THE FIRST AMENDMENT AS AN INSUFFICIENT SOLUTION TO THE PARADOX OF TOLERANCE

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The paradox of tolerance was first articulated by Karl Popper in 1945, stating that to preserve a tolerant society, the tolerant society should claim the right to suppress the intolerant, even by force. As such, to ensure that a tolerant society remains tolerant, the "solution" to the paradox is to grant the society the right to be intolerant of intolerance. Of course, the First Amendment is intimately related to the paradox, as it prevents the government from abridging speech—including speech that may be considered intolerant. This Article explores whether the First Amendment can help in "solving" the paradox of tolerance, especially in the digital age, and finds that it cannot.

Part I of this Article explains the paradox of tolerance and the commentary on that paradox. Part II explains how fundamental First Amendment principles, including the reliance on the marketplace of ideas, prevent abridging speech that may be considered intolerant. Part III applies the marketplace of ideas concepts to the digital sphere, examining the unique characteristics of online speech and how those characteristics interact with the concept of the marketplace of ideas. Part III also reviews recent First Amendment jurisprudence regulating the internet and explains how that jurisprudence similarly makes it difficult to "solve" for the paradox of tolerance under the First Amendment.

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INTRODUCTION

Intolerance has become ever-more prevalent in American society, from intolerance to lactose to more pernicious forms of social and political intolerance.[1] These more pernicious forms of intolerance are increasing while the media landscape on which we express our intolerance has changed, and continues to change, significantly. While intolerance was often expressed in the privacy of a dinner party, the confines of a few inches of a newspaper column, or a fireside radio chat, the internet has made it easy to broadcast intolerance through 140 characters, a 10-second video, or, for a very few, non-fungible tokens.[2]

This growth of intolerance naturally comes at the expense of tolerance. If there is more intolerance, there is less tolerance: it is a zero-sum game. This raises a fundamental question of liberty and democracy in the form of the paradox of tolerance, a concept first articulated by Karl Popper in 1945.[3] In the duopoly of tolerance and intolerance, Popper stated that if a tolerant society tolerated the intolerant and the growth of the intolerant, a tolerant society could eventually become intolerant *because of* its tolerance of the intolerant.[4] Naturally, and paradoxically, the only way to stave off the destruction of that tolerant society is to suppress the intolerant, even by force. As such, to ensure that a tolerant society remains tolerant, the "solution" to the paradox is to grant the society the right to be intolerant of intolerance.[5] Popper, and later John Rawls, argued for two instances in which a tolerant society could be intolerant of intolerance: where intolerance was immune to rational argument (that could be used to combat intolerance); and where intolerance led to violence.[6] However, First Amendment jurisprudence provides little protection from the paradox of tolerance, and does not allow for the solutions posed by Popper and Rawls.

Part I of this Article explains in further depth the paradox of tolerance, and the legal and philosophical commentary on that paradox. The First

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1. *See, e.g.*, Meredith Blake, *Jon Stewart Says Conservatives Have "Barack-Tose Intolerance"*, L.A. TIMES (Oct. 23, 2012), https://www.latimes.com/entertainment/tv/la-xpm-2012-oct-23-la-et-st-jon-stewart-fox-news-not-optimal-20121023-story.html (confirming you didn't hallucinate the Daily Show's "Barack-tose intolerance" joke).

2. Joe Tidy, *Whatever Happened to NFTs*, BBC (Nov. 9, 2023), https://www.bbc.com/news/business-67295786.

3. KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581 n.4 (Routledge 2019) (1945).

4. *Id.*; *cf.* L. Carol Ritchie & Tien Le, *On International Tongue Twister Day, Test Out These Tried, True and Tricky Ones*, NPR (Nov. 8, 2021), https://www.npr.org/2021/11/08/1053442919/happy-international-tongue-twister-day.

5. I use "solution" in quotes because the paradox, as all paradoxes, reveals limits in our proposed systems; the only solution here would be one that is itself paradoxical.

6. *See infra* note 30 and accompanying discussion.

Amendment is inherently related to this paradox, because it prevents the government from abridging speech, including speech that may be considered intolerant. And First Amendment jurisprudence, through its incitement and true threats doctrine, allows society to be intolerant of intolerance when intolerance leads to violence.[7] But First Amendment jurisprudence does not allow the government to abridge intolerant speech that is immune to rational argument. Part II of this Article discusses the "marketplace of ideas" underpinning the First Amendment, and how that marketplace is susceptible to being taken over by intolerance, leading to the severe consequences of the paradox of tolerance. Part III goes further, looking at this marketplace of ideas in the digital era. Given the structure of the internet and the incentives that the internet provides to online speakers, as well as the unique characteristics of digital speech, the digital marketplace of ideas is not just susceptible to being taken over by intolerance: it often prioritizes intolerance over tolerance. Recent First Amendment jurisprudence provides little guidance or help in addressing that imbalance.

But this lack of protection against intolerance is an inherent feature of the First Amendment, which is predisposed to preventing tyranny,[8] including tyranny from an intolerant majority. By preventing the government from intruding on individuals' right to speech, the First Amendment protects a sphere of personal autonomy that permits individuals to search for knowledge and truth, and expand the realm of societal knowledge and liberty.[9] In and of itself, that is a critical and important value that would be undermined if the First Amendment were to permit government intrusion into speech, to the extent required by the paradox of tolerance. Yet, despite the limitations of the First Amendment, all is not lost. Other aspects of the Constitution may provide solutions, at the voting booth and through federalism. And longer-term solutions may also help develop resistance to intolerance.

I. THE PARADOX OF TOLERANCE

Philosopher Karl Popper first articulated the paradox of tolerance in 1945 in the context of Plato's *paradox of freedom*.[10] In Plato's commentary and critique of democracy and in his story of the rise of the tyrant, Plato raised the question: "What if it is the will of the people that they should not

7. *See infra* notes 31–32 and accompanying discussion.

8. *See infra* notes 108–10 and accompanying discussion.

9. Lee C. Bollinger, The Tolerant Society: *A Response to Critics*, 90 COLUM. L. REV. 979, 982 (1990) [hereinafter *A Response to Critics*].

