

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Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

[6] *Id*. at 2514 (Kagan, J., dissenting) (quoting Elrod v. Burns, 427 U.S. 347, 357 (1976) (plurality opinion)). *But see id.* at 2504. ("[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.").

[7] *2018 Michigan Election Results*, MICH. DEP'T OF ST. (Nov. 26, 2018), https://mielections.us/election/results/2018GEN_CENR.html [https://perma.cc/EN8H-3WFE].

[8] *Amendment Language*, VOTERS NOT POLITICIANS, https://votersnotpoliticians.com/language/ [https://perma.cc/N3QG-BAKF].

[9] S.M., *supra* note 4; Complaint for Declaratory and Injunctive Relief [hereinafter *Political Actors Complaint*] at ¶ 2, Daunt v. Benson, 425 F.Supp.3d 856, No. 1:19-cv-00614 (W.D. Mich. July 30, 2019).

[10] *See* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1102 (2016) (collecting cases and scholarship).

[11] *See infra* Part IV.A.

[12] Tim Wu, *Beyond First Amendment Lochnerism: A Political Process Approach*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/beyond-first-amendment-lochnerism-a-political-process-approach [https://perma.cc/2E32-8Y26].

[13] *See infra* notes 23–27 and accompanying text.

to the mapmakers. Litigation similar to Michigan's IRC challenge is likely in the coming years,[14] and the 2020 census and reapportionment will bring fierce redistricting battles across the country.[15] In some cases, these fights will be between citizens and their elected officials.[16] Courts should not construe the First Amendment to aid the latter.

The argument of this Comment is two-fold. First, because the Michigan plaintiffs' arguments subvert the doctrines on which they rely, courts should reject their First Amendment claims. Second, these doctrines cannot support the plaintiffs' claims because of their origins as pro-democratic shields against government action. This signals a potential limiting principle for First Amendment jurisprudence more generally: plaintiffs should not be able to use pro-democratic doctrine to achieve anti-democratic ends.[17]

This Comment proceeds in four parts. Part II provides a brief historical background to the problem of partisan gerrymandering, focusing on Michigan's current congressional maps, and describes the relevant features of Michigan's independent redistricting commission. Part III analyzes the doctrines on which the Michigan plaintiffs rely and shows that they cannot support the plaintiffs' claims without serious distortion. Part IV demonstrates why these doctrines are inapposite by returning to their pro-democratic roots and introduces a pro-democratic limiting principle on First Amendment claims. The theoretical contours of this principle and some anticipated responses are then mapped out. Part V concludes.

II. PARTISAN GERRYMANDERING AND MICHIGAN'S "PROP 2"

A. The Problem of Partisan Gerrymandering

Every ten years, states must redraw their state legislative and congressional district maps to account for population changes.[18] Partisan

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[14] John Wildermuth, *Redistricting Battle in Michigan Could Threaten California Citizens' Commission*, S.F. CHRON. (Aug. 8, 2019), https://www.sfchronicle.com/politics/article/Redistricting-battle-in-Michigan-could-threaten-14284757.php [https://perma.cc/GXM2-RLB3]; *see also* David Gartner, Arizona State Legislature v. Arizona Independent Redistricting Commission *and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 590–91 (2019).

[15] Ally Mutnick, *Epic Redistricting Battles Loom in States Poised to Gain, Lose House Seats*, POLITICO (Dec. 30, 2019), https://www.politico.com/news/2019/12/30/redistricting-house-2020-091451 [https://perma.cc/XN8P-DNTK].

[16] Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ [https://perma.cc/L8CB-U49T].

[17] *Cf.* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 123 (2009) ("[W]hen a statute is not clear, the law should favor the voters and their enfranchisement. . . .This is a venerable principle, and one that all courts should embrace as a legitimate canon of construction in election law cases.").

[18] Reynolds v. Sims, 377 U.S. 533, 583 (1964); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

gerrymandering is the process of manipulating district lines for political gain, typically to advantage one political party over another.[19] Partisan gerrymandering has always been a part of American politics,[20] but the practice has become much more relevant in recent years.[21] Gerrymanders have also become much more efficient. "[T]he scale and skew of today's gerrymandering are unprecedented in modern history."[22]

In *Rucho v. Common Cause*,[23] the Supreme Court held that challenges to partisan gerrymanders present political questions "beyond the reach of federal courts."[24] The majority determined that, despite the undemocratic nature of partisan gerrymandering,[25] courts have "no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions" when remedying gerrymandering harms.[26] The Court did recognize, however, that some states are addressing partisan gerrymandering by taking away the legislature's power to draw districts, and cited Michigan's 2018 constitutional amendment doing just that.[27]

B. Michigan's Maps

Before 2018, the state legislature drew Michigan's congressional district map.[28] Republicans controlled both legislative houses and the governorship during the 2010 redistricting cycle and produced one of the most gerrymandered congressional maps in the country.[29] Emails uncovered during litigation revealed partisan motivations and self-dealing underlying the redistricting process: accommodating incumbents, cramming "ALL of the Dem garbage" into four districts, and

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[19] RUTH GREENWOOD ET AL., DESIGNING INDEPENDENT REDISTRICTING COMMISSIONS 4–5 (2018), https://campaignlegal.org/sites/default/files/2018-07/Designing_IRC_Report2-071018_0.pdf [https://perma.cc/V4VM-V28H].

[20] Rucho v. Common Cause, 139 S. Ct. 2484, 2494–95 (2019).

[21] N.Y. Times Editorial Board, *Do-It-Yourself Legislative Redistricting*, N.Y. TIMES (July 21, 2018), https://www.nytimes.com/2018/07/21/opinion/redistricting-gerrymandering-citizens-michigan.html [https://perma.cc/6ZZT-7Q9R].

[22] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 876 (2015).

[23] 139 S. Ct. 2484 (2019).

[24] *Id.* at 2506–07.

[25] *Id.* at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015)).

[26] *Id.* at 2507.

[27] *Id.*

[28] MICH. COMP. LAWS ANN. §§ 3.61–64, *repealed by* MICH. CONST. art. IV, § 6.

[29] Ted Roelofs, *Gerrymandering in Michigan is Among the Nation's Worst, New Test Claims*, BRIDGE (Apr. 13, 2017), https://www.bridgemi.com/michigan-government/gerrymandering-michigan-among-nations-worst-new-test-claims [https://perma.cc/BE4U-ESGR].

spending "a lot of time providing options to ensure [that Republicans] have a solid 9-5 delegation in 2012 and beyond."[30]

Opponents of Michigan's gerrymander turned to the ballot box and the federal courts. In November 2018, a non-profit organization called Voters Not Politicians spearheaded a successful effort to amend Michigan's constitution, instituting an independent redistricting commission.[31] Concurrently, the League of Women Voters challenged the district maps on First Amendment grounds. In *League of Women Voters of Michigan v. Benson*,[32] a three-judge district court panel concluded that "the predominant purpose of the Enacted Plan was to subordinate the interests of Democratic voters and entrench Republicans in power," in violation of the First Amendment.[33] The court held that legislators discriminated against citizens based on their partisan views and burdened citizens' associational rights by making it more difficult to organize as a party.[34] That court enjoined the use of those maps for future elections and required Michigan to draw a remedial map,[35] but the Supreme Court vacated this order in light of *Rucho*.[36]

C. Redistricting Commissions and Michigan's Step Forward

Although states have relied on redistricting commissions since the 1950s, most states reserve a large role for the state legislature.[37] In Hawaii and New Jersey, for example, legislative leaders of each major party choose an equal number of commissioners, who then select a chairperson.[38] Newer commissions, such as California's, have limited the role of legislative actors.[39] In 2018, Michigan amended its constitution through ballot initiative to create an independent citizens

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[30] Beth LeBlanc & Jonathan Oosting, *GOP Emails: Let's 'Cram Dem Garbage' Into Southeast Michigan Districts*, DETROIT NEWS (July 26, 2018), https://www.detroitnews.com/story/news/politics/2018/07/26/gop-emails-dem-garbage-gerrymander-lawsuit/838694002/ [https://perma.cc/GU5H-CU2J].

[31] MICH. CONST. art. IV, § 6. *See infra* Part II.0.

[32] 373 F. Supp. 3d. 867 (E.D. Mich. 2019), *vacated* by Chatfield v. League of Women Voters, 140 S. Ct. 429 (2019).

[33] *Id.* at 953–54.

[34] *Id.* at 938, 954–55. *But see* Rucho v. Common Cause, 139 S. Ct. 2484, 2504 (2019) (holding that partisan gerrymanders do not violate the First Amendment).

[35] *League of Women Voters of Mich.*, 373 F. Supp. 3d. at 960.

[36] *Chatfield*, 140 S. Ct. at 429–30.

[37] *Creation of Redistricting Commissions*, NAT'L CONF. OF ST. LEGISLATURES, (Aug. 1, 2020), http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx [https://perma.cc/8fpv-KL5y].

[38] HAW. CONST. art. IV, § 2; N.J. CONST. art. II, § 2.

[39] CAL. GOV'T CODE § 8252(2)(B)(e) (limiting legislative leaders to only striking randomly selected applicants).

redistricting commission similar to California's for state legislative and congressional races.[40]

By codifying expert guidance on how best to prevent gerrymandering and preserve independence, Michigan's IRC marks a step forward in IRC design.[41] The amendment requires that the commission consist of thirteen randomly selected members: two sets of four commissioners for affiliates of each major party, and five commissioners that do not affiliate with either major party.[42] This distinguishes Michigan's IRC even from California's, which grants each party five seats with four for independents, creating an even-numbered commission that could deadlock.[43] Decisions adopting district maps require a majority vote that must include at least two commissioners from each major political party and two unaffiliated commissioners.[44]

Michigan's IRC bans political actors and their immediate families from serving on the commission. The constitutional amendment prevents anyone from applying for the commission who currently is or in the past six years has been: a candidate or elected official to a partisan office; a member of a political party's leadership; an employee of the legislature, partisan officials, candidates, or political action committees; a registered state lobbyist; or an immediate family member of individuals otherwise barred.[45] The IRC's proponents defend these restrictions as necessary to create "a fair, impartial, and transparent process where voters—not politicians—will draw Michigan's . . . district maps."[46]

III. FIRST AMENDMENT CHALLENGES TO MICHIGAN'S IRC

In August 2019, Republicans challenged the amendment establishing Michigan's IRC, wielding novel expansions of First Amendment doctrine in an attempt to invalidate the commission. Two groups of plaintiffs filed now-consolidated complaints. As of this writing, the case is pending before the Sixth Circuit[47] after the Western District of Michigan granted the defendants' motions to dismiss.[48]

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[40] *Compare* MICH. CONST. art. IV, § 6, *with* CAL. GOV'T CODE § 8252.

[41] *See generally* GREENWOOD ET AL., *supra* note 19; *Redistricting Commissions: What Works*, BRENNAN CTR. FOR JUST., (July 24, 2018), https://www.brennancenter.org/our-work/analysis-opinion/redistricting-commissions-what-works [https://perma.cc/8RJC-PLJ2].

[42] MICH. CONST. art. IV, § 6(2)(a)(iii), (f).

[43] CAL. CONST. art. XXI, § 2(c)(2).

[44] MICH. CONST. art. IV, § 6(14)(c).

[45] *Id.* § 6(1)(b)(i–vi), (c).

[46] *We Ended Gerrymandering in Michigan*, VOTERS NOT POLITICIANS, https://votersnotpoliticians.com/redistricting/ [https://perma.cc/XGY7-CPFX].

[47] Plaintiffs' Notice of Appeal at 1, Daunt v. Benson, No. 1:19-cv-614 (W.D. Mich. Aug. 3, 2020).

[48] Opinion and Order at 34, Daunt v. Benson, No. 1:19-cv-614 (W.D. Mich. July 6, 2020).

The first group of plaintiffs, backed by an affiliate of the National Republican Redistricting Trust,[49] consists of political actors banned from serving on the commission. They argue that the amendment places an unconstitutional condition on a government benefit: commission membership is available only to those who do not exercise their First Amendment rights.[50] Relying on the Supreme Court's jurisprudence banning political patronage, the group challenges what they perceive to be an underlying assumption of the IRC: that "it is only elected officials and candidates, and those somehow tied to them, [that] have a personal and passionate interest in the outcome of redistricting."[51]

The Michigan Republican Party ("MRP") spearheads the second complaint, which relies on the First Amendment's protections of associational rights for three constitutional attacks.[52] First, the MRP argues that individuals express their party affiliation in part by running for office, working on campaigns, and serving in party leadership; by restricting who may serve on the commission, Michigan forces individuals to choose between associating with the MRP and serving on the commission.[53] Second, the MRP alleges injuries to its own associational interests, including not being involved in the seating of Republican commissioners and the lack of assurance that self-designated Republicans are "bona-fide affiliates."[54] Third, the MRP claims that the allocation of five commissioner positions to non-affiliated candidates amounts to viewpoint discrimination: each major party is disfavored with only four seats apiece. The MRP seeks to show that the challenged provisions fail to satisfy strict scrutiny: that no compelling government interest justifies the provisions and that there are less restrictive alternatives.[55]

It is difficult to imagine how the redistricting commission could remain independent if a court accepts the Michigan plaintiffs' claims. Their viewpoint discrimination theory would likely bar any seat allocation that did not afford equal space to party-affiliated and non-affiliated members. Expanded associational rights would then lead to party leaders vetting would-be commissioners. And should the patronage claims succeed, Michigan would be unable to prevent political parties from choosing those with financial and professional incentives to particular redistricting outcomes from serving on the commission. Fortunately,

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[49] S.M, *supra* note 4.

[50] Political Actors Complaint, *supra* note 9, at ¶¶ 6, 38–47.

[51] *Id.* ¶ 61.

[52] *See* Complaint for Declaratory and Injunctive Relief at 2 [hereinafter *MRP Complaint*], Mich. Republican Party v. Benson, No. 1:19-cv-00669 (W.D. Mich. Aug. 22, 2019).

[53] *Id.* ¶¶ 78–82.

[54] *Id.* ¶¶ 66–73.

[55] *Id.* ¶¶ 74–75, 85–86, 98–99.

none of these doctrines support the Michigan plaintiffs' claims. This Section addresses these doctrines—political patronage, associational rights, and viewpoint discrimination—in turn, showing that the Michigan plaintiffs are attempting to shoehorn their grievances into inapposite jurisprudence.

A. Political Patronage: Turning *Elrod* On Its Head

The banned political actors root their claim in a series of cases striking down political patronage systems. This line begins with *Elrod v. Burns*,[56] when the Supreme Court held that a sheriff violated the First Amendment rights of Republican subordinates when he required them to support the Democratic Party or risk termination.[57] The plurality held that "[t]he denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly,"[58] and that

> [I]f conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.[59]

The Supreme Court later refined and expanded the *Elrod* plurality's holding in *Branti v. Finkel*,[60] when it heard a challenge to an alleged partisan-motivated termination of public defenders.[61] *Branti* refined an exception the Court made in *Elrod* for policymakers: elected officials may discriminate on partisan grounds for high-level employees to ensure the proper functioning of representative government.[62] The Court held that some positions can be exempt from *Elrod* if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[63] In 1990, the Court in *Rutan v. Republican Party of Illinois*[64] expanded its

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[56] 427 U.S. 347 (1976) (plurality opinion).

[57] Elrod v. Burns, 427 U.S. 347, 350–51, 357 (1976) (plurality opinion).

[58] *Id.* at 361.

[59] *Id.* at 363.

[60] 445 U.S. 507 (1980).

[61] Branti v. Finkel, 445 U.S. 507, 515–16 (1980).

[62] *Id.* at 518 (citing *Elrod*, 427 U.S. at 366–67).

[63] *Id.*

[64] 497 U.S. 62 (1990).

patronage ban beyond firing to include other employment decisions, including hiring.[65]

The Michigan plaintiffs claim that the IRC amendment's exclusionary provisions force them to choose between the exercise of their First Amendment rights and a government benefit: between political activity and eligibility to serve on the commission.[66] But the cases on which the plaintiffs rely ban employment discrimination solely on the basis of *party affiliation*, not engaging in professional politics.[67] Party affiliation is not grounds for exclusion from Michigan's IRC,[68] and to claim the contrary is to misunderstand the ban. The amendment bans individuals because of their professional conflicts of interest, not their political beliefs.[69] Moreover, even if a court were to grant that party affiliation was a criterion for serving on the commission, the commissioners of the IRC easily fall within the policymaker expression. Granting the Michigan plaintiffs' claims subverts the rationales behind banning patronage in the first place: to ensure an effective governance system and preserve the democratic process.

The Michigan plaintiffs misunderstand the patronage ban. *Rutan* articulates the Supreme Court's rule regarding political patronage: "the First Amendment forbids government officials to discharge[, hire, transfer, or recall] . . . public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved."[70] No part of Michigan's IRC does this. Party affiliation plays no role in the Michigan plaintiffs being banned from the commission, which excludes their Democratic counterparts as well.[71]

Michigan's IRC also differs from patronage systems because government officials are barely involved in the selection process. Being selected is akin to winning two lotteries; the Secretary of State has no discretion whatsoever in choosing commissioners.[72] Legislative leaders from both major parties are able to strike some applicants, but such strikes do not affect the partisan composition. That is, attempting to strike candidates of rival parties would not result in fewer rival party

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[65] *Id.* at 79.

[66] Political Actors Complaint, *supra* note 9, at ¶¶ 6, 38–47.

[67] *Rutan*, 497 U.S. at 64 (summarizing *Elrod* and *Branti*).

[68] MICH. CONST. art. IV, § 6(1)(b).

[69] VOTERS NOT POLITICIANS, *supra* note 46 ("The amendment disqualifies these individuals from servicing on the Commission because they are most likely to have a conflict of interest when it comes to drawing Michigan's election district maps.").

[70] *Rutan*, 497 U.S. at 64.

[71] MICH. CONST. art. IV, § 6(1).

[72] *Id.* § 6(2).

members from sitting on the commission.[73] Patronage systems worked, in part, to alter the partisan makeup of government employees, and the IRC's partisan makeup can only change if a third party wins more representatives in the state legislature than either the Democratic or Republican Parties.[74]

If courts find that the patronage cases control this dispute, they should also recognize that the commissioners are high-level policymakers exempt from the patronage ban.[75] The Sixth Circuit has extended the policymaking exception articulated in *Branti* to positions on partisan-balanced commissions.[76] When such a commission is tasked with drawing political boundaries, partisan considerations are much more important. Through commissioner selection, consensus-driven voting rules, and explicit criteria, the IRC's design prevents any political faction from unilaterally controlling the redistricting process.[77] Neutralizing partisanship—ensuring that "representative government not be undercut by tactics obstructing the implementation of [new] policies"—requires knowing candidates' party affiliations and seating them accordingly.[78] Without question, party affiliation is an appropriate requirement for an IRC commissioner. Moreover, the commission has sole power to draft its procedural rules and hire staff and consultants to aid its deliberations,[79] it has legal standing to defend actions regarding adopted plans,[80] and its commissioners are subject to strict limitations on receiving gifts.[81] Government officials with such broad discretion and authority typically fall within *Branti*'s policymaking exception.[82]

Using political patronage jurisprudence to enjoin an independent redistricting commission subverts the rationale of the patronage ban. In striking down patronage systems, the Court chided the government for claiming that such partisan systems were required for effective governance;[83] in this case, banning the Michigan plaintiffs and others like

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[73] *Id.* § 6(2)(e).

[74] *Id.* § 6(2)(a)(iii), (f).

[75] *See* Branti v. Finkel, 445 U.S. 507, 518 (1980).

[76] McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996).

[77] *See Statewide Ballot Proposal 2018-2—Redistricting*, CITIZENS RES. COUNCIL OF MICH. (Aug. 30, 2018), https://crcmich.org/wp-content/uploads/Official_Ballot_Wording_Prop_18-2_632052_7-1.pdf [https://perma.cc/RV6D-FWUP]; *see also* VOTERS NOT POLITICIANS, *supra* note 46.

[78] Elrod v. Burns, 427 U.S. 347, 367 (1976).

[79] MICH. CONST. art. IV, § 6(4).

[80] *Id.* § 6(6).

[81] *Id.* § 6(11).

[82] *Cf.* Branti v. Finkel, 445 U.S. 507, 518 (1980) (comparing the irrelevance of party affiliation for a football coach with its relevance to assistants to the Governor).

[83] Rutan v. Republican Party of Ill., 497 U.S. 75, 75 (1990).

them, irrespective of party affiliation, is necessary to effectively govern.[84]

The Supreme Court has recognized the preservation of the democratic process as a compelling government interest.[85] In the context of patronage bans, this means that individuals cannot be discouraged from expressing themselves politically at work.[86] But an IRC is different. Commissioners are encouraged to express themselves politically; the diversity of political opinion allows partisan commissioners to produce non-partisan outcomes.

Allowing the banned Michigan plaintiffs to serve on the commission would undermine the democratic process in at least two ways. The allowing court would not only overrule the will of a supermajority of Michiganders, but also grant immense power to those with the most to gain professionally from redistricting. Banning individuals directly involved in the political process, or those with close family members so involved, is a narrowly tailored regulation that serves multiple compelling state interests, if it raises constitutional problems at all.[87]

B. Associational Rights: Who Speaks for "The Party"?

The Michigan plaintiffs rely in part on the First Amendment protections afforded to political parties.[88] Political parties are quite complex,[89] and for decades, defining their scope has tied academics and judges in knots.[90] Political scientist V. O. Key defined parties as having three basic components: first, the "party-in-government," elected officials who affiliate with a party; second, the "party leadership," individuals who work for the party organization itself; and finally, the "party-in-the-electorate," individuals whose affiliation with the party is limited

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[84] Intervenor-Defendant Voters Not Politicians' Answer in Opposition to Motion for Preliminary Injunction [hereinafter *Voters Not Politicians' Answer*] at 30–31, Daunt v. Benson, No. 1:19-cv-00614 (W.D. Mich. Sep. 19, 2019) <<The exclusion of applicants who are officeholders, candidates, or those financially tied to officeholders and candidates is necessary to maintain the integrity of the electoral system, to ensure district lines that will foster competition, reduce incumbency protection in line-drawing, and encourage new candidates. . . . All of these compelling interests can only be advanced by excluding from the Commission those whose interests are advanced by drawing districts that benefit their own political and financial interests, rather than drawing districts that foster a functioning representative democracy.>>

[85] *See infra* notes 135–145 and the accompanying text.

[86] *Rutan*, 497 U.S. at 69–71.

[87] *See* Voters Not Politicians' Answer, *supra* note 84, at 30–31.

[88] *See supra* notes 52–54 and accompanying text.

[89] Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 95–115 (2002).

[90] Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 775–79 (2000).

to self-identifying, voting in party primaries, and the like.[91] Although the Supreme Court generally focuses on party leadership when discussing parties, the Court has made clear that political parties are more than their state and national committees.

Tashjian v. Republican Party of Connecticut[92] marked the first time the Supreme Court struck down a state election regulation on the grounds that it violated a political party's First Amendment associational rights.[93] The Connecticut GOP opened its primary elections to unaffiliated voters, in violation of a state statute requiring party primaries be open only to voters registered with the party.[94] Citing *Elrod*, the Court held that "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."[95] The Court articulated two distinct associational rights that are in tension in the IRC litigation: an individual's "right to associate with the political party of one's choice" and a party's "freedom to identify the people who constitute the association."[96]

The Court may have implicitly resolved this tension by limiting a party's associational freedom to the selection of nominees for elected office. In *California Democratic Party v. Jones*,[97] the Court struck down California's blanket primary, which allowed individuals to vote for any party's candidate in any race, with the highest vote-getter of that party's candidates being considered that party's nominee.[98] In doing so, the Court highlighted the importance of a party's "right to exclude," holding that the blanket primary forced parties "to adulterate their candidate-selection process—the basic function of a political party—by opening it up to persons wholly unaffiliated with the party."[99]

The Supreme Court's most recent case in the *Tashjian* line squarely presented this tension. In *Washington State Grange v. Washington State Republican Party*,[100] party leaders challenged Washington's primary system, in which the top two vote-getters, regardless of party affiliation, would advance to the general election, but candidates

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[91] V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 163–65 (5th ed. 1964) (Key uses slightly different terms: "party-in-the-legislature" when discussing the "party-in-government" and "professional political workers" when discussing the "party leadership").

[92] 479 U.S. 208 (1986).

[93] *Id.* at 211.

[94] *Id.*

[95] *Id.* at 214.

[96] *Id.* (internal citations omitted); *see also id.* at 215 ("Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals . . . while still others limit their participation to casting their votes for some or all of the Party's candidates.").

[97] 530 U.S. 567 (2000).

[98] *Id.* at 586.

[99] *Id.* at 575, 581 (internal citations omitted).

[100] 552 U.S. 442 (2008).

could self-designate their party preferences.[101] The Court held that Washington's primary system did not infringe on the associational rights affirmed in *Jones* because it did not choose nominees: "the law never refers to candidates as nominees of any party, nor does it treat them as such."[102]

The Michigan plaintiffs seek an unprecedented expansion of a political party's right to exclude. Parties have never been understood to have First Amendment claims to non-elected partisan offices: the line of cases demarcating associational rights has been limited to internal party affairs and primary elections. Additionally, such an expansion of associational rights would empower party leadership to exclude self-affiliated members, putting the rights of the party and the individual in tension.

Political parties do not have an associational right to vet appointments to partisan offices. Many federal agencies have partisan balance requirements in which neither major party chooses its standard-bearers.[103] Moreover, presidents must often appoint cross-partisans.[104] Given the MRP's worry of Democratic leaders striking applicants from the Republican pool, such requirements would seem to inflict a greater associational harm. Yet no court has held these requirements unconstitutional, and it is difficult to see how they could be on associational grounds.[105]

The MRP seeks a role in the commissioner selection process because it does not trust that those who self-identify as Republicans are "bona-fide affiliates."[106] The Michigan plaintiffs' challenge, therefore, can be cast as a battle between the party leadership and the party-in-the-electorate—the average Republican voter.[107] Viewed in this light, the MRP's claim seems much more sinister: individuals not known by party officials to promote the tenets of "the party" have no right to call themselves members. In *Washington State Grange*, Chief Justice Roberts and Justice Alito expressly rejected the view that self-designated political affiliation outside of party nominations raises such forced association concern: "[T]here is no general right to stop an individual from

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[101] *Id.* at 444.

[102] *Id.* at 453.

[103] *See infra* notes 114–121 and accompanying text.

[104] Ronald J. Krotoszynski, Jr., Johnjerica Hodge, & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 969 (2015).

[105] *But cf. id.* at 983–84 (arguing that increased restriction on presidential appointments could invalidate federal partisan balance requirements on separation of powers grounds). Even if parties could show an associational harm, scholars have been skeptical of universally applying strict scrutiny to such cases. *See* Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1287–88 (2018).

[106] MRP Complaint, *supra* note 52, at ¶¶ 66–73.

[107] *See* KEY, *supra* note 91, at 164.

saying, 'I prefer this party,' even if the party would rather he not."[108] The MRP has a right to protect its brand and make its positions known, but that right does not extend to preventing others from affiliating with the party or requiring a purity test for self-designated affiliates.

C. Viewpoint Discrimination or Viewpoint Channeling?

Michigan's IRC allocates five seats to commissioners unaffiliated with either major political party and four seats to each party's affiliates.[109] The Michigan plaintiffs claim this disparity amounts to viewpoint discrimination because, by allocating a minority of seats to each major party, the IRC "seeks to suppress speech and expression motivated by Republican ideologies and perspectives, while enhancing the perspectives of commissioners who are unaffiliated."[110]

A government engages in content-based discrimination when its regulation targets particular speech, can only be justified by referencing its content, or is adopted because of government disapproval of the proscribed message.[111] Viewpoint discrimination, a more pernicious form of content-based discrimination, occurs when the government "targets not subject matter, but particular views taken by speakers[:] . . . when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[112] In order to survive a viewpoint discrimination challenge, the government must show its regulation is narrowly tailored to serve a compelling state interest.[113]

Michigan's 4-5-4 seat allotment is a kind of partisan balance requirement. These requirements, common at the federal level, are typically reserved for independent governmental bodies; they not only temper partisan considerations, but also "foster a sense of legitimacy in the agency's actions in the public's eye."[114] Michigan's partisan balancing is unique even among other redistricting commissions. Only two other states include a contingent of non-affiliated commissioners: Colorado's commission requires a 4-4-4 split among the two major parties and non-affiliated members,[115] and California's requires a 5-4-5 split, ensuring

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[108] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 460–61 (2008) (Roberts, C.J., concurring). *Cf.* Clingman v. Beaver, 544 U.S. 581, 592 (2005) (distinguishing between an individual right to affiliate with a party and a "less important burden" on a party's right to attract new voters).

[109] MICH. CONST. art. IV, § 6(2)(f).

[110] Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 23, Mich. Republican Party et al. v. Benson, No. 1:19-cv-00669 (W.D. Mich. Aug. 22, 2019).

[111] Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015).

[112] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[113] *See Reed*, 576 U.S. at 163.

[114] Krotoszynski, Jr. et al., *supra* note 104, at 983, 1009–17.

[115] COLO. CONST. art. V, § 44.1(10).

that party-affiliated members have greater seats than non-affiliated members.[116] Both come with the cost of an even-numbered commission, risking deadlock and various contingency mechanisms to approve district maps.

The Michigan plaintiffs' viewpoint discrimination claim should fail. First, no court has held partisan balance requirements to discriminate on the basis of viewpoint, even though the majority of them allow for an imbalance between the major political parties. Second, the selection process and composition of the commission make it nearly impossible to intentionally suppress any ideology. Third, the fact that the people barred from serving as commissioners are not excluded from any other part of the redistricting process—and that any barred individual can serve on the commission after six years—undercuts the notion that the government seeks to suppress a particular viewpoint.

Partisan balance requirements are something of a misnomer; rather than requiring equal party representation, nearly all of them simply limit partisan imbalance to no more than a bare majority.[117] If successful, however, the Michigan plaintiffs' viewpoint discrimination challenge could apply with equal force to institutions such as the FTC,[118] the SEC,[119] the EEOC,[120] and dozens more, despite having been perceived as constitutional for decades.[121] Therefore, courts should be wary of extending viewpoint discrimination jurisprudence to reach this commission.

It is difficult to see how Michigan's IRC discriminates on the basis of viewpoint. No part of the commission discriminates on the basis of a particularized message or seeks to suppress particular ideologies.[122] On the contrary, the IRC's design channels partisan interests in such a way that no one ideology dominates any other.[123] The complaint also assumes that non-affiliates of either party constitute a unified viewpoint that disfavors the Michigan plaintiffs.[124] This assumption is misguided.

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[116] CAL. CONST. art. XXI, § 2(c)(2).

[117] Krotoszynski et al., *supra* note 104, at 962.

[118] 15 U.S.C. § 41 (1914).

