

# VERMONT LAW REVIEW

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VOLUME 50 NUMBER 2

SPRING 2026

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## FOREWORD: VERMONT LAW REVIEW CELEBRATES FIFTY YEARS

Fifty years ago, the first volume of the *Vermont Law Review* was published by students of the first graduating class. I was a recent law school graduate with law review experience, and Dean Thomas Debevoise had asked me to serve as the editor to guide the students through the process of creating the first volume. I told the story of that process in the Law Review's 20th anniversary volume.<sup>1</sup> I offer the following remarks in celebration of the 50th anniversary of this important and influential publication.

Dean Debevoise's vision was not just that the new law school would have a law review, but that it would be one with credibility and stature. In part as a result of his professional connections, we were able to solicit articles for the first volume from nationally recognized jurists and scholars. The foreword was written by the Hon. Sterry R. Waterman, Judge of the Court of Appeals of the Second Circuit. The articles were by Donald T. Trautman of Harvard Law School, an expert on conflict of laws; Norman J. Williams, Jr. of Rutgers Law School, a leading scholar on planning and zoning practices who had just begun to teach at Vermont Law School; Charles D. Ablard, General Counsel for the Department of the Army, an authority on wetlands protection; and Peter F. Coogan, a leading bankruptcy scholar who taught at the University of Southern California and Harvard and Yale Law Schools.

As was the law review custom, shorter Notes were written by the students. These focused on Vermont topics. Robert J. Angres (whose last name made him the very first student to graduate from Vermont Law School) wrote about juveniles' right to counsel in criminal pre-charge diversion programs in Vermont. He later had a successful civil practice in Nevada and was admitted to the Supreme Court of the United States in 2009. George K. Belcher did a critique of a Vermont Supreme Court case upholding the constitutionality of the state law authorizing driver's license suspension for failure to pay the poll tax. He was in private practice in Vermont before serving as the Washington County Probate Judge for 21 years, followed by assignments as an administrative judge. Frederick C. Giandomenico, the law school's first valedictorian, dissected the legal strategies used in the case of *Vermont v. New York*, in which the state sought remedies for pollution of Lake Champlain. After law school he returned to his hometown of Walpole, Massachusetts where he maintained a law practice with his brother. Louis J. Cattani wrote about inequity in the Vermont law of valuation of business inventory for tax purposes. He was the first student Editor-in-Chief of the *Vermont Law Review* the following year,

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<sup>1</sup> Mary Miles Teachout, *Vermont Law Review Celebrates Twenty Years*, 20 VT. L. REV. 1, 1 (1995).

and after graduation he maintained a solo private practice in both Vermont and New Hampshire until his untimely death from cancer. Lawrence Berger's note addressed a Vermont legislative proposal to exclude evidence of a victim's character in forcible rape cases. He practiced law in New York State for decades, representing federal law enforcement officers.

For the last 50 years, the *Vermont Law Review* has published pieces on broad national and international interests as well as articles and notes on issues of law specific to Vermont. The legal public has benefited from this scholarship, and the law review experience has enhanced the participating students' appreciation for the importance of thoughtful and detailed analysis, helping to prepare them for successful careers in the law. This resource had not existed in Vermont before that first volume, but it continues to enrich the work of lawyers, teachers, legislators, and judges in Vermont and elsewhere. We owe a debt of gratitude to those early pioneers and those who have followed in their footsteps through the pages of the *Vermont Law Review* over these last 50 years.

—*Mary Miles Teachout*

**THE FIRST AMENDMENT UNDER SIEGE: OR HOW TO  
CENSOR WITHOUT REALLY TRYING**

**Rodney Smolla**<sup>\*</sup>

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<sup>\*</sup> Professor of Law, Vermont Law and Graduate School, Senior Counsel, Meier Watkins Phillips Pusch, Washington, D.C.

## INTRODUCTION

The First Amendment as we know it is under siege. And it is under siege as we have rarely known it. Consider, as evidence of the siege, a sampling of Executive Branch orders and proclamations germane to free expression. The sampling may be first catalogued by subject—the viewpoints and perspectives disfavored by the Administration of President Trump. These include (among the highlights) desecrating the American Flag as a symbol of protest; expression promoting diversity, equity, and inclusion; advancing disfavored public health perspectives, such as disfavored views on vaccine policies; and advancing disfavored positions on environmental protection and climate change.<sup>1</sup> The sampling may secondly be catalogued by target—particular groups that have especially drawn the Administration’s ire and been threatened with retribution. These include major American law firms, American universities, and foreign nationals lawfully residing in the United States, among others.<sup>2</sup>

In this Article, I describe these attacks and critique their constitutionality. I conclude that, in many respects, the actions taken by the Administration violate existing First Amendment doctrines. On the optimistic side, I predict that when and if challenges to these actions reach the United States Supreme Court *on the merits*, the Supreme Court will declare many of the actions unconstitutional. On the pessimistic side, I fear that, nonetheless, much irreparable damage will already have been done.

In military terms, a “siege” is an operational tactic calculated to subdue or conquer an enemy by surrounding or isolating a fortified place, such as a city or fortress, without a direct attack, such as by starving the enemy into submission. The current attack on the First Amendment is such a “siege,” in that the Administration does not have to win all its battles in order to win the war. Many of the Administration’s actions are not “direct attacks,” to continue the military metaphor. Rather, through such tactics as cutting off federal funding or revoking other privileges, the Administration has often been able to coerce capitulation. Not everyone surrendered, to be sure. As will be seen, some law firms and universities relented to Administration pressure, reaching deals that often involved self-censorship, but other law firms and universities fought back.<sup>3</sup> On the whole, however, capitulation breeds capitulation. If not total victory, the Administration has gained such momentum from the deals it has cut that free expression writ large has been

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1. *See infra* Parts I, IV.

2. *See infra* Parts II–IV.

3. *See infra* Parts III, IV, V.

dealt a major blow, as more and more entities and individuals feel pressure to give up, lest the sword of Damocles should fall.

The damage has been exacerbated by delay. Time is on the government's side. Many federal district court judges have shown great courage in issuing preliminary injunctions against Administration policies that appear likely to violate the First Amendment. However, the Administration has been remarkably successful in overturning those injunctions, often by obtaining stays while the litigation continues, effectively putting off any final resolution on the merits for a year or more.<sup>4</sup> In the interim, the retribution continues. A law firm or a university faced with the immediate loss of hundreds of millions of dollars may deem it more practical to just accede rather than fight the good fight. This is especially so when the outcome is not guaranteed, and resolution may take years—years in which the funding is lost. Even more powerfully, the leverage exacted against one particularly vulnerable group—non-citizens lawfully residing in the United States—has a particularly powerful *in terrorem* effect. In short, it is possible to accomplish real-world censorship simply by laying siege.

#### I. THE FLAG DESECRATION ORDER

President Donald Trump issued an Executive Order on August 25, 2025, entitled *Prosecuting Burning of the American Flag*.<sup>5</sup> The Order recites that, “The American Flag is a special symbol in our national life that should unite and represent all Americans of every background and walk of life. Desecrating it is uniquely offensive and provocative.”<sup>6</sup> It goes on to declare: “[Desecrating the Flag] is a statement of contempt, hostility, and violence against our Nation—the clearest possible expression of opposition to the political union that preserves our rights, liberty, and security.”<sup>7</sup>

Plainly aware that the Order would be in tension with First Amendment principles, it added the additional preamble:

Notwithstanding the Supreme Court's rulings on First Amendment protections, the Court has never held that American Flag desecration conducted in a manner that is

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4. See Suzanne Monyak & Jacqueline Thomsen, *Trump Reigns Supreme in High Court Emergency Docket Decisions*, BLOOMBERG LAW (Jan. 27, 2026), <https://news.bloomberglaw.com/us-law-week/trump-reigns-supreme-in-high-court-emergency-docket-decisions>.

5. Exec. Order No. 14,341, 90 Fed. Reg. 42127 (Aug. 25, 2025).

6. *Id.* § 1, 90 Fed. Reg. at 42127.

7. *Id.*

likely to incite imminent lawless action or that is an action amounting to “fighting words” is constitutionally protected.<sup>8</sup>

The Order’s citation to *Texas v. Johnson* was political craftsmanship. *Texas v. Johnson* is the landmark decision holding that the First Amendment protects the burning of the American Flag as an act of symbolic expressive protest.<sup>9</sup> Yet the Order acts as if *Texas v. Johnson* is on the Administration’s side.

Shortly after the issuance of the Order, Jay Carey, a 22-year Army veteran, burned the Flag in Lafayette Park outside the White House as a gesture of symbolic protest against the President’s Executive Order, declaring that President Trump’s order violated the First Amendment.<sup>10</sup> Law enforcement immediately took him into custody.<sup>11</sup> The Administration claims that nothing in the Executive Order contradicts *Texas v. Johnson*.<sup>12</sup> Yet here we are with the likes of Jay Carey arrested for a symbolic act of protest against the Executive Order.<sup>13</sup> Even so, let’s pose it as an even fight. Is the Order constitutional or not?

As a preliminary matter, the Order includes several boilerplate statements at the end that are plainly intended to inoculate the Order from judicial challenge.<sup>14</sup> This language is a recurring leitmotif in virtually all of the Trump Administration’s Executive Orders or other “guidance” documents it has issued. It is a sort of “now you see it, now you don’t” approach to governance. The document in substance *seems* to dictate policy but then purports not to. The tactic is reminiscent of what Humpty Dumpty described: “‘When *I* use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”<sup>15</sup> The Administration, conjuring “Alice in Trumpland,” on the one hand seeks to legislate and regulate through Executive Orders. On the other hand, when challenged, the mantra tends to be “well, never mind.” It is as if the Executive

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8. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 408–10 (1989)).

9. *Johnson*, 491 U.S. at 407–10.

10. Khaleda Rahman, *Who is Jay Carey? Veteran Who Burned US Flag After Trump’s Executive Order*, NEWSWEEK (Aug. 26, 2025), <https://www.newsweek.com/jay-carey-veteran-burned-us-flag-2119229>.

11. *Id.*

12. Exec. Order No. 14,341 § 1, 90 Fed. Reg. at 42127.

13. Rahman, *supra* note 10.

14. Exec. Order No. 14,341 §§ 3–4, 90 Fed. Reg. at 42128.

15. *Broward Cnty. v. Fla. Carry, Inc.*, 313 So. 3d 635, 643 (Fla. Dist. Ct. App. 2021) (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 103 (1909)).

Orders are “[t]old by an idiot, full of sound and fury, [s]ignifying nothing.”<sup>16</sup> First Amendment law, fortunately, is not so credulous:

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she cannot do, however, is use the power of the State to punish or suppress disfavored expression.<sup>17</sup>

Let us assume, then, that the Order is “law” in the sense that courts know law.<sup>18</sup> The Order contemplates three different forms of prosecutorial enforcement.

First, the Order asserts that unprotected conduct—such as an incitement to violence or a hate crime—committed while desecrating the Flag will receive prioritized enforcement.<sup>19</sup>

Second, the Order asserts that Flag desecration carried out incident to the violation of some content-neutral laws will be targeted and referred for prosecution.<sup>20</sup> It thus prioritizes enforcement of criminal and civil laws “to the fullest extent possible” against “acts of American Flag desecration that violate applicable, content-neutral laws, while causing harm unrelated to expression, consistent with the First Amendment.”<sup>21</sup> Elaborating, the Order explains that this “may include, but is not limited to, violent crimes; hate crimes, illegal discrimination against American citizens, or other violations of Americans’ civil rights; and crimes against property and the peace, as well as conspiracies and attempts to violate, and aiding and abetting others to violate, such laws.”<sup>22</sup>

Third, the Order targets non-citizens. Among other prosecutorial actions to punish those who engage in flag desecration, the Order states:

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16. WILLIAM SHAKESPEARE, *MACBETH* act V, sc. 5, ll. 30–31.

17. *Nat’l Rifle Ass’n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024).

18. *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) (“[I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law . . .”).

19. Exec. Order No. 14,341 § 2(a), 90 Fed. Reg. at 42127.

20. *Id.* (“In cases where the Department of Justice or another executive department or agency (agency) determines that an instance of American Flag desecration may violate an applicable State or local law, such as open burning restrictions, disorderly conduct laws, or destruction of property laws, the agency shall refer the matter to the appropriate State or local authority for potential action.”).

21. *Id.*

22. *Id.*

The Secretary of State, the Attorney General, and the Secretary of Homeland Security, acting within their respective authorities, shall deny, prohibit, terminate, or revoke visas, residence permits, naturalization proceedings, and other immigration benefits, or seek removal from the United States, pursuant to Federal law . . . whenever there has been an appropriate determination that foreign nationals have engaged in American Flag-desecration activity under circumstances that permit the exercise of such remedies pursuant to Federal law.<sup>23</sup>

To what extent are these three strategies for punishing flag desecration consistent with First Amendment principles? Begin with the unprotected conduct committed while desecrating the Flag. This poses a First Amendment conundrum.

But to set the baseline, let's start with the part that is not a conundrum. That baseline was set by the Supreme Court's 1989 decision in *Texas v. Johnson*.<sup>24</sup> This was a 5–4 decision, in which Justice Brennan wrote the opinion for the Court.<sup>25</sup> It is, along with his opinion for the Court in *New York Times Co. v. Sullivan*,<sup>26</sup> among Justice Brennan's two signature contributions to modern First Amendment law. Interestingly, the five Justices who comprised the majority in *Johnson* crossed ideological lines. Justice Brennan's opinion was joined by Justices Scalia, Kennedy, Marshall, and Blackmun.<sup>27</sup> The dissenters were Chief Justice Rehnquist, and Justices Stevens, White, and O'Connor.<sup>28</sup> There were liberals and conservatives on both sides.

The defendant in the case was Gregory Lee Johnson, who burned an American Flag as symbolic anti-war protest in Dallas in 1984, during the Republican National Convention, which nominated President Ronald Reagan for a second term.<sup>29</sup> Johnson was convicted of desecrating the Flag.<sup>30</sup> At the outset, Texas conceded (as it essentially had to concede) that Johnson's Flag-burning was "expressive conduct" that triggered some level of First Amendment scrutiny.<sup>31</sup> In Gregory Johnson's

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23. *Id.* § 2(d), 90 Fed. Reg. at 42127–28 (citing 8 U.S.C. §§ 1182(a), 1227(a), 1424, 1427, 1451(c) (2025)).

24. 491 U.S. 397, 408–10 (1989).

25. *Id.* at 398.

26. 376 U.S. 254, 256 (1964).

27. *Johnson*, 491 U.S. at 398.

28. *Id.*

29. *Id.* at 399.

30. *Id.* at 400.

31. *Id.* at 405–06.

own words: “The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn’t have been made at that time.”<sup>32</sup> What was not conceded by Texas, however, was the appropriate level of First Amendment scrutiny. That turned, then and now, on whether the burden placed on Johnson’s expressive Flag-burning was “content neutral,” and thus subject to the intermediate level of scrutiny established in *United States v. O’Brien*,<sup>33</sup> or content-based, and subject to strict scrutiny.<sup>34</sup>

*O’Brien* involved the burning of a draft card as a symbol of anti-war protest during the Vietnam War.<sup>35</sup> The Supreme Court ruled that only intermediate scrutiny was warranted because the federal law prohibiting destruction of a draft card was not based on disagreement with any message that might be conveyed.<sup>36</sup> Rather, it served important governmental interests unrelated to the suppression of expression.<sup>37</sup> The Court reasoned that Congress passed the law to ensure the Selective Service System functioned effectively—an interest the Court deemed content-neutral.<sup>38</sup> The Court thus upheld the draft-card burner’s conviction.<sup>39</sup>

*O’Brien* has always been hard to swallow on its facts because the historical record seemed to indicate that Congress was motivated by a desire to suppress anti-war protests.<sup>40</sup> But while the application of intermediate scrutiny to facts in *O’Brien* may have been dubious, the core notion that laws that are content-neutral should be subjected only to intermediate scrutiny has endured. In the recent TikTok ban case, for example, the law requiring divestiture of TikTok from Chinese ownership was deemed content-neutral and upheld by the Court.<sup>41</sup> Similarly, relying on *O’Brien*, the Court recently found that age-verification requirements for online pornography sites were content-neutral and upheld the requirements.<sup>42</sup>

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32. *Id.* at 406.

33. 391 U.S. 367, 376–77 (1968) (establishing intermediate scrutiny for incidental burdens on expressive conduct).

34. *Johnson*, 491 U.S. at 403.

35. *O’Brien*, 391 U.S. at 369.

36. *Id.* at 377.

37. *Id.*

38. *Id.*

39. *Id.* at 382.

40. RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 9:5 (2025 ed. 2025).

41. *TikTok Inc. v. Garland*, 145 S. Ct. 57, 72 (2025).

42. *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2309 (2025) (“In this respect, H.B. 1181 is analogous to the prohibition against destroying draft cards that this Court upheld in *United States v. O’Brien*. The prohibition may have had the effect of making it unlawful to protest the draft by burning one’s draft card. But, the ‘destruction’ of a draft card is not itself ‘constitutionally protected activity,’ because the card is a Government document that, among other functions, serves as proof of registration.

So, are laws prohibiting Flag desecration content-based or content-neutral? Or to put the point more pointedly, what's the difference between laws penalizing the burning of a draft card and the burning of the Flag? *Johnson* supplies the answer. While there are arguably content-neutral justifications for prohibiting destruction of a government document, such as a draft card, there are simply no conceivable content-neutral reasons for prohibiting the desecration of the Flag.

The Court rejected all of Texas's proffered interests to defend its law. Texas claimed that Flag desecration tends to encourage breach of the peace because many onlookers are likely to take serious offense in witnessing the spectacle.<sup>43</sup> This claim, the Court held, ran contrary to contemporary First Amendment principles because a major function of free speech is to invite dispute, even when the dispute is fraught with offense or anger.<sup>44</sup> The Court punctuated the point in a sentence that would achieve stature as a First Amendment classic, one of the most often quoted encapsulations of the very core of free speech principles: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>45</sup>

Particularly significant for purposes of analyzing President Trump's Executive Order, the Court in *Johnson* roundly rejected the notion that the government may simply *presume* that certain highly offensive speech will automatically qualify as "incitement" or "fighting words."<sup>46</sup>

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The prohibition on destroying draft cards thus placed only an incidental burden on First Amendment expression, making it subject to intermediate scrutiny. So too here, because accessing material obscene to minors *without verifying one's age* is not constitutionally protected, any burden H.B. 1181 imposes on protected activity is only incidental, and the statute triggers only intermediate scrutiny." (citations omitted)).

43. *Texas v. Johnson*, 491 U.S. 397, 408 (1989).

44. *Id.* at 408–09 ("Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)) (citing *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988))).

45. *Id.* at 414 (citing *Hustler Mag.*, 485 U.S. at 55–56; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462–63 (1980); *Fed. Comm'n Comm'n v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63–65, 67–68 (1976); *Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142–43 (1966); *Stromberg v. California*, 283 U.S. 359, 368–69 (1931)).

46. *Id.* at 408–10.

Gregory Johnson's expression clearly qualified as neither. *Johnson* fully repudiated Texas's argument that there is something inherent in Flag desecration to qualify it as unprotected speech. Johnson's conviction was grounded entirely on the communicative impact of the expressive conduct, particularly the emotional reaction of onlookers.<sup>47</sup> Yet criminalizing "offensive or disagreeable" speech runs directly contrary to what the Court famously described as a "bedrock principle" in *Johnson*.<sup>48</sup>

## II. ATTACKS ON NON-CITIZEN LAWFUL AMERICAN RESIDENTS

President Trump's flag-desecration Executive Order illustrates one of the most powerful weapons in the federal government's current siege against freedom of speech: the threat of deporting persons who engage in disfavored speech. This includes non-citizens lawfully residing in the United States, such as foreign nationals on student or work visas.

The government's position is that entry into the United States is a privilege granted at the grace of the United States as a sovereign.<sup>49</sup> Entry may come with whatever conditions the government chooses to impose.<sup>50</sup> This includes the condition that the guest of this country not abuse the privilege of having been granted entry by presuming to criticize or protest against the guest's sovereign host.<sup>51</sup>

Opposing this view, non-citizen lawful residents of the United States argue that once lawfully admitted into the country, lawful non-citizens are entitled to the same First Amendment rights as citizens.<sup>52</sup> These rights must of course include the right to engage in peaceful protest against official governmental policies and practices.<sup>53</sup> Distilled to its core, the issue thus joined is whether lawfully admitted non-citizens residing in the United States possess the same free speech rights as citizens enjoy. The issue has been central to a number of cases challenging Executive Orders that target noncitizens.

In *American Association of University Professors v. Rubio*, United States District Judge William Young held that foreign citizens lawfully within the United States possess "at least the core rights protected by the First

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47. *Id.* at 412.

48. *Id.* at 414.

49. *Harisiades v. Shaughnessy*, 342 U.S. 580, 586–87 (1952).

50. *Id.* at 586–88; *id.* at 596–97 (Frankfurter, J., concurring).

51. This is the position the government has taken with regard to non-citizens, law firms, and universities. See *infra* note 61 and accompanying text; *infra* Parts II–IV.

52. See *infra* note 57 and accompanying text.

53. See *infra* note 57 and accompanying text.

Amendment, chief among them the right to speak on political subjects.”<sup>54</sup> The government in *American Association of University Professors* relied on the Supreme Court’s decision in *Harisiades v. Shaughnessy*.<sup>55</sup> In *Harisiades*, the Supreme Court upheld the deportation of lawful-resident aliens because they were once members of the Communist Party.<sup>56</sup> In resisting deportation, the non-citizens made the claim that as lawful residents of the United States, they were entitled to the same rights as American citizens.<sup>57</sup> The Supreme Court rejected this contention, invoking the reasoning of the once-dominant *right-privilege distinction*.<sup>58</sup> In constitutional law, the *right-privilege distinction* applies when a person is granted a *privilege* by the government.<sup>59</sup> That privilege may be subject to conditions—or revoked entirely—at the will of the government because it was never a formally vested “right.”<sup>60</sup>

As the Supreme Court in *Harisiades* put it: “Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government’s power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.”<sup>61</sup>

This statement from *Harisiades* essentially encapsulates the current position of the Trump Administration in a nutshell. The argument is pristine in its simplicity, boiling down to this: You are here as a guest of the United States as a matter of sovereign hospitality; you may be ejected for any reason that the ruling administration deems appropriate because, as a guest, you do not enjoy the rights of citizens. The question is whether the Trump Administration’s position—which appears backed by *Harisiades*—is sound constitutional law, or whether more contemporary developments in constitutional jurisprudence have superseded it.

The District Court in *American Association of University Professors* took the view that *Harisiades* is no longer valid.<sup>62</sup> And for good reason.

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54. 780 F. Supp. 3d 350, 382 (D. Mass. 2025).

55. 342 U.S. 580 (1952); *Rubio*, 780 F. Supp. 3d at 382.

56. *Harisiades*, 342 U.S. at 592.

57. *Id.* at 584 (“Their basic contention is that admission for permanent residence confers a ‘vested right’ on the alien, equal to that of the citizen, to remain within the country, and that the alien is entitled to constitutional protection in that matter to the same extent as the citizen.”).

58. *Id.* at 586–87.

59. Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 71 (1982) [hereinafter *Reemergence of the Right-Privilege Distinction*].

60. *Id.* at 71–72; see *Harisiades*, 342 U.S. at 586–87.

61. *Id.*

62. *Am. Ass’n. of Univ. Professors v. Rubio*, 780 F. Supp. 3d 350, 382 (D. Mass. 2025) (“The Public Officials’ reliance on case law from the height of the second Red Scare era, such as *Harisiades v. Shaughnessy* is misplaced, and this Court assumes instead that noncitizens lawfully present in the United

*Harisiades* was decided in 1952, well before modern First Amendment principles that provide robust protection for free speech. In that era, mere membership in disfavored organizations, such as the Communist Party, could be proscribed.<sup>63</sup> Under the now-dominant First Amendment regime, content and viewpoint discrimination are presumptively unconstitutional.<sup>64</sup> *Harisiades* was a child of the *Red Scare* epoch in American history, with its obsessive fear of communism and the notorious red-baiting tactics of McCarthyism.<sup>65</sup> Yet modern First Amendment doctrine has long since passed this epoch.<sup>66</sup>

It is worth a brief interjection here to remind the reader what the Red Scare epoch was like, and how, even as quickly as just three years after *Harisiades*, the Supreme Court began to push back against it. The Supreme Court's 1955 decision in *Peters v. Hobby*<sup>67</sup> is an important exemplar. John P. Peters was a medical science professor at Yale.<sup>68</sup> He was an expert in the study of metabolism.<sup>69</sup> Because of his eminence in the field of medical science, he was employed as a Special Consultant in the United States Public Health Service of the Federal Security Agency.<sup>70</sup> Administrators drummed Professor Peters out of government service, finding that he was "disloyal" to the United States.<sup>71</sup> The Supreme Court, in an opinion by Chief Justice Earl Warren, held that the actions taken against Peters were illegal and ordered that the finding of his disloyalty be expunged.<sup>72</sup> Peters

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States have at least the core rights protected by the First Amendment, chief among them the right to speak on political subjects at least where such speech poses no immediate threat to others.") (internal citation omitted).

63. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961).

64. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional . . ."); *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) ("Viewpoint discrimination,' as we have put it, represents 'an egregious form' of content regulation, and governments in this country must nearly always 'abstain' from it." (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

65. *Rubio*, 780 F. Supp. 3d at 382.

66. See cases cited *supra* note 63.

67. 349 U.S. 331 (1955). The United States was represented in the case by none other than Warren Burger, then an Assistant Attorney General, who would of course later become Chief Justice of the United States Supreme Court. *Id.* at 332.

68. *Id.* at 333.

69. *Id.*

70. *Id.*

71. *Id.* at 337.

72. *Id.* at 348–49 ("Initially petitioner is entitled to a declaratory judgment that his removal and debarment were invalid. He is further entitled to an order directing the respondent members of the Civil Service Commission to expunge from its records the Loyalty Review Board's finding that there is a reasonable doubt as to petitioner's loyalty and to expunge from its records any ruling that petitioner is barred from federal employment by reason of that finding.").

was not reinstated because the job term had expired.<sup>73</sup> The majority opinion in *Peters* was based on perceived technical deficiencies in the procedures followed by the disloyalty board that impugned Dr. Peters.<sup>74</sup> Although the majority opinion by Chief Justice Warren was somewhat sterile in its reliance on technical procedural defaults, one passage in the opinion hinted at the deeper values at stake:

While loyalty proceedings may not involve the imposition of criminal sanctions, the limitation on the Board's review power to adverse determinations was in keeping with the deeply rooted principle of criminal law that a verdict of guilty is appealable while a verdict of acquittal is not. This safeguard was one of the few, and perhaps one of the most important, afforded an accused employee under the Order. Its effect was to leave the initial determination of his loyalty to his co-workers in the department—to his peers, as it were—who knew most about his character and his actions and his duties. He was thus assured that his fate would not be decided by political appointees who perhaps might be more vulnerable to the pressures of heated public opinion.<sup>75</sup>

This notion that “political appointees” might be influenced by the “pressures of heated public opinion” to brand Dr. Peters disloyal was clearly an important animating backdrop to the majority's opinion.<sup>76</sup> Two Supreme Court Justices, Justices Black and Douglass, however, saw deeper constitutional issues in the case. Justice Black saw potential separation of powers issues; he doubted Congress had authorized the disloyalty purge.<sup>77</sup> Justice Douglas's opinion, however, was the most prescient and germane to the fundamental civil liberties at stake when the government proclaims that

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73. *Id.* at 349 (“His prayer for reinstatement, however, cannot be granted, since it appears that the term of petitioner's appointment would have expired on December 31, 1953, wholly apart from his removal on loyalty grounds.”).

74. *Id.* at 340.

75. *Id.* at 344–45.

76. *Id.* at 345.

77. *Id.* at 350 (Black, J., concurring) (“But I wish it distinctly understood that I have grave doubt as to whether the Presidential Order has been authorized by any Act of Congress. That order and others associated with it embody a broad, far-reaching espionage program over government employees. These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here. And of course the Constitution does not confer lawmaking power on the President.”).

public employees should be dismissed on accusations of disloyalty by “faceless informers.”<sup>78</sup> In a powerful passage, Justice Douglas wrote:

Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. . . . We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. . . . It is an un-American practice which we should condemn.<sup>79</sup>

What was true in 1955 is true in 2026. The actions of the federal government today reprise the witch-hunt tactics of the Red Scare epoch. They are un-American practices “which we should condemn.”<sup>80</sup>

### III. ATTACKS ON LAW FIRMS

A number of President Trump’s Executive Orders targeted major American law firms. President Trump’s Administration sought to penalize those firms for taking positions—past and present—contrary to the views and agenda of the Administration. The prominent law firms so targeted took two opposite approaches. Many major firms settled with the Trump Administration, agreeing to cease the actions that drew the attacks and to provide hundreds of millions of dollars in pro bono legal services on behalf of President Trump’s favored causes.<sup>81</sup>

Other firms fought back against President Trump’s Executive Orders, filing federal court suits alleging that the Orders were illegal. The firms

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78. *Id.* at 352 (Douglas, J., concurring).

79. *Id.* at 350–52.

80. *Id.* at 352.

81. According to *The New York Times*, major law firms that reached such deals with the Trump Administration included: Paul, Weiss, Rifkind, Wharton & Garrison; Skadden, Arps, Slate, Meagher & Flom; Willkie Farr & Gallagher; Milbank; Kirkland & Ellis, Latham & Watkins, A&O Shearman; Simpson Thacher & Bartlett; and Cadwalader, Wickersham & Taft. See Matthew Goldstein, *Five More Big Law Firms Reach Deals with Trump*, N.Y. TIMES (Apr. 11, 2025), <https://www.nytimes.com/2025/04/11/business/trump-law-firms-kirkland-ellis-latham-watkins.html>.

The firms settled for various amounts, with many agreeing to provide as much as \$100 million to \$125 million in pro bono or free legal work to causes favored by President Trump. *Id.*

fighting back include Susman Godfrey,<sup>82</sup> Perkins Coie,<sup>83</sup> Wilmer Cutler Pickering Hale & Dorr,<sup>84</sup> and Jenner & Block.<sup>85</sup> And that number may grow. The central claim in many of those suits was that the President's Executive Order violated the First Amendment.<sup>86</sup>

In the preliminary stages of this law firm litigation, the law firms with the spine to challenge the Executive Orders have prevailed against President Trump. In the *Wilmer* litigation, United States District Judge Richard J. Leon granted in part and denied in part preliminary relief under the First Amendment.<sup>87</sup> In the *Susman Godfrey* litigation, United States District Judge Loren L. Alikhan issued a temporary restraining order barring the government from enforcing any actions against the firm.<sup>88</sup> In the *Perkins Coie* litigation, United States District Judge Beryl A. Howell declared President Trump's Executive Order against the firm unconstitutional.<sup>89</sup> Judge Howell opened with the observation that no President in American history had so brazenly attacked the independence of lawyers, noting that President Trump's actions channeled the tactics memorialized by the famous exhortation from William Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers."<sup>90</sup> And in the *Jenner & Block* litigation, United States District Judge John D. Bates, in an elegantly

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82. *Susman Godfrey LLP v. Exec. Off. of President*, 2025 WL 1113408, at \*1 (D.D.C. Apr. 15, 2025). [Author's Disclosure:] President Trump's attack on the Susman Godfrey firm was driven by that firm's leading role in its successful advocacy on behalf of Dominion Voting against Fox News, predicated on the false claims by Fox that Dominion was complicit in stealing the 2020 presidential election from President Trump, a claim debunked by the court in that litigation. I served as co-counsel with the Susman Godfrey law firm in representing Dominion in that litigation.

83. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 120 (D.D.C. 2025).

84. *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*, 774 F. Supp. 3d 86, 88 (D.D.C. 2025).

85. *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 88 (D.D.C. 2025).

86. *See infra* notes 87–88, 90, 92, 94 and accompanying text.

87. *Wilmer*, 774 F. Supp. 3d at 88.

88. *Susman Godfrey LLP v. Exec. Off. of President*, 2025 WL 1113408, at \*1 (D.D.C. Apr. 15, 2025).

89. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 181 (D.D.C. 2025).

90. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 118–19 (D.D.C. 2025) ("No American President has ever before issued executive orders like the one at issue in this lawsuit targeting a prominent law firm with adverse actions to be executed by all Executive branch agencies but, in purpose and effect, this action draws from a playbook as old as Shakespeare, who penned the phrase: 'The first thing we do, let's kill all the lawyers.' When Shakespeare's character, a rebel leader intent on becoming king hears this suggestion, he promptly incorporates this tactic as part of his plan to assume power, leading in the same scene to the rebel leader demanding '[a]way with him,' referring to an educated clerk, who 'can make obligations and write court hand.' Eliminating lawyers as the guardians of the rule of law removes a major impediment to the path to more power." (citations omitted) (quoting WILLIAM SHAKESPEARE, *HENRY VI, PART 2*, act 4, sc. 2, ll. 74–75, 90, 106) (citing *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) ("disposing of lawyers is a step in the direction of a totalitarian form of government"))).

forceful opinion, issued a preliminary injunction against the Trump Administration's enforcement of actions against the Jenner firm.<sup>91</sup> As Judge Bates eloquently put it:

In our constitutional order, few stars are as fixed as the principle that no official “can prescribe what shall be orthodox in politics.” And in our constitutional order, few actors are as central to fixing that star as lawyers.

This case arises from one of a series of executive orders targeting law firms that, in one way or another, did not bow to the current presidential administration's political orthodoxy. Like the others in the series, this order—which takes aim at the global law firm Jenner & Block—makes no bones about why it chose its target: it picked Jenner because of the causes Jenner champions, the clients Jenner represents, and a lawyer Jenner once employed. Going after law firms in this way is doubly violative of the Constitution. Most obviously, retaliating against firms for the views embodied in their legal work—and thereby seeking to muzzle them going forward—violates the First Amendment's central command that government may not “use the power of the State to punish or suppress disfavored expression.” More subtle but perhaps more pernicious is the message the order sends to the lawyers whose unalloyed advocacy protects against governmental viewpoint becoming government-imposed orthodoxy. This order, like the others, seeks to chill legal representation the administration doesn't like, thereby insulating the Executive Branch from the judicial check fundamental to the separation of powers. It thus violates the Constitution and the Court will enjoin its operation in full.<sup>92</sup>

The early success of the law firms challenging President Trump's actions should, if extant First Amendment principles are conscientiously applied, end in final success as well. Democracy was not the signature contribution of the United States Constitution to the advance of human civilization. Democracy as an idea and a reality has existed for millennia in ancient Greece and Rome. The unique American contribution to the advance

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91. *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 88 (D.D.C. 2025).

92. *Id.* (first quoting *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); and then quoting *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024)).

of human affairs was the idea of *rights*, enforceable *against* the government by an *independent* judiciary.<sup>93</sup> And the enforcement of those rights was entrusted to an independent judiciary and the vigorous advocacy of lawyers through an adversarial system grounded in fundamental values of due process and the rule of law. The Trump Administration’s retaliatory attacks on law firms who dare to represent clients and causes disfavored by the Administration are no less than a siege against the core principles upon which the nation was founded.<sup>94</sup> The stalwart federal judges who have stood up to those attacks should be commended. One hopes their courage will be vindicated as the cases proceed.

#### IV. ATTACKS ON UNIVERSITIES

The Trump Administration has also targeted American universities through a plethora of Executive Orders. The core of that targeting is a document entitled *Compact for Academic Excellence in Higher Education* (Compact).<sup>95</sup> The Compact addresses such topics as “equality in admissions,” “marketplace of ideas and civil discourse,” “nondiscrimination in faculty and administrative hiring,” “institutional neutrality,” “student learning,” “student equality,” “financial responsibility,” and “foreign entanglements.”<sup>96</sup> In exchange for adherence to the Compact’s directives, universities may keep their federal grant funding.<sup>97</sup> But universities that violate the Compact will lose access to “all monies advanced by the U.S. government.”<sup>98</sup>

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93. The importance of rights and the corresponding independence of the judiciary is a recurring theme in the messages of Chief Justice John Roberts. See CHIEF JUSTICE JOHN ROBERTS, 2025 YEAR END REPORT ON THE FEDERAL JUDICIARY 3–7 (2025).

94. *Jenner & Block*, 784 F. Supp.3d at 94 (“Jenner’s primary claim—and its most straightforward winner—is the First Amendment retaliation claim. To prevail, Jenner ‘must show (1) that it engaged in protected conduct, (2) that the government took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff’s position from speaking again, and (3) that there exists a causal link between the exercise of a constitutional right and the adverse action taken against him.’ At prong three, ‘[t]he improper motive must be a but-for cause of the government action, meaning that the adverse action . . . would not have been taken absent the retaliatory motive.’” (alteration in original) (first quoting *Scahill v. District of Columbia*, 909 F.3d 1177, 1185 (D.C. Cir. 2018); and then quoting Comm. on Ways & Means, U.S. House of Reps. v. U.S. Dep’t of Treasury, 45 F.4th 324, 340 (D.C. Cir. 2022))).

95. Exec. Off. of the President, *Compact for Academic Excellence in Higher Education* (Oct. 1, 2025) [hereinafter *Compact for Academic Excellence in Higher Education*] (available at: <https://www.washingtonexaminer.com/wp-content/uploads/2025/10/Compact-for-Academic-Excellence-in-Higher-Education-10.1.pdf>).

96. §§ 1–8.

97. § 10.

98. *Id.*

Of particular concern for the purposes of this Article are a number of provisions in the Compact that directly concern expressive activity. The Compact contains hortatory language with which it is impossible to disagree, proclaiming: “Truth-seeking is a core function of institutions of higher education. Fulfilling this mission requires maintaining a vibrant marketplace of ideas where different views can be explored, debated, and challenged.”<sup>99</sup> That is the good news. Here is the bad. The Compact also contains requirements that are brazenly tilted in favor of conservative viewpoints—the very antithesis of a “vibrant marketplace of ideas.” In one extraordinary sentence, for example, the Compact states: “Signatories commit themselves to revising governance structures as necessary to create such an environment, including but not limited to transforming or abolishing institutional units that purposefully punish, belittle, and even spark violence against conservative ideas.”<sup>100</sup> The Compact addresses the ongoing tensions at universities involving the *heckler’s veto* problem.<sup>101</sup> It requires that:

Universities shall be responsible for ensuring that they do not knowingly: (1) permit actions by the university, university employees, university students, or individuals external to the university community to delay or disrupt class instruction or disrupt libraries or other traditional study locations; (2) allow demonstrators to heckle or accost individual students or groups of students; or (3) allow obstruction of access to parts of campus based on students’ race, ethnicity, nationality, or religion. Signatories commit to using lawful force if necessary to prevent these violations and to swift, serious, and consistent sanctions for those who commit them.<sup>102</sup>

The Compact requires universities to adopt policies prohibiting “support for entities designated by the U.S. government as terrorist organizations.”<sup>103</sup> The Compact’s insistence on “institutional neutrality” requires that “all university employees, in their capacity as university representatives, will abstain from actions or speech relating to societal and political events except in cases in which external events have a direct impact upon the university.”<sup>104</sup> The Compact purports to distinguish what is forbidden—speaking on

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99. § 2.

100. *Id.*

101. *Id.*

102. *Id.* (footnote omitted).

103. *Id.*

104. *Id.*

political or social events in an employee’s official capacity—from what is permitted—speaking as an individual: “All university members, including students, faculty, and staff, are encouraged to comment on current events in their individual capacities, provided they do not purport to do so on behalf of the university or any of its sub-divisions.”<sup>105</sup>

On the issue of student equality, the Compact states: “Women’s equality requires single-sex spaces, such as bathrooms and locker rooms, and fair competition, such as in sports. Institutions commit to defining and otherwise interpreting ‘male,’ ‘female,’ ‘woman,’ and ‘man’ according to reproductive function and biological processes.”<sup>106</sup> The Compact then dictates quotas to universities on the number of international students they may admit, including limits on how many students may come from any one country.<sup>107</sup> The Compact is a curious document, speaking in doublespeak worthy of the sinister governments imagined by Franz Kafka’s *The Trial*,<sup>108</sup> George Orwell’s *1984*,<sup>109</sup> or Ray Bradbury’s *Fahrenheit 451*.<sup>110</sup> For while paying lip service to ideals of academic freedom and the marketplace of ideas, the Compact engages in an insidious undermining of those ideas, part Machiavelli and part Mafia. As the Mafia patriarch Don Corleone (played by Marlon Brando) infamously quipped in *The Godfather*, “I’m gonna make him an offer he can’t refuse.”<sup>111</sup>

Writ large, the Compact is a devious incursion on honored American traditions of academic freedom. To reprise *The Godfather*, by attempting to make universities accept an offer they can’t refuse, the Compact exerts an *in*

105. § 4.

106. § 6.

107. § 8.

108. See generally FRANZ KAFKA, *THE TRIAL* (1925) (*The Trial* is perhaps the most famous legal novel dealing with the terrifying experience of a person charged for reasons he cannot fathom and for which he can obtain no explanation. It is from that novel that the common pejorative “Kafkaesque” is so often used to critique governmental procedures that are deemed by judges or lawyers as lacking in transparency or accountability or otherwise devoid of rationality); see, e.g., *Riley v. Bondi*, 145 S. Ct. 2190, 2219 (2025) (Sotomayor, J., dissenting) (criticizing actions of the Administration of President Trump and Attorney General Pam Bondi as illogical and absurd, joined by Justices Kagan, Jackson, and Gorsuch, describing the actions as “Kafkaesque” (quoting Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colo., 145 S. Ct. 1497, 1513 (2025))).

109. See generally GEORGE ORWELL, *1984* (1949) (exploring themes of an omnipresent oppressive government, coining phrases such as “Big Brother” and giving rise to the common pejorative “Orwellian”); see, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 720 (2010) (referring to an “Orwellian explanation” pejoratively).

110. See generally RAY BRADBURY, *FAHRENHEIT 451* (1953) (The most famous work of American literature ever to explore themes of censorship and conformity); see also Rodney A. Smolla, *The Life of the Mind and a Life of Meaning: Reflections on Fahrenheit 451*, 107 MICH. L. REV. 895 (2009) (paying homage to the novel and exploring its themes of censorship and pressures of cultural conformity).

111. *THE GODFATHER* (Paramount Pictures 1972).

*terrorem* chill on students, faculty members, and others who comprise a university's community. As the Supreme Court recognized in *Keyishian v. Board of Regents of University of State of New York*,<sup>112</sup> striking down a plan to ferret "subversives" from state higher education institutions:

The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says." The result must be to stifle "that free play of the spirit which all teachers ought especially to cultivate and practice."<sup>113</sup>

In *Sweezy v. New Hampshire*,<sup>114</sup> the Supreme Court observed that the "essentiality of freedom in the community of American universities is almost self-evident."<sup>115</sup> Emphasizing the "vital role in a democracy that is played" by universities, the Court warned that to "impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."<sup>116</sup> More importantly, Justice Felix Frankfurter expressed similar sentiments in a concurring opinion.<sup>117</sup> Justice Frankfurter, a professor at Harvard before joining the Court, quoted from statements from South Africa in expressing what might be called the *soul* of the very idea of what a university should be. "In a university," Justice Frankfurter wrote, "knowledge is its own end, not merely a means to an end."<sup>118</sup> This ethos has consequences, the most important of which is safeguarding a university's essential *independence*. "A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest."<sup>119</sup> Justice Frankfurter then described "the four essential freedoms of the university," which are the freedoms "*to determine for itself* on academic

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112. 385 U.S. 589 (1967).

113. *Id.* at 601 (first quoting *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964); and then quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

114. 354 U.S. 234 (1957).

115. *Id.* at 250.

116. *Id.*

117. *Id.* at 263 (Frankfurter, J., concurring).

118. *Id.* at 262 (quoting THE CONF. OF REPS. OF THE UNIV. OF CAPE TOWN & THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10 (1957) [hereinafter OPEN UNIVERSITIES]).

119. *Id.* (quoting OPEN UNIVERSITIES, *supra* note 118, at 10).

grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>120</sup>

The Trump Administration’s Compact offends these traditions of academic freedom in countless ways. Most broadly, the Compact undermines the independence of universities. As Justice Frankfurter warned, a university cannot be true to its nature if the university becomes a “tool of . . . [the] State.”<sup>121</sup> Yet the entire animating purpose of the Compact is to render American universities tools of the federal government, advancing the viewpoints the current administration favors. And make no mistake, the Compact is dripping with viewpoint discrimination. Universities are required to abolish units that “belittle . . . conservative ideas.”<sup>122</sup>

The Compact denies universities the right to speak in their own voice on issues of political or social concern.<sup>123</sup> To be sure, there are many universities that have already adopted this policy of institutional neutrality, a policy that had its most famous genesis in the Kalven Report from the University of Chicago.<sup>124</sup> The gist of the Kalven Report is that a university should protect the freedom of students and faculty to speak out on issues, but not itself take institutional positions on such issues.<sup>125</sup> As an educator, I have personally favored the position adopted in the Kalven Report, and so on this score I actually agree with the position taken in the Compact. But many other educators disagree with the Kalven Report’s position, and that is their right. Critics include such estimable scholars as Yale Professor Robert Post, former Dean of Yale Law School.<sup>126</sup> The Compact thus forces universities to accept *one interpretation* of the proper institutional policy on taking official positions on public policies and events—an affront to the freedom of universities to decide such policies for themselves.

The Compact requires that universities ban “support” for terrorist organizations.<sup>127</sup> But while the Supreme Court has made it clear that the government may ban the provision of “material support or resources”<sup>128</sup> for

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120. *Id.* at 263 (emphasis added) (quoting OPEN UNIVERSITIES, *supra* note 118, at 11–12).

121. *Id.* at 262 (quoting OPEN UNIVERSITIES, *supra* note 118, at 10).

122. *Compact for Academic Excellence in Higher Education*, *supra* note 95, § 2.

123. § 4.

124. KALVEN COMM., UNIV. OF CHI., REPORT ON THE UNIVERSITY’S ROLE IN POLITICAL AND SOCIAL ACTION (1967).

125. *Id.*

126. Robert Post, *The Kalven Report, Institutional Neutrality, and Academic Freedom*, in REVISITING THE KALVEN REPORT: THE UNIVERSITY’S ROLE IN SOCIAL AND POLITICAL ACTION (Keith E. Whittington & John Tomasi eds., forthcoming) (manuscript at 5–6) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4516235](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4516235)).

127. *Compact for Academic Excellence in Higher Education*, *supra* note 95, § 2.

128. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 7–8 (2010) (quoting 18 U.S.C. § 2339(B)(a)(1)).

terrorist organizations, it has also made clear that mere independent advocacy in favor of the causes advanced by such organizations is protected by the First Amendment.<sup>129</sup> The key case is *Holder v. Humanitarian Law Project*.<sup>130</sup> The law at issue in *Holder* banned the provision of “material support or resources” to designated terrorist organizations.<sup>131</sup> Significantly, the Compact does not use that same term of art, “material support or resources,” but the far vaguer term “support.”<sup>132</sup> As such, the Compact is in tension with the reasoning of *Holder*, which clearly distinguished between conduct orchestrated by a terrorist organization itself, and *independent advocacy*, which remained outside the statute’s scope and constitutionally protected: “The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”<sup>133</sup> The Compact’s vague use of the term “support” could force universities to prohibit students, faculty members, or others within the university community, including outside speakers, from expressions of sympathy or advocacy supportive of the causes of entities designated by the government as terrorist groups. The Compact could place universities in the unseemly position of being forced to censor the free speech that speakers would otherwise enjoy.

In a similar vein, the Compact’s restrictive and conservative positions on gender identity act to impose positions on universities, such as on transgender discrimination contrary to the positions the universities would themselves adopt.<sup>134</sup>

In sum, by presuming to dictate policy on university governance structures, faculty appointments, and the composition of student bodies, the Compact stands as an insult to the “four essential freedoms of the university.”<sup>135</sup> Institutions of higher education are entitled to decide for themselves “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>136</sup>

The Compact aligns with other missives from the Administration aimed at higher education since President Trump’s second term began. The

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129. *See generally id.*

130. *Id.*

131. *Id.* at 7 (quoting 18 U.S.C. § 2339(B)(a)(1)).

132. *Compare* 18 U.S.C. § 2339(B)(a)(1) (“material support or resources”), *with Compact for Academic Excellence in Higher Education*, *supra* note 95, § 2 (“support”).

133. *Holder*, 561 U.S. at 31–32.

134. *Compact for Academic Excellence in Higher Education*, *supra* note 95, § 6.

135. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting OPEN UNIVERSITIES, *supra* note 118, at 11).

136. *Id.* (quoting OPEN UNIVERSITIES, *supra* note 118, at 12).

missives have consistently included claims by the government that programs dedicated to promoting diversity, equity, and inclusion constitute discrimination on the basis of race violating federal civil rights laws.<sup>137</sup> The Administration also claimed that the failure of American universities to crack down on students and faculty who sided with pro-Palestinian viewpoints in the aftermath of the October 7, 2023, Hamas terrorist attacks on Israel constituted anti-Semitism.<sup>138</sup>

It is difficult to predict how many universities will agree to the Compact, and how many will reject it. Lawsuits challenging the Administration's attacks on universities' academic independence remain ongoing works in progress. What can be said, however, is that the position the Administration has taken runs afoul of the core values of academic freedom that have long dominated American free speech jurisprudence. In the words of the Supreme Court: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."<sup>139</sup> Academic freedom is "therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>140</sup>

## V. CONCLUSION: FIGHTING BACK AGAINST THE SIEGE

I conclude this Article by highlighting three First Amendment doctrines that I believe are especially important in fighting back against the siege: (1) the unconstitutional conditions doctrine; (2) the distinction between "jawboning" and "coercion"; and (3) the powerful doctrine prohibiting viewpoint discrimination.

### A. Unconstitutional Conditions

Constitutional law was once dominated by what is typically called the "right-privilege distinction."<sup>141</sup> The right-privilege distinction is grounded in the argument that while citizens may enjoy certain constitutional "rights," government benefits—which are "privileges"—are a different matter.<sup>142</sup> The government may place conditions on the receipt of a government "privilege,"

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137. See Exec. Order No. 14,173 §§ 1–4, 90 Fed. Reg. 8633, 8633–35 (Jan. 31, 2025).

138. See Exec. Order No. 14,188 § 1, 90 Fed. Reg. 8847, 8847 (Feb. 3, 2025).

139. *Keyishian v. Bd. of Regents of U. of N.Y.*, 385 U.S. 589, 603 (1967).

140. *Id.*

141. See generally *Reemergence of the Right-Privilege Distinction*, *supra* note 59, at 71–76 (describing history of the right-privilege distinction).

142. *Id.*

which may include the surrender of constitutional freedoms (such as free speech) that the recipient would otherwise enjoy.<sup>143</sup> For example, a visa is a privilege, not a right. Thus, the government can grant the privilege—a visa—on the condition that the recipient not engage in protest activity criticizing the positions of the government. Similarly, a law firm has no right to government business, which is a privilege. Thus, the government may pressure law firms seeking to transact business with government agencies to agree to the conditions imposed by the government. And above all, there is no right to government funding. Universities that receive government funding—a privilege—may thus be forced to accept conditions on that funding, such as the Compact’s imposed conditions, even if universities would be otherwise free to engage in the activities the Compact prohibits.<sup>144</sup>

The right-privilege distinction is a recurring leitmotif of President Trump’s Administration. The three examples of the siege on free speech described in this Article—the attacks on the expressive rights of non-citizens, law firms, and universities—are all premised upon the right-privilege distinction.