10. POPPER, *supra* note 3, at 117 & 581 n.4.

rule, but a tyrant instead?"[11] At base, the paradox of freedom assumes that freedom, which is the absence of any restraining control, "must lead to very great restraint, since it makes the bully free to enslave the meek."[12] From this arises the *paradox of tolerance*: if there exists unlimited tolerance, that tolerance will permit people to be tolerant of people who are intolerant. Should those intolerant people then attempt to destroy—philosophically or otherwise—the tolerant people? "[T]he tolerant will be destroyed, and tolerance with them."[13] Thus, to preserve a tolerant society, Popper argues that a tolerant society

> should claim the *right* to suppress [the intolerant] if necessary even by force; for it may easily turn out that [the intolerant] are not prepared to meet us on the level of rational argument, but [may] begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law, and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal.[14]

Popper's solution to this natural paradox was not widely shared by other philosophers and politicians—both before and after his time. For example, Thomas Jefferson argued: "If there be any among us who would wish to dissolve this Union, or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it."[15] Centuries later, John Rawls concurred, stating that a society that does not tolerate the intolerant would otherwise itself be intolerant, and therefore unjust.[16] But even there, Rawls qualified: if there are "considerable risks to [the society's]

11. *Id.* at 117.
12. *Id.* at 581 n.4.
13. *Id.*
14. *Id.*
15. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004 (last visited May 17, 2026).
16. JOHN RAWLS, A THEORY OF JUSTICE 192 (rev. ed. 1999).

own legitimate interests. . . . [The society] can properly force the intolerant to respect the liberty of others . . . . [Only] when the constitution itself is secure [is] there . . . no reason to deny freedom to the intolerant."[17]

Other commentators have offered similar views. For example, Lee Bollinger argues that under certain theories of speech, speech should be entitled to greater tolerance than other kinds of activity, because speech itself is valuable.[18] Doing so serves the interests and goals of a self-governing society, though Bollinger assumes that such a society is comprised of citizens who engage seriously and rationally with their civic duties.[19] Bollinger argues that in a modern society, tolerance of intolerant speech furthers the society's goals of self-control, self-discipline, and self-restraint.[20] As such, only when tolerance of that speech ends up failing to further those goals should that speech not be tolerated. For example, speech that is physically threatening, and which might undermine an individual's self-restraint and provoke intolerance, should not be permitted, because such speech hits the barrier of human limitations.[21] Here, Bollinger relies on the *clear and present danger* test,[22] though not entirely in the form presented by Supreme Court doctrine.[23]

Bollinger also raises an interesting definitional issue. He notes that tolerance is generally "a way of approaching problems and conflicts," and in effect means "being able to put aside our beliefs, of overcoming the instinct to have things our own way, to control, to dominate."[24] Bollinger's argument raises an important question of what tolerance is and isn't. But in creating this definition, he also concedes that the definition is clearly nebulous, because tolerance is always a question of a matter of degree.[25] However, here, we don't need a specific and precise definition of tolerance to address the paradox. Instead, we just need to know whether a system—in this case, our legal system through its First Amendment jurisprudence—can address *any* form of intolerance, such as the most extreme forms of intolerance, rather than those forms of intolerance that are only arguably intolerant. At its most extreme, intolerance is an unwillingness to put up with someone or

17. *Id.*

18. LEE C. BOLLINGER, THE TOLERANT SOCIETY 8 (1986) [hereinafter THE TOLERANT SOCIETY].

19. *Id.* at 46–57.

20. *Id.* at 140–44.

21. *Id.* at 187.

22. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (articulating "clear and present danger" test).

23. THE TOLERANT SOCIETY, *supra* note 18, at 192–93.

24. *A Response to Critics*, *supra* note 9, at 986.

25. *Id.*

something else. We need not define it any further than that, because we simply need to understand whether the First Amendment allows society to be intolerant of even those most extreme intolerances.

Michel Rosenfeld argues a second level of this paradox: even tolerance of intolerant speech is intolerant, because tolerating *intolerant* speech requires being *intolerant* of those who would silence the intolerant speech, or alternatively implies or otherwise suggests some level of intolerance for those towards whom the intolerant speech is directed.[26] Rosenfeld proposes a pluralist conception of tolerance, where tolerance of the intolerant is required only inasmuch as it does not contravene *second-order norms*, which constitute conceptions of the good of society in its own right, as opposed to *first-order norms*, which are the various norms promoted by competing conceptions of good.[27] The pluralist hierarchy calls for tolerance of the intolerant only to the extent that it does not contravene *second-order norms*, i.e., to the extent that intolerance does not question conceptions of the good of the pluralistic society.[28] So intolerance that undermines pluralistic norms need not be tolerated, while intolerance of the views and ways of life of others must be tolerated.[29]

Taken together, these various commentaries on the paradox of tolerance provide two "solutions" that raise questions as applied to First Amendment jurisprudence. First, as Popper, Rawls, and Bollinger argue, a society *should* be intolerant of intolerance leading to violence—a risk to one's "self-preservation," or the endangering of one's security or the security of the institutions of liberty.[30] This, under First Amendment jurisprudence, is a trivial issue. The First Amendment incitement and true threats doctrines are carve-outs that do *not* protect speech advocating for imminent lawless action[31] or speech containing expressions of intent to commit unlawful violence.[32] Concomitant with this "solution," the incitement and true threats doctrines support the proposition that society is intolerant of intolerance leading to violence.

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26. Michel Rosenfeld, *Spinoza's Dialectic and the Paradoxes of Tolerance: A Foundation for Pluralism?*, 25 CARDOZO L. REV. 759, 766 (2003).

27. *Id.* at 786, 790.

28. *Id.* at 790.

29. *Id.*

30. RAWLS, *supra* note 16, at 192–93; POPPER, *supra* note 3, at 581 n.4; *see* THE TOLERANT SOCIETY, *supra* note 18, at 187 (arguing that "the tolerance function must occasionally give way to the reality of human needs").

31. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

32. *See, e.g.*, Counterman v. Colorado, 143 S. Ct. 2106, 2118 (2023) (articulating the mens rea standard for the true threats doctrine as recklessness).