[119] Securities Exchange Act, 15 U.S.C. § 78d (1934).

[120] Civil Rights Act, 42 U.S.C. § 2000e-4 (1964).

[121] Krotoszynski, Jr. et al., *supra* note 104, at 948 ("Partisan balance requirements for independent federal agencies. . . . ha[ve] been, for the most part, uncontroversial and widely accepted by Congress, the President, and the federal courts.").

[122] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[123] MICH. CONST. art. IV, § 6(14)(c) ("A final decision of the commission to adopt a redistricting plan requires a majority vote of the commission, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party.").

[124] Plaintiffs' Consolidated Response to Defendants' Respective Motions to Dismiss and Plaintiffs' Consolidated Reply to Defendants' Respective Responses to Motion for Preliminary Injunction

Given the multiple layers of random selection, neither affiliated nor non-affiliated commissioners are likely to have monolithic viewpoints. It is highly unlikely that the four Democratic, four Republican, and five non-affiliated commissioners will represent three distinct positions on redistricting that correspond with their respective labels. Attempts by partisans from either major party to game the non-affiliated group will simply make a diversity of views more likely. This makes a claim that the government is seeking to repress any particular ideology suspect.[125] Moreover, if the alleged discrimination is rooted in affiliation with a major party, then such discrimination would favor the Michigan plaintiffs: commissioners affiliating with major political parties enjoy an 8-5 seat advantage.

Echoing the responses to the political patronage claims, the IRC amendment bars the Michigan plaintiffs not because of their viewpoints but because of their professional conflicts of interest.[126] This undermines the notion that the government is targeting their ideology. Furthermore, the Michigan plaintiffs can still participate in the redistricting process. The commission is required to be incredibly transparent by holding public meetings, facilitating public participation, and publishing the materials used to create the maps.[127] Political actors can still participate in public hearings as can any other citizen. They are only restricted from casting votes for particular maps, something the First Amendment should not guarantee.

IV. PROTECTING THE DEMOCRATIC FIRST AMENDMENT

Democracy thrives when citizens exercise their First Amendment rights. The Founders valued freedom of speech because they believed "that public discussion is a political duty; and that this should be a fundamental principle of the American government."[128] The First Amendment traditionally accomplishes this by shielding individuals from governmental regulation of speech; it protects the autonomy of citizens to choose how to express themselves on matters of public concern,[129] free from government censorship[130] or command.[131]

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at 31–32, Daunt v. Benson, No. 1:19-cv-00614 (W.D. Mich. Oct. 3, 2019).

[125] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[126] MICH. CONST. art. IV, § 6(1)(b).

[127] *Id.* § 6(8)–6(10).

[128] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[129] *See* Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940).

[130] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989).

[131] *See* West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

What happens, then, when private actors attempt to weaponize the First Amendment and undermine democratic governance?[132] The remainder of this Comment will address this dangerous strand of "First Amendment opportunism": one in which private, partisan actors wield the First Amendment against public, democratic reforms.[133] The following Section grounds the doctrinal distortion the Michigan plaintiffs seek in the doctrines' pro-democratic origins: the Supreme Court fashioned these doctrines to preserve democratic governance or its pre-requisites.[134] It addresses each of those doctrines in turn before introducing a theoretical limiting principle on First Amendment jurisprudence and addressing some potential responses.

A. Forging Anti-Democratic Swords from First Amendment Shields

The Supreme Court consistently justified its holdings banning patronage schemes with appeals to democratic values. The *Elrod* plurality cited "the free functioning of the electoral process" as a distinct First Amendment harm.[135] With regard to belief and association, the plurality held patronage to be "inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment."[136] *Branti* contemplated an electoral regulation in which party affiliation would be essential to a government employee's work.[137] When reaffirming these decisions in *Rutan*, the Court once again referred to "the preservation of the democratic process" as a compelling state interest.[138]

The Court uses the phrases "democratic process" and "electoral process" to refer to processes of political competition.[139] The *Elrod* plurality held that preserving that competition "is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms."[140] It then reasoned that patronage schemes ran counter to this compelling interest because they could result in the entrenchment of the party in power.[141] This is precisely the problem Michigan's IRC solves. By removing any party's monopoly over the

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

[133] Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 175–76 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

[134] *See infra* Part IV.A.

[135] Elrod v. Burns, 427 U.S. 347, 356 (1976) (plurality opinion).

[136] *Id.* at 357 (internal citations omitted).

[137] Branti v. Finkel, 445 U.S. 507, 518 (1980).

[138] Rutan v. Republican Party of Ill., 497 U.S. 62, 74 (1990).

[139] *See Elrod*, 427 U.S. at 368; *see also* Williams v. Rhodes, 393 U.S. 23, 32 (1968).

[140] *Elrod*, 427 U.S. at 368.

[141] *Id.* at 369 (internal citations omitted).

redistricting process, it prevents the majority party from entrenching itself, thereby protecting the free functioning of the electoral process.

The Supreme Court also grounds its unconstitutional conditions analysis in concerns about political competition. *Rutan* makes clear that the government may not condition the receipt of a benefit on the waiving of a constitutional right.[142] The conditions in patronage systems are unconstitutional "because of the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job."[143] The Michigan plaintiffs argue that the IRC's conditions bring their claim within the Court's patronage jurisprudence.[144] Again, the Michigan plaintiffs are not banned from the IRC because of their political beliefs.[145] And because they are not being coerced into supporting a particular ideology,[146] the plaintiffs' unconstitutional conditions claim is meritless.

Turning to the associational rights claims, these arguments suffer from a major anti-democratic flaw. The arguments elevate the associational rights of a party above those of individuals and ignore the associational harms the IRC seeks to prevent. Once properly taken into account, the associational harms of partisan gerrymandering should dissuade courts from ruling for the Michigan plaintiffs.

The First Amendment rights of political organizations, though distinct, are rooted in the rights of individuals to associate towards common ends.[147] In *California Democratic Party v. Jones*, the Supreme Court held that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."[148] This reliance on political parties should not blind courts to their unique dangers. Political parties "seek to gain and keep control of the machinery of government and thus to direct the great involuntary association, the state. This makes it especially critical that courts guard against the dominant political party attempting to entrench itself in power by squeezing out its rivals."[149]

The Michigan plaintiffs, currently members of the majority party in the Michigan state legislature,[150] seek to use the right of association

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[142] *Rutan*, 497 U.S. at 71.

[143] *Id.* (internal citations omitted).

[144] Political Actors Complaint, *supra* note 9, at ¶ 44.

[145] *See* MICH. CONST. art. IV, § 6(1)(b).

[146] *Id.* § 14(c).

[147] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

[148] Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

[149] Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2195 (2018) (internal citations omitted).

[150] MICH. DEP'T OF ST., *supra* note 7.

to run roughshod over the associational rights of individuals. Several members of the Supreme Court, though never a majority, have attributed associational harms to partisan gerrymandering. In his concurrence in *Vieth v. Jubelirer*,[151] Justice Kennedy argued that partisan gerrymanders burden individual associational rights because they have "the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views."[152] Most recently, Justice Kagan led three other justices in dissent, arguing that partisan gerrymandering dilutes the votes of disfavored party members, "frustrat[ing] their efforts to translate those affiliations into political effectiveness."[153] The majority in *Rucho*, however, did not find that partisan gerrymandering caused any First Amendment harms because the petitioners failed to provide a manageable judicial standard.[154]

The Supreme Court has not considered another associational harm: the manner in which legislatures draw partisan gerrymanders. The First Amendment protects political parties because of their ability to advance the beliefs of the individuals that constitute them.[155] A partisan gerrymander's true frustration of political success is not the lack of enthusiasm the minority party may experience in its interactions with voters and donors. It is the exclusion of that party's elected officials from meaningful participation in the redistricting process.

Michigan's last redistricting cycle illustrates this well. Because Republicans held the governorship and majorities in both legislative houses in 2011, they could exclude Democrats entirely from the process. "[S]ecuring enough voters for passage did not necessarily require securing a single vote from a Democratic legislator in either chamber."[156] During the 2011 redistricting cycle, the line-drawers worked "in a secure location" to avoid Democrats.[157] Republican leadership met weekly away from the legislature to discuss redistricting, and "took several steps to ensure that these . . . meetings remained secret," including using personal rather than government email addresses and labeling meeting agendas confidential.[158] No Democrats were invited to attend any of the meetings until after the maps were voted out of committee.[159]

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[151] 541 U.S. 267 (2004).

[152] *Id.* at 314 (Kennedy, J., concurring).

[153] Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (Kagan, J, dissenting).

[154] *See id.* at 2504 ("How many door knocks must go unanswered? How many petitions unsigned?").

[155] Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986).

[156] League of Women Voters of Mich. v. Benson 373 F. Supp. 3d. 867, 886 (E.D. Mich. 2019), *vacated* by Chatfield v. League of Women Voters, 140 S. Ct. 429 (2019).

[157] *Id.* at 886.

[158] *Id.* at 887.

[159] *Id.*

If the First Amendment purports to protect an "unfettered interchange of ideas,"[160] then the necessary exclusion of partisan opponents in designing partisan gerrymanders could constitute an associational harm in its own right.

Finally, the Michigan plaintiffs argue that the commission's unequal seat allocation constitutes viewpoint discrimination. The anti-democratic implications of this charge are less apparent because viewpoint discrimination claims are not inherently focused in the electoral process. The First Amendment protects individuals from viewpoint discrimination because "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."[161] Here again, the doctrinal subversion the Michigan plaintiffs seek is clear: in their attempt to preserve their ability to stifle speech of minority party members, the Michigan plaintiffs would have courts dismantle an institution designed to stop them.

The crux of the Michigan plaintiffs' viewpoint discrimination claim is an unequal seat allocation.[162] First Amendment doctrine seems to be in tension on this point. On one hand, the Supreme Court has held that "there is an equality of status in the field of ideas and government must afford all points of view an equal opportunity to be heard."[163] On the other hand, the Court maintains that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[164] This leaves the government in an untenable position. If both are true, the government can neither allocate an equal nor unequal number of seats. Some authors accept this tension as proof that the Court must address structural questions of democracy with a different paradigm than rights-interests balancing.[165] The First Amendment is flexible enough to engage in this kind of structural analysis.

B. A Pro-Democratic Limiting Principle on First Amendment Jurisprudence

If the doctrinal distortion is unconvincing, a review of the challenged governmental action should put this litigation's anti-democratic nature in stark relief. A supermajority of Michiganders passed a

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[160] Roth v. United States, 354 U.S. 476, 484 (1957).

[161] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

[162] Plaintiffs' Consolidated Response, *supra* note 124, at 31–32.

[163] Carey v. Brown, 447 U.S. 455, 463 (1980) (internal citations omitted).

[164] Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

[165] Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998).

constitutional amendment via ballot initiative.[166] That amendment vests the power to draw district lines—to determine which votes will count towards particular seats—away from the self-interested legislature and into the hands of citizens. It is this governmental action that the Michigan plaintiffs seek to enjoin. The Michigan plaintiffs are attempting to use the First Amendment to overturn the results of a public debate that will change how future debates will be had.

Success for the Michigan plaintiffs would repudiate the First Amendment doctrines' democratic origins. That fact sheds light on a potential limiting principle: the First Amendment should not be construed to further anti-democratic efforts. There are many ways courts could incorporate this principle: for instance, upholding the preservation of the democratic process as a compelling interest, as in *Elrod*;[167] refusing judicial review to overturn the result of public debate,[168] or presuming the constitutionality of facially pro-democratic actions. Courts adopting this principle may simply leave doctrine as is but apply it with a more pro-democratic mood.[169] The remainder of this Comment will provide a theoretical framework for this limiting principle regardless of the doctrinal form it takes.

1. Protecting democracy with a republican First Amendment

At its root, a pro-democratic limiting principle flips the First Amendment's "premised . . . mistrust of governmental power."[170] In the early twentieth century, the Supreme Court used this mistrust to fashion a shield for the soapbox dissenter.[171] Although this shield is necessary for democratic self-governance, this model of the First Amendment assumes a world in which the state only works to restrict speech, and the individual only seeks to express himself. The Michigan plaintiffs flip the script: it is private individuals, rather than the state, who seek to restrict speech. To adapt to circumstances like these, a different model might prove useful:

> We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities, and, using the enrichment of public

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[166] *See* MICH. DEP'T OF ST., *supra* note 7.

[167] Elrod v. Burns, 427 U.S. 347, 368–69 (plurality opinion).

[168] *See* Wu, *supra* note 12.

[169] *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (describing a situation where the Court decided to interpret legislation in light of the "mood" expressed by Congress on the legislation); *see also supra* notes 33–35 and accompanying text.

[170] Citizens United v. FEC, 558 U.S. 310, 340 (2010).

[171] Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986).

> debate as the touchstone, we must begin to discriminate between them. When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the [F]irst [A]mendment. What is more, when on occasions it fails to, we can with confidence demand that the state so act. The duty of the state is to preserve the integrity of public debate[,] . . . to safeguard the conditions for true and free collective self-determination. It should constantly act to correct the skew of social structure, if only to make certain that the status quo is embraced because we believe it the best, not because it is the only thing we know or are allowed to know.[172]

The idea that the state is able—and sometimes required—to enhance speech is not new. Courts have understood the First Amendment not only as protecting a means of self-fulfillment, but also as a collective tool used to define the social good, what Morgan Weiland refers to as the "republican tradition," in the classical sense of the term.[173] Proponents of the republican tradition argue that "[w]hat the phrase 'the freedom of speech' in the First Amendment refers to is a social state of affairs, not the action of an individual or institution."[174]

Government action is valid, so held the Supreme Court, as long as it furthers "the First Amendment goal of producing an informed public capable of conducting its own affairs."[175] Thus, governments can be made to protect speakers from hecklers' vetoes, not only to respect the speaker's rights, but also to ensure that the audience can listen.[176] This understanding presumes the existence of mechanisms that allow an informed public to conduct its affairs according to its own will.[177] A prodemocratic limiting principle would fit neatly within this tradition, and the litigation challenging Michigan's IRC—a representational reform enacted via ballot initiative—tees up this principle quite well.

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[172] *Id.* at 1416.

[173] Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN L. REV. 1389, 1404–13 (2017) (in contrast with the First Amendment's "liberal tradition" that emphasizes individual self-expression and the need for protection from government interference).

[174] *See, e.g.*, Fiss, *supra* note 171, at 1411.

[175] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969).

[176] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[177] *Cf.* Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) (When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. . . . [because] it is the *democratic electoral process* that first and foremost provides a check on government speech. . . . [T]he Free Speech Clause helps produce informed opinions among members of the public, *who are then able to influence the choices of a government that*, through words and deeds, *will reflect its electoral mandate*) (emphasis added) (internal citations omitted).

2. Representational reforms via ballot initiative

Michigan passed the IRC via ballot initiative. The popular initiative has been part of American democracy since the dawn of the twentieth century.[178] Although government action should not escape liability simply because a majority of voters approve,[179] initiatives are far from the legislative[180] or executive[181] actions that typically give rise to First Amendment challenges. Whereas traditional government action constrains public debate, popular initiatives take effect as the result of one.

Furthermore, the IRC initiative survived attempts by several of the Michigan plaintiffs to remove it from the ballot in the first place.[182] Rejecting the plaintiffs' claims then, the Michigan Supreme Court explained "that the adoption of the initiative power, along with other tools of direct democracy, reflected the popular distrust of the Legislative branch of our state government."[183] It is telling that legislators and party leaders, having failed to block the measure and having lost at the polls, now seek to use the courts to overturn popular will.[184] The First Amendment protects the right of individuals to participate in public debate; it does not guarantee that they win.

Michigan's IRC is also a particular kind of government action: a representational reform. Questions regarding how votes are cast and aggregated, as well as how winners are declared, form the core of the electoral process. When governments act to open these decisions to public discussion, they further First Amendment principles. Since *Stromberg v. California*,[185] the Court has held that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."[186] Pro-democratic representational reforms generally, and

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[178] For a brief history, see Robert S. Sandoval, *Restricted Subject Matters: Misconceptions of Speech and Ballot Initiatives*, 2015 U. CHI. LEGAL F. 669, 671–76 (2015).

[179] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 623 (1996).

[180] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 382–83 (1968) (reviewing a challenge to a federal statute based in part on the alleged intent of Congress to stifle protests against the Vietnam War).

[181] *See, e.g.*, Gregory v. Chicago, 394 U.S. 111, 111–12 (1969) (reviewing a challenge to law enforcement officers' arrests of civil rights protesters).

[182] Citizens Protecting Mich.'s Constitution v. Sec'y of State, 921 N.W.2d 247, 247 (Mich. 2018).

[183] *Id.* at 254 (internal citations omitted).

[184] *See* Wu, *supra* note 12 (proposing a specific variant of the democratic limit: an anti-circumvention principle); *id.* ("In cases where the underlying law does not censor political speech, nor arise from majoritarian prejudice against a despised or unpopular speaker, and particularly where the political debate is in progress, the judiciary should avoid using the First Amendment to give one side of the debate a judicially granted circumvention of democratic politics.").

[185] 283 U.S. 359 (1931).

[186] *Id.* at 369.

Michigan's IRC in particular, create space for public debate by supplanting a traditionally opaque and one-sided process.[187]

Representational reforms are especially powerful when passed via ballot initiative. As was the case in Michigan, heavily gerrymandered district maps render the legislature unresponsive to citizens' concerns. As Justice Ginsberg noted, direct democracy is fully consistent with the notion of the people as sovereign.[188] Courts can and should give ballot initiatives a "hard[ ] look" if they appear to endanger the rights of minorities.[189] But this strict review is misplaced when voters themselves act to improve the mechanisms by which their voices are heard.[190]

C. Anticipated Responses

A pro-democratic limiting principle on First Amendment jurisprudence could face several challenges. Practically, whatever doctrinal form this principle takes, courts will have to reckon with plaintiffs who ground their claims, as the Michigan plaintiffs have, in pro-democratic language. Theoretically, three larger issues loom. First, courts might reject the premise altogether: the First Amendment protects individuals from government interference, not government from private challenges. Second, it is precisely when government claims to act pro-democratically that courts should apply more scrutiny, not less. Finally, and perhaps most damning, such a principle may run afoul of *Rucho*: judgements about which side of a First Amendment dispute is "pro-democratic" are not legal, but political. The remainder of this Section addresses each of these in turn.

1. Finding the wolf in sheep's clothing

Plaintiffs are not likely to bring First Amendment challenges in anti-democratic language, although post-*Rucho* this may change.[191] One difficulty with a pro-democratic limiting principle arises not when plaintiffs are brazenly anti-democratic, but when they couch their anti-

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[187] MICH. CONST. art. IV, § 6(8)–6(10).

[188] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2674–76 (2015).

[189] Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1559–60 (1990).

[190] Eule did not extend the same relaxed approach to apportionment or redistricting reforms, recognizing that often such reforms are merely façades intended to disenfranchise minorities. *Id.* When a redistricting reform is targeted at an anti-democratic practice, however, this suspicion should be tempered, if not entirely assuaged.

[191] Nicholas Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 124 n.75 (2019).

democratic intentions in pro-democratic language. The Michigan plaintiffs do this in spades.[192]

Courts can overcome this hurdle in at least two ways. First, they could refuse to apply the limiting principle if the government does not address the democratic implications of the plaintiff's challenge. Judges would trust the adversarial process to illustrate what the plaintiff's rhetoric might hide. Second, they might only apply the limiting principle in extreme cases, which are easier to identify. If plaintiffs are seeking large doctrinal expansions, judges may feel more comfortable applying the limit. A strong version of this principle would have courts sanction plaintiffs for making frivolous claims,[193] but the intended result of the limiting principle can be achieved simply by raising the limit *sua sponte*. This practical difficulty is no different than many circumstances in which courts skeptically examine the claims that come before them, and so should not pose much of a problem for this limiting principle.

2. A narrower First Amendment

In contrast to the small-"r" republican view articulated above, the understanding of the First Amendment as primarily a shield *for* private actors *from* government action dominates the Supreme Court's jurisprudence.[194] This view focuses on the removal of governmental restraints from the arena of public discussion,[195] but is not incompatible with a pro-democratic limiting principle.

The First Amendment shields private actors from government interference because autonomy of expression typically results in the speech environment required for functioning democracies.[196] The republican approach does not require abandoning individual expressive rights; Zechariah Chafee described the First Amendment as balancing individual interests with the societal needs of collective decision-making.[197] A pro-democratic limiting principle could provide this balance by stopping plaintiffs from commandeering First Amendment jurisprudence to exclude expression from political opponents.[198]

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[192] *See* Political Actors Complaint, *supra* note 9, at ¶¶ 40–46, 58–59; *see also* MRP Complaint, *supra* note 52, at ¶¶ 8, 66–111.

[193] FED. R. CIV. P. 11(b)(2), (c)(3).

[194] Weiland, *supra* note 173, at 1404–08.

[195] Cohen v. California, 403 U.S. 15, 24 (1971).

[196] Fiss, *supra* note 171, at 1409–10.

[197] ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 510 (1941).

[198] *Cf.* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding that judicial intervention was itself a governmental action subject to constitutional restraints).

Even granting that a pro-democratic First Amendment limit should exist, how should it apply to anti-democratic actions not grounded in speech? Gerrymandering's democratic deficits differ from typical First Amendment harms: fair district lines are not intrinsically related to broadening public discourse. Chief Justice Roberts made this point implicitly in *Rucho*: "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district."[199]

Courts should adopt a pro-democratic limit in rejecting IRC challenges, even if they adhere to a narrow view of the First Amendment. Independent commissions are designed to address non-speech issues like representative skews *via the expansion of public debate*. Michigan's IRC opens up a traditionally secretive redistricting process to the public.[200] Eliminating that opportunity could prove a larger First Amendment harm than upholding it.

Moreover, non-speech mechanisms can create speech harms, which weakens the case for not applying the First Amendment in defense of independent commissions. The relationship between partisan gerrymandering and political competitions makes this clear. If the First Amendment is to protect expression and association such that government is responsive to popular will,[201] then uncompetitive elections produce serious First Amendment harms.[202] District maps drawn by commissions are typically more competitive than those drawn by legislatures,[203] so interpreting the First Amendment to uphold IRCs is fully consistent with its aims.

3. More or less government skepticism

When should courts trust the government's word? Dissenting from the Court's validation of a campaign finance ballot initiative, Justice Scalia quipped, "The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched

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[199] Rucho v. Common Cause, 139 S. Ct. 2484, 2504 (2019). *But see* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011) ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal citations omitted).

[200] *See* MICH. CONST. art. IV, § 6(8)–(10).

[201] Stromberg v. California, 283 U.S. 359, 369 (1931).

[202] Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 270–71 (2006) ("When statewide political gerrymanders . . . intentionally and systematically turn congressional elections into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.").

[203] *Id.* at 259–60.

monopolist who says he welcomes full and fair competition."[204] First Amendment jurisprudence can be seen as having "as its primary, though unstated, object the discovery of improper governmental motives."[205] The motives underlying government action on representational issues are especially relevant because decisions on these matters change the rules of political participation, affecting every other public debate.[206]

In an article defining this motive-discovering approach to the First Amendment, Justice Kagan, then a professor, outlined a typology of impermissible motives for speech restrictions: disapproving of particular ideas, privileging favored speech, threatening officials' self-interest.[207] These motives are unlikely to drive reforms like Michigan's IRC. Official self-interest and entrenchment are almost mutually exclusive with the introduction of an independent redistricting commission.[208] And although it is easy to imagine a commission designed to discriminate on the basis of viewpoint—such as one that banned any affiliates from a minority party from meaningful participation—it is precisely that First Amendment harm that IRCs prevent.[209]

4. Another political question?

A pro-democratic limiting principle could entangle courts in nonjusticiable political questions. The government must create elections before citizens can become candidates, finance campaigns, organize political parties, and vote. Building electoral systems requires making decisions about what kind of politics is desirable.[210] For courts to apply a democratic limiting principle, they might have to make normative decisions about what kind of democratic system should be furthered or whether a provision promotes democracy at all.[211]

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[204] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[205] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

[206] *Cf.* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("Especially since the right to exercise the franchise . . . is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

[207] Kagan, *supra* note 205, at 428–29.

[208] Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1824–27 (2012).

[209] *See, e.g.*, CAL. CONST. art. XXI, § 2(c)(5); COLO. CONST. art. V, § 48(2); ARIZ. CONST. art. IV, pt. 2, § 1(12).

[210] Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 50–51 (2004).

[211] *Cf.* Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 753–54 (2004).

This kind of normative decision might run afoul of *Rucho*.[212] The Supreme Court has long held political questions beyond the reach of the judiciary,[213] and this proposed limiting principle invites them. The majority in *Rucho* understood the plaintiffs to have made a claim about a particular democratic system—proportional representation—and chastised them for doing so.[214] The *Rucho* Court was also clear that, unlike in racial vote-dilution cases, political motives raise no constitutional quandaries.[215] This might signal an unwillingness to involve courts in determining whether a reform is democracy-promoting and therefore worth protecting. So, is a pro-democratic limiting principle on First Amendment jurisprudence feasible in a post-*Rucho* world? Yes.

The foregoing critique assumes that courts do not and should not engage in policymaking. This assumption is neither true nor tenable. Justices consider policy outcomes as early as the certiorari process.[216] And despite deriving much of its legitimacy from the fiction that it is a legal institution, rather than a political one, the Supreme Court must often "decide cases where legal criteria are not in any realistic sense adequate to the task."[217] The question, then, is not whether courts should refrain from making policy decisions, but—in Chief Justice Roberts' words, whether the Court has the duty to say "this is not law."[218] The question, then, is how to understand the judiciary's role as a policymaker not directly accountable to the people.[219]

Democracy requires a commitment to abide by collectively adopted rules despite individual dissent, so long as the rulemaking process is open and fair. Democratic malfunction, therefore, does not occur when elected officials craft rules with which people disagree. "Malfunction occurs when the *process* is undeserving of trust, when . . . the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[220]

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[212] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

[213] *See* Luther v. Borden, 48 U.S. 1, 46 (1849).

[214] *Rucho*, 139 S. Ct. at 2499 ("Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment . . . and to rearrange the challenged districts to achieve that end.").

[215] *Id.* at 2497 ("The basic reason [partisan gerrymandering is difficult to adjudicate] is that, while it is illegal for a jurisdiction . . . to engage in racial discrimination in districting, a jurisdiction may engage in constitutional political gerrymandering.") (internal citations omitted).

[216] Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1067 (2009) ("When they prefer the expected policy outcome of the merits decision to the status quo, justices are more likely to vote to hear a case.").

[217] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as A National Policy-Maker*, 6 J. PUB. L. 279, 280 (1957).

[218] *Rucho*, 139 S. Ct. at 2508 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).

[219] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[220] JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980) (emphasis in original); *see also*

The *Rucho* majority's deference to the political branches on the solution to partisan gerrymandering is backwards. It is precisely because judges are not elected—and therefore insulated from political pressures—that they must safeguard the process by which individuals translate their preferences into government action.[221] Justices need not apply their own conceptions of democracy. They must simply clear the path for the public to decide for themselves. The proposed limiting principle would fit this mold well: courts should uphold Michigan's IRC against First Amendment challenges not only because the commission will result in a more inclusive political process, but also because it was chosen directly by those with the right to decide.

The Supreme Court has intervened in the political process before, most notably in striking down malapportioned districts. In *Reynolds v. Sims*,[222] the Court invalidated a state legislative map with wildly unequal district populations, beginning a massive wave of redistricting across the country.[223] With "no effective political remedy" available to the plaintiffs,[224] the Court exalted political participation such that it asked whether any "constitutionally cognizable principles" justified judicial *inaction*, a far cry from the *Rucho* Court's recalcitrance.[225] Far from reducing the Court's legitimacy, its intervention in *Reynolds* quickly removed a barrier to political participation in a manner most came to respect.[226] A democratic limiting principle on First Amendment jurisprudence might do the same.

The *Rucho* court distinguished *Reynolds*—and might target a democratic First Amendment limit—on two grounds. First, although malapportionment is unconstitutional, partisan considerations in redistricting are not.[227] Second, the one-person, one-vote standard is "relatively easy to administer as a matter of math," whereas partisan gerrymandering claims lack an objective measure based in the Constitution.[228] Both these distinctions fall short. The Supreme Court has largely held government partisanship unconstitutional in other areas, including the First Amendment via the patronage cases discussed

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Rucho, 139 S. Ct. at 2524–25 (Kagan, J., dissenting).

[221] ELY, *supra* note 220, at 103; *see also* Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 53–54 (2000) ("What exactly is the Supreme Court good for if it refuses to examine a likely constitutional error that if uncorrected will engender a national crisis? . . . Political considerations in a broad, nonpartisan sense will sometimes counsel the Court to abstain, but sometimes to intervene.").

[222] 377 U.S. 533 (1964).

[223] Reynolds v. Sims, 377 U.S. 533, 545–47 (1964).

[224] *Id.* at 553.

[225] *Id.* at 561.

[226] *See* ELY, *supra* note 220, at 121.

[227] Rucho v. Common Cause, 139 S. Ct. 2484, 2497 (2019).

[228] *Id.* at 2501.

above.[229] As to the second challenge, the one-person-one-vote standard is not found in the Constitution either—indeed, the composition of the Senate explicitly rejects such a conception of democracy.[230] Administrability and objectivity depend largely on the form such a limiting principle would take. Some limits are easier to administer or more objective than others: compare a refusal to entertain challenges at all with a presumption of constitutionality, for instance. Administrability and objectivity should inform how courts apply this limit, but these constraints do not prevent courts from enforcing any limit whatsoever.

V. CONCLUSION

Pro-democratic reformers are building independent redistricting commissions on shaky grounds. The majority that held partisan gerrymanders nonjusticiable in *Rucho* may soon strike down independent commissions across the country,[231] perhaps using the Michigan plaintiffs' claims to do so. But whereas that decision was based on the Elections Clause and governed only congressional redistricting, a First Amendment challenge would reach even further. "[T]he First Amendment theory would [hold unconstitutional] *all* commissions, whether created by voter initiative, state legislation, or Congress, and whether responsible for congressional or state legislative redistricting . . . if they excluded certain citizens from membership."[232] Regardless of the outcome of the pending litigation, the Michigan plaintiffs' challenges provide a peek into Pandora's box: a warning of the kinds of challenges reformers can expect.

This Comment has labored to make two points. First, the First Amendment doctrines on which the Michigan plaintiffs rely in challenging their state's IRC fail to support their claims. They are either entirely inapposite or would require such peripheral expansion as to threaten the doctrines' cores.[233] Second, the Michigan Plaintiffs' use of these doctrines fail because the doctrines are rooted in the preservation of prerequisites for a functioning democracy—government insulation from party patronage, rights of political association, and protection from viewpoint discrimination. This Comment then proposed a solution to

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[229] Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 376–403 (2017); *see also supra* notes 135–143 and accompanying text.

[230] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 50–53 (2006).

[231] Stephanopoulos, *supra* note 191, at 148.