The right-privilege distinction was a harsh doctrine.<sup>145</sup> Fortunately, the harshness of the doctrine has been mitigated by a counter-doctrine, known as the *unconstitutional conditions doctrine*.<sup>146</sup> The most famous repudiation of the right-privilege distinction, a repudiation embracing the countering unconstitutional conditions doctrine, comes from the Supreme Court’s 1972 decision in *Perry v. Sindermann*,<sup>147</sup> in which the Court proclaimed:

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes

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143. *Id.*

144. *Am. Ass’n of Univ. Professors v. Trump (AAUP v. Trump)*, No. 25-CV-07864, 2025 WL 3187762 (N.D. Cal. Nov. 14, 2025); *see infra* text accompanying notes 177–202 (discussing *AAUP v. Trump*).

145. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (describing history of the right-privilege distinction and critiquing it).

146. *See generally* *Reemergence of the Right-Privilege Distinction*, *supra* note 59; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) (describing evolution of the unconstitutional conditions doctrine); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1 (1988) (describing analytic groundings of unconstitutional conditions theory).

147. 408 U.S. 593 (1972).

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.<sup>148</sup>

Does this mean that *all* conditions placed on the receipt of government “privileges” restricting First Amendment freedoms are invalid? Not exactly. The First Amendment principles that have emerged are more complicated: sometimes conditions are permissible and sometimes not. The tensions between the right-privilege distinction and the unconstitutional conditions doctrine remain uneasy, and modern constitutional law is still a long way from completely working itself pure.<sup>149</sup> Yet even so, it is clear enough at present that for the government to simply declare, “your presence here is a privilege” will not on its own any longer cut it.

The best articulation of the divide between permissible and impermissible conditions was set forth by Chief Justice John Roberts in *Agency for International Development v. Alliance for Open Society International, Inc.*<sup>150</sup> Distilled to its core, *Alliance* explained the key First Amendment divide this way: “[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”<sup>151</sup> To be sure, as the opinion in *Alliance* recognized, “The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition.”<sup>152</sup> Yet at the end of the day, it is substance, not form, that matters. The government “cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”<sup>153</sup>

The Trump Administration’s actions attacking non-citizens, law firms, and universities should be deemed to violate the First Amendment because they attempt to do precisely what the *Alliance* test forbids—seeking to

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148. *Id.* at 597.

149. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 405 (1989) (“This process of reducing the gap between what the abstractions (rules) indicate and what direct application of the background justifications indicate is what Kalven saw as the law ‘working itself pure.’”).

150. 570 U.S. 205 (2013).

151. *Id.* at 214–15.

152. *Id.* at 215.

153. *Id.* (quoting *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 547 (2001)).

leverage funding to regulate speech outside the contours of the programs themselves—falling on the impermissible side of the First Amendment divide. Penalizing Diversity, Equity, and Inclusion (DEI) advocacy also violates existing First Amendment principles, falling on the forbidden side of the divide.

Whether this is where the Supreme Court lands on this issue, as cases challenging the Administration’s actions wend their way upward through the litigation process, remains to be seen. But there is hope. As an example, a federal district court in *National Association of Diversity Officers in Higher Education v. Trump*, applied the *Alliance* test in issuing preliminary injunctive relief in favor of plaintiffs challenging restrictions on DEI programming.<sup>154</sup> The court summarized the matter: “the government may not terminate government contracts or grants ‘because of the[] [contractors’ or grantees’] speech on matters of public concern.’”<sup>155</sup>

In reaching this assessment, it is necessary to also reject the claim by the Trump Administration that DEI programming is itself a form of illegal race discrimination. The government’s position is that DEI programming is a form of “affirmative action,” which was declared unconstitutional and a violation of Title VI of the Civil Rights Act of 1964 by the Supreme Court’s anti-affirmative action decision in *Students for Fair Admission v. Harvard*.<sup>156</sup> The argument that DEI programming equals impermissible affirmative action race discrimination has been a pervasive leitmotif of the Trump Administration, surfacing in many of the cases challenging President Trump’s Executive Orders.<sup>157</sup> The argument is fundamentally

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154. 767 F. Supp. 3d 243, 259 (D. Md. 2025).

155. *Id.* at 276 (alterations in original) (quoting *Bd. of Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 674 (1996) (“Recognizing that ‘constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights,’ our modern ‘unconstitutional conditions’ doctrine holds that the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.” (alterations in original) (first quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972); and then quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))).

156. 143 S. Ct. 2141 (2023).

157. *See Am. Ass’n of Colleges for Tech. Educ. v. McMahon*, 770 F. Supp. 3d 822, 837–38 (D. Md. 2025) (reciting from a government directive stating: “From the Supreme Court’s 1954 landmark opinion in *Brown v. Board of Education* to its 2023 decision in *Students for Fair Admissions, Inc. v. Fellows of Harvard College*, education has played a central role in this Nation’s fight against discrimination. It remains a priority of the Department of Education to eliminate discrimination in all forms of education throughout the United States. This includes ensuring that the Department’s grants do not support programs or organizations that promote or take part in diversity, equity, and inclusion (‘DEI’) initiatives or any other initiatives that unlawfully discriminate on the basis of race, color, religion, sex, national origin, or another protected characteristic. Illegal DEI policies and practices can violate both the letter and purpose of Federal civil rights law and conflict with the Department’s policy of prioritizing merit, fairness, and excellence in education. In addition to complying with the civil rights laws, it is vital

unsound. The decision in *Students for Fair Admission* banned race-conscious affirmative action policies in admission to colleges and universities.<sup>158</sup> The decision did not ban *academic discussion* of matters related to race, including matters relating to DEI. To equate curricular and extra-curricular academic programing relating to diversity with discrimination is an illogical and illegal leap.<sup>159</sup>

### B. When “Jawboning” Morphs into Coercion

In the fictional movie *The Godfather*, Marlon Brando as mafia boss Don Corleone made him an offer “he [couldn’t] refuse.”<sup>160</sup> Or, translated: relent or face a gun to the head. In the real-life world of the Trump Administration, Brendon Carr, the Chair of the Federal Communications Commission, disgruntled with commentary by late-night host Jimmy Kimmel in the aftermath of the Charlie Kirk murder, said publicly, “We can do this the easy way, or the hard way.”<sup>161</sup> Even conservative Texas Senator Ted Cruz saw Carr’s remarks as similar to those of a mafioso boss.<sup>162</sup> Once again, two truisms sign off in opposition. On the one hand, government officials are entitled to express themselves, including “jawboning” to encourage private actors, such as Jimmy Kimmel’s employer, ABC, to take

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that the Department assess whether all grant payments are free from fraud, abuse, and duplication, as well as to assess whether current grants are in the best interests of the United States.” (quoting Directive on Department Grant Priorities, Denise L. Carter, Dep’t of Educ., Eliminating Discrimination and Fraud in Department Grant Awards (Feb. 5, 2025) (on file with the *Vermont Law Review*) (promulgated following Executive Order 14,151)).

158. *Students for Fair Admission*, 143 S. Ct. at 2166.

159. See Nat’l Educ. Ass’n v. U.S. Dep’t of Educ., 779 F. Supp. 3d 149, 199–200 (D.N.H. 2025) (“The obligations imposed by the 2025 Letter are new. Indeed, as recently as 2023, the Department advised schools and regulated entities that DEI programs were not only lawful, but to be encouraged. Defendants’ argument that the 2025 Letter merely interprets Title VI obligations announced in the *Students for Fair Admissions* case is not persuasive. While the Supreme Court held in *Students for Fair Admissions* that the use of racial preferencing in admissions failed to satisfy strict scrutiny, the Court did not hold that the Constitution commands color-blindness. To the contrary: ‘nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.’ And in his concurring opinion, Justice Kavanaugh makes explicit that ‘governments and universities still “can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.”’” (first citing Nat’l Family Plan. & Reprod. Health Ass’n, Inc. v. Sullivan, 979 F.2d 227, 237 (D.C. Cir. 1992) (“[A] rule which ‘effect[s] a change in existing law or policy’ is legislative.” (alterations in original)); then quoting *Students for Fair Admissions*, 143 S. Ct. at 2176; and then quoting *id.* at 2225 (Kavanaugh, J., concurring)).

160. THE GODFATHER, *supra* note 111.

161. Kevin Brueninger, *Ted Cruz Compares FCC Chair Carr to Mafia Boss in Jimmy Kimmel Warnings*, CNBC (Sept. 9, 2025), <https://www.cnbc.com/2025/09/19/ted-cruz-jimmy-kimmel-fcc-carr-mafia.html>.

162. *Id.*

action that the government officials deem wise. Under the “government speech doctrine,”<sup>163</sup> the government can “say what it wishes”<sup>164</sup> and “select the views that it wants to express.”<sup>165</sup> “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others,” and thus does not need to “maintain viewpoint-neutrality when its officers and employees speak about that venture.”<sup>166</sup> And since “*the government*” is an abstraction, while “*government officials*” are not, it necessarily follows that government officials can “*jawbone*” to express their views on the government’s behalf:

A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others.<sup>167</sup>

But there are limits. Very important limits. There comes a point at which jawboning morphs into coercion. Call it the *Godfather* rule: a government official cannot “use the power of the State to punish or suppress disfavored expression.”<sup>168</sup>

When government officials make coercive threats to exercise governmental power lest a speaker stand down, the First Amendment is violated.<sup>169</sup> And such coercive threats can include the withholding of government funding, which can, in many circumstances, be nothing less than a mafia-like “gun to the head.”<sup>170</sup>

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163. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

164. *Id.* at 467 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

165. *Id.* at 468.

166. *Matal v. Tam*, 582 U.S. 218, 234 (2017).

167. *Nat’l Rifle Ass’n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024).

168. *Id.*

169. *Id.* at 1332 (“Yet where, as here, a government official makes coercive threats in a private meeting behind closed doors, the ‘ballot box’ is an especially poor check on that official’s authority. Ultimately, the critical takeaway is that the First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries.”).

170. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012) (“In this case, the financial ‘inducement’ Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head.”).

*C. The Prohibition of Viewpoint Discrimination as an Uber Norm*

Cutting across all arenas of First Amendment doctrine is the *uber norm* prohibiting viewpoint discrimination. The prohibition on viewpoint discrimination is so powerful that it can be invoked to invalidate government action that might otherwise be constitutionally defensible if not for the government's viewpoint discrimination.<sup>171</sup> The prohibition on viewpoint discrimination is so uniquely dominant that courts, from the Supreme Court down, repeatedly invoke it to strike down governmental action that might otherwise have been permissible were it not infected by viewpoint bias.<sup>172</sup>

Most importantly, this Article advances that the prohibition on viewpoint discrimination applies even to decisions based on the distribution of government benefits. The great decision establishing this principle is *Rosenberger v. Rector & Visitors of University of Virginia*.<sup>173</sup> In *Rosenberger*, the Supreme Court admirably held that the University of Virginia violated the First Amendment prohibition on viewpoint discrimination by refusing to disburse funding to a student group

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171. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (“Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But ‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion.’ St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry Rules.”).

172. *See, e.g., Cornelius v. NAACP*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“[T]he State may 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.”); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (holding that a city cannot deny Jehovah’s Witnesses permit to use a city park for bible talks when other religious and political groups had been allowed to use the park for similar purposes); *Baugh v. Judicial Inquiry and Review Comm’n*, 907 F.2d 440, 443–44 (4th Cir. 1990) (“Viewpoint-neutrality is concerned with limitations on speech on the basis of the viewpoint expressed and ‘the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’” (quoting *Vincent*, 466 U.S. at 804)); *Amato v. Wilentz*, 753 F. Supp. 543, 553–54 (D.N.J. 1990) (“However, even in a non-public forum the state cannot regulate protected speech on the basis of its viewpoint. ‘Viewpoint discrimination . . . is impermissible regardless of the nature of the forum.’ Indeed, the essence of the First Amendment is that the State cannot regulate speech ‘merely because public officials disapprove the speaker’s views.’” (alteration in original) (first quoting *Student Coal. for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 437 (3d Cir. 1985); and then quoting *Niemotko*, 340 U.S. at 282)).

173. 515 U.S. 819, 829–31 (1995).

proselytizing conservative political and religious views.<sup>174</sup> The Court emphatically emphasized that “[v]iewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>175</sup>

The siege on the First Amendment orchestrated by the Trump Administration is shot through and through with such viewpoint discrimination. As the court found in *National Association of Diversity Officers*, the viewpoint discrimination inherent in the Executive Order at issue there all but dispositively determined the Executive Order’s constitutional infirmity.<sup>176</sup> You may pick your own cliché. Perhaps, “what goes around comes around,” or “what is good for the goose is good for the gander.” All that matters is that the constitutional principles at stake be applied with neutrality, without regard to whose ox is gored. It is as much a violation of First Amendment principles to restrict the funding of liberal viewpoints as it is a violation to restrict the funding of conservative viewpoints—full stop.

These counter-attacks against the siege wage on.

Among the most important battles is the ongoing fight against the Administration’s attack on the University of California, Los Angeles. In *AAUP v. Trump*,<sup>177</sup> the Administration engaged in an unapologetic attack on all things “woke” at UCLA.<sup>178</sup> District Judge Rita F. Lin of the United States District Court for the Northern District of California rebuffed the attack, issuing a preliminary injunction sternly rejecting the Administration’s efforts.<sup>179</sup> The preliminary injunction barred President Trump and various subordinate federal agencies and officials from proceeding with their threats to cancel some \$1.2 billion in federal funding to UCLA.<sup>180</sup> In this Article, I have referred to the Administration’s tactics as a “siege.” The court used the term “playbook,” and then described the Administration’s efforts in candid terms:

[T]he Administration and its executive agencies are engaged in a concerted campaign to purge “woke,” “left,” and “socialist” viewpoints from our country’s leading

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174. *Id.*

175. *Id.* at 829 (citing *Perry*, 460 U.S. at 46).

176. *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp.3d 243, 282 (D. Md. 2025).

177. No. 25-CV-07864, 2025 WL 3187762, at \*1 (N.D. Cal. Nov. 14, 2025).

178. *Id.*

179. *Id.* at \*38.

180. *Id.* at \*8, 38.

universities. Agency officials, as well as the President and Vice President, have repeatedly and publicly announced a playbook of initiating civil rights investigations of preeminent universities to justify cutting off federal funding, with the goal of bringing universities to their knees and forcing them to change their ideological tune. Universities are then presented with agreements to restore federal funding under which they must change what they teach, restrict student anonymity in protests, and endorse the Administration's view of gender, among other things. Defendants submit nothing to refute this.

It is undisputed that this precise playbook is now being executed at the University of California. Defendant Leo Terrell, who heads the Administration's Task Force to Combat Anti-Semitism, publicly stated in a news interview that the UC had been "hijacked by the left" and vowed to begin investigations.<sup>181</sup>

The court focused particularly on the words and actions of Leo Terrell, the head of the Administration's Task Force to Combat Anti-Semitism, the federal entity that has been the phalanx of the Administration's assault on progressive activities at American universities.<sup>182</sup> The court stated: "As described by Terrell, the investigations and funding cuts aimed at UCLA were intended not only to 'eliminate anti-Semitism,' but also to eliminate the 'left' and 'Marxist' viewpoints at the UC."<sup>183</sup>

Applying the Supreme Court's 2024 decision in *National Rifle Association of America v. Vullo*, which held that actions by government officials may trigger First Amendment scrutiny when they extend beyond mere jawboning expressing the government's views to threats of coercion,<sup>184</sup> the district court in *AAUP v. Trump* held that the threats from federal officials went beyond merely expressing criticism of the University's policies, to threats of regulatory action adverse to the University.<sup>185</sup> These threats, the court reasoned, were enough to cross the line into coercion and unconstitutional territory.<sup>186</sup> The court recognized, for example, the

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181. *Id.* at \*1. The court's reference to "UC" refers to the University of California System generally. *Id.*

182. *Id.*

183. *Id.* at \*4.

184. 144 S. Ct. 1316, 1326 (2024).

185. 2025 WL 3187762, at \*1.

186. *Id.* at \*12.

pervasive regulatory authority federal agencies have that may be held over the head of the University.<sup>187</sup> The government and its officials are entitled to their viewpoints, the court opined, but the government’s “failure to persuade does not allow it to hamstring the opposition.”<sup>188</sup> It is one thing to take a position as the government, it is another to skew the marketplace of ideas. As the court put it, the government “may not burden the speech of others in order to tilt public debate in a preferred direction.”<sup>189</sup>

The court in *AAUP v. Trump* found unpersuasive the government’s attempt to invoke the line of First Amendment precedent dealing with discipline against government employees, particularly the balancing test emanating from *Pickering v. Board of Education*.<sup>190</sup> It thus declined “to adopt the view that any university that accepts funds from the federal government becomes a ‘government contractor’ for First Amendment purposes, whose speech the federal government can regulate just as it would an at-will employee.”<sup>191</sup> Elaborating, the court explained that even if the *Pickering* balancing test were applied, the government would still not prevail because “the evidence is overwhelming that Defendants’ motivation is their desire to penalize disfavored viewpoints.”<sup>192</sup>

Most germane to a central thesis of this Article, the court in *National Association of Diversity Officers in Higher Education v. Trump* wisely applied the unconstitutional conditions doctrine and the *Alliance* test.<sup>193</sup> Both distinguished the permissible decisions of government to decide what programs to subsidize and what programs not to subsidize, when the government is defining the limits of a government spending program, and impermissibly imposing “conditions that seek to leverage funding to regulate speech outside the contours of the program.”<sup>194</sup> The court in *AAUP v. Trump*

187. *Id.* at \*13 (“Second, the speakers have direct ‘regulatory authority’ over the UC. First, DOJ—which sent the August 8 Offer and on whose behalf Terrell spoke—has regulatory authority to bring enforcement actions under Titles VI, VII, and IX. The Attorney General has regulatory authority to oversee and coordinate enforcement of Titles VI and IX among federal agencies. Additionally, the Task Force Agencies and Funding Agencies have statutory authority to terminate federal funding for violations of Title VI and Title IX. Finally, the President, as the head of the executive branch, has authority to direct the Agency Defendants, meaning that he also has regulatory authority.”) (first citing 28 C.F.R. § 42.10; then citing 42 U.S.C. § 2000e-6; 28 C.F.R. § 54.605; then citing Exec. Order No. 12,250, 45 Fed. Reg. 72995 (Nov. 2, 1980); then citing 42 U.S.C. § 2000d-1; and then citing 20 U.S.C. § 1682).

188. *Id.* at \*14 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011)).

189. *Id.*

190. *AAUP v. Trump*, 2025 WL 3187762, at \*14; *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

191. *AAUP v. Trump*, 2025 WL 3187762, at \*14.

192. *Id.*

193. 767 F. Supp. 3d 243, 276 (D. Md. 2025); see *supra* text accompanying notes 150–55.

194. *AAUP v. Trump*, 2025 WL 3187762, at \*23 (quoting *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013)).

acknowledged that the government possessed the prerogative to preferentially and conditionally fund speech that advances the Administration's "preferred agenda."<sup>195</sup> Yet even so, the court held, "[T]he unconstitutional conditions doctrine prohibits the government from placing 'a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.'"<sup>196</sup> To be sure, the Supreme Court in *Rust v. Sullivan* held that the federal government could require that the grantee keep abortion-related speech separate and distinct from Title X activities, but only so long as the government did not force the Title X grantee to give up abortion-related speech altogether.<sup>197</sup> Yet, the court in *AAUP v. Trump* concluded: "That is precisely the line of which Defendants have run afoul here."<sup>198</sup>

In an interesting final turn, the court in *AAUP v. Trump* invoked a line of constitutional jurisprudence outside the First Amendment to underscore the impermissibly coercive nature of the government's actions. In its landmark ruling on the constitutional issues surrounding the Affordable Care Act (often described as Obamacare), the Supreme Court in *National Federation of Independent Business v. Sebelius* struck down certain aspects of the Act by declaring them unconstitutionally coercive.<sup>199</sup> In *Sebelius*, the majority opinion of Chief Justice Roberts held that Congress exceeded its authority under the Spending Clause of the Constitution, and thus violated the Tenth Amendment when Congress conditioned the States' access to existing and future federal Medicaid funds on their agreement to expand Medicaid to cover additional categories of individuals.<sup>200</sup> As previously noted, the Chief Justice in *Sebelius* colorfully opined that Congress had done more than merely incentivize the States' actions—it had presented them with a "gun to the head."<sup>201</sup> The court in *AAUP v. Trump* held that the actions of the federal government had the same coercive characteristics as those struck down in *Sebelius*, in that the government had "threatened to withhold potentially all federal funding from the UC unless it accept[ed] Defendants' demands to institute wide-ranging policy changes and pay for additional programs such as an external auditor."<sup>202</sup>

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195. *Id.*

196. *Id.* (emphasis omitted) (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

197. *Sullivan*, 500 U.S. at 196.

198. *AAUP v. Trump*, 2025 WL 3187762, at \*23.

199. 567 U.S. 519, 581 (2012).

200. *Id.*

201. *Id.*; see *supra* note 170 and accompanying text.

202. *AAUP v. Trump*, 2025 WL 3187762, at \*24.

*D. A Final Word*

All in all, to channel the rock group *Pink Floyd*, it's "just another brick in the wall."<sup>203</sup> As district court decisions, brick by brick, erect a wall against the Administration's siege on the First Amendment, there is room for guarded optimism that the wall may stand.

The stout First Amendment principles with which I have concluded here—the unconstitutional conditions doctrine, coercion, and viewpoint discrimination—have not been the exclusive pet agendas of either conservatives or liberals, in American thought generally or among the justices of the Supreme Court, throughout history or as presently constituted. Over time, these have proven to be enduring principles, embraced by Republicans and Democrats, conservatives and liberals. Let us hope and pray, much as Abraham Lincoln so hoped and prayed in the *Gettysburg Address*, that a Nation so dedicated to such principles can "long endure."<sup>204</sup>

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203. PINK FLOYD, ANOTHER BRICK IN THE WALL, PART 2 (EMI 1979).

204. Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863).

# THE MARKETPLACE OF IDEAS AT THE ANOCRATIC FORK: A PLEA FOR POSITIVE FREEDOM OF SPEECH

Connor W. Grosshanten\*

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## INTRODUCTION

Freedom of expression under the First Amendment is perhaps the most vital freedom to democratic functionality guaranteed by our Constitution. It allows for individual self-expression, peaceful conflict resolution, advocacy for cherished causes, discussion of important topics, and the political criticism that democracy requires.<sup>1</sup> This Article focuses on the final two activities—often the foremost arguments for any defense of free speech—and their crucial role in democracy.

The first is the *argument from truth*, advanced most famously by English philosophers John Milton and John Stuart Mill. As its name suggests, the argument from truth defends free speech for its value in discovering truth; being free to discuss, debate, inquire, criticize, and exchange ideas is indispensable to the search for truth that guides our opinions, beliefs, and actions both as individuals and a voting public.<sup>2</sup> In the mid-17th century, Milton pointed to the English Crown's publication restrictions as stifling the public's ability to seek out truth, conveying a broader principle that an absence of government intervention was crucial to doing so.<sup>3</sup> Over two centuries later, John Stuart Mill reinforced this principle by linking the search for truth to his broader arguments for free thought and discussion. Mill reasoned that free discussion supported the search for truth by allowing for the adversarial confrontation of ideas—or *counterspeech*—with a trinary outcome: (1) your understanding is *incorrect*, so counterspeech is needed for others to correct you; (2) your understanding is *partially incorrect*, so counterspeech is needed to improve your understanding; or (3) your understanding is *correct*, so counterspeech is needed for you to realize the strength of your understanding.<sup>4</sup> In this sense, even factually inaccurate information plays a valuable role.<sup>5</sup>

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1. NADINE STROSSEN, *FREE SPEECH: WHAT EVERYONE NEEDS TO KNOW* 14 (2024) [hereinafter STROSSEN, *FREE SPEECH*].

2. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15–16 (1982) [hereinafter SCHAUER, *FREE SPEECH*].

3. See JOHN MILTON, *AREOPAGITICA* 68–69 (1649) (“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . . And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”); SCHAUER, *FREE SPEECH*, *supra* note 2, at 15, 74.

4. JOHN STUART MILL, *ON LIBERTY* 95 (Lawbook Exchange 2011) (1859) (Mill's trinary outcome); SCHAUER, *FREE SPEECH*, *supra* note 2, at 15–16, 24, 27–28, 74.

5. SCHAUER, *FREE SPEECH*, *supra* note 2, at 74; see *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964).

Mill's approach to the search for truth is the basis of the United States Supreme Court's *marketplace of ideas* principle that has guided much of its First Amendment jurisprudence for over a century.<sup>6</sup> As Justice Oliver Wendell Holmes Jr. introduced in his 1919 *Abrams v. United States* dissent, the marketplace of ideas metaphor uses Mill's adversarial conception of the search for truth to analogize the free exchange of ideas to a commercial marketplace.<sup>7</sup> Holmes channeled the prevailing laissez-faire economic thought of the time, arguing that just as the competition of an unregulated commercial marketplace would yield the best products, an unregulated marketplace of ideas would yield the best ideas.<sup>8</sup> Holmes's legendary *Abrams* dissent added the marketplace of ideas to the Supreme Court's lexicon and solidified governmental noninterference with the American conception of free speech.<sup>9</sup> This Article will revisit the marketplace of ideas in Part II.

The second is the *argument from democracy*, most famously advanced by American philosopher Alexander Meiklejohn.<sup>10</sup> The argument from democracy is rooted in the notion that the voting public in a democratic state is the sovereign and, as such, must be able to self-govern.<sup>11</sup> Accordingly, the argument from democracy stresses the need for freedom of speech for two reasons. First, free speech is indispensable to public deliberation because a sovereign electorate must engage in the Miltonian-Millian search for truth

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6. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (first invocation of marketplace metaphor); *Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (counterspeech, or "more speech" doctrine).

7. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). For insight into Holmes's reliance on Mill, see 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 160, 187 (Mark DeWolfe Howe ed., 1953) (illustrating that Holmes read Mill's *On Liberty* in early 1919 and embraced Mill's position).

8. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); SCHAUER, FREE SPEECH, *supra* note 2, at 15-16.

9. See, e.g., *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) (first express use of "market place of ideas"); *Sullivan*, 376 U.S. at 269 (referring to First Amendment protection for "unfettered interchange" of political speech); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) (referring to First Amendment protection for "'uninhibited, robust, and wide-open' public debate concerning matters of public interest" (quoting *Sullivan*, 376 U.S. at 270)); *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (reaffirming commitment to the "'open marketplace' of ideas" (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008))).

10. See John M. Kang, *Against Political Speech*, 22 NEV. L.J. 803, 821-25 (2022) [hereinafter Kang, *Against Political Speech*] (describing Meiklejohn's "Argument from Self-Government," i.e., the argument from democracy).

11. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 6-9 (Lawbook Exchange 2012) (1948) [hereinafter MEIKLEJOHN, SELF-GOVERNMENT]; SCHAUER, FREE SPEECH, *supra* note 2, at 35-38.

to inform its decision-making.<sup>12</sup> Second, the freedom to criticize provides another means of keeping public officials accountable to the electorate, maintaining their respective roles as public servants and the sovereign.<sup>13</sup> Meiklejohn rooted his conception of this argument in the idea of town meetings, particularly those historically conducted in New England small towns.<sup>14</sup> Such meetings functioned as direct democracies for all adult residents; members would propose, debate, and decide on ideas by majority vote, limited only by a moderator ensuring orderly discussions.<sup>15</sup> To Meiklejohn, the voting public's sovereignty was absolute in either direct or representative democracy, and therefore, the need for its informed decision-making was the same.<sup>16</sup> By extension, Meiklejohn emphasized the importance of free speech in maximizing the overall pool of available ideas to contribute to public deliberation.<sup>17</sup> In this sense, free speech was critical not merely for conveying information but for receiving it so that it could be taken into account in decision-making.<sup>18</sup> Meiklejohn's conception of the argument from democracy incorporated not only free speech and expression as an individual right but also other First Amendment freedoms—such as publication and assembly—for their role in public deliberation.<sup>19</sup> The Supreme Court has adopted the argument from democracy into its First Amendment jurisprudence, as it did the argument from truth.<sup>20</sup> Historically,

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12. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 24–27; SCHAUER, FREE SPEECH, *supra* note 2, at 35–36; *see* Lyrisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (2010) [hereinafter Lidsky, *Nobody's Fools*]; *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791–92 (1978) (reasoning informed democratic decision-making requires access to conflicting arguments).

13. SCHAUER, FREE SPEECH, *supra* note 2, at 36, 38.

14. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 22–25.

15. *Id.* at 22–27; SCHAUER, FREE SPEECH, *supra* note 2, at 37–38.

16. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 26–27; SCHAUER, FREE SPEECH, *supra* note 2, at 38; *but see* JOHN DEWEY, FREEDOM AND CULTURE 41–42 (Prometheus 1989) (1939) [hereinafter DEWEY, FREEDOM AND CULTURE]; Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1057–58 (2016).

17. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 25–26.

18. *Id.* at 24–26; SCHAUER, FREE SPEECH, *supra* note 2, at 27–28; SOPHIA ROSENFELD, DEMOCRACY AND TRUTH 33–34 (2019).

19. *See* ROSENFELD, *supra* note 18, at 33–35.

20. *See, e.g.*, *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 390 (1969) (acknowledging the public's right to access information on matters of public concern); *CBS, Inc. v. FCC*, 453 U.S. 367, 395–97 (1981) (acknowledging political candidates' corresponding right to use public airwaves); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997) (arguing “must-carry” provisions promote information circulation and broadcaster competition and diversity); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (identifying a primary value of speech is informing the audience); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (prioritizing maximizing contributions to the marketplace of ideas).

these conceptions of our freedom of speech have, by and large, been bulwarks for American civil liberties.

Today, however, our stalwart commitment to the arguments from truth and democracy is actively undermining the very democratic functionality each was intended to serve. Each argument is exceptionally poor at contending with misinformation. In any of its forms, misinformation is harmful because it reduces one's ability, individually or collectively, to think and act in one's own interest.<sup>21</sup> By extension, misinformation heavily undermines the quality of democratic deliberation and thus democratic self-government.<sup>22</sup> In the online age, the remarkable volume and virality of misinformation in the political environment threaten catastrophe. As such, misinformation should be anathema in a democratic society and viewed as its biggest threat. Instead, in commitment to the arguments from truth and democracy, existing First Amendment jurisprudence allows misinformation to thrive functionally unchecked. Political misinformation—that is, false statements of fact about a matter of public concern—is uniquely damaging, and yet, as political speech, it receives the highest level of constitutional protection available.<sup>23</sup> Worse still, misinformation need not be merely inaccurate political information; misinformation may be intentional (disinformation), distributed en masse (“fake news”), or even factually accurate (propaganda).<sup>24</sup> Accordingly, the United States faces a brutal and potentially fatal state of affairs: on the one hand, the freedom of political speech is indispensable to democratic deliberation and self-government; on the other, misinformation makes that freedom easily weaponized against

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21. *See* *Hustler Mag. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . . .”); CASS. R. SUNSTEIN, ON RUMORS 10 (2009) [hereinafter SUNSTEIN, ON RUMORS]; THOMAS RID, ACTIVE MEASURES 7–8 (2020); Hannah Arendt, *Truth and Politics*, in TRUTH: ENGAGEMENTS ACROSS PHILOSOPHICAL TRADITIONS 295, 309 (Jose Medina & David Wood eds., John Wiley & Sons 2005) (1967) [hereinafter Arendt, *Truth and Politics*].

22. SCHAUER, FREE SPEECH, *supra* note 2, at 169; Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 454–55, 468 (2020); *see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring) (“[T]he stream of information about public officials and public affairs is polluted and often remains polluted by false information . . . .”).

23. “Political speech” is speech “relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations omitted) (first quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983); and then quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)); *see* *Myers*, 461 U.S. at 145 (stating political speech receives the highest First Amendment protection).

24. *Propaganda*, BLACK'S LAW DICTIONARY (11th ed. 2019); JASON STANLEY, HOW PROPAGANDA WORKS 42 (2015) [hereinafter STANLEY, PROPAGANDA] (propaganda may be factually correct).

democratic functionality and well-being.<sup>25</sup> Something has to give, and it must be drastic.

This Article is far from the first recognition of this dynamic. In his 1949 *Terminiello v. Chicago* dissent, Supreme Court Justice Robert H. Jackson famously warned against allowing the Constitution to become a “suicide pact”:

This Court has gone far toward accepting the doctrine that civil liberty means . . . that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.<sup>26</sup>

Former Harvard Law dean Martha Minow arrived at a similar conclusion. In her book *Saving the News*, Professor Minow implores supportive action to protect the freedom of the press rather than continuing to suffer under a purely libertarian conception of First Amendment free press protections.<sup>27</sup> The government has a duty to adopt this understanding; it has an obligation to take affirmative steps to improve democratic deliberation.<sup>28</sup> This Article makes an analogous plea for the freedom of speech: noble and well-intended as it may be, adherence to such an intensely libertarian conception of First Amendment protections will have catastrophic and potentially fatal consequences. As such, a fundamental change in First Amendment jurisprudence and public understanding of free speech is vital.<sup>29</sup>

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25. Redish & Pereyra, *supra* note 22, at 468; see Philip M. Napoli, *What if More Speech is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM’N L.J. 55, 88 (2018); Frederick Schauer, *Free Speech and the Argument from Democracy*, in LIBERAL DEMOCRACY: NOMOS XXV 241, 249 (1983) [hereinafter Schauer, *Free Speech and the Argument from Democracy*].

26. 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

27. MARTHA MINOW, *SAVING THE NEWS* 98, 101–02 (2021).

28. See *id.* at 60, 75, 98–99, 101–2, 146–47; MEIKLEJOHN, *SELF-GOVERNMENT*, *supra* note 11, at 16–17; ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 233, 240, 559 (Lawbook Exchange, 2d ed. 2018) (1941) [hereinafter CHAFEE, *FREE SPEECH IN THE UNITED STATES*]; JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 34–35 (Prometheus 2000) (1935) [hereinafter DEWEY, *LIBERALISM*]; *infra* Part IV.A.

29. Larry Kramer, *A Deliberate Leap in the Opposite Direction: The Need to Rethink Free Speech*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* 17, 23–27 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022); see CAILIN O’CONNOR & JAMES OWEN WEATHERALL, *THE MISINFORMATION AGE* 184–86 (2019).

## I. POSITIVE AND NEGATIVE FREE SPEECH

*A. Positive and Negative Freedom*

At its core, the issue is one of positive and negative freedom.<sup>30</sup> *Negative freedom* is the more libertarian conception of freedom, where one is free from control, obstruction, or influence by external forces and obligations, namely those caused by other people.<sup>31</sup> In practice, negative freedom is generally pursued by removing obstacles and refers to freedom from government interference.<sup>32</sup> *Positive freedom*, by contrast, is the capacity to make effective use of one's negative freedom.<sup>33</sup> After all, what use is freedom if one cannot make effective use of it? Or, more eloquently, "We are free to do only the things we *can* do."<sup>34</sup> Negative freedom emphasizes individual autonomy and lack of constraint, whereas positive freedom emphasizes individual agency, self-realization, and intelligent self-control.<sup>35</sup> In other words, negative freedom is freedom *from*, whereas positive freedom is freedom *to*.

Paradoxically, each of these freedoms risks devolving into tyranny if taken to an extreme, each for different reasons.<sup>36</sup> Positive freedom necessarily involves active governmental efforts to empower individuals to develop their agency. Doing so requires not only government intervention but also more governmental power over its citizens. If this power accumulates without clear checks and regulations, it risks paternalistic actions and authoritarianism.<sup>37</sup> Negative freedom, by contrast, begets oligarchy; it allows for uneven distribution and access to the resources needed for positive freedom (e.g., financial stability, social connections,

30. See Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY 166, 168–69 (Henry Hardy ed., 2d ed., 2002) (1958) [hereinafter Berlin, *Two Concepts of Liberty*]; JOHN DEWEY & JAMES HAYDEN TUFTS, ETHICS 320–22 (Jo Ann Boydston, ed., S. Ill. Univ. Press 2008) (2d ed. 1932) [hereinafter DEWEY & TUFTS, ETHICS (2d ed. 1932)]. See generally Berlin, *Two Concepts of Liberty*, *supra*, at 166–217, for an in-depth discussion on positive and negative freedom.

31. Berlin, *Two Concepts of Liberty*, *supra* note 30, at 168–174; JOHN DEWEY & JAMES HAYDEN TUFTS, ETHICS 392 (Jo Ann Boydston ed., S. Ill. Univ. Press 1978) (1908) [hereinafter DEWEY & TUFTS, ETHICS (1st ed. 1908)].

32. TIMOTHY SNYDER, ON FREEDOM 162 (Amanda Cook ed. 2024) [hereinafter SNYDER, ON FREEDOM] ("Negative freedom is the fantasy that the problem is entirely beyond us, and that we can become free simply by removing an obstacle.")

33. DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 392; see SNYDER, ON FREEDOM, *supra* note 32, at 209.

34. SNYDER, ON FREEDOM, *supra* note 32, at 40 (emphasis added).

35. Berlin, *Two Concepts of Liberty*, *supra* note 30, at 178–180; DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 392.

36. Isaiah Berlin, *Five Essays on Liberty: Introduction*, in ISAIAH BERLIN: LIBERTY 1, 37, 39 (Henry Hardy ed., 2d ed. 2002).

37. *Id.* at 39–40, 53–54.

education, time, and other needs for personal development).<sup>38</sup> Such divisions lead to large positive freedom disparities between the vast majority of the public and those better off, affording the latter a disproportionate say in public affairs and ability to maintain circumstances that benefit them.<sup>39</sup> The result is class-based political divisions, resentment, hostility, and political tension.<sup>40</sup> In majoritarian democratic systems, this is the Founders' dreaded *tyranny of the majority*; here, however, the tyrannical "majority" is not numerical but political—it is a small, wealthy class whose disproportionate resources translate into dominant political power over the broader public.<sup>41</sup> However, these consequences, while valid concerns, are the result of an *excess* of their respective type of freedom. Seeing them as inevitable is fallacious "slippery slope" reasoning.<sup>42</sup>

As you may surmise, the United States is enamored with the negative conception of freedom—typically at the expense of enjoying positive freedom. As a result, the United States is embroiled in a state of affairs quite similar to the pitfall of negative freedom described above. The American negative freedom obsession stems from two places. The first is the classical liberal thought that forms the bedrock of American political thought. Liberal thinkers like John Locke and John Stuart Mill viewed freedom as naturally occurring in the individual and able to be fostered by removing restrictions to promote individual growth.<sup>43</sup> While they acknowledged one's circumstances as outside forces that shape individuals, they generally considered such forces to be external factors with little bearing on one's freedom.<sup>44</sup> Second, this rationale has been reinforced among Americans for

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38. *Id.* at 39–40; DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 349.

39. See Berlin, *Two Concepts of Liberty*, *supra* note 30, at 39–40; Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 151–53 (2017) [hereinafter Balkin, *Constitutional Crisis*]; Jack M. Balkin, *Constitutional Rot*, in CAN IT HAPPEN HERE? 19, 22 (Cass R. Sunstein ed., 2018); DEWEY, *LIBERALISM*, *supra* note 28, at 35, 41, 43–44, 66 (showing shift in liberalism from pursuing change fostering positive freedom to defending negative freedom as a means of preserving the status quo).

40. Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53; see ROSENFELD, *supra* note 18, at 40–41 (explaining income and education inequality can incite political divisions, undermining democracy); JASON STANLEY, *HOW FASCISM WORKS* 76–77 (2018) [hereinafter STANLEY, *FASCISM*] (role of inequalities in democratic disfunction, especially in context of fascism).

41. See THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); ROSENFELD, *supra* note 18, at 129–30; DEWEY, *LIBERALISM*, *supra* note 28, at 43–44.

42. See SNYDER, *ON FREEDOM*, *supra* note 32, at 210. "Slippery slope" reasoning assumes that an end result is inevitable as soon as any meaningful step in its direction is taken. *Slippery Slope*, BLACK'S LAW DICTIONARY (11th ed. 2019); see generally LAURA JOFFE NUMEROFF, *IF YOU GIVE A MOUSE A COOKIE* (1985) (illustration of slippery slope fallacy).

43. See DEWEY, *LIBERALISM*, *supra* note 28, at 15, 34–35, 46–47; SCHAUER, *FREE SPEECH*, *supra* note 2, at 26–27.

44. See DEWEY, *LIBERALISM*, *supra* note 28, at 34–35; SCHAUER, *FREE SPEECH*, *supra* note 2, at 26.

centuries by social and political challenges in which “freedom” meant relief from an oppressive force and achieving that relief meant preserving the autonomy of the oppressed.<sup>45</sup> Examples include the tyranny of the Crown in the Revolutionary War; the institution of slavery and (perceived) federal overreach in the Antebellum period and Civil War; xenophobia and government intervention during and directly following Reconstruction;<sup>46</sup> and communist authoritarianism during the 20th century.<sup>47</sup> In its short life, the United States has consistently viewed freedom as negative; this is especially clear in how controversial yet necessary American advancements in positive freedom were at the time, like the Emancipation Proclamation, trust-busting, labor standards, New Deal policies, desegregation, and the Civil Rights Movement.<sup>48</sup>

The United States has thus far refused to acknowledge that a commitment to negative freedom betrays the goals of its liberal philosophical foundation: the common good; development of one’s capacities as a sovereign individual; and the freedom of expression, inquiry, and discussion.<sup>49</sup> While negative freedom is indispensable to a democratic society, it is far from the timeless end goal liberal thinkers believed it to be. A thoroughly negative freedom, once reached, quickly becomes a dead end; it leaves little to build upon, and ironically, it thwarts progress toward the common good of the individuals it is meant to serve.<sup>50</sup> Negative freedom alone will never suffice.<sup>51</sup> “No man and no mind were ever emancipated merely by being left alone.”<sup>52</sup> Just as children are not left to raise themselves, “[w]e need support to become autonomous people, sovereign individuals. Freedom requires a positive presence, not malign neglect.”<sup>53</sup> This is significantly attributable to the fact that the needs of positive freedom change as societal needs evolve, and oppression—rather than coming solely from the government—is a product of the unique conditions and circumstances of the

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45. See DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 333.

46. See Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943).

47. See DEWEY, *LIBERALISM*, *supra* note 28, at 28, 43–44.

48. See Gary J. Simson, *The Roberts Court’s Overprotection of Free Speech and the Perfect Storm with Social Media*, 90 TENN. L. REV. 941, 1008 (2023).

49. See DEWEY, *LIBERALISM*, *supra* note 28, at 33, 40–41.

50. See *id.* at 40–41, 42–44, 49; DEWEY, *FREEDOM AND CULTURE*, *supra* note 16, at 14; DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 326, 329–30 (against viewing once-helpful principles as universal truths); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* 173 (Melvin L. Rogers ed., Ohio Univ. Press 2016) (1927) [hereinafter DEWEY, *PUBLIC AND ITS PROBLEMS*].

51. See DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 333; SNYDER, *ON FREEDOM*, *supra* note 32, at 215–16.

52. DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 50, at 191.

53. See SNYDER, *ON FREEDOM*, *supra* note 32, at 66.

time.<sup>54</sup> In its history, American freedom suffered religious persecution, tyrannical monarchy, chattel slavery, inhumane working conditions, unequal rights and treatment under the law, income inequality, and now debilitating misinformation.

Adapting to support positive freedom will require American public decision-making to balance it with negative freedom protections.<sup>55</sup> This is true for three reasons, each of which will inform that balancing test. First, and thankfully, balancing positive and negative freedom is not a zero-sum game, as they are not mutually exclusive and do not necessarily conflict. On the contrary, just as positive freedom is the logical (and assumed) complement of negative freedom, negative freedom is a *prerequisite* for positive freedom, since making effective use of one's freedoms requires having such freedoms in the first place.<sup>56</sup> Second, our individual legal rights and freedoms are social by nature and thus require us to consider their impacts on the broader public.<sup>57</sup> The American individualistic worldview—an outgrowth of negative freedom and personal autonomy—implies that society is merely a population of individuals, overlooking that the inverse is just as true.<sup>58</sup> “[T]he very concept of American individualism is itself a group norm.”<sup>59</sup> What benefits a community often benefits its members, and vice versa.<sup>60</sup> Just as we exist in the context of our communities,<sup>61</sup> so too do our legal rights and freedoms, which are only enjoyed within the society that grants and guarantees them. Those legal rights and freedoms are meant to serve the public by way of serving individuals, not merely solely serving individuals.<sup>62</sup> As such, the balance of individual and societal interests is a core component of striking the proper balance between positive and negative

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54. DEWEY, LIBERALISM, *supra* note 28, at 42–43, 54 (showing how the nature of oppression has changed throughout American history and need not be by an act of government); Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 343–44, 346 (1915) [hereinafter Pound, *Interests of Personality*].

55. See Pound, *Interests of Personality*, *supra* note 54, at 347; DEWEY & TUFTS, ETHICS (2d ed. 1932), *supra* note 30, at 350; Terminiello v. Chicago, 337 U.S. 1, 31 (1949) (Jackson, J., dissenting).

56. Berlin, *Two Concepts of Liberty*, *supra* note 30, at 36; DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 392; Carol L. Gould, *Reframing Democracy with Positive Freedom*, in POSITIVE FREEDOM: PAST, PRESENT, FUTURE 141, 149 (John Christman ed., 2021).

57. See Pound, *Interests of Personality*, *supra* note 54, at 347, 349; ZECHARIAH CHAFEE JR., THE INQUIRING MIND 233 (1928); John Dewey, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 71, 76–77 (Fred B. Rothman & Co. 1987) (1941).

58. See DANNAGAL GOLDTHWAITE YOUNG, WRONG 77–78 (2023).

59. *Id.* at 79.

60. See Pound, *Interests of Personality*, *supra* note 54, at 347, 349; DEWEY & TUFTS, ETHICS (1st ed. 1908), *supra* note 31, at 431 (community benefit from individual benefit); DEWEY & TUFTS, ETHICS (2d ed. 1932), *supra* note 30, at 322–23, 324 (individual benefit from community benefit).

61. YOUNG, *supra* note 58, at 77–79.

62. Pound, *Interests of Personality*, *supra* note 54, at 346–47, 356.

freedoms.<sup>63</sup> Third and finally, as discussed above, the requirements for positive freedom are relative to the conditions of the time and must be continually adjusted and reweighed to ensure the proper support for citizens' freedoms.<sup>64</sup>

### *B. Positive and Negative Free Speech*

Returning to the focus of this Article, the dynamic of positive and negative freedom applies to our First Amendment protections, as does the balancing test from Part I.A.<sup>65</sup> First, a negative freedom of speech is a prerequisite to positive freedom of speech.<sup>66</sup> Second, our individual free speech rights are social by nature, existing in the context of our community.<sup>67</sup> Third, free speech exists in the context of the conditions of the time, particularly affected by advancements in communication technology.<sup>68</sup> Unfortunately, First Amendment protections are perhaps the sphere of American society most heavily bloated by an excess of negative freedom, and as such, our balancing of positive and negative freedoms of speech has been almost consistently incorrect.<sup>69</sup> Worse still, many will likely not see this as true because the Supreme Court's free speech and press jurisprudence *has* acknowledged exceptions to First Amendment protection based on speech's comparative harm to the broader interests of society.<sup>70</sup> This is problematic because those exceptions, while correctly supporting positive freedom in

63. *See id.* at 343–44, 347, 349.

64. DEWEY, LIBERALISM, *supra* note 28, at 42–43, 54; Pound, *Interests of Personality*, *supra* note 54, at 343–44, 347.

65. Pound, *Interests of Personality*, *supra* note 54, at 351–54; DEWEY, LIBERALISM, *supra* note 28, at 69–70; *see* MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 18; SNYDER, ON FREEDOM, *supra* note 32, at 194.

66. *See* Kramer, *supra* note 29, at 29 (developing positive free speech still requires existing negative speech protections).

67. *See* *McCutcheon v. FEC*, 572 U.S. 185, 236, 237 (2014) (Breyer, J., dissenting). Moreover, the arguments from truth and democracy are rooted in serving the social interests of the public. *See supra* INTRODUCTION.

68. *Compare* STROSSEN, FREE SPEECH, *supra* note 1, at 64–68 (new technologies creating new free speech debates), *with* Pound, *Interests of Personality*, *supra* note 54, at 343–44, 453–56 (stating that societal progress creates new demands to support freedom, including for individual free speech, which must be weighed against society's needs).

69. *See, e.g.,* *McCutcheon*, 572 U.S. at 203.

70. *See* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50–51 (1961); CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 35 (First Amendment speech protection depends on balance between “two . . . social interests, in public safety and in the search for truth.”); *see generally* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (incitement of violence); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam) (true threats); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978) (indecenty).

other spheres of American life, do not serve to support a positive freedom of speech.<sup>71</sup> Despite the early liberal thinkers' arguments for negative free speech that influenced First Amendment jurisprudence, a predominantly negative freedom of speech will never suffice, and it grows progressively more insufficient with time.<sup>72</sup> Democratic deliberation requires an informed electorate, making our commitment to an intensely negative free speech anachronistic.<sup>73</sup>

While the United States has historically held free speech to be an individual negative freedom in accordance with its liberal roots, its deeply problematic libertarian free-speech tradition—the focus of this Article's criticism—was invented by Harvard Law Professor Zechariah Chafee Jr., an early-20th-century progressive and civil libertarian.<sup>74</sup> Like many of his progressive contemporaries, Chafee emphasized the social interest of free speech protections over individual interests, stressed the need for positive free speech efforts, and recognized that meeting positive freedom of speech needs would depend upon the conditions of the time.<sup>75</sup> However, Chafee broke with fellow progressives in asserting that adapting to such changing conditions justified broader protection for negative free speech.<sup>76</sup> He insisted (ahistorically) that this degree of protectiveness over negative freedom of speech reflected longstanding traditional libertarian principles, and he misattributed this conception to progressive thought.<sup>77</sup> Chafee considered First Amendment speech protection to be set only by “the balancing against each other of two very important social interests, in public safety and in the search for truth.”<sup>78</sup> In doing this, Chafee pedestalized free-speech protection,

71. Kramer, *supra* note 29, at 26–27.

72. SCHAUER, FREE SPEECH, *supra* note 2, at 26–27; DEWEY, LIBERALISM, *supra* note 28, at 74 (“[I]ntelligence is an individualistic possession, at best enlarged by public discussion.”).

73. See MINOW, *supra* note 27, at 75, 98–99; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 191.

74. Pound, *Interests of Personality*, *supra* note 54, at 453–54 (free speech has historically been a negative individual freedom); MARK A. GRABER, TRANSFORMING FREE SPEECH 122, 126–29 (1991) (Chafee inventing American libertarian free-speech tradition).

75. GRABER, *supra* note 74, at 12–13, 15, 125–26; see, e.g., Pound, *Interests of Personality*, *supra* note 54, at 453–56; CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 559 (need for “affirmative steps” to support free speech); see Zechariah Chafee, Jr., *Some New Ideas About Law*, 11 IND. L.J. 503, 508 (1936) (stating that constitutional principles are not rigid rules to be applied based on the framers' intent but instead reflect social interests and must be adapted to the times).

76. GRABER, *supra* note 74, at 4, 123.

77. *Id.* at 122–23, 125–29.

78. CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 35. This protection for free speech until it endangers the public is better known from Justice Holmes's *Schenck* and *Abrams* opinions as the clear and present danger standard, the meaning of which Chafee himself fabricated. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); GRABER, *supra* note 74, at 4, 122–23, 128. Graber states:

insisting that its importance to democratic deliberation elevated it above use in the balancing of individual and societal interests.<sup>79</sup> Moreover, Chafee's arguments helped shift the focus of the judiciary away from "protect[ing] fundamental rights from majoritarian tyranny" to "polic[ing] the democratic process," or rather from a function needed to counteract the effects of a negative free speech excess to a function emphasizing the shielding of negative freedom of speech.<sup>80</sup> While this rightly took the matter of free speech away from Congress's consideration, it wrongly elevated free speech protection to its current position, where it is frequently abused with impunity.<sup>81</sup> Chafee's libertarian conception of free speech has since found an almost mythical status among modern free-speech scholars and misleadingly framed generations of free-speech discussion by overprioritizing the protection of negative freedom of speech.<sup>82</sup> To this day, we have continually adhered to Chafee's libertarian free-speech tradition despite, and not because of, the results of negative free speech protections.<sup>83</sup>

## II. THE MARKETPLACE OF IDEAS DEMONSTRATES THE NEED FOR POSITIVE FREEDOM OF SPEECH

Chafee's libertarian tradition led to the Supreme Court's embrace of the argument from truth—in the form of the marketplace of ideas—and, later, the argument from democracy as mainstays in its First Amendment

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Chafee clearly invented history when he declared that Holmes used the phrase "clear and present danger" in *Schenck* to make "the punishment of words for their bad tendency impossible." In fact, Chafee's 1919 *Harvard Law Review* article . . . marked the first time that "clear and present danger" was used as a speech-protective standard. When Holmes and Brandeis later decided to support the claims of political dissenters, they proceeded to accept "as their own the libertarian meaning Chafee erroneously read into their [sic] words."

*Id.* at 128 (footnotes omitted) (first quoting *Schenck*, 249 U.S. at 52; then quoting Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 967 (1919); and then quoting David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 594 (1981)).

79. GRABER, *supra* note 74, at 125–26; see CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 35; SCHAUER, FREE SPEECH, *supra* note 2, at 29–30 (over-prioritization of search for truth); see, e.g., *United States v. Stevens*, 559 U.S. 460, 470–71 (2010) (speech's protection is not directly determined by its societal costs).

80. GRABER, *supra* note 74, at 125–26.

81. See *id.* at 12, 162 (Chafee's libertarian free-speech tradition problems); Kang, *Against Political Speech*, *supra* note 10, at 803–07, 856–57, 863–64 (political speech protections threaten democracy by enabling misinformation).

82. GRABER, *supra* note 74, at 1–2, 6–7, 12–13, 15, 122, 171. As Graber points out, "The central question most historical works on First Amendment doctrine ask is, *Under what conditions does a given thinker claim that government can regulate speech?* From this narrow perspective[,] all defenders of expression rights seem part of a common tradition." *Id.* at 15 (emphasis added). This framing of free-speech discussion implicitly overprioritizes protecting negative free speech.

83. See *id.* at 15; Kramer, *supra* note 29, at 24–27 (libertarian free-speech tradition problems).

jurisprudence. As they currently exist, these maladaptive doctrines continually guarantee a dangerous excess of negative free speech at the expense of the positive free speech required for functional democratic deliberation. To illustrate the danger of adhering to a libertarian conception of free speech in the age of misinformation, the centerpiece of this Article will explore the marketplace of ideas metaphor and some of the many assumptions required for it to function as intended in the context of misinformation. This Article loosely organizes the included assumptions by whether the assumption pertains to (1) counterspeech, (2) *marketgoers* (i.e., the members of the electorate participating in democratic deliberation), or (3) the marketplace metaphor generally.

### A. Counterspeech Assumptions

As Justice Louis Brandeis explained in his 1927 *Whitney v. California* concurrence, “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”<sup>84</sup> This is the *counterspeech* (or “more speech”) doctrine; absent an emergency that justifies censorship as a “clear and present danger,”<sup>85</sup> confronting harmful or fallacious speech with accurate counterspeech is how better ideas win the day. Accordingly, a successful marketplace of ideas requires a successful use of the counterspeech doctrine. However, counterspeech carries a preliminary flaw: “more speech”—the already one-dimensional and maladaptive solution it poses—is its only means of addressing the issue of misinformation.

#### 1. Assumption that Counterspeech Is Reliably Effective

While individual instances of counterspeech need not always be successful, as the cornerstone of the marketplace of ideas, it must be both effective enough and effective often enough to support marketplace functionality. Unfortunately, counterspeech is seldom effective. Counterspeech’s success presupposes a high level of rationality from individual marketgoers that neglects to factor in human psychosocial behaviors and biases.<sup>86</sup> In particular, counterspeech only works where

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84. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

85. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

86. SCHAUER, FREE SPEECH, *supra* note 2, at 26–27, 30, 154–55; *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting) (trusting in public’s rationality); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 259 (1961) [hereinafter Meiklejohn, *The First Amendment is an Absolute*] (“And the same principle holds good if a

marketgoers are continually willing to question their understandings in the face of contrary evidence and “update” their understandings accordingly.<sup>87</sup> For a number of reasons, including the following brief examples, it is not at all cynical to acknowledge that this presumption of updating is frequently mistaken. First, people commonly exhibit a *truth bias*; we tend to believe and rely upon what we hear despite good reasons not to and subsequent corrections of those statements.<sup>88</sup> Second, human beings have a natural *confirmation bias*, the innate desire to relieve our insecurities by seeking out reaffirmation for our understandings and avoiding challenges to them.<sup>89</sup> We frequently exhibit, by extension, a *disconfirmation bias*, where we become more critical of information we encounter that contradicts our understanding.<sup>90</sup> Third, as part of a process called *biased assimilation*, we apply our biases when interpreting new information and develop a strong emotional attachment to our (potentially erroneous) beliefs.<sup>91</sup> This attachment is particularly strong for identity-based beliefs like religious convictions or partisan political stances.<sup>92</sup> And fourth, when we face a challenge to our identity-based belief, we tend to reject the disconfirming evidence and dig in our heels, doubling down on that potentially mistaken understanding.<sup>93</sup> This *backfire effect* is especially common for issues of fact, making it a direct barrier to updating political stances required for marketplace functionality.<sup>94</sup> With a greater amount of misinformation in the

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citizen attacks, by words of disapproval and condemnation, the policies of government, or even the structure of the Constitution. These are ‘public’ issues concerning which, *under our form of government, he has authority, and is assumed to have competence, to judge.*” (emphasis added).

87. RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419, 435–36 (2020) (“Updating Assumption”); see YOUNG, *supra* note 58, at 104.

88. CASS R. SUNSTEIN, LIARS 73–75 (2021) [hereinafter SUNSTEIN, LIARS] (truth bias and “meta-cognitive myopia”).

89. See CASS R. SUNSTEIN, #REPUBLIC 114–21, 123, 125 (2018) [hereinafter SUNSTEIN, #REPUBLIC] (confirmation bias); LEE MCINTYRE, POST-TRUTH 40–41, 45 (2018) [hereinafter MCINTYRE, POST-TRUTH] (motivated reasoning). Confirmation bias and motivated reasoning are closely related and often used interchangeably, which also supports this understanding.

90. SUNSTEIN, ON RUMORS, *supra* note 21, at 50; Jones & Sun, *supra* note 87, at 442–43.

91. See SUNSTEIN, ON RUMORS, *supra* note 21, at 9, 18; SANDER VAN DER LINDEN, FOOLPROOF 33 (2023).

92. See NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP 30 (2022); VAN DER LINDEN, *supra* note 91, at 40–41; YOUNG, *supra* note 58, at 90–92.

93. VAN DER LINDEN, *supra* note 91, at 35–36; Jones & Sun, *supra* note 87, at 445–46; see YOUNG, *supra* note 58, at 175–76 & nn.18–19 (hostile media effect).

94. Jones & Sun, *supra* note 87, at 445–46 (“If attempts to correct people’s basic factual misperceptions on questions critical to public policy are not only sometimes unsuccessful but . . . counterproductive[.] . . . then constructive, deliberate political debate seems like a pipedream indeed.”); Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, 41 POL. BEHAV. 135, 160 (2019).

marketplace of ideas, these behaviors shield a greater number of misinformed political opinions from refutation.

Marketgoers also face emotional hurdles to rational decision-making. When new information produces strong emotions—especially negative ones like anger and disgust—we are more likely to believe and share that information.<sup>95</sup> This process, called *emotional selection*, leads to our fixation on outrage and sensationalism at the expense of our consideration for the new information’s factual accuracy.<sup>96</sup> This is the mental process exploited by propaganda; the information, regardless of its factual accuracy, exploitatively solicits an emotional response to bypass one’s logical faculties.<sup>97</sup> In conjunction with biased assimilation and the backfire effect’s particular applicability to issues of fact, emotional selection becomes a terrifying driver of problematic forms of speech such as hate speech and conspiracy theories. Hate speech is particularly resistant to counterspeech due to its tendency to have a silencing effect on potential sources of counterspeech and the targeted groups’ “lack [of] access and resources to effectively reach all of those exposed to the initial [hateful] speech.”<sup>98</sup> Conspiracy theories, on the other hand, resist counterspeech by being “self-sealing”; they habitually reject disconfirming information by dismissing debunking efforts with a *that’s-what-they-want-you-to-think* rationale, and interpreting the attempted debunking as reassurance for the conspiracy theory’s correctness.<sup>99</sup>

Human irrationalities that negate counterspeech are also not limited to individuals. As individuals, we commonly base our opinions on those of others, especially when we lack enough information to support our own.<sup>100</sup> Moreover, we often seek out like-minded groups as a source of reassurance for our beliefs; within these groups, social pressures reduce receptiveness to

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95. SUNSTEIN, ON RUMORS, *supra* note 21, at 58–59 (emotional selection).

96. *Id.*; DEWEY & TUFTS, ETHICS (2d ed. 1932), *supra* note 30, at 359 (“Dispositions like love of ease, of sensational excitement, and desire to be relieved from responsibility for obtaining information, are the internal forces which reinforce the suppression of truth and the distortion of fact which come from without.”).

97. STANLEY, PROPAGANDA, *supra* note 24, at 48–49, 53 (definition of propaganda); *id.* at 42 (demonstrating that propaganda can be factually correct while still exploiting an emotional response); see Kramer, *supra* note 29, at 31.

98. Napoli, *supra* note 25, at 67; Billie Murray, *The Anti-Democratic Consequences of the “More Speech” System*, 56 COMM. & DEM. 198, 199–200 (2022).

99. YOUNG, *supra* note 58, at 44 & n.43; CASS R. SUNSTEIN, CONSPIRACY THEORIES & OTHER DANGEROUS IDEAS 1, 5–10 (2014) [hereinafter SUNSTEIN, CONSPIRACY THEORIES]; see, e.g., LEE MCINTYRE, ON DISINFORMATION 15, 22–23 (2023) [hereinafter MCINTYRE, ON DISINFORMATION] (explaining a common five-point flawed-reasoning strategy among science deniers; denialist beliefs are rooted in identity, not fact).

100. SUNSTEIN, ON RUMORS, *supra* note 21, at 9, 24 (social cascades); see SUNSTEIN, #REPUBLIC, *supra* note 89, at 57 (“cybercascades”); *Argumentum Ad Populum*, BLACK’S LAW DICTIONARY (11th ed. 2019).

new ideas and radicalize members' opinions.<sup>101</sup> Like-mindedness affords members reassurance and confidence, but it frequently leads to *group polarization*. Members' newfound sense of security often leads to a stubborn willingness to double down, which in turn leads to ego-driven defenses of one's beliefs, even (and often) at the expense of factual accuracy.<sup>102</sup> One social pressure at work here is *groupthink*, where members will conform to their group's broader beliefs, generally to protect their reputation and favorable status within the group.<sup>103</sup> The result is both individual radicalization and approval of the broader group's radicalization.<sup>104</sup> Deeply-held beliefs that already feed into tribalistic behavior—namely, ones regarding socio-political identities like political affiliation, religious beliefs, and race-based prejudices—only serve to bolster these effects.<sup>105</sup>

## 2. Assumption that Counterspeech Is Available

To be effective, counterspeech needs to occur at a rate and volume that enables it to counteract problematic speech in the marketplace.<sup>106</sup> Today, counterspeech is becoming progressively less available, as a vast majority of marketplace discourse occurs online, especially through social media.<sup>107</sup> This is because social media companies use proprietary algorithms to locate and present content tailored to individual users' interests to keep them engaged and available for advertisements.<sup>108</sup> Users exhibiting emotional selection are more inclined to like, share, and subscribe to provocative content, so platforms' algorithms feed users increasingly inflammatory, outrageous, and ideologically extreme material, regardless of its factual accuracy.<sup>109</sup> These

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101. SUNSTEIN, ON RUMORS, *supra* note 21, at 32 (group polarization).

102. *Id.* at 38–41 (three steps of group polarization); SUNSTEIN, #REPUBLIC, *supra* note 89, at 68; *see, e.g.*, HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 382 (Mariner 1968) (1951) [hereinafter ARENDT, TOTALITARIANISM] (“[O]ne could make people believe the most fantastic statements one day, and trust that if the next day they were given irrefutable proof of their falsehood, they would take refuge in cynicism; instead of deserting the leaders who had lied to them, they would protest that they had known all along that the statement was a lie and would admire the leaders for their superior tactical cleverness.”).

103. Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955); SUNSTEIN, ON RUMORS, *supra* note 21, at 28–31.

104. SUNSTEIN, ON RUMORS, *supra* note 21, at 41–42; CASS R. SUNSTEIN, CONSPIRACY THEORIES AND OTHER DANGEROUS IDEAS 16–17 (2014) (“reputational cascade”).

105. YOUNG, *supra* note 58, at 92, 180–81; KALMOE & MASON, *supra* note 92, at 30; *see* MCINTYRE, ON DISINFORMATION, *supra* note 99, at 22–23.

106. *See* SCHAUER, FREE SPEECH, *supra* note 2, at 30 (stating that the Argument from Truth impliedly requires counterspeech).

107. *See* *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017).

108. BARBARA F. WALTER, HOW CIVIL WARS START 110 (2022); SUNSTEIN, ON RUMORS, *supra* note 21, at 58–59 (emotional selection).

109. *See* WALTER, *supra* note 108, at 111; MINOW, *supra* note 27, at 3, 20, 31.

individualized content rabbit holes often create digital information silos, or *filter bubbles*.<sup>110</sup> The resulting informational isolation limits contact with opposing viewpoints and sources of counterspeech, exacerbates the psychosocial behaviors discussed above, and facilitates ideological radicalization.<sup>111</sup> Worse still, this phenomenon occurs on both the supply and demand sides of content consumption, as online content creators produce increasingly extreme content to attract viewers.<sup>112</sup> Even if counterspeech were an effective response, the proprietary nature of social media algorithms makes it impossible to determine which counterspeech to provide a user, let alone whether it will be effective.<sup>113</sup> The final result is a marketplace that rewards radical and false ideas rather than filtering them out, the subject of Part III.

### 3. Assumption that Truth Will Prevail

The marketplace of ideas is a truth-seeking mechanism. It is not enough that counterspeech be successful in changing a marketgoer's mind; for the marketplace to support democratic deliberation, informed and accurate speech must prevail—or, at least, more often than not—when confronted with uninformed or inaccurate speech. Once again, this is often not the case. Mill's assumption that an absence of “persecution” would allow truth to “triumph” is simply mistaken.<sup>114</sup> Human beings have no inherent ability to distinguish truth from falsity—hence the heavy emphasis that proponents of democracy have historically placed on educating the public—and truth has no inherent advantage over falsity.<sup>115</sup> In fact, falsity can be much more appealing, particularly since those pushing deliberate falsehoods can account

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110. WALTER, *supra* note 108, at 111; MINOW, *supra* note 27, at 19–20, 24–5, 30–31 (“digital gerrymandering”; filter bubble); see YOUNG, *supra* note 58, at 203–04 (“Monopolization—Mediated propaganda can only thrive in the absence of counterpropaganda.”).

111. See WALTER, *supra* note 108; *supra* Part II.A.1.

112. RENEE DIRESTA, INVISIBLE RULERS 168 (2024); *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds*, Hearing Before S. Comm. on Judiciary Subcomm. on Priv., Tech., & L., 117th Cong. 2–3 (Apr. 27, 2021) [hereinafter *Hearings*] (endnote omitted) (statement of Joan Donovan, Ph.D., Rsch. Dir., Harvard Kennedy Sch.'s Shorenstein Ctr. on Media, Pol., & Pub. Pol'y).

113. YOUNG, *supra* note 58, at 234.

114. See SCHAUER, FREE SPEECH, *supra* note 2, at 26–27 (against the assumption that truth will prevail).

115. *Id.*; SNYDER, ON FREEDOM, *supra* note 32, at 194; ROSENFELD, *supra* note 18, at 53 (historical emphasis on education); see, e.g., CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 560.

for the circumstances in advance and tailor their claims accordingly.<sup>116</sup> Moreover, as with conspiracy theories or religious beliefs, some truth claims are insurmountable not because of their accuracy or support but because they are unfalsifiable.<sup>117</sup>

Compounding this, the marketplace of ideas envisions the average marketgoer as a diligent detective of truth and a paragon of civic virtue; marketgoers must make the search for truth their top priority if the marketplace is to be a truth-seeking mechanism.<sup>118</sup> This is true of neither individuals nor the public for reasons that include acting in accord with the psychosocial behaviors and biases discussed above.<sup>119</sup> Individuals may not prioritize truth-seeking by, for instance, aiming only to win in debate without any willingness to “update.”<sup>120</sup> For the public, a truth-seeking priority may easily be overshadowed by the identity-based tribalism, which has become the hallmark of contemporary American politics.<sup>121</sup>

#### 4. Assumption of Equal Deployability

For counterspeech to serve its intended role in the marketplace of ideas, true speech and true counterspeech must be deployable at a rate comparable to that of false speech and false counterspeech. First, if true speech were more burdensome to produce than false counterspeech, true speech would be easier to defeat with false counterspeech and thus less likely to gain traction in the marketplace. Second, if true counterspeech were more burdensome than false speech, there would be fewer instances of true counterspeech to challenge false speech. Producing true speech is more burdensome in both

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116. See SCHAUER, *FREE SPEECH*, *supra* note 2, at 75; Hannah Arendt, *Lying in Politics*, in *CRISES OF THE REPUBLIC* 1, 6–7 (Harvest 1972) (1971) [hereinafter Arendt, *Lying in Politics*].

117. YOUNG, *supra* note 58, at 44; see MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 15 (common five-point flawed-reasoning in denialism, e.g., “impossible expectations for what the other side must achieve”).

118. SCHAUER, *FREE SPEECH*, *supra* note 2, at 17, 23; Jones & Sun, *supra* note 87, at 426–32 (“Truthseeking Assumption”).

119. See *supra* Part II.A.1–2.

120. See SUNSTEIN, *LIARS*, *supra* note 88, at 66 (Argument from Truth presumes genuine arguments by marketgoers); see also generally Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 *BEHAV. & BRAIN SCI.* 57 (2011) (people often argue not to identify truth but to win and reinforce beliefs).

121. See YOUNG, *supra* note 58, at 180–81, 235; Murray, *supra* note 98, at 201–02; MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 22–23.

circumstances, of which the first will be explored in a later Part,<sup>122</sup> and the second will be explored here.<sup>123</sup>

According to the crass yet profound *Brandolini's Law*, “The amount of energy needed to refute bullshit is an order of magnitude bigger than that needed to produce it.”<sup>124</sup> The marketplace, however, erroneously assumes that truth and falsehood can be deployed at the same rate and with the same effect; truth being more difficult to deploy than falsehood necessarily occurs at the expense of the better-informed party.<sup>125</sup> To illustrate the point by analogy, consider the relationship between superheroes and supervillains: a supervillain is unconcerned with the damage they cause to the city as they seek to defeat the superhero, whereas the superhero must not only defeat the supervillain but do so in a way that spares their life while preventing casualties and minimizing damage. The burden on the superhero (the marketgoer producing truthful counterspeech) is thus significantly higher than the burden on the supervillain (the marketgoer producing false initial speech). This disparity in burdens—the *Superhero's Burden*—necessarily encumbers truthful counterspeech and bolsters false initial speech. Modern debate provides an excellent example of the Superhero's Burden in the form of *Gish galloping*, a bad-faith debate tactic in which one debater quickly produces a stream of silly assertions to overburden their opponent with arguments to refute; if the opponent becomes flustered and unable to respond effectively, and the audience has not caught on to the arguments' nonsensical nature, the Gish gallop has been deployed effectively.<sup>126</sup> Debate is already a poor fact-finding mechanism since neither argumentative skill nor audience approval requires a significant basis in fact. The added difficulty of

122. See *infra* Part II.C.1–2.

123. “Cheap speech,” by nature, necessarily confirms that false initial speech can be deployed quicker than true counterspeech. RICHARD L. HASEN, *CHEAP SPEECH* 19–20 (2022).

124. See Andrew Gelman, *The Bullshit Asymmetry Principle*, COLUM. UNIV.: STAT. MODEL., CAUSAL INFER., & SOC. SCI. (Jan. 28, 2019), <https://statmodeling.stat.columbia.edu/2019/01/28/bullshit-asymmetry-principle/> (Brandolini's Law, i.e., the “Bullshit Asymmetry Principle”); see also, e.g., Phil Williamson, *Take the Time and Effort to Correct Misinformation*, 540 NATURE 171, 171 (2016).

125. See SNYDER, ON FREEDOM, *supra* note 32, at 266 (“As Simone Weil wrote, discovering and receiving truth takes work, whereas producing and believing the false is effortless.”); SCHAUER, FREE SPEECH, *supra* note 2, at 74–75 (“accepting falsity requires less effort than identifying truth”); Arendt, *Lying in Politics*, *supra* note 116, at 6–7 (advantage of the liar).

126. “Gish galloping” is:

[A] fallacious debate tactic in which a person uses as many arguments as possible against their opponent without any consideration into the strength of the arguments. . . . As such, the Gish gallop fallacy only focuses on the quantity of the arguments, not the quality, in order to achieve its objective: to make it too difficult for the opponent to respond. As a result, the person committing it seemingly gains an upper hand in the debate.

Editorial Staff, *Gish Gallop (Logical Fallacy): Definition and Examples*, FINMASTERS (emphasis omitted) <https://finmasters.com/gish-gallop/#gref> (last updated May 23, 2023).

marketplace counterspeech carrying the Superhero's Burden only serves to make the various forms of misinformation all the more challenging to combat.<sup>127</sup>

### *B. Marketgoer Assumptions*

#### 1. Assumption Against Ad Populum

In his legendary *Abrams* dissent, Justice Holmes opined that “[t]he ultimate good desired is better reached by free trade in ideas” and that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>128</sup> Justice Brandeis’s comparably famous *Whitney* concurrence develops this notion of “political truth” as the best or most beneficial idea reached through marketplace discourse.<sup>129</sup> But this highlights the single most critical flaw of the marketplace of ideas: it does not distinguish between that “political truth” and reality-based truth. In other words, the marketplace metaphor uses popular acceptance as its means of evaluating both matters of opinion and matters of fact. While there are few indications that the marketplace of ideas was intended to also apply to matters of fact, our adherence to the metaphor has nonetheless extended to cover matters of fact.<sup>130</sup> Conflating factual accuracy with popular acceptance is a terrifyingly fallacious misstep, as these two distinct concepts commonly do not overlap. Popularity alone does not make an unreasonable idea or understanding reasonable, nor does persuasiveness make an inaccurate idea or understanding accurate.<sup>131</sup> As evidenced by the many deviations from marketplace expectations this Article presents, the assumption that an idea’s popular acceptance reflects its factual accuracy or reliability is an egregious and load-bearing error, the reliance upon which will undermine the very democratic deliberation that the First Amendment was created to facilitate.<sup>132</sup>

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127. See Napoli, *supra* note 25, at 70 (Fake news “do[es] not require the same rigorous research, verification processes, or trained professionals to produce.”).

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

129. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see SCHAUER, *FREE SPEECH*, *supra* note 2, at 19–22 (“the consensus, or ‘survival,’ theory of truth”).

130. Frederick Schauer, *Facts and the First Amendment*, 57 *UCLA L. REV.* 897, 907 (2010); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 *U. PA. J. CONST. L.* 845, 848; see, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 279–280 (1964) (protecting factually inaccurate published statements as political speech); *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (plurality opinion) (providing First Amendment protection for false claims of military medals).

131. See *Argumentum Ad Populum*, *supra* note 100.

132. SCHAUER, *FREE SPEECH*, *supra* note 2, at 21–22; MORGAN MARIETTA & DAVID C. BARKER, *ONE NATION, TWO REALITIES* 294 (2019); see Napoli, *supra* note 25, at 88 (regarding the counterintuitively detrimental effect of broad political speech protections); DEWEY, *PUBLIC AND ITS*

This issue seems to stem from two places. First, *truth* as a concept has been philosophized for millennia, so much so that its countless meanings have made it so amorphous that, today, the term's intended meaning often must be specified once the word is used.<sup>133</sup> The liberal philosophical tradition that inspired the Founding Fathers and Mill—and by extension Chafee, Holmes, and Brandeis—considered truth to be a social concept, usually an instance of dependable knowledge reached in consensus, not a demonstrable fact on which to base opinions and inform democratic deliberation.<sup>134</sup> In this sense, “truth” would be a form of opinion, not fact.<sup>135</sup> Second, democratic deliberation as an institution is based not only upon consensus-building but also upon progress. To hold an opinion is to observe the same fact (or set of facts) that others do and arrive at a different (or potentially different) preference-based conclusion about that fact. Therefore, a shared reality or mutual basis in fact is a prerequisite for informed discussion and debate, and thus for democratic deliberation.<sup>136</sup> Contesting the shared facts required for democratic deliberation wrongly demotes indisputable (or functionally indisputable) matters of fact to disputable matters of opinion. This makes progress from democratic deliberation impossible, as Part III explains.

## 2. Assumption that Truth and Falsehood Are Distinguishable

Similarly to how the marketplace metaphor assumes marketgoers' rationality and value of truth, it also assumes that marketgoers can distinguish

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PROBLEMS, *supra* note 50, at 199–200 (forming popular opinion requires investigation, collaboration, and reliance upon factual knowledge).

133. See, e.g., ROSENFELD, *supra* note 18, at 15, 18–19; SCHAUER, FREE SPEECH, *supra* note 2, at 22, 26–27 (stating that writers before Mill “considered [truth] self-evident, needing only to be expressed to be recognized,” and so they “simply assumed that truth would reveal itself in the interplay of competing belief”).

134. ROSENFELD, *supra* note 18, at 27–28; Arendt, *Truth and Politics*, *supra* note 21, at 305; see, e.g., GRABER, *supra* note 74, at 109 (“Truth was the majority vote of that nation that could lick all others.” (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 310 (Peter Smith 1952) (1920))).

135. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (indicating, through Jefferson's language “we hold these truths to be self-evident,” a consensus-based agreement on the matter, rather than a matter of fact.); Benjamin Franklin, *An Apology for Printers*, PA. GAZETTE (Jun. 10, 1731) (“[W]hen Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play, the former is always an overmatch for the latter: Hence they cheerfully serve all contending Writers that pay them well, without regarding on which side they are of the Question in Dispute.”), *quoted in* CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 298.

136. ROSENFELD, *supra* note 18, at 173–74; MARIETTA & BARKER, *supra* note 132, at 294; see DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 200; OTTO NEURATH, *Foundations of the Social Sciences*, in 2 FOUNDATIONS OF THE UNITY OF SCIENCE: TOWARD AN INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 1, 1–5 (Otto Neurath et al. eds., 1944) (need for a “universal jargon” in unified science).

good products from bad ones.<sup>137</sup> Even otherwise ideal marketgoers cannot contribute to marketplace discourse unless they can properly evaluate the general quality of each competing idea. One example of this is *bothsidesism*. Contemporary demand for “balanced” reporting has led the news media—to avoid accusations of bias—to merely present competing partisan positions rather than weigh in on their respective merits.<sup>138</sup> In doing so, the news media present the two positions as if they are equally reasonable and supported, potentially legitimizing (at least) one poorly supported position or suggesting that a solution lies somewhere in the middle ground.<sup>139</sup>

Misinformation, in any form, exploits this issue in two interrelated ways. First, misinformation can—and is often intended to—play on psychosocial behaviors and biases, elevating factually inaccurate ideas in the marketplace to a level of perceived (but unwarranted) viability on par with factually accurate ideas. Potentially the largest contributing factor is one of the key components of successful propaganda—the *Illusory Truth Principle*, under which we tend to believe an idea is more accurate the more often we hear it.<sup>140</sup> Repetition legitimizes: the more we hear an idea, the more familiar and safer it feels.<sup>141</sup> Worse still, the Illusory Truth Principle is at play *regardless* of one’s prior knowledge of the matter involved.<sup>142</sup> In fact, this effect of misinformation is so potent that it can significantly change our memories of situations we as individuals personally experienced, a phenomenon called the *misinformation effect*.<sup>143</sup> In other words, misinformation can create marketplace false positives. Second, where such false positives have made

137. SCHAUER, FREE SPEECH, *supra* note 2, at 75, 154–55; Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 833 (2008).

138. YOUNG, *supra* note 58, at 141, 152 (“bothsidesism”; “conflict framing”). As journalism professor Jonathan Foster often said to his students, “If someone says it’s raining and another person says it’s dry, it’s not your job to quote them both. Your job is to look out the f\*\*\*ing window and find out which is true.” MCINTYRE, ON DISINFORMATION, *supra* note 99, at 54.

139. MCINTYRE, ON DISINFORMATION, *supra* note 99, at 53–55; *see, e.g.*, NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT 214–15 (2010).

140. Aumyo Hassan & Sarah J. Barber, *The Effects of Repetition Frequency in the Illusory Truth Effect*, 6 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS, DEC. 2021, at 1, 1; VAN DER LINDEN, *supra* note 91, at 21–23, 172 (illusory truth effect); JONATHAN RAUCH, THE CONSTITUTION OF KNOWLEDGE 28 (2021) [hereinafter RAUCH, THE CONSTITUTION OF KNOWLEDGE] (explaining how propaganda requires extensive repetition); TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 66–67 (2017) (“[T]he fascist style depends upon ‘endless repetition,’ designed to make the fictional plausible . . . .”); *see* MILL, *supra* note 4, at 71 (without understanding why something is true or false, people will resort to trusting repetition as an indication of truth); ARENDT, TOTALITARIANISM, *supra* note 102, at 351 (noting the use of repetition in totalitarian propaganda).

141. VAN DER LINDEN, *supra* note 91, at 23.

142. Lisa K. Fazio et al., *Knowledge Does Not Protect Against Illusory Truth*, 144 J. EXPERIMENTAL PSYCH. 993, 999–1000 (2015).

143. VAN DER LINDEN, *supra* note 91, at 24–26.

truth and falsehood indistinguishable and interchangeable, expertise and knowledge-producing institutions can no longer inform democratic deliberation.<sup>144</sup> In circumstances where ideas have been artificially made indistinguishable and without relied-upon sources of knowledge and expertise, democratic deliberation becomes directionless, emotionally driven, and vulnerable to propagandic influences.<sup>145</sup> Any resulting progress from such deliberation is either reached by coincidence or allowed by accident.<sup>146</sup> As the philosopher Hannah Arendt once said, “[T]he result of a consistent and total substitution of lies for factual truth is not that the lies will not be accepted as truth, and the truth be defamed as lies, but that sense by which we take our bearings in the real world . . . is being destroyed.”<sup>147</sup> The dangers of continued misinformed popular belief in a democracy will be explored in Part III.

### 3. Assumption of Equal Participation

The marketplace of ideas presupposes that marketgoers have a minimum and comparable amount of access to the marketplace. No such guarantees exist, and the primary cause of this access disparity lies in marketgoers’ material wealth. At one end of the spectrum, materially poor marketgoers cannot afford the means by which to access and contribute to today’s predominantly online marketplace; at the other, far more problematic end, materially wealthy marketgoers can afford a disproportionate volume of contributions to marketplace discourse.<sup>148</sup> By donating to political campaigns and funding advertising, wealthy individuals, corporations, unions, and political action committees have an inordinate influence on public opinion,

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144. YOCHAI BENKLER ET AL., NETWORK PROPAGANDA 36–37 (2018) (disorientation); ROSENFELD, *supra* note 18, at 9, 129–30, 133–34; YOUNG, *supra* note 58, at 50–51 & nn.75–77, 119–21.

145. See BENKLER ET AL., *supra* note 144, at 36–37; MCINTYRE, POST-TRUTH, *supra* note 89, at 11–13; DIRESTA, INVISIBLE RULERS, *supra* note 112, at 227–28; SNYDER, ON FREEDOM, *supra* note 32, at 194; ARENDT, TOTALITARIANISM, *supra* note 102, at 351, 474; Lidsky, *Nobody’s Fools*, *supra* note 12, at 839.

146. See DEWEY, LIBERALISM, *supra* note 28, at 56, 74–75; SNYDER, ON FREEDOM, *supra* note 32, at 176–77, 187–88; SUNSTEIN, ON RUMORS, *supra* note 21, at 56–57; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 191; GRABER, *supra* note 74, at 89 (“Empirical investigation would settle political disputes ‘in the interest of the widest possible contribution to the interests of all,’ rather than in the narrow interest of a particular social class.” (quoting DEWEY, LIBERALISM, *supra* note 28, at 81)).

147. Arendt, *Truth and Politics*, *supra* note 21, at 309.

148. GRABER, *supra* note 74, at 210–12, 215; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (“The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. *The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.*” (emphasis added)).

debate, and perception relative to the average American.<sup>149</sup> By allowing this disproportionate marketplace access, freedom of speech is conflated with a freedom of reach.<sup>150</sup>

While Chafee and several Supreme Court justices have acknowledged this issue, the marketplace metaphor does not account for it.<sup>151</sup> In fact, the Supreme Court has determined that this problem is not a bug but a feature; its First Amendment jurisprudence insists that this flaw remain unaddressed and that it, in fact, supports democratic deliberation.<sup>152</sup> The Court has unwisely and repeatedly maintained that the First Amendment forbids government efforts to reduce this disparity, and that any harmful consequences of this outsized influence are merely a bullet to be bitten.<sup>153</sup> Because this subject matter has been thoroughly covered by legal scholars since the Court issued its infamous *Citizens United v. FEC*<sup>154</sup> decision in 2010, this Article will not analyze the matter in depth. What is important is that this disparity of marketplace access results in oversized and undue influence on democratic deliberation, political corruption in service of special interests, and the undermining of democracy by reducing the electorate's ability to act in its own interest.<sup>155</sup>

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149. GRABER, *supra* note 74, at 210–12, 215; ROSENFELD, *supra* note 18, at 165–66. Corporations enjoy the same First Amendment political speech protections as individual citizens. *Citizens United v. FEC*, 558 U.S. 310, 342–43, 346–47, 351 (2010); *see* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958).

150. *See* DiRESTA, INVISIBLE RULERS, *supra* note 112, at 146–47, 332.

151. GRABER, *supra* note 74, at 137; *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 256–57 (1976) (Burger, C.J., concurring) (per curiam); *Citizens United*, 558 U.S. at 394, 423–424, 450 (Stevens, J., dissenting).

152. GRABER, *supra* note 74, at 189; *Buckley*, 424 U.S. at 14, 19 (per curiam); *Citizens United*, 558 U.S. at 339; *McCutcheon v. FEC*, 572 U.S. 185, 196–97 (2014).

153. *See Citizens United*, 558 U.S. at 339–41, 351–52; *Buckley*, 424 U.S. at 48–49 (per curiam); *id.* at 256–57 (Burger, C.J., concurring in part and dissenting in part) (“There are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them . . .”).

154. 558 U.S. 310.

155. Disparate marketplace access will have undue influence on democratic deliberation. GRABER, *supra* note 74, at 215, 226; *Citizens United*, 558 U.S. at 394, 423–24, 450, 472–73 (Stevens, J., dissenting). Disparate marketplace access allows for political corruption in service of special interests. *Id.* at 440–41, 447–50; *McCutcheon*, 572 U.S. at 237–39, 245–50 (Breyer, J., dissenting). Disparate marketplace access undermines the democratic process and individual agency. *See* DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 192, 199, 202–03; GRABER, *supra* note 74, at 89.

*C. Metaphoric Assumptions*

## 1. Assumption Against “Too Much Speech”

The rationale behind counterspeech, and in turn the entire marketplace metaphor, is the “more speech” doctrine: generally, confronting false or fallacious ideas with correct ones is how better ideas win the day.<sup>156</sup> However, this impliedly assigns a “the-more-the-merrier” quality to speech in the marketplace, trusting that no volume of speech contributions will meaningfully affect the marketplace’s functionality.<sup>157</sup> This is both resoundingly untrue and the apparent position of the Supreme Court.<sup>158</sup> Professor Alexander Meiklejohn tacitly acknowledged the marketplace’s finite capacity for speech when he said, “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>159</sup> This distinction between marketplace speech contributions that are or are not “worth saying” encapsulates the concept of *cheap speech*: speech that is low-effort, low-value, and likely misinformation.<sup>160</sup> Even if, as Mill believed, false speech has a valuable role in the marketplace’s truth-seeking function, the presence and excess of information that does not contribute to marketplace discourse hinders productive deliberation. Cheap speech is not only speech that requires effort to refute, but its mere receipt in the marketplace contextualizes other information that marketgoers encounter, coloring their perception of its truthfulness.<sup>161</sup>

In the online age, even small amounts of cheap speech present an existential problem for democracy because of how easily deployable cheap speech is online. By playing on many of the psychosocial biases and behaviors discussed in this Article,<sup>162</sup> misinformation is more likely to be shared online and travels faster online than any truthful or neutral content,

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156. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see generally *supra* Part II.A.

157. SCHAUER, *FREE SPEECH*, *supra* note 2, at 77 (“If people are suspicious of suppressed opinions, it is largely based on their belief that opinions that really are false can be allowed expression without danger.”).

158. *Citizens United*, 558 U.S. at 335–36; see *id.* at 472 (Stevens, J., dissenting).

159. MEIKLEJOHN, *SELF-GOVERNMENT*, *supra* note 11, at 25.

160. See HASEN, *supra* note 123, at 19–20 (discussing Eugene Volokh, *Cheap Speech and What it Will Do*, 104 *YALE L.J.* 1805, 1808–18, 1831 (1995)).

161. *Id.* at 21; SCHAUER, *FREE SPEECH*, *supra* note 2, at 74 (“If we are searching for truth, plain error does nothing to help the process. It reduces the proportion of true propositions among all propositions expressed thereby diluting the frequency of truth and making it harder to locate. A needle is harder to find in a haystack than in two pieces of hay.”); see SUNSTEIN, *ON RUMORS*, *supra* note 21, at 5 (stating that cheap speech can be rumors that use “where-there’s-smoke-there’s-fire” thinking to sow doubt).

162. See *supra* Part II.A.1–2.

with political misinformation traveling the fastest of all.<sup>163</sup> While this is already a critical problem in its own right, cheap speech poses an even greater danger because it is weaponizable. The internet is susceptible to the tactic of *flooding* (that is, *reverse censorship* or *false amplification*), wherein a high volume of information is intentionally used to “drown out disfavored speech, or at least distort[] the sense of how much support any given view has.”<sup>164</sup> Flooding allows for First Amendment speech protection to be used against itself.<sup>165</sup> Abroad, autocratic governments like China, Russia, and the Philippines already employ flooding through “listener-targeted speech control” to suppress politically unfavorable speech.<sup>166</sup> As philosopher Lee McIntyre eloquently puts it, “Who needs censorship when the truth can be buried under a pile of bullshit?”<sup>167</sup>

## 2. Assumption of a Public Censor

By embodying the *laissez-faire* economic practices of the early 20th century—and thus the classical liberal notion that development and progress require minimizing government intervention—the marketplace of ideas implicitly assumes that the government is the agent of censorship to be guarded against. This is frequently not the case as censorship need neither be a public nor domestic practice, and it certainly is not confined to after-the-fact restrictions on speech or publication rights.<sup>168</sup> Let us address each of these three distinctions.

First, given Americans’ notorious distrust of government, it is easy to picture censorship only as the government denying citizens’ ability to speak or publish. But this is an outdated and unimaginative understanding rooted in the authoritarian tactics of the 20th century. In the same way that the needs for the enjoyment of a positive freedom change with the circumstances of the time, the means by which free speech rights may be stifled also changes.<sup>169</sup>

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163. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1148 (2018).

164. Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 565 (2018) [hereinafter Wu, *Is the First Amendment Obsolete?*]; MINOW, *supra* note 27, at 21, 23, 34 (2021) (flooding tactics); see SCHAUER, *FREE SPEECH*, *supra* note 2, at 202.

165. ROSENFELD, *supra* note 18, at 156; *but see* *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017) (First Amendment right to internet access).

166. Wu, *Is the First Amendment Obsolete?*, *supra* note 164, at 565 (describing flooding, reverse censorship, and use by Chinese government); MINOW, *supra* note 27, at 21, 23, 34 (compiling flooding tactics and use by Russian and Philippine governments).

167. MCINTYRE, *POST-TRUTH*, *supra* note 89, at 116.

168. GRABER, *supra* note 74, at 89.

169. See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297–99 (2014); DEWEY, *LIBERALISM*, *supra* note 28, at 42–43, 54; GRABER, *supra* note 74, at 169–70.

Modern disinformation tactics take advantage of the unique characteristics and properties of online media to hinder democratic deliberation. Flooding, from Part II.C.1, is one such example, as is a related technique called the *firehose of lies*, wherein someone tries to mitigate criticism by disorienting their audience with numerous contradictory explanations.<sup>170</sup>

Second, disinformative practices are not exclusive to the government. *Doubt-mongering*, perhaps the best example of private disinformation campaigns, lies in corporate uses of the “Tobacco Strategy.”<sup>171</sup> For over 40 years, the American tobacco industry infamously sought to suppress knowledge of the dangers of smoking cigarettes.<sup>172</sup> Despite knowing as early as 1953 of the danger of their products, the tobacco industry continued to deny health risks and actively sow doubt among the public until the 1990s.<sup>173</sup> One 1969 internal memo read, “[D]oubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the minds of the general public.”<sup>174</sup> Hoping to replicate the tobacco industry’s success in disinforming the public, the fossil-fuel industry employed the “tobacco road” to promote climate denialism.<sup>175</sup> Since as early as 1977, oil corporations and their financial supporters have donated millions of dollars to climate-denialist think tanks, sponsored contradictory scholarship, lobbied elected officials to take denialist positions, and pushed education officials to adopt science curricula encouraging doubt.<sup>176</sup> Despite a functionally universal scientific consensus (over 99.9%) on anthropogenic climate change and over

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170. MCINTYRE, ON DISINFORMATION, *supra* note 99, at 32; *see* RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 163 (describing how Steve Bannon’s strategy is to “flood the zone with shit”).

171. ORESKES & CONWAY, *supra* note 139, at 6, 34–35.

172. *Id.* at 33.

173. *Id.* at 21, 33–34; *see* United States v. Philip Morris, Inc., 449 F. Supp. 2d 1, 27–28, 146 (D.D.C. 2006) (convicting Philip Morris and other tobacco companies under RICO Act for devising and executing a scheme to defraud consumers and potential consumers about the hazards of cigarettes, of which they had known since the 1950s); MCINTYRE, POST-TRUTH, *supra* note 89, at 20–27 (tobacco strategy).

174. MCINTYRE, POST-TRUTH, *supra* note 89, at 24 (quoting Brown & Williamson, Smoking and Health Proposal 4 (1969) (transcript of presentation to the B&W Executive Committee, available at <https://www.industrydocuments.ucsf.edu/docs/psdw0147> (Bates No. 690010951-690010959))).

175. *See generally* ORESKES & CONWAY, *supra* note 139, at 35, 168–215 (discussing tobacco and fossil fuel companies’ use of doubt); *see also* MCINTYRE, POST-TRUTH, *supra* note 89, at 27–33 (using the tobacco industry’s strategy as means of perpetuating climate denialism). Dozens of cases against the oil industry are taking place nationwide. *See U.S. Climate Change Litigation*, COLUM. CLIMATE SCH. SABIN CTR. FOR CLIMATE CHANGE L., <https://www.climatecasechart.com/search> (last visited May 17, 2026) (select “Case categories” under “Filters” on the left, then check the box next to “Actions seeking money damages for losses (US)” to see pending climate litigation).

176. *See* MCINTYRE, ON DISINFORMATION, *supra* note 99, at 11 (lobbying elected officials; contradictory scholarship); MCINTYRE, POST-TRUTH, *supra* note 89, at 27–33 (think tank contributions and influence on school curricula).

a century of observations supporting that consensus, 80% of Americans are not aware of that consensus, nearly 40% still do not believe climate change is man-made, and over 25% still do not believe it is happening at all.<sup>177</sup>

Third, censorship is frequently not a domestic practice. Foreign governments frequently conduct disinformation campaigns—often called *active measures*—on other countries’ citizens.<sup>178</sup> Through such targeted efforts, foreign governments intentionally influence marketplace discourse as a means of undermining enemy democratic states, reducing their ability to self-govern.<sup>179</sup> As it turns out, the marketplace of ideas does not exist in a vacuum, and malicious non-marketgoers have become quite skilled at putting their thumb on the scale. The weaponizable nature of misinformation will be discussed further in Part III.

### 3. Assumption of Relative Benignity

The marketplace of ideas metaphor also assumes that constitutionally protected speech is relatively harmless to marketplace discourse. The metaphor presumes that, even if some speech is damaging, the marketplace can recover through more speech—reflecting the marketplace’s institutional resilience.<sup>180</sup> This presumed elasticity can be observed in at least two interrelated forms. First, there is a presumption that constitutionally

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177. Krishna Ramanujan, *More Than 99.9% of Studies Agree: Humans Caused Climate Change*, CORNELL CHRON. (Oct. 19, 2021), <https://news.cornell.edu/stories/2021/10/more-999-studies-agree-humans-caused-climate-change> (reporting 99.9% peer-reviewed scientific papers find anthropogenic climate change); see generally Richard P. Allan et al., U.N. Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers*, in CLIMATE CHANGE 2021, WORKING GROUP I: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE IPCC 3 (V. Masson-Delmotte et al. eds., 2021) (showing broad and international consensus among scientific community of the existence and danger of climate change); Svante Arrhenius, *On the Influence of Carbonic Acid in the Air Upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237, 237–38 (1896) (first recorded observation of climate change); Anthony Leiserowitz et al., CLIMATE CHANGE IN THE AMERICAN MIND: BELIEFS & ATTITUDES 5, 8, 10 (2023) (statistics); Brian Kennedy & Alec Tyson, *How Americans View Climate Change and Policies to Address the Issue*, PEW RSCH. CTR. (Dec. 9, 2024), <https://www.pewresearch.org/science/2024/12/09/how-americans-view-climate-change-and-policies-to-address-the-issue/> (statistics).

178. See RID, *supra* note 21, at 4–5 (Soviet Cold War disinformation campaigns); NAT’L INTEL. COUNCIL, ICA 2020-00078D, INTEL. COMM’Y ASSESSMENT: FOREIGN THREATS TO THE 2020 US FEDERAL ELECTIONS 1 (2021); see also, e.g., Mary Clare Jalonick & Eric Tucker, *Senate Panel Backs Assessment that Russia Interfered in 2016*, AP (Apr. 21, 2020), <https://apnews.com/article/d094918c0421b872eac7dc4b16e613c7>.

179. See RID, *supra* note 21, at 4–5; Renee DiResta, *Algorithms, Affordances, and Agency*, in SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 121, 127 (Lee C. Bollinger & Geoffrey R. Stone eds., 2022).

180. See Schauer, *Free Speech and the Argument from Democracy*, *supra* note 25, at 248 (“Ratchet Fallacy”).

protected speech will not lead to the dissolution of the democracy in which the marketplace exists.<sup>181</sup> This presumption is the focus of both Part II.C.5 and Part III. Second, there is a presumption that the mere presence—rather than the merits—of constitutionally protected speech supporting a minority opinion will not undermine the public’s ability to implement the majority position.<sup>182</sup> Justice Oliver Wendell Holmes Jr. made this presumption in his free-speech opinions, basing his rationale in a strange commitment to majoritarian principles.<sup>183</sup> By taking the fallacious truth-as-popular-acceptance position<sup>184</sup>, he tacitly took the position that speakers’ minority viewpoints should receive constitutional protection because those viewpoints posed no real risk of interfering with the majority’s ability to implement its viewpoint.<sup>185</sup>

This principle of functional impotence in the marketplace is deeply misguided. In the United States, hate speech provides a clear illustration. Generally speaking, a majority of Americans value equality of opportunity, respect for human dignity, and equal treatment under the law and so want American society to reflect those values. However, where a small yet vocal minority of Americans expresses hateful positions for one or more targeted demographics, that minority of speakers reduces the dignity of that demographic and increases social tensions at that demographic’s expense.<sup>186</sup> The expression of those hateful positions by that minority of speakers thus detracts from the majority’s ability to bring about its values of equality and dignity.<sup>187</sup> Hate speech poses two additional challenges. First, it is especially resistant to counterspeech because it tends to discourage potential sources of counterspeech, and the targeted demographic often has fewer resources and marketplace access to counter the hate speech effectively.<sup>188</sup> Second, it is

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181. See Kramer, *supra* note 29, at 30–31.

182. SCHAUER, FREE SPEECH, *supra* note 2, at 29–30.

183. Frederick Schauer, *Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition*, 51 SETON HALL L. REV. 205, 215–16 (2021) [hereinafter Schauer, *Harmless Speech Tradition*]; GRABER, *supra* note 74, at 109–11; compare *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that compulsory vaccination laws should be upheld because of “the right of a majority to embody their opinions in law”), with *id.* at 55–56 (majority opinion) (explaining that such laws are instead justified as valid exercises of state police power to protect public health and the common good).

184. See *supra* Part II.B.1.

185. GRABER, *supra* note 74, at 109–11; Schauer, *Harmless Speech Tradition*, *supra* note 183, at 205–06, 215–16.

186. SCHAUER, FREE SPEECH, *supra* note 2, at 29–30.

187. *Id.*; see, e.g., Ibram X. Kendi, *When Free Speech Becomes Unfree Speech*, THE EDULEDGER (Oct. 20, 2015), <https://www.diverseeducation.com/students/article/15097335/when-free-speech-becomes-unfree-speech> (exemplifying negative free speech protections coming at the expense of racial equality and dignity).

188. Napoli, *supra* note 25, at 67; see Murray, *supra* note 98, at 199–200.

“cheaper” and more easily deployable than corrective counterspeech, a frustrating complement to the first challenge.<sup>189</sup>

#### 4. Assumption of Fit

The marketplace of ideas metaphor is not a one-size-fits-all approach. Technological advancements have created new means of communication with unique properties for which the marketplace metaphor must account to adequately support First Amendment protections.<sup>190</sup> The emergence of film in the early 20th century introduced a visual dimension to communication and expression to which the Supreme Court struggled for decades to apply the First Amendment.<sup>191</sup> And when broadcast media traded the physical property of print media for the same spatial dimension as the telephone, the marketplace of ideas metaphor needed to be tailored accordingly.<sup>192</sup>

Technological advancements that create new means of communication also create new opportunities for misinformation, in any of its forms, to proliferate. Governments have struggled with this issue for hundreds of years, and the result, to put it mildly, is not a better-informed electorate.<sup>193</sup> For instance, the invention of the printing press helped spur the witch-hunting obsession in Europe from the 15th to the 18th centuries.<sup>194</sup> The publication and mass distribution of a 1486 how-to for witch-hunting, *The Hammer of the Witches*, led to around 300 years of witch-based conspiracies, witch-hunting institutions, and the torture or execution of over 50,000 people.<sup>195</sup>

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189. Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for 21st-Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1640 (2021).