Outside of the context of speech leading to violence, two options exist for addressing intolerance that otherwise grows to undermine or destroy a tolerant society. Bollinger and Rosenfeld offer subjective solutions that ask that society be intolerant of speech that undermines the fundamental tenets of a tolerant society. Bollinger argues that speech that doesn't achieve society's goals of self-control, self-discipline, and self-restraint should not be tolerated.[33] Rosenfeld argues that society should not be tolerant of intolerance that questions conceptions of the good of the pluralistic society.[34] But this set of solutions is flatly incompatible with the First Amendment. The First Amendment provides that the government shall not "abridg[e] the freedom of speech."[35] Naturally, that means that the government cannot abridge even intolerant speech, let alone speech that subjectively may be intolerant towards fundamental societal principles. For example, in *National Socialist Party of America v. Village of Skokie*, the Supreme Court reversed the Illinois Supreme Court's decision to deny a stay preventing the Nazi party from organizing a march in Skokie, affirming that even the Nazi party had First Amendment rights that protected its intolerant speech.[36] As applied to the Bollinger and Rosenfeld solutions, any law that is intolerant of some subjective notion of problematic speech is a law regulating speech based on content, and such laws are generally presumptively unconstitutional.[37] Even if such a solution did not hit a constitutional wall, it would require the tedious exercise of determining which subjective values should be protected against intolerance, and requires a normative exercise that is beyond the scope of this Article.

In contrast, Popper and Rawls argue that a society *should* be intolerant of intolerance if rational argument—some sort of logical, Aristotelian form of deductive reasoning attempting to seek the truth[38]—is insufficient to counter the intolerance at hand, therefore requiring some stronger measure. It is true that First Amendment doctrine provides no exception for intolerant speech immune from rational argument.[39] But First Amendment doctrine emphasizes the importance of the Amendment's *marketplace of ideas* as an

33. *See supra* notes 18–23 and accompanying discussion.

34. *See supra* notes 26–29 and accompanying discussion.

35. U.S. CONST. amend. I.

36. 432 U.S. 43, 44 (1977) (per curiam).

37. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468 (2010) (noting that content-based restrictions on protected speech are presumptively unconstitutional).

38. *See, e.g.*, POPPER, *supra* note 3, at 236 (describing Aristotelianism as "demonstration or proof, and definition," which are "the two fundamental methods of obtaining knowledge," both of which are forms of "rational argument").

39. *See, e.g.*, *infra* note 104 and accompanying discussion.

antidote to intolerance.[40] Could it be that the First Amendment *facilitates* the Popper and Rawls solution, as the marketplace of ideas naturally destroys intolerance that is intolerant of rational argument? Unfortunately, no.

II. THE MARKETPLACE OF IDEAS PERMITS INTOLERANCE THAT IS IMMUNE TO RATIONAL ARGUMENT

As Justice Holmes famously dissented, "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market."[41] That marketplace of ideas is theorized to be the best way to separate falsehoods from facts. As John Stuart Mill postulated, such a marketplace permits the "miscellaneous collection of a few wise and many foolish individuals, called the public," to determine whether one's judgment is correct.[42] But this concept allows "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."[43] Yet that reliance on "the public" opens the door to the paradox: What if some in the public who are participating in the marketplace of ideas are intolerant?

Perhaps we can take refuge in the "truth-seeking function of the marketplace of ideas."[44] John Stuart Mill's theory of tolerance was intrinsically tied to truth: only a marketplace of ideas that permits a wide range of voices—including voices that espouse evil or falsities—can ensure that the truth is eventually found; an absence of falsehood in the marketplace of ideas would not stress-test what we currently believe to be the truth.[45] Conversely, rational argument based on truth could then destroy intolerance based on falsehoods.[46] As such, under the marketplace theory, truth should ultimately prevail over falsehoods,[47] and therefore over intolerance. But this fundamental truth-seeking function is inadequate in multiple respects.

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40. *See infra* Part II.

41. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

42. JOHN STUART MILL, ON LIBERTY 40 (1859).

43. Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 23 (Ill. 1978) (per curiam).

44. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988). Of course, not all speech advances our search for knowledge and the truth. *See, e.g.*, *A Response to Critics*, *supra* note 9, at 980 (1990) (noting that many justifications for protecting all speech arise from speech's truth- and knowledge-seeking functions).

45. MILL, *supra* note 42, at 26–30.

46. POPPER, *supra* note 3, at 581 n.4.

47. JOHN MILTON, AREOPAGITICA 51–52 (J. Hales ed. 1917).

First, truth does not always prevail over falsehood, and one need not look to ancient history for relevant examples.[48] In fact, falsehoods may be based *in part* on truth[49] so a marketplace where some truth prevails may not lead to an outcome where all falsehood is destroyed. Similarly, intolerant views may also begin from a truthful premise, but be based on faulty or illogical reasoning that leads to an intolerant conclusion. For example, the COVID-19 pandemic began in China,[50] and those with intolerant views used that reality to justify hate-based attacks against the Asian-American community during the COVID-19 pandemic.[51] Likewise, intolerance may also have its own internal logic that leads to false outcomes, based on faulty or problematic logic. Intolerance may take truth and contort it into intolerance based on problematic inferences. In the COVID-19 example, the intolerant may have taken the fact that the pandemic originated in China as a reasonable foundational and factual premise, and then argued that Asian Americans were therefore, in part, responsible for the pandemic. While the reasoning is faulty, a marketplace of ideas that arguably produces the truth would simply not destroy the faulty logic leading to intolerance.

Second, because the marketplace of ideas is necessarily dependent on "the public," a public that is irrationally prejudicial or in some other way unreasonable or predisposed to believe a falsehood over a truth may choose a falsehood over a truth, despite the truth-seeking function of the market.[52] In fact, listeners often are biased in favor of their pre-existing beliefs and

48. *See generally* Harry H. Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1130 (1979) ("It is naive to think that truth will *always* prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of man. The zealot and the ideologue too often have overwhelmed the truth-teller. Often it is hard for a listener to reject false ideas, opinions, and positions that happen to coincide with his own self-interest or that appeal to his half-submerged prejudices."); Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 310 (2018) ("[A]s the nation's experience with Russia's extensive disinformation campaign during the 2016 election has illustrated, falsehoods may not be exposed and truths may not emerge until well after voters leave the ballot booth.").

49. *See, e.g.*, Christopher Paul & Miriam Matthews, *The Russian "Firehose of Falsehood" Propaganda Model*, RAND (July 11, 2016,), https://www.rand.org/pubs/perspectives/PE198.html (explaining that the Russian "firehose of falsehood" propaganda model involves little commitment to truth, but that many falsehoods contain "a significant fraction of the truth.").