[232] *Id.* at 158 (emphasis in original).

[233] *Cf.* Weiland, *supra* note 173, at 1389–90.

similar challenges going forward: courts should refuse to bend First Amendment doctrines in a way that furthers anti-democratic ends.

Proponents of reforms like Michigan's IRC would do well to counter anti-democratic challenges with a robust articulation of the First Amendment, one that stands in full-throated defense of the ways it can and should protect our democracy. Only by holding true to the core of the First Amendment—by resisting the forging of anti-democratic swords from democratic shields—can courts prevent the First Amendment from collapsing under the weight of its own distorted doctrine.

"Segs and the City" and Cutting-Edge Aesthetic Experiences: Resolving the Circuit Split on Tour Guides' Licensing Requirements and the First Amendment

Marie J. Plecha[†]

I. INTRODUCTION

Tourism represents an important contributor to state and local economies.[1] The industry is growing within the United States, as domestic and international travel to and within states continues to increase and contribute to revenue.[2] Accordingly, some U.S. cities have sought to regulate operations of the industry, including the activities of official tour guides.[3] City tour guides can play an essential role in influencing visitors' perceptions of a city's history, cultural customs, and anthropological development. This is especially the case given the rapid expansion of information technology, as tourists increasingly rely on human guides only where they seek a customized interactive experience on their visits to a particular locality.[4]

A circuit split currently exists between the Fifth Circuit and the D.C. Circuit regarding whether cities may impose rigorous licensing requirements on potential tour guides, which can include written examinations, personal background checks, and even drug tests.[5] The

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[1] *See, e.g.*, *Importance & Economic Impact of Domestic Tourism*, WORLD TRAVEL & TOURISM COUNCIL, https://www.wttc.org/publications/2018/domestic-tourism/ [https://perma.cc/EJW2-LKC3].

[2] *See, e.g.*, *U.S. Travel and Tourism Overview*, U.S. TRAVEL ASS'N, https://www.ustravel.org/system/files/media_root/document/Research_Fact-Sheet_US-Travel-and-Tourism-Overview.pdf [https://perma.cc/TH9D-WJU9] (updated Mar. 2020) (noting that U.S. domestic travel increased 1.9 percent from 2017 to a total of 2.3 billion person-trips in 2018).

[3] *Id.*

[4] For a longer discussion, see Betty Weiler & Rosemary Black, *The Changing Face of the Tour Guide: One-way Communicator to Choreographer to Co-creator of the Tourist Experience*, 40 TOURISM RECREATION RES. 364–78 (2015), https://www.tandfonline.com/doi/pdf/10.1080/02508281.2015.1083742 [https://perma.cc/W7VX-JHUD].

[5] Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014) (holding that a licensing scheme for tour guides was content neutral and that requiring guides to pass an examination and drug test furthered the city's substantial interests in protecting the tourism industry and protecting the public from crime). *Contra* Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014) (holding that the District's licensing scheme of for-hire tour guides was not narrowly tailored to further the District's substantial interest in promoting the industry and economy, as necessary to constitute an acceptable limitation on protected speech under the First Amendment).

essential debate concerns whether the licensing requirements constitute an unacceptable limitation on protected speech in violation of the First Amendment, or if the tests represent a permissible exercise of the city's police powers in an effort to regulate the local tourism industry.[6] Since the Supreme Court denied certiorari in *Kagan v. City of New Orleans*,[7] the split endures among the federal courts of appeal.

A key development in Supreme Court jurisprudence since the Fifth Circuit's decision in *Kagan* and the D.C. Circuit's decision in *Edwards v. District of Columbia*[8] is the Supreme Court's decision providing guidance regarding the appropriate treatment of professional speech with *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*)[9] in 2018. In that case, the Court struck down a statute implementing mandatory notice requirements for crisis pregnancy centers, and held that "professional speech" of individuals who perform services requiring a state license is not a separate category of speech exempt from the rule that content-based regulations are subject to strict scrutiny.[10] Hence, if tour guides' speech is a form of "professional speech" as referenced in *NIFLA*, the decision could implicate the extent to which state and local governments may constitutionally regulate it.

This Comment will argue that tour guides' speech is not a form of professional speech. Thus, as will be explored, the circuit split should be resolved by applying the D.C. Circuit's reasoning in *Edwards* to strike down similar tour guide licensing schemes as unconstitutional violations of the First Amendment. These licensing statutes should be subject to heightened strict scrutiny review rather than intermediate scrutiny, because (1) the regulations are a content-based regulation of speech, (2) tour guides engage in political speech when they interact with tourists, and (3) burdensome licensing hurdles can constitute a form of compelled speech for tour guides.

Part II will outline the factual and legal background of the circuit split and relevant frameworks for First Amendment analysis. Part III will argue that tour guide speech constitutes protected political speech and that local licensing regulations should be subject to heightened strict scrutiny review. Part IV summarizes the argument and the broader context of the issue.

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[6] *See, e.g.*, Kristin Tracy, *"And to Your Left You'll See . . . ": Licensed Tour Guides, the First Amendment, and the Free Market*, 46 U. BALT. L. REV. 169 (2016).

[7] Kagan v. City of New Orleans, 135 S. Ct. 1403 (2015).

[8] 755 F.3d 996.

[9] 138 S. Ct. 2361 (2018).

[10] *Id.* at 2371–72.

II. FACTUAL AND LEGAL BACKGROUND

A. The Circuit Split

Two federal circuit courts of appeals are currently split regarding whether city tour guide licensing requirements restrict speech in violation of the First Amendment. On one side of the split is the Fifth Circuit in *Kagan v. City of New Orleans*,[11] a 2014 decision. In *Kagan*, the Fifth Circuit affirmed a district court ruling that granted summary judgment to the city of New Orleans against plaintiff tour guides who claimed that the city's licensing scheme infringed upon their First Amendment free speech rights.[12] The city required its tour guides to: 1) "pass an examination on knowledge of the city's historical, cultural, and sociological developments," 2) not have been convicted of a felony within the past five years, 3) pass a drug test, and 4) pay a $50 initial licensing fee.[13] The court first noted that under a facial review of the city's licensing law, the law furthered a clear purpose of "promot[ing] and protect[ing]" visitors and tourists by identifying "those tour guides who have licenses and are reliable, being knowledgeable about the city and trustworthy, law-abiding and free of drug addiction."[14] The law was thus a permissible exercise of the city's police power serving an important governmental purpose.[15]

However, the Fifth Circuit proceeded to engage in intermediate scrutiny review in accordance with the District of Columbia district court's analysis in the *Edwards* case (regarding the District's law).[16] The court distinguished the case law cited by plaintiffs-appellants—cases requiring strict scrutiny analysis because the relevant laws were content based—by reasoning that the New Orleans ordinance at issue was content-neutral.[17] New Orleans's licensing requirements, the Fifth Circuit noted, while somewhat rigorous, had "no effect whatsoever on the content of what tour guides say."[18] The court held that the law survived intermediate scrutiny review because it "promote[d] a substantial

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[11] 753 F.3d 560 (5th Cir. 2014).

[12] *Id.* at 561.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 561–62.

[16] *Id.* at 562 (citing Edwards v. Dist. of Columbia, 943 F. Supp. 2d 109, 118 (D.D.C. 2013)) (holding that a similar tour guide licensing scheme in the District of Columbia did not violate the First Amendment under intermediate scrutiny review because "[n]othing about the District's interest in keeping visitors from dangerous, unethical, or uninformed guides [was] remotely related to the suppression of free expression, or intended to control the content of what . . . tour guide[s] may say during tours").

[17] *Id.*

[18] *Id.*

interest that would be achieved less effectively absent the regulation."[19] By requiring tour guides to sustain a foundation of knowledge about the city and not be felons or drug addicts, the law promoted a government interest of city and visitor safety that would be unserved without the law's protections. The New Orleans ordinance thus did not violate the First Amendment, so the licensing requirements could remain in effect.[20]

On the other side of the split is the D.C. Circuit in *Edwards v. District of Columbia*,[21] also decided in 2014. The case was similar to *Kagan* in its premise: a group of for-hire city tour guides, who owned and operated a Segway-rental and tour business called "Segs in the City," brought a First Amendment challenge against the District, alleging that its licensing scheme for tour guides constituted an unacceptable limitation on protected speech.[22] To qualify for an official license to work as a city tour guide, an applicant was obligated to:

> (1) be at least eighteen years old . . . (2) be proficient in English . . . (3) not have been convicted of certain specified felonies . . . (4) make a sworn statement that all statements contained in his or her application are true and pay all required licensing fees . . . and (5) pass an examination "covering the applicant's knowledge of buildings and points of historical and general interest in the District."[23]

The plaintiffs specifically objected to the District's regulations that levied civil and criminal penalties like fines on individuals who conducted a tour without first satisfying these requirements.[24] According to the plaintiffs, the exam requirement was particularly rigorous, as it consisted of 100 multiple-choice questions and drew from subject matter in fourteen different categories, including Architecture, Dates, Government, Historical Events, and Regulations.[25] Similar to the Fifth Circuit in *Kagan*, the district court held that the law survived intermediate scrutiny analysis and did not violate the First Amendment.[26]

On appeal, the plaintiff-appellants presented two principal arguments: (1) the tour guide regulations were a content-based restriction on speech rather than a content-neutral restriction on conduct, and

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[19] *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

[20] *Id.*

[21] Edwards v. District of Columbia, 755 F.3d 996, 998 (D.C. Cir. 2014).

[22] *Id.* at 1000.

[23] *Id.*

[24] *Id.* at 999.

[25] *Id.* at 999–1000.

[26] *Id.* at 1000.

thus qualified for strict scrutiny review; and in the alternative, (2) even if the regulations were content-neutral, they would fail intermediate scrutiny review because there was an insufficient evidentiary basis to conclude that the regulations promoted a substantial government interest that would otherwise be achieved less effectively.[27] The *Edwards* court declined to decide the question of whether strict scrutiny should apply, as it agreed with the appellants' second argument: the city's regulations failed even under the more lenient intermediate scrutiny standard.[28]

In its analysis, the D.C. Circuit assumed *arguendo* that the regulations were content-neutral and placed only incidental burdens on speech.[29] The court proceeded with analysis under the intermediate scrutiny standard, under which a government regulation is constitutional if:

> (1) "it is within the constitutional power of the Government"; (2) "it furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest;" and (5) the regulation leaves open ample alternative channels for communication . . . .

The court's analysis fixated primarily on the government's economic interest in promoting the tourism industry. Ultimately, the court held that the District's law failed the second and the fourth prongs.[30] In respect to the second prong, the District had presented no evidence in the record that ill-informed tour guides (the issue that purportedly justified the multiple-choice exam) were in fact a problem for the city's tourism industry,[31] or that the exam regulation actually furthered the District's interest in preventing the stated harms.[32] As to the fourth prong, the District had provided no evidence that normal market forces, such customer reviews on Yelp or tour guide companies' own economic interests in attracting customers through high-quality tours, would not serve as an adequate defense to "seedy, slothful tour guides" on their own as an alternative to the regulation.[33] The District had also failed to provide evidence that less rigorous requirements would not be equally effective

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 1001.

[30] *Id.* at 1009.

[31] *Id.* at 1003.

[32] *Id.* at 1005.

[33] *Id.* at 1006–1007.

in promoting their governmental interest.[34] Thus, there was no justification for the District's argument that the restrictive laws were the most effective means of accomplishing its stated objectives.[35]

Additionally, the court found inconsistencies in the District's position. For example, while tour buses with pre-recorded audio narrations were exempt from the licensing requirement, the regulations still applied to guides who used audio guides or distributed pamphlets instead of speaking while on a guided walking or Segway tour.[36] The court held that the tour bus exemption was arbitrary and thus rendered the regulations impermissibly underinclusive, as they restricted speech for some groups but not others.[37] This could potentially lead the District to favor or disfavor a particular type of speech in its implementation of the policy. In addition, the court held that if the regulations are understood primarily as a restriction on conduct with only incidental effects on speech, then they were overbroad because they would forbid an unlicensed individual from lecturing to a tour guide even if accompanied by a fully licensed guide.[38] Thus, finding that the government regulations were not sufficiently narrowly tailored to directly advance the District's asserted interests, the court struck down the licensing scheme as unconstitutional under the First Amendment.[39]

Since the Supreme Court denied certiorari in the tour guides' appeal of *Kagan*, the circuit split has not been resolved. Classifying and analyzing the appropriate constitutional framework for tour guide speech can help identify the proper legal outcome for a future reviewing court.

To frame the terms of the debate, the primary doctrinal question is whether the states' regulation of tour guides' speech is content-based or content-neutral. Content-neutral regulations limit speech without regard to the message that is being conveyed, while content-based restrictions limit speech *because* of the message conveyed.[40] Content-based laws are presumptively unconstitutional and subject to strict scrutiny,[41] while content-neutral laws generally must survive only intermediate scrutiny.[42] Determining how to classify tour guides' speech

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[34] *Id.* at 1009.

[35] *Id.*

[36] *Id.* at 1008.

[37] *Id.*

[38] *Id.* at 1008–09.

[39] *Id.*

[40] *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983).

[41] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[42] Kagan v. City of New Orleans, 753 F.3d 560, 562 (5th Cir. 2014).

thus informs the nature of the judicial scrutiny a regulation should receive and the likelihood it will be upheld.

B. The *National Institute of Family and Life Advocates v. Becerra* Decision as it Relates to Tour Guide Speech

Although the Supreme Court has not issued a ruling on the tour guide licensing regime question, its decision in *NIFLA* in 2018 adds more color to discussion about occupational or professional speech. How the Court thinks about this type of speech could be relevant to the tour guide analysis. *NIFLA* involved a First Amendment action brought by two crisis pregnancy centers—pro-life centers that offer pregnancy-related services—in California against state and local officials.[43] The centers challenged a state law called the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) that required clinics that primarily served pregnant women to post certain notices at their facilities.[44] These notices included (1) for licensed clinics, a statement that California provided free or low-cost services, including abortions (with a phone number to call); or (2) for unlicensed clinics, a notice that the state of California had not licensed the clinic to provide medical services.[45] The state alleged that the purpose of the FACT Act was to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them."[46] However, the petitioners alleged that the notice requirements violated their First Amendment rights by compelling them to engage in speech about abortion, a practice which the crisis pregnancy centers opposed.[47]

The Court held that the notice requirements violated the First Amendment and were unconstitutional, reversing the Ninth Circuit's decision.[48] The Court commented specifically on the appropriate level of scrutiny for the notice requirement for the licensed medical clinics. It determined that California's law was content-based because it "target[ed] speech based on its communicative content"—in this instance, the availability of abortions in the state.[49] Typically, content-based restrictions on speech are subject to an exacting strict scrutiny analysis on review, under which they "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly

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[43] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2365 (2018) (*NIFLA*).

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2369.

[47] *See id.* at 2370.

[48] *See id.* at 2378.

[49] *Id.* at 2371 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

tailored to serve compelling state interests."[50] However, the Ninth Circuit had not applied strict scrutiny even though the law was content-based because it found that the notice requirement regulated professional speech, which it reasoned was afforded less protection than other forms of speech.[51] Under this less demanding level of scrutiny, the Ninth Circuit held that the California law did not violate the First Amendment.[52]

The Court rejected the Ninth Circuit's distinction of professional speech as a separate category of speech subject to different rules or a different standard of scrutiny.[53] The Court stated that "[s]peech is not unprotected merely because it is uttered by professionals."[54] As the Court reasoned, less protection for professional speech has been afforded by the Court only in two distinct circumstances: (1) where a law requires professionals to disclose factual and noncontroversial information in their commercial speech;[55] and (2) where a law regulates professional conduct that incidentally involves speech, such as in a lawyer's efforts to procure clients.[56] In the case of the crisis pregnancy centers, neither line of precedents was implicated.[57]

The Court reasoned that in the context of professional speech, content-based regulations pose the same risks as in any other circumstance in which the state seeks to "suppress unpopular ideas or information" rather than to advance a legitimate regulatory goal.[58] Accordingly, there was no constitutional basis for affording this type of speech disparate treatment.[59] Because government policing of the content of professional speech threatens to infringe the "uninhibited marketplace of ideas" necessary to uncover the truth (and in the areas of medicine and public health, potentially save lives), content-based regulations must undergo strict scrutiny review as in other contexts.[60] Moreover, the category of professional speech could be difficult to define, and states could choose the amount of protection particular speech receives simply by requiring a license for that profession of the speaker.[61]

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[50] *Reed*, 576 U.S. at 163.

[51] *NIFLA*, 138 S. Ct. at 2337.

[52] *Id.* at 2370.

[53] *Id.* at 2371–72.

[54] *Id.* (emphasis omitted).

[55] *Id.* at 2372 (citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)).

[56] *Id.* (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[57] *Id.*

[58] *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

[59] *See id.*

[60] *Id.* at 2366 (citations omitted).

[61] *Id.* at 2374.

Applying the strict scrutiny review it deemed appropriate, the Court held that the notice requirement was "wildly underinclusive" because it singled out crisis pregnancy centers by requiring the disclosures, excluding from its scope numerous other types of health centers and community clinics that educated women about health care services.[62] The Court also noted that there were other ways that the state could have conveyed or publicized the information to women aside from requiring compelled disclosures for the clinics.[63] Consequently, the Court held that the law was not narrowly tailored to serve the compelling state interest that California asserted. The notice requirement was essentially a form of content-based compelled speech for the crisis pregnancy centers and could not withstand strict scrutiny review.[64]

C. Defining Tour Guides' Speech: Relevant First Amendment Frameworks

In order to articulate a legal theory to resolve the circuit split concerning tour guides' speech, it is necessary to classify the exact nature of this speech. This analysis will help indicate the appropriate legal framework a court should use when weighing licensing schemes within the First Amendment's bounds. Ultimately, I conclude that political speech is the appropriate classification.

1. Occupational or professional speech

An initial question is whether tour guides' speech could be plausibly identified as occupational or professional speech. The Supreme Court held in *NIFLA* that professional speech is not a separate category subject to a distinct level of scrutiny,[65] and relevant academic commentary[66] suggests that tour guide speech may not fall into this category anyway (which could inform how we conceptualize the effect of the *NIFLA* decision on the circuit split).

In her article, *Licensing Knowledge*, Professor Claudia E. Haupt provides some color regarding what types of speech could plausibly be considered professional at all, as opposed to pure First Amendment speech.[67] Haupt argues for a distinction between passing along mere information, as a tour guide does, and giving actual professional advice,

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[62] *Id.* at 2375.

[63] *Id.* at 2376.

[64] *Id.* at 2375.

[65] *Id.*

[66] *See, e.g.*, Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501 (2019).

[67] *See id.*

as a doctor does.[68] She contends that professional speech (i.e., speech that could defensibly be subject to state licensing requirements that do not undermine First Amendment protections) goes beyond "the conveyance of raw information" and is instead

> individualized to the situation of the client[,] . . . tied to a body of disciplinary knowledge from which it gains authority, and . . . occurs within a social relationship that is defined by knowledge asymmetry between speaker and listener, reliance on the speaker's advice, and trust in the accuracy of that advice.[69]

In Haupt's view, tour guide speech is mere information conveyance rather than the offering of professional advice. Thus, state licensing requirements are less justified because the state lacks the viable objective of preventing tangible harm to consumers.[70]

In another article, *The Limits of Professional Speech*, Haupt further articulates her argument for narrowing the boundaries of what we conceptualize as professional speech.[71] She argues that the objective of licensing professionals' speech is to ensure that clients receive "accurate, comprehensive, and reliable advice" that comports with modern scientific and academic knowledge of the relevant topic, and that the notion of "professional speech" should be defined narrowly to limit the scope of malpractice liability for some forms of "false speech."[72] Haupt argues that the required crisis pregnancy center disclosures in *NIFLA* should not have been analyzed by the Ninth Circuit under professional speech terms because the required disclosures regulated the delivery of medical services rather than the content of actual professional advice.[73]

Under Haupt's theory, an employee conveying *information* to his or her customers (like a tour guide does) would present a more viable First Amendment defense to a licensing requirement than would a professional conveying specialized disciplinary *knowledge* (like a doctor).[74] This "information vs. knowledge" distinction, assuming that tour guides

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[68] *Id.* at 529–30.

[69] *Id.* at 529.

[70] *Id.* at 530.

[71] Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J. FORUM 185 (2018).

[72] *Id.* at 185; *see also* King v. Christie, 981 F. Supp. 2d 296, 319 (D.N.J. 2013) ("[T]here is a more fundamental problem with [the argument that professional counseling is speech], because taken to its logical end, it would mean that any regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.").

[73] *See* Haupt, *supra* note 71, at 193–95.

[74] *See* Haupt, *supra* note 66, at 532–33.

do not provide "knowledge" in the same way doctors do, provides support to the D.C. Circuit's view in *Edwards* that city tour guides submit a colorable First Amendment claim against licensing schemes.

2. Commercial speech

Another relevant classification of speech for tour guides is commercial speech. This is because city tour guides are often employed by a private tour guide company rather than operating freelance or being employed by the city itself.[75] Commercial speech, for purposes of First Amendment analysis, is defined as expression related solely to the economic interests of the speaker and its audience.[76] Essentially, it does no more than propose a commercial transaction.[77] For example, advertisements for the prices of prescription drugs constitute commercial speech.[78] Commercial speech is protected by the First Amendment, but the Constitution accords it a lesser protection than it does other constitutionally safeguarded expression.[79] Under the four-part test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the government may regulate commercial speech if: (1) the speech at issue concerns lawful activity and is not misleading; (2) the asserted government interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the regulation is not more extensive than necessary to serve that interest.[80]

In all likelihood, tour guides' speech cannot be classified as commercial speech. Beyond simply proposing an economic transaction to visitors, tour guides provide commentary on the geography, history, politics, and sociology of a given city, which serves to enrich tourists' intangible enjoyment of the destination rather than target their economic interests. It is thus unlikely that governments could use this framework to justify licensing requirements.

3. Political speech

There is a far more colorable argument for classifying tour guides' speech as political speech, which is afforded the strongest First Amendment protection. The Supreme Court has identified political speech as

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[75] *Tour Guide Career*, IRESEARCH, http://career.iresearchnet.com/career-information/tour-guide-career/ [https://perma.cc/48KD-5ZSH].

[76] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

[77] *Id.*

[78] *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

[79] *See, e.g.*, Gibson v. Tex. Dep't of Ins.—Div. of Workers' Comp., 700 F.3d 227, 233–34 (5th Cir. 2012).

[80] *Central Hudson*, 447 U.S. at 566.

core First Amendment speech, critical to the functioning of the U.S. democratic system.[81] As the Court has affirmed, "the practice of persons sharing common views banding together to achieve a common end"—such as marches and protest activities—is "deeply embedded in the American political process" and invokes particularly forceful First Amendment protections.[82] Furthermore, the location of the activities matters, as restrictions on speech in a traditional public forum like streets and sidewalks are reviewed under the strictest level of scrutiny.[83]

If tour guide speech constitutes a form of political speech, licensing restrictions are more likely to be analyzed under a rigorous strict scrutiny standard. In addition to protecting protest activities, courts have interpreted the First Amendment's core political speech protections to prevent the government from making it difficult for people to talk to each other about political issues.[84] Political speech includes "interactive communication concerning political change,"[85] "advocacy of political reform,"[86] "handing out leaflets in the advocacy of a politically controversial viewpoint,"[87] and "persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues."[88] Given that tour guides enter their posts with differing perceptions of a city's history, cultural customs, and anthropological development colored by their personal experiences and ideological views, there is a plausible argument that tour guide speech constitutes protected political speech.

4. Compelled speech

An alternative or additional possibility is that tour guide licensing requirements are tantamount to compelled speech, impermissible under the First Amendment. The Supreme Court has held that just as the First Amendment can prevent the government from prohibiting speech, it can prevent the government from compelling individuals to express

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[81] *See* Carey v. Brown, 447 U.S. 455, 467 (1980) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

[82] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) (internal citation omitted).

[83] *See* United States v. Kokinda, 497 U.S. 720, 726 (1990).

[84] *See, e.g.*, Initiative & Referendum Inst. v. Walker, 161 F. Supp. 2d 1307, 1313 (D. Utah 2001) (citing Campbell v. Buckley, 203 F.3d 738 (10th Cir. 2000)).

[85] Meyer v. Grant, 486 U.S. 414, 421–22 (1988).

[86] *Id.* at 421 n.4.

[87] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995).

[88] *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

certain views, or to pay subsidies for speech to which they object.[89] In *United States v. United Foods, Inc.*,[90] the Court held that assessments imposed on fresh mushroom handlers pursuant to a statute to fund advertisements promoting mushroom sales violated the First Amendment.[91] In *NIFLA*, the Court struck down the crisis pregnancy center notice requirements because it found that they compelled individuals to speak a particular message, thus altering the content of their speech.[92] Requiring aspiring tour guides to prepare for and pass a content-based examination about the city's culture, history, and sociology (which was being required in both *Kagan*[93] and *Edwards*[94]) or to pay a fee in order to qualify for a state license (as was the case in *Kagan*[95]) could constitute compelled speech because these requirements force tour guides to express or subsidize a set of factual positions selected by the state.

Returning to *The Limits of Professional Speech*, Haupt argues that the disclosures required in *NIFLA* should be properly analyzed under the compelled speech doctrine articulated in *Zauderer v. Office of Disciplinary Counsel*,[96] rather than classified as a form of true professional speech.[97] In *Zauderer,* the Court subjected certain required consumer disclosures only to rational basis review, because the advertisers' speech interests were outweighed by the state's interest in preventing consumer deception or confusion.[98] In the tour guide context, the relevant question is whether and to what extent cities' interest in preventing tourists' confusion or deception outweighs tour guides' interest in communicating their (potentially political) views during their tours.[99] If the cities' interest prevails substantially, then the infringement upon the guides' free speech protections should be subject to a lower standard of review, like rational basis review.[100] In *Zauderer*, the court identified the protection of consumers' interest in information as they navigate the marketplace as the principal objective of the compelled

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[89] United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

[90] 533 U.S. 405 (2001).

[91] *Id.* at 416.

[92] Nat'l Inst. of Family and Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2371 (2018) (internal citation omitted).

[93] Kagan v. City of New Orleans, 753 F.3d 560, 561 (5th Cir. 2014).

[94] Edwards v. District of Columbia, 755 F.3d 996, 999 (D.C. Cir. 2014).

[95] *Kagan*, 753 F.3d at 561.

[96] 471 U.S. 626 (1985).

[97] *See* Haupt, *supra* note 71, at 196–98; *see also supra* Section II.C.1.

[98] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

[99] *See id.*

[100] *See id.*

disclosures.[101] The cities' interest in providing visitors with accurate information about the locale's history and culture could justify compelling potential guides to gain familiarity with certain information.

D. The Appropriate Level of First Amendment Scrutiny for Tour Guide Speech.

The key doctrinal question to inform future courts' consideration of tour guide regulations is what level of scrutiny should be appropriately afforded. The court in *Edwards* declined to rule on the question of whether they must undergo strict scrutiny review because it determined that the District of Columbia regulations did not survive even intermediate scrutiny.[102] Intermediate scrutiny applies to content-neutral restrictions that place an incidental burden on speech.[103] While courts have formulated intermediate scrutiny differently, the regulation on speech is generally required to serve an "important" or "substantial" interest unrelated to the suppression of free expression.[104] Strict scrutiny, on the other hand, applies to government restrictions on the *content* of protected speech,[105] particularly political speech,[106] or the speech of disfavored speakers.[107] Strict scrutiny requires that the challenged statute be narrowly tailored to achieve a compelling government interest.[108]

The level of scrutiny afforded to tour guide licensing requirements critically informs whether they will survive under the First Amendment. The key inquiry is whether the burdens imposed on would-be tour guides (like multiple choice exams) restrict the *content* of would-be tour guides' speech, or whether these burdens are content-neutral in nature. This further highlights the question of to what extent tour guide commentary is tantamount to political speech.

III. ARGUMENTS

A. Tour Guide Speech is an Important First Amendment Issue.

As an initial matter, it is important to establish that tour guide speech is a category that substantially requires First Amendment

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[101] *See* Haupt, *supra* note 71, at 196.

[102] Edwards v. District of Columbia, 755 F.3d 996, 1000 (D.C. Cir. 2014).

[103] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994).

[104] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77, (1968); Clark v. Jeter, 486 U.S. 456, 461 (1988).

[105] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

[106] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340 (2010).

[107] *See, e.g.*, *Turner Broad.*, 512 U.S. at 658.

[108] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

protections. Recent demographic and economic trends in the profession and the tourism industry generally illustrate the need for an ideologically diverse cohort of tour guides in the United States. First, domestic tourism to and within the U.S. is growing, so more people are visiting U.S. cities and listening to tour guides' speech.[109] For foreign visitors, the ideologies and views represented in a live tour have the potential to color perspectives of the U.S. more generally. For domestic tourists, exposure to a particular tour guide's viewpoint could either mitigate or reinforce the country's polarized political divide.

Second, academic research indicates that with the rapid expansion of information technology, visitors who do opt for human tour guides increasingly rely on them to provide interactive and personalized experiences rather than simply communicate facts.[110] Tourists seeking raw information about the locale are more likely to rely on the Internet or other digital sources, so a human tour guide plays a growing role as a communicator and experience-broker, rather than a one-way presenter and entertainer.[111] In their article "The Changing Face of the Tour Guide," Professors Betty Weiler and Rosemary Black argue that tour guides broker visitors' experiences by facilitating encounters with certain physical access points and by channeling their communication expertise to empathize with each unique visitor.[112] Because tour guides assume growing communicative responsibility to add legitimate value to visitors' experiences over the Internet, there is greater room for interjection of guides' personal experiences with a particular location or cultural tradition—a practice which necessarily implicates speech.

Third, the current cohort of tour guides in the U.S. lacks substantial demographic diversity, which illustrates the importance of facilitating minority perspectives in the profession.[113] In 2019, sixty-nine percent of tour guides in the U.S. were White.[114] The next highest groups were "Other" (seven percent) and Hispanic, Latino, or Spanish (seven percent).[115] Additionally, the majority of tour guides in the U.S. have some level of post-high school education: thirty-six percent hold a certificate or associate degree, twenty percent hold a bachelor's degree, and nine percent hold a master's degree.[116] As a result, perspectives and

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[109] *See, e.g.*, U.S. TRAVEL ASS'N, *supra* note 2.

[110] *See* Weiler & Black, *supra* note 4, at 364.

[111] *See id.* at 365.

[112] *See id.* at 366–69.

[113] *See Tour Guide Demographics in the United States*, CAREER EXPLORER, https://www.careerexplorer.com/careers/tour-guide/demographics/ [https://perma.cc/XJ4A-LP5U].

[114] *Id.*

[115] *Id.*

[116] *What Education Do Tour Guides have?*, CAREER EXPLORER, https://www.careerexplorer.com/careers/tour-guide/education/ [https://perma.cc/WR54-2QLT].

experiences from lower socioeconomic classes may be excluded from the profession and shielded from tourists.