190. *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 386 (1969) (“[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them.”); see sources cited *supra* note 67; see also, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (holding Fairness Doctrine is inapplicable to newspapers).

191. See *Mut. Film Corp. v. Indus. Comm’n. of Ohio*, 236 U.S. 230, 242, 244 (1915) (“[Films] are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.” (emphasis added)), *overruled by* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

192. See, e.g., *Red Lion Broad.*, 395 U.S. at 387–88 (discussing the physical scarcity of the radio frequency spectrum as a justification for tailored First Amendment regulations); *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (applying a similar rationale to television broadcasting, noting that a licensee’s exclusive use of the public domain is burdened by enforceable public obligations).

193. See YUVAL NOAH HARARI, *NEXUS* 92–93 (2024); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* 137–39 (2018) (explaining how the wide dissemination of information by the printing press did not lead to a better-informed public).

194. See HARARI, *supra* note 193, at 92; see generally Kerice Doten-Snitker et al., *Ideational Diffusion and the Great Witch Hunt in Central Europe*, 53 THEORY & SOC’Y 1291 (2024).

195. See HARARI, *supra* note 193, at 94–101.

The United States, too, has adjusted poorly. For instance, while First Amendment free-press protection was primarily meant for individual publishers, contemporary usage of the term “press” has questionably led to free-press coverage for virtually all books, magazines, newspapers, and news broadcasts.<sup>196</sup>

As evidenced by new-age disinformation tactics like flooding, the marketplace metaphor has not been tailored to the internet and social media.<sup>197</sup> Social media’s unique properties have substantial impacts on the dissemination of misinformation. To name a few: social media platforms constantly change and add features affecting user experience; new platforms and features spur changes by other platforms; platforms commonly update their ad policies and technology in ways that affect user interaction and content creator incentives; and the international nature of the internet often leads to inconsistent and uncoordinated regulatory policies.<sup>198</sup> Nonetheless, the Supreme Court has applied the marketplace metaphor to online speech with neither the appropriate tailoring nor the appropriate adjustments to that tailoring as technology has evolved.<sup>199</sup>

Poor tailoring of free-speech protections—not just the marketplace metaphor—to new channels of speech also implicates the “principle of functional impotence.”<sup>200</sup> First, existing First Amendment speech doctrines like the *clear and present danger* standard already fail to account for the more indirect and attenuated harms of misinformation, which, by nature, reduces the electorate’s ability to think and act in its own interest.<sup>201</sup> This alone cuts against Justice Holmes’s position on free-speech protections.<sup>202</sup> Second, technological advancements allow peddlers of misinformation to reach an impossibly larger audience. As a result, doctrines that do not address

196. SCHAUER, *FREE SPEECH*, *supra* note 2, at 106–07.

197. See ROSENFELD, *supra* note 18, at 40–41, 156; BENKLER ET AL., *supra* note 144, at 20–23; STROSSEN, *FREE SPEECH*, *supra* note 1, at 142–43 (“More recently, the communications medium by which speech is transmitted has become a less significant factor in determining how much protection the speech should receive . . .”).

198. Garrett Morrow & John P. Wihbey, *Marketplace of Ideas 3.0? A Framework for the Era of Algorithms*, 29 RICH. J.L. & TECH. 52, 87–89 (2023).

199. See STROSSEN, *FREE SPEECH*, *supra* note 1, at 142–43. Note that Strossen illustrates this contention somewhat supportively, which this Article does not. Compare *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (limiting initial tailoring of the marketplace metaphor to online speech), with *Packingham v. North Carolina*, 582 U.S. 98, 104, 108 (2017) (rejecting First Amendment protections for sex offenders using social media).

200. See *supra* Part II.C.3.

201. See Kang, *Against Political Speech*, *supra* note 10, at 803–04, 856–67, 863–64 (arguing that political speech protection threatens democracy by enabling misinformation); *Hustler Mag. v. Falwell*, 485 U.S. 46, 52 (1988); Kramer, *supra* note 29, at 25–26, 30–31.

202. See sources cited *supra* note 183.

misinformation challenges become increasingly inadequate as technological innovation creates new channels by which misinformation can reach receptive audiences that were previously out of reach.<sup>203</sup>

This shortcoming culminates in previously tolerable misinformation causing intolerable harm with impunity.<sup>204</sup> A prime example is the phenomenon of *stochastic terrorism*, where a public figure's demonization of an individual or group leads to violence against that individual or group by the public figure's audience.<sup>205</sup> One such perpetrator is Alex Jones, the prominent political extremist and conspiracy theorist. Infamously, Jones falsely depicted mass shootings in Newtown, Connecticut (2012) and Parkland, Florida (2017) as government "false flag" operations employing child "crisis actors" to drum up support for gun control measures.<sup>206</sup> His defamatory claims against the survivors and victims' families led to extended harassment campaigns, tormenting, death threats, and other forms of abuse that culminated in \$1.4 billion in defamation suit damages.<sup>207</sup> On April 30, 2026, Jones announced that, due to a forced closure of his Infowars studio in Austin, Texas, "the last official Infowars show" would air that day.<sup>208</sup> Unfortunately, he plans to continue to produce his disinformative, conspiracy content at a new studio.<sup>209</sup> Aside from a few assertions constituting actionable defamation, Jones's decades of broadcasting fictional content and inspiring real-world crimes have generally enjoyed First Amendment protection.<sup>210</sup> Without online media to circulate their absurdities, bad actors like Jones would presumably be functionally impotent political speakers

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203. See BENKLER ET AL., *supra* note 144, at 33–34.

204. See Kramer, *supra* note 29, at 24–27.

205. Bryn Nelson, *Weaponization of Disgust*, SCI. AM., May 2023, at 10, 10.

206. See Jim Vertuno, *Alex Jones Concedes Sandy Hook Attack was '100% Real'*, AP (Aug. 3, 2022), <https://apnews.com/article/health-us-news-shootings-texas-lawsuits-d029d6736d2ce6755c9e89e7cf9f27af>; Rachel Janik, "Crisis Actors" Conspiracy Theory Spreads Across the Radical Right, S. POVERTY L. CTR. (Feb. 23, 2018), <https://www.splcenter.org/resources/hatewatch/crisis-actors-conspiracy-theory-spreads-across-radical-right/>.

207. See Mark Sherman, *Supreme Court Rejects Alex Jones' Appeal of \$1.4 Billion Defamation Judgment in Sandy Hook Shooting*, AP (Oct. 14, 2025), <https://apnews.com/article/supreme-court-newtown-shooting-alex-jones-infowars-ddcdede90c0c8d2710c768fd0ea9946f>.

208. Tovia Smith, *The Onion's Bid to Take Over Infowars Moves to the Texas Supreme Court*, NPR, <https://www.npr.org/2026/04/30/nx-s1-5806038/the-onion-infowars-alex-jones-texas-supreme-court> (last updated Apr. 30, 2026).

209. *Id.*

210. See, e.g., Peter Fimrite, *Masked Man Enters, Attacks Bohemian Grove / 'Phantom' Expected Armed Resistance*, SFGATE (Jan. 24, 2002), <https://www.sfgate.com/bayarea/article/masked-man-enters-attacks-bohemian-grove-2881742.php> (reporting Jones's broadcast inspired an armed man to enter San Francisco-based Bohemian Club, convinced of "bizarre, Luciferian ceremonies," "child abuse," and "human sacrifice").

relegated to the political fringe, as Justice Holmes envisioned.<sup>211</sup> This audience size issue is a frequently ignored principle in First Amendment jurisprudence and will be revisited in Part IV.

### 5. Assumption of Inevitability

Finally, the marketplace metaphor presupposes democracy. John Stuart Mill understood that truth would not always prevail over falsehood in the short term, but he argued that over long periods of time, truth would be rediscovered and reasserted until the conditions were right for it to achieve popular acceptance.<sup>212</sup> In other words, Mill believed the marketplace of ideas would course correct and eventually arrive at truth in the long run—an idea which other contributors to the American free-speech tradition seem to have adopted.<sup>213</sup> But no matter the timeframe, truth has no inherent power to overcome falsehood and marketgoers have no inherent power to discern the two.<sup>214</sup> This Article has demonstrated this to be the case in the short term.<sup>215</sup> By any definition of *the long run*, the result is the same. In any observable length of time, history is replete with counterexamples of truth reliably overcoming falsehood; in an unlimited or indefinite timeframe, the notion that truth will eventually triumph is unfalsifiable and worthless.<sup>216</sup> In any case, trust that truth will inherently prevail is unjustifiable: a parallel of the misplaced trust the American free-speech tradition has in the marketplace of ideas.

But Mill was wrong for another, more important reason. As this Article has suggested several times, the marketplace metaphor presupposes the survival of the democratic system in which it exists.<sup>217</sup> Of the many problems with analogizing speech to economics, faith that a democratic public will inevitably find its way to truth is likely the worst; not because of some cynical view of the American public or human beings in general, but rather because democracies are notoriously fragile and not known for their longevity.<sup>218</sup> It must be understood that popular sovereignty is its own weakness, a double-

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211. See sources cited *supra* note 183.

212. MILL, *supra* note 4, at 54; see SCHAUER, FREE SPEECH, *supra* note 2, at 26–27.

213. See, e.g., CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 139 (“The only tribunal which can . . . [evaluate] the menace of ideas is time.”).

214. SCHAUER, FREE SPEECH, *supra* note 2, at 26–27.

215. See *supra* Part II.A.3, II.B.2.

216. SCHAUER, FREE SPEECH, *supra* note 2, at 27.

217. See *supra* Part II.

218. See Kramer, *supra* note 29, at 25–26; O’CONNOR & WEATHERALL, *supra* note 29, at 179–80.

edged sword that has been observed for millennia.<sup>219</sup> As the philosopher Karl Popper once described this dynamic—sometimes called the *Paradox of Freedom* and captured in the Founding Fathers’ fear of the *tyranny of the majority*—“unlimited freedom leads to its opposite, since without its protection and restriction by law, freedom must lead to a tyranny of the strong over the weak.”<sup>220</sup> This is the precise dynamic at play between constitutional free-speech protections and the (lack of) regulation of misinformation: if a voting majority can be convinced of dangerous fictions and cast their votes based on their misinformed understanding, the democratic public loses its ability to self-govern, and their compromised democracy begins to devolve into autocracy.<sup>221</sup> Joseph Goebbels, the Minister of Propaganda in Nazi Germany, hauntingly once said, “This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.”<sup>222</sup> Mill did not account for the notion that democracy may not survive long enough for truth to be found. As Zechariah Chafee once paraphrased his contemporary’s comments on the matter, “[I]n the long run . . . we shall all be dead – and perhaps not peacefully in our beds either.”<sup>223</sup>

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Whether it takes the form of fake news, disinformation tactics, or propaganda, misinformation is the Achilles’ heel of democracy: it turns the

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219. See Plato, Republic bk. VI, 488c–89a (“Ship of State” metaphor); *id.* bk. VIII, 562c–62e (Socrates’s criticism of democracy); George Washington, Washington’s Farewell Address to the People of the United States 12 (Sept. 19, 1796), in S. Pub. 115-5, Dec. 2017, at 1, 11–12 (stating that demagogues will exploit popular sentiment to gain power and subvert democracy); KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581 n.4 (Princeton 1994) (1945) (“paradox of tolerance”).

220. POPPER, *supra* note 219, at 257–58 (Paradox of Freedom); see THE FEDERALIST NO. 51, *supra* note 41, at 324–25.

221. See SCHAUER, FREE SPEECH, *supra* note 2, at 160–61; see also, e.g., GUSTAVE LE BON, THE CROWD: A STUDY OF THE POPULAR MIND 67 (Dover 2002) (1896) (“The masses have never thirsted after truth. They turn aside from evidence that is not to their taste, preferring to deify error, if error seduce them. Whoever can supply them with illusions is easily their master; whoever attempts to destroy their illusions is always their victim.”); see also BENITO MUSSOLINI, MY AUTOBIOGRAPHY 25 (Richard Washburn Child trans., Scribner ed. 1928) (“Among foreign writers, I have meditated much upon the work of the German thinkers. I have admired the French. One of the books that interested me most was the “Psychology of the Crowd” [also known as “The Crowd”] by Gustave Lebon [sic].”).

222. This quote may be misattributed, however, likely coming from an introduction to a compilation of Goebbels’s works. See DER ANGRIF: AUFSÄTZE AUS DER KAMPFZEIT [THE ATTACK: ESSAYS FROM THE FIGHTING PERIOD] 61 (Hans Schwarz van Berk ed., 1935), quoted in STANLEY, PROPAGANDA, *supra* note 24, at v.

223. CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 28, at 560 (paraphrasing Walter Lippmann).

popular sovereignty of the democratic public against itself. The marketplace of ideas metaphor and other free-speech doctrines, First Amendment jurisprudence, and the general American free-speech tradition do not account for this and wrongly refuse to do so. These frameworks erroneously adhere to a near-total commitment to a negative freedom of speech that cannot address the harms of misinformation until those harms, for instance, give rise to a defamation claim. For the many reasons outlined in this Part, misinformation makes the conception of free speech as a negative freedom untenable, likely catastrophic for American democracy, and progressively less viable with time.<sup>224</sup> As Part III will explain, the consequences for failing to adopt positive free speech protections—so as not to infringe upon the enjoyment of negative free speech—will be fatal for democracy.<sup>225</sup>

### III. DEMOCRATIC EROSION, THE ANOCRATIC FORK, AND THE CONSEQUENCES OF INACTION

The circumstances described above evince a natural and fatal malfunction of democracy. It is the intersection at which popular sovereignty and democratic rule come to be at odds. The democratic state that finds itself at this fork in the road faces the dilemma of making fundamental changes to preserve its democratic system or succumbing to democratic collapse from elected authoritarian rule.<sup>226</sup> The democracy at this fork has backslid into a state of *anocracy*, a form of government between democracy and autocracy that has features of both.<sup>227</sup> The United States presently sits at this *Anocratic Fork*—somewhere it has not been since the volatile years following independence—and we are here because of our commitment to negative freedom and especially to negative free speech.<sup>228</sup> As a result, “We are no longer the world’s oldest continuous democracy.”<sup>229</sup> To traverse the Anocratic Fork and reestablish democracy in the United States, we must adopt positive free-speech protections. To do so, it is paramount to

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224. SUNSTEIN, ON RUMORS, *supra* note 21, at 10 (supporting the idea that disinformative political speech inhibits democratic deliberation and causes citizens to lose faith in the government, its officials, and its policies).

225. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 89 (“The biggest problem facing our nation is misinformation-at-scale. . . . The cost of doing nothing is democracy’s end.” (alteration in original) (quoting *Hearings*, *supra* note 112, at 7)).

226. See WALTER, *supra* note 108, at 89–101; see also, e.g., Jerome Kerwin, *The German Reichstag Elections of July 31, 1932*, 26 AM. POL. SCI. REV. 921, 921 (1932) (National Socialist Party wins 230 seats in German legislature); Karl Loewenstein, *Dictatorship and the German Constitution: 1933–1937*, 4 U. CHI. L. REV. 537, 545 (1937) (German legislature votes to grant dictatorial power).

227. See WALTER, *supra* note 108, at 14.

228. See *id.* at 135–38.

229. See *id.* at 138.

understand the dynamics at play: the influence of populist demagoguery, the role of misinformation, and how social media acts as an accelerant.

### *A. Misinformation Feedback Loops*

The addition of misinformation into a democracy, intentionally or not, sets into motion two interrelated feedback loops that facilitate democratic erosion. This Article will refer to these as the *dysfunction* and *radicalization* feedback loops, respectively. This Part will briefly provide a general description of each feedback loop before exploring their key contributing factors. The first feedback loop, the *dysfunction feedback loop*, pertains to democratic erosion by way of misinformation's direct damage to democratic deliberation. Misinformation, by nature, detracts from democratic deliberation by reducing the set of mutually agreed-upon facts required for productive discussion and informed progress.<sup>230</sup> Uninformed deliberation then produces poor decision-making by the electorate in evaluating the quality of important ideas, issues, arguments, ballot measures, and candidates for public office.<sup>231</sup> The elected government then acts either in accordance with, or in spite of, these misunderstandings and misevaluations, performing less successfully and becoming less responsive to the public's needs.<sup>232</sup> As a result, the government's unresponsiveness to the democratic public causes dissatisfaction, distrust, and delegitimization in the eyes of its citizens.<sup>233</sup> The citizens' disconnection and distrust toward this delegitimized government builds receptiveness to misinformation.<sup>234</sup> Both domestic populist demagogues and, as explored in Part II.C.2, malicious foreign actors exploit

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230. See *supra* Part II.B.1.

231. ROSENFELD, *supra* note 18, at 129–30; Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53; Redish & Pereyra, *supra* note 22, at 468.

232. Balkin, *Constitutional Crisis*, *supra* note 39, at 151; JÜRGEN HABERMAS, LEGITIMATION CRISIS 70 (Thomas McCarthy trans., Beacon Press 1975) (1973). For example, in 2024, misinformation, disinformation, and conspiracy theories about the Federal Emergency Management Agency (FEMA) led many survivors to not to seek aid or evacuate during Hurricane Helene, making disaster relief efforts harder, sowing distrust against FEMA, and leading to heavy FEMA funding cuts. David Klepper, *After the Deluge, the Lies: Misinformation and Hoaxes About Helene Cloud the Recovery*, AP, <https://apnews.com/article/hurricane-helene-trump-musk-conspiracy-theories-misinformation-fe81869765d778ac2ff3dc5f9ac18e10> (last updated Oct. 5, 2024); David Klepper, *Russia Amplified Hurricane Disinformation to Drive Americans Apart, Researchers Find*, AP, <https://apnews.com/article/russia-hurricane-disinformation-fema-9e37c73ab8ffa2a2d338797a1a827e57> (last updated Oct. 24, 2024); Jack Brook, *Loss of FEMA Program Spells Disaster for Hundreds of Communities and Their Projects*, AP, <https://apnews.com/article/fema-bric-grants-climate-resilience-cb2ead8d418e1ff4e53d95f482de3522> (last updated Apr. 28, 2025).

233. Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53; HABERMAS, *supra* note 232, at 69, 72.

234. SUNSTEIN, ON RUMORS, *supra* note 21, at 56; BENKLER ET AL., *supra* note 144, at 16.

this weakness of democracy regularly and to great effect.<sup>235</sup> The second feedback loop is the *radicalization feedback loop*, and it pertains to democratic erosion by way of populist demagoguery undermining key democratic norms. Misinformation leads to social and political polarization, creating partisan animosity, defactualization (i.e., the rejection of factual information and the formation of different political realities), and distrust that feed into one another.<sup>236</sup> The results are twofold: (1) heavy misinformation, often taking the forms of conspiracism and denialism;<sup>237</sup> and (2) an unmooring from reality that creates high susceptibility to propaganda.<sup>238</sup> And, as the final section of this Part will explore, each component of this feedback loop contributes to the likelihood of political violence and civil war.<sup>239</sup>

### B. Populist Demagoguery and Identity-Based Appeals

As populist demagogues, aspiring autocrats contribute to both misinformation feedback loops described above. To do so, they exploit the identity-based fears and misinformed grievances of a particular disgruntled demographic—usually the dominant socio-ethnic group, often leading that demographic to factionalize along racial, ethnic, and religious lines.<sup>240</sup> Populist demagogues instill this faction with a fear that their traditional way of life is being abandoned, and thus rejected, producing feelings of loss, insult, resentment, and hostility.<sup>241</sup> This identity-based feeling of loss,

235. See *supra* Part II.C.2; RID, *supra* note 21, at 11, 426 (describing strategic disinformation campaigns, or “active measures”); see also, e.g., Shannon Bond, Jude Joffe-Block & Caitlin Thompson, *How Russian Operatives Covertly Hired U.S. Influencers to Create Viral Videos*, NPR (Sept. 5, 2024), <https://www.npr.org/2024/09/05/nx-s1-5100829/russia-election-influencers-youtube>.

236. See *infra* Part III.B; DIRESTA, INVISIBLE RULERS, *supra* note 112, at 230 (distrust and polarization feedback loop); YOUNG, *supra* note 58, at 59–62, 122–23 (defactualization, different political realities, affective polarization); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 24–25 (defactualization); MARIETTA & BARKER, *supra* note 132, at 262–63 (polarization, defactualization, distrust feedback loop).

237. See YOUNG, *supra* note 58, at 52; SUNSTEIN, ON RUMORS, *supra* note 21, at 56–57; MCINTYRE, ON DISINFORMATION, *supra* note 99, at 26, 84–85 (denialism); ARENDT, TOTALITARIANISM, *supra* note 102, at 382 (denialism).

238. See *supra* Part II.B.2.

239. See *infra* Part III.E.

240. See WALTER, *supra* note 108, at 35–40; YOUNG, *supra* note 58, at 66, 68–69, 134–35, 180–81 (race and religion, respectively; demagogues target these overlaps); STANLEY, FASCISM, *supra* note 40, at 89–90, 98–99 (describing the same tactics as used in fascist politics).

241. WALTER, *supra* note 108, at 36–40, 42–46, 63, 65–69, 74–77 (“superfactions” and “downgrading”); YOUNG, *supra* note 58, at 66, 180–81 (identity threat); KALMOE & MASON, *supra* note 92, at 33, 69–70, 74, 78–81, 85–87, 106, 120, 162–64; STANLEY, FASCISM, *supra* note 40, at 94, 98–99 (loss of dominant status).

sometimes called a *status threat* or *identity threat*, produces tremendous emotional investment in one's partisan identity that, in turn, leads to significant ideological radicalization and hostility toward political opponents—even to a point of becoming open to political violence and the dehumanization of those opponents.<sup>242</sup> Non-faction members factionalize in response, exhibiting similar but more moderate behavior.<sup>243</sup> Moreover, the group psychosocial behaviors discussed in Part II.A.1–2 (e.g., group polarization and groupthink) accentuate this issue, further diluting the quality of deliberation and decision-making within the groups.<sup>244</sup> And because major political events like elections tend to name winners and losers and serve as predictable occasions on which factions may lose power, elections ironically become democratically *destabilizing* events rather than *restabilizing* ones.<sup>245</sup>

Today, both the news media and social media drastically exacerbate this issue. Where tensions escalate between competing factions, members of each faction seek out news coverage that comforts them by reaffirming the understanding that is rooted in the identity they feel is under attack.<sup>246</sup> This is particularly strong among those in the first faction, whose threatened identity is likely a combination of smaller identities, such as race, ethnicity, religion, culture, or country of origin.<sup>247</sup> As well, the more identities that are implicated, the stronger the feeling of status threat and thus susceptibility to demagoguery.<sup>248</sup> As for-profit corporations, traditional news outlets—and the social media platforms on which their coverage appears—are incentivized to attract and maintain viewers, and they do so with sensationalized, outrageous, and analytically shallow coverage regardless of

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242. YOUNG, *supra* note 58, at 60–62, 92–93, 97, 100–101 (regarding partisan identity, affective polarization, and dehumanization); KALMOE & MASON, *supra* note 92, at 69–70, 75–77 (regarding affective polarization leading to increasing openness to political violence; strong partisan social identity leads to high polarization and violent views); Robin K. Maril, *Originalism and Democratic Decline*, 88 MD. L. REV. 926, 966–67 (2025); *see, e.g.*, WALTER, *supra* note 108, at 53, 63–69, 74–77, 173–74 (regarding status threat, increased openness to political violence, dehumanization); STANLEY, *FASCISM*, *supra* note 40, at xxix–xxx, 89–90 (use of identity-based polarization to dehumanize others).

243. *See* YOUNG, *supra* note 58, at 92; STANLEY, *FASCISM*, *supra* note 40, at 96–97 (regarding counter-factionalization in the face of discrimination and oppression).

244. *See supra* Part II.A.1; YOUNG, *supra* note 58, at 108 (stating that identity-driven sociopolitical sorting leads to different understandings of the world).

245. WALTER, *supra* note 108, at 93, 95–96; KALMOE & MASON, *supra* note 92, at 33, 46, 64, 120, 126; *see, e.g.*, *Trump v. United States*, 144 S. Ct. 2312, 2324–25 (2024) (referring to the events of Jan. 6, 2021).

246. YOUNG, *supra* note 58, at 66, 180–81; *see supra* Part II.A.1 (confirmation bias and motivated reasoning).

247. YOUNG, *supra* note 58, at 183, 235; *see generally* WALTER, *supra* note 108, at 35–40 (regarding trends of factionalization and “superfactions” in anocracies).

248. WALTER, *supra* note 108, at 44–46.

its quality or accuracy.<sup>249</sup> By providing sensationalized coverage of identity-reaffirming content, popular media maximizes viewership and creates a deeply problematic trust in their coverage.<sup>250</sup> This trust is problematic for three reasons. First, due to something called the *Hostile Media Effect*, the more attached someone is to their partisan identity, the more hostile they become to any media coverage inconsistent with their partisan opinions.<sup>251</sup> Second, as those staunch partisans develop trust in the coverage, they also radicalize further and become hostile toward any supposedly like-minded sources that contradict their understanding, thus requiring a consistent flow of progressively more outrageous coverage to maintain their viewership.<sup>252</sup> Third, the greater the following this coverage attracts, the more incentive politicians and activists have to indulge and contribute to the narratives presented in the coverage, which, in turn, requires outrageous claims or actions from them to earn coverage from the outlet and trust from its audience.<sup>253</sup> Worse still, this progressively radicalizing coverage provides the ideal opportunity for demagogues to reach “not just a receptive audience, but also a receptive medium”; the audience is seeking uncritical guidance during a (perceived) trying time, and the news outlet has substantial profit incentives to allow the demagogue to regularly indulge that audience with low-value political rhetoric.<sup>254</sup> The feedback loop the news outlet has created will produce progressively more misinformation and do progressively more damage to democratic deliberation.<sup>255</sup>

While social media companies uncritically—but indirectly—indulge this profit-centered feedback loop by providing access to that content on their platforms, the platforms themselves spur those identity-based fears in two unique ways, which this Article will refer to as the *rabbit hole* and *sorting dynamics*, respectively.<sup>256</sup>

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249. *Id.* at 110–11, 115–16; BENKLER ET AL., *supra* note 144, at 77–81; YOUNG, *supra* note 58, at 153, 156.

250. YOUNG, *supra* note 58, at 181–83; BENKLER ET AL., *supra* note 144, at 77–81.

251. YOUNG, *supra* note 58, at 175–76, 183; BENKLER ET AL., *supra* note 144, at 78–80.

252. YOUNG, *supra* note 58, at 175–76, 183; BENKLER ET AL., *supra* note 144, at 77–81; DIRESTA, INVISIBLE RULERS, *supra* note 112, at 168; *see, e.g.*, Will Steakin, *Trump Supporters Angry Over Justice Department’s Epstein Memo*, ABC (July 8, 2025), <https://abcnews.go.com/Politics/trump-supporters-angry-justice-departments-epstein-memo/story?id=123567461>.

253. YOUNG, *supra* note 58, at 134–35, 147, 151, 183; BENKLER ET AL., *supra* note 144, at 78–80.

254. YOUNG, *supra* note 58, at 147, 153 & n.66, 156, 194, 203–204 & nn.22–23. Extremism and feelings of disempowerment lead to greater receptiveness to rumors and outrageous beliefs, such as conspiracy theories. *See* SUNSTEIN, ON RUMORS, *supra* note 21, at 56–57; KALMOE & MASON, *supra* note 92, at 126.

255. BENKLER ET AL., *supra* note 144, at 81.

256. YOUNG, *supra* note 58, at 206; *Hearings*, *supra* note 112, at 55.

First, the rabbit hole dynamics. As a substantial amount of scholarship across disciplines has explored, and as this Article has discussed, social media platforms create a metaphorical rabbit hole of increasingly sensationalized and extreme content as a means of maximizing user engagement and thus ad revenue opportunity.<sup>257</sup> In the user's individualized rabbit hole, the algorithm not only funnels increasingly inflammatory material of questionable accuracy to the user based on their views, likes, and shares, but this also causes content creators to produce increasingly sensationalized content to attract and maintain viewers.<sup>258</sup> As discussed earlier in this Part, identity-based content is particularly evocative, and identity-reaffirming content is in high demand, both of which social media algorithms exploit. But unlike the news media's radicalization feedback loop, this one goes a step further in its personalized responsiveness to the individual.<sup>259</sup> And in our online world, social media provides both less identity-disconfirming content and fewer real-world interactions with people of differing views, leading to information silos (filter bubbles) and ideological reinforcement.<sup>260</sup>

Second, the sorting dynamic. When social media algorithms recommend increasingly inflammatory content to users, they do not tailor-make new content for the individual user, but rather they recommend existing content to the user base in part on its popularity with other users with similar characteristics.<sup>261</sup> In doing so, social media algorithms introduce like-minded users on their interactive platforms during those users' journeys down their respective radicalization rabbit holes.<sup>262</sup> From there, the group psychosocial behaviors discussed above affect group discourse, and opportunistic propagandists and demagogues gain access to another receptive audience on a platform that incentivizes misinformation.<sup>263</sup> Through social media, "a

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257. WALTER, *supra* note 108, at 110–11; DiResta, *Algorithms, Affordances, and Agency*, *supra* note 179, at 129–30 (detailing an internal Facebook presentation, leaked to the *Wall Street Journal*, which stated: "'Our algorithms exploit the human brain's attraction to divisiveness' and promote 'more and more divisive content in an effort to gain user attention and increase time on the platform.'" (quoting Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020), <https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499>)); *see supra* Part II.A.2.

258. *See sources cited supra* note 112.

259. *See Hearings*, *supra* note 112, at 5–6.

260. YOUNG, *supra* note 58, at 203–04 ("Monopolization"); WALTER, *supra* note 108, at 110–11; MINOW, *supra* note 27, at 19–20, 24–25, 30–31 ("digital gerrymandering" and the filter bubble).

261. *Hearings*, *supra* note 112, at 5–6.

262. *See* YOUNG, *supra* note 58, at 203–04; BENKLER ET AL., *supra* note 144, at 33–34 ("Propaganda Pipeline"); WALTER, *supra* note 108, at 111.

263. *See supra* Part II.A.1–2; YOUNG, *supra* note 58, at 147, 153, 156, 194, 203–06; *Hearings*, *supra* note 112, at 1–3.

small group of highly motivated and connected actors can manipulate public understanding of any issue simply by using these products as they are designed”; the platforms “efficiently unite monstrous errors with their defenders.”<sup>264</sup>

### *C. Negative Appeals: Negative Freedom and Individualism*

In making identity-based appeals to their factionalized audiences, populist demagogues tend to base their rhetoric in individualism and negative freedom.<sup>265</sup> By appealing to individualism and negative freedom, a demagogue is able to promote a lack of obligation between fellow citizens and thereby erode the faction-member audience’s solidarity with non-faction members.<sup>266</sup> Fostering these sociopolitical tensions undermines the public’s capability of deliberating and organizing for social and political change—the very function a democracy is intended to facilitate.<sup>267</sup> For example, authoritarians—and especially fascists—abhor labor unions for their ability to build solidarity and community among working-class faction members and working-class non-faction members.<sup>268</sup> Individualism and negative freedom deployed in such ways accomplish two things. First, as employed in authoritarian regimes, it facilitates an “us” versus “them” mentality, otherizing non-faction members.<sup>269</sup> Second, it instills resistance to political change, thereby preserving the status quo.<sup>270</sup> In this second way, populist demagogues act in accordance with the wills of oligarchs or other elites, using negative freedom appeals as a pretext to maintain societal conditions that provide these established elites with their financial positions.<sup>271</sup> Since policies that support the common good (and thus positive freedom) necessarily alter such societal conditions, they undermine elites’ interests and provide them a strong financial incentive for establishing and maintaining a

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264. *Hearings*, *supra* note 112, at 1; SNYDER, ON FREEDOM, *supra* note 32, at 187; *see* WALTER, *supra* note 108, at 111 (“[T]he longer a discussion continue[s], the more extreme the comments bec[o]me.”).

265. *See* STANLEY, FASCISM, *supra* note 40, at 182–83; SNYDER, ON FREEDOM, *supra* note 32, at 209–10.

266. *See* STANLEY, FASCISM, *supra* note 40, at 182–83; SNYDER, ON FREEDOM, *supra* note 32, at 209–10.

267. *See* STANLEY, FASCISM, *supra* note 40, at 182–83; SNYDER, ON FREEDOM, *supra* note 32, at 209–10 (showing solidarity as a prerequisite for democracy).

268. STANLEY, FASCISM, *supra* note 40, at 170–74, 176–77.

269. *See id.*; SNYDER, ON FREEDOM, *supra* note 32, at 209–10.

270. *See* DEWEY, LIBERALISM, *supra* note 28, at 35, 41, 43–44; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 163–64, 192–93 (using classical liberal values to perpetuate the status quo).

271. *See* Balkin, *Constitutional Crisis*, *supra* note 39, at 151–53; DEWEY, PUBLIC AND ITS PROBLEMS, *supra* note 50, at 199, 202–03.

public fixation on negative freedom. So long as that fixation exists, the common good is not served, the status quo is perpetuated, the public grows increasingly frustrated as its needs remain unmet, and political tensions grow. An excess of negative freedom thereby exists at the expense of positive freedom and facilitates democratic decline. Concerningly, an emphasis on the value of negative freedom is a crucial element of not only American libertarian culture and its underlying liberal philosophical tradition, but also of fascist-authoritarian ideologies since the turn of the 21st century.<sup>272</sup> Rhetorical appeals to negative freedom are thus especially potent in democracies like the United States, the susceptibility of which will be explored further in Part III.D.

Negative freedom is also used for preserving a cultural and political status quo, as opposed to the socioeconomic one described above. Fascist authoritarians of the past century furnish numerous examples, as evidenced by the otherizing, “us” versus “them” mentality mentioned above.<sup>273</sup> Such populist demagogues base their identity-based appeals in, among other things, the national identity and traditional values of their factionalized audience and a return to a corresponding (but fictional) idealized past—a tactic often referred to as “restorative nostalgia.”<sup>274</sup> This restorative nostalgia has, perhaps obviously, played a central role in the past half-century of American politics, but the American legal context offers one of the best examples: constitutional originalism. While originalism as a form of constitutional interpretation is as old as the Constitution itself and has been used as one of numerous tools for interpreting its text, the contemporary originalism seen today began in the 1970s and 1980s in response to partisan dissatisfaction with rulings by the Warren and Burger Courts.<sup>275</sup> Landmark mid-century rulings like *Brown v. Board of Education*,<sup>276</sup> *Miranda v. Arizona*,<sup>277</sup> *Roe v. Wade*,<sup>278</sup> and *Griswold v. Connecticut*<sup>279</sup> frustrated political conservatives, leading them to criticize the Supreme Court for

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272. See STANLEY, FASCISM, *supra* note 40, at 178–79; see, e.g., *id.* at 50–51, 150 (modern autocrat tactic examples).

273. See STANLEY, FASCISM, *supra* note 40, at 11, 21, 50–52, 64, 106–08, 150–55 (Viktor Orban; Recep Erdogan; Benito Mussolini; Adolf Hitler).

274. See Maril, *supra* note 242, at 932–33, 963–64, 967–68 (“restorative nostalgia”); STANLEY, FASCISM, *supra* note 40, at 3–5, 15, 19–20 (the “mythic past”).

275. JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM 4–5 (2024); Maril, *supra* note 242, at 932, 946–51, 958.

276. 347 U.S. 483 (1954).

277. 384 U.S. 436 (1966).

278. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

279. 381 U.S. 479 (1965).

judicial activism, “legislating from the bench,” and inventing rights not expressly found in the text of the Constitution.<sup>280</sup> In line with the restorative nostalgia of the day, conservative legal scholars began calling for heavily limited judicial review and the acknowledgement of the fixed “original intent” and “original meaning” of the Constitution’s drafters, constraining judges to that understanding.<sup>281</sup> Out of reverence for a mythologized past, originalism’s mandate for a basis in “history and tradition” requires that modern judicial decisions be rooted in Antebellum norms and sociopolitical culture.<sup>282</sup> This mistakenly commits modern judicial decisions to outdated norms as eternal truths,<sup>283</sup> ignores potential shifts in meaning,<sup>284</sup> sidelines progress on issues of human and civil rights,<sup>285</sup> and allows activist judges to cite (a)historical or (un)traditional evidence to justify their desired interpretations.<sup>286</sup> In doing so, originalist jurisprudence has produced a drastic prioritization of negative freedom by heavily favoring (preferred) individual rights protections over measures supporting the common good (and thus positive freedom).<sup>287</sup> Free speech jurisprudence is one such example. While our negative free-speech fixation predates the modern originalist movement by over half a century, the Supreme Court continues Chafee’s pedestalization of negative free speech by, for instance, strategically overemphasizing free speech protections to justify rulings against disapproved laws or regulations that “so much as brush up against” a First Amendment interest.<sup>288</sup> As a result in line with the dysfunction feedback

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280. See GIENAPP, *supra* note 275, at 4–6; Maril, *supra* note 242, at 932, 949–51.

281. See GIENAPP, *supra* note 275, at 4–6; Maril, *supra* note 242, at 932, 949–51.

282. Maril, *supra* note 242, at 961–62, 965; see, e.g., N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2126–30 (2022) (laying out the history and tradition standard in the Second Amendment context); see also GIENAPP, *supra* note 275, at 2.

283. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605–07 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]; John Dewey, *Logical Method and Law*, 10 CORNELL L. REV. 17, 25–27 (1924) [hereinafter Dewey, *Logical Method and Law*].

284. GIENAPP, *supra* note 275, at 45 (conceptual drift).

285. Maril, *supra* note 242, at 930–31, 958, 961–64, 972–73.

286. See GIENAPP, *supra* note 275, at 1–2, 63–64; Maril, *supra* note 242, at 929–30, 958–61, 972–74.

287. See Alexander Tsesis, *The Free Speech Clause as a Deregulatory Tool*, 5 J. FREE SPEECH L. 381, 387–88, 399 (2024).

288. *Id.* at 386–87, 390, 395. For example, the Court ruled state laws unconstitutional on First Amendment free speech grounds in cases including the following: *Expressions Hair Designs v. Schneiderman*, 581 U.S. 37, 48 (2017) (holding a credit card sales law unconstitutional because it “regulat[ed] the communication of prices rather than prices themselves”); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 585 (2011) (Breyer, J., dissenting); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2365 (2018) (holding that a public health information disclosure law unconstitutionally required unlicensed pregnancy crisis centers to inform patients seeking family planning of their licensure status); *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (holding that a law unconstitutionally required charities to confidentially disclose their largest donors, violating the donors’ rights); see

loop, activist judges can “prepackage ‘justifications for particular outcomes’” while Congress and government agencies become “incapable of responding to new conditions and challenges,” and the public’s needs remain unmet.<sup>289</sup> Of course, this tactic is far from limited to First Amendment claims. But by using a purely negative conception of free speech to perpetuate the status quo, courts ironically create an “inert people”—the very outcome that Justice Brandeis intended free speech to prevent.<sup>290</sup> By relying on “history and tradition,” the Court weaponizes constitutional provisions against the values the Constitution was written to support, thereby participating in and contributing to the restorative nostalgia that leads to democratic decline and autocracy.<sup>291</sup>

#### *D. Disorientation*

Populist demagogues propagandize the public through means not addressable under a tradition of purely negative free-speech conception. They anchor their identity-based appeals in negative freedom and individualism, and they frequently rely on several common tactics to undermine democratic norms and well-being. First, they foster public distrust in elites, a category from which they distinguish themselves and ideological allies.<sup>292</sup> This may take several interrelated forms, but the unifying theme is a distrustful, anti-intellectual and anti-authority sentiment in which “common sense,” everyday wisdom is asserted as preferable to expertise.<sup>293</sup> A frustrated and resentful portion of the public—for any of the reasons discussed in this Part, be it a perceived status threat or the government’s low responsiveness to public needs—may come to see the government’s

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Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 565 (2018) (“[S]peak[ing] the language of democratic constitutionalism while identifying its resonant-frequency points of tension and complexity to reverse its effects.”).

289. See Tsesis, *supra* note 287, at 382, 387, 390, 395, 400–01 (first quoting Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983); and then quoting *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in part and dissenting in part)); Maril, *supra* note 242, at 961, 964.

290. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Maril, *supra* note 242, at 964, 966–67; DEWEY & TUFTS, *ETHICS* (2d ed. 1932), *supra* note 30, at 359 (misinformation worsens democratic self-government); see Murray, *supra* note 98, at 201 (hate speech context); see, e.g., *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126–30 (2022).

291. See Scheppelle, *supra* note 288, at 569–70, 579–80 (“constitutional capture”); see generally Maril, *supra* note 242, at 964–75.

292. Populist demagogues use “common sense” rhetorical appeals to play on public distrust of elites and gain trust. See ROSENFELD, *supra* note 18, at 89–91, 112–13, 125, 126–27; YOUNG, *supra* note 58, at 65–66.

293. See ROSENFELD, *supra* note 18, at 101–04, 129–30, 133–34.

legitimacy as low enough to dissuade them from giving any credence to what its subject-matter experts (or any similar or associated knowledge-producing institutions) have to say.<sup>294</sup> Instead, and commonly at the direction of a populist demagogue, the public concludes that expert knowledge is no more valuable than the average citizen's "common sense."<sup>295</sup> Populist demagogues earn their support by appealing to this sentiment, falsely claiming that the many issues facing the public have "simple, practical, even obvious, nonideological fixes" with "extraordinary" payoff, and that the demagogue can deliver such results to them.<sup>296</sup> Second, they dismiss knowledge-producing institutions as biased or captured arms of the state, thereby defactualizing this subset of the public and fostering its own political reality.<sup>297</sup> This produces something similar to the Hostile Media Effect called *Epistemic Separatism*, or the belief that only one's political faction grasps reality.<sup>298</sup> Finally, the defactualized faction reaches a state of heavy susceptibility to propagandic influence, where it is essentially immune to good-faith discourse and where denialism and conspiracism run rampant.<sup>299</sup> This all feeds the dysfunction feedback loop as it either serves to immunize the status quo with further political inaction or actively undermine the public

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294. *Id.* at 90–91; HABERMAS, *supra* note 232, at 69, 72.

295. ROSENFELD, *supra* note 18, at 90–91, 101–04; YOUNG, *supra* note 58, at 119–20, 122; STANLEY, FASCISM, *supra* note 40, at 36, 38; *see* DiRESTA, INVISIBLE RULERS, *supra* note 112, at 227–28.

296. ROSENFELD, *supra* note 18, at 90–91, 101–02.

297. YOUNG, *supra* note 58, at 119–23, 154–55; MARIETTA & BARKER, *supra* note 132, at 262–63; STANLEY, FASCISM, *supra* note 40, at 36, 38, 50–51, 57–58; *see, e.g., id.* at 50–51 (showing authoritarian leaders Viktor Orban and Recep Erdogan delegitimizing their respective nations' universities); Paul Freking, *House Approves Trump's Request to Cut Funding for NPR, PBS and Foreign Aid*, AP (June 12, 2025), <https://apnews.com/article/trump-budget-cuts-npr-pbs-global-health-2844a884091dce5255a3f4ad70f3a1c6>.

298. *See* RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 174–75; YOUNG, *supra* note 58, at 122–23; BENKLER ET AL., *supra* note 144, at 81; *see also, e.g.,* STANLEY, FASCISM, *supra* note 40, at 52 (Rush Limbaugh's "four corners of deceit: government, academia, science, and media. Those institutions are now corrupt and exist by virtue of deceit."). During his 2021 keynote address at the National Conservatism Conference, J.D. Vance, then a candidate for the U.S. Senate, explicitly framed American universities as adversaries of the nation's youth:

[W]e have to honestly and aggressively attack the universities in this country. . . . [T]he universities do not pursue knowledge and truth, they pursue deceit and lies, and it's time to be honest about that fact. . . . [A]t those universities, they are told that working with your hands is looked down upon, they are told that America is a fundamentally evil and racist country, they are taught . . . that this country, built by our fathers and grandfathers is an evil and terrible place. . . . [W]e are giving our children over to our enemies and it's time we stop doing it.

J.D. Vance, Candidate for Senate, *The Universities Are the Enemy*, Keynote Address at the National Conservatism Conference II (Nov. 2, 2021) (transcript available at <https://www.youtube.com/watch?v=0FR65Cifhw&t=1s>).

299. *See supra* Part II.B.2; sources cited *supra* note 99.

good with extremist political action.<sup>300</sup> Social media, with its ever-expanding reach and ability to reinforce misunderstandings, makes the demagogues' job of creating this populist-expertise divide even easier.<sup>301</sup>

### *E. Political Violence and Civil War*

The factors presented in this Part explain the democratic erosion American society is experiencing. As part of the dysfunction feedback loop, the economic and political inequality maintained by perpetuating the status quo leads to a higher risk that those not enjoying positive freedom will resort to political violence and that the nation may even fall into civil war.<sup>302</sup> As President Kennedy famously said: "Those who make peaceful revolution impossible will make violent revolution inevitable."<sup>303</sup> It is no coincidence and should come as no surprise that, across the globe, democratic erosion has coincided with the advent of the internet, social media use, and the need to regulate the platforms.<sup>304</sup> Where online media has taken root, democracies of all forms have experienced backsliding, with a direct correlation between the extent of democratic backsliding and the presence of online media.<sup>305</sup> In part, this is because online misinformation stimulates domestic terrorism and other forms of political violence. Among the greatest threats to American national security is the rising number of attacks by domestic terrorists, radicalized individually online by influences often based in ethnic, racial, or religious sentiments or "strong anti-government or anti-authority sentiments."<sup>306</sup> In recent years alone, the United States has frequently seen threats of political violence, including death threats to public employees and officials,<sup>307</sup> bomb

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300. See ROSENFELD, *supra* note 18, at 56–57, 129–30.

301. *Id.* at 150.

302. See generally LARS-ERIK CEDERAN, KRISTIAN SKREDE GLEDITSCH, & HALVARD BUHAUG, *INEQUALITY, GRIEVANCES, AND CIVIL WAR* 93–118 (2013); see also STANLEY, *FASCISM*, *supra* note 40, at 86, 90.

303. John F. Kennedy, Remarks on the First Anniversary of the Alliance for Progress, 1962 PUB. PAPERS 220, 223 (Mar. 13, 1962).

304. WALTER, *supra* note 108, at 108.

305. *Id.* at 106–12.

306. *Oversight of the Federal Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats*, Hearing Before the S. Comm. on the Judiciary, 117th Cong. 1, 3 (Mar. 2, 2021) (statement of Christopher A. Wray, Director of the Fed. Bureau of Invest.); see WALTER, *supra* note 108, at 208 (discussing Wray's statement); Brian Naylor & Ryan Lucas, *Wray Stresses Role of Right-Wing Extremism in Hearing About Jan. 6 Riot*, NPR (Mar. 2, 2021), <https://www.npr.org/2021/03/02/972539274/fbi-director-wray-testifies-before-congress-for-1st-time-since-capitol-attack> (showing domestic terrorism investigations doubled between 2017 and 2020).

307. See, e.g., Christina A. Cassidy & Lindsay Whitehurst, *Election Workers Have Gotten Death Threats and Warnings They Will Be Lynched, the US Government Says*, AP, <https://apnews.com/article/election-workers-threats-justice-department-trump->

threats to public buildings and offices,<sup>308</sup> attempted attacks on government offices,<sup>309</sup> kidnapping and murder plots on public officials,<sup>310</sup> the assassination of a prominent political activist,<sup>311</sup> two presidential assassination attempts,<sup>312</sup> and other subversions of the law.<sup>313</sup> Moreover, the remote nature of the internet has given rise to stochastic terrorism.<sup>314</sup> One prominent example is Chaya Raichik, a political extremist and conspiracy theorist operating on social media as “Libs of TikTok.”<sup>315</sup> Raichik

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f17df44d63156a28eaa0862b0aa08f0b (last updated Aug. 31, 2023); Nicholas Riccardi, *Rising Political Threats Take US into Uncharted Territory as 2024 Election Looms*, AP, <https://apnews.com/article/political-violence-extremism-trump-social-media-utah-9d37a5226dfc16bbf9ec910cebdaaca6> (last updated Aug. 13, 2023) (reporting that a Utah man seeking to assassinate the president was killed in standoff with FBI and that a Texas man was sentenced for death threats against Arizona election workers); *Texas Woman Accused of Threatening to Kill Judge Overseeing Trump Election Case and a Congresswoman*, AP, <https://apnews.com/article/donald-trump-tanya-chutkan-judge-threats-texas-7d90ad3c8b552b49e269a3f842a6700c> (last updated Aug. 16, 2023).

308. See, e.g., Ivana Saric, *Bomb Threats Force Evacuation of State Capitols Across U.S.*, AXIOS, <https://www.axios.com/2024/01/03/state-capitols-bomb-threats> (last updated Jan. 4, 2024); *Massachusetts Man Gets Prison for Making Bomb Threat to Arizona Election Office*, AP, <https://apnews.com/article/bomb-threat-election-office-arizona-massachusetts-7318471564eb94b7f43b822241eb550e> (last updated Mar. 13, 2024).

309. See, e.g., Tom Dreisbach, *An Attempted Attack on an FBI Office Raises Concerns About Violent Far-Right Rhetoric*, NPR (Aug. 12, 2022), <https://www.npr.org/2022/08/12/1117275044/an-attempted-attack-on-an-fbi-office-raises-concerns-about-violent-far-right-rhe>; Mike Balsamo & Samantha Hendrickson, *Ohio Gunman Appeared to Threaten FBI After Trump Home Search*, AP (Aug. 12, 2022), <https://apnews.com/article/fbi-office-shooting-suspect-killed-eb85e9faa93612fc54fb15639075d0fe>.

310. See, e.g., Joey Cappelletti & Ed White, *2 Men Convicted in Plot to Kidnap Michigan Gov. Whitmer*, AP (Aug. 23, 2022), <https://apnews.com/article/elections-presidential-michigan-gretchen-whitmer-grand-rapids-9ad8f100d32e7d5883b1be9d6c4cb8d5>; Mark Sherman et al., *Armed Man Arrested for Threat to Kill Justice Kavanaugh*, AP (June 8, 2022), <https://apnews.com/article/us-supreme-court-brett-kavanaugh-district-of-columbia-maryland-government-and-politics-179d18e7f933b3decbaddb542ceb0b29>.

311. Hannah Shoenbaum et al., *Conservative Activist Charlie Kirk Assassinated at Utah University*, AP, <https://apnews.com/article/charlie-kirk-conservative-activist-shot-546165a8151104e0938a5e085be1e8bd> (last updated Sept. 11, 2025).

312. See, e.g., *Trump Survives Assassination Attempt at Campaign Rally, As It Unfolded*, AP, <https://apnews.com/live/election-biden-trump-campaign-updates-07-13-2024> (last updated July 15, 2024); Alanna Durkin Richer et al., *Trump Was the Subject of an Apparent Assassination Attempt at His Florida Golf Club, the FBI Says*, AP, <https://apnews.com/article/trump-shooting-gunshots-florida-f62f8378d3a8ce7b2e99d6a8fb40aba9> (last updated Sept. 16, 2024).