50. *See, e.g.*, *WHO Scientific Advisory Group Issues Report on Origins of COVID-19*, WORLD HEALTH ORG. (June 27, 2025), https://www.who.int/news/item/27-06-2025-who-scientific-advisory-group-issues-report-on-origins-of-covid-19.

51. NEIL G. RUIZ ET AL., PEW RSCH. CTR., ASIAN AMERICANS AND DISCRIMINATION DURING THE COVID-19 PANDEMIC 60 (2023).

52. Michel Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. L. REV. 1457, 1469 n.33 (1987) [hereinafter Rosenfeld, *Extremist Speech*] (reviewing THE TOLERANT SOCIETY, *supra* note 18).

against receiving or accepting new ideas, especially those which do not comport with their views.[53]

Third, and most relevant here, the First Amendment does not categorically reject false speech, because falsehoods are "nevertheless inevitable in free debate."[54] Instead, only false speech that may cause "legally cognizable harm"—such as defamation, fraud, and perjury—is generally unprotected by the First Amendment.[55] So even here, there is no guarantee that the truth *will* prevail over the falsehoods upon which intolerance is premised, or that the First Amendment *guarantees* that falsehoods will be demolished by the truth.

Worse yet, Popper theorized that intolerant ideas may be wholly immune to rational and truthful thought,[56] so a marketplace of ideas where truth *does* win over the falsehoods that intolerance is premised upon may still fail to destroy intolerance itself. Popper noted that those who are intolerant may "not [be] prepared to meet us on the level of rational argument, but begin by denouncing all argument; [and] they may forbid their followers to listen to rational argument."[57] The marketplace of ideas requires willing participants—buyers and sellers of ideas—for it to function. But intolerance often stems from an unwillingness to consume new ideas altogether,[58] making a marketplace that assists in identifying the truth wholly irrelevant.

In contrast, those who espouse intolerance are likely to spread their message of intolerance.[59] In such a situation, sellers of intolerance abound. The buyers, however, are not already intolerant; rather, they are willing to be open to new ideas (such as intolerant ideas). The glut of intolerant ideas may drive the "price" or cost of acceptance of those intolerant ideas down, perhaps because of the ubiquity of the intolerant ideas, or because intolerance may appeal to a listener's "half-submerged prejudices" or "self-interest."[60] As more listeners "buy" intolerant ideas and themselves become intolerant, they may also begin to espouse (or sell) their intolerant ideas; as such the number

53. *A Response to Critics*, *supra* note 9, at 983.

54. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) (quoting Gertz v. Robert Welch Inc., 418 U.S. 323, 340, 344 n. 9 (1974)).

55. United States v. Alvarez, 567 U.S. 709, 719 (2012).

56. *See supra* text accompanying note 14.

57. POPPER, *supra* note 3, at 581 n.4.

58. *See, e.g.*, THE TOLERANT SOCIETY, *supra* note 18, at 85–86 (noting that under one model of free speech, people tend to feel certain about their beliefs and feel justified in requiring others to conform).

59. *See, e.g.*, RAWLS, *supra* note 16, at 192–93 ("[E]ven if an intolerant sect should arise, provided that it is not so strong initially that it can impose its will straightway, or does not grow so rapidly that the psychological principle has no time to take hold, it will tend to lose its intolerance and accept liberty of conscience. . . . Of course, the intolerant sect may be so strong initially or growing so fast that the forces making for stability cannot convert it to liberty.").

60. Wellington, *supra* note 48, at 1130.

of "sellers" of intolerant ideas exponentially increases, while the number of intolerant listeners willing to be converted away from or against their intolerant ideas remains infinitesimal. At the same time, because those who are intolerant may "denounc[e] all argument" (and therefore truth),[61] or would "ruthlessly suppress the speech of those with whom they disagree,"[62] the number of speakers espousing truths that would normally be able to diminish intolerance may decline in number.

Therefore, even in a marketplace of ideas where the truth-seeking function *should* prevail in theory, a seller of an intolerant idea may capture that market.[63] But that's only half the story: the traditional *marketplace* of ideas was based on a physical marketplace, probably located in the town square. As with many First Amendment metaphors, such as the "public square,"[64] the dawn of the internet has changed the marketplace of ideas—and emphasizes the First Amendment's inability to solve the paradox of tolerance.

III. THE MARKETPLACE IN THE DIGITAL AGE

The First Amendment's marketplace of ideas in the digital age fares no better against the paradox of tolerance. As Justice Thomas first noted in his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*, the digital marketplace of ideas is far more expansive and far more complicated to govern than the traditional "public square,"[65] which is the scene of "traditional speech" that takes place in the physical, offline world. An "unprecedented amount[] of speech" takes place online, and much of that speech takes place on private platforms,[66] rather than in the traditional public square, which was often government property (like a town square).[67]

These two unique characteristics of "online speech"—volume and the private nature of the digital public square—reflect two issues pertaining to

61. POPPER, *supra* note 3, at 581 n.4.

62. Rosenfeld, *Extremist Speech*, *supra* note 52, at 1457.

63. *See generally* HARRY G. FRANKFURT, ON BULLSHIT (2005) (discussing how "bullshit," which is similar to but not exactly lying, can be insidiously disruptive, is unavoidable, and thrives in skepticism where it is impossible to discern truth or "objective reality").

64. *See, e.g.*, Packingham v. North Carolina, 582 U.S. 98, 107 (2017) (noting that the internet is "the modern public square").

65. *Id.*; *see* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (discussing then-former President Trump's Twitter account as a "public forum").

66. *Biden*, 141 S. Ct. at 1221.

67. *See, e.g.*, Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, YALE L.J. F. 427, 429 (2021) ("In its most literal sense, the public square is a physical space, open to the public and usually managed by the government . . . . Famous public squares include the ancient Agora in Athens, the Piazza San Marco in Venice, and Times Square in New York City.").

the paradox of tolerance. First, the sheer volume of speech online a direct consequence of the nature of the internet. Online speech is frequently anonymous, disconnected, or distant from the listener of the speech, and is directly shaped by the algorithms that present that speech to listeners.[68] These unique characteristics of online speech lead to online speech more often being intolerant than "traditional" speech in the founders' version of the "public square." Second, the private nature of digital public squares makes it more complicated to apply the First Amendment, which textually prevents the *government* (as opposed to private entities) from abridging speech.[69] Because of this critical difference, the Court has not created coherent and consistent jurisprudence regarding the application of the First Amendment to digital speech on private platforms. In fact, much of recent First Amendment jurisprudence, consistent with prior doctrine about the marketplace of ideas, forecloses any avenue allowing the government to address intolerance—and for good reason.