Since tour guides do not necessarily represent a diverse range of perspectives to tourists under current industry demographics—and there is a growing responsibility for guides to provide personalized communicative expertise as information technology expands—it is important for guides to receive vigorous First Amendment protections and face fewer state-imposed barriers to entry into the profession.

B. Tour Guide Speech Does Not Constitute a Form of Professional Speech Over Which the Government's Police Powers Should Justify Licensing Requirements.

Though the Supreme Court held in *NIFLA* that professional speech should not be analyzed under a different legal standard with respect to its First Amendment protections, a compelling question still arises regarding the bounds of what we conceive as professional speech and whether tour guide speech fits into this framework. In her scholarship, Cynthia Haupt advanced the claim that there is a distinction between passing along mere information as a tour guide and giving actual professional advice as a doctor.[117] She argues that the notion of professional speech should be defined narrowly to encapsulate only the conveyance of knowledge to avoid impermissibly expanding the scope of the doctrine.[118]

Consistent with Haupt's theory, tour guide speech should not be categorized as professional speech that could defensibly be subject to state regulations such as licensing requirements. However, in divergence from Haupt's theory, tour guide speech does not constitute "mere information conveyance," more similar to that of a sales cashier than that of a doctor. Given tour guides' critical role in channeling their personal communication skills and unique backgrounds to personalize tourists' experiences,[119] tour guides' speech should be classified as political speech rather than falling neatly at either end of Haupt's proposed spectrum.[120]

While the government should be permitted by its police powers to regulate the activities of pure *knowledge*-based professionals like doctors, whose giving of misinformation could risk serious harm to patients or clients, it should not be permitted to regulate the *information* tour guides give that often bleeds into guides' personal opinions. Thus, to the

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[117] *See generally* Haupt, *supra* note 71.

[118] *Id.*

[119] *See supra* Section III.A.

[120] *See infra* Section III.C.

extent courts conceptualize professional speech as speech that the government can regulate, tour guide speech should not be grouped into this category at all. While tour guides are often employed by larger corporations or organizations, unlike doctors they communicate information to clients in a way that is necessarily informed by their own personalized experiences and not beholden to scientific research or the findings of the relevant knowledge community. While there is some degree of information asymmetry between tour guides and visitors regarding the history, norms, and culture of the relevant locale, the harms of misinformation to consumers are more likely psychic rather than entailing a risk of physical or medical harm, which should limit the scope of the government's viable interest in regulation. Moreover, even if tour guides' speech could plausibly be grouped with that of doctors or lawyers (under a similar theory of information asymmetry, perhaps), *NIFLA* would require heightened scrutiny of the speech assuming that it is content-based as this Comment argues that it is.[121] Finally, because tour guide speech is political, and thus enjoys particularly forceful First Amendment protections,[122] state restrictions in the form of strict licensing regimes must fail strict scrutiny review.

A potential counterargument is that tour guides are typically employed by companies, rather than operating freelance, and are thus operating in a professional capacity rather than in a personal capacity. Additionally, there is some risk of harm to their clients (tourists) if they communicate misinformation. However, tour guides cannot feasibly be subjected to malpractice liability like doctors can, and the risk of physical harm to clients is undoubtedly lower than in contexts like medicine. Tour guides should receive an even stronger First Amendment shield than doctors for communicating information that is not consistent with the accepted standard of knowledge, for example, if they happen to have an unconventional view. This is especially the case because doctors are less likely to convey political opinions or address ideological topics as they communicate knowledge to patients. And for tour guides, even without the threat of potential malpractice liability, the risk of receiving poor customer reviews and being subjected to natural market forces should sufficiently deter them from providing misinformation.

Another obvious weakness with Haupt's position is the difficulty in line-drawing between knowledge-based and information-based speech, which the ambiguity of classifying tour guides' speech aptly illustrates. While tour guide speech bears more closely to the conveyance of knowledge-based advice than Haupt concedes, it is ultimately an

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[121] *See* Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (*NIFLA*).

[122] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

oversimplification to reduce some forms of occupational speech as wholly devoid of interjections of the speaker's opinions. While governments can likely make stronger arguments in favor of regulating knowledge-based speech within the legal exercise of police powers, the distinction is largely inapposite in light of *NIFLA*'s rejection of professional speech as a legally distinguishable category.[123]

C. Tour Guide Speech Constitutes Protected Political Speech.

Rather than being analyzed under the umbrella of professional or commercial speech, tour guides' speech should be classified as a form of political speech that must receive particularly forceful and heightened First Amendment protections.[124] Tour guides do not operate in a professional vacuum nor simply communicate information that is wholly detached from their personalized life experiences. Assuming that tour guides have lived in, spent time in, or acquired information about the relevant city by some means over the course of their lifetimes, tour guides' perceptions of a city's sociological development, political history, and esoteric customs are necessarily colored by their distinct personal and political ideologies. Moreover, tour guides' communication style and word choice reflects their personalities and psychological makeup, which academic literature indicates can be correlated with political preferences.[125] One study indicated that the frequency of particular words that people used on Twitter correlated with Democratic or Republican political affiliation.[126] For example, Democrats were more likely to use emotionally expressive words and focus on entertainment and culture rather than politics, while Republicans used swear words less frequently and highlighted their religiosity more often.[127] Democrats were also more likely to use first-person singular pronouns (perhaps reflecting their desire to emphasize uniqueness), while Republicans were more likely to use first-person plural and third-person masculine pronouns.[128] Since even tour guides who follow a script likely do not plan out every word ahead of time (especially when responding

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[123] *NIFLA*, 138 S. Ct. at 2371–72.

[124] *See Claiborne Hardware*, 458 U.S. at 907.

[125] *See, e.g.*, Jacob B. Hirsh et al., *Compassionate Liberals and Polite Conservatives: Associations of Agreeableness with Political Ideology and Moral Values*, PERSONALITY & SOCIAL PSYCHOL. BULL. 365, 655 (2010); Karolina Sylwester & Matthew Purver, *Twitter Language Use Reflects Psychological Differences Between Democrats and Republicans*, PLOS ONE (Sept. 16, 2015), https://doi.org/10.1371/journal.pone.0137422 [https://perma.cc/77U9-UKCE].

[126] Sylwester & Purver, *supra* note 125, at 15–16 ("Language encodes who we are, how we think and what we feel. We show that, even in a noisy Twitter dataset, patterns of language use are consistent with findings obtained through classical psychology methods.").

[127] *See id.* at 14.

[128] *See id.*

to visitors' questions), there is ample room for guides' personality traits and ideological preferences—to the extent that they are correlated with certain word choices or modes of diction—to bleed through and reach listeners. And this is especially the case with the increasing industry demand for guides to empathize and connect with visitors to provide interactive in-person experiences.[129]

Political speech includes "interactive communication concerning political change,"[130] and the First Amendment protects the ability of people to talk freely to each other about political issues.[131] Since tour guides—either explicitly or implicitly—communicate their understanding of certain political events or figures through their choice of rhetoric (and the words that they select could be correlated with ideological preference), there is a colorable argument that their speech could be classified as political. Accordingly, courts reviewing cities' licensing requirements should interpret the content of tours as a form of "interactive communication" relating to political issues,[132] rather than simply a one-way transmission of information within an employee's workday as Haupt classified it. Acknowledging the expressive nature of tour guides' interactive communication with visitors—and the ideological views that are consciously or subconsciously transmitted—would require particularly forceful First Amendment protections and strict scrutiny review of regulations.[133] For example, tour guides could make comments about political figures in the city or describe a landmark in a particular way that reflects their ideologies. This designation as political speech would provide tour guides with the utmost First Amendment immunity from burdensome licensing schemes that could potentially have the effect of suppressing their speech. In resolving the circuit split, this would provide further support to the D.C. Circuit's ruling in *Edwards* striking down the licensing requirements.

A possible counterargument is that tour guides may largely stick to a script in communicating the content of their tours to clients, so there may not be much room for interjection of political preferences or ideology. However, as discussed above, tour guides' choice of rhetoric or diction regarding a particular historical or political event can subconsciously convey an implicit bias or internalized ideological viewpoint. And as indicated by academic literature, personality traits alone could reflect political attitudes, especially if visitors on the tours are

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[129] *See* Weiler & Black, *supra* note 4, at 368–69.

[130] Meyer v. Grant, 486 U.S. 414, 421–22 (1988).

[131] *See* Initiative & Referendum Inst. v. Walker, 161 F. Supp. 2d 1307, 1313 (D. Utah 2001).

[132] *Meyer*, 486 U.S. at 421–22.

[133] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

particularly perceptive.[134] For example, political conservatives are more likely to display resistance to change and acceptance of inequality, while political liberals are more likely to display openness and agreeableness.[135] These are certainly traits that visitors could perceive as they interact with their guides and ask questions, even if the guides generally stick to a script. Additionally, tour guides could choose to explicitly communicate their beliefs on a particular subject matter. More data regarding the script requirements for guides compared by U.S. cities could lend further credence to this argument. But given the level of personal engagement between tour guides and visitors and the likely opportunity for visitors to ask personalized questions, there is a strong case for the political speech designation even if the majority of a given tour follows a regular formula.

D. Regulation of Tour Guide Speech is Content-Based Rather than Content-Neutral, so the Proper Legal Standard for Evaluating Tour Guide Licensing Requirements is Strict Scrutiny.

Rather than the intermediate scrutiny review under which the D.C. Circuit struck down the District of Columbia's statute in *Edwards*, tour guide licensing requirements should be analyzed under a heightened strict scrutiny review. Strict scrutiny applies to government restrictions on the *content* of protected speech.[136] Even if cities' licensing schemes do not explicitly impose requirements on the information included in the tours, and the tour guides theoretically remain free to say what they wish, they can still impact the content of the tours that are ultimately permitted to proceed. This is because the requirements function as a mechanism allowing the state to select what types of people they will permit to become tour guides to begin with, which directly affects the content of the tours that reach visitors. Rigorous multiple-choice tests and high licensing fees could impose high costs of entry for would-be tour guides and could potentially incentivize some people interested in the profession to opt out. For example, potential guides of lower socioeconomic classes may be unable to afford the licensing fees, or individuals with lower education levels may not be sufficiently equipped to prepare for the written exams.

Possibly, individuals who would opt out because of the requirements could be individuals with politically dissenting views who may not educate or finance themselves within the conventional societal framework (which could be correlated with overcoming the licensing

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[134] *See, e.g.*, Hirsh et al., *supra* note 125, at 661–62.

[135] *Id.* at 661.

[136] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011).

thresholds and succeeding in entering the profession). This seems especially plausible because most tour guides in the U.S. are currently white individuals with some level of post-high school education.[137] At the very least, there is certainly a colorable argument that the requirements select for people who are more educated, more affluent, and less likely to have committed a crime. Especially in light of my discussion above regarding implicit and explicit ideological rhetoric and biases, the licensing requirements could have the effect of favoring one form of political speech (i.e., one set of views) over others. For this reason, the licensing requirements are not content-neutral and should receive heightened strict scrutiny review.

The obvious counterargument is that the licensing statutes simply impose a set of requirements for tour guides and have no effect whatsoever on the content of what they actually say. However, given the current lack of educational (and thus socioeconomic) diversity in the profession,[138] it is highly plausible that the cumbersome nature of fees and exam requirements tend to favor some societal groups (i.e., more educated and affluent individuals) and impose higher upfront costs on others. And this may affect the content of the tours that the city ultimately allows to go forward.

E. Licensing Requirements for Tour Guides Constitute a Form of Compelled Speech.

There is a plausible argument that certain elements of the cities' licensing requirements, like written examinations and mandatory fees, constitute a form of compelled speech. Most likely, however, this classification would be largely fact dependent. Through its analysis of compelled disclosures, *NIFLA* again becomes relevant in this discussion. The licensing requirements are most likely to constitute compelled speech where they require potential tour guides to pass a written examination, thereby compelling them to learn a particular framework of understanding about the city's history, culture, and sociological realities. In both *Kagan* and *Edwards*, the relevant cities (New Orleans and the District of Columbia, respectively) required tour guides to pass written examinations. In *Edwards*, the examination addressed content from fourteen different categories, which included "Government," "Historical Events," and "Regulations."[139] As discussed above, a particular resident's perception of a particular historical event (e.g., the Civil War) or a state regulation could vary drastically from another's based on his or

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[137] CAREER EXPLORER, *supra* note 113; *see also* CAREER EXPLORER, *supra* note 116.

[138] *See supra* Section III.A.

[139] Edwards v. District of Columbia, 755 F.3d 996, 999–1000 (D.C. Cir. 2014).

her identity, demographics, and personal experiences. By requiring tour guides to learn a state-selected set of facts (which could potentially bleed into ideologies) and implicitly representing them as the foundation for state-sanctioned tours, local government thus compel tour guides to endorse a certain set of views.

The same could be said for mandatory licensing fees (which were required in the facts of *Kagan*), which would analogously require tour guides to subsidize the continued state endorsement of this set of ideologies.[140] Similar to the Court's reasoning in *NIFLA*, which rejected a separate First Amendment framework of analysis for professional speech,[141] the exam requirements and fees may constitute compelled speech and should not receive lessened First Amendment scrutiny simply because they occur in a professional context. Rather, they should be reviewed under strict scrutiny because they constitute a content-based regulation of speech.[142]

Under the *Zauderer* framework that Haupt would require, cities' interest in avoiding confusion or deception of tourists likely does not outweigh tour guides' interest in communicating their personal views to visitors, which the written examinations in particular could have the potential to hinder. This is because the content of tours amounts to a form of political speech—which receives particularly forceful First Amendment protections—and risking tourist confusion is unlikely to cause constitutional harm. So the regulations should not receive a less rigorous standard of judicial scrutiny because the state's interest is obviously countervailing.[143] As a caveat to this point, evidence that tourist misinformation is rampant in a particular city as a result of unreliable guides—which does not currently appear to exist anecdotally or on a quantitative scale—could tip the scales in favor of the state's interest. Additionally, the applicability of the compelled speech doctrine here is again largely fact dependent. While the cities in both *Kagan* and *Edwards* required written examinations for tour guides, another city could theoretically impose other licensing requirements that do or do not violate the First Amendment without implicating the compelled speech doctrine at all.

A potentially compelling counterargument here is that the required written examinations and fees do not appear to alter the content of the tours themselves, after the guides ultimately receive their licenses (short of evidence that a city actually requires its guides to communicate the material reflected on the exams). While this argument

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[140] *See* United States v. United Foods, Inc., 533 U.S. 405, 411–12 (2001).

[141] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371–72 (2018).

[142] *See supra* Sections III.C–D.

[143] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

certainly limits the strength of the compelled speech argument, it is plausible that the nature of the material chosen for the exams colors the tour guides' understanding of the city's history, politics, and sociology, especially given the effects of recency bias that could compel tour guides to prioritize this new knowledge over previously existing ideological views or perceptions of the city. The presence of certain material on the examination could also imply to tour guides that they are discouraged from or expected not to expressly contradict this information in their tours (and guides have an incentive to follow actual or perceived state policies in order to avoid losing their jobs). Furthermore, while less apposite to the question of the circuit split itself (which concerns licensing requirements), tour guide companies' internal rules and employee expectations have the potential to inhibit a tour guide's speech or compel expression of a particular set of views.

F. The Circuit Split is Properly Resolved by Adopting the D.C. Circuit's Interpretation in *Edwards*.

In resolving the existing circuit split, the proper legal outcome is similar to the approach that the D.C. Circuit adopted in *Edwards*: rigorous licensing requirements imposed on potential tour guides constitute an unacceptable limitation on protected speech in violation of the First Amendment.[144] Moreover, although the *Edwards* court declined to decide the question, these licensing statutes should be subjected to heightened strict scrutiny review rather than intermediate scrutiny, because intensive licensing schemes can have the effect of altering the content of tour guide speech that is permitted to reach the tourist audience. The interest in safeguarding tour guides' First Amendment rights should outweigh the cities' police powers-based efforts to regulate the local tourism industry because tour guides engage in a form of vigorously protected political speech. This is an especially critical concern given the increasing reliance on human tour guides to provide communicative and personalized experiences to visitors.[145]

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[144] Edwards v. District of Columbia, 755 F.3d 996, 1009 (D.C. Cir. 2014).

[145] *See* Weiler & Black, *supra* note 4, at 364.

IV. CONCLUSION

Protecting tour guide speech matters. Tour guides can serve as the primary liaisons and gatekeepers to U.S. cities, and the ways in which they represent the locale can meaningfully shape the perceptions of visitors and their contacts at home, both domestically and abroad. Maintaining a diverse cohort of U.S. tour guides is important to ensure that a representative range of viewpoints on a city's culture, politics, and traditions are conveyed to tourists. Otherwise, the narrative of political discourse surrounding a city as portrayed to visitors could be controlled by the state. Because tour guide speech can convey the guides' ideological leanings through express statements, conscious or subconscious word choice, or even through their personalities, it should be properly classified as political speech. And because licensing requirements constitute a filtering mechanism that can select for particular education levels, socioeconomic classes, or even races, the speech regulations are content-based and should receive heightened strict scrutiny review. Additionally, while largely fact dependent in its applicability, the compelled speech doctrine may limit states' ability to require written examinations about the city or mandatory licensing fees.

There may still be room for cities and localities to retain some degree of regulatory authority over local guides without implicating the First Amendment. A possibility could be requiring all official tour guide companies to register with the city, so that the city has some ability to track which groups are representing ideas about the locale to the outside world. In order to maximize free speech protections, however, it may be wiser for cities to surrender regulatory power to the markets and allow private mechanisms like Yelp reviews or competitive pricing schemes to govern the success of particular types of tours or tour guides in the city. With constitutionally shielded political discourse at stake, perhaps states should loosen their regulatory grip on their local branding and permit the "Segs and the City"-s of the world to roam free.

When Free Speech Isn't Free: The Rising Costs of Hosting Controversial Speakers at Public Universities

Rebecca Roman[†]

I. INTRODUCTION

"Free" speech seems like a misnomer when looking at the price public universities have to pay to protect students' First Amendment rights. Accommodating controversial speakers on campus requires universities to balance budget constraints with free speech. Recently, universities' obligation to provide security to people on campus and their commitment to free speech have come into conflict, resulting either in hefty security costs or lawsuits because the law is unsettled as to who should pay the security fees for controversial speakers.[1] The potent combination of rising security costs and frequent and aggressive responses to these controversial speakers makes this a serious First Amendment issue.[2] However, trying to impose the security fees on the student groups who invite these speakers may infringe on students' First Amendment rights.

Examples of this clash between free speech and financial feasibility are easy to find. In 2017, the University of California, Berkeley spent four million dollars on security costs and other expenses for events featuring controversial speakers like Milo Yiannopoulos and Ben Shapiro.[3]

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[1] Teresa Watanabe, *Q&A: UC Berkeley Chancellor Carol T. Christ: 'Free Speech Has Itself Become Controversial'*, L.A. TIMES (Sept. 14, 2017), https://www.latimes.com/local/education/la-me-uc-berkeley-chancellor-free-speech-20170914-htmlstory.html [https://perma.cc/XAT2-U48W].

[2] Douglas Belkin, *Fear of Violent Protests Raises Cost of Free Speech on Campus*, WALL ST. J. (Oct. 22, 2017), https://www.wsj.com/articles/fear-of-violent-protests-raises-cost-of-free-speech-on-campus-1508670000 [https://perma.cc/T94J-GWVX].

[3] Ashley Wong, *UC Berkeley Spent $4 Million on 'Free Speech' Events Last Year*, DAILY CALIFORNIAN (Feb. 4, 2018), https://www.dailycal.org/2018/02/04/uc-berkeley-split-4m-cost-free-

UC Berkeley Chancellor Carol Christ says such security costs are "certainly not sustainable."[4] On the other hand, UC Berkeley paid out $70,000 to two student groups to settle a free speech suit that was filed after the University tried to restrict speeches by two controversial speakers.[5] On the other side of the country, University of Florida Spokeswoman Janine Sikes noted that "[p]ublic institutions cannot continue to pay this kind of money," when discussing the $500,000 tab the University ran up in security costs when white nationalist Richard Spencer visited campus.[6] Meanwhile, the University of Washington paid $122,500 in legal fees in a settlement with College Republicans after trying to make the student group pay $17,000 as a "security fee" for costs associated with hosting a rally with the conservative group, Patriot Prayer.[7]

The crux of the problem established by these examples is that there are two incongruent yet uncompromisable interests at stake. One is the protection of students' First Amendment rights to free speech, and the other is the finite budgets of universities and the money they must spend to protect that speech. This Comment first argues that public universities cannot impose additional security fees on student groups who invite controversial speakers without running afoul of the First Amendment and provides universities with constitutionally permissible alternatives to help lower security costs. Section II provides necessary background on applicable First Amendment doctrine. Section III discusses Supreme Court precedent on fees in public forums and student speech rights in a university setting, as well as recent lower court campus security fee cases. Finally, Section IV uses that progression of cases to establish that imposing additional security costs on student groups that invite controversial speakers impermissibly infringes on students' First Amendment rights. In light of this conclusion, Section V lays out constitutionally permissible alternatives for universities to manage security costs.

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speech-events-uc-office-president/ [https://perma.cc/3LAF-835Q].

[4] Watanabe, *supra* note 1.

[5] Alex Morey, *UC Berkeley Agrees to Pay $70k, Change Policies, in Speech Suit Settlement*, FIRE (Dec. 14, 2018), https://www.thefire.org/uc-berkeley-agrees-to-pay-70k-change-policies-in-speech-suit-settlement/ [https://perma.cc/X2FM-SHLU].

[6] Belkin, *supra* note 2.

[7] Katherine Long, *UW to Pay $122,500 in Legal Fees in Settlement with College Republicans over Free Speech*, SEATTLE TIMES (June 18, 2018), https://www.seattletimes.com/seattle-news/uw-to-pay-127000-in-legal-fees-in-settlement-with-college-republicans-over-free-speech/ [https://perma.cc/WX8V-L5DM].

II. FIRST AMENDMENT DOCTRINE

There are two foundational First Amendment issues at play in addressing the free speech implications of security fees in a university context: public forum doctrine and the heckler's veto.

A. Public Forum Doctrine

Public forum doctrine is an analytical tool used by courts to determine what kinds of restrictions the government can impose on speech based on where the speech takes place. There are three types of forums in which speech is protected to varying degrees: (1) traditional public forums, (2) designated public forums, and (3) nonpublic forums.

Traditional public forums are those places that "have immemorially been held in trust for the use of the public," such as parks and public streets.[8] In addition to the traditional public forum, the government can create a designated public forum by opening public property for communicative activity.[9] This second type of forum does not have to be a public forum indefinitely, but so long as the government uses it as a public forum, courts will treat it as such.[10] Designated public forums can be further broken down into limited and non-limited designated forums. Non-limited designated forums are not limited on who can speak or what can be discussed.[11] In contrast, a limited designated forum is a type of designated public forum opened only for certain groups or types of speech.[12] Lastly, nonpublic forums are forums for public speech that are not "traditional" and have not been designated a public forum by the government.[13] Examples of nonpublic forums include airport terminals, public schools' internal mail systems, and polling places.

In a nonpublic forum, the government may apply content-based restrictions on speech, as long as the restrictions are reasonable and do not discriminate based on speakers' viewpoints.[14] Traditional and

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[8] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

[9] *See id.* at 45.

[10] *See id.* at 46 (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)).

[11] Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 498 (2005).

[12] *See id.*; *see also Perry Educ. Ass'n*, 460 U.S. at 46 n.7, 47 ("A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.").

[13] *See* Langhauser, *supra* note 11, at 498.

[14] *See id.* at 494, 503 ("Succinctly stated, 'content' refers broadly to the subject matter of the speech; 'viewpoint' refers to the perspective from which a speaker views a particular topic—e.g. viewing child-rearing questions from a Christian perspective; and 'effect' is what happens or is likely to happen in response to the expression of that content and/or viewpoint.") (footnote omitted) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995)).

designated forums are more protective of free speech. In these forums, content-neutral restrictions will be subject to intermediate scrutiny, meaning they "must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so."[15] A regulation is content neutral if it serves purposes unrelated to the content of the expression.[16] Restrictions on the time, place, and manner of expressive activity are generally content neutral because they do not discriminate based on the content of the message.[17] For example, in *Ward v. Rock Against Racism*,[18] the Supreme Court held that New York City did not run afoul of the First Amendment when it passed a regulation on the volume of amplified music at concerts in Central Park because its purpose was to regulate noise levels, as opposed to the content of the music.[19]

In traditional and designated public forums, content-based restrictions will be subject to strict scrutiny, meaning that to be upheld, the regulation must further a compelling state interest and be narrowly tailored to achieve that interest.[20] While there is no precise definition of a compelling state interest, examples include "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[21] For a regulation to be narrowly tailored, the regulation must promote a substantial government interest that cannot be achieved as effectively in a less restrictive way.[22] In other words, the regulation must "not [be] substantially broader than necessary to achieve the government's interest."[23] For illustration, in *McCullen v. Coakley*,[24] the Massachusetts state legislature sought to protect its interest in public safety and patient access to reproductive health care by making it a crime to "knowingly stand on a 'public way or

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[15] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[16] *Id.* at 791.

[17] *Id.*

[18] 491 U.S. 781.

[19] *See id.* at 792.

[20] *See* Langhauser, *supra* note 11, at 502.

[21] McCullen v. Coakley, 573 U.S. 464, 486–87 (2014) (citations omitted) (citing Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997)). *See generally* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 398 (2006). *But see* Ronald Steiner, *Compelling State Interest*, MTSU (2009), https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest [https://perma.cc/CEX4-DV74] ("An interest is compelling when it is essential or necessary rather than a matter of choice, preference, or discretion.").

[22] Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

[23] *Id.*

[24] 573 U.S. 464 (2014).

sidewalk' within 35 feet" of an abortion clinic.[25] The Supreme Court held that the statute was not narrowly tailored because the "buffer zones" burdened significantly more speech than was necessary to achieve the asserted state interests.[26] In fact, the Court found that another provision in the same statute protected the state's interests as effectively in a less restrictive way, by making it a crime to knowingly impede "another person's entry to or exit from a reproductive health care facility."[27]

In sum, content-based restrictions on speech in public forums will be subject to strict scrutiny review, while restrictions on speech in nonpublic forums will only face intermediate scrutiny. Section III will establish that universities contain a variety of public and nonpublic forums. For example, a classroom is not a public forum,[28] but a student activity fee often is a public forum, albeit a "metaphysical" one.[29]

B. The Heckler's Veto

The heckler's veto pertains to restrictions placed on speech by the government in response to an audience's reaction or expected reaction. A heckler's veto is an "impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience."[30] The Supreme Court has held that a speaker should not be silenced because of a hostile audience, and many courts have imposed affirmative obligations on the state to provide for the security of controversial speakers in public forums.[31]

The government's obligation to protect and promote unpopular speech in a typical heckler's veto case is not without limit. First, speech protections only apply to protected speech; that is, certain categories of speech do not qualify for First Amendment—and therefore government—protection. For example, speech that amounts to incitement of violence would not be protected, even in a traditional public forum.[32]

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[25] *Id.* at 469, 486 (internal quotation marks omitted).

[26] *Id.* at 490.

[27] *See id.* at 490–91.

[28] *See* Bishop v. Arnov, 926 F.2d 1066, 1071 (11th Cir. 1991).

[29] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995).

[30] Startzell v. City of Philadelphia, 533 F.3d 183, 200 (3d Cir. 2008).

[31] *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *see also* Ovadal v. City of Madison, 416 F.3d 531, 537 (7th Cir. 2005) ("The police must permit the speech and control the crowd; there is no heckler's veto.") (quoting Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993)); Grider v. Abramson, 994 F. Supp. 840, 845–46 (W.D. Ky. 1998) ("The police were not at liberty to do nothing; authorities had to develop some way of allowing the rallies to proceed while at the same time protecting those participating."), *aff'd*, 180 F.3d 739 (6th Cir. 1999).

[32] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (establishing that speech advocating illegal conduct is protected under the First Amendment unless the speech is likely to incite

Additionally, "the law does not expect or require [the police] to defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury."[33] With this background in mind, this Comment argues that universities that impose additional security fees on student groups who invite controversial speakers are engaging in a de facto heckler's veto by imposing these additional costs due to audiences' reactions.

III. PROGRESSION OF CASES

There are two series of cases implicated by the question of who should pay security fees required to host controversial speakers on campus. The first outlines when security fees can be charged in certain public forums. The second outlines the relationship between universities and student speech. This Comment argues that these two series of cases fit together to establish that when universities establish a designated public forum, imposing additional security costs on student groups who invite controversial speakers to campus constitutes an infringement on students' First Amendment rights. The recent security fee cases in Subsection C illustrate that some courts have adopted this conclusion.

A. Fees and Permits in Public Forums

The government must protect controversial speakers in traditional public forums and may not charge speakers for increased security costs based on audience reaction to their controversial speech.[34] However, the Supreme Court has held that regulations regarding the use of public forums that ensure the safety and convenience of the people are not inconsistent with the First Amendment, so long as they do not give the government too much discretion.[35] In *Cox v. New Hampshire*[36] the Supreme Court upheld a statute that required organizers to obtain a special license before putting on a demonstration in a public forum.[37] The statute authorized a municipality to charge a permit fee for the "maintenance of public order" of up to $300.[38] The Court held that it was constitutional to charge a fee limited to the purpose of

"imminent lawless action").

[33] Glasson v. City of Louisville, 518 F.2d 899, 909 (6th Cir. 1975), *overruled on other grounds by* Bible Believers v. Wayne Cty., 805 F.3d 228 (6th Cir. 2015).

[34] *See Forsyth*, 505 U.S. at 135–36.

[35] *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

[36] 312 U.S. 569.

[37] *Id.* at 575–78.

[38] *Id.* at 576–77.

meeting the expense of administering the licensing act and maintaining public order.[39] The Court went so far as to state that:

> [t]he suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.[40]

In contrast to *Cox*, the Supreme Court has also held that a similar ordinance allowing county commissioners to assess a fee of up to $1,000 per day was unconstitutional because it gave a county administrator too much discretion to determine how much to charge.[41] In *Forsyth County v. Nationalist Movement*,[42] the Supreme Court granted certiorari to determine "the constitutionality of charging a fee for a speaker in a public forum."[43] As a result of demonstrations that led to unrest in a small rural county, commissioners enacted an ordinance that required a permit and a fee to be paid in advance of any event.[44] The fee was to be determined as needed to "meet the expense incident to the administration of the ordinance and to the maintenance of public order," but was capped at $1,000.[45] The commissioners wanted to impose some of the increased security costs on the demonstrators because the provision of "necessary and reasonable protection" to participants in these demonstrations "exceed[ed] the usual and normal cost of law enforcement."[46] When the plaintiffs proposed a demonstration a few years later, the county imposed a $100 fee for the permit.[47] The plaintiffs sued claiming the fee infringed on their First Amendment rights.[48]

In a public forum, content-based regulations of speech must be "narrowly tailored to serve a significant government interest."[49] In *Forsyth*, the ordinance imposing a fee based on audience reaction was content-based because "[t]hose wishing to express views unpopular with

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[39] *Id.* at 577.