313. See, e.g., TJ L’Heureux et al., *A Right-Wing Sheriffs Group That Challenges Federal Law Is Gaining Acceptance Around the Country*, AP, <https://apnews.com/article/constitutional-sheriffs-5568cd0b6b27680a28de8a098ed14210> (last updated Aug. 21, 2023) (“The [Constitutional Sheriffs & Peace Officers Association], known as CSPOA, teaches that elected sheriffs must ‘protect their citizens from the overreach of an out-of-control federal government’ by refusing to enforce any law they deem unconstitutional or ‘unjust.’”).

314. See *supra* notes 205–07, 210–11 and accompanying text.

315. Chaya Raichik, S. POV. L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/chaya-raichik> (last visited May 17, 2026).

targets private LGBTQ individuals—often teachers and healthcare workers—across the country, posting their names, addresses, or places of employment alongside anti-LGBTQ misinformation and conspiracy theories.<sup>316</sup> Many of Raichik’s millions of followers then threaten and harass the individuals or their employers, aiming to get the individual fired or disrupt whatever fictional activity Raichik claims is occurring.<sup>317</sup> In 2021 and 2022 alone, Raichik’s posts led to bomb threat evacuations at dozens of public schools and libraries nationwide and similar threats of violence against children’s hospitals in at least five cities.<sup>318</sup> Raichik, however, denies accusations of wrongdoing as fake news despite knowing her content’s effects.<sup>319</sup>

Beyond the democratic erosion the United States sees today, anocracies like the United States face a profound risk of civil war. While another conflict like the American Civil War of the 1860s is quite unlikely, we are wrong to assume that a domestic armed conflict is no longer realistic. Our accustomedness to the resiliency of our democratic institutions and lack of imagination as to what a civil war would look like in the contemporary United States have made us unjustifiably confident in our safety from violent conflict.<sup>320</sup> Anocracies like the United States are the countries most prone to civil war, especially those with more democratic features than authoritarian ones.<sup>321</sup> Backsliding democracies, therefore, are the most at risk.<sup>322</sup> The hallmark of such democracies is factionalization along racial, ethnic, and religious lines.<sup>323</sup> Would-be autocrats responsible for these tensions, contributing to the radicalization feedback loop, erode democratic norms and institutional legitimacy for the sake of scoring political victories.<sup>324</sup> When

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316. Will Carless, *When Libs of TikTok Tweets, Threats Increasingly Follow*, USA TODAY, <https://www.usatoday.com/story/news/investigations/2023/11/02/lib-of-tiktok-tweets-death-bomb-threats/71409213007/> (last updated Nov. 5, 2023).

317. *Id.*

318. *Id.*

319. See Matt Lavietes, *Libs of TikTok Creator Accused of Inspiring School Bomb Threats Named to Oklahoma Library Board*, NBC NEWS, <https://www.nbcnews.com/nbc-out/out-news/lib-of-tik-tok-bomb-threats-oklahoma-library-committee-rcna135369> (last updated Jan. 23, 2024) (Raichik denies wrongdoing); Christopher Wiggins, *Libs of TikTok Creator Seems Overjoyed at Report Highlighting Her Dangerous Posts*, ADVOCATE (Nov. 7, 2023), <https://www.advocate.com/news/lib-of-tiktok-media-attention> (reporting that Raichik posted on social media a photo of herself smiling and holding a *USA Today* article detailing her posts and her followers’ actions).

320. WALTER, *supra* note 108, at 124, 168–69.

321. *Id.* at 13, 15.

322. *Id.* at 22; Balkin, *Constitutional Crisis*, *supra* note 39, at 152–53.

323. WALTER, *supra* note 108, at 35–40; see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 115–16 (2018).

324. See LEVITSKY & ZIBLATT, *supra* note 323, at 106–07, 111–12 (describing institutional forbearance and consequences when leaders abandon it).

not in office, they convince their factionalized audience “that democracy as it has existed will lead to more corruption, more lies, and greater bungling of economic and social policy.”<sup>325</sup> Once an autocrat takes office, they use the ensuing political disorganization to steer into anocracy by breaking institutional norms, ignoring democratic guardrails, and “exploiting weaknesses in the constitution, electoral system, and judiciary.”<sup>326</sup> Because other, non-autocratic officials are unable or unwilling to stop the autocrat from amassing power, the country autocratizes, coming closer to civil war.<sup>327</sup> Unregulated social media is accelerating the process, and our commitment to a negative free-speech tradition is keeping them unregulated.<sup>328</sup>

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As this Part demonstrates, the nature of democracy and the technological advancements that enable its antagonists to undermine it require a departure from the purely negative conception of free speech to which we have traditionally adhered. Over a century ago, the philosopher John Dewey explored the shortcomings of negative freedom in his explanation of positive freedom:

*Effective [Positive] Freedom.*—Exemption from restraint and from interference with overt action is only a condition, though an absolutely indispensable one, of effective freedom. The latter requires (1) positive control of the resources necessary to carry purposes into effect, possession of the means to satisfy desires; and (2) mental equipment with the trained powers of initiative and reflection requisite for free preference and for circumspect and far-seeing desires. *The freedom of an agent who is merely released from direct external obstructions is formal and empty. If he is without resources of personal skill, without control of the tools of achievement, he must inevitably lend himself to carrying out the directions and ideas of others. If he has not powers of deliberation and invention, he must pick up his ideas casually and superficially from the suggestions of his environment and appropriate the notions which the interests of some class insinuate into his mind. If he ha[s] not powers*

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325. WALTER, *supra* note 108, at 21; see LEVITSKY & ZIBLATT, *supra* note 323, at 5 (autocrats facilitate backsliding).

326. WALTER, *supra* note 108, at 20–21.

327. *Id.* at 21.

328. *Id.* at 109.

of intelligent self-control, he will be in bondage to appetite, enslaved to routine, imprisoned within the monotonous round of an imagery flowing from illiberal interests, broken only by wild forays into the illicit.<sup>329</sup>

No democratic citizen is truly free under such circumstances. Failing to adopt a positive conception of free speech will constitute both a failure to address a central flaw of democracy and a failure to adapt to changing circumstances.<sup>330</sup> But we have remained enamored with negative freedom, or, to use Justice Elena Kagan’s words, wedded “to a static vision of governance, [becoming] incapable of responding to new conditions and challenges.”<sup>331</sup> Thus far, few have even begun to acknowledge the negative speech problem, let alone identify solutions.<sup>332</sup> Inaction will be fatal to American democracy,<sup>333</sup> and by all indications, conditions of polarization and defactualization will worsen.<sup>334</sup> The *more-speech* approach that stresses education as a solution is not working; citizens are using further information to support their own narratives.<sup>335</sup> Both the magnitude of the problem and the need for change cannot be overstated. We have unwittingly arrived at the Anocratic Fork: we must now choose to either reform our conception of free speech so as to maintain democracy or stay the course and decline into autocracy.

#### IV. TRAVERSING THE ANOCRATIC FORK: SOLUTIONS

Our outdated commitment to a negative free-speech conception under Chafee’s free-speech tradition has long since begun the process of

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329. DEWEY & TUFTS, *ETHICS* (1st ed. 1908), *supra* note 31, at 392 (emphasis added).

330. See Redish & Pereyra, *supra* note 22, at 454–55, 468, 471–72 (noting the danger of inaction on false political speech).

331. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in part and dissenting in part).

332. See, e.g., David Bauder, *No More Fact-Checking for Meta. How Will This Change Media – and the Pursuit of Truth?*, AP, <https://apnews.com/article/fact-check-politics-trump-verification-misinformation-00bc57b4a3c348a1363610c1cbbfd8ca> (last updated Jan. 9, 2025) (reporting that Meta, which owns Facebook and Instagram, ends fact-checking on its platforms); Daphne Psalidakis, *US State Department Closing Office Aimed at Countering Foreign Disinformation*, REUTERS (Apr. 16, 2025), <https://www.reuters.com/business/media-telecom/us-state-department-closing-office-aimed-countering-foreign-disinformation-2025-04-16/> (Secretary of State Rubio disbands State Department unit that combats foreign disinformation, claiming it suppresses speech).

333. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 89; Kramer, *supra* note 29, at 25–26, 30–31.

334. See MARIETTA & BARKER, *supra* note 132, at 292–93.

335. See *id.* at 262–63, 294–96; YOUNG, *supra* note 58, at 194, 213.

democratic decline, and we are potentially beyond the point of no return.<sup>336</sup> Our free-speech tradition maintains that the issues of political misinformation we face are products of the time to be dealt with independent of free-speech protections, rather than products of the tradition itself.<sup>337</sup> There is an unequivocal need for fundamental and immediate change in free speech jurisprudence toward a positive freedom of speech.

### A. Foundational Components

The key concept to be incorporated is the need for a mutual basis in fact to support democratic self-government, which entails the regulation of falsehoods.<sup>338</sup> In the negative free-speech conception of classical liberalism, where truth as factual accuracy was not the goal, discussion and debate by the democratic electorate were thought to lead to knowledge with which to guide democratic decision-making.<sup>339</sup> While this deliberation may be a critical component of self-government, deliberation can only lead to informed democratic decision-making when the electorate obtains and bases that deliberation upon factually accurate information.<sup>340</sup> Such information supports democratic decisions and facilitates self-government in the same way that individual rungs of a ladder reliably support each step of the person climbing it. It is also the basis of opinion, where holders of different opinions on a matter must be operating on the basis of the same set of facts.

Facts and opinions do not hold the same value in the context of democratic self-government; facts exist independently, whereas opinions may be either informed by facts or uninformed. Democratic deliberation and decision-making, as a means of self-government, can only afford to incorporate *informed* opinions.<sup>341</sup> Uninformed opinions have little contributory value, if any, to democratic decision-making and may instead

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336. See DEWEY, LIBERALISM, *supra* note 28, at 74–75 (noting that propaganda and the democratic decline it causes are the product of excessive negative freedom, and that positive freedom is required to make effective use of that negative freedom.); MARIETTA & BARKER, *supra* note 132, at 294–96 (unlikelihood of recovery).

337. Kramer, *supra* note 29, at 24–27; see STROSSEN, FREE SPEECH, *supra* note 1, at 68–71 (arguing that robust free-speech protections remain essential to addressing modern societal challenges rather than being the root cause of them); RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 18–19 (stating that adhering to negative free speech protections is indispensable rather than a source of democratic struggles).

338. ROSENFELD, *supra* note 18, at 173–74 (need for mutual basis in fact); see sources cited *supra* note 136.

339. See *supra* Part II.B.1.

340. See MARIETTA & BARKER, *supra* note 132, at 294; MINOW, *supra* note 27, at 145; DEWEY, FREEDOM AND CULTURE, *supra* note 16, at 41–42; DEWEY, LIBERALISM, *supra* note 28, at 56, 74–75.

341. See DEWEY, FREEDOM AND CULTURE, *supra* note 16, at 41, 112.

hinder the process.<sup>342</sup> Negative free-speech conceptions, commonly embodied by the marketplace of ideas, foolishly treat fact, informed opinion, and uninformed opinion as being ideas of equal value and for the marketgoers to distinguish.<sup>343</sup> As such, misinformation reduces, or even removes, the mutually accepted facts required for informed opinion, making it destructive to value fact and opinion equally in the marketplace.<sup>344</sup> To extend equal First Amendment protection to political speech and political misinformation is to protect speech at the expense of mutual reality and the public interest, contravening the goals of the Constitution.<sup>345</sup> In Hannah Arendt's words, "What is at stake here is a common and factual reality itself, and this is a political problem of the first order."<sup>346</sup> However, "Whether the First Amendment will suffice to protect this most essential political freedom, the right to unmanipulated factual information without which all freedom of opinion becomes a cruel hoax, is another question."<sup>347</sup> There must be, in some form and to some extent, a right to unadulterated, factually accurate information to support democratic self-government.<sup>348</sup>

Though not a substitute for some express duty to ensure a minimum basis in fact, there are two affirmative duties consistent with this need that must be used to support it. First, the press has an implied affirmative constitutional duty to inform the public.<sup>349</sup> Consistent with the Enlightenment influences of its framers, the First Amendment's protection for freedom of the press has been interpreted to support informed deliberation as a means of achieving democratic self-government.<sup>350</sup> And while the language of the First Amendment's Free Press Clause only forbids acts of Congress that abridge

342. See sources cited *supra* notes 21–22.

343. See sources cited *supra* note 130; see also, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("[U]nder the First Amendment there is no such thing as a false idea.").

344. See O'CONNOR & WEATHERALL, *supra* note 29, at 179–80, 186; *supra* Part II.B.2.

345. See Redish & Pereyra, *supra* note 22, at 454–55; Napoli, *supra* note 25, at 88; DEWEY, LIBERALISM, *supra* note 28, at 28, 35, 66 (explaining liberalism's goal of progress toward the common good).

346. Arendt, *Truth and Politics*, *supra* note 21, at 300.

347. Arendt, *Lying in Politics*, *supra* note 116, at 45.

348. See SNYDER, ON FREEDOM, *supra* note 32, at 190 ("Freedom of speech means a right to facts. Defending that right means sharing the facts about which people can speak.").

349. See RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 383 (2021); Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 749–55 (2014).

350. See Meiklejohn, *The First Amendment Is an Absolute*, *supra* note 86, at 259; John M. Kang, *Why the Actual Malice Test Should Be Eliminated*, 50 FLA. ST. U. L. REV. 513, 522–24 (2023) [hereinafter Kang, *Actual Malice Test*]; sources cited *supra* note 9; see also, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 273–80 (1964). The *Sullivan* Court cited the Virginia and Kentucky Resolutions condemning the 1798 Sedition Act as justification for raising First Amendment free-press protections for political speech to support self-government. *Id.*

freedom of the press, the press's implied duty to inform the public is rooted in the public's interest in and need for a *free flow of information* that will inform democratic deliberation.<sup>351</sup> Moreover, it also follows that by allowing misinformation to proliferate through the press and pollute democratic deliberation, the central goals of free-press and free-speech protections are undermined. As such, the constitutional role of the press is not being fulfilled and must be reestablished, which will be discussed in this Part.

Second, the government has an implied duty, rooted in its own survival, to facilitate democratic self-government.<sup>352</sup> Without digressing too far into abstract political theory, a government has an inherent duty to maintain its own existence and stability; it would be pointless to establish a government to support the common good if it could not survive to do so.<sup>353</sup> In the case of a representative democracy, it is the electorate that is sovereign; its decision-making through democratic deliberation is the ultimate basis for determining government action.<sup>354</sup> As illustrated in the dysfunction feedback loop, the electorate's misinformed policy decisions cause dysfunctional government actions, reducing the electorate's (and thus, the government's) ability to act in the public interest—the antithesis of self-government.<sup>355</sup> This jeopardizes the public's security from threats both foreign and domestic.<sup>356</sup> To the extent that misinformation succeeds in altering public opinion, it shifts sovereignty

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351. MINOW, *supra* note 27, at 98–99, 146–47; *see supra* INTRODUCTION; *see, e.g.*, Saxbe v. Wash. Post, 417 U.S. 843, 872 (1974) (Powell, J., dissenting) (An “absolute interview ban” that would have forbidden press coverage on “prison conditions and inmate grievances . . . significantly impair[ed] the constitutional interest of the people in a free flow of information and ideas on the conduct of their government.”).

352. *See* MINOW, *supra* note 27, at 146–47; Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795–96 (1981); SNYDER, ON FREEDOM, *supra* note 32, at 53, 66 (showing need for governmental support to become sovereign).

353. *See* Henry W. Bikle, *The Jurisdiction of the United States over Seditious Libel*, 50 U. PA. L. REV. 1, 3 (1902). Autocratic and fascistic thinkers have long emphasized this need. *See, e.g.*, CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 46–47, 50 (George Schwab trans., The Univ. of Chi. Press Expanded ed., 2007) (1932).

354. MEIKLEJOHN, SELF-GOVERNMENT, *supra* note 11, at 6–9; HABERMAS, *supra* note 232, at 70; *see* James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791, *reprinted in* 14 THE PAPERS OF JAMES MADISON 170, 170 (1983). (“Public opinion sets bounds to every government, and is the real sovereign in every free one.”).

355. David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 308 (2022); BENKLER ET AL., *supra* note 144, at 16; ROSENFELD, *supra* note 18, at 129–30.

356. *See* RID, *supra* note 21, at 11, 426 (foreign threats); *Oversight of the Federal Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats*, Hearing Before the S. Comm. on the Judiciary, 117th Cong. 1, 3 (Mar. 2, 2021) (statement of Christopher A. Wray, Director of the Federal Bureau of Investigation) (domestic threats); WALTER, *supra* note 108, at 208 (domestic threats; discussing that testimony).

from the electorate to the misinformation purveyors.<sup>357</sup> Therefore, the government has a well-founded duty to prevent misinformation by facilitating democratic deliberation.<sup>358</sup>

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To preface the remainder of this Article, there is a critical understanding commonly overlooked in relevant scholarship on the contemporary misinformation crisis: the fundamental nature of the problem. Like any system of government, democracy has critical flaws that its adversaries may exploit. But as the timeless nature of the Anocratic Fork suggests, democracy's Achilles' heel of propaganda and misinformation is rooted in democracy's reliance on popular sovereignty. No matter how artificial the online misinformation causing democratic erosion may be, it is effective because it exploits the necessarily human element of democracy. The problem is human and, therefore, fundamental.<sup>359</sup>

Social media and other online communication channels undeniably give way to fast and thorough means of disseminating misinformation, accessing populist demagoguery, and conducting disinformation campaigns. And while these new challenges must be addressed, they are only modern instances of bad actors exploiting the ancient weakness that democracies neglect to fix. As such, any solution that only serves to address such anti-democratic uses of online media is necessary but insufficient. So long as the underlying, fundamental issue of susceptibility to misinformation exists, those measures are only band-aid fixes.

Speech is a unique and notoriously unwieldy subject that, as Part II makes clear, generally does not lend itself to analogies. However, for the sake of explanation, consider the analogy of speech to an environmental setting, or "information environment," as it is sometimes called.<sup>360</sup> In this context, firefighting is an apt metaphor for combating misinformation. Forest fires are destructive but natural occurrences that must be managed to protect the ecosystem's well-being. Preventative measures are critical, as fire spreads

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357. Lidsky, *Nobody's Fools*, *supra* note 12, at 839.

358. Wu, *Is the First Amendment Obsolete?*, *supra* note 164, at 571–72 (“[T]he duty of the state is to preserve the integrity of public debate’ so as to ‘safeguard the conditions for true and free collective self-determination.’” (quoting Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986))).

359. BENKLER ET AL., *supra* note 144, at 21, 38; see Massaro & Norton, *supra* note 189, at 1641–42 (suggesting designing algorithms to offset human cognitive biases and improve decision-making); see also, e.g., Vosoughi et al., *supra* note 163, at 1150 (robots shared true and false information at same rate).

360. Tim Wu, *Disinformation in the Marketplace of Ideas*, 51 SETON HALL L. REV. 169, 170 (2020); see generally, e.g., Wu, *Is the First Amendment Obsolete?*, *supra* note 164.

rapidly and exponentially.<sup>361</sup> For misinformation, this has historically been various forms of education.<sup>362</sup> In firefighting, this would be preparation such as stocking up on firefighting resources, conducting regular controlled burns, hiring additional staff, planning and practicing response, or even ensuring that flammable material is not kept near the forest. Once a fire begins, however, those measures may well be futile if there is still an arsonist out in the forest lighting new blazes. For firefighting to succeed, the priority shifts from halting the fire to stopping the arsonist before subsequent fires become uncontrollable. Under our current negative free-speech tradition, we have no meaningful way to stop the arsonist—the misinformation purveyor—or prevent their actions.<sup>363</sup>

### B. Immovable Supreme Court Precedents

Supreme Court precedent is even more obstructive of positive free speech than conventional negative free-speech wisdom. The Supreme Court has clung to an exceedingly formalistic approach to First Amendment issues, adhering to rigid negative free speech ideals like the marketplace of ideas, the clear and present danger standard, and the notion of maintaining a free flow of information.<sup>364</sup> Even its few instances of upholding negative free speech restrictions are based on broadly preserving negative free speech principles.<sup>365</sup> But the formalism of the 21st century Court's First Amendment jurisprudence borders on malicious compliance.<sup>366</sup> Under the negative free-

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361. See Vosoughi et al., *supra* note 163, at 1147 (finding that false information circulates significantly faster online than true information); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n.9 (1974) (“[T]he law of defamation is rooted in our experience that the truth rarely catches up with a lie.”).

362. See sources cited *supra* note 115; see also, e.g., THOMAS JEFFERSON, A BILL FOR THE MORE GENERAL DIFFUSION OF KNOWLEDGE (1779), reprinted in 2 THE PAPERS OF THOMAS JEFFERSON 526, 526–35 (Julian P. Boyd ed., 1950) (any government may become tyrannical, so we must guard against this by educating the masses to protect freedom); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

363. See Simson, *supra* note 48, at 1016 (inapplicability of reactive measures to address misinformation); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 84–85 (“We cannot debunk our way out of an infodemic. One doesn’t fix a polluted information stream simply by diluting it with truth. You have to remove the source of the pollution.”).

364. See, e.g., Thomas W. Joo, *The Worst Test of Truth: The “Marketplace of Ideas” as Faulty Metaphor*, 89 TUL. L. REV. 383, 409 (2014) (stating that the Court in *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion) applied the marketplace metaphor as a reason not to regulate false statements of fact on matters of public interest).

365. See, e.g., sources cited *supra* note 20.

366. See *supra* Part III.C (ideological weaponization of First Amendment jurisprudence); Pound, *Mechanical Jurisprudence*, *supra* note 283, at 605, 606–07 (stating legal decisions should not use outdated principles or legal structures when attempting to solve new problems); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1, 35–37 (Stuart E. Thiel & David Widger eds., The

speech tradition Chafee instilled, political speech is pedestalized so highly as to be nearly immune to limitations until it infringes upon others' private rights.<sup>367</sup> In accordance with this protection, and out of observation of a potential chilling effect on the exercise of free speech, the Court generally considers political misinformation to be constitutionally protected.<sup>368</sup> As a result, the political misinformation constraints required for democratic deliberation to have some basis in fact are currently a non-starter.<sup>369</sup>

The Court has a history of acknowledging the lack of constitutional protection for false statements of fact in various forms.<sup>370</sup> However, the clearest of these comes from Justice William Brennan's opinion for a unanimous Court in *Garrison v. Louisiana*:

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effectuated. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . ." Hence the knowingly false statement and the

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Project Gutenberg EBook 2000) (1881) (stating that the law must adapt to the public's evolving needs, not remain anchored in rigid formalism irrespective of the outcome).

367. See *supra* Part I.B (Chafee's free-speech tradition); Zechariah Chafee, Jr., *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins."); see also, e.g., *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring) (listing the many ways that a deliberate lie might not cause actual harm).

368. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–72 (1964).

369. See Simson, *supra* note 48, at 1010–12 (social media regulation unlikely to survive First Amendment scrutiny).

370. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against calculated falsehood without significant impairment of their essential function."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]he erroneous statement of fact is not worthy of constitutional protection . . . ."); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("[D]emonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact.'" (quoting *Gertz*, 418 U.S. 323, 340 (1974))); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").

false statement made with reckless disregard of the truth, do not enjoy constitutional protection.<sup>371</sup>

Despite the *Garrison* Court's excellent acknowledgment, Chief Justice John Roberts wrongly repudiated this position in an eight-justice majority opinion in *United States v. Stevens*, reaffirming the Court's commitment to a negative free-speech tradition:

The government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. . . . The Government derives its proposed test from these descriptions in our precedents [referring to the *Garrison* position above]. But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.<sup>372</sup>

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371. *Garrison v. Louisiana*, 379 U.S. 64, 75–76 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

372. *United States v. Stevens*, 559 U.S. 460, 470–71 (2010) (citations omitted) (quoting Brief for United States at 8, *Stevens*, 559 U.S. 460 (No. 08–769)); *but see* Roscoe Pound, *Interests of Personality [Concluded]*, 28 HARV. L. REV. 445, 455–56 (1915).

Under some circumstances[,] the interests of the state in its personality may have to be weighed against the individual interest in free political belief and free expression thereof. This may mean that the social interest in the free development of the individual must be weighed with the social interest in the state as a social institution. . . . But the manifestations of belief . . . may so affect the activities of the state necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech.

*Id.*

In one fell swoop, the Chief Justice dismissed a balancing test that would have been instrumental in combating misinformation and functionally reduced the underlying statements to dicta. The Court shortly thereafter solidified the Chief Justice's position in *United States v. Alvarez*.<sup>373</sup> When given the chance to allow regulation of knowingly false statements of fact—whether on matters of public concern (i.e., political disinformation, or intentional political misinformation) or not—both Justice Kennedy's plurality opinion and Justice Breyer's concurrence rejected the idea on negative free speech grounds.<sup>374</sup> Even when the *Garrison* Court's position is tempered by the Court's acknowledgment in *New York Times v. Sullivan* that false statements of fact are “inevitable in free debate” and require some protection “if the freedoms of expression are to have the ‘breathing space’ that they need to survive,” it still does not follow that knowingly false statements of fact on matters of public interest deserve complete protection from regulation.<sup>375</sup> If regulating knowingly false statements of fact on matters of political interest were to lead to true political speech being chilled (as the *Sullivan* Court feared), that chilling effect would be limited to self-censorship by an inevitably small group who would irrationally withhold political speech that they believed to be correct out of fear of punishment for political speech they knew to be incorrect.<sup>376</sup> Such a regulation would not clearly harm *any* valuable constitutional interest of either the disinforming speaker or disinformed audience, making the *Alvarez* plurality and concurrence's positions all the more maddening.<sup>377</sup> Even protection for libelous political speech, under the deeply problematic *Sullivan* “actual malice” requirement, did not extend to *knowingly* false political speech.<sup>378</sup>

With such a dire public need to curb political misinformation, the Court's essentially absolutist approach to political speech hamstrings an already rapidly delegitimizing government's ability to do so.<sup>379</sup> The support of democratic self-government, without which the United States cannot exist, is the paramount interest protected by the First Amendment, taking priority over, if absolutely nothing else, the mere ability of a malicious speaker to say

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373. 567 U.S. 709 (2012) (plurality opinion).

374. *Id.* at 722; *id.* at 731–37 (Breyer, J., concurring).

375. 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

376. Simson, *supra* note 48, at 966 n.101; see Redish & Pereyra, *supra* note 22, at 471–72.

377. Simson, *supra* note 48, at 968.

378. *Sullivan*, 376 U.S. at 279–80 (stating that a public official cannot recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, *with knowledge that it was false* or with reckless disregard of whether it was false or not.” (emphasis added)).

379. See Simson, *supra* note 48, at 1015–16; Kramer, *supra* note 29, at 26–27, 30–31.

what they please without restraint.<sup>380</sup> Assuming no other significant interests are implicated, there is no sufficient reason that legislatures cannot pass viewpoint-neutral regulations targeting, at a bare minimum, political disinformation.<sup>381</sup> Until the Court recognizes the priority of democratic self-government, the government's available actions to tackle the existential threat of misinformation are limited to soft-power suggestions and incentive-based coercion. Always a carrot, never a stick. Even then, the "carrots" available to the government are only the ones that somehow manage to pass First Amendment muster. Worse still, we continually see that the education-based and debunking approaches of fighting misinformation are unsuccessful and can worsen the problem.<sup>382</sup>

Contrary to the Court's negative free-speech prescriptions, democratic deliberation requires positive free speech in the form of viewpoint-neutral speech regulations with built-in safeguards that prevent governmental abuse and democratic norms that reinforce proper usage. Despite his disappointing *Alvarez* concurrence, Justice Stephen Breyer later maintained that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*."<sup>383</sup> By not regulating misinformation to preserve a minimum level of factuality, political factions develop their own political realities, and speech loses its democratic utility. Meiklejohn's argument from democracy necessarily assumes that democratic deliberation is supported by a minimum basis in factuality.<sup>384</sup> His basis for arguing for absolute freedom of political speech from government regulation was rooted in concerns of government paternalism<sup>385</sup> undermining the public's ability to make informed political decisions.<sup>386</sup> This is particularly understandable in that Meiklejohn lived and wrote in the context of the terrifying 20th-century authoritarianisms of Nazi Germany, the Soviet Union, and fascist Italy.<sup>387</sup>

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380. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 107–08 (1960); ROSENFELD, *supra* note 18, at 163; *McCutcheon v. FEC*, 572 U.S. 185, 237 (2014) (Breyer, J., dissenting).

381. Massaro & Norton, *supra* note 189, at 1660–61.; see Redish & Pereyra, *supra* note 22, at 471–72.

382. MARIETTA & BARKER, *supra* note 132, at 292, 294–96; YOUNG, *supra* note 58, at 194, 213; MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 84–85.

383. *McCutcheon*, 572 U.S. at 237 (Breyer, J., dissenting).

384. Redish & Pereyra, *supra* note 22, at 470.

385. By "paternalism," this Article means "a restriction on otherwise protected speech justified by the government's belief that speaking or receiving the information in the speech is not in the citizens' own best interests." Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 582–83 (2004).

386. Redish & Pereyra, *supra* note 22, at 453 (stating that Meiklejohn argued for extending absolute protection to political speech); *id.* at 470 (basing the argument in paternalism).

387. See Scheppele, *supra* note 288, at 571–73.

Paired with his influence by Chafee—whose arguments Justices Holmes and Brandeis adopted—it is clear how such theories influenced his own.<sup>388</sup> But guarding against the tactics of those regimes creates an outdated notion of speech protections that does not defend against the tactics of online-age autocrats and other contemporary populist demagogues.<sup>389</sup> While government paternalism will always be a justifiable concern for democratic deliberation, it should never be understood to forbid any action by the government to facilitate a factual basis in democratic deliberation.<sup>390</sup> The foreign nature of this understanding to First Amendment jurisprudence invites disaster by placing even partial and ineffective solutions to our misinformation crisis far out of reach.<sup>391</sup>

### *C. A Proposed Framework*

Without any realistic means of regulating misinformation under modern First Amendment jurisprudence, genuine positive free-speech solutions need to be explored in the abstract—that is, outside the context of what is realistic (or even possible) in our current negative free-speech tradition. As such, it is important to at least have a theoretical basis that prioritizes democratic self-government from which a working legal framework for viewpoint-neutral regulation may be drawn. To that end, this Article submits the two-part framework of principles presented below, against the backdrop of which Part IV.D will explore and evaluate what seem to be the strongest (though insufficient) partial solutions to the misinformation crisis. Most of the proposed principles in this Part will be presented as an elemental test. However, this formatting is purely for clarity of explanation and is not intended to suggest that the best approach to regulating misinformation is, for example, a tort claim for which this element test would serve as a *prima facie* case.

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388. See GRABER, *supra* note 74, at 4 (noting that Holmes and Brandeis “adopted [Chafee’s] arguments as their own”); *id.* at 170–71 (explaining how Meiklejohn’s work is built on Chafee’s framework).

389. See Scheppele, *supra* note 288, at 565, 570–75, 578 (explaining that new-age autocrats “have learned to speak the language of democratic constitutionalism while identifying resonant-frequency points of tension and complexity in order to reverse its effects;” they are skilled at “[p]ortraying themselves as democratic constitutionalists.”).

390. See Redish & Pereyra, *supra* note 22, at 470; SCHAUER, *FREE SPEECH*, *supra* note 2, at 155; SUNSTEIN, *LIARS*, *supra* note 88, at 133.

391. See Simson, *supra* note 48, at 1010–12 (social media regulations are unlikely to survive First Amendment scrutiny).

### 1. Capacity and the Megaphone Principle

One of the foremost points of this article is that disseminating information to the public regarding matters of public concern implicitly carries with it some form of obligation to ensure that the information is factually accurate and able to be relied upon for democratic deliberation. The need for a minimum basis in factual accuracy appears inescapable for any contributor to democratic deliberation. That factual obligation, however, need not (and should not) be uniform among all contributors, as they do not have the same capacity for harm and do not hold equal interests in informed democratic deliberation. The key is *audience size*, a significant determining factor in the destructive potential of political misinformation and the reason that technological advancements make historically tolerable misinformation intolerable.<sup>392</sup> Historically, the Supreme Court has given essentially no consideration to audience size as a criterion for First Amendment protection, instead mistakenly treating speech and publication as functionally interchangeable forms of expression.<sup>393</sup> But unlike verbal speech, a publication is a tangible and durable recording that can be disseminated more broadly, giving it a greater capability to misinform and defame.<sup>394</sup> In the context of misinformation, equal constitutional protection for speech and publication is extraordinarily harmful.

Taken together, that issue of audience size and the need for a minimum factual basis would strongly suggest that the extent of a contributor's obligation to provide a minimum factual basis should be proportionate to the extent of their access to the public. In other words, the greater the reach of their megaphone, the greater their factual obligation to the public. This *megaphone principle* is the basis for the first element of the framework: *capacity*. While a uniform requirement of accuracy in political speech to the

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392. See YOUNG, *supra* note 58, at 192; see also, e.g., sources cited *supra* notes 183, 199, 201 (printing press bolstering misinformation).

393. See STROSSEN, FREE SPEECH, *supra* note 1, at 142–43; see also, e.g., Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043–44, 2047 (2021). The majority gives no consideration whatsoever to the number of recipients made available by social media or the lack of impact an inflammatory video would have had if it were not posted. Simson, *supra* note 48, at 1014–15; see generally *id.* at 973–90 (2023) (using *Mahanoy* and *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) to demonstrate the Supreme Court's disregard for audience size). The majority even refers to the 250 recipients as a “private circle.” *Mahanoy*, 141 S. Ct. at 2047.

394. PROSSER AND KEETON ON THE LAW OF TORTS § 112, at 785 (5th ed. 1984) (stating that, between slander and libel, libel has been “established as the greater wrong”). This is why, for instance, libel damages are typically notably higher than slander damages. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 2:3, at 2-10 (5th ed. 2017) (stating that, historically, plaintiffs would be more likely to recover in libel cases than in slander cases because libel's effects are more permanent).

public would certainly produce far too strong a chilling effect, making the extent of that requirement proportionate to the size of the speaker's audience provides a twofold benefit. First, at the far end of the reach-obligation spectrum, political speech contributors with the greatest reach are typically those with both the means to afford that reach and the ability to abuse that reach to misinform the public. It is only appropriate that they face a higher burden to provide factually accurate information. Second, as we approach the near end of the reach-obligation spectrum, the inverse is true. Those political speech contributors without the means or resources to reach a significant audience are unlikely to disseminate much political misinformation and therefore need not be burdened with a meaningful responsibility to provide factually accurate information.<sup>395</sup> The essence of the megaphone principle is that, by nature of not having significant material resources, the average private citizen very rarely has the capacity for their political speech to disinform or defame, whereas the larger political speech contributors—who produce a vast majority of political misinformation—do far more damage to democratic discourse.<sup>396</sup> As such, only the latter needs to be meaningfully regulated. Determining a political speech contributor's capacity to disinform or defame should focus on two factors: (1) possession of the means or material resources required to reach a sufficient audience, and (2) a significant likelihood that the contributor's audience will believe their statements.<sup>397</sup>

While this sort of positive free-speech empowerment of the electorate is “wholly foreign to” our current negative free-speech tradition, using such a basis to regulate political misinformation may produce a number of benefits.<sup>398</sup> First, it safeguards individual political speech protections for the vast majority of the public while curbing the ability of materially wealthy sources of political speech to disproportionately influence democratic

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395. See Seana Valentine Shiffrin, *Unfit to Print: Government Speech and the First Amendment*, 69 UCLA L. REV. 986, 1025–26 (2022). Ironically, Justice Holmes may have unwittingly been onto something with his strange, majoritarian principle of impotence discussed in Part II.C.3. See sources cited *supra* note 183.

396. See WALTER, *supra* note 108, at 215 (megaphone analogy); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 79–81; RonNell Andersen Jones, *Defamation, Disinformation, and the Free Press Function*, 3 J. FREE SPEECH L. 103, 110–11 (2023) [hereinafter Jones, *Free Press Function*] (referring to a small group of large-scale, repeat offenders of disseminating political misinformation); Philip M. Napoli & Fabienne Graf, *Social Media Platforms as Public Trustees: An Approach to the Disinformation Problem*, in ARTIFICIAL INTELLIGENCE AND THE MEDIA: RECONSIDERING RIGHTS AND RESPONSIBILITIES 93, 100 (2022).

397. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 22 (“Disinformation must be created, it must be amplified, and it must be believed.”).

398. *Citizens United v. FEC*, 558 U.S. 310, 350 (2010).

deliberation.<sup>399</sup> Second, it provides a significantly easier means of enforcing misinformation regulations, as a uniform standard for all contributors would be almost as unenforceable as it would be undesirable. Third, it could serve to restore quality news coverage and support a diversity of news sources; large news outlets have the resources to conduct fact-checking and ensure journalism standards to which they should be adhering already, whereas smaller outlets with fewer resources would be able to build an audience and only face such a burden as that audience grows.

Restoring these journalistic standards is especially important in a time when social media news coverage is destroying the news industry. Social media platforms replace the press by providing news coverage on their platforms without compensating the original reporting outlets, amplify other news sources without any standards of journalistic integrity, and destroy trust in the press by providing users with ample misinformation inconsistent with press coverage.<sup>400</sup> As well, social media allows for *parasitic journalism*, wherein users deprive news outlets of revenue by identifying their professionally investigated and reported news story, recycling it as their own content, and circulating it for views.<sup>401</sup> As such, by addressing such issues, the megaphone principle could serve to curb political misinformation in the context of both legacy media and social media.

## 2. Knowledge or Blatancy

Second, the megaphone principle demands several considerations regarding political speech contributors with the capacity to disinform. For a contributor to be subject to viewpoint-neutral regulation under this principle, they must make a statement of fact to the public on a matter of public concern that possesses five qualities. The following subparts explore each of these qualities in turn.

### a. Falsity (or Functional Equivalent)

The statement at issue must, of course, be false. As such, a demonstration of factual accuracy would serve as a total defense against regulation. For this element, a “false” statement is not verifiably or demonstrably factually accurate by normal means. This wording is

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399. See, e.g., *id.* at 349–50 (2010) (prioritizing marketplace input despite disproportionate and undue influence on marketplace discourse by materially wealthy speakers).

400. See MINOW, *supra* note 27, at 25–35 (social media undermines trust in journalism); Kramer, *supra* note 29, at 23.

401. Napoli, *supra* note 25, at 69–70.

intentional, however, since the propagandic use of ridiculous but unfalsifiable statements of fact may be just as potent as garden-variety misinformation (e.g., conspiracy theories) while being easier to produce. For only this element, such unfalsifiable claims should be deemed false by default.

#### b. Knowing Falsity (or Functional Equivalent)

The statement at issue must be either knowingly false or readily or easily recognizable as false. “Knowingly false” political speech is political disinformation and must be regulable.<sup>402</sup> Similar to the *Sullivan* standard of reckless indifference to truth or falsity, the statement may satisfy this element by being easily or readily recognizable as false. While a complete lack of research is a lower bar than the *Sullivan* standard, 60 years of technological development has made political speech exponentially easier to both verify and broadcast.<sup>403</sup> Moreover, being recognizably false allows for the regulation of statements of fact that—while technically unfalsifiable because they cannot realistically be disproven—are so highly misleading or absurd as to be recognizably false in context.<sup>404</sup> The issue of unfalsifiability in cases like political conspiracy theories requires further consideration, like whether the claim, taken in context, was ridiculous enough that the contributor clearly recognized (or reasonably should have recognized) it as such.<sup>405</sup>

#### c. Material Falsity

The statement at issue must be materially false—that is, the false components of the statement must pertain to the matter of public concern that the statement addresses.<sup>406</sup> For example, this was a concern that led to overprotection in *New York Times v. Sullivan*.<sup>407</sup> The publication at issue correctly highlighted extensive police abuse of civil rights protesters,

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402. See Simson, *supra* note 48, at 966 & n.101, 968 (justification for regulating knowingly false statements of fact).

403. See *St. Amant v. Thompson*, 390 U.S. 727, 731, 733 (1968) (“Failure to investigate does not in itself establish bad faith.”); Redish & Pereyra, *supra* note 22, at 473 (noting the actual malice element of proposed misinformation regulation).

404. See Wes Henricksen, *Disinformation and the First Amendment*, 96 ST. JOHNS L. REV. 543, 559 (2021) (“verifiably false or misleading information” as an element of proposed misinformation regulation).

405. See, e.g., sources cited *supra* notes 206–07, 210 (Alex Jones); *supra* Part III.E (Chaya Raichik, or “Libs of TikTok”).

406. See Redish & Pereyra, *supra* note 22, at 474, 477–79 (noting the materiality element of proposed misinformation regulation).

407. 376 U.S. 254 (1964).

expressing factually accurate, constitutionally protected support for the movement.<sup>408</sup> But the publication falsely alleged specific instances of police abusing and attacking student protestors and bombing Martin Luther King Jr.'s home.<sup>409</sup> These statements were materially false, but because the publication was not defamatory, the *Sullivan* Court ruled that the publication was constitutionally protected political speech.<sup>410</sup>

#### d. Actual Harmfulness

The statement at issue must be actually harmful to democratic deliberation. For misinformation to do damage, it must actually succeed in affecting democratic deliberation. So, the materially false statement at issue must result in political misinformation (or be reasonably expected to do so).<sup>411</sup>

#### e. Foreseeable Harmfulness

The statement at issue must also be foreseeably harmful to democratic deliberation, as suggested above. The contributor must either realize (or reasonably be expected to realize) that the statement may realistically lead to harm.<sup>412</sup> As such, this element necessarily implicates the propensity of the statement to be believed, and, by extension, the contributor's knowledge that the audience will believe the statement. Prior instances of the audience believing the contributor's (or similar contributors') statements are a helpful guideline.<sup>413</sup>

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408. *Id.* at 256–57.

409. *Id.* at 257–58.

410. *Id.* at 264.

411. See Helen Norton, *Government Falsehoods, Democratic Harm, and the Constitution*, 82 OHIO ST. L.J. ONLINE 1, 2–3 (2021) (“democratic harms”); see, e.g., Helen Coster & Jack Queen, *Fox Settles Dominion Lawsuit for \$787.5 Million Over U.S. Election Lies*, REUTERS (Apr. 19, 2023), <https://www.reuters.com/legal/dominions-defamation-case-against-fox-poised-trial-after-delay-2023-04-18/>; Dietrich Knauth, *Alex Jones Must Pay \$1.1 Billion of Sandy Hook Damages Despite Bankruptcy, Judge Rules*, REUTERS (Oct. 19, 2023), <https://www.reuters.com/legal/alex-jones-cant-avoid-sandy-hook-verdicts-bankruptcy-judge-2023-10-19/>; WILL SOMMER, TRUST THE PLAN 7–9 (1991) (“PizzaGate,” part of the QAnon conspiracy theory that led to the attack Washington, D.C., pizza shop by a gunman who believed a global, Satanic child sex-trafficking ring to be in its basement.).

412. See *supra* Parts II.C.4, III.E (stochastic terrorism); sources cited *supra* notes 210, 315–17, 319 (stochastic terrorism; Chaya Raichik & “Libs of TikTok”).

413. See *supra* Part II.C.4 (stochastic terrorism; Alex Jones); sources cited *supra* notes 206–07, 210 (Alex Jones).

#### *D. Insufficient Solutions*

Given the fundamental nature of the contemporary misinformation crisis and how far afield the American negative free-speech tradition is, meaningful solutions are exceedingly unlikely. The proposed solutions, if any, will only be half-measures, focusing on the contemporary symptoms of political misinformation and leaving unchallenged the fundamental democratic weakness that causes them.<sup>414</sup> And while such half-measures would be pleasant surprises, if the objective is to successfully curb political misinformation, the best these measures can hope to accomplish is supplementing a genuine solution. Without one, they address only superficial symptoms. This Part illustrates that dynamic by using the proposed framework of Part IV.C to highlight the insufficiency of (theoretically) feasible solutions proposed elsewhere. Because they serve to contrast with that framework, these proposed solutions will not be explored in great depth.

##### 1. Active Negative Intervention

Some scholars propose active governmental efforts to mitigate online extremism by intervening in the dynamics of the radicalization feedback loop explored in Part III.A–B. One example comes from Harvard Law Professor Cass Sunstein, which he refers to as the “cognitive infiltration of extremist groups.”<sup>415</sup> Sunstein suggests the use of government agents, to the extent permitted by law and ethical constraints, to penetrate online information silos and to introduce a diversity of opinion to “undermine percolating conspiracy theories by raising doubts about their factual premises, causal logic, or implications for action, political or otherwise.”<sup>416</sup> Sunstein also suggests two methods for the government agents to participate: undercover (via a fake identity or anonymity) or openly as themselves. The open option allows for an honest and transparent attempt to dispel political misinformation, whereas the undercover option provides a means (although ethically questionable) of avoiding being dismissed by users.<sup>417</sup>

Thankfully, Sunstein does recognize the difficulty posed by some of the cognitive factors at play, such as the “self-sealing,” debunk-resistant nature of conspiracy theories.<sup>418</sup> However, Sunstein clearly maintains faith in a marketplace of ideas, evident in his emphasis on viewpoint diversity as a

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414. *See supra* Part IV.A.

415. *See* SUNSTEIN, ON RUMORS, *supra* note 21, at 28–30.

416. *Id.* at 29.

417. *Id.* at 29–30.

418. *Id.* at 29.

solution and his assumption that users are receptive interlocutors deep in their fact-finding mission. Sunstein's suggestion, at least in the context of this article, embodies the worst of both worlds for negative and positive conceptions of free speech, respectively. First, by focusing on the users and not the content or its creator, this is an ad hoc solution that provides no means of addressing or deterring the misinformation that is radicalizing users. As a result, its all-carrot-no-stick approach does not serve to establish a minimum basis in fact and allows misinformation to continue unimpeded.

Second, it makes liberal use of the main problem of positive free speech efforts: government overreach. Because this proposal targets extremism (an issue of opinion) and not misinformation (an issue of fact), this proposal would establish an alarmingly direct form of viewpoint discrimination and government paternalism. Of course, the government has an interest in curbing political extremism as a means of supporting democratic deliberation. However, the United States already has a profound and overlooked problem of government officials disinforming and propagandizing the public.<sup>419</sup> The notion of the government developing the infrastructure, tactics, and precedent needed to carry out modern targeted domestic disinformation campaigns is a much greater threat to democratic self-government than it is a help.

## 2. Revisiting the *Sullivan* Actual Malice Standard

In 1964, the Supreme Court brought forth a new negative free speech paradigm for First Amendment speech and press protections in its landmark decision *New York Times v. Sullivan*.<sup>420</sup> Justice William Brennan's unanimous majority opinion established the "actual malice" standard, wherein a public official suing for defamation over statements about their official conduct could only seek damages if the official could establish that the statement was made with "actual malice"—namely, "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>421</sup> The standard the suing official needed to meet rose from the moderately protective "negligence" standard to the exceptionally protective "actual malice" standard; this shift established a strong negative free speech protection for political speech by implicating the defendant's subjective

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419. See *supra* Part III.B–D; BENKLER ET AL., *supra* note 144, at 78–80 (government officials' role in political misinformation); Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 838–48 (2020) (prevalence of contemporary misinformation by government officials).

420. 376 U.S. 254, 279–80 (1964).

421. *Id.*; see *St. Amant v. Thompson*, 390 U.S. 727, 728 (1968).

thought process.<sup>422</sup> Despite Meiklejohn hailing the *Sullivan* decision as “an occasion for dancing in the streets,” and the fact that the Supreme Court has made numerous subsequent decisions building upon the *Sullivan* precedent, its actual malice standard has become quite controversial.<sup>423</sup> Decades of legal scholarship have thoroughly criticized the *Sullivan* actual malice standard and its progeny for a wide array of democratically harmful reasons: its poor adaptability to digital and online media;<sup>424</sup> the extraordinary difficulty of proving actual malice;<sup>425</sup> and its incentivizing of poor journalistic standards.<sup>426</sup> While each of these points contains valid criticisms of the doctrine, the most significant problem with the *Sullivan* decision and its progeny is their inappropriate establishment and solidification of negative free speech protections for misinformation.<sup>427</sup>

While the *Sullivan* Court correctly recognized that an “erroneous statement is inevitable in free debate,” it dangerously extended First Amendment protection to false political speech unless that speech violated a person’s private rights, as in defamation.<sup>428</sup> Moreover, the *Sullivan* Court did so unnecessarily, as the Court needed only to reverse the libel judgment because the publication at issue did not mention the plaintiff by name, position, or indirect reference, and therefore provided no basis for a libel claim.<sup>429</sup> Worse still, the Court gratuitously and wrongly tethered its speech-protective rationale to an ahistorical (and intellectually dishonest) characterization of the Sedition Act of 1798 as a purely self-interested and overwhelmingly panned attack on partisan dissent.<sup>430</sup> Section 2 of the

422. Daniel E. Rauch, *Defamation as Democracy Tort*, 172 U. PA. L. REV. 1453, 1488–89 (2024) [hereinafter Rauch, *Defamation as Democracy Tort*].

423. 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 (1964) (evincing Alexander Meiklejohn’s statement).

424. See Delery H. Perret, *An Unforeseen Problem: How Gertz Failed to Account for Modern Media and What to Do Now*, 80 LA. L. REV. 541, 543–44 (2020); Jasmine E. McNealy, *All the Rumors are True: Verification, Actual Malice, and Celebrity Gossip*, 88 MO. L. REV. 751, 753–54 (2023).

425. See Kang, *Actual Malice Test*, *supra* note 350, at 519–20; Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1488–89.

426. See Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1488, 1509–10.

427. See *id.* at 1479–82; Kang, *Actual Malice Test*, *supra* note 350, at 527.

428. *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964); *United States v. Alvarez*, 567 U.S. 709, 732–33 (2012) (Breyer, J., concurring).

429. See Kang, *Actual Malice Test*, *supra* note 350, at 558–59.

430. *Sullivan*, 376 U.S. at 273–77. In providing favorable arguments, the *Sullivan* Court selectively omitted from its condemnation of the Sedition Act that the Virginia and Kentucky Resolutions represented (at least officially) the minority view in the 16 states, as only 4 states (Georgia, Kentucky, Tennessee, and Virginia) condemned the Act whereas at least 8 states (Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) and the Pennsylvania House of Representatives officially opposed the Resolutions; 3 states (New Jersey, North Carolina, and South Carolina) did not issue official resolutions of support or opposition. Kang, *Against Political Speech*, *supra*

Sedition Act, the primary provision at issue, allowed for criminal punishment of anyone who would:

[W]rite, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States . . . .<sup>431</sup>

There is no doubt that the Sedition Act's vague language was abused for partisan political ends—a mistake that no solution to the contemporary misinformation crisis can afford to repeat. However, the primary problem of the Sedition Act was that it conflated seditious libels that harmed democratic deliberation with non-seditious libels that harmed public individuals' reputations.<sup>432</sup> The government had an existential need to prevent political misinformation and, as an independent matter, a valid interest in protecting individuals' reputations from defamatory falsehoods.<sup>433</sup> However, the Sedition Act's overbroad application and partisan abuse made it unpopular among the newly democratic American public and created a generalized animosity toward the Act, irrespective of the needs its individual provisions addressed.<sup>434</sup> So, when the *Sullivan* Court uncritically asserted that “the lesson to be drawn from the great controversy over the Sedition Act of 1798”<sup>435</sup> was the need for greater political speech protection, it wholly missed the point. Ironically, by failing to distinguish between democratically harmful libels and libels that harm individual reputation, the *Sullivan* Court's rationale for the actual malice standard makes the same mistake of overbroad application as those who passed the Sedition Act.<sup>436</sup> The *Sullivan* Court's mistake, however, is inverted, as it overprotects political misinformation to the same sweeping extent that the Sedition Act underprotected it.