A. The Unique Nature of Online Speech

At base, online speech has distinct unique characteristics, by virtue of it being online rather than in-person. Online speech does not require physically addressing a listener. This facilitates anonymity, where a speaker need not reveal their identity at all. Additionally, the speaker may be physically distant from the listener, and therefore distant from seeing, hearing, or feeling any consequences of their speech.[70] A corollary of that distance is also that a speaker need not even know that they *have* a listener: they may speak into the digital void, which at base seems more socially acceptable than talking out loud at no one in particular.[71] These base differences—anonymity and distance from consequences—make it much easier to engage in online speech, creating a larger volume of speech than in the traditional town square.[72] That volume of online speech is not organized haphazardly: most

68. *See infra* notes 74–80 and accompanying discussion.

69. *See generally* U.S. CONST. amend. I; *see also, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (a designated public forum is "property that the State has opened for expressive activity by part or all of the public").

70. *See, e.g.*, Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1539 (2007) ("[A]nonymity can also shield speakers from liability for a variety of torts, including defamation, invasion of privacy, fraud, copyright infringement, and trade secret misappropriation.").

71. *See, e.g.*, *Old Man Yells at Cloud*, FANDOM, https://memepediadankmemes.fandom.com/wiki/Old_Man_Yells_at_Cloud (last visited May 17, 2026).

72. *See supra* text accompanying note 66. It doesn't take much to visualize this: hundreds, if not thousands, of people are actively "talking" in any online community at a given time. But hundreds of people talking in a physical public square would lead to pure pandemonium.

of it takes place on online platforms. But because of this sheer volume, those platforms need to make decisions on which speech to display to whom, either through human decision-making or through the use of algorithms. The result is a system that prioritizes certain types of speech over others and may often drown out certain viewpoints.

Anonymity and volume are two second-degree characteristics of online speech. But both of these characteristics can exacerbate intolerance. First, anonymity permits speakers to say things they may otherwise not say if their identity were known. This is, in part, because anonymity minimizes any potential repercussions—legal or social—of espousing intolerant speech.[73] Of course, the absence of social or legal pressure and consequences "protect[s] unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[74] And anonymous speech also cuts against surveillance, which reduces the pressure to conform to majoritarian behavior.[75]

But anonymity cuts both ways; preventing legal and social consequences for speech also can encourage intolerance. Because speakers are shielded from social and legal constructs, they may also choose to take less reasonable positions than they otherwise would were their speech constrained by what society defines as tolerant and intolerant.[76] They may also engage in speech that is construed as threatening or otherwise suggesting physical harm,[77] even if the speech does not rise to the level of incitement *per se*. Further, because of the nature of the internet, anonymity can amplify the perceived support for a viewpoint through the use of bots,[78] and because there is no limit on the

73. *See* Lidsky & Cotter, *supra* note 70, at 1538.

74. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); *see* Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 167 (2002).

75. Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 492 (2015) (noting that surveillance and the threat of surveillance can cause an individual to conform to a group's behavior or beliefs and can more broadly change a subject's behavior).

76. *See, e.g.*, Seo Yoon Lee & Jung-Hyun Kim, *What Makes People More Polarized? The Effects of Anonymity, Being with Like-Minded Others, and the Moderating Role of Need for Approval*, TELEMATICS & INFORMATICS, Jan. 2023, at 1, 1–2 (finding that individuals who engaged in online discussion with like-minded others were most likely to move their opinions toward extremity).

77. *See, e.g.*, Danielle Keats Citron, *Law's Expressive Value in Combatting Cyber Gender Harassment*, 108 MICH L. REV. 373, 396–97 (2009) (discussing the prevalence of online abuse, which "inflicts significant economic, emotional, and physical harm on women in much the same way that workplace sexual harassment does"); *see generally* Sarah E. Smith, Comment, *Threading the First Amendment Needle: Anonymous Speech, Online Harassment, and Washington's Cyberstalking Statute*, 93 WASH. L. REV. 1563 (2018) (describing how anonymous speech facilitates online harassment and cyberstalking).

78. *See, e.g.*, Josh Uyheng et al., *Bots Amplify and Redirect Hate Speech in Online Discourse About Racism During the COVID-19 Pandemic*, SOCIAL MEDIA + SOC'Y, July–Sept. 2022, at 1, 2.

number of accounts any one individual can have, even a single person can exaggerate the number of accounts espousing intolerant viewpoints. Each of these disadvantages of anonymous speech increases the amount of intolerant speech taking place online. Despite these disadvantages, anonymous speech is constitutionally protected under longstanding doctrine,[79] and has played an important and valuable role in the marketplace of ideas since the (pre-digital) time of the founding.[80]

In addition to anonymity, the volume of speech online and its consequent organization on digital platforms also creates complex incentives that encourage intolerance. Given the volume of speech online, not all speech will be heard. Online platforms have the unenviable task of determining how to prioritize some speech over others, given that humans have a finite capacity to consume information. And since most platforms seek to provide content that engages their users, they must also prioritize speech that generates, or is more likely to generate, engagement on those platforms.[81]

Assuming they want to be heard, speakers have the task of offering speech that will be prioritized and engaged with. Users may take advantage of algorithms that prioritize user engagement by offering speech that is more likely to generate engagement and attention. The most likely candidate for speech that generates engagement is speech providing unorthodox, out-group viewpoints (such as a "hot take"), or speech that may be considered divisive or aggressive.[82] This results in a vicious self-reinforcing cycle, where

79. Kaminski & Witnov, *supra* note 75, at 495–97; *see* Apratim Vidyarthi, *The Public Square Has Eyes (Or Cameras): Anonymous Speech Under the First and Fourth Amendments in the Age of Facial Recognition*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 630, 635–43 (2022) (describing the longstanding case law protecting anonymous speech and cited to solely because of that extensive analysis and not because I thought it would be bemusing to cite to my own Article); *see generally Obama Awards Obama a Medal*, KNOW YOUR MEME (2023), https://knowyourmeme.com/memes/obama-awards-obama-a-medal.

80. *See, e.g.*, Chesa Boudin, *Publius and the Petition:* Doe v. Reed *and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2150–56 (2011) (discussing the history of anonymous speech during the founding).