[40] *Id.*

[41] *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992).

[42] 505 U.S. 123.

[43] *Id.* at 129.

[44] *See id.* at 130.

[45] *Id.* at 126–27 (internal quotation marks omitted).

[46] *Id.* at 126 (internal quotation marks omitted).

[47] *Id.* at 134–35 (1992).

[48] *Id.* at 127.

[49] *Id.* at 130.

bottle throwers, for example, may have to pay more for their permit."[50] Applying strict scrutiny, the Supreme Court found that the statute was not narrowly tailored because there were no "narrowly drawn, reasonable and definite standards guiding the hand of the Forsyth County administrator."[51] Specifically, the administrator did not have to rely on objective factors or explain his unreviewable decision; therefore, a biased administrator could use the fees as a form of censorship.[52] The uncontrolled discretion of the ordinance permitted a content-based metric for assessing security fees.[53] Thus, it invalidated the ordinance.[54]

The language of the regulations in *Cox* and *Forsyth* are hard to distinguish, making the outcomes hard to reconcile.[55] The *Forsyth* Court did not overrule *Cox*, but stated it did not read *Cox* to permit a state entity to charge controversial speakers a premium due to hostile audience reaction.[56] While this explanation fails to explain how such similar language can be read in opposite ways, it makes clear that the Supreme Court would not permit a premium to be charged to controversial speakers going forward.

The Supreme Court recently upheld a content-neutral permit system that allowed for permit seekers to be excluded if the exclusion helped preserve park facilities, prevented dangerous uses of forums, and assured financial accountability for damage caused by an event.[57] In *Thomas v. Chicago Park District*,[58] a park ordinance required individuals to obtain a permit before hosting events of more than fifty people.[59] The ordinance listed reasons why the Park District could deny an application for a permit, including that "the applicant has not tendered the required application fee," "the applicant . . . has on prior occasions damaged Park District property and has not paid in full for such damage," and "the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public."[60]

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[50] *Id.* at 134 (citing Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989)).

[51] *Id.* at 133 (internal citations omitted).

[52] *Id.* at 133–34.

[53] *Id.*

[54] *Id.* at 137.

[55] *Compare id.* at 126–27 (the fee was to be determined as needed to "meet the expense incident to the administration of the Ordinance and to the maintenance of public order"), *with* Cox v. New Hampshire, 312 U.S. 569, 576–77 (1941) (the statute authorized a municipality to charge a permit fee for the "maintenance of public order" of up to $300).

[56] *Forsyth*, 505 U.S. at 136.

[57] *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002).

[58] 534 U.S. 316.

[59] *Id.* at 322.

[60] *Id.* at 318 n.1.

Although mere time, place, and manner restrictions can be applied in a discriminatory way by giving too much discretion to park officials, there was no fear that an official would grant or deny a permit based on its content under the ordinance in this case.[61] The Park District could only deny a permit for one of the reasons set forth in the ordinance, and the Court found those grounds to be "reasonably specific and objective, and [did] not leave the decision 'to the whim of the administrator.'"[62] Together, *Cox*, *Forsyth*, and *Thomas* illustrate that, in traditional public forums, permits and fees must be assessed in an objective and content neutral way and speakers cannot be excluded or surcharged based on the content of their speech (lest the regulation be subject to strict scrutiny).

B. Universities and Students' First Amendment Rights

Students enjoy the constitutional protections of the First Amendment in a university setting.[63] Though the Supreme Court has long recognized the authority of the state and of school officials to "prescribe and control conduct in the schools,"[64] it has held that First Amendment protections are "nowhere more vital than in the community of American schools."[65] It is important to note that this Comment addresses the First Amendment rights of students at public universities because the First Amendment only applies to government actors.[66] Although many private universities protect student speech with commendable commitment, those institutions are not bound by the First Amendment.[67] However, there are many reasons why private universities should adhere to First Amendment principles.[68] Thus, this Comment may be applicable to private universities committed to protecting free speech as well.

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[61] *Id.* at 323–24.

[62] *Id.* at 324 ("They provide 'narrowly drawn, reasonable and definite standards' to guide the licensor's determination.") (quoting Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

[63] *See* Healy v. James, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large.").

[64] *Id.*

[65] *Id.* ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas . . . .'") (quoting Keyishian v. Bd. of Regents State Univ. of N.Y., 385 U.S. 589, 603 (1967)). Of course, there are many cases that cabin this broad pronouncement and allow school administrators to restrict speech on campuses. *See generally* JUSTIN DRIVER, THE SCHOOLHOUSE GATE (2018).

[66] *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.").

[67] *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS xi (2017) ("We recognize, of course, that the First Amendment applies only to public colleges and universities.").

[68] Aside from the benefits generally associated with the First Amendment, like the sharing of

The cases that set the parameters for a university's ability to interfere with students' First Amendment rights arose in the context of student group recognition. The following cases established that universities provide limited public forums to registered student organizations and that universities cannot deny these student organizations access to those forums based on a group's viewpoints.

Denial of official recognition of a student organization, without sufficient justification, violates students' First Amendment right of association.[69] In *Healy v. James*,[70] the Supreme Court held that a public educational institution exceeds constitutional bounds when it "restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent."[71] The Court further held that the denial of official recognition to a student group without justification unconstitutionally impedes a group's ability to associate by denying access to campus resources.[72]

Using the same logic as in *Healy*, the Supreme Court has made clear that universities cannot allow some groups to use campus resources but deny others based on the content of their messages.[73] In *Widmar v. Vincent*,[74] a state university was sued by a religious student group that was denied access to campus facilities because of a regulation that prohibited the use of school property for religious purposes in an attempt to avoid state support for religion.[75] The Court held that the University had rendered itself a limited public forum by holding itself open for use by student groups.[76] Relying on *Healy*, the Supreme Court reiterated that students have a right to free speech on campus and that the withholding of campus resources is a form of prior restraint, subject to strict scrutiny.[77] The Court held that the regulation was invalid because it was a content-based regulation on religious activity and the University could not show that regulation of that activity was necessary

ideas, President Trump issued an executive order directed at both public and private universities urging them to protect free speech on campus or risk losing federal funds. *See* Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER ED (Mar. 22, 2019), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk [https://perma.cc/BQ2P-UQ4Q].

[69] *See Healy*, 408 U.S. at 181 ("[T]he freedom of association is . . . implicit in the freedoms of speech, assembly, and petition.").

[70] *Id.*

[71] *Id.* at 187–88.

[72] *Id.* at 181.

[73] *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[74] 454 U.S. 263.

[75] *Id.* 265–66.

[76] *Id.* at 267–68, 272.

[77] *Id.* at 267 n.5.

to serve a compelling interest or that the regulation itself was narrowly drawn to achieve that end.[78]

Similarly, universities cannot fund the speech of some groups but not others based on viewpoints.[79] Though it often authorized the payment of printing costs for student publications, the University in *Rosenberger v. Rector & Visitors of the University of Virginia*[80] denied printing costs to a student group's newspaper on the ground that it promoted religious beliefs.[81] The Supreme Court held that the University had created a limited public forum by enacting a policy of providing funding for the printing costs of student publications and that the denial of funding for the plaintiffs' publication involved unconstitutional viewpoint discrimination, violating the students' First Amendment rights.[82] It did not matter that that the University was denying funding for speech as opposed to a platform for speech, as in *Widmar*.[83]

Healy, *Widmar*, and *Rosenberg* establish that the "First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints."[84] It may be permissible, however, to deny a student group access to campus resources if the resources are a subsidy and withholding access would not constitute a prior restraint on free speech. At issue in *Christian Legal Society v. Martinez*[85] was the constitutionality of a university policy that required registered student organizations to accept an "all-comers" policy to allow all students to participate in any student organization.[86] A student group sued the University after they were rejected as a registered student organization ("RSO") for refusing to comply with the all-comers policy.[87] The Court deemed the RSO program a limited public forum, such that it could only impose restrictions on speech that were reasonable in light of the purposes of the forum and viewpoint neutral.[88] Unlike earlier cases, the Supreme Court characterized the denial of school resources to student organizations as denial of a subsidy, as opposed to a prior restraint.[89] In doing so, it forewent an

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[78] *Id.* at 270, 276.

[79] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

[80] *Id.*

[81] *Id.* at 827.

[82] *Id.* at 831.

[83] *Id.* at 832–33 (citing *Widmar*, 454 U.S. at 276).

[84] Christian Legal Soc. v. Martinez, 561 U.S. 661, 667–68 (2010) (citing *Rosenberger*, 515 U.S. 819; *Widmar*, 454 U.S. 263; Healy v. James, 408 U.S. 169 (1972)).

[85] 561 U.S. 661.

[86] *Id.* at 668.

[87] *Id.*

[88] *Id.* at 679 (citing *Rosenberger*, 515 U.S. at 829).

[89] *Id.* at 683.

analysis of the regulation under strict scrutiny, opting instead for the "less restrictive limited-public-forum analysis."[90]

The *Martinez* Court ultimately held that the all-comers policy did not violate the students' First Amendment rights because the policy was a reasonable and viewpoint-neutral condition on RSO status.[91] The policy was considered reasonable because it comported with the limited forum's purpose to bring together individuals with "diverse backgrounds and beliefs, encourage[ing] tolerance, cooperation, and learning among students."[92] The all-comers policy was also viewpoint neutral because the policy drew no distinction between groups based on their message or perspective.[93] Additionally, even without official recognition, the group had access to alternative channels, such as access to school facilities and advertising mechanisms.[94]

On a related note, in furtherance of free speech, universities may impose a mandatory fee to sustain open dialogues on campus so long as the allocation of funding to student groups is viewpoint neutral.[95] In *Board of Regents v. Southworth*,[96] a group of students tried to challenge a mandatory student fee policy at their university, claiming it violated their First Amendment rights because the fee was used to fund speech with which plaintiffs did not agree.[97] The University collected the activity fee to "facilitate[] the free and open exchange of ideas by, and among, its students."[98] The Court held it was constitutionally permissible to collect a fee for that purpose, so long as it protected students' First Amendment interests by allocating those funds to student groups in a viewpoint neutral way.[99]

The cases in this section paved the way for the recent security fee cases to be decided—and more commonly, settled—by ascertaining that universities offer a number of limited public forums. These cases show that when universities establish such forums, courts will step in to ensure that all students' speech rights are protected equally. However, courts have left open the question of how this precedent applies in the context of imposing security costs on student groups who invite controversial speakers to campus.

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[90] *Id.*

[91] *Id.* at 697

[92] *Id.* at 689 (internal quotation marks omitted).

[93] *Id.* at 694–95.

[94] *Id.* at 690.

[95] *See* Bd. of Regents v. Southworth, 529 U.S. 217, 229–30 (2000).

[96] 529 U.S. 217.

[97] *Id.* at 221.

[98] *Id.* at 229.

[99] *Id.* at 229–30.

C. Recent Campus Security Fee Cases

Professor Erica Goldberg has advocated that courts should apply a *Forsyth* analysis—requiring a court to determine whether a fee structure gives administrators "unbridled discretion" and whether the structure is content neutral—to universities when assessing the constitutionality of security fees.[100] She also recommended that universities create a separate fund for extra security, rather than asking students or the speaker to pay.[101] Since her article was published in 2011, a number of cases have addressed the constitutionality of imposing security costs on student groups who invite controversial speakers, though most have been resolved by a settlement rather than a judgement.

While there is no Supreme Court judgment dealing with security fee allocation for speakers invited by students, the Court has made clear that a fee policy that gives a state actor too much discretion to determine security costs will be held unconstitutional.[102] With this idea in the background, the Fifth Circuit decided *Sonnier v. Crain*,[103] in which an uninvited, non-student speaker sued the Southeastern Louisiana University to enjoin enforcement of the speech policy regulating speech by non-students on campus and imposing security fees.[104] The fee policy stated that the "sponsoring individual(s) or organization(s) [would be] responsible for the cost of . . . security beyond that normally provided by the University."[105] The speaker claimed that the speech policy violated the First Amendment because it gave the University "sole discretion . . . in determining both the need for, and the strength of the security" and would impute any additional costs on the sponsoring individual or organization.[106] Relying on *Forsyth*, the Court struck down the policy because it gave the University "unbridled discretion" to determine the security fee.[107]

When a university gives itself broad discretion to determine security costs for hosting speakers on campus, the underlying regulation will likely be held unconstitutional. In an order granting the student plaintiffs' motion for a temporary restraining order, a federal district

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[100] Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 395–96 (2011).

[101] *Id.* at 403.

[102] *See generally* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992).

[103] 613 F.3d 436 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011).

[104] *Id.* at 438.

[105] *Id.* at 440 n.4.

[106] *Id.* at 447.

[107] *Id.* at 447–48.

court recently applied *Forsyth* in the context of a security fee for a controversial speaker invited to campus by a student group.[108] In *College Republicans v. Cauce*,[109] a student group sought to bring a controversial speaker to campus for a "Freedom Rally."[110] The University's event policy required student organizations to pay the anticipated costs of security for on-campus events.[111] For the rally, the University determined that it needed enhanced security based on the time and location of the event, how many people were estimated to attend the event, and audience responses to the controversial speaker at prior events.[112] The University therefore demanded a $17,000 reimbursement from the group.[113] The student group filed suit claiming the fee policy violated their First and Fourteenth Amendment rights by "regulating the student organization's expression based on its conservative viewpoints and the potential reaction of those who oppose [the speaker]."[114]

In reaching its conclusion in *Cauce*, the court relied on *Forsyth*, finding that the security fee policy at issue was neither reasonable nor viewpoint neutral because it gave administrators "broad discretion to determine how much to charge student organizations for enhanced security, or whether to charge at all."[115] The court noted that the amount of the fee would "depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content."[116] The policy also failed because the fees were assessed based on "history or examples of violence, bodily harm, property damage, significant disruption of campus operations and violations of the campus code of conduct and state and federal law."[117] The court feared this would lead administrators to "inevitably impose elevated fees for events featuring speech that is controversial or provocative and likely to draw opposition."[118] This case was resolved when the parties agreed to a settlement—with the University agreeing to pay $122,500 in legal fees to the College Republicans' attorneys and agreeing to rescind the security fee policy for student group events.[119] Though the University decided it

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[108] *See* Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *2 (W.D. Wash. Feb. 9, 2018) (citing *Forsyth Cty.*, 505 U.S. at 133).

[109] 2018 WL 804497.

[110] *Id.* at *1.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at *2 (citing Forsyth Cty. Nationalist Movement, 505 U.S. 123, 133 (1992)).

[116] *Id.* (citing *Forsyth*, 505 U.S. at 134).

[117] *Id.* at *3 (internal quotation marks omitted).

[118] *Id.*

[119] *See* Long, *supra* note 7.

would no longer charge student groups a security fee for speakers, the settlement did not preclude the University from "creating a constitutionally permissible security fee for student events" in the future.[120]

In another recent case on security fees for invited speakers, a California district court allowed a student group to proceed on an Equal Protection claim against its university for imposing a security fee that was much higher than it had been for other similarly situated events.[121] In *Young American's Foundation v. Napolitano*,[122] a registered student organization had organized an on-campus speaking engagement featuring Milo Yiannopoulos, a controversial conservative figure.[123] The university cancelled the Yiannopoulos event when protests turned violent.[124]

In response to this event, University officials instituted policies that put restrictions on the student organization's subsequent speaking engagements featuring controversial figures.[125] Under the policies, the University charged a $5,788 security fee for one of its events.[126] For another event, the University imposed a $15,738 security fee, later reduced to $9,162.[127] The reduced fee was still almost twice as much as the fee charged for an event featuring Supreme Court Justice Sotomayor in the same facility, with more people, and with access to a larger part of the facility.[128]

The court in *Napolitano* ultimately found that plaintiffs had sufficiently alleged an Equal Protection Clause violation, based on the imposition of an unreasonable fee.[129] Relying on *Cox*, the court noted that "with regard to security fees, government officials may . . . properly impose fees consistent with the First Amendment."[130] However, the court was not convinced that the fees in this case were reasonable, stating that, "[i]n the absence of a pleaded explanation for any of the fees imposed, and where, as here, an explanation is not otherwise apparent, such allegations suffice to support an as-applied challenge" to the

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[120] *Id.*

[121] *See* Young Am.'s Found. v. Napolitano, No. 17-CV-02255-MMC, 2018 WL 1947766, at *9 (N.D. Cal. Apr. 25, 2018).

[122] 2018 WL 1947766.

[123] *Id.* at *1.

[124] *See id.*; *see also* Young Am.'s Found. v. Kaler, 370 F. Supp. 3d 967, 991 n.5 (D. Minn. 2019).

[125] *Id.*

[126] *Id.* at *9.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* (internal quotation marks omitted) (citing Cox v. New Hampshire, 312 U.S. 569, 577 (1941)).

policies.[131] This case was resolved when the plaintiffs settled with UC Berkeley for $70,000 to cover the plaintiff's attorney costs, as well as a revision of the campus policies for hosting speakers.[132] The school noted that the settlement was not a concession that the policies allowed for viewpoint discrimination.[133]

These recent security fee cases show that courts have tended to find the imposition of additional security fees on student groups who invite controversial speakers to be problematic, if not unconstitutional. Given the trend of universities settling these cases, universities may even agree.

IV. UNCONSTITUTIONAL IMPOSITION OF FEES

None of the First Amendment case law directly precludes a university from charging security fees; however, the fees must comport with constitutional requirements of content neutrality, lest they be subject to strict scrutiny. The cases discussed in Section III demonstrate that any fees based on audience reaction to a controversial speaker must pass strict scrutiny to avoid violating the First Amendment because audience reaction is not a content neutral way to assess fees.[134]

Professor Goldberg looked to some of the cases discussed in this Comment to address whether "[p]ublic universities should adopt clearly articulated policies that conform to *Forsyth*, *Southworth*, and their progeny to ensure that administrators do not punish unpopular views or assess speaker's fees based on controversial content."[135] She articulated the basic elements of a constitutional security fee as: "(1) risk-neutral and content-neutral standards for determining security fees; (2) explicit guidelines on how those fees are determined; and (3) a transparent process for student groups to appeal security fees that are larger than normal."[136] The problem is, assigning additional security costs to student groups who invite speakers who elicit violent reactions from protestors will necessarily fail prong (1) of this test.

With foresight, Professor Goldberg's article argued for extending *Forsyth* to apply in the limited public forum context of a university

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[131] *Id.* (footnote omitted).

[132] Sophia Brown-Heidenreich, *UC Berkeley to Settle Free Speech Lawsuit with Conservative Group*, DAILY CALIFORNIAN (Dec. 3, 2018), https://www.dailycal.org/2018/12/03/uc-berkeley-to-settle-free-speech-lawsuit-with-conservative-groups/ [https://perma.cc/NPH4-NB9Y].

[133] *Id.*

[134] *See, e.g.*, Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992).

[135] Goldberg, *supra* note 100, at 400.

[136] *Id.* at 400–01.

setting.[137] This not only complies with Supreme Court precedent,[138] but lower courts have also adopted this approach. The court in *Cauce* followed this approach when it relied on *Forsyth* to determine a security fee was unconstitutional.[139] However, in *Napolitano*, another federal district court relied on *Cox* to hold that government officials can impose security fees, consistent with the First Amendment.[140] The court in *Napolitano* did not find the policy to be unconstitutional itself, but was concerned that the security fee was being imposed inconsistently.[141] The fee policy itself may have been the issue, or it could have been that the policy was applied incorrectly, leading to the inconsistencies. It is hard to know, because in both of these district court cases, the parties settled before the courts resolved the controversies.[142] The Court in *Forsyth* stated that the difference in the fee policy invalidated in *Forsyth* and the fee upheld in *Cox* was that, in *Forsyth*, the county could impose an increased security fee in anticipation of a hostile audience.[143] However, there did not seem to be any real difference in the discretion given to the government in either case.[144]

Given the importance of the exchange of ideas on campus and the constitutional protection of students' speech, the cases discussed in Section III.B demonstrate that courts will not allow universities to charge student groups who invite controversial speakers to campus more for the security costs that they charge for other speakers. Additionally, a security fee structure that would allow a university to impose a security fee within a permissible range would not be workable. Given the exorbitant costs of security for these events, the range would be huge (e.g., a range from $0 to $500,000, in case Richard Spencer visits).[145] Not only would additional costs be unpayable by most student groups, but a range that spans thousands of dollars leaves more room for arbitrary enforcement than even the $1,000 range invalidated in *Forsyth*.

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[137] *Id.* at 400.

[138] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)) (discussing designated public forums).

[139] Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *2 (W.D. Wash. Feb. 9, 2018) (citing Forsyth, 505 U.S. at 133–34).

[140] Young Am.'s Found. v. Napolitano, No. 17-CV-02255-MMC, 2018 WL 1947766, at *9 (N.D. Cal. Apr. 25, 2018) (citing Cox v. New Hampshire, 312 U.S. 569, 577 (1941)).

[141] *Id.*

[142] *See* Morley, *supra* note 5; Long, *supra* note 7.

[143] *Forsyth*, 505 U.S. at 136.

[144] *Compare id.* at 126–27 (the fee was to be determined as needed to "meet the expense incident to the administration of the Ordinance and to the maintenance of public order"), *with Cox*, 312 U.S. at 577 (the statute authorized a municipality to charge a permit fee of up to $300 intended to "meet the expense incident to the administration of the act and to the maintenance of public order").

[145] *See* Morley, *supra* note 5.

Universities might try to avoid hosting certain controversial speakers altogether by relying on *Thomas*, in which a park district did not violate the First Amendment by denying access to its facilities based on an ordinance that was "reasonably specific and objective."[146] It is conceivable that a university could set up a policy very similar to that in *Thomas* by requiring permits for invited speakers and making the permits subject to a set of limitations that would to allow it to withhold a permit in cases of danger.[147] Given case law in university settings, it is clear that universities cannot discriminate based on student organizations' viewpoints, which also precludes discrimination based on predicted audience reactions.[148] When Richard Spencer rented space from the University of Florida, the University was able to cancel his first reservation because there were imminent and legitimate dangers that it could point to.[149] However, the University acquiesced that absent extenuating circumstances, it was obligated to allow him use of the University as a public forum.[150] Whether relying on *Forsyth*, *Cox*, or *Thomas*, assigning additional security costs to student groups who invite controversial speakers will trigger strict scrutiny review, and the speakers cannot be turned away simply because of a hostile audience.

V. OTHER WAYS OF MANAGING SECURITY COSTS

Since public universities may not impose extra security fees on student groups who invite controversial speakers to campus and the costs stemming from hosting these speakers are becoming unmanageable, universities must figure out other ways to defray these costs.[151] In light of the analysis above, this section will address potential ways universities can decrease security costs that do not involve impermissible impositions of additional fees on student groups.

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[146] Thomas v. Chi. Park Dist., 534 U.S. 316, 324 (2002).

[147] *See id.* at 318 n.1.

[148] *See generally* Bd. of Regents v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

[149] *National Policy Institute's Richard Spencer Speaking Engagement Confirmed for Oct 19 at UF*, UNIV. OF FLA. NEWS, https://news.ufl.edu/for-media/media-advisories/archive/2017/10/national-policy-institutes-richard-spencer-speech-confirmed-for-oc.html [https://perma.cc/MR6B-Y7AR] (last visited Nov. 13, 2020).

[150] *Id.*

[151] *See generally* Wong, *supra* note 3 (noting that the Office of the President of the University of California system would pay for half of the four million dollar security costs incurred by UC Berkeley in 2017 due to the "extraordinary circumstances").

A. Use *Martinez* to Argue that Security Fee Allotments are a Subsidy

The most interesting approach a university might take to limit its security expenses would require it to change the student fee structure so that every RSO receives a set budget from the school to fund everything from printing newspapers to, say, covering the costs of security fees to host a controversial speaker. Universities may also try to set a baseline amount of money for security per event, available for all student groups, and any costs beyond that amount would be imposed on the group inviting the speaker or hosting the event.[152] A university might be able to frame the both the RSO budgets or the security fee as a subsidy and support their position along the same lines as the rationale in *Martinez*.[153] First, the *Martinez* Court framed access to school resources as a subsidy whereas, in the past, the Supreme Court had framed the issue as one of prior restraint.[154] In the past, courts viewed withholding student group recognition as a prior restraint on speech it limited their access to a limited public forum.[155] A university might try to argue that it is not withholding additional funding based on audience reaction, but that it is giving something equally to all student groups. Second, the all-comers policy in *Martinez* was determined to be "textbook viewpoint neutral" because it applied to everyone.[156] While the amount of money allotted to each student group would be equal, this approach would likely still be seen as a prior restraint on speech, because student groups that cannot afford to cover additional security fees for their speakers would not be able to invite them.[157]

B. Educate and Train Students Before Conflicts Arise

Universities can institute First Amendment education and/or training for students, similar to that used for Title IX training.[158]

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[152] *See, e.g.*, Susan Kelly, *Cornell to Cover Security Fees for Student Events*, CORNELL CHRON. (Apr. 30, 2019), https://news.cornell.edu/stories/2019/04/cornell-cover-security-fees-student-events [https://perma.cc/8GT3-9XSS]. Cornell, a private university, recently instituted a security fee policy, eliminating security fees for most student organizations and student sponsored events. The University agreed to cover security costs up to $8,000 per event. *Id.*

[153] *See generally* Christian Legal Soc. v. Martinez, 561 U.S. 661 (2010).

[154] *Id.* at 683.

[155] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 264 n.5 (1981).

[156] *Id.* at 694–95.

[157] *See* Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *3 (W.D. Wash. Feb. 9, 2018). The court found that imposing a fee *after* the event was nonetheless a prior restraint on speech. *Id.* The court noted that student groups, knowing they may be stuck with a large security fee, could be discouraged from bringing in a speaker if they won't be able to afford the fee. *Id.*

[158] *See, e.g.*, Jamie D. Halper, *College Title IX Training Becomes Mandatory, Tied to Course Enrollment*, HARV. CRIMSON (June 30, 2018), https://www.thecrimson.com/article/2018/6/30/title-

Informing students in a direct and clear way of the importance of free speech on campus and outlining responses to speakers with whom students do not agree may lead to more tolerance on campus. While the University of Florida did spend over $500,000 when Richard Spencer came to campus, the protests did not rise to the level of those at UC Berkeley, which paid similarly large security fees for a similar event.[159] One reason for this may be the way the University of Florida handled the event. The University took a direct and transparent approach to hosting Richard Spencer, who was not invited by a student group,[160] by dedicating a webpage which explained their responsibilities under the First Amendment[161] and advocated that students not give Spencer the spotlight by staying away from the event.[162] The University of Florida made clear the reasons Spencer was coming to campus and how much he paid to rent the space.[163] In short, universities can reduce spikes in security costs by investing in both conflict prevention geared towards the event and general tolerance education.

The University of Chicago provides another example of a university clearly stating expectations for student conduct.[164] In 2016, the private university sent a letter to all incoming freshmen informing them of the University's commitment to free speech and its refusal to compromise on its values.[165] When former chairman of a conservative media outlet and Trump advisor Steve Bannon was invited to campus in 2018, protests erupted but did not escalate to violence, though Bannon never set a date to speak.[166] Additionally, the University of Chicago serves as an

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ix-training-mandatory/ [https://perma.cc/FQ2W-FGWF].

[159] *See* Belkin, *supra* note 2; *see also* Jeremy Bauer-Wolf, *Lessons from Spencer's Florida Speech*, INSIDER HIGHER ED (Oct. 23, 2017), https://www.insidehighered.com/news/2017/10/23/nine-lessons-learned-after-richard-spencers-talk-university-florida [https://perma.cc/TW2N-5VJ6].

[160] *See* UNIV. OF FLA. NEWS, *supra* note 149 ("Despite not being invited by the University of Florida, National Policy Institute's President Richard Spencer is scheduled to speak on October 19 on campus . . . . The [National Policy Institute] has rented space for an event . . . on the UF campus in Gainesville.").

[161] *See Frequently Asked Questions About the First Amendment*, UNIV. OF FLA., https://freespeech.ufl.edu/qa-for-1019-event/ [https://perma.cc/24A4-NFEP] (last visited Nov. 13, 2020).

[162] W. Kent Fuchs (@PresidentFuchs), TWITTER (Oct. 16, 2017, 8:55 AM) https://twitter.com/PresidentFuchs/status/919924840529846273.

[163] *See* Annalisa Merelli, *The University of Florida is Allowing Richard Spencer to Speak Because it Has To*, QUARTZ (Oct. 17, 2017), https://qz.com/1103619/the-university-of-florida-is-allowing-richard-spencer-to-speak-because-it-has-to/ [https://perma.cc/Y7Z4-363W].

[164] Though a private university, the University of Chicago is considered a leader in protecting free speech on campus. *See generally* Tom Lindsay, *35 Universities Adopt 'The Chicago Statement' On Free Speech*, FORBES (Feb. 28, 2018), https://www.forbes.com/sites/tomlindsay/2018/02/28/35-universities-adopt-the-chicago-statement-on-free-speech-1590-to-go/#1445c48c771b [https://perma.cc/JC8Q-KPAV].

[165] *See* Scott Jaschik, *U Chicago to Freshmen: Don't Expect Safe Spaces*, INSIDER HIGHER ED (Aug. 25, 2016), https://www.insidehighered.com/news/2016/08/25/u-chicago-warns-incoming-students-not-expect-safe-spaces-or-trigger-warnings [https://perma.cc/HB8L-WDVM].

[166] Lynne Marek, *Will Steve Bannon Speak at U of Chicago, or Won't He?*, CRAIN'S CHI. BUS.

example of general tolerance education: the University sought to design a more robust education program to educate students on the rights and responsibilities that come with participating in the university community, including "targeted outreach measures for students and recognized student organizations, which build on existing student-centered programs and resources but are coordinated by the Office of Campus and Student Life and developed with the faculty."[167]

C. Institute Physical Security Best Practices

Universities can institute best practices in securing these events to decrease costs. Some have questioned whether the security fees for these events needed to be as high as they were. For example, Ben Shapiro's visit to the University of Tennessee cost the University less than $4,000, in sharp contrast with the hundreds of thousands spent by other universities.[168] To prepare for the event, the University instituted a "clear bag policy" for attendees, prohibited signs and large bags, and did not allow for re-admittance to the event.[169] Similarly, the University of Florida was credited for its successful strategy of separating Spencer's supporters from protestors with physical barriers.[170] As universities cannot pass on increased costs of security due to audience response to a controversial speaker, they would be well-advised to consider instituting measures like these to help decrease their security costs.