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note 10, at 818–21; WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT* 323–25 (2016). The *Sullivan* Court also omitted that the Resolutions were partially rooted in the nullification doctrine. See Bikle, *supra* note 353, at 21–22.

431. Sedition Act, ch. 74, § 2, 1 Stat. 596, 596 (1798).

432. Bikle, *supra* note 353, at 18–19; see Kang, *Actual Malice Test*, *supra* note 350, at 527.

433. Bikle, *supra* note 353, at 23.

434. *Id.*

435. *Sullivan*, 376 U.S. at 273.

436. See Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1479, 1482–83, 1485–87, 1535 (demonstrating mischaracterization of issue as purely one of political speech interest versus reputational interest).

In light of these considerations, it would be appropriate to alter the *Sullivan* actual malice standard, as many scholars and jurists have suggested. Returning to a standard of negligence by overturning *Sullivan* outright would likely have deeply undemocratic results. If it were overturned, public officials, public figures, major corporations and organizations, and other materially wealthy plaintiffs could easily resort to “libel bullying”—that is, filing suit merely to intimidate and silence speakers or publishers over unfavorable statements about them.<sup>437</sup> A replacement standard needs to (1) be flexible enough to allow recovery for the defamed, (2) be strict enough to prevent either abuse by libel-bully plaintiffs or excess protection for negligently misinformative publications, and (3) have sufficient guardrails to prevent misapplication by a partisan court. What such a standard would look like is an article unto itself. However, while they presumably need to be refined and adapted, a possible starting place may be an objective standard of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”<sup>438</sup>

Alternatively, or perhaps in conjunction with a new standard, courts should consider supplemental claims for recovery to offset the pressure a lower standard would place on reporting by news outlets. For example, Professors Randall Bezanson and Gilbert Cranberg once proposed a standard of “institutional reckless disregard,” wherein plaintiffs could bring tort claims “not against the reporter and editor but against the corporation” for business decisions it makes “that affect journalism when they manifest knowing indifference to the risk of defamatory falsehood that flows from the decisions.”<sup>439</sup> For another example, several legal scholars have suggested modified fraud suits as a viable vehicle for suits against political misinformation made for personal or political benefit, creating causes of action for speech that constitutes, for example, “political fraud” or “fraud on the public.”<sup>440</sup> As a final example, there seems to have been little exploration of non-financial alternatives to the damages-based actual malice standard.

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437. See Lyrisa Barnett Lidsky, *Untangling Defamation Law: Guideposts for Reform*, 88 MO. L. REV. 663, 681 (2023) [hereinafter Lidsky, *Untangling Defamation Law*] (libel bullying); Lyrisa Barnett Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. FREE SPEECH L. 79, 82 (2023) [hereinafter Lidsky, *Gordian Knot*] (“SLAPP” suits); Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1511 (“win-by-suing” nuisance plaintiffs).

438. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967); see Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1488–89, 1509.

439. Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA. L. REV. 887, 891, 901 (2005).

440. See Redish & Pereyra, *supra* note 22, at 472–479 (noting the “political fraud” claim); Henricksen, *supra* note 404, at 559–72 (“fraud on the public” claim).

For instance, creative use of a forced retraction and apology as an alternative to monetary damages may provide more avenues to resolution, so long as sufficient guardrails exist to prevent abuse by powerful interests.<sup>441</sup> At the very least, this may circumvent resource-intensive litigation leveraged by libel bullying.<sup>442</sup>

Unfortunately, reforming the *Sullivan* actual malice standard as a means of addressing the contemporary misinformation crisis is deeply problematic and risky. In addition to the factor of libel bullying mentioned above, there are two significant issues. First, defamation suits are an inadequate means of combating political misinformation because of their imprecision in targeting it. Defamatory statements or publications are not necessarily political, and political misinformation need not be defamatory. So, while defamation suits for defamatory political speech or publication can be used to great effect, such suits are limited in the amount of political misinformation they can address.<sup>443</sup> Because defamation suits function as a means of recovering damages for reputational harm, they only incidentally curb misinformation and do so only after it has been released to and consumed by a broad audience.

Second, while at least two Supreme Court justices have thankfully criticized the *Sullivan* actual malice standard's enabling of misinformation, those justices have a poor grasp of the misinformation crisis and risk worsening the problem if the Court were to revisit *Sullivan*. Justice Clarence Thomas primarily roots his *Sullivan* criticisms in constitutional originalism, calling its actual malice standard constitutionally baseless and neglectful of "the Constitution's original . . . meaning."<sup>444</sup> While Justice Neil Gorsuch agrees with Justice Thomas's ahistorical originalist bases, he focuses more on the real-world damage misinformation causes and whether the actual malice standard actually fosters informed

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441. See Kang, *Actual Malice Test*, *supra* note 350, at 564–65; Lidsky, *Gordian Knot*, *supra* note 437, at 84; SUNSTEIN, *LIARS*, *supra* note 88, at 102–03 ("notice and takedown" liability in an online context).

442. See Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1492–93, 1510–11, 1521 (arguing for lower standards as a faster resolution of libel claims that does not sacrifice evaluation on the merits).

443. Jones, *Free Press Function*, *supra* note 396, at 108–13; see Lidsky, *Untangling Defamation Law*, *supra* note 437, at 673 (discussing *Sullivan*'s limited effect on political misinformation); see also, e.g., Helen Coster & Jack Queen, *Fox Settles Dominion Lawsuit for \$787.5 Million over U.S. Election Lies*, REUTERS (Apr. 19, 2023), <https://www.reuters.com/legal/dominions-defamation-case-against-fox-poised-trial-after-delay-2023-04-18/>; Knauth, *supra* note 411.

444. *McKee v. Cosby*, 139 S. Ct. 675, 678 (2019) (mem.) (Thomas, J., concurring in denial of cert.); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424–25 (2021) (mem.) (Thomas, J., dissenting in denial of cert.).

democratic deliberation.<sup>445</sup> However, Justice Gorsuch is also concerned with the plaintiff classes created by subsequent cases and seems to neglect the issue above by overattributing the prevalence of political misinformation to the news media.<sup>446</sup> Accordingly, if the broader Court shares any of Justices Thomas's or Gorsuch's disdain for news media, the Court may use (a)historical bases to overrule or amend *Sullivan* in ways that do not address the misinformation crisis and instead further entrench negative free speech protections.

### 3. A Fairness Doctrine 2.0

As is hopefully clear, a significant legal challenge in curbing misinformation is a near-total reliance on reactive responses to misinformation once it has already been consumed. Prior restraints on First Amendment-protected expression are nearly absolute. However, political speech in mass media has been regulated in the past, most notably when the mid-20th century Supreme Court upheld some content regulations of public broadcasts. Amid the rise in televised news consumption, the Federal Communications Commission (FCC) promulgated the Fairness Doctrine in 1949, which required the broadcasting of "discussion of public issues" and "fair coverage" for opposing viewpoints on those issues.<sup>447</sup> In 1987, however, a deregulation-minded FCC unwisely repealed the doctrine, claiming it "contravene[d] the First Amendment," despite numerous Supreme Court decisions upholding the doctrine's application to broadcasting as constitutional.<sup>448</sup> In response to this unpopular move, Congress passed a bipartisan bill to codify the Fairness Doctrine that same year, which President Reagan vetoed, echoing the FCC's rationale.<sup>449</sup> The doctrine has since remained dead.

Immediately following the doctrine's demise, extreme partisan talk radio programs exploded onto the scene, where they thoroughly undermined

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445. *Berisha*, 141 S. Ct. at 2428, 2430 (Gorsuch, J., dissenting in denial of cert.); *see id.* at 2425 (Thomas, J., dissenting in denial of cert.) (originalist interpretation).

446. *See id.* at 2427–28 (Gorsuch, J., dissenting in denial of cert.) (overemphasizing news media editorial shortcomings); *id.* at 2428–29 (overinclusiveness of public figure doctrine).

447. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949); *Red Lion Broad. v. FCC*, 395 U.S. 367, 369 (1969).

448. *Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 (D.C. Cir. 1989), *aff'g In re* Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C. Rcd. 5043, 5057 (1987); *see In re* Inquiry into Section 73.1910 of the Comm'ns' Rules and Reguls. Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C.2d 145, 145, 246 (1985).

449. S. 742, 100th Cong. (1987); Message to the Senate Returning Without Approval the Fairness in Broadcasting Bill, 1 PUB. PAPERS 690 (Jun. 19, 1987) (Pres. Reagan's veto message).

democratic deliberation throughout the 1990s virtually unimpeded.<sup>450</sup> These new, pre-internet partisan echo chambers led to extreme partisan division and affective polarization, reflected in the “Contract with America” in 1994 and the establishment of partisan television news networks in 1996, which capitalized on this new public sentiment.<sup>451</sup> The resulting partisan animosity, amplified by the internet and social media, has evolved into what America is experiencing today.<sup>452</sup>

While many scholars caution against a reinstatement of the original Fairness Doctrine, they advocate for comparable alternatives.<sup>453</sup> Although divided on whether doing so could be effective, their explorations of the idea seem to neglect major reasons for and against its adoption. Beginning with the doctrine’s benefits, it served both negative and positive free speech purposes. On one hand, the doctrine required viewpoint diversity, which prevented information silos and encouraged toleration.<sup>454</sup> On the other hand, the doctrine safeguarded democratic deliberation by preventing hyperpartisan or extremist viewpoints from being asserted as fact.<sup>455</sup> Modern scholarship, operating within our negative free-speech tradition, has focused predominantly on the former benefit, despite continual evidence supporting the contrary.<sup>456</sup>

As evidence for the efficacy of purely negative free speech measures against misinformation, the Fairness Doctrine is a false positive, but its simultaneous positive free speech function makes it a rare historical example of a proactive positive free speech measure in the United States. Moreover, its negative free speech value is also significant. Where the FCC and President Reagan were mistaken, as social media has illustrated, is that viewpoint diversity must come from *within* the same information source, not merely be made optionally available across numerous, ideologically committed information sources.<sup>457</sup> Moreover, the Fairness Doctrine was concerned only with matters of opinion, leaving out the logistical challenges of mandating accurate coverage.

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450. See ROSENFELD, *supra* note 18, at 146–48.

451. See *id.*; YOUNG, *supra* note 58, at 58–59, 175–76 (discussing Contract with America and partisan television news networks); RAUCH, THE CONSTITUTION OF KNOWLEDGE, *supra* note 140, at 174 (epistemic separatism).

452. BENKLER ET AL., *supra* note 144, at 21.

453. See, e.g., MINOW, *supra* note 27, at 154–57; SUNSTEIN, #REPUBLIC, *supra* note 89, at 213–15; Victor Pickard, *The Strange Life and Death of the Fairness Doctrine*, 12 INT’L J. COMM’N 3434–3444, 3447 (2018).

454. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

455. See MCINTYRE, ON DISINFORMATION, *supra* note 99, at 77.

456. See MARIETTA & BARKER, *supra* note 132, at 262–63, 294–96.

457. MCINTYRE, ON DISINFORMATION, *supra* note 99, at 76–77.

Turning to its weaknesses, however, there are plenty. Scholars correctly point to the Fairness Doctrine's poor applicability to the individualized nature of the internet and social media, and the historical difficulty of enforcing it. While these are both salient concerns, they are not dispositive. First, improving mass media news coverage would improve the quality of a significant amount of political information entering the public sphere, and second, historical practices of enforcing the doctrine were evidently successful before the advent of contemporary technologies that may facilitate enforcement.<sup>458</sup> Without more, the fact that a solution is only a partial fix or difficult to carry out at one point in time is not enough of a reason to forgo it. However, there are at least three significant problems. First, the Supreme Court's rationale for holding the Fairness Doctrine constitutional was that the public airwaves it applied to were considered a scarce resource to which the public required greater access for informed democratic deliberation.<sup>459</sup> The Court was not concerned with supporting a minimum basis in fact, and a lack of access is certainly no longer an issue. Second, while presenting information in a "fair and balanced"<sup>460</sup> manner may seem appropriate, it creates a dangerous false equivalency of opinions. Democratic deliberation is a means of problem-solving, and as such, granting empirically uninformed opinions the same value as informed ones is counterproductive, unnecessarily making the uninformed opinion more widely available.<sup>461</sup> This is particularly problematic in circumstances where one political faction is polarized to a notably greater extent than the other.<sup>462</sup> Third, a "balanced" and "objective" coverage of political news stories leads to a sanitized presentation of competing political factions' arguments rather than an investigation of those arguments' respective merits. Doing so still leads to cynicism, the taking of sides, and partisan hostility.<sup>463</sup>

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458. Pickard, *supra* note 453, at 3434 ("Although the Fairness Doctrine's effectiveness and enforceability are debatable, it encouraged sensitivity toward programming biases and provided local communities an important tool with which to hold broadcasters accountable.").

459. *See* *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

460. *In re* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949).

461. ROSENFELD, *supra* note 18, at 160–62; *see* YOUNG, *supra* note 58, at 141, 152, 160–61 ("bothsidesism" and conflict framing); ORESKES & CONWAY, *supra* note 139, at 240–41; *id.* at 19 ("no need to 'balance Hitler against Churchill'" (quoting David Halberstam, *THE POWERS THAT BE* 39 (Univ. of Ill. Press 2000) (1979))).

462. BENKLER ET AL., *supra* note 144, at 16; YOUNG, *supra* note 58, at 70–71, 235 (asymmetric polarization).

463. YOUNG, *supra* note 58, at 141–42, 156 ("conflict framing"); MCINTYRE, ON DISINFORMATION, *supra* note 99, at 36, 53–55 (false equivalence and defactualization).

#### 4. Social Media Regulation

As the primary medium for the contemporary misinformation crisis, no solution can be viable unless that leaves social media unregulated. Social media companies are aware their platforms “exploit the human brain’s attraction to divisiveness” and promote “more and more divisive content in an effort to gain user attention and increase time on the platform.”<sup>464</sup> The attention-based and profit-driven nature of social media companies’ business models means that social media “cannot optimize for the public interest,” and thus they must be regulated.<sup>465</sup> Thankfully, social media regulation is a more realistic response under a negative free-speech tradition in the respect that First Amendment protections only protect against regulations by the government, not private corporations.

Contemporary scholarship across disciplines is teeming with proposed solutions for curbing social media misinformation. The most common example is amending Section 230(c) of the Communications Decency Act of 1996, which shields social media companies from liability for the content posted on their platforms and does not require them to set content standards.<sup>466</sup> While this would be both a welcome change and one that is responsive to intense bipartisan interest in accountability for social media companies, amending Section 230(c) is likely futile for two reasons. First, while there is bipartisan disdain for social media companies, the defactualized nature of our misinformation crisis has led each major political party to take issue with Section 230(c) for opposite reasons. Political liberals take issue with the misinformation liability shield in Section 230(c)(1), whereas political conservatives tend to take issue with the “good faith” provision in Section 230(c)(2), which allows a platform to voluntarily act “in good faith” to limit content it deems objectionable regardless of that content’s constitutionality.<sup>467</sup> The parties’ staunchly opposed stances make meaningful

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464. DiResta, *Algorithms, Affordances, and Agency*, *supra* note 179, at 129–30 (quoting Horwitz & Seetharaman, *supra* note 257).

465. *Hearings*, *supra* note 112, at 1, 3.

466. 47 U.S.C. § 230(c); Andrew Ceresney et al., *Regulating Harmful Speech on Social Media: The Current Legal Landscape and Policy Proposals*, in *SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY* xxiii, xxiv–xxvii (Lee C. Bollinger & Geoffrey R. Stone eds., 2022); *see, e.g.*, *Gonzalez v. Google*, 282 F. Supp. 3d 1150 (N.D. Cal. 2017) (Facebook, Google, and Twitter not liable for terrorist posts); Bauder, *supra* note 332 (Facebook stops fact-checking for its posts).

467. Danielle Draper, *Summarizing the Section 230 Debate: Pro-Content Moderation vs Anti-Censorship*, BIPARTISAN POL’Y CTR. (July 5, 2022), <https://bipartisanpolicy.org/blog/summarizing-the-section-230-debate-pro-content-moderation-vs-anti-censorship/>; Ashley Johnson & Daniel Castro, *Fact-Checking the Critiques of Section 230: What Are the Real Problems?*, INFO. TECH. & INNOV. FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/fact-checking-critiques-section-230-what-are-real-problems/> (Critique #8).

reform unlikely, let alone desirable. Second, as this Article has stressed, while social media regulations are welcome and necessary, social media is but the most recent development in communication technology that has allowed bad actors to exploit the fundamental and unaddressed weakness of democracy. Addressing the misinformation-enabling features of new technological developments will only ever be a band-aid fix, especially as technology develops at a progressively quicker pace. Amending Section 230(c), if even possible, is too superficial a solution.

Instead, among the best courses of action regarding social media misinformation is to regulate the online sphere as a public resource. This implies some form of recognition of the public sphere as a publicly held resource, the maintenance of which requires governmental regulation.<sup>468</sup> Where the public sphere is privatized, the private owners and managers drawing exorbitant profits from it should be considered public trustees, saddled with public interest obligations to support democratic deliberation.<sup>469</sup> This could be particularly beneficial in that it avoids several additional legal requirements for antitrust regulation, and because social media implicates other substantial user interests like privacy concerns.<sup>470</sup> Additionally, regarding the latter, the implication of such substantial social interests may serve as a threshold for determining which platforms require regulation, ensuring that public trustee obligations tend to fall on larger platforms.<sup>471</sup> Moreover, social media platforms could be regulated as public utilities. The oversight from public-utility-style regulation would allow for incentives to offset the profit motives at issue and numerous means of holding the social media companies accountable for misinformation. For example, certain public servants may be empowered to compel annual reports, set performance benchmarks, oversee platforms' actions within the market, raise responsiveness to user complaints, and "ensure due process and transparency while leaving the platforms as private entities still able to restrict hate speech, clickbait articles, or inflammatory or untrustworthy news."<sup>472</sup> While public-trust-based regulatory solutions would implicate partisan policy preferences and would need to be adapted to new technological advancements, this may

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468. See MINOW, *supra* note 27, at 120–21; *New St. Ice Co. v. Liebmann*, 285 U.S. 262, 304 (1932) (Brandeis, J., dissenting) (vendors monopolizing a publicly necessary good or service may justifiably be regulated more heavily). This public-resource rationale is often consistent with existing regulations. See, e.g., 47 C.F.R. § 73.1217(a) (broadcast hoaxes).

469. See *Hearings*, *supra* note 112, at 1, 3–4; Napoli & Graf, *supra* note 396, at 14, 16; ROSENFELD, *supra* note 18, at 164.

470. Napoli & Graf, *supra* note 396, at 16, 32–33.

471. *Id.* at 21.

472. See MINOW, *supra* note 27, at 123; Napoli & Graf, *supra* note 396, at 32–33.

be a viable long-term solution and a complement to the fundamental change required.

#### CONCLUDING THOUGHTS

To reiterate, “the First Amendment advances not only the individual’s right to engage in political speech, but also the public interest in preserving a democratic order in which collective speech *matters*.”<sup>473</sup> There should be no mistake that, especially in the context of the First Amendment, the American obsession with negative freedom at the expense of positive freedom is what will end the American experiment. After all, this is why the United States is the only developed democracy to which misinformation poses an existential threat.<sup>474</sup> America’s conception of freedom as a relief from oppression—and, by extension, a distrust of government—distinguishes it from other Western democracies, which understand both the government’s necessary role “as a safety net against corrupt private sector interests” and the need “to protect [democracy] from anti-democratic ideas.”<sup>475</sup> Yet, here in the United States, we cannot bring ourselves to do so.

It seems that the only viable solution, no matter how improbable, is a widespread consensual understanding that some degree of regulation of factually inaccurate information is necessary for the sake of democratic self-government.<sup>476</sup> But current conventional wisdom would have us believe that maintaining our woefully inadequate negative free-speech tradition is preferable to jumping ship, as if the flaws of other nearby ships make them worse alternatives to the actively sinking ship we stand upon.<sup>477</sup> This conventional wisdom has developed an unacceptable habit of turning valid concerns into thought-terminating cliches. Several common ones should be dispelled.

#### *A. Regulation and Censorship Are Not Synonymous*

Viewing content only as either censored or uncensored is a false dichotomy, ignoring the possible middle grounds between the slightest regulation and full-throated censorship. Exclaiming “censorship” at the

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473. *McCutcheon v. FEC*, 572 U.S. 185, 237 (2014) (Breyer, J., dissenting).

474. See *YOUNG*, *supra* note 58, at 192.

475. Simson, *supra* note 48, at 1008.

476. As John Milton himself once wrote, “[H]e . . . who overcomes by force hath overcome but half his foe.” *PARADISE LOST* bk. I, ll. 647–49 (Stephen Orgel & Jonathan Goldberg eds., Oxford Univ. Press ed., 2005) (1674).

477. See *YOUNG*, *supra* note 58, at 222; *but see* Kramer, *supra* note 29, at 31; *Reductio Ad Absurdum*, *BLACK’S LAW DICTIONARY* (11th ed. 2019).

slightest instance of regulation cannot continue to be a get-out-of-jail-free card.<sup>478</sup> This is especially true given that there is no firm agreement among the defenders of our negative free-speech tradition about what constitutes a free-speech violation.<sup>479</sup>

### *B. Regulatory Results Will Not Be Distributed Evenly*

While misinformation regulation must be nonpartisan, one political faction will inevitably be regulated more than another.<sup>480</sup> This, without more evidence, cannot be labeled as discriminatory or biased for two reasons. First, the party not presently in power will always be the more frustrated party (and thus, more likely to produce partisan misinformation). Second, while no faction is immune from populist demagoguery, the identity-based appeals from Part III are more attractive to political conservatives and dominant ethnic, racial, and religious groups.<sup>481</sup> A partisan basis for misinformation does not make it more tolerable.

### *C. There Must Be an “Optimal Chill”*

The dreaded “chilling effect” on free expression is a product of our overprotection of political speech, and it misleadingly implies that no such chill should exist.<sup>482</sup> On the contrary, there is indeed an appropriate level of chilling, and the real task is to find the optimal amount.<sup>483</sup>

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478. DiRESTA, *INVISIBLE RULERS*, *supra* note 112, at 147. This is a common tactic of extremists and conspiracy theorists like Alex Jones (InfoWars), who, case in point, brazenly named his media company, “Free Speech Systems LLC.” Warning Letter from Donald D. Ashley, Director, U.S. Food & Drug Admin., and Richard A. Quaresima, Acting Associate Director, Fed. Trade Comm’n, to Free Speech Systems LLC d.b.a. Infowars.com, MARCS-CMS 605802, (Apr. 9, 2020), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/free-speech-systems-llc-dba-infowarscom-605802-04092020>.

479. See GRABER, *supra* note 74, at 7, 187–88 (noting Justices Black and Douglas, among the staunchest civil libertarian justices ever, disagreeing over a negative free speech violation).

480. See MCINTYRE, *ON DISINFORMATION*, *supra* note 99, at 53–55.

481. BENKLER ET AL., *supra* note 144, at 16 (asymmetric polarization); YOUNG, *supra* note 58, at 70–71, 191–92, 235.

482. See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1636 n.7 (2013).

483. SUNSTEIN, *LIARS*, *supra* note 88, at 64–65; see Rauch, *Defamation as Democracy Tort*, *supra* note 422, at 1510–11; Redish & Pereyra, *supra* note 22, at 454–55, 471–72; Simson, *supra* note 48, at 966 n.101, 968; *supra* Part IV.B.

*D. The Slope Is Not So Slippery*

While free speech is an indispensable right that must be guarded cautiously, the notion that free speech regulation creates a slippery slope to tyranny is fallacious and perhaps the best example of a speech-related perpetuation of the status quo.<sup>484</sup> It assumes, first, that each supposed loss of speech rights necessarily entails another with no possibility of reversal or redirection, and second, that no safeguards can prevent the undesirable outcome (e.g., ensuring that the principles guiding the regulation are specific enough to prevent abuses).<sup>485</sup> The slippery-slope argument is essentially a concession that a line in the sand must be drawn, but because there is disagreement or uncertainty as to where to draw that line, it would be best not to draw one at all.<sup>486</sup>

*E. The Devil We Know Is Not Better than the Devil We Do Not*

While the logistics of holding the speech regulator accountable to the electorate is a perfectly reasonable concern, the age-old question of “*quis custodiet ipsos custodes?*”<sup>487</sup> (“who will watch the watchmen?”)<sup>488</sup> is another unwarranted insistence on maintaining the status quo.<sup>489</sup> While a comprehensive and exhaustive solution to the watchman problem is not possible here, this Article has shown at length why continuing in the negative free-speech tradition is a non-option. It is also foolish to assume that the question’s logistics, alone, make it unanswerable, as though no viable solution can be fashioned using, for example, courts or expert bodies with layers of partisan insulation or legal standards like the burden of proof.<sup>490</sup> As

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484. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 373 (1985) [hereinafter Schauer, *Slippery Slopes*]; Kramer, *supra* note 29, at 27–31.

485. See Schauer, *Slippery Slopes*, *supra* note 484, at 375.

486. See *id.* at 381–82.

487. Decimus Junius Juvenalis, *Ivni Ivvenalis Satvra VI* [Satire VI] ll. 347–48.

488. [Editor’s note:] While often translated in popular culture as “who will watch the watchmen?”, scholarly translations often differ. One classic translation renders the phrase as: “who will watch the warders?” G. G. Ramsay, *Juvenal, Satires. (1918). Satire 6*, THE TERTULLIAN PROJECT, [https://www.tertullian.org/fathers/juvenal\\_satires\\_06.htm](https://www.tertullian.org/fathers/juvenal_satires_06.htm) (last visited May 17, 2026).

489. This is the “status-quo bias.” See Ilana Ritov & Jonathan Baron, *Status-Quo and Omission Biases*, 5 J. RISK & UNCERTAINTY 49, 49 (1992) (emphasis omitted); see MILL, *supra* note 4, at 34–36, 45 (stating that censorship is “an assumption of infallibility”).

490. See SUNSTEIN, *LIARS*, *supra* note 88, at 59–61; YOUNG, *supra* note 58, at 221–22 (discussing Facebook’s “quasi-independent body of experts and scholars who [c]ould be called on to review particularly contentious content decisions and issue binding verdicts”); see generally DEWEY, *PUBLIC AND ITS PROBLEMS*, *supra* note 50, at 153–77 (experimental approach to legislation incorporating public input); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–95 (1975)

well, there is no reason to believe that democratic norms, guardrails, or other means of minimizing corruptive influences cannot provide a long-term solution.

*F. Perfection Is the Enemy of Progress*

It is common among defenders of our negative free-speech tradition to point to the difficulties of speech regulation or its inability to fully address an issue as justification not to adopt such measures.<sup>491</sup> However, difficulty is often the bullet to be bitten, and, absent a comprehensive solution, partial solutions to a problem are preferable to non-solutions or inaction. Even if that were not the case, a necessary but imperfect law needs to be adapted and refined to real-world conditions to better serve its function. There is an inescapable experimental, trial-and-error requirement for it to become more effective, even if never perfect.<sup>492</sup>

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Justice Jackson was correct to identify adherence to negative freedom as a constitutional “suicide pact.”<sup>493</sup> A principle overapplied is a liability. Our steadfast commitment to that negative freedom makes an existential and imminent threat out of an obvious and foreseeable weakness. In a world where history repeats itself—or at least rhymes—American enamored with negative freedom protections is leading us to fail the open-book test of history. The price of freedom is indeed eternal vigilance, and vigilant we have not been. The lesson that democracy is defeated from within has eluded us, and for that oversight, we are suffering the consequences.

As President John Adams once presciently replied to a critic:

*Remember Democracy never lasts long. It soon wastes exhausts and murders itself. There never was a Democracy Yet, that did not commit suicide. It is in vain to Say that Democracy is less vain, less proud, less selfish, less ambitious or less avaricious than Aristocracy or Monarchy.*

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(11 elements of a fair hearing); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (1962) (“passive virtues”).

491. See generally, e.g., NADINE STROSSEN, *HATE* 106–19 (2018); STROSSEN, *FREE SPEECH*, *supra* note 1, at 32–36, 173–74 (arguing that hate speech laws are difficult to draft, difficult to enforce, and unable to eliminate hate speech and hate crimes); *but see* Murray, *supra* note 98, at 202.

492. Dewey, *Logical Method and Law*, *supra* note 283, at 26; see POPPER, *supra* note 219, at 148–57 (piecemeal engineering); Kramer, *supra* note 29, at 29.

493. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

It is not true in Fact and no where appears in history. Those Passions are the same in all Men under all forms of Simple Government, and when unchecked, produce the same Effects of Fraud Violence and Cruelty. When clear Prospects are opened before Vanity, Pride, Avarice or Ambition, for their easy gratification, it is hard for the most considerate Phylosophers and the most conscientious Moralists to resist the temptation. *Individuals have conquered themselves, Nations and large Bodies of Men, never.*<sup>494</sup>

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494. Letter from John Adams to John Taylor (Dec. 17, 1814) (emphasis added), <https://founders.archives.gov/documents/Adams/99-02-02-6371> [<https://perma.cc/5299-X7N4>].

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

**Apratim Vidyarthi\***

*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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> 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.<sup>9</sup> 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*.<sup>10</sup> 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

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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?”<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup>

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.”<sup>15</sup> Centuries later, John Rawls concurred, stating that a society that does not tolerate the intolerant would otherwise itself be intolerant, and therefore unjust.<sup>16</sup> But even there, Rawls qualified: if there are “considerable risks to [the society’s]

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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.”<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> Bollinger argues that in a modern society, tolerance of intolerant speech furthers the society’s goals of self-control, self-discipline, and self-restraint.<sup>20</sup> 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.<sup>21</sup> Here, Bollinger relies on the *clear and present danger* test,<sup>22</sup> though not entirely in the form presented by Supreme Court doctrine.<sup>23</sup>

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.”<sup>24</sup> 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.<sup>25</sup> 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

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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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> So intolerance that undermines pluralistic norms need not be tolerated, while intolerance of the views and ways of life of others must be tolerated.<sup>29</sup>

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.<sup>30</sup> 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<sup>31</sup> or speech containing expressions of intent to commit unlawful violence.<sup>32</sup> 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.<sup>33</sup> Rosenfeld argues that society should not be tolerant of intolerance that questions conceptions of the good of the pluralistic society.<sup>34</sup> 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."<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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<sup>38</sup>—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.<sup>39</sup> But First Amendment doctrine emphasizes the importance of the Amendment's *marketplace of ideas* as an

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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.<sup>40</sup> 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.”<sup>41</sup> 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.<sup>42</sup> 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.”<sup>43</sup> 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.”<sup>44</sup> 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.<sup>45</sup> Conversely, rational argument based on truth could then destroy intolerance based on falsehoods.<sup>46</sup> As such, under the marketplace theory, truth should ultimately prevail over falsehoods,<sup>47</sup> 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.<sup>48</sup> In fact, falsehoods may be based *in part* on truth<sup>49</sup> 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,<sup>50</sup> and those with intolerant views used that reality to justify hate-based attacks against the Asian-American community during the COVID-19 pandemic.<sup>51</sup> 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.<sup>52</sup> In fact, listeners often are biased in favor of their pre-existing beliefs and

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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.<sup>53</sup>

Third, and most relevant here, the First Amendment does not categorically reject false speech, because falsehoods are “nevertheless inevitable in free debate.”<sup>54</sup> Instead, only false speech that may cause “legally cognizable harm”—such as defamation, fraud, and perjury—is generally unprotected by the First Amendment.<sup>55</sup> 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,<sup>56</sup> 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.”<sup>57</sup> 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,<sup>58</sup> 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.<sup>59</sup> 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.”<sup>60</sup> 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

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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),<sup>61</sup> or would “ruthlessly suppress the speech of those with whom they disagree,”<sup>62</sup> 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.<sup>63</sup> 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,”<sup>64</sup> 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,”<sup>65</sup> 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,<sup>66</sup> rather than in the traditional public square, which was often government property (like a town square).<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> That volume of online speech is not organized haphazardly: most

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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., Lyriisa 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](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.<sup>73</sup> 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.”<sup>74</sup> And anonymous speech also cuts against surveillance, which reduces the pressure to conform to majoritarian behavior.<sup>75</sup>

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.<sup>76</sup> They may also engage in speech that is construed as threatening or otherwise suggesting physical harm,<sup>77</sup> 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,<sup>78</sup> 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,<sup>79</sup> and has played an important and valuable role in the marketplace of ideas since the (pre-digital) time of the founding.<sup>80</sup>

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.<sup>81</sup>

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.<sup>82</sup> This results in a vicious self-reinforcing cycle, where

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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,"<sup>83</sup> current First Amendment jurisprudence offers few remedies.<sup>84</sup> 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.<sup>85</sup> 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. COMM'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<sup>86</sup>—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.<sup>87</sup> 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.<sup>88</sup> Because the CDA was a “content-based regulation of speech” that was not narrowly tailored, it failed strict scrutiny.<sup>89</sup> 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.<sup>90</sup> First, in *Mahanoy Area School District v. B.L.*, the

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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*.<sup>91</sup> *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.<sup>92</sup> 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.”<sup>93</sup> *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.<sup>94</sup> 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.<sup>95</sup> Applying intermediate scrutiny, the Court held that the provisions

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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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> In contrast to *Mahanoy* and *Moody*, *Paxton*'s central thrust applies to (1) obscene speech, which the Court noted is not always constitutionally protected,<sup>99</sup> and (2) laws that protect minors from such obscene speech.<sup>100</sup> But applied to intolerant speech, *Paxton* is hardly applicable, because obscene speech is that which "appeals to the

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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.”<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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

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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.<sup>105</sup>

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.<sup>106</sup>

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.<sup>107</sup> 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.<sup>108</sup> Because of the inherent subjectivity of the concept of tolerance, there is no

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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."<sup>109</sup> 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.<sup>110</sup> But notwithstanding the boundaries of the First Amendment, the Constitution provides outer bounds for preventing the kind of intolerance that Popper associated with tyranny.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> 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.

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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).

**REMEMBER THE CINNAMON CHALLENGE? IT’S NOT AS  
HARMLESS AS YOU THINK: DISCUSSING THE HIDDEN  
DANGERS OF SEEMINGLY HARMLESS CONTENT,  
ALGORITHMS, AND SECTION 230 PROTECTIONS**

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## INTRODUCTION

Three young men barrel down a road motivated by Snapchat's speed filter, believing they would unlock hidden achievements within Snapchat if they reached a high enough speed. Snapchat's speed filter overlaid a user's captured video, displaying their current speed. Instead of unlocking an achievement, all three lost their lives in pursuit of one.

The parents sued Snapchat. Amazingly, Section 230 of the Communications Decency Act did not immunize Snapchat or bar the parents' claims.<sup>1</sup> This case, *Lemmon v. Snap*, provides an example of how "seemingly harmless content," such as a speed overlay, can create real consequences and highlights the problem that Section 230 often poses for plaintiffs seeking redress.<sup>2</sup> *Lemmon* is an unusual case because Section 230 did not outright bar the plaintiffs' claims. Plaintiffs seeking to hold social media companies accountable for the harm caused by their platforms face a significant challenge due to Section 230, particularly in cases where seemingly harmless content inflicts harm.

Congress must reform Section 230 to limit its sweeping immunities. Section 230 has allowed large social media platforms to escape accountability for far too long, shutting the doors on plaintiffs seeking justice, even when ostensibly innocuous content inflicts real and devastating harm.

Part I of this Note provides an overview of Section 230 of the Communications Decency Act, outlining its purpose, key provisions, and the entities to which the Act applies. It also evaluates how various courts have interpreted Section 230 and discusses recent cases relevant for future plaintiffs. This Part also delves into the opposition to Section 230 and how it deviates from Congress's original intent at the time of its enactment. Laying the groundwork in this sense is crucial for legal professionals, policymakers, and scholars interested in internet law and Section 230, as it empowers them to shape the future of this important legislation.

Part II first analyzes the challenges that plaintiffs seeking redress face due to the broad interpretation of Section 230 by many courts, as illustrated in *In re Facebook, Inc.*<sup>3</sup> A broad interpretation of Section 230 allows social media companies to skirt liability even when the content on their platform—

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1. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021).

2. This Note uses the term "seemingly harmless content" primarily to describe online challenges that appear ostensibly harmless but can create unintended physical harm, particularly to minors. See *infra* Part II.B.2 (explaining why the salt and ice challenge is an example of seemingly harmless content).

3. 625 S.W.3d 80, 90 (Tex. 2021).

content that they are aware of—causes grave harm. Plaintiffs with claims relating to objectively harmless content will have a more difficult time having their claims heard with a broad interpretation. Congress is best suited to clarify Section 230’s correct scope of interpretation. This Part then explores how future plaintiffs can best position their legal claims within the current legal landscape surrounding Section 230. Finally, Part II discusses the implications of the Supreme Court’s recent decisions in *Moody v. NetChoice, LLC*<sup>4</sup> and explores steps plaintiffs can take to avoid having their claims barred by Section 230.

Part III examines why reforming Section 230 is the best solution to realign it with Congress’s original intent in today’s modern internet landscape with the potential plaintiff’s interest at the forefront. This Part first discusses Section 230 and how advances in technology—unforeseeable at the time of enactment—along with broad judicial interpretations, have created challenging conditions for plaintiffs. Next, this Part explores a potential approach to reforming Section 230 for modern times. The approach is modeled after the Florida state law at issue in the Supreme Court’s decision in *Moody*, which hinged a platform’s Section 230 immunities on its annual revenue and monthly users. Afterward, it examines another proposed Section 230 reform, which offers tax credits to platforms that improve their content moderation. While this approach may be insufficient on its own, it could complement other reforms to realign Section 230 and help plaintiffs, especially those harmed by seemingly harmless content, to seek justice and obtain redress.

## I. BACKGROUND

This Part provides the necessary background of Section 230 of the Communications Decency Act, covering the Act’s original purpose, how it functions, and how different courts have often broadly interpreted it. It explains the distinction between Sections 230(c)(1) and (c)(2) to show the immense immunities the Act and different courts give social media platforms. This Part also analyzes cases such as *Zango*,<sup>5</sup> *Zeran*,<sup>6</sup> *Fair Housing Council of San Fernando Valley*,<sup>7</sup> *Anderson*,<sup>8</sup> and *Lemmon*<sup>9</sup> to

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4. 144 S. Ct. 2383 (2024).

5. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

6. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

7. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

8. *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024).

9. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

illustrate how courts have interpreted the Act and the impact it has had on plaintiffs, most often with negative consequences, emphasizing the need for reform.

*A. The Purpose of Section 230 of the Communications Decency Act*

In 1996, Congress enacted the Communications Decency Act of 1996, codified at 47 U.S.C. § 230.<sup>10</sup> Congress enacted it with the primary aim of fulfilling two policy objectives: (1) “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”<sup>11</sup> and (2) “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”<sup>12</sup> Congress focused on these policy objectives to promote the free flow of information while protecting the safety of children.<sup>13</sup> Congress sought to accomplish these policy objectives primarily through Sections 230(c)(1) and (c)(2).<sup>14</sup>

Section 230(c)(1) pertains to the treatment of a publisher and speaker. It states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>15</sup> Section 230(c)(1) makes an interactive computer service provider liable for content only if it creates or publishes the content itself.<sup>16</sup> Meanwhile, Section 230(c)(2) protects providers from civil liability.<sup>17</sup> It states that no provider or user of an interactive computer service is liable for such things outlined in subsections (A) and (B) of the statute.<sup>18</sup> Subsections (A) and (B) provide,

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively

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10. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133.

11. 47 U.S.C. § 230(b)(2) (originally enacted as Pub. L. No. 104-104, 110 Stat. at 138); see 15B AM. JUR. 2D *Computers and the Internet* § 200, Westlaw (database updated May 2026) (explaining the intent and objective of Congress in enacting Section 230).

12. 47 U.S.C. § 230(b)(5) (originally enacted as Pub. L. No. 104-104, 110 Stat. at 138); see 15B AM. JUR. 2D *Computers and the Internet*, *supra* note 11, § 200.

13. 15B AM. JUR. 2D *Computers and the Internet*, *supra* note 11, § 200.

14. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 2 (2024).

15. 47 U.S.C. § 230(c)(1).

16. BRANNON & HOLMES, *supra* note 14, at 2.

17. § 230(c)(2).

18. *Id.*

violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>19</sup>

Section 230(c)(2) incentivizes platforms to act responsibly by filtering out bad content without facing punishment.<sup>20</sup> Section 230(c)(2) protects platforms when they moderate content in good faith, while Section 230(c)(1) protects platforms from being held responsible for content posted by their users. Taken together, Sections 230(c)(1) and (c)(2) provide broad immunities for interactive service providers.<sup>21</sup>

Although *Zango* does not pertain to social media platforms, it illustrates the broad immunity that Sections 230(c)(1) and (c)(2) provide together.<sup>22</sup> *Zango* was an internet company that provided online videos, games, and utilities to users who agreed to view advertisements while using the internet.<sup>23</sup> Kaspersky is an internet security software distributor that distributes software to filter and block malware.<sup>24</sup> Kaspersky's software classified *Zango*'s advertisements as a type of malware.<sup>25</sup> Once the software detected malware, it warned users of the potential presence of malware and gave the option to either block the malware or skip the warning.<sup>26</sup> *Zango* sued Kaspersky, claiming that the security software wrongfully interfered with user access to *Zango*.<sup>27</sup> The software disabled certain features and repeatedly displayed a malware warning whenever users accessed *Zango*, which would inevitably lead users to avoid using *Zango*.<sup>28</sup>

The court articulated that Section 230(c)(1) did not grant Kaspersky immunity because Kaspersky's software did not host third-party content.<sup>29</sup>

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19. See § 230(c)(2)(A)–(B) (clarifying that “material described in paragraph (1)” is referring to material described in Subsection (A), “material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”).

20. BRANNON & HOLMES, *supra* note 14, at 3.

21. *Id.* at 2.

22. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

23. *Id.* at 1170.

24. *Id.* at 1171 (defining malware as malicious software that “can compromise the security and functionality of a computer.” It does so by “compromising a user’s privacy, damaging computer files, stealing identities, or spontaneously opening Internet links to unwanted websites, including pornography sites.”).

25. *Id.*

26. *Id.*

27. *Id.* at 1172.

28. *Id.* at 1171.

29. *Id.* at 1174–75.

Instead, Kaspersky benefited from Section 230(c)(2)(B), which granted immunity to Kaspersky since the software provided a means to restrict access to objectionable material.<sup>30</sup> While this particular case is not in the context of social media platforms, it demonstrates the broad immunities of Sections 230(c)(1) and (c)(2) enjoyed by interactive service providers generally, including social media platforms. When one provision does not apply, the other may offer immunity. The two are not mutually exclusive. It is worth noting that up until *Zango*, in 2009, the Ninth Circuit had previously applied Section 230(c)(1) but had never applied Section 230(c)(2).<sup>31</sup> The court stated, “This is the first time we have considered this particular application of § 230, although we have previously addressed immunity under § 230(c)(1).”<sup>32</sup>

This is significant as it indicates or reinforces that when Section 230 is invoked, Section 230(c)(1) is primarily utilized, and Section 230(c)(2) is a backup. The court’s brief discussion of why Section 230(c)(1) did not apply before addressing Section 230(c)(2) supports this.<sup>33</sup> It demonstrates that internet service providers are afforded multiple outs when in litigation. In addition to demonstrating the stacked levels of immunity that providers of interactive computer services are afforded by Section 230, *Zango* helps clarify what qualifies as an interactive computer service, upon which such immunity is contingent.<sup>34</sup>

The court explained that Kaspersky was a provider of an interactive computer service because Kaspersky was an “access software provider that provides or enables computer access by multiple users to a computer server” under Section 230(f)(2).<sup>35</sup> Additionally, it explained that Kaspersky was an “access software provider” since its security software provided “enabling tools that . . . filter, screen, allow, or disallow content” under Sections 230(f)(4) and (f)(4)(A).<sup>36</sup> Lastly, the court explained that “under the literal provisions of § 230(f)(2), Kaspersky ‘provides or enables computer access by multiple users to a computer server’ by providing its customers with online access to its update servers.”<sup>37</sup> Courts may consider a provider an interactive computer service if it provides software that enables multiple users to access a computer server. This case illustrates the expansive view of

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30. *Id.*

31. *Id.* at 1174.

32. *Id.*

33. *Id.* at 1174–75.

34. 47 U.S.C § 230(c)(1), (f)(2).

35. *Zango*, 568 F.3d at 1175 (quoting 47 U.S.C § 230(f)(2)).

36. *Id.* (quoting § 230(f)(4), (f)(4)(A)).

37. *Id.* (quoting § 230(f)(2)).

what constitutes an interactive computer service and how some courts may interpret it—in this instance, the Ninth Circuit.

Section 230(f) also defines the terms “interactive computer service” and “information content provider.”<sup>38</sup> The statute defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.”<sup>39</sup> An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>40</sup> Courts generally have interpreted an interactive computer service as anything that allows multiple users to access a server that transmits information to them.<sup>41</sup>

Based on this interpretation, courts have broadly interpreted “information content providers” to encompass platforms that provide broadband internet access or web hosting services.<sup>42</sup> Web giants like Google and Facebook fit neatly into this definition. The broad interpretation even extends to physical libraries that provide access to computers.<sup>43</sup> Given the expansive scope of the statute, social media platforms fall well within the protections of Section 230.

### *B. How Courts Have Interpreted and Applied Section 230 to Social Media Platforms*

Courts have yet to determine the extent of immunity social media platforms should have under Section 230, resulting in varied interpretations and differing outcomes. To understand the scope of interpretation, it is essential to recognize the typical difference between distributors and publishers. Courts may hold distributors of third-party content liable only if they knew or should have known that the content they are distributing is problematic.<sup>44</sup> Conversely, a publisher’s liability does not hinge on notice in

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38. § 230(f)(2)–(3).

39. § 230(f)(2).

40. § 230(f)(3).

41. BRANNON & HOLMES, *supra* note 14, at 3 (“In a computer network, a server is generally the hardware or software that provides a service, such as transmitting information, to another piece of hardware or software called the client.”).

42. *Id.*

43. *Id.*

44. Claudia Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37, § 24 (2011).

the same way distributor liability does, because publisher liability is not dependent on whether they knew content was problematic before dissemination of it.<sup>45</sup> However, many courts appear to reject the distinction between distributors and publishers, treating the two as the same.<sup>46</sup> The distinction is crucial to understanding Section 230 fully and how it operates; however, it is more critical to understand how courts have interpreted and applied it.

There is no uniform interpretation of Section 230 when applied to social media platforms and the level of immunity it grants.<sup>47</sup> A broad interpretation of Section 230 means that claims against a social media platform will be barred even if the platform knew of the offensive or prohibited content.<sup>48</sup> This broad interpretation requires courts to treat social media platforms as distributors, which, under this interpretation, are considered as a subset of publishers and therefore receive the same immunity from Section 230.<sup>49</sup> Even if a platform is a distributor and is aware of offensive content, it would be treated as a publisher under Section 230(c)(1) and thus immune from liability. A narrow, more limited interpretation of Section 230 would mean that a social media company would only be liable for third-party content if it had actual knowledge or reason to believe that the content was offensive or prohibited.<sup>50</sup>

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45. Compare RESTATEMENT (SECOND) OF TORTS § 581(1) (1977) (stating that a distributor, one who merely “delivers or transmits” content, is liable “if, but only if, he knows or has reason to know” of the problematic content being distributed), with *id.* § 581 cmt. g (stating that original publishers of content are not subject to the “exceptional rule” of notice which distributors benefit from).

46. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (explaining for purposes of defamation law that distributors are considered to be publishers, and stating “Congress has indeed spoken directly to the issue by employing the legally significant term ‘publisher,’ which has traditionally encompassed distributors and original publishers alike.”); *Barrett v. Rosenthal*, 146 P.3d 510, 517 (Cal. 2006) (“Although ‘distributors’ become liable only upon notice, they are nevertheless included in ‘the larger publisher category.’” (quoting *Zeran*, 129 F.3d at 332)); *Doe v. Am. Online, Inc.*, 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998) (“The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.” (quoting *Zeran*, 129 F.3d at 332)); *id.* (“If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message.” (quoting *Zeran*, 129 F.3d at 333)).

47. *Catalano*, *supra* note 44, § 2.

48. Jeff Kosseff, *A User’s Guide to Section 230, and a Legislator’s Guide to Amending It (Or Not)*, 37 BERKELEY TECH. L.J. 757, 776 (2022).

49. *Id.*; see 47 U.S.C. § 230(c)(1) (2018) (stating “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Under a broad interpretation, when a distributor is considered a subset of publisher, the distributor would receive the same immunity under Section 230’s prohibition on treating providers as publishers.

50. See Kosseff, *supra* note 48, at 791–92.

The Fourth Circuit in *Zeran v. America Online, Inc.* demonstrates just what a broad interpretation of Section 230 looks like.<sup>51</sup> This case involved an anonymous post to AOL, advertising the sale of T-shirts showcasing distasteful messages about the 1995 Oklahoma City bombing.<sup>52</sup> The post directed those interested in purchasing T-shirts to contact Zeran.<sup>53</sup> Subsequently, those offended by the T-shirts perpetually harassed Zeran.<sup>54</sup> Zeran contacted an AOL representative and informed them of the situation.<sup>55</sup> AOL assured Zeran it would be dealt with.<sup>56</sup> Instead, more posts continued to be posted, directing attention to Zeran.<sup>57</sup> Eventually, a local Oklahoma radio broadcaster saw the original post and directed listeners to contact Zeran, at which point his abuse intensified.<sup>58</sup> Zeran then sued AOL, claiming that once he notified AOL of the defamatory post, they had a duty to remove it and inform users that it was false.<sup>59</sup> The court refused to hold AOL liable, as Section 230 shielded it from liability<sup>60</sup>.

The court reasoned that if computer service providers, such as AOL, were held liable as distributors, they would face endless liability whenever they received notice of a potentially defamatory message.<sup>61</sup> It would be impractical to thoroughly investigate every report.<sup>62</sup> Additionally, the court feared that unlimited exposure to liability and the impracticability of investigating every report would incentivize computer service providers to remove posts without conducting an investigation, thereby having a chilling effect on First Amendment speech.<sup>63</sup> This is because the incentive to remove posts promptly to avoid liability may discourage internet discourse and negatively impact protected online speech.<sup>64</sup> In effect, this could deter

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51. *Zeran*, 129 F.3d at 331.

52. *Id.* at 329; see *Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited May 17, 2026) (explaining that the Oklahoma City Bombing carried out by Timothy McVeigh on April 19, 1995, when he bombed the Alfred P. Murrah Federal Building with a box truck loaded with explosives, remains the deadliest act of domestic terrorism in the United States, killing 168 people, including 19 children).

53. *Zeran*, 129 F.3d at 329.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 329–30.

60. *Id.* at 332.

61. *Id.* at 333.

62. *Id.*

63. *Id.*

64. *Id.*; see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 693 (1978) (“A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not

individuals from posting true—but controversial—statements that are protected speech, just because the message could potentially be deemed defamatory.