81. *See, e.g.*, Hannah Metzler & David Garcia, *Social Drivers and Algorithmic Mechanisms on Digital Media*, 19 PERSP. ON PSYCH. SCI. 735, 736–37 (2024) ("Most current digital-media algorithms strongly optimize for engagement. However, social success and quality of content are only partly correlated. Optimizing for popularity even seems to lower the overall quality of content. Engagement metrics primarily promote content that fits immediate human social, affective, and cognitive preferences and biases rather than quality content . . . ." (citations omitted)); Haochen Sun, *The Right to Know Social Media Algorithms*, 18 HARV. L. & POL'Y REV. 1, 33 (2024) ("[I]t is the commercial interests of social media companies, through engagement-driven algorithms or paid advertisements, that determine what users see.").

82. *See, e.g.*, Smitha Milli et al., *Engagement, User Satisfaction, and the Amplification of Divisive Content on Social Media*, KNIGHT FIRST AMEND. INST. (Jan. 3, 2024), https://knightcolumbia.org/content/engagement-user-satisfaction-and-the-amplification-of-divisive-content-on-social-media (describing a randomized experiment finding that Twitter's engagement-based

platforms encourage speech that generates engagement, and speakers then generate divisive speech to do the same.

This noxious combination of anonymous speech and the self-reinforcing cycle is worsened by First Amendment jurisprudence's inability to address a dynamic of disproportionality. In circumstances where the voice of "a few [could] drown[] out the [voices of the] many,"[83] current First Amendment jurisprudence offers few remedies.[84] The "drowning out" principle in the past has distorted speech, but with the supercharging effect of the digital marketplace of ideas, it is now silencing speech altogether, because powerful voices—such as those with bigger wallets or social media accounts—may inundate listeners, preventing less powerful voices from breaking through.[85] In the context of the paradox of tolerance, that means that powerful intolerant voices—amplified by the perverse incentives of digital speech and the protections of anonymous speech—may be able to drown out tolerant voices.

Taken together, anonymity, the self-reinforcing cycle, and the drowning out effect combine to create an online marketplace of ideas that supercharges and creates a preference for intolerance. Whereas the traditional marketplace of ideas was simply inadequate to address issues of intolerance because that marketplace could be inundated by intolerance, the digital marketplace is more predisposed to intolerant speech; it is also more difficult to regulate through the First Amendment.

B. Recent First Amendment Jurisprudence on Digital Speech Is Scattered and Makes It Difficult to Address Intolerant Speech

The Supreme Court's First Amendment jurisprudence regarding online speech has been generally skeptical of governmental regulations against

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ranking algorithm amplified emotionally charged, out-group hostile content that users say makes them feel worse about their political out-group); Luke Munn, *Angry by Design: Toxic Communication and Technical Architectures*, 7 HUM. & SOC. SCI. COMMC'NS 1 (2020) (examining online platforms and noting that major platforms privilege "incendiary content [that] set[s] up a stimulus-response loop that promotes outrage expression," and "lead[s] users towards more extreme content."); Daniel Hickey et al., *X Under Musk's Leadership: Substantial Hate and No Reduction in Inauthentic Activity*, PLOS ONE, Feb. 12, 2025, at 1, 3, 10 (finding that engagement on X, formerly known as Twitter, grew with 70% more likes for hate speech posts per week compared to an average of 24% more likes per week for randomly sampled English-language tweets); Aashish Srivastava, *Social Media and Online Trolling: Examining the Legal Developments in Platform Responsibilities for Tackling Trolling in the U.S., U.K., and Australia*, *in* HANDBOOK ON CYBER HATE 275, 277 (2024) (describing the history of online trolling in the U.S., U.K., and Australia).

83. Citizens United v. FEC, 558 U.S. 310, 441 (2010) (Stevens, J., dissenting) (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)).

84. *Id.* at 319 (majority opinion).

85. *See generally* Case Comment, *Drowning Out Democracy*, 137 HARV. L. REV. 2386, 2388–89 (2024).

online speakers. While there is little case law directly on point, the Court has written a few seminal opinions on how the First Amendment governs online speech, and some courts of appeals have provided further guidance. Those cases do not look at online speech through the characteristics of anonymity and volume presented above. Instead, the Court's cases assess regulations on online speech more broadly and end up applying strict scrutiny—the standard under which the Court is most skeptical of any government regulations[86]—to content-based regulations of digital speech. They also limit the government's ability to regulate online speech in cases where the government would otherwise have expansive power. And finally, they rule on the unique characteristic of private platforms hosting online speech by holding that private platforms have their own First Amendment rights that protect those platforms from government intrusion into how the platforms host and moderate speech.

First, in *Reno v. ACLU*, the Supreme Court applied strict scrutiny to strike down the Communications Decency Act of 1996 (CDA), which criminalized the knowing transmission of "obscene or indecent" messages to any recipient under the age of 18.[87] The Court held that speech on the internet is entitled to the highest level of First Amendment protection, similar to protections for traditional print media, and therefore applied strict scrutiny to the CDA's content-based regulation.[88] Because the CDA was a "content-based regulation of speech" that was not narrowly tailored, it failed strict scrutiny.[89] As such, under *Reno*, content-based regulations of online speech—such as speech that would regulate "intolerance"—are subject to strict scrutiny, narrowing the possibility of government regulation of intolerance.

In the two decades after *Reno*, the Court had various opportunities to address online speech but scarcely issued decisions addressing the core gravamen of digital First Amendment issues. That changed in the 2020s, with three pertinent cases incoherently shaping core First Amendment principles around digital speech.[90] First, in *Mahanoy Area School District v. B.L.*, the

86. *See, e.g.*, Sable Commc'ns v. FCC, 492 U.S. 115, 119, 126 (1989) (applying strict scrutiny to a content-based regulation and demonstrating that strict scrutiny requires that the government's law or policy abridging the First Amendment be narrowly "drawn" (that is, narrowly tailored) to achieve a compelling state interest).

87. 521 U.S. 844, 859 (1997).

88. *Id.* at 863, 882.

89. *Id.* at 871.

90. Note that the Court decided a host of digital First Amendment cases on jurisprudential grounds, rather than issuing decisions based on core First Amendment principles. For example, in *Murthy v. Missouri*, the Court reversed the Fifth Circuit's decision regarding allegations that the government

Court ruled that public schools could not regulate a student's vulgar language on social media because that speech was made off-campus, where the school did not stand *in loco parentis*.[91] *Mahanoy* provides a similar narrowing principle to *Reno*, limiting the avenues by which the government can regulate even children's speech, no matter how vulgar or problematic, by limiting the application of *in loco parentis* standing to speech made on-campus.