D. More Aggressive University Response to Hecklers

Universities may decide to crack down harder on disruptive protestors to discourage conduct that infringes on the speech rights of others. In 2017, the University of Chicago formed a committee to look into what could be done about disruptive conduct on campus in response to controversial speakers.[171] The committee recommended that the University work to reduce the chances that disrupters prevent others from

(Oct. 1, 2018), https://www.chicagobusiness.com/news/will-steve-bannon-speak-u-chicago-or-wont-he [https://perma.cc/57H9-6SJK]; *see also* Grace Hauck, *Rally to Disinvite Bannon Draws Counter-Protests*, CHI. MAROON (Feb. 4, 2018), https://www.chicagomaroon.com/article/2018/2/4/rally-disinvite-bannon-draws-counter-protests/ [https://perma.cc/H9BY-USM3].

[167] Colleen Flaherty, *Dealing with Disrupters*, INSIDE HIGHER ED (Mar. 22, 2017), https://www.insidehighered.com/news/2017/03/22/u-chicago-committee-proposes-ways-dealing-those-who-shout-down-invited-speakers [https://perma.cc/G38L-FW3B].

[168] Rachel Ohm, *Shapiro's University of Tennessee Visit Didn't Cost a Fortune*, KNOX NEWS (Nov. 6, 2017), https://www.knoxnews.com/story/news/education/2017/11/06/shapiros-university-tennessee-visit-didnt-cost-fortune-why-and-why-does-matter/818833001/ [https://perma.cc/ER52-MNP2].

[169] *Id.*

[170] *See* Bauer-Wolf, *supra* note 159.

[171] *See* Flaherty, *supra* note 167.

speaking by instituting a "free speech deans on call" program that would allow for the designation and training of faculty to deal with disruptive conduct as it happens.[172] The centralized punishment apparatus would be made up of five members consisting of faculty and students and dole out punishment on a case-by-case basis.[173] Punishment need not be harsh to be effective, but punishing disrupters more seriously could lead to a decrease in disruptive activity for fear of repercussions. However, the speaker and the protestor have a First Amendment right to free speech. The issue addressed by this Comment is the high costs of security for controversial speakers given a hostile audience reaction. The goal is not to prevent protests but to ensure both the rights of the speaker and the protester are protected. To help ensure that the rights of protestors are protected, the University of Chicago committee gave examples of what would constitute "disruptive"[174] and "nondisruptive"[175] conduct to ensure students would know they still have the ability to protest speakers with whom they disagree.

The heart of the problem addressed by this Comment is the conduct of hecklers on campus, not the hecklees. Imposing additional security costs on student groups who invite controversial speakers can make it cost prohibitive for their voices to be heard. But, it should not be overlooked that there are important speech interests on both sides. The solutions discussed in this Section attempt to balance the rights of a speaker with dissenters' rights to object. Both parties have a right to free speech and these solutions attempt to protect both parties' speech interests.

VI. COUNTERARGUMENTS

There are a number of counterarguments to the conclusion that universities cannot impose additional security fees onto the student groups who invite controversial speakers to campus. Most of the counterarguments suggest approaches that target a speaker's ability to speak in the first place. Whether a university can exclude these speakers altogether plays into the issue of security fees because there is a fear that putting the security costs on the speaker or, in this case, the student group who invites the speaker, will chill speech if the student

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[172] *Id.*

[173] *Id.*

[174] *Id.* ("Disruptive protests . . . include blocking access to an event or to a university facility and shouting or otherwise interrupting an event or other university activity with noise in a way that prevents the event or activity from continuing in its normal course.") (internal quotation marks omitted).

[175] *Id.* ("'Nondisruptive protests include: marches that do not drown out speakers; silent vigils; protest signs at an event that do not block the vision of the audience; and boycotts of speakers or events,' the [committee's] report says.").

group cannot afford the fees.[176] Because these speakers cannot be excluded based on audience reaction, this Section will show that the counterarguments cannot resolve the question of who should pay the speaker fees.

A. Students' Free Speech Rights are Not Being Infringed Upon

One might argue that students' free speech rights are not implicated when a university imposes security costs on a student group who invites an outside speaker. The argument would be that the speaker's rights are stifled, but not the rights of the students who invited the speaker. Professor Goldberg persuasively argues that students' free speech rights are implicated in a number of ways. First, the fees infringe on a student group's First Amendment right to receive information.[177] Further, the non-student speech is attributable to the student group who invited the speaker, and the "extra security fees are a burden on the student group's speech in the same way as denying a student organization funding to publish its religious newspaper."[178] Although the imposition of security fees do not prevent students themselves from speaking, their free speech rights are impeded nonetheless when they cannot afford to invite speakers to campus.

B. Controversial Speakers Should Not be Brought to Campus

Another foreseeable counterargument is that nobody should pay the security fees because these controversial speakers should not be invited to campus in the first place. This argument would be strong-er against speakers like Richard Spencer or Milo Yiannopoulos, who are widely considered to be more showmen than speakers of sub-stance. The speech being offered may not seem to contribute to civil discourse, however, the First Amendment protects even hateful and offensive speech[179]

A stronger argument for excluding these speakers comes from Professor Robert Post of Yale University, who argues that there is no First Amendment right to free speech on university campuses.[180] If he is

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[176] *See, e.g.*, Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *3 (W.D. Wash. Feb. 9, 2018).

[177] *See* Goldberg, *supra* note 100, at 383 ("Given a willing speaker, freedom of speech protects both the source and the recipients of the communication") (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756, 773 (1976)).

[178] *Id.* at 386 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995)).

[179] Elisabeth E. Constantino, Comment, *Free Speech, Public Safety, & Controversial Speakers: Balancing Universities' Dual Roles After Charlottesville*, 92 ST. JOHN'S L. REV. 637, 639 (2018) (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[180] *See* Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-

correct, then the solution to the escalating costs of security fees can be avoided by preventing the controversial speakers from coming to campus in the first place. Professor Post argues that universities' dual missions of "education and the creation of knowledge" take them outside the realm of public discourse and therefore, allow universities to engage in content discrimination.[181] In support of his argument, he lists examples of this acceptable "content discrimination": professors are prohibited from engaging in personal abuse of their students, professors hired to teach mathematics must teach mathematics, and professors engage in content discrimination when grading exams.[182] Dean Erwin Chemerinsky of UC Berkeley published a response to Professor Post's article, saying that Professor Post argues for what he thinks that law should be, instead of what the law is.[183] Dean Chemerinsky points out the fatal flaw in Professor Post's argument: the idea that because free speech principles do not always apply on campus, they can never apply.[184] When a public university creates a limited public forum, it does not follow that the entire university becomes a public forum.[185] As described in Section III, the law is on Dean Chemerinsky's side.[186]

C. It Is A Waste of Money to Host Controversial Speakers

One might also argue that the huge security costs required to host these speakers are a waste of money for everyone involved because it is so rare these speakers even get to actually speak. "Shouting down" controversial speakers has become a common response to speakers on campus, in which the speaker has a platform but cannot convey his message.[187] This Comment does not argue that universities will always be successful in protecting First Amendment rights, but the fact that it is difficult to protect free speech rights does not mean universities do not have the responsibility to try. Instituting some of the solutions

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campuses-milo-spencer-protests [https://perma.cc/G9VD-8BWA].

[181] *Id.*

[182] *Id.* Professor Post states: "I subject my students to constant content discrimination. If I am teaching a course on constitutional law, my students had better discuss constitutional law and not the World Series." *Id.*

[183] *See* Erwin Chemerinsky, *Hate Speech is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest [https://perma.cc/BCT9-JN55].

[184] *Id.*

[185] *Compare* Bowman v. White, 444 F.3d 967, 976–77 (8th Cir. 2006) (explaining that a university classroom is a non-public forum), *with* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995) (holding that the university had created a limited public forum by funding the printing costs of student publications).

[186] *See supra* Section III.B.

[187] Charles S. Nary, *The New Heckler's Veto: Shouting Down Speech on University Campuses*, 21 U. PA. J. CONST. L. 305, 306 (2018).

described in Section V may not only lower security costs to the university, but may also increase the likelihood these speakers can actually use the platform the university is protecting.[188]

VII. CONCLUSION

The University of Florida had to pay $500,000 for security when Richard Spencer came to the campus, uninvited.[189] If a university has to foot the bill when speakers are not invited to campus by student groups, the justifications for requiring them to pay the security fees are even stronger when students are actually interested in what a speaker has to say.[190] On the other hand, if universities do not find a way to get security fees under control, the community could lose out on the university as a forum altogether. The line of cases about the relationship between universities and students makes it clear that universities provide limited designated public forums for students to invite speakers.[191] These designated public forums are only treated as such as long as they are open to the public.[192] Universities may decide the costs are too high to allow outside speakers in if they are consistently having to pay millions of dollars per year on security fees alone. While it may be the case that less harm would come to speech on campus by charging a fee as opposed to not having speakers on campus altogether, the First Amendment forbids universities from imposing additional security costs onto the student groups who invite controversial speakers to campus. In an effort to preserve the university as a marketplace of ideas that universities have come to serve as, universities and scholars must continue to develop methods of coping with exorbitant security costs when controversial speakers come to campus.

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[188] *See, e.g.*, *supra* Section V.B (discussing how instituting free speech training for students may decrease the amount of heckling that occurs in response to controversial speakers).

[189] Belkin, *supra* note 2.

[190] *See* Padgett v. Auburn Univ., No. 3:17-CV-231-WKW, 2017 WL 10241386, at *1 (M.D. Ala. Apr. 18, 2017). The court sided with a student who invited Richard Spencer to campus after the university cancelled the event due to security concerns. *Id.* The court granted a temporary restraining order against the university to enjoin it from cancelling the event. *Id.*; *see also* Jeremy Bauer-Wolf, *Auburn University Lawsuit Settled*, INSIDE HIGHER ED (May 16, 2017), https://www.insidehighered.com/quicktakes/2017/05/16/auburn-university-lawsuit-settled [https://perma.cc/E7G5-UUYL].

[191] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[192] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

Immigration, Retaliation, and Jurisdiction

Daniel Simon[†]

I. INTRODUCTION

When federal officials told Ravidath Ragbir that they were deporting him because of his immigration activism, no one could stop them.[1] This unreviewability was by design—a feature, rather than a bug, of our immigration laws. Federal law curtails the ability of aliens facing removal from the United States to seek relief through habeas corpus: No federal court may exercise habeas jurisdiction over a claim by an alien challenging her removal, regardless of whether that claim is statutory or constitutional in nature.[2] While this limitation presents broader problems for immigrants in detention, its impact is particularly pronounced in the context of selective or retaliatory enforcement.

Ragbir's case demonstrates the dangers of this general rule. Ragbir—an alien deportable as a result of a federal wire fraud conviction—has spent years organizing for more lenient immigration policies. That advocacy led a senior official from Immigration and Customs Enforcement to admit that he was deporting Ragbir *because* of his advocacy. Ragbir remains in the United States thanks to the intervention of federal courts. But in Ragbir's case, discretion layered with unreviewability allowed the Executive to come perilously close to deporting Ragbir to his native Trinidad because of his criticisms of a government policy—the undisputed nucleus of the First Amendment's Free Speech Clause. Whether he should be here or there is quite beyond the point: motive matters in the law as in life, and identifying motives as impermissible serves valuable expressive and dignitary purposes.

This Comment explains why certain claims of selective enforcement in retaliation for First Amendment activity are—thanks to the

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[1] Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019), *vac'd sub nom.* Pham v. Ragbir, No. 19-1046, 2020 WL 5882107 (U.S. Oct. 5, 2020); *see also* Ragbir v. Holder, 389 F. App'x 80 (2d Cir. 2010); Ragbir v. Lynch, 640 F. App'x 105 (2d Cir. 2016); Ragbir v. Barr, No. 18-1595, 2019 U.S. App. LEXIS 37203 (2d Cir. July 30, 2019); Ragbir v. United States, No. 17-1256, 2019 U.S. Dist. LEXIS 13236, (D.N.J. Jan. 25, 2019), *aff'd*, 950 F.3d 54 (3d Cir. 2020) (denying writ of coram nobis).

[2] 8 U.S.C. § 1252(g) (2020).

Suspension Clause[3]—exempt from the general rule of unreviewability set forth above. Although courts have previously addressed related questions, none has done so squarely, and none has done so in light of the Supreme Court's decision in *Nieves v. Bartlett*.[4] In *Nieves*, the Court held that the existence of probable cause generally bars retaliatory arrest claims except in those circumstances where an officer's discretion would typically counsel against arresting a similarly situated individual.[5] Given that aliens in removal proceedings have no general "constitutional right to assert selective enforcement,"[6] however, *Nieves* may portend the doom of all retaliatory removal claims irrespective of the Suspension Clause.

But it shouldn't. The vast discretion afforded the executive in immigration enforcement authorizes it to knowingly tolerate the unlawful presence of aliens within the United States. When, after obtaining an order of final removal against an alien, the government grants the alien a stay of removal, the government should not be allowed use that order to chill that alien's First Amendment rights. Such a proposition is not new. The Constitution and statutes such as the Speedy Trial Act[7] ensure that prosecutors cannot use the specter of criminal prosecution to coerce criminal suspects. Immigration authorities shouldn't be able to do so either. Moreover, *Nieves* arose in the criminal context, whereas immigration proceedings are civil. Thus, arguments that *Nieves* somehow changed the game are wide of the mark.

This Comment proceeds in three principal parts. The first traces the histories of habeas corpus, immigration, and retaliation. The second explains Ragbir's dilemma. And the third brings the two together.

Ultimately, the Comment concludes that for a narrow class of aliens—those who entered the United States lawfully, remain in the United States pursuant to a stay of removal, and have exhausted all statutory avenues for review—the Suspension Clause bars the application of jurisdiction-stripping statutes to claims arising from the government's retaliatory decision to remove the alien from the country. Because these aliens are in detention within—and have substantial ties to—the United States, the writ of habeas corpus as understood at the Framing guarantees that the Suspension Clause applies to them. When an alien has exhausted her lone statutorily authorized motion to reopen her case with Immigration and Customs Enforcement, no adequate

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[3] U.S. CONST. art. I, § 9, cl. 2.

[4] 139 S. Ct. 1715 (2019).

[5] *Id.* at 1727.

[6] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

[7] Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, codified at 18 U.S.C. §§ 3161–3174.

judicial forum exists in which she can challenge subsequent constitutional violations. Any statutes, then, which operate to preclude judicial review of the government's allegedly retaliatory decisionmaking must be deemed inapplicable absent a Congressional suspension of the writ of habeas corpus.

II. APPLICABLE LAW

A. Habeas Corpus in America

Any effort to examine the power of the executive to detain might sensibly start with an examination of the laws authorizing such detentions. For reasons which will hopefully become apparent, this examination instead starts with the most ancient and storied remedy for such detentions, the writ of habeas corpus.

"Indisputably hold[ing] an honored position in our jurisprudence,"[8] the "Great Writ" of habeas corpus protects "liberty and republicanism" against "arbitrary imprisonments," "the favorite and most formidable instruments of tyranny."[9] So essential is the protection against arbitrary arrest or detention that it has become a feature of customary international law[10]—an unsurprising development given the writ's availability across both common and civil law systems.[11] The Framers regarded the availability of habeas as vital: early drafts of the Suspension Clause envisioned the writ as being "enjoyed in this Government in the most expeditious and ample manner."[12] "Suffering the denial of habeas corpus became a marker of liberty and independence, a point of honor by which Americans would sustain rebellion."[13] The decision in 1774 to suspend the writ within Quebec even prompted an overture from the Continental Congress for that province to join the fledgling union.[14] It is no wonder, then, that the Framers took care when drafting

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[8] Engle v. Isaac, 456 U.S. 107, 126 (1982).

[9] THE FEDERALIST No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961); WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 137–38 (9th ed. 1783) ("And by the *habeas corpus* act, 31 Cha. II. c. 2. (that second *magna carta*, and the stable bulwark of our liberties) it is enacted, that no subject of this realm . . . shall be sent prisoner into . . . places beyond the seas (where they cannot have the benefit and protection of the common law).").

[10] Int'l Covenant on Civil & Political Rights, art. 9, *adopted* Dec. 19, 1966, 999 U.N.T.S. 14668.

[11] *See, e.g.*, "amparo de libertad" and "Verfassungsbeschwerde." *Cf.* CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig M. Bradley ed., 2d ed. 2007) (surveying international criminal procedure); Wilhelm Karl Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 CORNELL L. REV. 250, 300–301 (1966).

[12] 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 249 (Jonathan Elliot ed., 1837); *see also* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 460–64 (Jonathan Elliot ed., 1837).

[13] PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 253 (2010).

[14] 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–89, 105–13 (1904); *see* Zechariah

the Constitution to limit the circumstances in which the writ could be suspended.

To do so the Framers drew from the experience of the Confederation. Before the Ratification, just four state constitutions contained provisions protecting the writ.[15] Confederation-era legislation in Pennsylvania,[16] New York,[17] and Virginia[18] protected the writ, while Georgia and Massachusetts adopted a belt-and-suspenders strategy.[19] These statutory enactments largely tracked the language of Britain's seminal Act of 1679,[20] with two states going so far as to copy the text verbatim—including now-superfluous language regarding "his majesty's justices."[21] South Carolina's 1712 enactment of the 1679 Act remained in force,[22] thus bringing the total number of states with positive protection for the writ to eight.[23] At the nascent federal level, the Northwest Ordinance enacted by the Confederation Congress in 1787 specifically provided that "inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus."[24]

At Philadelphia, however, little was said about what would become the Suspension Clause. Notables at the Convention questioned the need for an explicit protection of the writ in the new Union, fearing it would

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Chafee Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 145 (1952).

[15] Dallin H. Oaks, *Habeas Corpus in the States—1776–1865*, 32 U. CHI. L. REV. 243, 247 (1965). Georgia incorporated the Act of 1679 into its constitution; North Carolina conferred a personal right to habeas corpus (though it did not use those words); and Massachusetts and New Hampshire provided both an affirmative right to the writ and legislative power to suspend it for a period of time. *See* N.C. CONST art. XIII (1776); GA. CONST. art. LX (1777); MASS. CONST. ch. 6, art. VII (1780); N.H. CONST. pt. 2, art. 91 (1784).

[16] Act of Feb. 18, 1785, § 12, *reprinted in* DIGEST OF THE LAWS OF PENNSYLVANIA 573 (7th ed., Philadelphia, Davis 1847) (imposing a £200 fine on anyone who transfers a prisoner without legal authority).

[17] Act of Feb. 21, 1787, N.Y. Laws 1785–88, 424 (Official Reprint 1886).

[18] Act of 1779, 11 VA. STAT. 410 (Richmond, Cochran 1823) (prohibiting transfers of prisoners out of the state except "where the prisoner shall be charged by affidavit with treason or felony, alleged to be done in any of the other United States of America, in which . . . case he shall be sent thither in custody" by order of a Virginia court).

[19] *See, e.g.*, GA. CONST. art. LX (1777) ("The principles of the habeas-corpus act shall be a part of this constitution."); Act of Mar. 16, 1785, 1 MASS. GEN. LAWS ch. 72, § 10 (1823) (prohibiting "any person [from] transport[ing] . . . any subject of this Commonwealth . . . to any part or place without the limits of the same . . . except [if] such person be sent by due course of law, to answer for some criminal offense committed in some other of the United States of America").

[20] Regarded by Blackstone as the "second *magna carta*," the Act represented a decades-long struggle to codify the power of courts to question the basis for an individual's detention. 31 Cha. 2. c. 2 §8 (1679); *see supra* note 9; Halladay, *supra* note 13, at 80–81.

[21] *See* GA CONST. art. LX (1777); Act of Oct. 16, 1692, 2 S.C. STAT. 74 (Cooper 1837).

[22] Act of Dec. 12, 1712, 2 S.C. STAT. 399–401 (Columbia, Johnston 1837) (adopting the Habeas Corpus Act of 1679).

[23] Delaware, New Jersey, Connecticut, Rhode Island, and Maryland round out the Thirteen. Rhode Island had no written constitution before the Ratification. *See* Oaks, *supra* note 15, at 247.

[24] The Northwest Ordinance, art. II, codified at 1 Stat. 50 (1787).

provide a roadmap for abuse.[25] Initial proposals placed in Article III an outright prohibition on suspending the writ, presumably to empower federal judges in their own right.[26] When the rough outlines of what would become the Suspension Clause were approved, the Clause was moved to Article I to reflect its constraint on Congress's powers. The resulting text—that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"[27]—tracked that of Massachusetts' constitution and was approved seven to three. The three dissenters believed the writ should be inviolable.[28]

Of course, all thirteen states would ratify the Constitution. While the Constitution provided an implied right of habeas corpus, it would take legislative action to provide a path for accessing the writ. Congress did not delay. Section 14 of the Judiciary Act of 1789[29] provided that federal district judges and justices of the Supreme Court could issue writs of habeas corpus to those incarcerated by the federal government.[30] Although unsettled at Ratification,[31] the question of whether the Suspension Clause was intended to vest the federal courts with jurisdiction of their own was answered in *Ex parte Bollman*.[32] The First Congress had, in the First Judiciary Act, supplied federal courts with jurisdiction to preserve the privilege gestured towards in the Suspension Clause.[33] In *Bollman*, Chief Justice Marshall suggested that the failure to do so would have violated the Suspension Clause itself.[34]

Since that time, little has changed in the writ's purposes. Much has changed in the way of process and limitations, however. Modern federal

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[25] Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Julian P. Boyd ed., 1956); *see also*, Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451, 463–65 (1996) (describing Anti-Federalist opposition to the Suspension Clause).

[26] *See* Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L. J. 585, 595 (1976) (noting that Charles Pinckney's plan provided for the habeas right in what was then Article VI, the section on judicial power).

[27] U.S. CONST. art. I, § 9, cl. 2.

[28] Oaks, *supra* note 15, at 248*; see also* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955) (objecting that the Constitution lacked "the eternal and unremitting force of the habeas corpus laws").

[29] Ch. 20, 1 Stat. 73, 81–82 (1789).

[30] *Id.* § 14. The current habeas corpus statute authorizing review of federal detention, 28 U.S.C. § 2241 (2020), flows directly from this first authorization.

[31] Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 973–74 (1998); *accord* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 113–15 (Phillip H. Nicklin ed., Portage Pub., Inc. 2011) (1825); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1509–10 (1987).

[32] 8 U.S. (4 Cranch) 75, 94 (1807).

[33] *Id.* at 95.

[34] *Id.* ("[F]or if the means [of exercising review] be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.").

habeas corpus petitions are brought in federal district court.[35] But as recently as 2009, the Court has reaffirmed that habeas must remain available so as to protect against arbitrary detentions.[36] The Suspension Clause ensures that, absent an "adequate and effective" alternative to habeas, the writ itself will be available.[37] And nowhere is "the need for collateral review is mo[re] pressing" than "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court."[38]

Modern habeas corpus has, for all intents and purposes, always acted as a check on the authority of the executive to detain the individual.[39] "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers."[40] But while legislative, jurisprudential, and academic discussion of habeas corpus has largely centered on review of criminal convictions or punishments, habeas has never been so limited. Aliens have long used the Great Writ as a manner of seeking review of their detention or exclusion from the United States.

B. Immigration Proceedings & Their Limits

The power to exclude noncitizens is a hallmark of sovereignty.[41] But for the first eighty years of the Republic, Congress passed just one

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[35] 28 U.S.C. § 2241. Though statutes authorize the Supreme Court to grant habeas corpus as a matter of the Court's original jurisdiction, the Court has not done so since 1925. *See Ex parte* Grossman, 267 U.S. 87 (1925); *cf.* Felker v. Turpin, 518 U.S. 651 (1996) (denying petitioner's habeas claim on the merits).

[36] Boumediene v. Bush, 553 U.S. 723, 797 (2008).

[37] Swain v. Pressley, 430 U.S. 372, 381 (1977).

[38] *Boumediene*, 553 U.S. at 783.

[39] INS v. St. Cyr, 533 U.S. 289, 301–03 (2001), *superseded by statute*, 8 U.S.C. § 1252. ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). *See, e.g.*, *Swain*, 430 U.S. at 380 n.13 (1977); *Id.* at 386 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."); Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

[40] Harris v. Nelson, 394 U.S. 286, 291 (1969); *see also* Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("[H]abeas corpus cuts through all forms and goes to the very issue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.").

[41] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to . . . expel undesirable aliens . . . [is not] expressly affirmed by the Constitution, nevertheless exist[s] as inherently inseparable from the conception of nationality.") (citing Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893)); *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV.

bill related to the admission or removal of aliens from the United States: The Alien Friends Act[42] authorized the removal or exclusion of individuals "dangerous to the peace and safety of the United States."[43] Since then, immigration policy and the structures used to effectuate that policy have evolved to meet new economic and political realities. Modern immigration law is "akin to a corn maze,"[44] governed by a complex web of statutes, regulations, and discretion. Much has been written on these subjects; a primer is in order nonetheless.[45]

1. Historical proceedings

The Court in the *Passenger Cases*[46] confirmed that regulation of immigration was an exclusively federal subject.[47] Despite this confirmation of federal supremacy, Congress did not act in the realm of immigration until 1875.[48] In the 1880s, Congress began to exercise what would become known as its Plenary Power.[49] Starting in the *Chinese Exclusion Case*,[50] Congress's unenumerated power to regulate the exclusion and removal of immigrants was rooted in the sovereign right of the nation to defend itself.[51] While the Plenary Power has been the subject of much debate by scholars, its place in constitutional law is secure.

Removal of aliens ultimately came to be viewed as an administrative process rather than a true "legal" (in the common law sense)

255, 274 (1984).

[42] Ch. 58, 1 Stat. 557 (1798).

[43] *Id.* § 1. Congress had passed the Naturalization Act of 1790, ch. 3, 1 Stat. 103. That law, however, regulated naturalization rather than immigration—a distinction of significance.

[44] Ragbir v. Sessions, No 18-cv-236, 2018 U.S. Dist. LEXIS 13939, at *3 (S.D.N.Y. Jan. 29, 2018), *vacated as moot*, No. 18-1595, 2019 U.S. App. LEXIS 37203 (2d Cir. July 30, 2019).

[45] The realm of exclusion, or the denial of entry into the United States, is largely beyond the scope of this Comment. The Executive enjoys even broader discretion in the area of exclusion than it does in removal, and the First Amendment has never been applied extraterritorially. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2416–23 (2018); *see also* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (holding that plenary power authorized the Attorney General to exclude foreign nationals on the basis of their speech); Kerry v. Din, 576 U.S. 86, 103 (2015) (Kennedy, J., concurring in the judgment) (applying *Mandel*'s reasoning and holding). Claims regarding the exclusion of aliens on First Amendment grounds are thus unlikely to succeed.

[46] 48 U.S. 283 (1849).

[47] *Id.*

[48] *See* Act of Mar. 3, 1875, ch. 141, 5, 18 Stat. 477, 477–78; *accord* INS v. St. Cyr, 533 U.S. 289, 305 (2001).

[49] *See generally* Legomsky, *supra* note 41.

[50] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

[51] *See, e.g.*, Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010); *see also Curtiss-Wright*, 299 U.S. at 318. *But see also* Arizona v. United States, 567 U.S. 387, 416 (2012) ("The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.").

proceeding requiring a hearing before a court.[52] But a constant feature of whatever process was due to an alien was the availability of habeas to challenge her removal. One judge in the Northern District of California is reported to have heard over seven thousand habeas petitions challenging the removals of mostly Asian immigrants between 1882–1890.[53]

Frustrated with the delays such proceedings could entail, Congress elected to provide alternative forms of review. In the 1917 Immigration Act Congress strove to curb judicial review to the maximum extent possible.[54] Even so, courts continued to exercise review of exclusion and deportation orders for compliance with "fundamental principles of justice embraced within the conception of due process of law."[55] With the passage of the Immigration and Nationality Act of 1952 (INA)[56]—the backbone of modern immigration law—the government ushered in a system of administrative and judicial review based on factors such as an alien's residence within or without the nation, the grounds for removing the alien, and principles of finality. Following the enactment of the Administrative Procedure Act (APA),[57] immigrants facing removal could seek "substantial evidence" review pursuant to the Hobbs Act of the government's decision in a court of appeals.[58] But prior to the APA's enactment, habeas was the exclusive avenue for an alien to challenge removal or exclusion. In 1961, Congress amended the INA to modify various substantive aspects of immigration law such as country quotas, but nothing in these amendments was intended to foreclose habeas review.[59] For the next three decades, little would change in American immigration proceedings.

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[52] *See* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

[53] Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 348 (1988).

[54] S. Rep. No. 352, 64th Cong., 1st Sess., Vol. 2, 16 (remarking of § 17 of the Act that "[t]he last [finality] provision, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded at our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (The Japanese Immigrant Case, 189 U.S. 86 [(1903)]; Pearson v. Williams, 202 U.S. 281 [(1906)]; etc.).").

[55] Kwok Jan Fat v. White, 253 U.S. 454, 458 (1920) (quoting Tang Tun v. Edsell, 223 U.S. 673, 681–82 (1912)).

[56] Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[57] Pub.L. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[58] Shaughnessy v. Pedreiro, 349 U.S. 48, 50–51 (1955); Wong Yang Sung v. McGrath, 339 U.S. 33, 52–53 (1950) (holding that deportation proceedings must comply with the APA to be enforceable).

[59] "[T]here is always available to an alien in custody under a deportation order the right to apply for a writ of habeas corpus for the purpose of questioning the validity of the order." H. Rep. No. 1086, 87th Cong., 1st Sess., (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2974.

2. Modern immigration proceedings

Congress dramatically reformed immigration proceedings in 1996. The Antiterrorism and Effective Death Penalty Act (AEDPA)[60] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[61] ushered in the modern system for adjudicating deportability and removal. Today, aliens who arrive or remain in the United States without authorization are subject to removal from the country,[62] as are lawful permanent residents who become "deportable."[63] A lawful permanent resident can be rendered deportable by committing any crime that: may result in a sentence of more than one year in prison; involves the transportation or possession of any controlled substance except less than thirty grams of marijuana; is defined as an "aggravated felony"; is a domestic violence offense; or is the alien's second crime of "moral turpitude."[64] A deportable alien is, by contrast, only made removable if the Department of Homeland Security (DHS) chooses to seek that alien's removal and proves that the alien is in fact deportable.

To render an alien removable, the DHS serves an alien it believes to be subject to removal with a "notice to appear" for a hearing before an immigration judge employed by the Department of Justice.[65] At that proceeding, the alien may be detained pending removal, have their residency status modified, or may be released.[66] Ultimately, the immigration judge determines, based on applicable statutes and regulations, whether to issue an order of final removal against the alien. Only once such an order has been entered may DHS remove an alien.