In *Zeran*, the court adopted a broad interpretation of Section 230.<sup>65</sup> Even though AOL was aware of the problematic content on its site, it was not held liable, thereby removing the distinction between distributor and publisher liability. The court stated that Congress intended “publisher” to encompass distributors in Section 230.<sup>66</sup> While AOL was acting as a distributor of content, it was liable as a publisher, which meant it was immune under Section 230.<sup>67</sup>

Conversely, a prime example of a court adopting a narrow interpretation of Section 230 is *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.<sup>68</sup> This case involved a website that matched roommates, prompting users to complete an online questionnaire first.<sup>69</sup> The questionnaire asked sensitive questions like sex, sexual orientation, and if the user had children.<sup>70</sup> The Fair Housing Council alleged that the website acted as a broker, which it was not permitted to do.<sup>71</sup> The court determined the website was not immune under Section 230 because it had materially contributed to unlawful content by creating a questionnaire that forced users to participate in a discriminatory process.<sup>72</sup> Upon determining that the website was not immune under Section 230, the court remanded the case to the lower court to determine whether the website violated the Fair Housing Act.<sup>73</sup>

The Ninth Circuit has boiled down the narrow interpretation in this case to the “material contribution test.”<sup>74</sup> Under a narrow interpretation, a company is liable under Section 230 if it made a “material contribution” that

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specifically directed at that protected activity.”); *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (explaining the ambiguity of the Communications Decency Act’s scope raises First Amendment concerns because it creates uncertainty among speakers about whether they are violating the statute, resulting in an “obvious chilling effect on free speech”).

65. *Zeran*, 129 F.3d at 331.

66. *Id.* at 334.

67. *Id.* at 332.

68. 521 F.3d 1157 (9th Cir. 2008).

69. *Id.* at 1161.

70. *Id.*

71. *Id.* at 1162.

72. *Id.* at 1167–68 (explaining that an entity is deemed to have made a material contribution when it has taken steps to develop the alleged unlawful content, thus making the entity a developer and not immune under Section 230).

73. *Id.* at 1175.

74. Kosseff, *supra* note 48, at 781–82.

has made the content allegedly unlawful.<sup>75</sup> Under this test, just encouraging the content is not enough and will not be considered a “development” of the alleged unlawful content.<sup>76</sup> Unfortunately for potential plaintiffs, the narrow interpretation and this test have been used by courts in cases involving Section 230 only rarely.<sup>77</sup> If more courts adopted a narrow interpretation and the material contribution test, it would be easier to hold social media companies liable because social media platforms would not benefit from the blanket immunity of a broad interpretation. Plaintiffs would also have an opportunity to argue that the social media platform actually made a material contribution to the allegedly unlawful content that, if successful, could remove a platform’s immunity. However, courts generally do not adopt this approach.

Courts have generally adopted the broad interpretation of Section 230, which grants vast immunities to social media platforms for third-party content—that includes *Zeran*.<sup>78</sup> Over the last 20 years, only 19 out of 500 decisions involving Section 230 relied on Section 230(c)(2),<sup>79</sup> illustrating the vast immunities created by a broad interpretation of Section 230(c)(1). When Section 230(c)(1) immunity does not apply, Section 230(c)(2) may still apply to provide immunity. Suppose a social media platform is partly involved in creating the content. The platform will be barred from immunity under Section 230(c)(1) in that case.<sup>80</sup> Section 230(c)(2) may act as a safety net if the platform can show it took action to restrict access to the offensive or prohibited content.<sup>81</sup> Section 230(c)(1) and Section 230(c)(2), combined with the broad interpretation courts have applied to Section 230, have allowed social media platforms to essentially skirt liability.

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75. *Id.* at 781; see *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 414–15 (6th Cir. 2014). The Sixth Circuit explained that:

Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA—a concept that is certainly more difficult to define and apply than the Ninth Circuit’s material contribution test. Congress envisioned an uninhibited, robust, and wide-open internet, but the muddiness of an encouragement rule would cloud that vision.

*Id.* (citations omitted). It is unclear, but it appears that courts do not have a uniform stance on whether encouragement constitutes a material contribution; however, at least the Sixth Circuit has stated that it does not. *Id.*

76. Kosseff, *supra* note 48, at 778.

77. *Id.* at 785.

78. *Id.*

79. *Id.* at 779.

80. *Id.* at 783.

81. *Id.*

Two recent critical cases involving the expansion of legal protections for social media platforms are *Moody v. NetChoice*<sup>82</sup> and *Anderson v. TikTok*.<sup>83</sup> *Moody* expanded First Amendment protections for social media platforms.<sup>84</sup> *Anderson* demonstrated how these added protections from *Moody* intertwine with Section 230.<sup>85</sup> These cases illustrate the challenges plaintiffs face when bringing a Section 230 claim against social media platforms and offer insight into how future claims involving Section 230 may need to be approached.

### 1. *Moody v. NetChoice*: Social Media Algorithms and Expressive Activity

The Supreme Court has recently ruled that social media algorithms are protected speech under the First Amendment.<sup>86</sup> In *Moody v. NetChoice*, a Florida law that limited social media platforms' ability to regulate content on their platform was at issue.<sup>87</sup> The law limited social media platforms' ability to filter, prioritize, and label user content.<sup>88</sup> Additionally, the law required social media platforms to provide an individualized explanation to a user if a social media platform removed or altered the user's post.<sup>89</sup> The law established a threshold based on either a monthly user count of more than 100 million monthly active users or an annual gross revenue of more than \$100 million, which would determine who the law applied to.<sup>90</sup> This ensured that the law applied only to large social media platforms.<sup>91</sup> The district court entered a preliminary injunction against the state's law.<sup>92</sup> The Eleventh Circuit upheld the injunction, stating that the restrictions triggered, and were unlikely to withstand, First Amendment heightened scrutiny.<sup>93</sup> By contrast, the Fifth Circuit, reviewing a similar Texas law, reversed a preliminary injunction and held that the platforms' content moderation did not constitute protected First Amendment speech.<sup>94</sup> The state of Florida appealed the Eleventh Circuit's decision and petitioned the Supreme Court for certiorari.

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82. 144 S. Ct. 2383 (2024).

83. 116 F.4th 180 (3d Cir. 2024).

84. *Moody*, 144 S. Ct. at 2409. ("First, presenting a curated and 'edited compilation of [third party] speech' is itself protected speech." (alteration in original) (quoting *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 570 (1995))).

85. *Anderson*, 116 F.4th at 184.

86. *Moody*, 144 S. Ct. at 2409.

87. *Id.* at 2395.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2396.

93. *Id.*

94. *Id.* at 2388.

The Court granted review to resolve a circuit split between the Fifth and Eleventh Circuits' differing decisions.<sup>95</sup>

NetChoice argued that the challenged state law affected a social media platform's ability to make editorial judgments, choose and display content, and engage in expressive activity—all of which is protected speech.<sup>96</sup> The Court ultimately remanded the case to the lower appellate courts of Florida and Texas,<sup>97</sup> stating that the lower courts did not properly analyze the facial First Amendment challenge.<sup>98</sup> However, the Court noted that social media platforms' curated feeds, which are edited compilations of third-party content, constitute expressive activity and are considered protected First Amendment speech.<sup>99</sup> Additionally, the Court stated that the government could not be given the power to control the expression of ideas by burdening some and allowing others at its discretion.<sup>100</sup>

*Moody* further highlights the challenges of holding social media platforms accountable. Notably, this decision established that social media platforms' use of algorithms to create a feed is an expressive activity protected under the First Amendment.<sup>101</sup> Justice Alito's concurrence, joined by Justices Thomas and Gorsuch, expressed skepticism toward the majority opinion, sensing that social media platforms were given excessive freedom and protection.<sup>102</sup> Justice Alito's concurrence stated that the majority "unreflectively assumes the truth of NetChoice's unsupported assertion that social-media platforms—which use secret algorithms to review and moderate an almost unimaginable quantity of data today—are just as expressive as the newspaper editors who marked up typescripts in blue pencil 50 years ago."<sup>103</sup> As a result of *Moody*, social media platforms receive significant protection from the courts beyond the Section 230 immunities, making it more difficult for plaintiffs to bring successful challenges.

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95. *Id.* at 2397.

96. *Id.*

97. *Id.* at 2384 (noting that the Supreme Court consolidated *NetChoice v. Paxton* with *Moody v. NetChoice*).

98. *Id.* at 2399.

99. *Id.* at 2409.

100. *Id.* ("To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. And that is what the First Amendment protects all of us from.").

101. *Id.*

102. *Id.* at 2422 (Alito, J., concurring).

103. *Id.*

## 2. *Anderson v. TikTok*: A Post-*Moody* Challenge to Algorithms

Enter *Anderson v. TikTok*: a critical case involving algorithms and Section 230.<sup>104</sup> The issue in *Anderson* revolved around the death of a ten-year-old girl, Nylah Anderson.<sup>105</sup> Anderson attempted the “Blackout Challenge,” a challenge where individuals record themselves choking to the point of blacking out and post the videos to the platform.<sup>106</sup> Tragically, Anderson choked herself to death to replicate the Blackout Challenge.<sup>107</sup> The challenge appeared on her “For You Page,” a curated feed of third-party content on TikTok that uses an algorithm to recommend content based on the user’s interests, age, demographics, and “other metadata.”<sup>108</sup> Anderson’s attempt at the challenge—shown to her through TikTok’s algorithm—resulted in her death.

Anderson’s mother sued TikTok for strict product liability and negligence.<sup>109</sup> She alleged that TikTok was aware of the challenge, “allowed users to post videos” of the challenge, and “recommended and promoted” the video to minors.<sup>110</sup> The court held that the Blackout Challenge was protected speech.<sup>111</sup> The court reiterated that Section 230 only immunizes a social media platform if it is being sued for someone else’s expressive activity and does not immunize the platform if the expressive activity is the platform’s own.<sup>112</sup> Anderson’s mother alleged that TikTok’s algorithm constituted expressive activity.<sup>113</sup> However, the Third Circuit cited *Moody*, stating that although the algorithm that recommended the Blackout Challenge was the platform’s own expressive activity, it was protected First Amendment

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104. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 181 (3d Cir. 2024).

105. *Id.*

106. *Id.*

107. *Id.* at 182.

108. *Id.*; see generally Annie Badman & Matthew Kosinski, *What is Metadata?*, IBM, <https://www.ibm.com/think/topics/metadata> (last visited May 17, 2026). Badman and Kosinski define metadata as:

[D]ata about data. That is, it provides details about data that is separate from the content of the data itself. For example, a table of recent customer orders constitutes a data set, while information about that data set—such as who owns it or what type of file it is—is the metadata.

*Id.* (internal quotation marks omitted). Metadata is important and crucial for effectively organizing large swathes of content and data. Metadata generally consists of “the author, creation date, file size and keywords” which attaches to data when it is created. *Id.* Metadata is often attached automatically but can be done manually.

109. *Anderson*, 116 F.4th at 182.

110. *Id.*

111. *Id.* at 184.

112. *Id.* at 183.

113. *Id.*

speech.<sup>114</sup> Additionally, the court noted that Section 230 did not bar Anderson's claims.<sup>115</sup>

This case highlights the difficulty plaintiffs face when trying to hold social media companies liable. Even when a claim such as Anderson's was not barred by Section 230 because it was the platform's own expressive activity, it was still unsuccessful due to *Moody* because such activity constituted protected speech. Judge Matey concurred, stating that Section 230 provides immunity only for hosting third-party content and nothing more.<sup>116</sup> Therefore, Anderson's other claims may be successful if he can demonstrate that TikTok knowingly distributed, recommended, and promoted content it knew could cause harm.<sup>117</sup> After *Moody*, the bar for holding social media companies liable is exceptionally high, even in cases involving objectively harmful content, such as the Blackout Challenge. Before *Moody*, such a challenge would have had a much higher likelihood of success.

### 3. *Lemmon v. Snap*: A Case Where a Challenge Survived Section 230

A key takeaway from *Lemmon v. Snap* is that social media platforms are not invincible.<sup>118</sup> *Lemmon* is an example of a potentially successful claim involving seemingly harmless content brought against a social media platform. Three young men were traveling in a car at a high rate of speed, with one of them using a Snapchat speed filter to capture their speed.<sup>119</sup> To keep users engaged, Snapchat has a reward system that rewards users for the snaps they send with "trophies, streaks, and social recognitions."<sup>120</sup> Snapchat would not inform users how to unlock these different achievements, leaving them to rely on luck or guesswork to find where an achievement might be hidden.<sup>121</sup> Many Snapchat users believed they would receive an achievement for recording a speed over 100 miles per hour, including the young men in *Lemmon*.<sup>122</sup>

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114. *Id.* at 183–84.

115. *Id.* at 184.

116. *Id.* at 186 (Matey, J., concurring).

117. *Id.*

118. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021).

119. *Id.* at 1088.

120. *Id.* (clarifying that Snapchat works by allowing users to communicate primarily through "snaps": photos and videos that exist only temporarily on the receiver's phone).

121. *Id.*

122. *Id.* at 1089.

The young men pursued the alleged achievement, but the car eventually crashed, and all three men died.<sup>123</sup> There was never such an achievement.<sup>124</sup> The parents sued Snapchat for negligent design, a tort product liability claim.<sup>125</sup> This claim requires the reviewing court to apply the *risk-utility test*, which asks whether the foreseeable risk of harm outweighs the utility of the product.<sup>126</sup> Under the risk-utility test, a product is deemed defectively designed if the risks associated with its use outweigh the benefits it offers.<sup>127</sup> To determine whether the risk of a product outweighs its benefits, courts may consider the product's utility, cost, nature of the alleged defect, its danger, likelihood of causing harm, presence of warnings, and the availability of removing the defect or of a safer alternative design.<sup>128</sup>

The Ninth Circuit did not apply the risk-utility test. Instead, it stated that the plaintiff's claim was not barred by Section 230 because it did not hold Snapchat to be a publisher or speaker, nor did it depend on third-party content.<sup>129</sup> The court noted that the claim rested on Snapchat's creation of the speed filter and reward system, which encouraged users to attempt dangerous speeds for a reward.<sup>130</sup> The claim is predicated on Snapchat's own actions: the design.<sup>131</sup> Since the claim was predicated in this way, the court stated, "Because the Parents' claim does not seek to hold Snap responsible as a publisher or speaker, but merely 'seek[s] to hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter,' § 230(c)(1)

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123. *Id.* at 1088–89.

124. *Id.*; see WSB Cox, *Judge Orders Snapchat CEO to Answer Questions in 100mph Crash Lawsuit over App's Speed Filter*, YAHOO!NEWS (July 25, 2024), <https://www.yahoo.com/news/judge-orders-snapchat-ceo-answer-012202680.html> (responding to an allegation from litigation involving the speed filter, Snapchat stated: "The complaint filed in this case is not factually accurate. Among other things, Snapchat has never offered in-app trophies or additional points for using the speed filter."). Snapchat's speed filter never had any associated achievements; users only believed it did. *Id.*

125. *Lemmon*, 995 F.3d at 1092.

126. *Id.*

127. 12 JAMES D. HERSCHLEIN, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 127:61, Westlaw (Robert L. Haig ed., 5th ed., database updated Nov. 2025) Herschlein states: Under the risk-utility approach, the determination of whether a product is defectively designed is dependent upon whether the benefits in using the products as designed outweigh the risk of harm associated with the design. Considerations taken into account in this test are the nature and utility of the product to the user; the cost of the product; the nature of the defect and its danger; the likelihood that such harm will occur; the presence or absence of warnings and instructions; the cost of eliminating the danger of the defect; the manufacturer's ability to eliminate the danger without impairing the usefulness of the product; and the availability of an alternative design.

*Id.*

128. *Id.*

129. *Lemmon*, 995 F.3d at 1093.

130. *Id.*

131. *Id.* at 1094.

immunity is unavailable.”<sup>132</sup> This reasoning may be useful for future plaintiffs attempting to hold social media companies liable for seemingly harmless content.

This case is significant for demonstrating that a tort product liability claim can successfully overcome the immunity provided by Section 230. To be sure, *Lemmon*, taken with *Anderson*, indicates that it is very difficult for a claim to survive Section 230, especially for a claim involving seemingly harmless content. However, these cases suggest an alternative route for redress: product liability claims. A social media platform user who sustains an injury due to seemingly harmless content may be able to claim the algorithm was defectively designed in the way it promoted the content to a vulnerable population. However, a more effective and practical approach to securing redress would be to reform Section 230, making it easier for plaintiffs to bring claims against social media platforms.

### C. *Opposition to Section 230*

Congress enacted Section 230 of the Communications Decency Act in 1996, nearly 30 years ago, during the infancy of the internet.<sup>133</sup> Since its formative years, the internet has progressed beyond what Congress could have understood in 1996.<sup>134</sup> The Communications Decency Act was an early attempt by Congress to regulate the internet.<sup>135</sup> There is little evidence to suggest that Congress intended Section 230 to extend to technological advances such as algorithms used by social media platforms.<sup>136</sup> In 1996,

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132. *Id.* at 1093 (alteration in original) (emphasis added) (quoting *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 136 (2018)) (explaining that the court ultimately remanded the case to the lower court for further proceedings because the lower court dismissed the case based entirely on Section 230).

133. Nandor F.R. Kiss, *The Twenty-Six Words That Created the Internet . . . and Then Maybe, Kind of, Destroyed Society: Understanding and Reforming Section 230 of the Communications Decency Act*, 31 MICH. TECH. L. REV. 131, 131 (2025). Kiss explains:

In 1996, Congress passed Section 230 of the Communications Decency Act, a twenty-six-word law that immunized early internet companies from civil immunity arising from hosted, third-party content. At the time, the law was necessary to allow fledging companies to innovate without fear of bankruptcy-inducing lawsuits and ultimately helped to create the internet as we know it. To the extent this civil immunity has contributed to the vast technological advances over the past three decades, it should be lauded.

*Id.*

134. Allison Zakon, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1108, 1120 (2020).

135. Tyler Lisea, *Lemmon Leads the Way to Algorithm Liability: Navigating the Internet Immunity Labyrinth*, 50 PEPP. L. REV. 785, 788 (2023).

136. Haley Bernstein, *Reconciling Section 230 and the First Amendment: Should Social Media Companies be Held Liable for the Consequences of Their Recommendation Algorithms?*, 19 J. BUS. & TECH. L. 373, 385 (2024).

Congress enacted Section 230 to encourage moderation of online obscenity and protect small startup companies from litigation that could financially cripple them.<sup>137</sup>

At the time, Congress couldn't have predicted social media giants like Google or Facebook, which are now trillion-dollar companies.<sup>138</sup> Section 230 would have protected these companies when they were small; however, such companies no longer require the same extensive protections as they now have sufficient revenue to defend against litigation when necessary.<sup>139</sup> Those in favor of reforming or repealing Section 230 argue that diluting Section 230 protections would require social media platforms to be more vigilant in monitoring the content they promote, thereby incentivizing them to avoid promoting harmful content for the sake of engagement and profit.<sup>140</sup> If social media platforms do not benefit from the protections of Section 230, they would be more apt to prevent litigation in the first place by ensuring their content is adequately moderated and more aware of who it is directed towards.

## II. HOLDING SOCIAL MEDIA COMPANIES LIABLE: A PLAINTIFF'S PLAYBOOK

Social media platforms' algorithm-driven content feeds promote and direct seemingly harmless content to youths, creating the potential for physical harm. Yet Section 230 of the Communications Decency Act wrongfully shields them from liability. To correct this, Congress should reform Section 230 to peel back the strong immunities that social media platforms benefit from, making it easier for plaintiffs injured by seemingly harmless content to seek redress.

### *A. Congress Is Best Suited to Clarify the Scope of Section 230*

To bring a successful Section 230 claim, plaintiffs must surmount an exceedingly high bar. Many courts' broad interpretation of Section 230 makes it extremely difficult for claims involving seemingly harmless content

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137. *Id.*

138. *Id.*; see *Meta Platforms, Inc. (META)*, YAHOO!FINANCE, <https://finance.yahoo.com/quote/META/> (last visited May 17, 2026) (demonstrating that as of May 17, 2026, Facebook's market capitalization was \$1.559 trillion); *Alphabet Inc. (GOOG)*, YAHOO!FINANCE, <https://finance.yahoo.com/quote/GOOG/> (last visited May 17, 2026) (demonstrating that as of May 17, 2026, Google's market capitalization was \$4.765 trillion).

139. Bernstein, *supra* note 136, at 386.

140. Zakon, *supra* note 134, at 1108, 1110.

to survive even though the claim may involve serious harm.<sup>141</sup> This leads to a twofold effect. First, it makes it difficult for plaintiffs' claims to survive Section 230. Second, the difficulty in surviving Section 230 has a chilling effect on plaintiffs who may want to bring a claim.<sup>142</sup>

Many courts' unwillingness to interpret Section 230 more narrowly is crushing potential claims, especially those involving seemingly harmless content.<sup>143</sup> It means that Section 230 will bar a plaintiff's claims against a social media platform, even if the platform was aware of the harmful content leading to the claim and took no action.<sup>144</sup> This requires a court to treat a social media platform—normally acting as a distributor of content—as a publisher, thereby affording the lesser liability of a publisher. The Supreme Court's recent denial of certiorari and Justice Thomas's accompanying statement in *Doe v. Facebook* stemming from the facts of *In re Facebook, Inc.* demonstrate the judicial lean to interpret Section 230 broadly. This broad interpretation grants social media platforms immunity regardless of the harm a plaintiff has sustained.<sup>145</sup> However, Justice Thomas remains skeptical of an expansive interpretation.<sup>146</sup>

In the case of *In re Facebook, Inc.*, a male sexual predator used Facebook to lure a 15-year-old girl to a meeting where she was then beaten, raped repeatedly, and trafficked for sex.<sup>147</sup> After she escaped, the predator continued to use the girl's online profile to lure other minors; the mother of the girl reported this activity to Facebook, but Facebook never responded.<sup>148</sup> The plaintiffs brought various claims against Facebook, including negligence, gross negligence, negligent undertaking, and a sex trafficking claim under a Texas statute.<sup>149</sup>

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141. See discussion *supra* Part I.

142. See *Zeran v. Am. Online, Inc.*, 129 F.3d 331, 331 (4th Cir. 1997); cases cited *supra* note 64.

143. See Kosseff, *supra* note 48, at 773–79 (discussing the predominantly broad interpretation of Section 230 adopted by reviewing courts, which has shielded platforms from most claims brought under the Act).

144. *Id.* at 774.

145. *In re Facebook, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (“Federal and state courts have uniformly held that section 230 ‘should be construed broadly in favor of immunity.’” (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019))).

146. *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (statement of J. Thomas respecting denial of certiorari) (clarifying that the Texas Supreme Court in *In re Facebook* applied a broad interpretation immunizing Facebook, but Justice Thomas's statement in *Doe v. Facebook* expresses skepticism about such expansive immunity). *Doe v. Facebook* was issued in 2022, but Justice Thomas still expressed similar skepticism of Section 230 in *Moody*, issued in 2024. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2421 (2024) (Thomas, J., concurring).

147. *In re Facebook*, 625 S.W.3d at 84.

148. *Id.*

149. *Id.* at 83.

The plaintiffs based their common law claims on Facebook's failure to satisfy its duty of care to its users by failing to implement safeguards to prevent adults from contacting minors.<sup>150</sup> The district court determined that all common law claims were barred under Section 230.<sup>151</sup> The court barred them by adopting a broad interpretation of Section 230, treating social media platforms as publishers of third-party content.<sup>152</sup> This interpretation allows Section 230 to bar any claim against a social media platform that originates from third-party content.<sup>153</sup> However, Section 230 did not bar the sex-trafficking claim due to the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA).<sup>154</sup> FOSTA made clear that Section 230 should not be construed to bar certain sex trafficking-related causes of action.<sup>155</sup>

The Supreme Court denied the plaintiff's writ of certiorari, and Justice Thomas issued the statement of denial.<sup>156</sup> Justice Thomas acknowledged that courts have granted extensive immunity to social media platforms such as Facebook.<sup>157</sup> He further noted that, in this case, Facebook received immunity even though it was aware of its platform being used to facilitate trafficking.<sup>158</sup> Moreover, Facebook did not take reasonable steps to mitigate the issue, as doing so would have cost the company users and the ad revenue generated by those users.<sup>159</sup> Significantly, Justice Thomas noted that it is challenging to fathom why Section 230's third-party content immunities should extend to Facebook's own acts and omissions.<sup>160</sup> He also emphasized that Congress should address the correct scope of Section 230 and that this was not the appropriate case to attempt to determine the proper scope of Section 230.<sup>161</sup>

This Note remains focused on addressing seemingly harmless content that injures individuals and discussing avenues by which such individuals may be able to bring a claim past Section 230. Yet *In re Facebook, Inc.* illustrates well the judiciary's broad interpretation of Section 230 and how it will bar almost any claim, regardless of how heinous. In *In re Facebook, Inc.*,

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150. *Id.* at 93.

151. *Id.*

152. *Id.* at 90.

153. *Id.*

154. *Id.* at 99.

155. *Id.* at 100.

156. *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1087 (2022) (statement of J. Thomas respecting denial of certiorari).

157. *Id.* at 1088.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

which involved claims seeking redress for serious harm caused by third-party content that Facebook was aware of, the court was still unwilling to hold the social media company liable. Additionally, only because of a separate act did the sex trafficking claim survive.

It is clear to see the issue this would pose to plaintiffs attempting to bring claims for injuries stemming from third-party content that seemed harmless. That is, courts are unwilling to hold social media companies liable for objectively harmful third-party content. It is difficult to see why they would extend liability to objectively harmless content. The broad immunities that bar many claims relating to objectively harmful third-party content have likely discouraged many from bringing similar claims that would be actionable if not for Section 230.<sup>162</sup> Likewise, individuals with claims stemming from objectively harmless content are also likely deterred from even bringing a claim, given the judicial landscape related to Section 230. However, Justice Thomas signaled a shift in the judicial tide toward a narrower interpretation that would provide plaintiffs with a better chance of succeeding in holding social media companies liable.<sup>163</sup>

In Justice Thomas's denial of certiorari, he acknowledged the Court's broad interpretation of Section 230 as problematic, as it grants social media platforms too much immunity. He noted that it should only be resolved once an appropriate case is before the Court to decide on the issue or once Congress steps in to clarify the correct scope of Section 230.<sup>164</sup> However, it is uncertain when an appropriate case to decide the issue will come before the Court, especially given the discouraging nature of the judicial landscape for plaintiffs' claims. This is consistent with Justice Thomas's posture in *Moody*, where he and Justice Gorsuch joined Justice Alito's concurrence.

The concurrence expressed concerns that the *Moody* decision had given social media platforms excessive freedom and protection.<sup>165</sup> Justice Thomas's statement accompanying the denial of certiorari in *In re Facebook, Inc.* and Justice Alito's *Moody* concurrence signal that the justices on the Court have recognized that social media platforms have been granted excessive immunity. This furthers the difficulty plaintiffs will face in bringing a successful claim stemming from objectively harmless content. Congress should be the arbiter of the correct scope of Section 230. Still, until

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162. Stanley M. Bensen & Philip L. Verveer, *Section 230 and the Problem of Social Cost*, 30 J.L. & POL'Y 68, 120 (2021).

163. *Doe*, 142 S. Ct. at 1089 (statement of J. Thomas respecting denial of certiorari).

164. *Id.* at 1088.

165. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2422 (2024) (Thomas, J., concurring) ("The holding in these cases is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta.").

an appropriate case reaches the Court to decide the proper scope of Section 230, plaintiffs are left to grapple with the broad interpretation of Section 230. *Anderson v. TikTok* illustrates the difficulty plaintiffs face. *Anderson* is a post-*Moody* challenge that clarifies what a future plaintiff may have to do to bring a successful claim past Section 230 in the wake of *Moody*.

*B. A Future Plaintiff's Posture for Potential Success with a Broad Interpretation of Section 230*

Given the broad interpretation of Section 230 that many courts have adopted, as well as *Moody*, which afforded social media platforms additional protection beyond Section 230, the most suitable approach for plaintiffs is to bring a product liability claim. Plaintiffs' claims against social media platforms stemming from objectively harmless third-party content will likely struggle to survive Section 230 immunity, as courts have barred many claims related to harmful content. Plaintiffs with claims arising from seemingly harmless content have a lesser chance of success than those with claims arising from harmful content. Still, they may be able to succeed based on a product liability claim, similar to those presented in *Anderson* and *Lemmon*.

In *Anderson*, the plaintiff brought claims of negligence and strict product liability against TikTok.<sup>166</sup> While Section 230 did not bar the claims, they failed under *Moody*, as the Court stated that TikTok's algorithm constituted expressive activity and was thus protected under the First Amendment.<sup>167</sup> For a plaintiff's claim stemming from objectively harmless third-party content, they must pass two barriers: (1) *Moody*'s classification of algorithms as the platform's own expressive activity protected by the First Amendment; and (2) Section 230. Getting past *Moody* may be possible because the court in *Anderson* appears to have oversimplified the application of *Moody*. The court in *Anderson* reasoned that TikTok's algorithm compiles third-party content; therefore, it is expressive activity and is protected First Amendment speech.<sup>168</sup>

However, *Moody*'s concurrences state that not all compilations of third-party content qualify as expressive activity deserving of First Amendment protection.<sup>169</sup> There is hope that the concurrences will kickstart plaintiffs' claims to progress past *Moody*.

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166. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 182 (3d Cir. 2024).

167. *Id.* at 184.

168. *Id.* at 183.

169. *Moody*, 144 S. Ct. at 2430. The Court explains that:

Because not all compilers express a message of their own, not all compilations are protected by the First Amendment. Instead, the First Amendment protects only those compilations that are "inherently

1. A Plaintiff's Stance to First Survive *Moody*

The concurrences in *Moody* suggest that the application of the majority opinion may be more nuanced than it appears. First, in Justice Thomas's concurrence, he raised an issue with the majority's failure to consider the full range of applications an algorithm may have on a platform, instead basing the opinion on two specific examples: Facebook's newsfeed and YouTube's homepage.<sup>170</sup> This issue is particularly important in light of Justice Alito's concurrence, joined by Justices Thomas and Gorsuch. Justice Alito stated that since "not all compilers express a message of their own, not all compilations are protected by the First Amendment."<sup>171</sup>

Additionally, the First Amendment only protects inherently expressive compilations, which means that the compiler selects third-party content to spread the compiler's own message.<sup>172</sup> Most importantly, Justice Alito stated that not all compilers compile third-party content in an inherently expressive way and that "[s]ome may serve as 'passive receptacle[s]' of third-party speech or as 'dumb pipes . . .'"<sup>173</sup> These kinds of compilers do not deserve First Amendment protection. The concurrence first provides the example of an inherently expressive compiler: an editor's select compilation of poems that express their view of poets.<sup>174</sup> Then, the concurrence offers a counterexample: a head of a neighborhood group who compiles residents' contact information.<sup>175</sup> The latter is not a meaningful expression of the compiler.<sup>176</sup> Platforms such as TikTok, which utilize an algorithm to make editorial decisions, should not be considered inherently expressive; instead, they function as a "dumb pipe" and are therefore not entitled to First Amendment protections.

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expressive" in their own right, meaning that they select and present speech created by other persons in order "to spread [the compiler's] own message."

*Id.* (alteration in original) (quoting *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)).

170. *Id.* at 2412 (Thomas, J., concurring).

171. *Id.* at 2430 (Alito, J., concurring).

172. *Id.*

173. *Id.* at 2431 (alteration in original). Justice Alito clarified that a "dumb pipe" in the context of social media platforms is one that acts as a passive receptacle regurgitating content it is fed by users for other users to view with the platform not conveying a message of their own by showing one user's content to another user. *Id.* This is in contrast to Facebook or YouTube, which attempted to convey a message of their own by specifically showing one user's content to another to convey a specific message or set of beliefs or values. *Id.* at 2403–06 (majority opinion).

174. *Id.* at 2430 (Alito, J., concurring).

175. *Id.*

176. *Id.*

One may argue that TikTok is fundamentally different from the platforms in *Moody* because it generally lacks an inherently expressive message of its own, which it tries to convey through its algorithm and compilation of third-party content. It is more akin to a “dumb pipe,”<sup>177</sup> thus not inherently expressive and not protected by the First Amendment. The majority in *Moody* articulated that social media platforms’ curated feeds consist of third-party content, but the greater message, conveyed through the compilation of particular content by algorithms, is the platform’s own message.<sup>178</sup> They state, importantly, that the choices on what to display “rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality.”<sup>179</sup> The majority had an issue with the way the state laws attempted to manipulate the platforms “to create a different expressive product, communicating different values and priorities.”<sup>180</sup> Facebook’s newsfeed and YouTube’s homepage both displayed a set of values through the curation of content to present a particularly trustworthy feed in accordance with their guidelines and standards.<sup>181</sup> The content displayed on users’ feeds may also be influenced by a user’s interests and past activities; however, that is not the only factor that drives an algorithm’s curation on these platforms.<sup>182</sup>

Conversely, TikTok appears to lack any message of its own that it is attempting to display through the aggregation of third-party content. TikTok’s algorithm appears to compile information solely driven by users’ behavior without advancing its own inherently expressive message. TikTok’s lack of value-driven compilation becomes evident from the name of its user feed, which is called the “For You Page,” and the themes on which TikTok bases its community guidelines. Its community guidelines, which dictate curation, are based on themes of balancing harm prevention and expression, embracing human dignity, and ensuring their actions are fair.<sup>183</sup> However, it is unclear from these guidelines what message of its own TikTok is trying to convey.<sup>184</sup>

It seems that TikTok attempts to create a general space where users can share their own messages, devoid of TikTok’s own message, by compiling

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177. *Id.* at 2431.

178. *Id.* at 2405 (majority opinion).

179. *Id.*

180. *Id.* at 2408.

181. *Id.* at 2403.

182. *Id.*

183. *Community Principles*, TIKTOK (Aug. 14, 2025), <https://www.tiktok.com/community-guidelines/en/community-principles>.

184. *Id.*

users' content. TikTok's vague mission statement further reinforces this: "Our mission is to inspire creativity and bring joy."<sup>185</sup> Inspiring creativity and joy is not an inherently expressive message of TikTok's own that it can express through its compilation of third-party content. Its mission statement is more of an aspiration that users bring creativity and joy to the platform through their content rather than TikTok's curation of content that conveys creativity and joy in itself. It is devoid of an articulable set of beliefs or values. Contrast this with Facebook's newsfeed or YouTube's homepage, which the Court assessed as possessing certain values that guided its content curation to convey an inherently expressive message of its own, conducive to a newsfeed or homepage.<sup>186</sup>

For example, Facebook's mission statement is "to give people the power to build community and bring the world closer together."<sup>187</sup> This mission statement embodies values and beliefs that Facebook can articulate and promote through its curated content, such as fostering community and empowering communities. Facebook itself supports this as it provides various examples of how it has utilized its site's content to support its mission statement. Facebook stated, "When data is shared responsibly with communities that need it most, it can improve well-being and save lives. For example, the results of our COVID-19 symptom survey have enabled us to share symptom maps and predict disease spread, helping health researchers track and combat the coronavirus (COVID-19) pandemic."<sup>188</sup> Similarly, Facebook provides instances where Facebook's content sharing has supported Black and diverse communities, small businesses, and the news industry by making news more accessible.<sup>189</sup> Facebook has a value-driven mission statement that is reflected in its content compilation. This is in stark contrast to TikTok's valueless mission statement and endless stream of content, which lacks any aggregated message of its own; it is not an inherently expressive use of an algorithm.

*Moody* poses an additional barrier for plaintiffs bringing claims stemming from seemingly harmless content by classifying a social media

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185. *About, TIKTOK*, <https://www.tiktok.com/about?lang=en> (last visited May 17, 2026).

186. *Moody*, 144 S. Ct. at 2403–06 (2024) (explaining that social media platforms implement community standards through algorithms that prefer certain content and disfavor other content based on the values within those standards). The majority also stated that the use of an algorithm deciding to prefer and disfavor certain content based on the platform's set of values is what gives the platform a "particular expressive quality." *Id.* at 2405.

187. *Connecting People and Building Community on Facebook*, FACEBOOK <https://www.facebook.com/government-nonprofits/blog/connecting-people-and-building-community-on-facebook> (last visited May 17, 2026).

188. *Id.*

189. *Id.*

platform's use of an algorithm to make editorial decisions as an expressive activity protected by the First Amendment.<sup>190</sup> The court in *Anderson* demonstrates this by oversimplifying the application of *Moody*, which appears more nuanced than the court suggested.<sup>191</sup> The concurrence's skepticism of the majority opinion's broadness provides an avenue for plaintiffs to argue that the algorithm will receive protection only if it conveys an inherently expressive message of the platform's own.<sup>192</sup> Plaintiffs may still be able to bring claims against a social media platform's algorithm if they can demonstrate that the platform's use of an algorithm does not convey an inherently expressive message of its own,<sup>193</sup> as TikTok has shown. If a plaintiff successfully demonstrates that a platform's algorithm is not inherently expressive and thus not protected under the First Amendment, they still have to deal with Section 230.

## 2. The Second Step for Plaintiffs: Surviving Section 230

Even if a plaintiff can avoid First Amendment protections under *Moody*, the plaintiff's claim still needs to survive Section 230 to be successful. A plaintiff may be able to do this through a product liability claim because it can survive Section 230 and be successful. In *Anderson*, *Moody* blocked the claims, including a product liability claim.<sup>194</sup> However, the concurrence noted that Section 230 provided immunity from suits based on third-party content but did not shield TikTok from suits based on its own actions.<sup>195</sup> Section 230 would not block *Anderson*'s product liability claim.<sup>196</sup> Such a claim may be successful if a plaintiff can demonstrate that the platform knowingly distributed content through targeted recommendations that it knew could cause harm.<sup>197</sup> This is where *Lemmon* comes in to explain how a

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190. *Moody*, 144 S. Ct. at 2409.

191. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (explaining that the court classified TikTok's recommendation of the Blackout Challenge as expressive activity deserving of First Amendment protections under *Moody*). However, the court does not engage in the value or belief analysis that *Moody* did for Facebook and YouTube when the Court classified their algorithm use as First Amendment-protected expressive activity. *Moody*, 144 S. Ct. at 2405–06 (explaining the values and beliefs Facebook and YouTube attempt to convey through their content compilation). Nor does the court analyze whether the recommendation was a part of TikTok's own inherently expressive message that Justice Alito's concurrence states is necessary to receive First Amendment protections. *Id.* at 2431 (Alito, J., concurring) (stating only those platforms that convey their own inherently expressive message through their compilation of content are deserving of First Amendment protections).

192. *Anderson*, 116 F.4th at 183.

193. *Moody*, 144 S. Ct. at 2431 (Alito, J., concurring).

194. *Anderson*, 116 F.4th at 184–85; see *supra* text accompanying notes 109–15.

195. *Id.* at 186.

196. *Id.* at 193.

197. *Id.*

successful product liability claim may work for plaintiffs bringing claims stemming from seemingly harmless content.

*Lemmon* is a prime example of plaintiffs piercing a social media platform's immunity under Section 230 for seemingly harmless content through a product liability claim.<sup>198</sup> Though Snapchat's speed filter, which was the focus of this case,<sup>199</sup> fundamentally differs from a platform's use of an algorithm that makes targeted recommendations, *Lemmon's* reasoning can be extended to algorithms. The court reasoned that this claim was based on the idea that "manufacturers have a 'duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public.'"<sup>200</sup> Thus, the fundamental analysis for holding a manufacturer liable is "whether a reasonable person would conclude that 'the reasonably foreseeable harm' of a product, manufactured in accordance with its design, 'outweigh[s] the utility of the product.'"<sup>201</sup> More broadly, this is known as the risk-utility test, which determines whether a reasonable person would consider a product's foreseeable risk of harm to outweigh its utility.<sup>202</sup> The court notes that a manufacturer's duty of care requires the manufacturer to foresee all reasonable uses and misuses of its product, as well as the consequential, foreseeable dangers.<sup>203</sup> A claim like this will be the best way for plaintiffs bringing claims stemming from harmless content to demonstrate that certain algorithms fail the risk-utility test and to hold social media companies liable.

A plaintiff may be able to show that a social media platform fails the risk-utility test by pointing to specific defects in the design of the algorithm.<sup>204</sup> One such defect that could be utilized is *inattentional blindness*, which "occurs when developers design a system to focus on a specific goal, such as time spent or engagement, and overlook equally essential features like user wellbeing."<sup>205</sup> The danger with a defect like inattentional blindness is that manufacturers will prioritize user engagement and time spent on the app through targeted recommendations that increasingly narrow content to maintain a user's attention without regard for other risks.<sup>206</sup> Interestingly, multiple investigations have revealed that TikTok systematically displays

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198. *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021).

199. *Id.* at 1088.

200. *Id.* at 1092 (quoting LEWIS BASS, PRODS. LIAB.: DESIGN & MFG. DEFECTS § 2.5 (2d ed., 2020)).

201. *Id.* (alteration in original).

202. *Id.*; see HERSCHLEIN, *supra* note 127, § 127:61.

203. *Lemmon*, 995 F.3d at 1092.

204. Zakon, *supra* note 134, at 1129.

205. *Id.* at 1128.

206. *Id.* at 1129.

extreme content to vulnerable teenage accounts, primarily to maintain user attention and engagement, which drives profit.<sup>207</sup> In 2022, major social media companies generated approximately \$11 billion in ad revenue from U.S. children aged 0 to 17 years old.<sup>208</sup>

To prevail on a claim of inattentive blindness, a plaintiff needs to show that the social media platform could have avoided the defect and dangers it poses if a reasonable design alternative existed that the manufacturer did not adopt.<sup>209</sup> In cases where plaintiffs bring claims for seemingly harmless content, the outcome will depend heavily on the specific facts and whether an alternative design could have reasonably prevented whatever harm was caused. However, when it comes to seemingly harmless challenges, such as the “Cinnamon Challenge”<sup>210</sup> or “Planking,”<sup>211</sup> a social media platform could adopt an algorithm that refuses to recommend such content entirely but does not block a user from searching for it. This way, such challenges are less likely to reach those users—such as minors—most likely to be influenced to replicate them and face potential injury.

A plaintiff would then need to show that the reasonable alternative design’s burdens do not outweigh the safety benefits to users.<sup>212</sup> A plaintiff

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207. Nancy Costello et al., *Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-Level Policy Action to Protect Youth from the Dangers of Social Media*, 49 AM. J.L. & MED. 135, 136–37 (2023).

208. *Id.* at 137.

209. Zakon, *supra* note 134, at 1130.

210. *See, e.g.*, Anand N. Bosmia & Kevin J. Leon, *Lung Injury and the Cinnamon Challenge: College Students Should Beware This Internet Dare*, 7 J. INJ. & VIOLENCE RSCH. 41, 41 (2015) (explaining that the cinnamon challenge consisted of an individual consuming one tablespoon of cinnamon powder within one minute without drinking any liquids). The issue is that “cinnamon is a caustic powder composed of cellulose fibers, which neither dissolve nor biodegrade in the lungs. The powder quickly dries out the mouth, which makes swallowing the powder very difficult.” *Id.* This can lead to irritation of the mouth, nose, throat, and lungs and can lead to respiratory complications, especially for those with pre-existing conditions. *Id.*; *see also* Amelia Grant-Alfieri et al., *Ingesting and Aspirating Dry Cinnamon by Children and Adolescents: The “Cinnamon Challenge”*, 131 PEDIATRICS 833, 833–34 (2013) (explaining that “there were 51,100 YouTube clips depicting the Cinnamon Challenge. One video was viewed >19 million times, predominantly by 13- to 24-year-olds, ages similar to people taking the Cinnamon Challenge and associated with the greatest need for conformity.”). Attempts of the challenge have led to calls to poison centers, emergency room visits, hospitalizations, and use of ventilators for those who suffered a collapsed lung as a result. *Id.* at 833.

211. *See* Stefania Barbieri et al., *Planking or the “Lying-Down Game:” Two Case Reports*, 6 INTERACT. J. MED. RSCH. e4 (2017) (explaining that planking consisted of individuals lying face down stiff like a board of wood). The challenge encouraged and influenced primarily adolescents to perform this act in more extreme or obscure locations in hopes of impressing peers by their funny, creative, or unusual location. *Id.* This can lead to unintended or unforeseen injuries; a 17-year-old who attempted the challenge suffered severe injury from a fall, with hospital bills costing about \$37,440. *Id.* An 18-year-old injured in a similar manner had hospital bills costing about \$27,380, demonstrating that such a simple act can lead to costly consequences. *Id.*

212. Zakon, *supra* note 134, at 1130–31.

could do this by articulating that such an alternative design does not impose a significant burden on anyone or limit access to content. This would improve safety by preventing an algorithm from taking advantage of minors and their desire to be seen through replicating such challenges. Minors are particularly vulnerable to social media challenges as they are more susceptible to peer pressure and the desire to belong.<sup>213</sup> Such harmless challenges that a minor may be influenced to imitate as a result of the algorithm's targeted recommendations could include the "salt and ice challenge."<sup>214</sup>

The salt and ice challenge involved an individual pouring salt on their arm and holding an ice cube to it as long as the participant could withstand.<sup>215</sup> This challenge may seem harmless enough, especially for a minor, although unbeknownst to most, mixing salt with ice lowers the melting point of ice to the point where it can cause cold burns.<sup>216</sup> Dangerously, as the challenge progresses, the pain from the initial chill evolves into numbness.<sup>217</sup> At the same time, damage is being done to the skin tissue, ultimately resulting in localized, deep-stage frostbite.<sup>218</sup> Given their susceptibility to peer pressure, minors may not fully comprehend the risks associated with such seemingly innocuous challenges.<sup>219</sup> Minors' lack of awareness makes the issue particularly significant.<sup>220</sup>

This issue is sinisterly supported by physicians' recent difficulty distinguishing unintentional injuries from suicides among adolescents related to social media challenges.<sup>221</sup> In recent years, adolescents injured as a result of such challenges have denied any intention of self-harm, demonstrating the unawareness of the many dangers such challenges may pose.<sup>222</sup> Such difficulty in distinguishing the two can be seen in *Anderson*, where a girl essentially hanged herself even though it was in pursuit of an online challenge.<sup>223</sup> As Judge Matey stated, "Nylah, still in the first years of her

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213. Elisa Astorri et al., *Online Extreme Challenges: Putting Children at Risk: What We Know to Date*, 75 MINERVA PEDIATRICS 98, 99 (2023).

214. *Adolescent Risk-Taking: Salt and Ice Challenge*, CLINICAL ADVISOR, <https://www.clinicaladvisor.com/clinicalchallenges/adolescent-risk-taking-salt-and-ice-challenge/2/> (last visited May 17, 2026); accord Michael M. Vosbikian & Jennifer M. Ty, *The Ice and Salt Challenge: An Atypical Presentation of a Cold Injury*, 5 J. BONE & JOINT SURGERY 1, 1 (2015).

215. Vosbikian & Ty, *supra* note 214, at 3.

216. Astorri et al., *supra* note 213, at 102.

217. Vosbikian & Ty, *supra* note 214, at 3.

218. *Id.*

219. Astorri et al., *supra* note 213, at 104.

220. *Id.* at 99.

221. Onomeasike Ataga & Valerie K. Arnold, *TikTok Challenges—Unintentional Injuries vs Suicide Attempts*, 82 JAMA PSYCHIATRY 5, 5 (2025).

222. *Id.*

223. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 186 (3d Cir. 2024).

adolescence, likely had no idea what she was doing or that following along with the images on her screen would kill her.”<sup>224</sup>

Highlighting the dangers of online challenges and the unawareness of their risks, “unintentional injuries were the leading cause of death among adolescents aged 15 to 19 years in the US from 2018 to 2021, while intentional self-harm (ie, suicide) was the third leading cause of death.”<sup>225</sup> With this, a plaintiff could argue that the burdens of the alternative design, that is, not promoting even harmless challenges, do not outweigh the safety benefits in mitigating minors’ susceptibility to replicate even seemingly innocuous challenges. A plaintiff has a good argument that the example alternative design does not restrict access to content. The alternative just prevents the content from being promoted to vulnerable classes of individuals for their safety.

This is likely the most effective way for a plaintiff to bring claims stemming from harmless content and overcome Section 230, potentially succeeding in holding a social media company liable. Taken together, *Anderson* and *Lemmon* strongly suggest that a product liability claim will survive Section 230.<sup>226</sup> Such a claim does not attempt to hold the social media company liable for third-party content, but rather for how the platform recommends it in a targeted manner—that is, the platform’s own actions for which Section 230 does not provide immunity. A plaintiff with a product liability claim would have to show that a social media platform’s algorithm fails the risk-utility test. They would have to do this by pointing to a specific defect, assessing other reasonable alternative designs, and determining whether the alternate design’s burdens would outweigh its safety benefits. As demonstrated above, a compelling case exists for plaintiffs to argue that a social media platform’s algorithm can fail the risk-utility test, thereby allowing them to prevail under Section 230 against the social media company.

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224. *Id.*

225. Ataga & Arnold, *supra* note 221, at 5; see *Suicide*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/suicide> (last updated Aug. 2025) (showing available data from 2023 shows a consistent trend of unintentional injuries resulting in far more death in adolescents than suicide). For ages 10–14, there were 481 suicides and 914 unintentional injury-related deaths. *Id.* For ages 15–24, there were 5,936 suicides and 14,126 unintentional injury-related deaths. *Id.* In both adolescent age brackets, the number of unintentional injury-related deaths roughly doubled the number of intentional suicides. *Id.*

226. See discussion *supra* Parts I.B.2–3, II.B.2.

## III. REELING IN SECTION 230

While the above outlines the best posture for a plaintiff with a claim stemming from harmless content, the best outcome for long-term justice is for Congress to step in and reform the statute to remove the substantial barrier it has imposed on plaintiffs. In recent years, there have been calls to reform the Communications Decency Act, with multiple bills proposed to Congress, indicating a desire for change.<sup>227</sup> Social media platforms have gained vast immunities under Section 230 in ways Congress did not intend when enacting Section 230, particularly regarding the platforms' use of algorithms.<sup>228</sup> In 1996, Congress intended Section 230 primarily "to encourage internet service providers to engage in content moderation of obscenity, as well as to protect small, start-up companies from excessive litigation threats."<sup>229</sup>

However, courts' broad interpretation of the statute has caused Congress's objectives in enacting Section 230 to be lost. As a result, Section 230 has expanded beyond Congress's limited intent, creating a nearly impenetrable barrier for plaintiffs seeking to hold social media companies liable. In 1996, Congress enacted Section 230 at a time when the internet was vastly different from what it is now; social media platforms, especially algorithms, would not emerge until many years later.<sup>230</sup> There is no way Congress in 1996 could have understood what the internet would eventually evolve into; in 1996, Google and Facebook did not even exist.<sup>231</sup>

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227. Michael Healy, *Opening the Floodgates: An Analysis of How State Intellectual Property Law Could Change the Modern Internet*, 98 CHI.-KENT L. REV. 701, 706 (2023); see *Section 230 Legislation Tracker*, LAWFARE, <https://www.lawfaremedia.org/projects-series/lawfare-research-initiative/section-230-tracker> (last updated Oct. 2, 2025) (demonstrating that there have been many congressional proposals to reform Section 230). Between 2020 and the time the tracker was last updated in 2025, a total of 89 proposals to reform Section 230 had been submitted. *Id.* That's 23 from the 116th Congress, 27 from the 117th Congress, 28 from the 118th Congress, and 11 from the 119th Congress. *Id.* This demonstrates a persistent and heavy push to reform Section 230.