Then, in 2024, in *Moody v. NetChoice, LLC*, the Court addressed whether Florida and Texas laws regulating social media platforms' abilities to "control whether and how third-party posts are presented to other users" violated the platforms' First Amendment rights.[92] The Court noted preliminarily that social media platforms "receive the First Amendment's protection," especially when those platforms are "mak[ing] choices about what third-party speech to display and how to display it."[93] *Moody*, too, provides a narrowing principle, noting that private online platforms have their own First Amendment rights that may not be infringed upon by government regulations. As such, private platforms can create their own internal guidelines or regulations around how speech is governed, free from unnecessary government interference. Contrast this with the traditional public square, where the square—normally owned or operated by the government—was free from unreasonable government interference. In the online sphere, platforms have the option to govern speech with minimal constraint; in the traditional square, the government is constrained from governing speech. In both cases, that means the government is limited in regulating speech—and therefore, in regulating intolerance.

In contrast, in early 2025, in *TikTok, Inc. v. Garland*, the Court ruled that provisions of the Protecting Americans from Foreign Adversary Controlled Applications Act—which made it unlawful for companies in the United States to provide services to distribute, maintain, or update TikTok, the popular Chinese-owned social media platform—were constitutional.[94] The Court held that because the law applied to all speakers and speech on TikTok, the law was content-neutral, and was thus subject only to intermediate scrutiny.[95] Applying intermediate scrutiny, the Court held that the provisions

coerced social media companies to remove individuals' social media posts, because the individual plaintiffs lacked standing. 144 S. Ct. 1972, 1985 (2024).

91. 141 S. Ct. 2038, 2049 (2021).

92. 144 S. Ct. 2383, 2393 (2024).

93. *Id.*

94. 145 S. Ct. 57, 62 (2025).

95. *Id.* at 71–74. Under intermediate scrutiny, a court "will sustain a content-neutral law 'if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" *Id.* at 67 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997)).

furthered the important governmental interest of protecting national security against China, a foreign adversary's control of United States users' data; that the interest was unrelated to the suppression of free expression; and that the law did not burden more speech than was necessary to further that governmental interest.[96] But this outer limit only applies to content-neutral regulations (i.e., regulations not targeting one type of speech), and *TikTok* only assesses intermediate scrutiny through the governmental interest in national security. Any government policy that prevents intolerant speech is most likely to be one that is not content neutral, as it would be a content-based regulation (regulating only intolerant speech). Even if the government could plausibly argue that such a regulation was content neutral, in the context of *TikTok*, the government's rationale would necessarily have to be linked to national security. In sum, *TikTok* provides little help in "solving" the paradox.

Finally, in *Free Speech Coalition v. Paxton*, the Court held that Texas' age-verification law that mandated online users to provide identification details in order to access adult content on adult websites was subject only to intermediate scrutiny, despite the law being a content-based restriction on speech.[97] Because the law fell within a state's "traditional power to prevent minors from accessing speech that is obscene from their perspective," and Texas' approach had "only an incidental effect on [adults'] protected speech," the Court held that only intermediate scrutiny applied, and that the law satisfied intermediate scrutiny.[98] In contrast to *Mahanoy* and *Moody*, *Paxton*'s central thrust applies to (1) obscene speech, which the Court noted is not always constitutionally protected,[99] and (2) laws that protect minors from such obscene speech.[100] But applied to intolerant speech, *Paxton* is hardly applicable, because obscene speech is that which "appeals to the

96. *Id.* at 73–77.

97. 145 S. Ct. 2291, 2302 (2025).

98. *Id.* at 2306 (citations omitted).

99. *Id.* at 2303.

100. Contra NetChoice, LLC v. Bonta, 113 F.4th 1101, 1108 (9th Cir. 2024) (upholding injunction against California's Age-Appropriate Design Code Act, which required that covered businesses must opine on and mitigate the risk that children may be exposed to harmful or potentially harmful materials online). In contrast to *Paxton*, the law at hand in *Bonta* was not limited to minors' access to obscene speech, but instead to exposure to any "material detriment to children that arise from the data management practices of businesses." *Id.* at 1109 (citing CAL. CIV. CODE § 1798.99.31(a)(1)(A), (B)); *see* Comput. & Commc'ns Indus. Ass'n v. Uthmeier, No. 25-11881, 2025 U.S. App. LEXIS 30966, at *3 (11th Cir. Nov. 25, 2025) (holding that a statute that implicated the First Amendment by restricting expressive activities was content neutral because it targeted addictive features regardless of content; because the state had a substantial interest in protecting minors from addiction, the statute survived intermediate scrutiny). In line with *Paxton*, *Uthmeier* applied intermediate scrutiny, and upheld the considered law because of the state's interest in protecting minors. *Id.* at *14.

prurient interest," "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and "taken as a whole, lacks serious literary, artistic, political, or scientific value."[101] Intolerant speech may intersect with obscene speech, but obscenity jurisprudence is largely related to sexual content, which is orthogonal to intolerant content.

Nevertheless, applied to the paradox of tolerance, the Court's jurisprudence in *Reno*, *Mahanoy*, and *Moody* grants private entities the right to regulate speech on their platforms as they see fit, and limits the ability for the government to regulate intolerant speech.[102] In fact, recent jurisprudence in the Ninth Circuit in *Children's Health Defense v. Meta Platforms* reflects added protections for individual speakers: where a *platform* could be considered a state actor under existing Supreme Court case law, the platform could be held liable for furthering or participating in government coercion of private speech.[103] In short, despite the different nature of the online marketplace of ideas, First Amendment jurisprudence remains similarly skeptical of governmental regulations of that marketplace.