Both the government and the alien may appeal adverse aspects of the immigration judge's ruling to the Board of Immigration Appeals (BIA), an appellate body within the Department of Justice.[67] Further review may be sought by filing a petition for review in a court of appeals, which has discretion to grant the petition and order reconsideration of certain aspects of the decision or alternative relief.[68] Although similar to the original petition for review process first established in the 1950s,

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[60] Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996).

[61] Div. C, Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009–546 (1996).

[62] 8 U.S.C. § 1227(a)(1) (2020).

[63] *Id.* § 1227(a)(2).

[64] *Id.*

[65] *Id.* § 1229(a) (initiation of removal proceedings); 8 C.F.R. § 1240.1(a) (2020) (describing authority of Immigration Judges); *see also* 8 C.F.R. § 1003.10(a) (2020) (authorizing appointment of immigration judges).

[66] 8 C.F.R. § 1240.1(a)(1)(i)–(iv).

[67] *Id.* §§ 1003.1–1003.3 (2020).

[68] 8 U.S.C. § 1252(b); *see also* 28 U.S.C. §§ 2341–2353 (2020) (specifying procedures for exercise of jurisdiction by courts of appeals over petitions for review).

the modern process consolidates judicial review of removal into a single Article III proceeding with only a narrow set of claims subject to review therein.[69] Questions of law and constitutional questions are reviewed de novo, while factual determinations by an immigration judge or the BIA are reviewed for substantial evidence.[70]

Because immigration hearings are not criminal in nature,[71] aliens have a right to counsel, but not appointed counsel, during these proceedings.[72] Likewise, other protections which accompany the criminal justice system are absent from the immigration context.[73] Although immigration proceedings are civil, recent cases have recognized the serious impact that removal can have on an alien and her family. Most notably, in *Padilla v. Kentucky*[74] the Court held that an attorney's failure to advise her client that his conviction for transporting marijuana would render him deportable could form the basis for an ineffective assistance of counsel claim.[75]

Resource constraints make removing all deportable aliens impossible. Congress has authorized the executive to selectively pursue both an order of removal and the order's ultimate effectuation.[76] An alien

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[69] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

[70] 8 U.S.C. § 1252(a)(2)(D) (specifying courts of appeal may review constitutional questions and questions of law in a petition for review proceeding); 8 U.S.C. § 1252(b)(4)(B) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

[71] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

[72] 8 U.S.C. § 1362 (2020); 8 C.F.R. § 1240.3 (2020) (implementing regulation). Nearly all agree that this right is constitutional in nature. *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *see also* Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause."); Dakane v. U.S. Attorney General, 399 F.3d 1269, 1273 (11th Cir. 2005) ("It is well established in this Circuit that an alien in civil deportation proceedings . . . has the constitutional right under the Fifth Amendment Due Process Clause . . . to a fundamentally fair hearing."); Borges v. Gonzales, 402 F.3d 398, 408 (3d Cir. 2005) ("[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings.") (citing *Reno*, 507 U.S. at 306); Rosales v. Bureau of Immigr. & Customs Enforcement, 426 F.3d 733, 736 (5th Cir. 2005) ("[D]ue process requires that [deportation hearings] be fundamentally fair . . . ."); Brown v. Ashcroft, 360 F.3d 346, 350 (2d Cir. 2004) ("The right . . . under the Fifth Amendment to due process of law in deportation proceedings is well established."). The Attorney General has agreed with this consensus. Matter of Compean, 25 I. & N. Dec. 1 (A.G. 2009).

[73] For example, the Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3, does not apply to immigration proceedings: Congress may pass laws that retroactively render aliens deportable for offenses that, at the time of conviction, could not have led to deportation. *See* Galvan v. Press, 347 U.S. 522, 531 (1954) ("And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation.").

[74] 559 U.S. 356 (2010).

[75] *Id.* at 374; *see* 8 U.S.C. § 1227(a)(2)(B)(i) (classifying aliens convicted "of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance" as deportable).

[76] *See* INA § 241 (codified at 8 U.S.C. § 1231(c)(2)(A)(i)) (authorizing the Attorney General to

against whom an order of final removal has been entered may request a stay of removal.[77] A 2017 article suggests that nearly one million individuals are present in the United States despite the fact that ICE has obtained a final order of removal against them.[78] Regardless of whether these aliens' removals have been formally stayed through the processes set forth in law, their continued presence is the result of ICE's discretion[79]: No statute provides for judicial review of the decision to grant, deny, or terminate a stay of removal.[80] Because a stay of removal is entered only after the issuance of an order of final removal, there is frequently nothing left for a court to review. The result is that current federal law operates—contrary to reality—as if the entry of an order of final removal is tantamount to execution of that order.[81]

3. Collateral review of immigration proceedings

The broad power of Congress to define the substantive bases for excluding or removing immigrants did nothing "which in any manner affect[ed] the jurisdiction of the courts of the United States to issue a writ of *habeas corpus*."[82] "We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief."[83] In 1892, the Court affirmed that "[a]n alien immigrant, prevented from landing . . . is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."[84]

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stay the removal of an alien if removal "is not practicable or proper"); *see also* Clark v. Suarez Martinez, 543 U.S. 371, 374 n.1 (2005) (stating that, pursuant to 6 U.S.C. §§ 251(2), 252(a)(3), 271(b), the Secretary of Homeland Security now has the authority to stay removals originally delegated by Congress in § 241 of the INA to the Attorney General).

[77] 8 C.F.R. § 241.6 (2020) ("Any request of an alien under a final order of deportation or removal for a stay of deportation or removal shall be filed . . . with the district director [of ICE] having jurisdiction over the place where alien is at the time of filing."); *see also Id.* § 212.5 (2020) (listing factors ICE should consider in whether to grant a stay); *accord* 8 U.S.C. § 1231(c)(2)(A).

[78] Vivian Yee, *Migrants Confront Judgment Day over Old Deportation Orders*, N.Y. TIMES (Mar. 4, 2017), https://www.nytimes.com/2017/03/04/us/migrants-facing-old-deportation-orders.html [https://perma.cc/65XW-REXF].

[79] *Id.*

[80] 8 U.S.C. § 1252(g); *see also infra* Part III.

[81] 8 U.S.C. § 1231(a)(1)(A) ("Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period').").

[82] United States v. Jung Ah Lung, 124 U.S. 621, 628–29 (1888).

[83] Boumediene v. Bush, 553 U.S. 723, 747 (2008); *see, e.g.*, Sommersett v. Stewart (Sommersett's Case), 20 How. St. Tr. 1, 80–82 (1772) (ordering an African slave freed upon finding the custodian's return insufficient). *See generally* Khera v. Sec'y of State for the Home Dept., [1984] A.C. 74, 111 (H.L.) ("Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question.").

[84] Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892); *see also* United States v. Jung Ah Lung, 124 U.S. 621 (1888) (affirming district court's use of habeas corpus to review an immigrant's long-term detention aboard a ship of voyage in San Francisco harbor).

This remained the case for over a century. In two landmark cases involving the power of the federal judiciary to review the exclusion of aliens from the United States, the Court declined to provide the aliens with relief. In *United States ex rel. Knauff v. Shaughnessy*,[85] the Court declined to require the Attorney General to admit Knauff, a war bride.[86] Knauff filed a habeas petition challenging her exclusion on the grounds that "her admission would be prejudicial to the interests of the United States."[87] The Attorney General declined to provide any basis for that conclusion, and the Court said he was not required to do so.[88] Three years later in *Shaughnessy v. United States ex rel. Mezei*,[89] the Court held that a noncitizen indefinitely detained because no other country would accept him could not compel his admission to the United States.[90] Despite Mezei's functional imprisonment on Ellis Island, the Court held that the refusal of other countries did not affect the unfettered discretion afforded to the Attorney General to make determinations regarding the admissibility of noncitizens.[91]

But in both cases the Court reached the merits. Nowhere in either opinion did the Court consider that the Plenary Power precluded judicial consideration of the immigrants' habeas petitions. The *substantive discretion* enjoyed by the executive did not minimize the *procedural protections* afforded by habeas corpus. Whether the immigrants could win relief on the merits was discrete from the method of challenging their predicaments. And even where Congress curtailed the extent of judicial review over immigration decisions, habeas remained available. In *Heikkila v. Barber*,[92] the Court concluded that, stripped of all jurisdiction other than that "required by the Constitution," habeas remained because some possibility of "judicial intervention in deportation cases" is necessary.[93] In fact, until 1952 "the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court."[94]

Seeking to streamline the process for removing aliens, Congress enacted the Immigration and Nationality Act.[95] But the 1961

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[85] 338 U.S. 537 (1950).

[86] *Id.* This uncomfortable phraseology comes from statute. *See* War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659.

[87] *Knauff*, 338 U.S. at 539.

[88] *Id.* at 544–45.

[89] 345 U.S. 206 (1953).

[90] *Id.* at 213.

[91] *Id.* at 213–15.

[92] 345 U.S. 229 (1953).

[93] *Id.* at 235.

[94] INS v. St. Cyr, 533 U.S. 289, 306 (2001).

[95] Pub. L. No. 82-414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections

amendments to the Immigration and Nationality Act ensured that the right of aliens to access habeas corpus was provided for by statute.[96] This status quo remained for the better part of four decades.

First enacted by IIRIRA, 8 U.S.C. § 1252(g) originally provided that:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.[97]

That text was ambiguous as to whether it precluded jurisdiction over constitutional as well as statutory claims. Courts of appeals were nearly unanimous that the efforts in AEDPA and IIRIRA to strip courts of jurisdiction did not extend to habeas corpus.[98] And in 2001 the Supreme Court agreed: nothing in IIRIRA or AEDPA did anything to limit the jurisdiction of district courts over aliens' petitions for habeas corpus if existing avenues, such as a petition for review, were foreclosed.[99]

Congress responded. Section 106 of the REAL ID Act of 2005[100] aimed to eliminate habeas review of the government's "'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'"[101] The modern, post-REAL ID Act text of § 1252(g) reads:

> Except as provided in this section and notwithstanding any other provision of law *(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title*, no court

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of 8 U.S.C.).

[96] 75 Stat. 651, 652 (1961), codified at 8 U.S.C. § 1105a(10) (repealed 1996).

[97] Pub. L. 104-208, 110 Stat. 3009, 3612.

[98] *See* Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998); Henderson v. INS, 157 F.3d 106 (2d Cir. 1998); Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999); Bowrin v. INS, 194 F.3d 483 (4th Cir. 1999); Requena-Rodriguez v. Pasquarell, 190 F.3d 299 (5th Cir. 1999); Pak v. Reno, 196 F.3d 666 (6th Cir. 1999); Shah v. Reno, 184 F.3d 719 (8th Cir. 1999); Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999); Jurado-Gutierrez v. Greene, 190 F.3d 1135 (10th Cir. 1999) (as amended upon denial of rehearing en banc); Mayers v. INS, 175 F.3d 1289 (11th Cir. 1999). The lone dissenting circuit was the Seventh. LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998).

[99] INS v. St. Cyr, 533 U.S. 289, 314 (2001). Although *St. Cyr* did not address § 1252(g) directly, it did address other subsections of § 1252 with identical language.

[100] Pub. L. No. 109–13, 119 Stat. 302 (2005).

[101] Real ID Act § 106 adds a new subsection, (a)(5) to 8 U.S.C. § 1252: "Notwithstanding any other provision of law (statutory or non-statutory), including [habeas, mandamus, and All Writs Act] . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter."

> shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.[102] (2005 additions italicized).

The legislative history of § 106 makes clear that Congress's intent was to provide the clear statement the Court said was lacking from the earlier language in *St. Cyr*.[103] Courts construing § 106 recognized that the continued ability of an immigrant to seek review of certain aspects of an immigration judge's decision—questions of law and constitutional claims[104]—in the Courts of Appeals ensured that an adequate substitute to habeas corpus remained.[105]

To take stock: habeas corpus in the United States has traditionally been understood to protect against unlawful executive detentions,[106] regardless of citizenship.[107] Aliens frequently—and, for nearly a century, exclusively—used habeas corpus to challenge their removal from the United States.[108] Frustrations with the delays such review brought led Congress to consolidate review in administrative agencies and, in meritorious cases, the courts of appeals. Simultaneously, Congress dramatically expanded the number of otherwise lawfully present aliens subject

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[102] The meaning of "nonstatutory" is unclear. The Second Circuit concludes that "nonstatutory" means "constitutional." Ragbir v. Homan, 923 F.3d 53, 66 (2d Cir. 2019). ("[W]e are aware of no 'nonstatutory' claim that a petitioner could bring in relation to a deportation proceeding other than one rooted in the Constitution."). The Ninth Circuit disagrees: in *Arce v. United States*, that court concluded that § 1252(g) did not preclude jurisdiction over a habeas claim brought by an alien who had been removed in violation of a judicial order staying his removal, suggesting that the inherent power of a court exceeds statutory and nonstatutory grants. 899 F.3d 796, 799–801 (9th Cir. 2018).

[103] 151 CONG. REC. 8393 (2005); *see also Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomms. on Immigr., Border Sec. & Citizenship and Terrorism, Tech. & Homeland Sec. of the S. Comm. Of the Judiciary*, 109th Cong. 1 (2005); Paul Diller, *Habeas and (Non-) Delegation*, 77 U. CHI. L. REV. 585, 615 (2010) (confirming that the REAL ID Act had been passed in direct response to *St. Cyr*.); H.R. REP. NO. 109-72, at 175 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 300 (Conference Report on the REAL ID Act seeking to avoid the constitutional concerns presented in *St. Cyr* regarding the complete suspension of habeas corpus for immigrants).

[104] 8 U.S.C. § 1252(a)(2)(D).

[105] *See, e.g.*, Ruiz-Martinez v. Mukasey, 516 F.3d 102, 114 (2d Cir. 2008); Mohamed v. Gonzales, 477 F.3d 522, 526 (8th Cir. 2007); Puri v. Gonzales, 464 F.3d 1038, 1041 (9th Cir. 2006); Alexandre v. Attorney General, 452 F.3d 1204, 1206 (11th Cir. 2006).

[106] Swain v. Pressley, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring).

[107] Cases arising from the United States' detention of suspected terrorists at Guantanamo Bay Naval Base reaffirmed the traditional understanding that, because a writ of habeas corpus was directed against the jailer on the detainee's behalf, an issuing court's jurisdiction over the jailer—not the detainee—is the paramount question in determining the jurisdictional power of a court to issue the writ. *See generally* Rasul v. Bush, 542 U.S. 466 (2006), *superseded by statute*, Pub. L. No. 109-148, div. A, title X, 119 Stat. 2680, 2739-44 (2005); Boumediene v. Bush, 553 U.S. 723 (2008).

[108] INS v. St. Cyr, 533 U.S. 289, 300 (2001) ("[S]ome judicial intervention in deportation cases is unquestionably required by the Constitution.") (internal quotation marks and citation omitted).

to removal on the basis of criminal convictions. But, facing resource limitations, the executive must decide against whom it should seek a removal order. Those constraints become even more acute when it comes to effectuating such orders. Thus, those ultimately removed[109] from the United States are done so only after ICE takes two affirmative steps: 1) the initiation of proceedings; and 2) the effectuation of removal. But the decision gap between the branches taking those steps creates unfettered, unreviewable discretion.

C. Retaliation

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[110] Thus, "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech.[111] This protection is not limited to the realm of criminal prosecutions but extends to all manner of governmental benefits or punishments.[112]

1. Modern doctrine

The earliest causes of action for unlawful arrest stemmed from the common law tort equivalent of false imprisonment.[113] "At common law, false imprisonment arose from a 'detention without legal process,' whereas malicious prosecution was marked 'by *wrongful institution* of legal process.'"[114] The presence of probable cause was generally a complete defense for peace officers to a claim of false imprisonment.[115] Two

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[109] This analysis excludes the vast number of individuals removed pursuant to "expedited removal." Expedited removal is available against certain categories of recently-arrived aliens who are incapable of demonstrating long-term presence within the United States—generally those apprehended near the border.

[110] United States v. Alvarez, 567 U.S. 709, 716 (2012) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)).

[111] Hartman v. Moore, 547 U.S. 250, 256 (2006) (citing Crawford-El v. Britton, 523 U.S. 574, 592 (1998)).

[112] Perry v. Spinderman, 408 U.S. 593, 597 (1972) ("[The 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. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.").

[113] Wheeler v. Nesbitt, 65 U.S. 544, 549–50 (1861) (noting that "[w]ant of reasonable and probable cause" is an "element in the action for a malicious criminal prosecution"); *see also* RESTATEMENT OF TORTS § 653 (AM. LAW INST. 1938).

[114] Nieves v. Bartlett, 139 S. Ct. 1715, 1726 (2019) (quoting Wallace v. Kato, 549 U.S. 384, 389–90 (2007)).

[115] *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR, THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 175 (Chicago, Callaghan 1880); 1 F. Hilliard, THE LAW OF TORTS OR PRIVATE WRONGS 207–08 (Boston, Little, Brown & Co. 1859).

cases undergird modern First Amendment retaliation doctrine and define in what circumstances that general presumption might be overcome: *Mt. Healthy City School District Board of Education v. Doyle*[116] and *Hartman v. Moore*.[117]

Fred Doyle sued the Mt. Healthy, Ohio school board after his teaching contract was not renewed, he alleged, because of his comments on school policy to a local radio program.[118] The board countered, arguing that Doyle would have been let go due to unrelated workplace problems regardless of his radio appearance.[119] The Supreme Court concluded that even though Doyle had shown that his statements were one of the factors which led to his termination, he had not shown that they were the but-for cause of his termination.[120] But, because of his initial showing that his conduct was protected First Amendment activity and that the board considered that conduct during their decision making, the Court remanded so that the district court could allow the Board to show by a preponderance of the evidence that Doyle's employment would have been discontinued irrespective of his protected conduct.[121]

In *Hartman*, William Moore was indicted for various violations of federal lobbying laws stemming from his advocacy against the implementation of ZIP+4 by the postal service.[122] After his acquittal—in which the district court remarked that there was a "complete lack of direct evidence" against the defendants[123]—Moore filed suit against five postal inspectors and the charging Assistant United States Attorney alleging they had instigated and undertaken the prosecution in response to Moore's criticisms of the Postal Service.[124]

Hartman posed a problem not present in *Mt. Healthy*'s civil context: the arresting officer and the prosecutor are almost never the same person. Thus, the retaliatory animus of the officer may be irrelevant to the prosecutor's decision to charge a suspect. And because prosecutors enjoy absolute immunity,[125] the crux of a retaliatory prosecution claim is that

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[116] 429 U.S. 274 (1977).

[117] 547 U.S. 250 (2006).

[118] Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 281–83 (1977).

[119] Brief for Respondent at *6, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278).

[120] *Mt. Healthy*, 429 U.S. at 287.

[121] *Id.*

[122] Hartman v. Moore, 547 U.S. 250, 252 (2006). Although irrelevant, the nature of the dispute is fascinating: Moore's company produced multiline optical scanners which would have been rendered obsolete to his largest customer, the Postal Service, had ZIP+4 become the norm; it obviously has not. Ironically, Moore's company did not receive a renewed contract for multiline readers.

[123] United States v. Recognition Equip. Inc., 725 F. Supp. 587, 596 (D.D.C. 1989).

[124] *Hartman*, 547 U.S. at 254.

[125] Imbler v. Pachtman, 424 U.S. 409 (1976). Absolute prosecutorial immunity is a longstanding feature of common law. *See* Bradley v. Fisher, 80 U.S. 335 (1872) (first recognizing absolute prosecutorial immunity); *accord* Floyd v. Barker, 12 Coke 23, 77 Eng. Rep. 1305 (1608) (early

the arrestor exerted improper influence over the prosecutor—that there is a nexus between the two. In *Hartman* the court held that "[a] plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge."[126] "If the plaintiff proves the absence of probable cause, then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the prosecution, and, if that showing is made, the defendant can prevail only by showing that the prosecution would have been initiated without respect to retaliation."[127] By requiring plaintiffs alleging retaliatory prosecution to plead and prove that probable cause—the nexus—did not exist, the Court protected the prosecutor's prerogative while preserving an avenue for relief.[128]

Having addressed the civil and prosecutorial contexts, it was inevitable that the Court would be asked to address what standard applied when individuals alleged retaliatory arrest. The first two cases to present this question were met with artful dodges.

At a shopping mall in Beaver Creek, Colorado, Vice President Dick Cheney was confronted by Steven Howards who was, simply put, not a fan.[129] Secret Service agents assigned to the Vice President's detail overheard Howards remark that he planned to ask the Vice President "how many kids he'[d] killed" that day.[130] While confronting the Vice President, Howards allegedly placed his hand on the Vice President's shoulder.[131] After a brief investigation, Agent Gus Reichle arrested Howards[132]—the state harassment and assault charges against him were ultimately dismissed.[133] Nevertheless, Howards sued Reichle and his colleagues, alleging their decision to arrest him was in retaliation for his statements about the Vice President.[134]

Although presented with an opportunity to establish a standard for determining what a plaintiff must prove to show a retaliatory arrest, the Court dodged in *Reichle v. Howards*.[135] The Tenth Circuit below had held that the agents were not entitled to qualified immunity for their

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recognition of the immunity); Yates v. Lansing, 5 Johns. 282, 291–96 (N.Y. 1810) (tracing history of the immunity).

[126] Lozeman v. City of Riviera Beach, 138 S. Ct. 1945, 1947 (2018) (citing *Hartman*, 547 U.S. at 265–66).

[127] *Id.*

[128] After nearly a decade of further proceedings, Moore finally lost his case against the inspectors at trial. Moore v. Hartman, 102 F. Supp. 3d 35 (D.D.C. 2015).

[129] Reichle v. Howards, 566 U.S. 658, 660 (2012).

[130] *Id.*

[131] *Id.* at 661.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 662.

[135] 566 U.S. 658 (2012).

conduct as it related to Howards' First Amendment claim.[136] In a unanimous opinion, the Court, perhaps tautologically, concluded that because it was not established that a retaliatory arrest unsupported by probable cause amounted to a constitutional violation—the dodged question—the agents were entitled to qualified immunity.[137] And since answering that question was enough to reverse, the Court chose that path of least resistance.[138]

Five months after Steven Howards was arrested, Fane Lozman was, too.[139] But it would take until 2018 for the Court to be presented with Lozman's case and, with it, a second opportunity to resolve the unanswered question from *Reichle*.

A longtime critic of his local government, Lozman was arrested at a city council meeting when he refused to vacate the podium.[140] This arrest was only the latest in a series of actions taken by the city against Lozman: He was fined for failing to muzzle his dachshund (who had no history of misbehavior) and was sued by the city in admiralty in a dispute arising from his houseboat.[141] In a now-familiar pattern, Lozman sued.

Recognizing the long history of animosity between Lozman and his local government, the Court concluded that Lozman's arrest was no ordinary arrest.[142] Unlike in *Reichle* where the arrest comprised the totality of the interaction between the citizen and the government, Lozman's saga with the City spanned years.[143] Moreover, transcripts from prior city council meetings showed that council members sought to use City resources to "intimidate" Lozman.[144] Unlike in *Reichle*, then, Lozman's beef was not with the officer who arrested him, but with the council who ordered him arrested pursuant to their policy of retaliation.[145] "On facts like these, *Mt. Healthy* provides the correct standard for

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[136] Howards v. McLaughlin, 634 F.3d 1131, 1149 (10th Cir. 2011).

[137] *Reichle*, 566 U.S. at 669–71.

[138] *Id.* at 663 ("If the answer to either question is 'no,' then the agents are entitled to qualified immunity. We elect to address only the second question.").

[139] *Compare McLaughlin*, 634 F.3d at 1135 (noting date of Howards' arrest as June 16, 2006), *with* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1950 (2018) (citing Def.'s Ex. 505, Doc. 687) (noting date of Lozman's arrest as November 2006).

[140] *Lozman*, 138 S. Ct. at 1949–50.

[141] City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel, Approximately Fifty-Seven Feet In Length, 649 F.3d 1259, 1263 (11th Cir. 2011) (noting that the dachshund in question—Lady—was, by all accounts, a very good girl). That libel gave rise to Lozman's first victory in the Supreme Court. *See* Lozman v. City of Riviera Beach, 568 U.S. 115 (2013).

[142] Lozman v. City of Riviera Beach, 138 S. Ct. 1949 (2018).

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1954 ("Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an official municipal policy of intimidation") (internal quotation marks and citation omitted).

assessing a retaliatory arrest claim."[146] The Court remanded the case to apply *Mt. Healthy* and afford the City the opportunity to prove that Lozman's conduct was not the but-for cause of his arrest, thus leaving the question presented—whether a claim of retaliatory arrest is defeated as a matter of law by the presence of probable cause for the arrest—unanswered yet again.[147]

2. The *Nieves* standard

Russell Bartlett's enjoyment of Arctic Man—the subarctic bacchanal which descends upon Paxson, Alaska, each spring—was cut short when he was arrested by Trooper Luis Nieves on April 13, 2014.[148] The two men had previously encountered one another earlier that day when a well-lubricated Bartlett began shouting at neighboring partiers to not talk to Nieves, who was asking them to place their keg inside their RV. Nieves and Bartlett exchanged words, then parted.[149] Their separation was not long for this world.

Later that evening, a second trooper was questioning two individuals when Bartlett reappeared, carrying with him his message of noncompliance.[150] After observing the second trooper push Bartlett away, Nieves rushed over and arrested Bartlett.[151] During the course of the arrest, Nieves purportedly said to Bartlett, "bet you wish you had talked to me now."[152] And while the charges against him were ultimately dropped, Bartlett sued, alleging the arrest was retaliatory.[153] After his grant of summary judgment was reversed by the Ninth Circuit, Trooper Nieves sought certiorari from the Supreme Court.[154]

In a 2019 opinion for himself and four others, Chief Justice Roberts concluded that the existence of probable cause to arrest Bartlett defeated his claim as a matter of law. Drawing on *Mt. Healthy* and *Hartman*, the Court held that probable cause will defeat most claims but that "objective evidence that [the plaintiff] was arrested when otherwise similarly situated individuals not engaged in the same sort of

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[146] *Id.* at 1955.

[147] *Id.* at 1954 ("Whether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case.").

[148] Bartlett v. Nieves, No. 4:15-cv-00004-SLG, 2016 U.S. Dist. LEXIS 87805 at *1–2 (D. Alaska July 17, 2016).

[149] Nieves v. Bartlett, 139 S. Ct. 1715, 1720 (2019).

[150] *Id.*

[151] *Id.* at 1720–21.

[152] *Id.* at 1721 (citing Bartlett v. Nieves, 712 F. App'x 613, 616 (9th Cir. 2017)) (cleaned up).

[153] *Id.*

[154] *Id.*

protected speech had not been" may allow such claims to go forward.[155] Thus, a jaywalker who is arrested may be able to sustain his burden, but the protestor in a crowd will not, particularly because "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest."'[156] But for that rare case where an individual can provide objective evidence that he was arrested while individuals similarly situated but for their silence were not, the *Mt. Healthy* standard governs.[157]

3. In immigration

Neither the First nor Fifth Amendment "acknowledge[] any distinction between citizens and resident aliens."[158] Nor does either recognize the distinction between those lawfully and unlawfully present.[159] But the ability of aliens to enforce those rights is not identical to that of their citizen peers.

The Court first addressed a claim of retaliatory removal in 1904.[160] After delivering a speech in New York City calling for general labor strikes, John Turner was arrested and detained on Ellis Island pending deportation for being an anarchist. The Court held that no First Amendment violation had taken place because Turner would be free to speak somewhere else following his deportation.[161] During the Cold War the

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[155] *Id.* at 1727.

[156] *Id.* at 1724 (internal quotation marks and citation omitted). That protected speech may be a legitimate consideration in a context such as a riot does not render it legitimate in the immigration context. A rabblerousing demonstrator who fails to disperse may be deemed more likely to escalate a situation because of her protected speech. But an immigration activist who is subjected to removal proceedings explicitly because of her anti-ICE rhetoric poses no such risk of escalation in a heated situation. And, unlike local law enforcement, ICE's Enforcement and Removal Operations officers are not tasked with maintaining public order at a demonstration.

[157] *Id.* at 1725 (citing Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1952 (2018)).

[158] Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (Murphy, J., concurring)). *But see also* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237 (2016).

[159] Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001). The Department of Justice in 2015 filed a brief in a class action against the Department of Homeland Security which argued that aliens unlawfully present in the United States are not protected by the First Amendment. *See* Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 11–13, Pineda-Cruz v. Thompson, No. 15-cv-00326, 2015 WL 3922298 (W.D. Tex. May 7, 2015). The outcome of that case did not turn on whether aliens unlawfully present were, in fact, protected by the First Amendment. *See* Dkt. 54, Notice of Voluntary Dismissal, *Pineda-Cruz*, 15-cv-00326 (W.D. Tex. Sept. 9, 2015). The government cites as authority for that proposition a published district court opinion, but that case addressed whether a nonresident noncitizen could claim the protections of the First Amendment in a defamation action against him. *See* Hoffman v. Bailey, 996 F. Supp. 2d 477 (E.D. La. 2014).

[160] United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904) (argued by Clarence Darrow and future Justice James Clark McReynolds).

[161] *Id.* at 292.

Court sanctified the deportation of Communists[162] and former Communists.[163] And in *Kleindienst v. Mandel*[164] the Court permitted exclusion of a Belgian socialist despite recognizing that it would prevent resident citizens from hearing his message.[165]

But the seminal case in the area of selective removal is *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*).[166] Eight members of the Popular Front for the Liberation of Palestine—then a terrorist organization in the eyes of the federal government[167]—faced deportation because, according to the FBI Director, of their First Amendment activity.[168] Rejecting their challenge, the Supreme Court in 1999 held that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."[169] Selective prosecution claims in the criminal context "invade a special province of the Executive—its prosecutorial discretion."[170] Those alleging selective prosecution must introduce clear evidence to displace "the presumption that a prosecutor has acted lawfully."[171] Moreover, "[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."[172]

Unlike in the context of criminal law enforcement where constitutional challenges merely "postpone the criminal's receipt of his just deserts [sic]," selective-enforcement challenges in the deportation context "permit and prolong a continuing violation of United States law."[173] The mere unlawful presence of the alien in the United States for the duration of the challenge, in other words, is a sufficient justification for the government to remove the alien.

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[162] Harisiades v. Shaughnessy, 342 U.S. 580, 594–96 (1952).

[163] Galvan v. Press, 347 U.S. 522, 531–32 (1954).

[164] 408 U.S. 753 (1972).

[165] *Id.* at 760–70.

[166] 525 U.S. 471 (1999) [hereinafter *AADC*].

[167] *Id.* at 473.

[168] *Hearings before the Senate Select Comm. on Intel. on the Nomination of William H. Webster, to be Dir. of Cent. Intel.*, 100th Cong. 95 (1987) ("[A]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation . . . . [I]n this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest.").

[169] *AADC*, 525 U.S. at 488.

[170] *Id.* at 489.

[171] *Id.* (citing United States v. Armstrong, 517 U.S. 456, 463–64 (1996)).