But this limit on the government's ability to police speech, despite digital speech incentivizing intolerance, is for good measure. Hate speech—which inarguably falls under the banner of intolerant speech—is protected under the First Amendment. In *Snyder v. Phelps*, the Court held that hateful speech such as "Thank God for Dead Soldiers" and "God Hates Fags" could not be the basis of liability for a tort of emotional distress.[104] Chief Justice Roberts, writing for the majority, noted:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen

101. *Paxton*, 145 S. Ct. at 2303 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

102. This Part solely analyzes the Court's First Amendment jurisprudence. Note, however, that Section 230 of the Communications Decency Act also grants immunity to online platforms and users from liability for third-party content. 47 U.S.C. § 230. In addition to the First Amendment, Section 230 further constrains third parties from holding platforms and users liable for speech, including intolerant speech, and therefore makes it difficult for a society to "solve" the paradox of tolerance. But because Section 230 is not squarely a First Amendment doctrine, this Article does not analyze the statute and associated case law. *See generally* Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) (holding that charges brought against Twitter for aiding and abetting terrorist attacks were not permissible under the Antiterrorism and Effective Death Penalty Act of 1996 and sidestepping questions related to Section 230 immunity); Force v. Facebook, 934 F.3d 53 (2d Cir. 2019) (holding that plaintiffs could not hold Facebook liable for terrorist groups' use of Facebook for terroristic activities because Facebook had Section 230 immunity).

103. 112 F.4th 742, 763–64 (9th Cir. 2024).

104. 562 U.S. 443, 448, 461 (2011).

> a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[105]

That constitutional tolerance of hate speech isn't limited to recent jurisprudence: it goes back to seminal First Amendment cases. In *Whitney v. California*, Justice Brandeis wrote that prohibiting "evil counsels" could backfire, because

> order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[106]

Brandeis' colloquy summarizes the First Amendment's incompatibility with "solving" the paradox of tolerance. The First Amendment prohibits "coercion" of discussion—the very coercion that Popper's solution requires against intolerance that would otherwise destroy a tolerant society.

But the colloquy also raises a more dangerous proposition: that of governing majorities. While a tolerant government that attempts to quash intolerance may be preferable, there is no guarantee that an intolerant "tyrann[y] of [a] governing majorit[y]" will not attempt to quash tolerant speech.[107] And even if the governing majority is not intolerant, a tolerant governing majority may be tempted to diminish free speech more than is necessary, according to the subjective norms of the tolerant majority.[108] Because of the inherent subjectivity of the concept of tolerance, there is no

105. *Id.* at 460–61; *but see* Volokh v. James, 148 F.4th 71, 101 (2d Cir. 2025) (certifying to the New York Court of Appeals a constitutional analysis of New York's Hateful Conduct Law, which required social media networks to have a clear policy on how they would address reports of "hateful conduct" as defined by the statute). As of May 2026, *Volokh* is pending before the New York Court of Appeals. Volokh v. James, 267 N.E.3d 1245 (2025).

106. 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

107. *Id.*

108. *A Response to Critics*, *supra* note 9, at 993.

way to guarantee that a government's attempt to quash intolerance may instead be seen and felt by some, or many, to be quashing tolerance. The First Amendment's protections of speech prevent the government from "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[109] It is clear, then, both because of its fundamentals and because of the current iteration of the First Amendment in the digital age, that the First Amendment does not have an answer to the paradox of tolerance.

CONCLUSION

Despite its inherent relationship to the paradox of tolerance, the First Amendment provides little relief in "solving" it. In contrast, other democracies without the equivalent of the First Amendment have been able to outlaw the speech of racists, fascists, and Nazis.[110] But notwithstanding the boundaries of the First Amendment, the Constitution provides outer bounds for preventing the kind of intolerance that Popper associated with tyranny.[111]

The most obvious "solution" to the paradox of tolerance lies at the voting booth, where the Constitution prevents an intolerant leader from holding more than two terms.[112] Ironically, the 22nd Amendment, which professes to protect democracy, is itself anti-democratic, because it prevents the people from freely electing a leader without constraint. But all political freedom has constraints.[113] In the same vein, the federalist structure of the Constitution provides another layer of protection against intolerance destroying tolerance. An intolerant federal power would not simply be able to destroy its tolerant subjects; instead, there may be competing state powers that protect those tolerant subjects. Of course, this assumes that those states, too, are willing to protect tolerance against intolerance.

A longer-term solution is to reduce the avenues by which intolerance organically develops. For example, a society that is primed to practice self-restraint may be one that develops tolerance over time.[114] Similarly, a society

109. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

110. Rosenfeld, *Extremist Speech*, *supra* note 52, at 1457.

111. See POPPER, *supra* note 3, at 117 & 581 n.4, where Popper discusses the paradox of freedom in the context of Plato's criticism of democracy and his story of the risk of the tyrant. Summarizing Plato, Popper states that a free man may exercise his absolute freedom by clamoring for a tyrant, ultimately destroying his own freedom. *Id.* at 117. Popper's paradox of tolerance arises as a corollary of this paradox of freedom. *Id.* at 581 n.4.

112. U.S. CONST. amend. XXII.

113. STANLEY L. BENN & R.S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 247–50 (1965).

114. THE TOLERANT SOCIETY, *supra* note 18, at 140–44.

that prioritizes diversity and education may increase tolerance by virtue of creating exposure to and a better understanding of dissimilar people.[115] Similarly, addressing other root causes of intolerance, such as economic anxiety, may prevent the growth of intolerance that raises the paradox of tolerance.

Finally, while the First Amendment alone provides little protection from the dangerous consequences of the paradox of tolerance, all is not lost or futile. Speakers can harness the First Amendment's protections to challenge intolerance. The First Amendment's protections do not simply prevent the government from destroying intolerance; they also prevent the government from destroying tolerance. And while the marketplace of ideas can be overtaken by seductive ideas of intolerance, that is simply a weakness of the marketplace, rather than a necessary outcome. In *many* instances, that marketplace of ideas *does* produce the truth, and tolerance *does* prevail over intolerance. That the marketplace is susceptible—especially in the current context of digital speech—to an errant outcome of falsehood or intolerance is not deterministic; it is only probabilistic. That means that speakers still have the ability to fight intolerance in that market. While the marketplace of ideas is still open, the fastest way to intolerance is failing to participate in that marketplace at all.

115. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330–32 (2003) (diversity facilitates cross-racial understanding, breaking racial stereotypes, improving workforce performance, improving national security, and improving civic participation); Per Adman & Lutz Gschwind, *Is the Positive Effect of Education on Ethnic Tolerance a Method Artifact? A Multifactorial Survey Experiment on Social Desirability Bias in Sweden*, 35 INT'L J. PUB. OP. RSCH., Winter 2023, at 1, 1 (finding that educated individuals are more tolerant toward ethnic minorities).