[172] *Id.* at 490 (quoting Wayte v. United States, 470 U.S. 598, 607–08 (1985)).

[173] *Id.*

Moreover, as was particularly the case in *AADC* (and *Knauff* and *Mezei*, too), inquiry into the motives of immigration officials may result in "the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques."[174] And although "the consequences of deportation may assuredly be grave, they are not imposed as a punishment," "the contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing."[175] The Court did not, however, foreclose lower courts from hearing habeas corpus petitions in the "rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome," but it offered no guidance as to what "outrageous" might be.[176]

III. RETALIATORY DISCRETION: THE CASE OF RAVIDATH RAGBIR

One scholar has catalogued at least a dozen instances in which a high-profile immigration activist has been subject to removal proceedings,[177] and there is reason to believe that count is underinclusive.[178] One case in particular has teed up the question of whether an Article III court can consider claims of retaliatory deportation through habeas corpus.

Admitted to the United States as a lawful permanent resident in 1994, Ravidath Ragbir was convicted of federal wire fraud in 2001.[179] Like many aliens convicted of federal crimes, his conviction rendered him eligible for deportation[180] from the United States because both of his crime of conviction is an "aggravated felonies" under the Immigration and Nationality Act.[181] After his conviction was affirmed,[182] his

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[174] *Id*. at 491.

[175] *Id.*

[176] *Id.*

[177] Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1443–45 (2018).

[178] That survey measured until March 2018. *See id.* at 1445 n.95.

[179] Ragbir v. Homan, 923 F.3d 53, 58 (2d Cir. 2019), *vac'd sub nom*. Pham v. Ragbir, No. 19-1046, 2020 WL 5882107 (U.S. Oct. 5, 2020). All facts here are portrayed in the light most favorable to Ragbir partially for demonstrative purposes, but also because that is the light in which reviewing courts have viewed them. *Cf.* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[180] 8 U.S.C. § 1227(a)(2)(A)(iii) (authorizing removal of those aliens convicted of aggravated felonies, defined at 8 U.S.C. § 1101(a)(43)(M) to include frauds involving a loss of greater than $10,000); *see also* 8 C.F.R. § 1001.1(p) (cancelling lawful permanent resident status for those against whom a final order of removal has been entered).

[181] 8 U.S.C. § 1101(a)(43)(M)(i) (defining "aggravated felonies"). It is worth noting that the list of "aggravated felonies" has grown substantially over time. This growth is particularly concerning because it renders more aliens potentially deportable, but as described *supra* Part III.B.2, the government enjoys discretion as to against whom it will pursue immigration proceedings.

[182] United States v. Ragbir, 38 F. App'x 788, 794 (3d Cir. 2002).

petition for certiorari denied,[183] and his 30-month sentence completed, the government sought and obtained an order of final removal against Ragbir.[184] Challenges to that order were fruitless.[185]

Like many undocumented aliens, Ragbir was not removed. For nearly a decade Ragbir benefited from this discretion: On four occasions between 2011 and 2018, ICE granted Ragbir administrative stays of removal. During the period of these stays, Ragbir was required to check in with immigration officials and refrain from illegal conduct.[186] While enjoying ICE's grace, Ragbir became an outspoken critic of American immigration policy.[187] This criticism drew significant media coverage.[188]

In January 2018 Ragbir's lawyers began meeting with the Deputy Director of ICE's New York office—Scott Mechkowski—to discuss renewing Ragbir's stay of removal. During one meeting, Mechkowski told Ragbir's counsel that he had met with Jean Montrevil—with whom Ragbir had co-founded an immigration-rights group—and told him, "Jean, from me to you . . . you don't want to make matters worse by saying things."[189] Montrevil was deported by ICE a short time later.[190] During that same conversation with Ragbir's counsel, Mechkowski remarked that "there isn't anybody in this entire building that doesn't . . . know about [Ragbir]."[191] At a follow-up meeting four days later, Mechkowski stated that he felt "resentment" about a protest Ragbir had led against ICE in 2017.[192] Three days later, Mechkowski informed Ragbir at a face-to-face meeting that his application for a renewal of his stay was denied and that his stay was being terminated prematurely.[193] Ragbir was arrested and flown to Florida for deportation that afternoon.[194] Meanwhile Ragbir's counsel filed a habeas petition in the Southern District of New York which was ultimately granted

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[183] Ragbir v. United States, 537 U.S. 1089 (2002).

[184] *Ragbir*, 923 F.3d at 58.

[185] Ragbir v. Holder, 389 F. App'x 80, 85 (2d Cir. 2010); Ragbir v. Lynch, 640 F. App'x 105, 108 (2d Cir. 2016); Ragbir v. Barr, No. 18-1595, 2019 U.S. App. LEXIS 37203, at *3 (2d Cir. July 30, 2019); Ragbir v. United States, No. 17-1256, 2019 U.S. Dist. LEXIS 13236, at *85–86 (D.N.J. Jan. 25, 2019), *appeal pending*, No. 19-1282 (3d Cir. 2019) (stay of judgment pending appeal denied Feb. 27, 2019).

[186] Pursuant to 8 C.F.R. § 212.5(d), immigration officials "may require reasonable assurances" that an alien whose removal has been stayed will make any required appearances and will "depart the United States when required to do so."

[187] *Ragbir*, 923 F.3d at 59.

[188] *See id.* at 59 n.8; *see also*, Cade, *supra* note 177, at 1444 n.91.

[189] *Ragbir*, 923 F.3d at 60 (citation omitted).

[190] *Id.*

[191] *Id.* (citation omitted).

[192] *Id.* (citation omitted).

[193] *Id.*

[194] *Id.*

on the basis that Ragbir's immediate detention and removal violated his due process rights to an orderly departure.[195] Ragbir then filed a lawsuit seeking declaratory and injunctive relief against a litany of ICE officials, alleging that the decision to remove him was in retaliation for his First Amendment conduct.[196]

The district court concluded that it lacked jurisdiction over Ragbir's claims as a result of § 1252(g).[197] Because the response to Ragbir's conduct did not fall within the "outrageous" discrimination exception to the general rule set forth in *AADC*, *he was not entitled to challenge his removal*.[198] It thus avoided the Suspension Clause question and dismissed the case.

Not so, said the Second Circuit.[199] The Second Circuit concluded that (a) § 1252(g) precludes judicial review of the decision to terminate or deny a stay and (b) that constitutional claims are "nonstatutory" under that subsection.[200] The court thus proceeded to determine whether *AADC* foreclosed Ragbir's claim of retaliatory removal.[201] It did not: Because Ragbir was previously a lawful resident, his removal was "indeed a punishment"[202] seemingly meted out in response to "speech on a matter of 'public concern.'"[203] Not only was Ragbir's speech on a matter of public concern, thus "occup[ying] the highest rung of the hierarchy of First Amendment values,"[204] but it was speech concerning "political change" lying at the "core" of political speech.[205] Repression of such activity "'trenches upon an area in which the importance of First Amendment protections *is at its zenith*.'"[206]

The court then weighed these interests against the government's "interest in having unchallenged discretion to deport Ragbir."[207] It wasn't close. Unlike in *AADC*, where the aliens were members of a terrorist group, Ragbir alleged "the Government undertook the deportation to silence criticism of the responsible agency."[208] Moreover, Ragbir's

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[195] Ragbir v. Sessions, 18-cv-236, 2018 U.S. Dist. LEXIS 13939, at *7 (S.D.N.Y. Jan. 29, 2018).

[196] *Ragbir*, 923 F.3d at 60–61.

[197] Ragbir v. Homan, No. 18-cv-1159, 2018 U.S. Dist. LEXIS 86753, at *9–18 (S.D.N.Y May 23, 2018).

[198] *Id.* at *25–26.

[199] *Ragbir*, 923 F.3d 53.

[200] *Id.* at. 64–65.

[201] *Id.* at 62–67.

[202] *Id.* at 71.

[203] *Id.* at 69 (quoting Snyder v. Phelps, 562 U.S. 443, 451–52 (2011)).

[204] *Id.* (quoting *Snyder*, 562 U.S. at 451–52).

[205] *Id.* (quoting Meyer v. Grant, 486 U.S. 414, 421–22 (1988)).

[206] *Id.* at 70 (quoting *Meyer*, 486 U.S. at 425)).

[207] *Id.* at 72.

[208] *Id.*

presence in the United States was not "an ongoing violation of United States law."[209] A lawful permanent resident rendered deportable by a criminal conviction has no legal obligation to deport himself, and his continued presence in the country is not a violation of any law, unlike immigrants who enter the country without authorization or inspection.[210] Only after an order of final removal is entered does an alien lose lawful permanent resident status.[211] And even though ICE had indeed received an order of final removal against Ragbir, it affirmatively authorized his presence in the country for nearly a decade.[212]

After the Second Circuit deemed the government's conduct "outrageous" within the meaning of *AADC*, the Suspension Clause question that the district court had dodged became unavoidable. Ragbir had exhausted both direct review of his order of removal and his statutorily authorized single motion to reopen those proceedings long before the alleged retaliation took place,[213] thus leaving him no "adequate substitute" to habeas corpus.[214] Thus, because Congress has not suspended the writ, the Second Circuit concluded that the application of § 1252(g) to his case violated the Constitution.[215]

Although the Second Circuit remanded to the district court to determine what relief might be appropriate if Ragbir succeeded in demonstrating that retaliatory animus motivated ICE's decision, it did suggest that a delay in his removal equivalent to the most recent stay granted by ICE would balance both the government's interest in removing "aliens convicted of 'aggravated felonies'" and Ragbir's First Amendment interests.[216]

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[209] *Id.* (quoting *AADC*, 525 U.S. 471, 491 (1999)). Recall: In *AADC*, none of the aliens had established lawful permanent residence in the United States; all had temporary visas the terms of which they had violated, rendering them deportable. 525 U.S. at 473.

[210] *See* Gerald L. Neuman, *Terrorism, Selective Deportation, and the First Amendment after Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 342 (2000).

[211] 8 U.S.C. § 1231(a).

[212] *Ragbir*, 923 F.3d at 58–59.

[213] *Id.* at 58–59, 62, 62 n.10 ("[T]he Government does not dispute, that [Ragbir] could not have brought his claim in a BIA proceeding or in a petition for review. That is because Ragbir's claim arose only after his petition process was exhausted and his order of removal became final."). *Cf.* 8 U.S.C. § 1229a(c)(7) (specifying that aliens are entitled to one motion to reopen their immigration proceedings and that any such motion must be filed within ninety days of the entry of the final order of removal).

[214] *Ragbir*, 923 F.3d at 73–74.

[215] *Id.* at 78–99.

[216] *Id.* at 79 n.34 (citing Memorandum from John Kelly, Sec'y of Dep't of Homeland Sec., to Kevin MacAleenan, Acting Comm'r, U.S. Customs & Border Prot. (Feb. 20, 2017) (on file with author)). It is notable that prior Administrations had even more emphatically stated that aliens convicted of aggravated felonies were the highest enforcement priority for DHS. *See, e.g.*, Memorandum from Jeh Charles Johnson, Sec'y of Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir. of Immigr. & Customs Enf't (Nov. 20, 2014) (on file with author) (classifying as "Priority 1," the "highest priority to which enforcement resources should be directed," "aliens convicted of

The government sought rehearing, which was denied.[217] The Supreme Court granted, vacated, and remanded the government's petition for a writ of certiorari in light of its prior opinion in *Department of Homeland Security v. Thuraissigiam*.[218]

Thuraissigiam presented the question of whether an alien seeking asylum but subject to so-called "expedited removal"[219] could seek review of his asylum claim through habeas corpus.[220] The Court said "no".[221] But it went further. Justice Alito's opinion for the Court raises doubts as to whether aliens in removal proceedings are within the protection of the Suspension Clause. Because aliens seek not discharge from custody but the right to remain in the United States, Justice Alito argued, they do not seek the "simple" remedy that habeas protected at the Founding.[222] Instead, they seek a new legal right—to remain in the United States. Moreover, Justice Alito argued that many of the cases discussed previously[223] from the "finality era" of the late 19th to mid-20th centuries are irrelevant to the Suspension Clause analysis because those courts drew their authority from the then-applicable laws granting habeas jurisdiction in immigration matters.[224] Of course, the value of the finality era cases comes not from their reliance on the Suspension Clause, but in their discussion of the scope of habeas corpus.

In any event, Justice Alito's opinion in *Thuraissigiam* reaffirmed that "[t]he writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation."[225] Thus, there should be no reason for the Second Circuit to reach a different result on remand.[226]

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an 'aggravated felony'" as defined by the INA).

[217] Order Denying Petition for Rehearing and/or Rehearing En Banc, Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597).

[218] 140 S. Ct. 1959 (2020).

[219] Thuraissigiam was apprehended just twenty-five yards from the United States' border with Mexico, thus rendering him eligible for the trimmed-down removal proceeding known as "expedited removal." 140 S. Ct. at 1964–65; *see also* 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(I–II) (outlining eligibility for expedited removal).

[220] *Thuraissigiam*, 140 S. Ct. at 1963.

[221] *Id.* at 1969.

[222] *Id.* at 1971.

[223] *See supra* at Part II.

[224] *Thuraissigiam*, 140 S. Ct. at 1975–81.

[225] *Id.* at 1981.

[226] The *Thuraissigiam* Court's discussion of due process is likewise inapposite to Ragbir's case; Ragbir was a lawful permanent resident, not unlawful entrant.

IV. THE CASE FOR HABEAS JURISDICTION

Ragbir's case presents circumstances markedly different from those in *Thuraissigiam*.[227] And if the Second Circuit recognizes as much and reaffirms its original holding, it is quite likely that Ragbir's case will present one of the first opportunities for the Court to give meaning to *AADC*'s reservation of "outrageous" conduct.[228] If the Court finds that ICE's conduct towards Ragbir was "outrageous" as (un)defined by *AADC*, it will be forced to address whether § 1252(g) applied to the stay-of-removal context violates the Suspension Clause. It should answer both in the affirmative.

A. Aliens and the First Amendment

1. *AADC* is distinguishable

Any theory under which Ragbir can receive habeas review of his detention presupposes a world in which deportable aliens can prevail on a claim of selective enforcement. *AADC* may have foreclosed that possibility. But Justice Scalia's reservation of "outrageous conduct" offers hope, as does the recognition that much of the Court's doctrine relating to governmental retaliation was established *after AADC* was decided.[229] So, too, does the unique context of the aliens in *AADC*.

Under modern statutes, the aliens in *AADC* might have been prosecuted for providing material support to a terrorist organization. The foreign policy rationale which supports much of the Plenary Power doctrine upon which immigration law is based—and which was explicitly relied upon in *AADC* as a reason to deny those aliens relief—is inapposite in the context of speech about immigration as a domestic policy matter. "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment."[230] Although one could describe discourse on immigration as a meta-foreign policy issue, that is almost certainly a bridge too far. And "when retaliation against protected

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[227] Unlike in *Thuraissigiam*, Ragbir does seek "simple release": his objective is to remain in the United States as he did pursuant to the stay of removal issued by DHS. That the "law" that resulted in his detention is regulatory in nature is of no matter. But for DHS's decision to terminate his stay, Ragbir would be free within the United States. *Cf. Thuraissigiam*, 140 S. Ct. at 1974 ("The relief that a habeas court may order and the collateral consequences of that relief are two entirely different things. Ordering an individual's release from custody may have the side effect of enabling that person to pursue all sorts of opportunities that the law allows.")

[228] It is quite likely that, unless the government elects not to seek certiorari, the Court would once again take up Ragbir's case, particularly given recent changes to the Court's membership: "Holding that an Act of Congress unconstitutionally suspends the writ of habeas corpus is momentous." *Thuraissigiam*, 140 S. Ct. at 1978.

[229] *Hartman*, *Reichle*, *Lozman*, and *Nieves* all post-date *AADC*.

[230] Gentile v. State Bar of Nev., 501 U.S. 1030, 1034 (1991).

speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress."[231] Ragbir is not the only individual who has been subjected to allegedly retaliatory enforcement by ICE in recent years:[232] In 2018, a Commentator cataloged a dozen such cases[233] in recent years; there is no reason to believe the number has decreased.

One might argue that Ragbir's advocacy of relaxed immigration policy in the United States can continue from his native Trinidad and Tobago, much as the Court suggested in *Turner*, where the anarchist would be deported the Australia to continue his speech. But that, too, ignores not only the nature of the First Amendment but the nature of rights in general. In another context the Court has reinforced the principle that the availability of alternative venues is not an adequate substitute for direct protection of a right.[234] Moreover, First Amendment jurisprudence has shifted hard against curtailing speech since *AADC*.[235]

This presupposes that Ragbir has First Amendment rights at all.[236] The Court has never directly addressed whether unlawfully present aliens are protected by the First Amendment, but the alternative would represent an outcome surprising to many. It strains credulity to believe that ICE could deport all unlawfully present aliens who are Catholic but not those who are Protestant. It is similarly implausible that ICE could allow Catholics, but not Protestants, to worship in immigration

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[231] Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954 (2018).

[232] Indeed, Ragbir's prayer for relief and the body of his complaint both suggest that a court could provide relief in his case to individuals other than Ragbir. *See* Complaint at 40–41, Ragbir v. Homan, 18-cv-1159, 2018 U.S. Dist. LEXIS 102443 (S.D.N.Y. June 19, 2018).

[233] Cade, *supra* note 177, at 1443 nn.86–88, 1444 nn.89–92, 1445 nn.93–95.

[234] *See, e.g.*, Transcript of Oral Argument at 37–38, Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

[235] *See generally* Citizens United v. FEC, 558 U.S. 310 (2010); Snyder v. Phelps, 562 U.S. 443 (2011); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011); Knox v. Serv. Emps. Int'l Union, 567 U.S. 298 (2012); United States v. Alvarez, 567 U.S. 709 (2012); McCullen v. Coakley, 573 U.S. 464 (2014); Janus v. AFSCME, Council 31 138 S. Ct. 2448 (2018).

[236] Before the Second Circuit, the government did not argue that Ragbir lacked First Amendment rights as a result of his deportability. *Compare* Brief for U.S., Ragbir v. Homan, 923 F.3d 53 (2d Cir. 2019) (No. 18-1597), *with* Ragbir v. Homan, No. 18-cv-1159, 2018 U.S. Dist. LEXIS 86753 (S.D.N.Y May 23, 2018) ("Political speech is worthy of the highest protection and so long as Ragbir remains in the United States, the First Amendment guarantees his freedom to speak and associate on any subject of his choosing."), thus the argument is forfeited, if not waived. *See* Ret. Plans Comm. of IBM v. Jander, 140 S. Ct. 592, 595 (2020) ("The Second Circuit 'did not address the[se] argument[s], and, for that reason, neither shall we.'") (quoting F. Hoffmann–La Roche Ltd. v. Empagran S.A., 542 U. S. 155, 175, (2004)); *Jander*, 140 S. Ct. at 597 (Gorsuch, J., concurring) ("[I]t is beyond debate that '[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'") (quoting Webster v. Fall, 266 U. S. 507, 511 (1925)); *see also* Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287, 306 (2010) (declining to consider argument not presented in the court of appeals); Cooper Indus., Inc. v. Availl Servs., Inc., 543 U.S. 157, 168–69 (2004) (same). *Cf.* Nautilus, Inc. v. Biosing Instruments, Inc., 572 U.S. 898, 913 (2014) ("[W]e are a court of review, not of first view.") (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

detention. Nor is it plausible to imagine a world in which ICE could condition a stay of removal on an alien's agreement to not engage in political speech—which the Court has repeatedly identified as the core of the First Amendment.[237] And if ICE did enact such a policy, courts would have jurisdiction to hear such challenge, jurisdictional considerations notwithstanding.[238]

2. *Nieves* is irrelevant

Ragbir was decided before the Court's decision in *Nieves*, a fact the government took pains to emphasize in its petition for rehearing before the Court of Appeals. That reliance may be misplaced. For decades the government has repeatedly emphasized—not incorrectly—that immigration proceedings are not criminal and that deportation is not a punishment.[239] And the Court has repeatedly agreed: "While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."[240] But the Court has drawn sharp lines between claims of retaliatory civil action (such as employment) and retaliatory criminal action (such as arrest or prosecution).[241] *Nieves* dealt with the question of arrest by law enforcement on criminal charges. Given immigration removal is not criminal, *Nieves*'s broadside against retaliatory criminal arrest claims is inapposite.

While it does not bolster Ragbir's claim, *Nieves* does not undermine *Mt. Healthy*, particularly in light of *Lozeman*. Recall, *Lozeman* distinguished between the heat-of-the-moment arrests like those in *Nieves* and *Reichle* and a pattern or practice of governmental discrimination. The decision to remove an individual from the United States is not "a dangerous task that requires making quick decisions in 'circumstances that are tense, uncertain, and rapidly evolving.'"[242] Instead, removal decisions are made by ICE officials and presented before a neutral magistrate. Even in those cases that are not reviewed by an Immigration Judge or a court due to delegated discretion (like Ragbir's), ample time

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[237] *See, e.g.*, *Janus*, 138 S. Ct. at 2463–64 (2018); *Citizens United*, 558 U.S. at 328, 339–41 (2010); *see also* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (striking down on First Amendment grounds a law which criminalized access to certain major social media websites by sex offenders).

[238] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 840 (2018) (eschewing "uncritical literalism" when construing phrases like "arising from" to, in that case, allow for consideration of a habeas petition challenging indefinite detention without bail hearings) (citation omitted).

[239] *See, e.g.*, *AADC*, 525 U.S. 471, 491 (1999).

[240] *Id.* (citing Carlson v. Landon, 324 U.S. 524, 537 (1952)); *see also* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) ("[R]emoval proceedings are civil . . . .") (citation omitted); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action . . . .").

[241] *See* Part II.C.1 above.

[242] Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019) (describing the nature of making arrests) (quoting Graham v. Connor, 490 U. S. 386, 397 (1989)).

exists for ICE to consider an alien's suitability for a stay. In Ragbir's case, his counsel was in discussions with ICE officials for months before the meeting at which Ragbir was detained.[243]

Moreover, the decision to arrest an individual and the decision to pursue the charges of arrest are often made by different individuals within different organizations in the arrest context. In Russell Bartlett's case, for example, his arrest may have been inspired by impermissible animus, but the decision of the local district attorney—who may be accountable to a different polity than the arresting officer—to pursue otherwise-valid charges against him is entitled to a presumption of regularity and impartiality.[244] Attributing the animus held by Trooper Nieves to prosecuting attorneys would require prosecuting attorneys to conduct substantial investigations into an officer's subjective motivations before pursuing charges. It is unclear whether prosecutors can make such evaluations in an unbiased way. Nor is it clear who would review any such determinations.

But ICE acts alone and unsupervised in the realm of stays of removal. Much like the school board in *Mt. Healthy* and the city council in *Lozman*, the decision to remove prominent ICE critics is clouded in a fog of uncertainty. As Gerald Neuman and others have noted, "Prosecutorial and adjudicative functions may be mixed, creating psychosocial and economic disincentives to the impartial resolution of cases once they have been brought."[245] Is ICE choosing to remove Ragbir because his number is up, or because he is a "persistent gadfly"[246] much like Fane Lozman? One frequently intoned virtue of the administrative state is its responsiveness to political pressures from the President. But in a system constrained by statute and regulation, the exercise of discretion in individual cases cuts both ways. Supporters of the Obama Administration's deferred action initiatives cited *AADC* as a basis for discretionary nonenforcement regimes.[247] In any event, the officer-prosecutor division in the immigration context is far less clear than in the criminal context. All immigration authority is centralized in the unitary executive.

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[243] Ragbir v. Homan, 923 F.3d 53, 60 (2d Cir. 2019) (noting that Ragbir's application for renewal of his stay was filed in November 2017 and still under consideration, according to ICE, on January 10, 2018).

[244] *See generally* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("'[T]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'") (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15, (1926)).

[245] Neuman, *supra* note 31, at 1023.

[246] Adam Liptak, *A Persistent Gadfly Wins Again in the Supreme Court*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/a-persistent-gadfly-wins-again-in-the-supreme-court.html [https://perma.cc/5RF7-ZWKV].

[247] *Cf.* Arizona v. United States, 567 U.S. 387, 394–98 (2012).

B. The Habeas Question

The problem in precluding habeas relief for retaliatory conduct is that, as in the case of Ragbir, alternative routes are often foreclosed. A final order of removal was entered against Ragbir in 2007. From that time until his arrest by ICE 2018, his continued presence in the United States was pursuant to stays of removal.[248] Once an order of removal is entered against an immigrant and all appeals before the Board of Immigration Appeals and the Court of Appeals are exhausted, no judicial review stands between an alien and deportation.[249] Thus, if the alleged retaliatory conduct takes the form of a denial or termination of a stay of removal, no neutral magistrate will ever be interposed between authorities and arbitrary enforcement. This is so despite the Court's recent recognition that habeas review remains available for immigrants perpetually detained pending removal.[250]

In its petition for rehearing before the Second Circuit, the government went to great lengths to emphasize that the order of removal entered against Ragbir had twice been sanctified by other Article III courts.[251] But that assertion, like the Sixth Circuit's in *Hamama v. Adducci*,[252] misses the crucial distinction between review of the entry of the order and the order's ultimate execution. In *Hamama*, the Sixth Circuit concluded that an alien's ability to move to reopen their proceedings affords aliens an "adequate and effective"[253] forum to challenge their ultimate removal.[254] But this view elides the fact that federal law provides aliens just one motion to reopen their removal proceedings, while the Executive can grant limitless stays of removal. That mismatch yields ample opportunity for abuse: Simply because Ragbir was able to challenge the grounds for the order's entry does not mean he has the ability to challenge any of the myriad legal or factual developments which may have arisen during the eleven years between the order's entry and its execution.

To be sure, the decision to stay Ragbir's removal is one committed to DHS's discretion.[255] But that discretion should not allow immigration

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[248] From 2007–2011 Ragbir's removal was stayed as he pursued appeals.

[249] Congress was well aware of this phenomenon as well as the breadth of discretion afforded immigration authorities in selecting whom to deport. *See AADC*, 525 U.S. 471, 483–84 (1999).

[250] *See* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

[251] Petition for Rehearing at 9–11, Ragbir v. Homan, 923 F.3d 53 (2d. Cir. 2019) (No. 18-1597).

[252] Hamama v. Adducci, 912 F.3d 869 (6th Cir. 2018), *cert. denied*, No. 19-294, 2020 WL 3578681 (U.S. July 2, 2020).

[253] *Id.* at 876.

[254] *Id.* at 875.

[255] 8 U.S.C. § 1231(c)(2)(A) authorizes the Attorney General to promulgate regulations regarding the granting of discretionary relief; he has done so. *See* 8 C.F.R. § 241.6.

officials to convert an order of final removal into a Sword of Damocles hanging above the heads of immigrants like Ragbir. Besides, the government's actions speak louder than its words: for eleven years ICE deemed Ragbir insufficiently dangerous to prioritize. Claims that Ragbir is a criminal the government has prioritized for deportation reveal the breadth of the discretion ICE is afforded in seeking and effectuating removals under current law.

It is not clear what good habeas review will do, though. No one challenges that Ragbir is removable based on his conviction. Numerous administrations have prioritized deportation of those convicted of aggravated felonies.[256] One of the crucial legitimating features of a standards-based system is a guarantee of reviewability. And although the immigration system is superficially governed by rules, the two-step discretion afforded to immigration authorities injects nearly limitless discretion in the realm of deportable lawful permanent residents.

As the Court of Appeals suggested in *Ragbir*, perhaps a remedy is that Ragbir is permitted to remain in the country for the duration of his most recent stay—something of an expectation damages theory of habeas relief. Or perhaps the value is in naming-and-shaming government officials, thus potentially opening them to liability in a civil damages suit brought by the alien regardless of his location. Maybe damages, but not a stay, is the correct remedy.[257] Answers are not ventured here. Regardless of the relief Ragbir is ultimately afforded or denied, that he be given his day in court is essential to vindicating the fundamental promise of habeas corpus: to protect against the "dangerous engine of arbitrary government."[258]

V. CONCLUSION

Since John at Runnymede, the principle that no person should be imprisoned but in accordance with the law has suffused the common law.[259] And as Lord Coke wrote in his Institutes, "if a man be taken or committed to prison *contra legem terrae*, against the Law of the land," "[h]e may have an *habeas corpus*."[260] We are far from the scenario envisioned by Madison 220 years ago in which "[i]f aliens had no rights

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[256] *See supra* note 216.

[257] Recent scholarship examines the availability of other civil actions in situations like Ragbir's. *See* Matthew Miyamoto, Comment, *Whether 8 U.S.C. § 1252(g) Precludes the Exercise of Federal Jurisdiction over Claims Brought by Wrongfully Removed Noncitizens*, 86 U. CHI. L. REV. 1655 (2019).

[258] 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

[259] See 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 1112–21 (3d ed. 1944).

[260] SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55 (6th ed. 1681).

under the Constitution, they might not only be banished, but capitally punished, without a jury or the other incidents to a fair trial."[261] But current immigration law layers unreviewability upon discretion. As Professor Hart counseled a half century ago, "a power to lay down general rules, even if it is plenary, does not necessarily include a power to be arbitrary."[262] The dual-discretion enjoyed by the Executive—choosing whom to make removable, and choosing from those whom to remove—invites arbitrariness. And as Justice Holmes observed, "the decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith."[263]

The presumption of judicial review in America is strong for good reason. "The 'check' the Judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review."[264] Thus for the narrow class of aliens like Ragbir—those (a) who were lawfully present in the United States then (b) rendered removable due to a criminal conviction or similar immigration infraction but (c) still present pursuant to stays of removal and (d) who have exhausted their sole motion to reopen—the Suspension Clause guarantees that their claims of "outrageous" retaliatory removal—"*contra legem terrae*"—be heard in court. As this piece and others have argued, the Suspension Clause has always functioned as a backstop: if judicial review is otherwise unavailable, the traditional remedy of habeas corpus cannot be suspended absent a clear Congressional statement.[265]

Those concerned with the strain on judicial resources that may result from recognizing the conclusion urged above can take solace in a simple legislative fix. Just as Congress in the mid-twentieth century shifted immigration oversight from habeas corpus to petitions for review, a modern Congress could cure any Suspension Clause concerns by

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[261] JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800 TOUCHING THE ALIEN AND SEDITION LAWS 233 (1850).

[262] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953).

[263] Chin Yow v. United States, 208 U.S. 8, 12 (1908).

[264] Dep't of Transp. v. Ass'n of Am. R.R.s, 575 U.S. 43, 76 (2015) (Thomas, J., concurring) (cleaned up).

[265] Richard H. Fallon, Jr., Comment, *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1084 (1998).

reforming the current system of motions to reopen immigration proceedings. Such a move would resupply the requisite "adequate alternative" to avoid running afoul of the Suspension Clause while preserving efficiency and discretion in immigration enforcement.