228. Bernstein, *supra* note 136, at 385.

229. *Id.*

230. *Id.*; see Nicholas Barrett, *How Have Social Media Algorithms Changed the Way We Interact?*, BBC, (Oct. 12, 2024), <https://www.bbc.com/news/articles/cp8e4p4z97eo> (showing that the use of algorithms with social media platforms would not emerge until at least 13 years after the enactment of Section 230 in 1996; "Social media algorithms, in their commonly known form, are now 15 years old. They were born with Facebook's introduction of ranked, personalised news feeds in 2009 and have transformed how we interact online.").

231. *Id.*

*A. Proposed Reform to Section 230 That Tracks the Florida Law at Issue in Moody*

Congress intended to protect companies like Facebook and Google when they were small startups.<sup>232</sup> For instance, Facebook, founded by a broke college student, likely could not afford to face liability for every user's post that might contain an actionable claim. Mark Zuckerberg even acknowledged that Section 230 has deviated from Congress's original intent during a Senate Commerce Committee hearing.<sup>233</sup> Referring to revising Section 230, he stated, "Changing it is a significant decision. However, I believe Congress should update the law to make sure it's working as intended."<sup>234</sup> This demonstrates that some large social media companies are at least aware that the protections of Section 230 they received differ from the intent of Congress when it enacted the law in 1996. However, companies such as Google and Facebook still enjoy the immunities of Section 230, which were intended for small startups, even though they are trillion-dollar companies with the resources to prevent litigation in the first place and face it when they cannot.<sup>235</sup> Given this departure from original legislative intent, it is time for Congress to step in and reform Section 230 to significantly reduce the level of immunity that social media platforms currently enjoy. Congress enacted the Communications Decency Act as an early attempt to establish guidelines for the new, rapidly expanding internet landscape.<sup>236</sup>

There is debate on whether Congress or the courts are better suited to remedy Section 230.<sup>237</sup> This Note argues that Congress is best suited to amend Section 230, potentially revising the law to require social media platforms to be more vigilant in monitoring the content they promote.<sup>238</sup> This would be beneficial as it would force social media platforms to be more cognizant of the content being circulated on their platform and inherently penalize things like inattentional blindness.<sup>239</sup> Platforms would no longer be able to freely use algorithms that focus on keeping a user's attention to target recommendations of any content to users, because users may hold them liable

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232. *Id.* at 385–86.

233. *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the Comm. on Com., Sci., & Transp.*, 116th Cong. 15 (2020) (statement of Mark Zuckerberg, Chief Executive Officer, Facebook, Inc.).

234. *Id.*

235. Bernstein, *supra* note 136, at 398; *see* sources cited *supra* note 138.

236. Lisea, *supra* note 135, at 788.

237. Noah Hale, *Section 230: The Valyrian Steel for Website Operators, and Why a Tax Credit Is the Best Solution to a Safer Internet*, 41 PACE L. REV. 281, 292 (2020).

238. Zakon, *supra* note 134, at 1108–10.

239. *See* discussion *supra* Part II.B.2.

for that content. Social media platforms would then have an incentive to ensure the content they circulate is not the kind that brings liability. If social media platforms fail to effectively monitor third-party content, they could face endless liability. Section 230 reform is due to bring it up to speed with the modern landscape of the internet and social media platforms now that the use of algorithms has complicated.

While plaintiffs bringing claims stemming from seemingly harmless content may be successful in bringing a product liability claim, a more effective solution would be for Congress to reform Section 230 and reduce the immunities from which social media platforms currently benefit. Congress should reform Section 230, as it no longer primarily fulfills Congress' original intent of regulating obscenity and protecting small startups and cannot adequately address the modern social media landscape.

One way Congress can implement effective reform is to adopt a model like the one at issue in the Florida state law in *Moody*. An approach modeled after this state law would more closely align with Congress' original intent of protecting small startups and entrepreneurs.<sup>240</sup> If this proposed scheme exactly mirrored the Florida state law, then social media companies with annual gross revenue over \$100 million or more than 100 million monthly active users would lose Section 230 immunities.<sup>241</sup> Such a scheme would update Section 230 to reflect the modern internet landscape, accounting for large social media platforms while retaining the policy objectives of the Communications Decency Act and the intent of Congress. The scheme would grant small social media startups the full range of Section 230 immunities, which they would then forfeit once they reach an annual gross revenue or monthly user count threshold set by Congress.

A staggered approach to Section 230 reform is necessary, as an outright repeal of Section 230 would benefit large social media platforms that can afford to defend themselves by eliminating smaller competitors in the market that cannot.<sup>242</sup> Mark Weinstein, CEO of a small messaging startup, in connection with the effects of a Section 230 repeal, stated, "The big boys have deep pockets. They can easily hire the massive moderation and legal

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240. See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2395 (2024) ("Florida's law regulates 'social media platforms,' as defined expansively, that have annual gross revenue of over \$100 million or more than 100 million monthly active users." (quoting FLA. STAT. § 501.2041(1)(g) (2026))); FLA. STAT. § 501.2041(1)(g) (2026) (stating that a social media platform has to meet either threshold: "Has annual gross revenues in excess of \$100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index[,] or "[h]as at least 100 million monthly individual platform participants globally.").

241. See sources cited *supra* note 240.

242. Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, 1, 2 (CATO Inst. Pol'y Analysis No. 922, 2022).

teams that would be necessary to defend themselves. I can't. Revoking Section 230 would put hundreds of startups and other smaller companies out of business."<sup>243</sup> One of the authors of Section 230 further emphasizes the importance of a staggered approach. Senator Ron Wyden stated that removing immunities for small startups "will kill the little guy, the startup, the inventor, the person who is essential for a competitive marketplace. It will kill them in the crib."<sup>244</sup> An approach modeled after the Florida state law in *Moody* will retain the Act's original intent, which includes protecting small startups while benefitting plaintiffs and bringing the Act up to speed with modern times, limiting the power of large platforms. The thresholds that Congress determines is appropriate should ensure that a startup would not get snuffed out by litigation but is also big enough to defend itself against litigation that may arise while operating a social media company.

### *B. Implications of the Proposed Reform and an Alternative Approach*

This proposed solution of reforming Section 230 modeled after the Florida law in *Moody* is not without criticism and potential implications of such reform. Critics of this solution may argue that entirely stripping Section 230 immunities from large social media companies would be overly burdensome and expose them to significant litigation. However, removing Section 230 immunities would not necessarily increase the number of lawsuits plaintiffs file against social media platforms, because plaintiffs already bring claims and courts then determine if Section 230 bars liability.<sup>245</sup> It would, however, allow more plaintiffs' claims to proceed without being barred automatically. Section 230 immunities only burden

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243. *Id.* at 6 (quoting Mark Weinstein, *Small Sites Need Section 230 to Compete*, WSJ OPINION, (Jan. 25, 2021), <https://www.wsj.com/opinion/small-sites-need-section-230-to-compete-11611602173>).

244. Jake Latimer, "I'm Concerned about This Post": *Combatting Fake News on Social Media*, 12 SEATTLE J. TECH & ENV'T & INNOVATION L. 209, 213 (2022) (quoting Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It - and Everything It's Brought with It.*, VOX (May 16, 2019), <https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulationsneutrality>).

245. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 1-2 (2018). Courts analyze whether Section 230 will bar liability by applying a three-part test:

"(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." A defendant must meet all three parts of the test to gain the benefit of Section 230's liability protections.

*Id.* (alteration in original) (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)). This does not affect a potential plaintiff's right to begin a cause of action and only determines whether a cause of action can succeed or must be ended because the three questions were answered in the affirmative and Section 230 bars liability for the defendant. *See id.*

plaintiffs and their claims; removing these immunities for large social media companies may prove to be a financial burden but would not create more litigation—that is, new categories of claims. Plaintiffs already bring these claims and courts then determine whether Section 230 bars liability. Such reform would be highly beneficial for plaintiffs seeking redress caused by seemingly harmless content.

Such plaintiffs would not need to go through the hurdle of pursuing a product liability claim, as the plaintiffs in *Lemmon* and *Anderson* had done for their claims to survive Section 230. Plaintiffs would be able to hold the company liable for seemingly harmless content from third parties without having to rely on another claim. Such reform would shift the burden from plaintiffs to social media platforms to prevent litigation in the first place through better moderation practices.

*In re Facebook, Inc.* provides a good example of the effect that such reform can have.<sup>246</sup> Had this reform been in place at the time of *In re Facebook, Inc.*, Facebook would have been well aware that it does not benefit from Section 230, would have employed best practices to protect its users from harm, and would likely have taken the mother's report more seriously rather than ignoring it.<sup>247</sup> Without Section 230, Facebook would face greater liability for failing to acknowledge or act on reports like the mother's, making it more likely they would take such reports seriously. Additionally, such reform would have ensured that the plaintiff's claims were not outright barred by Section 230, since Facebook would not have benefited from immunity for claims involving objectively harmful content.<sup>248</sup>

This reform would also allow plaintiffs to hold companies directly liable for seemingly harmless content, such as online challenges like the salt and ice challenge, without the need to utilize the risk-utility test.<sup>249</sup> Creating a way for plaintiffs to hold companies directly liable would create a strong incentive for platforms to prevent such content from reaching vulnerable populations, such as minors, thereby reducing the risk of harm and future litigation.

Another proposed reform to limit Section 230 is the introduction of a tax credit.<sup>250</sup> This would encourage both small and large platforms to invest in content moderation—which may be expensive—to remove dangerous

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246. 625 S.W.3d 80 (Tex. 2021).

247. *See id.* at 84 (noting that interactive website operators have strong expectations about Section 230 due to “prevailing judicial interpretation”).

248. *Id.* at 93.

249. *See* discussion *supra* Part II.B.2.

250. Hale, *supra* note 237, at 305.

content more effectively.<sup>251</sup> Then, the tax credit would reimburse platforms for these investments.<sup>252</sup> The rationale behind this approach is that platforms are just intermediaries; they are not the ones creating content and should be a part of the solution in creating a safer experience for users.<sup>253</sup> They should not be scared by the threat of liability.<sup>254</sup> This approach also aims to preserve technological innovation that might be hampered if platforms do not benefit from Section 230.<sup>255</sup> However, this solution fails to address the core issue—Section 230 outright bars plaintiffs’ claims—and instead seeks to target and limit hateful content.<sup>256</sup>

While primarily aimed at hate speech and hurtful content, the tax credit approach is still a proposed reform to the same Section 230 discussed above.<sup>257</sup> Tax credits are a less compelling option to protect future plaintiffs’ interests.<sup>258</sup> This approach is also flawed as it further benefits social media platforms and continues to quash potential plaintiffs’ claims. As it pertains to a plaintiff’s ability to hold social media companies liable, social media platforms will still retain all the immunities that Section 230 affords them. While this tax credit system aims to protect users by promoting content moderation, it disproportionately benefits social media platforms while leaving plaintiffs in the same position. Social media platforms get reimbursed for improving their platform systems and content moderation, while plaintiffs still struggle to get their claims past Section 230. The improved content moderation by platforms that could come from the tax credit system may prove helpful in preventing some claims. Still, it would be impossible to stop all legitimate claims from arising. Furthermore, improved content moderation systems are a great thing, but they can only go so far; as was seen in *Anderson*, it does not take much to create the conditions for irreparable harm to occur.<sup>259</sup> Even if content moderation systems could prevent 99% of

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251. *Id.* at 305–06.

252. *Id.*

253. *Id.* at 306.

254. *Id.* at 305.

255. *Id.* at 303.

256. *Id.* at 305.

257. *Id.* at 282.

258. *Id.*

259. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 186 (3d Cir. 2024) (Matey, J., concurring). Judge Matey explained:

The Blackout Challenge—performed in videos widely circulated on TikTok—involved individuals “chok[ing] themselves with belts, purse strings, or anything similar until passing out.” The videos “encourage[d]” viewers to record themselves doing the same and post their videos for other TikTok users to watch. Nylah, still in the first year of her adolescence, likely had no idea what she was doing or that following along with the images on her screen would kill her. But TikTok knew that Nylah would watch

harmful content that could conceivably cause harm from reaching users, the remaining 1% would still struggle to have their claims heard and not be outright barred by Section 230.

Additionally, money is not an issue for the large social media platforms that appear to be at the root of most plaintiffs' issues. As stated in the proposal for this approach, Facebook incurs approximately "\$432 million in labor costs for content moderators," excluding other associated expenses.<sup>260</sup> While this is a substantial sum, it is a drop in the bucket compared to the company's total revenue; according to Facebook's SEC filings, the company earned \$134.90 billion in 2023, a 16% increase from 2022.<sup>261</sup> It would not be in the interest of taxpayers or those who have struggled to obtain redress from platforms such as Facebook to award them a tax credit, even a temporary one. At the same time, platforms can retain Section 230 immunities. If there were a company that could face endless liability in such a scenario, it would be one like Facebook, which consistently generates large sums of money year after year. Large platforms, such as Facebook, have more than enough capital to defend against lawsuits, which they could mitigate through improved moderation practices without a tax credit system.<sup>262</sup>

Although the tax credit system approach is flawed on its own, it could be beneficial if combined with the Florida law approach. For example, tax credits could be granted to social media platforms that are still small enough to receive Section 230 immunities. This makes practical sense because small social media platforms would have relatively little annual revenue and fewer resources to put towards content moderation when compared to a company like Facebook. This combined approach would grant them the resources to protect users from potentially dangerous content, avoiding potential lawsuits and litigation costs, while also benefiting from the immunity of Section 230, thereby avoiding being stifled by litigation costs. However, once small social media companies satisfy the threshold to lose Section 230 immunities, they would simultaneously lose the tax credit benefits that can be used for content moderation. This would have the added benefit of incentivizing platforms to prioritize user well-being over growth. A company that prioritizes growth

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because the company's customized algorithm placed the videos on her "For You Page" after it "determined that the Blackout Challenge was 'tailored' and 'likely to be of interest' to Nylah."

*Id.* (alterations in original) (footnotes omitted) (citations omitted) (quoting Complaint, ¶¶ 3, 64–65, *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276 (E.D. Pa. 2022) (No. 2:22-cv-01849-PD)).

260. Hale, *supra* note 237, at 296.

261. Meta Platforms, Inc., Annual Report (Form 10-K), at 59 (Feb. 1, 2024).

262. Dean Baker, *Section 230: Can We Talk About It?*, CTR. FOR ECON. & POL'Y RSCH. (Sept. 9, 2023), <https://cepr.net/publications/section-230-can-we-talk-about-it/>.

over user well-being without adequate content moderation will face the consequences of litigation without Section 230 immunities.

#### CONCLUSION

Many plaintiffs' claims, especially those stemming from seemingly harmless content, have been disparately disadvantaged by the Section 230 immunities that have benefited social media platforms, creating a high bar to pass. The broad interpretation of Section 230 adopted by many courts has aggravated the issue for plaintiffs, barring claims before they can be heard. By classifying algorithms as expressive activity, *Moody* raised the bar even higher for plaintiffs, exacerbating their challenges.<sup>263</sup> Forcing plaintiffs to rely on legal theories like product liability to have their claims heard, as was the case in *Lemmon*<sup>264</sup> and *Anderson*,<sup>265</sup> creates unnecessary legal hurdles for plaintiffs. These cases, along with others, illustrate the damaging effect that Section 230 can have on plaintiffs seeking redress.

Therefore, reforming Section 230 is necessary to bring it up to speed with the modern internet landscape, restore Congress's original intent, and lower the bar for plaintiffs to hold social media companies liable. This can be accomplished through an approach modeled by *Moody*, based on a platform's annual revenue and user count, which may be more effective than other approaches, such as one that awards a tax credit alone. Ultimately, reforming Section 230 is necessary for Congress to ensure that platforms prioritize the well-being of their users and the content they display while also empowering plaintiffs to bring claims for harm caused by innocuous content.

—*Christian Patierno* \*

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263. See *supra* text accompanying note 114; see generally *Patterson v. Meta Platforms, Inc.*, 244 A.D.3d 29, 38 (2025) (demonstrating in a recent case the effect Section 230 and *Moody* are having on current plaintiffs). Notably, the court in *Patterson* outlined this exact scenario, illustrating how the foundation laid by *Moody* forces plaintiffs to fight both Section 230 and the First Amendment:

Thus, the interplay between section 230 and the First Amendment gives rise to a “Heads I Win, Tails You Lose” proposition in favor of the social media defendants. Either the social media defendants are immune from civil liability under section 230 on the theory that their content-recommendation algorithms do not deprive them of their status as publishers of third-party content, per *Force* and *M.P.*, or they are protected by the First Amendment on the theory that the algorithms create first-party content, as per *Anderson*.

*Id.*

264. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

265. *Anderson v. TikTok, Inc.*, 116 F.4th 180 (3d Cir. 2024).

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**WORKED TO DEATH: ADDRESSING THE ATROCITIES OF  
MODERN PRISON LABOR**

**Catherine Michael<sup>\*†</sup>**

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## INTRODUCTION

“His bucket lay beside him, tipped over, near pools of his blood.”<sup>1</sup> This was the fate of Frank Dwayne Ellington.<sup>2</sup> Mr. Ellington was a sanitation worker at Koch Foods poultry plant in Ashland, Alabama.<sup>3</sup> He was also a prisoner, employed as part of the Alabama Department of Corrections work release program. He cleaned the machinery used to kill and process chickens, often while the machinery was still running.<sup>4</sup> This practice eventually led to his death in 2018, when a machine latched onto his forearm and pulled him in up to his head, crushing his skull and killing him instantly.<sup>5</sup>

An Occupational Safety and Health Administration (OSHA) report on the incident detailed how Mr. Ellington and the other sanitation workers did not receive training on how to turn off the machines they cleaned.<sup>6</sup> OSHA had proposed a citation to the Koch Foods plant for this exact issue ten years prior.<sup>7</sup> Compounding the lack of training, the employees at the Koch Foods plant were under immense time pressure to maximize production.<sup>8</sup> In some instances, work release employees were sent back to prison if they were not able to meet their work quotas.<sup>9</sup> A plant supervisor told an OSHA investigator that “it’s possible that inmate Ellington could have left the machine running to save time in the cleaning process.”<sup>10</sup> Ultimately, OSHA proposed a \$38,802.00 fine for the death of Mr. Ellington.<sup>11</sup> Koch Foods argued that Mr. Ellington’s family should not be able to bring a wrongful death suit against it because it had paid for Mr. Ellington’s funeral expenses.<sup>12</sup> The plant and the family ultimately reached an undisclosed settlement.<sup>13</sup>

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1. Will Tucker, *The Kill Line*, S. POVERTY L. CTR. (July 26, 2018), <https://www.splcenter.org/news/2018/07/26/kill-line>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Letter from Ramona Morris, OSHA, to Will Tucker, S. Poverty L. Ctr. 9 (Apr. 10, 2018).

12. Robin McDowell & Margie Mason, *Prisoners in the US Are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, AP (Jan. 29, 2024) [hereinafter *Prisoners in the US Are Part of a Hidden Workforce*], <https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6f0eb4747963283316e494eadf08c4e>.

13. *Id.*

Mr. Ellington's story is not unique. It is part of a pattern, arguably a system, of severe bodily injuries experienced by incarcerated laborers across the United States. Horrifying examples abound: A cart weighing several hundred pounds fell six feet and crushed the leg of a prisoner working at Hickman's Egg Farm in Arizona.<sup>14</sup> His leg is now permanently deformed.<sup>15</sup> When a prisoner on work detail in Alabama was cutting down a tree, a branch fell on him, leaving him paralyzed.<sup>16</sup> A saw blade dislodged from a conveyor belt and cut into the skull of a Colorado prisoner while she was on work release.<sup>17</sup> While shocking stories like this are plentiful, the full extent of workplace injuries or deaths for prisoners is unknown because prisons do not collect data on these incidents.<sup>18</sup>

Incarcerated people in the United States have almost no recourse when they are forced to work in unsafe conditions or suffer injuries as a result. First, "onerous" standards make it nearly impossible to bring a claim under the Eighth Amendment.<sup>19</sup> Second, federal law makes it prohibitively difficult for incarcerated people to bring complaints without first going through an exceedingly convoluted administrative process within the prison.<sup>20</sup> Third, OSHA regulations apply only in a limited capacity to incarcerated workers, and in many states, they do not apply at all.<sup>21</sup> Thus, prisoners are left to suffer in silence.

Reform is needed and achievable. To start, the Supreme Court should extend Eighth Amendment protections to incarcerated laborers. Second, OSHA should expand its protections to cover all prisoners in the United States, in any job that they work. Third, the public should be made aware of the atrocities of prison labor so that they may be inspired to demand better treatment for prisoners. Together, these solutions could bring about much-needed protections for incarcerated workers.

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14. Elizabeth Whitman, *More Arizona Inmates Report Serious Injuries While Working at Hickman's Egg Farm*, PHX. NEW TIMES (Oct. 4, 2019), <https://www.phoenixnewtimes.com/news/arizona-inmates-report-serious-injuries-hickmans-egg-farm-osha-11367976>.

15. *Id.*

16. *See Buckley v. Barbour Cnty.*, 624 F. Supp. 2d 1335, 1341 (M.D. Ala. 2008).

17. Robert Dalheim, *Inmate Sues Colorado Sawmill After Grave Saw Injury*, WOODWORKING NETWORK (Aug. 15, 2017), <https://www.woodworkingnetwork.com/news/woodworking-industry-news/inmate-sues-colorado-sawmill-after-grave-saw-injury>.

18. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS 62 (2022).

19. Colleen Dougherty, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States*, 10 U. PA. J. BUS. & EMP. L. 483, 484 (2008).

20. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 67.

21. Megan Hauptman, *The Health and Safety of Incarcerated Workers: OSHA's Applicability in the Prison Context*, 37 ABA J. LAB. & EMP. L. 71, 78-79 (2023).

This Article, in three parts, will consider safety protections for incarcerated workers in the United States. Part I will provide a background on prison labor in the Western Hemisphere. It will focus particularly on a long history of bodily harm against incarcerated laborers. Part II will analyze the legal framework around this issue. It will look at Supreme Court and circuit court interpretations of the Eighth Amendment and how it applies to prison labor conditions. Part III will outline three solutions to the lack of safety protections for incarcerated laborers: applying the Eighth Amendment to prison labor conditions, expanding OSHA protections, and bringing public awareness to the issue.

## I. BACKGROUND

This Part explores the history of violence against incarcerated people, the origins of prison labor, and the eventual intersection of the two. It then outlines the current state of prison labor and the lack of safety protections for incarcerated people. It particularly focuses on the gaps in Occupational Safety and Health Administration (OSHA) coverage and the resulting injuries. This Part concludes with explanations of some of the current barriers to justice for victims of harsh prison labor conditions.

### *A. Prison Labor and the Treatment of Convicts Throughout History*

Perhaps the most famous account of severe bodily harm inflicted upon an incarcerated person comes from the Bible with the crucifixion of Jesus. Soldiers set a crown of thorns on Jesus's head, spat on him, and then struck him repeatedly with a staff.<sup>22</sup> The soldiers then crucified him in front of his family and disciples.<sup>23</sup> Jesus suffered and cried out before finally dying.<sup>24</sup> The soldiers then desecrated his corpse with a spear.<sup>25</sup>

Throughout history, people commonly made a public spectacle out of the gruesome killings of alleged wrongdoers.<sup>26</sup> One such spectacle was the act of drawing and quartering, where horses' leads were tied to each of a person's limbs, and then the horses were each sent running in a different direction, pulling the person apart.<sup>27</sup> Others included burning people alive,

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22. *Matthew* 27:29–30 (King James).

23. *John* 19:23–25 (King James).

24. *Matthew* 27:46–50 (King James).

25. *John* 19:34 (King James).

26. Richard Ward, *Introduction: A Global History of Execution and the Criminal Corpse*, NAT'L LIBR. MED. 1, 6 (2015).

27. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF PRISON* 3–5 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

hanging, decapitating, dismembering, and breaking people's bodies on a wooden wheel.<sup>28</sup> These acts often happened with large, public audiences.<sup>29</sup> Additionally, the executioners would then frequently display the corpses, subjecting them to extensive, ostentatious desecration.<sup>30</sup> The purpose of this was, ostensibly, to deter future crime.<sup>31</sup> However, over time, Western societies soured on the practice of public execution, considering it too barbaric.<sup>32</sup>

Prison labor entered the scene as an early act of criminal justice reform.<sup>33</sup> Proponents believed that instead of killing wrongdoers, perhaps they could rehabilitate them.<sup>34</sup> Thus, over time, criminals were sent to penitentiaries instead of to their deaths.<sup>35</sup> Examples of these penitentiaries existed as early as 1596, with the Rasphuis of Amsterdam.<sup>36</sup> Here, incarcerated people worked jobs during sentences of a limited duration.<sup>37</sup> They were also subject to a variety of requirements and prohibitions, all designed to reform them before their release back into their communities.<sup>38</sup>

Similar penitentiaries cropped up in early America. First, the Walnut Street Jail in Philadelphia opened in 1776.<sup>39</sup> Quakers operated the prison and believed they could reform prisoners through the use of solitary confinement and manual labor, rather than the traditional approach of physical punishment.<sup>40</sup> Later, New York's Auburn Penitentiary opened in 1816.<sup>41</sup> Here, prisoners were allowed to work together, but they were strictly required to work in silence in order to meditate on their crimes.<sup>42</sup> These penitentiaries served as models for others in the United States.<sup>43</sup>

However, states soon realized the economic value of prison labor, and their focus shifted from rehabilitation to profit.<sup>44</sup> Throughout the 19th

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28. Ward, *supra* note 26, at 5–6.

29. *Id.* at 5.

30. *Id.* at 5–6.

31. *Id.* at 10–11.

32. FOUCAULT, *supra* note 27, at 10.

33. *Id.* at 109.

34. *Id.* at 130–31.

35. *Id.* at 9–10.

36. *Id.* at 120.

37. *Id.* at 121.

38. *Id.*

39. Rex A. Skidmore, *Penological Pioneering in the Walnut Street Jail, 1789–1799*, 39 J. CRIM. L. & CRIMINOLOGY 167, 168 (1948).

40. Dougherty, *supra* note 19, at 486–87.

41. *Both Sides of the Wall: Auburn and Its Prison*, CAYUGA MUSEUM OF HIST. & ART, <https://cayugamuseum.org/both-sides-of-the-wall/> (last visited May 17, 2026).

42. Dougherty, *supra* note 19, at 486–87.

43. *Id.*

44. *Id.* at 487.

century, northern states contracted with private companies to sell prison labor, with productivity being their primary goal.<sup>45</sup> These prisoners delivered by producing nearly \$50 billion<sup>46</sup> in goods per year during this time.<sup>47</sup> However, “[a]s productivity increased, casualties mounted: the ‘Physician’s Report’ to the warden of the Indiana State Prison at Michigan City listed 245 industrial accidents resulting in permanent disabilities or death in 1 year for a population of 378.”<sup>48</sup> Shockingly, these prisons incarcerated children as young as six years old, forcing them to labor under the same harsh conditions as the adults.<sup>49</sup> The prisons effectively became factories, able to churn out far more goods than those employing free people.<sup>50</sup> The prisons were able to accomplish this by completely disregarding the wellbeing of prisoners and simply putting new prisoners on the line if the other ones died.<sup>51</sup>

Similarly egregious practices were underway in southern states at the same time. While the Thirteenth Amendment had ended the practice of chattel slavery, a carveout allowed for involuntary servitude as a form of punishment for crimes.<sup>52</sup> The southern states fully embraced this exception and began the practice of *convict leasing*.<sup>53</sup> The states would lease out large groups of convicts to private companies, at times a state’s whole convict population.<sup>54</sup> The practice was so widespread that some states did not even build new penitentiaries—they just sent their convicts to work.<sup>55</sup> States delivered the convicts to plantations, mines, railroads, and turpentine camps in large, rolling cages.<sup>56</sup>

Once the convicts arrived, the companies would subject them to unspeakable horrors. Supervisors would whip the laborers into unconsciousness and frequently work them until they died.<sup>57</sup>

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45. Genevieve LaBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 WORKINGUSA: J. LAB. & SOC’Y 327, 334 (2012).

46. Adjusted for inflation. *Id.* at 334 (noting that “Northern prisoners work[ing] in large-scale industrial factories produc[ed] the equivalent of over US\$30 billion (in 2005 dollars) a year in goods”). \$30 billion in 2005 dollars equates to just over \$51 billion in 2026 dollars. See *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited May 17, 2026).

47. LaBaron, *supra* note 45, at 334.

48. *Id.*

49. *Id.* at 335.

50. *Id.*

51. *Id.* at 334.

52. *Id.* at 337.

53. *Id.*

54. *Id.* at 339.

55. *Id.* at 338.

56. *Id.*

57. *Id.* at 338.

[I]t was profitable to literally work the prisoners to death because procuring new ones did not interfere with profits. In Mississippi, not a single leased convict lived long enough to serve a sentence of 10 years or more, and when they died, their unclaimed bodies were purchased by the Medical School at Nashville for students to practice on. The average life of a convict in Texas was about 7 years.<sup>58</sup>

States did nothing to prevent such horrific treatment, and, in fact, many state officials received bribes to arrest and convict more people to grow the labor force.<sup>59</sup> The vast majority of these convicts were recently freed slaves, who, under the leasing program, experienced treatment harsher than they experienced during their enslavement.<sup>60</sup>

Echoes of this treatment reverberated into modern times. Alabama prisons used “chain gangs” as recently as 2001.<sup>61</sup> Prisoners were shackled together and forced to perform manual labor along public highways.<sup>62</sup> Those who objected to the work were chained to a hitching post, with their hands over their head, all day in the hot sun.<sup>63</sup> And even today, if you step onto the grounds of the Angola Prison in Louisiana, it will look eerily reminiscent of the plantation that once occupied the same land.<sup>64</sup> Prisoners there pick cotton in fields all day in temperatures as high as 105 degrees Fahrenheit.<sup>65</sup> Prisoners who pass out are left unconscious in the field.<sup>66</sup>

In 1977, Michel Foucault wrote, “There remains . . . a trace of ‘torture’ in the modern mechanisms of criminal justice—a trace that has not entirely been overcome, but which is enveloped, increasingly, by the non-corporal nature of the penal system.”<sup>67</sup> Prison labor was originally a radical reform, moving away from the public mutilation and execution of convicts and towards rehabilitation. However, we have largely come full circle. States are now causing the mutilation and execution of prisoners via prison labor, just as they did during the 19th century and before. Foucault’s words ring truer today than ever.

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58. *Id.* at 339 (citations omitted).

59. *Id.* at 340.

60. *Id.* at 337.

61. *Alabama Ends Chain Gang Experiment*, PRISON LEGAL NEWS (Sept. 15, 2001), <https://www.prisonlegalnews.org/news/2001/sep/15/alabama-ends-chain-gang-experiment/>.

62. *Id.*

63. *Id.*

64. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 34.

65. *Id.* at 64.

66. *Id.*

67. FOUCAULT, *supra* note 27, at 16.

*B. Prison Labor Today*

Today, prison labor is a \$2 billion industry.<sup>68</sup> The American Civil Liberties Union (ACLU) estimates “that at least 791,500 people incarcerated in U.S. prisons perform work as part of their incarceration.”<sup>69</sup> These incarcerated laborers are nearly entirely exempt from the labor protections afforded to non-incarcerated people.<sup>70</sup>

Workers in the United States are typically protected by OSHA. The mission of OSHA is to “assure America’s workers have safe and healthful working conditions free from unlawful retaliation.”<sup>71</sup> It carries out this mission through a combination of regulations, training, and enforcement.<sup>72</sup>

A variety of restrictions limit OSHA’s protections over incarcerated workers to the point that the protections are almost non-existent. While OSHA has jurisdiction over federal prisons, it has issued a directive that limits its jurisdiction.<sup>73</sup> One such limitation is that OSHA must give advance notice to prisons before any inspections, which greatly reduces the efficacy of such inspections.<sup>74</sup> Additionally, courts at times appear to interpret OSHA protections as advisory rather than mandatory. For example, the Seventh Circuit held that prison labor programs “are not required by law to comply with [OSHA] safety standards . . . .”<sup>75</sup> Finally, OSHA protections explicitly do not apply to state employees, and OSHA considers laborers incarcerated in state prisons to be state employees.<sup>76</sup> This is a severely limiting factor because over 87% of United States prisoners are incarcerated in state prisons.<sup>77</sup> Thus, even these watered-down federal protections apply to, at best, around 12% of people incarcerated in the United States.

OSHA expects states themselves to fill the gaps where its regulations do not apply by creating labor regulations to protect state employees.<sup>78</sup> Twenty-

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68. *Prisoners in the US Are Part of a Hidden Workforce*, *supra* note 12.

69. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 24.

70. *Id.* at 12.

71. *About OSHA*, OSHA, <https://www.osha.gov/aboutosha> (last visited May 17, 2026).

72. *Id.*

73. OSHA, DIR. FAP 01-00-002, FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS WITH THE BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE § H.2.d(3) (1995) [hereinafter DIR. FAP 01-00-002].

74. Hauptman, *supra* note 21, at 85.

75. *Bagola v. Kindt*, 131 F.3d 632, 635 (7th Cir. 1997).

76. OSHA, Interpretation Letter No. 1975.5 (Dec. 16, 1992) [hereinafter Interpretation Letter No. 1975.5].

77. DEREK MUELLER & RICH KLICKOW, BUREAU OF JUST. STAT., PRISONERS IN 2023 – STATISTICAL TABLES 8 tbl 2 (2025); *see* BUREAU OF JUST. STATS., FEDERAL PRISONER STATISTICS COLLECTED UNDER THE FIRST STEP ACT, 2023, at 1 (2023).

78. Hauptman, *supra* note 21, at 85–86.

three states have chosen not to create any such protections to fill these gaps, so all of their state employees are unprotected.<sup>79</sup> Of the states that have created protections for their state employees, some states explicitly exclude state prisoners from the protections.<sup>80</sup> For example, an Arizona statute excludes prisoners from any of the rights or privileges given to employees, thus also excluding them from safety protections.<sup>81</sup> Other states choose only to provide safety protections in limited contexts, such as when prisoners are working for private companies.<sup>82</sup> At least one state, California, has extended slightly more safety protections to its prisoners.<sup>83</sup> California's law allows the state's Division of Occupational Safety and Health to review reports on prisoner injuries and deaths.<sup>84</sup> The Division then makes recommendations on how future similar incidents can be avoided.<sup>85</sup> That said, California is currently the exception in this space.

Further compounding this problem, prisoners also often find themselves in some of the most dangerous jobs. The National Employment Law Project found that, "in most states, public authorities and the carceral system knowingly place incarcerated workers in job categories with high incidences of injuries . . . while absolving themselves of responsibility for ensuring their safety."<sup>86</sup> Because prisoners are often coerced into working, they make prime candidates for the jobs that are too dangerous or degrading for others to choose to take on.<sup>87</sup> This combination of perilous conditions and near total lack of safety protections opens the door for prisoners to be seriously injured.

Prisons do not collect data on the injuries or deaths of their incarcerated workers, so it is hard to know just how pervasive this problem is.<sup>88</sup> However, the limited reports on prison labor conditions that do exist paint a dark picture. Of prisoners interviewed by the ACLU, 64% reported feeling unsafe while working.<sup>89</sup> Oftentimes, the injuries that prisoners suffer could be avoided with proper training; however, 70% of prisoners report receiving no formal training for the jobs that they perform.<sup>90</sup> Prisoners also frequently do

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79. *Id.*

80. ANASTASIA CHRISTMAN & HAN LU, NAT'L EMP. L. PROJECT, WORKERS DOING TIME MUST BE PROTECTED BY JOB SAFETY LAWS 19–20 (2024).

81. ARIZ. REV. STAT. ANN. § 31–251 (2025).

82. CHRISTMAN & LU, *supra* note 80, at 21.

83. CAL. CODE REGS. tit. 8, § 344.46 (2025).

84. *Id.*

85. *Id.*

86. CHRISTMAN & LU, *supra* note 80, at 6.

87. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 47.

88. *Id.* at 62.

89. *Id.* at 64.

90. *Id.* at 65.

not receive the necessary protective equipment to perform their jobs.<sup>91</sup> To make matters worse, prisoners also report receiving inadequate medical care after being injured, or, at times, no medical care at all.<sup>92</sup>

The story of Kandy Fuelling is emblematic of the prison labor crisis. Ms. Fuelling was on work release at a Colorado saw mill.<sup>93</sup> Her supervisor instructed her to remove a piece of stuck wood from a conveyor belt.<sup>94</sup> In the process of removing the piece of wood, a saw blade unexpectedly cut through Ms. Fuelling's helmet and into her skull.<sup>95</sup> A report of the incident states, "Pieces of her 'head matter' stuck to her shirt and she began bleeding profusely. . . . Fuelling was terrified to remove her hands from her skull because she was scared that her head was going to fall apart."<sup>96</sup> Ms. Fuelling's workplace did not call an ambulance or send her to the hospital.<sup>97</sup> Instead, someone stuck two menstrual pads over the wound, and Ms. Fuelling's fellow inmates took her back to the prison.<sup>98</sup> Ms. Fuelling eventually received medical care, but, in the process, she developed an antibiotic-resistant staph infection.<sup>99</sup> While her wound has now healed, she still suffers from short-term memory loss and severe headaches.<sup>100</sup>

### C. Barriers to Justice

To make matters worse, several formidable legal barriers currently stand in the way of justice for victims of harsh prison labor conditions. First, federal law prohibits incarcerated people from bringing civil rights claims in court without first exhausting all administrative remedies within the prison system.<sup>101</sup> Second, most incarcerated people must represent themselves in these suits, often lacking the requisite legal expertise to prevail.<sup>102</sup> Third, qualified immunity protects government officials from most civil suits.<sup>103</sup> In

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91. *Id.* at 62.

92. *Id.* at 14.

93. Dalheim, *supra* note 17.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 14.

100. Robin McDowell & Margie Mason, *US Prisoners are Being Assigned Dangerous Jobs. But What Happens if They Are Hurt or Killed?*, AP (May 16, 2024) [hereinafter *US Prisoners are Being Assigned Dangerous Jobs*], <https://apnews.com/article/prison-to-plate-inmate-labor-investigation-injuries-deaths-0ff52ff1735d7e9f858248177a2a60c3>.

101. *See infra* Part I.C.1.

102. *See infra* Part I.C.2.

103. *See infra* Part I.C.3.

combination, these factors make it nearly impossible for most prisoners to seek any sort of recompense for the workplace injuries they suffer.

### 1. Administrative Barriers

Congress passed the Prison Litigation Reform Act in 1996, seeking to quell what it saw as an excess of frivolous lawsuits being filed by incarcerated people.<sup>104</sup> The Act created what the ACLU has described as “nearly insurmountable barriers” for incarcerated people seeking to access “relief through federal courts.”<sup>105</sup> The most severe of these barriers is the Act’s requirement that incarcerated people must exhaust all available administrative remedies within the prison before they are able to seek remedies in court.<sup>106</sup> These administrative processes are so prohibitively complicated that incarcerated people often cannot advance their grievances far enough to seek external remedies.<sup>107</sup> Thus, courts may dismiss valid claims when incarcerated people cannot navigate their prison’s convoluted administrative remedy process to exhaustion.<sup>108</sup>

A Seventh Circuit case illustrates the issue. There, an incarcerated man claimed that a push lawnmower amputated his toe because the prison did not provide its incarcerated workers with the proper training or safety equipment to operate the mower safely.<sup>109</sup> The court found that the incarcerated man had a valid Eighth Amendment claim.<sup>110</sup> However, the court dismissed this claim because the man did not first exhaust the administrative remedies available to him within the prison.<sup>111</sup>

### 2. Lack of Access to Legal Counsel

The vast majority of prisoners must bring their own civil rights claims because they lack access to legal counsel. A Prison Policy Initiative report found that only 7.6% of incarcerated civil rights plaintiffs were represented by attorneys, compared to 89.8% of non-incarcerated civil rights plaintiffs.<sup>112</sup>

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104. Katherine Bennett & Rolando V. Del Carmen, *A Review and Analysis of Prison Litigation Reform Act Court Decisions: Solution or Aggravation?*, 77 PRISON J. 405, 405 (1997).

105. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 67.

106. 42 U.S.C. § 1997e(a).

107. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 67.

108. *Id.*

109. *Norris v. Cohn*, 27 F. App’x 658, 659–60 (7th Cir. 2001).

110. *Id.* at 660.

111. *Id.*

112. Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL’Y INITIATIVE (Apr. 26, 2021), [https://www.prisonpolicy.org/reports/PLRA\\_25.html](https://www.prisonpolicy.org/reports/PLRA_25.html).

The report attributes this lack of access to legal counsel to two other provisions of the Prison Litigation Reform Act.<sup>113</sup> These provisions discourage attorneys from taking on incarcerated clients because they limit the amount of recoverable attorneys' fees to below the market rate.<sup>114</sup> Adding insult to injury, the Act also severely limits the amount of damages that courts may award to incarcerated people.<sup>115</sup> Thus, because attorneys are so disincentivized from taking on incarcerated clients, incarcerated people are often left to represent themselves.

### 3. Qualified Immunity

The doctrine of qualified immunity generally protects government officials from liability when they violate people's rights.<sup>116</sup> In order to sue a government official, a person must prove that "(1) [the official] violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'"<sup>117</sup> In order to meet the "clearly established" element, the person must prove that "the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful."<sup>118</sup> The Supreme Court calls this a "demanding standard" that protects all government officials save for "the plainly incompetent or those who knowingly violate the law."<sup>119</sup> Thus, the default presumption rests in favor of qualified immunity. The plaintiff bears the heavy burden required to overcome this presumption.<sup>120</sup>

Ms. Fuelling's case, again, provides a prime example of the issues created by the legal landscape. Ms. Fuelling's lawyer "never met with her face-to-face and her suit was dismissed after a court ruled she could not sue state entities, leaving her with zero compensation."<sup>121</sup> It appears that inadequate access to legal counsel prohibited Ms. Fuelling from being able to defeat the government's qualified immunity defense, thus preventing Ms. Fuelling from getting justice.

Incarcerated people are no longer hanged in public squares or crucified high on a mountain. Yet they are worked to the point of serious injury, and

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

117. *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

118. *Id.* at 63 (internal quotations and citations omitted).

119. *Id.* (internal quotations omitted).

120. *Id.*

121. *US Prisoners are Being Assigned Dangerous Jobs*, *supra* note 100.

even worked to death, while hidden away in prisons and factories. The government does not document this practice, and incarcerated people are given little to no ability to defend themselves. Thus, these horrors endure.

## II. CONSTITUTIONAL ANALYSIS

This analysis walks through the case law pertinent to the constitutionality of harsh prison labor conditions. It begins with an explanation of the Supreme Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishments Clause. It then explains the Court's "deliberate indifference" standard, which applies to the conduct of prison officials. It then surveys circuit court opinions that have applied the deliberate indifference standard to prison officials' regulation of prison labor conditions. It concludes by considering an argument against the application of this standard to prison labor conditions, ultimately finding the argument without merit.

The Eighth Amendment prohibits "cruel and unusual punishments."<sup>122</sup> The Supreme Court has held that this means the government cannot use "excessive" forms of punishment.<sup>123</sup> The Court uses a two-factor test to determine whether a punishment is excessive: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."<sup>124</sup> The Court has acknowledged that its interpretation of the Eighth Amendment is not "static," regularly holding that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>125</sup> Thus, as the public's attitude towards acceptable forms of punishment shifts, so too does the Court's.

In response to these "evolving standards of decency,"<sup>126</sup> the Court has chosen to apply the Eighth Amendment to the conduct of prison officials and their treatment of incarcerated people.<sup>127</sup> The Court has held that the Eighth Amendment requires that the state provide for an incarcerated person's basic needs, which include "food, clothing, shelter, medical care, and reasonable safety."<sup>128</sup> In a case focused specifically on the medical needs of prisoners,

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122. U.S. CONST. amend. VIII.

123. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

124. *Id.* (citation omitted).

125. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

126. *Id.* (quoting *Trop*, 356 U.S. at 101).

127. *Helling v. McKinney*, 509 U.S. 25, 31 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").

128. *Id.* at 32.

the Court held that if a prison official accidentally deprives an incarcerated person of medical care, they do not violate the Constitution.<sup>129</sup> However, prison officials do run afoul of the Eighth Amendment if they are “deliberately indifferent” to the serious needs of incarcerated people.<sup>130</sup> The Court has held that this “deliberate indifference” can cause an “unnecessary and wanton infliction of pain,” which “no one suggests would serve any penological purpose.”<sup>131</sup> Thus, the standard to determine whether the action of prison officials violates the Eighth Amendment is that of “deliberate indifference.”

The Court’s “deliberate indifference” test has two requirements: one objective and the other subjective.<sup>132</sup> The objective requirement demands that the alleged deprivation of incarcerated people’s needs be “sufficiently serious.”<sup>133</sup> The deprivation need not result in an actual injury to constitute an Eighth Amendment violation, so long as the potential harm is sufficiently serious.<sup>134</sup> The Court has concluded that, “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”<sup>135</sup> Thus, a prison official’s conduct can meet this objective requirement if it creates carceral conditions “posing a substantial risk of serious harm.”<sup>136</sup>

The subjective requirement is that the prison official causing the serious deprivation must have acted with a deliberately indifferent state of mind.<sup>137</sup> In order to be deliberately indifferent, a prison official must know of an “excessive risk” to the health or safety of an incarcerated person *and* deliberately disregard that risk.<sup>138</sup> Because this is a subjective requirement, the presence of “objectively inhumane prison conditions” alone is not sufficient to find an Eighth Amendment violation: there must be an element of intent on the part of the prison official to inflict cruel and unusual punishments on the incarcerated person.<sup>139</sup> Courts can use circumstantial evidence to determine this intent.<sup>140</sup> To that end, “a factfinder may conclude

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129. *Id.*

130. *Id.* at 33.

131. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

132. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

133. *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

134. *Helling*, 509 U.S. at 33.

135. *Id.*

136. *Farmer*, 511 U.S. at 834.

137. *Id.*

138. *Id.* at 837.

139. *Id.* at 838.

140. *Id.* at 842.

that a prison official knew of a substantial risk from the very fact that the risk was obvious.”<sup>141</sup> Thus, a prison official violates the Eighth Amendment if they are aware of a substantial risk to an incarcerated person and nonetheless choose to ignore it.

Not every current justice is convinced by this reading of the Eighth Amendment. Justice Clarence Thomas has consistently opined that the Eighth Amendment should not apply to prison conditions at all. In numerous dissenting and concurring opinions, Justice Thomas has asserted that the framers of the Eighth Amendment intended for it to apply only to those issuing a sentence, not those responsible for executing it.<sup>142</sup> Citing multiple dictionaries contemporary to the passage of the Amendment, Justice Thomas has stated that the framers likely intended for the term “punishment” to mean “the penalty imposed for the commission of a crime.”<sup>143</sup> He has thus deduced that the Eighth Amendment should not apply to prison conditions or any injuries people may suffer while incarcerated.<sup>144</sup>

Despite Justice Thomas’s persistence, his originalist view of the Eighth Amendment has not seemed to gain any traction with the Court. As established above, the Court prefers to defer to the American public’s “evolving standards of decency” when interpreting the Eighth Amendment.<sup>145</sup> The public’s response to Justice Thomas’s interpretation of the Eighth Amendment was not positive; the *L.A. Times* called it “jarring and worrisome.”<sup>146</sup> Regardless of what the framers intended, the Court held that the Eighth Amendment applies to prison conditions. In the view of the majority, “[i]t is unquestioned that ‘[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment

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141. *Id.*

142. *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting) (“Thus, although the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose ‘punishment.’”); *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (“Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional.”); *Farmer*, 511 U.S. at 859 (Thomas, J., concurring) (“Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute ‘punishment’ under the Eighth Amendment.”).

143. *Helling*, 509 U.S. at 38 (Thomas, J., dissenting).

144. *Id.* at 38–39.

145. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

146. *Even Criminals Have Some Rights: Justice Thomas’ Dissent in Prison-Beating Case Is Jarring and Worrisome*, *L.A. TIMES* (Mar. 1, 1992), <https://www.latimes.com/archives/la-xpm-1992-03-01-op-5491-story.html>.

standards.”<sup>147</sup> However, the Court’s recent willingness to overturn long-standing precedent reminds us that no standard is set in stone.<sup>148</sup>

The Supreme Court has not decided whether the Eighth Amendment applies to incarcerated people’s labor conditions, but a majority of the circuit courts hold that it does. The Sixth Circuit summarizes this consensus, stating, “[i]t is widely accepted that dangerous prison work conditions can support a viable conditions-of-confinement claim under the Eighth Amendment deliberate-indifference standard.”<sup>149</sup> At least six other circuit courts have issued similar holdings.<sup>150</sup> These courts have applied the Supreme Court’s deliberate indifference standard to prison labor conditions created by prison officials and held that such conditions may violate the Eighth Amendment.<sup>151</sup>

One such application of the deliberate indifference standard appears in a Ninth Circuit case. In this case, a defective printing press ripped off an incarcerated man’s thumb.<sup>152</sup> Prior to this incident, the man had pointed out the defect to the prison official supervising his work and expressed concerns for his safety.<sup>153</sup> The prison official instructed the man to continue to use the defective press because they did not have time to fix it.<sup>154</sup> The Ninth Circuit held that the prison official’s conduct constituted an Eighth Amendment violation because he was aware of the risk that the defective equipment posed and instructed the incarcerated man to use it anyway.<sup>155</sup>

An Eighth Circuit case also applies the deliberate indifference standard to prison labor conditions.<sup>156</sup> In this case, a downed power line had started a fire, and a prison official had instructed an incarcerated man to stomp out the

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147. *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981) (alterations in original) (quoting *Hutto v. Finney*, 437 U.S. 678, 685 (1978)).

148. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242–43 (2022); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

149. *Rhodes v. Michigan*, 10 F.4th 665, 674 (6th Cir. 2021).

150. *Ambrose v. Young*, 474 F.3d 1070, 1075 (8th Cir. 2007) (“The Eighth Amendment’s prohibition against ‘cruel and unusual punishment’ applies to conditions of confinement and prison work assignments fall under the ambit of conditions of confinement.” (citation omitted)); *Morgan v. Morgensen*, 465 F.3d 1041, 1047 (9th Cir. 2006) (“[A] reasonable prison official would or should have understood that compelling an inmate to continue operating defective and dangerous prison work equipment would violate the Eighth Amendment.”); *Gill v. Mooney*, 824 F.2d 192, 195 (2d Cir. 1987); *Williams v. Wooten*, 119 F. App’x 625, 626–27 (5th Cir. 2004); *Balle v. Kennedy*, 73 F.4th 545, 557–58 (7th Cir. 2023); *Smith v. United States*, 561 F.3d 1090, 1104–05 (10th Cir. 2009).

151. *Smith*, 561 F.3d at 1105.

152. *Morgan*, 465 F.3d at 1044.

153. *Id.*

154. *Id.*

155. *Id.* at 1047.

156. *Ambrose v. Young*, 474 F.3d 1070, 1075 (8th Cir. 2007).

fire.<sup>157</sup> The man lost his balance and fell into the live power line.<sup>158</sup> “The power line gripped [the man], violently shaking his burning body for approximately one to two minutes.”<sup>159</sup> Afterward, his lifeless body dropped to the ground.<sup>160</sup> The Eighth Circuit concluded that the prison official’s conduct violated the Eighth Amendment because he demonstrated a “deliberate indifference to a known and substantial risk.”<sup>161</sup>

A Sixth Circuit case similarly applies the standard. In this case, an incarcerated woman was struck by an out-of-control laundry cart with enough force to crush her skull.<sup>162</sup> The woman was working alongside two prison officials to move laundry carts, which weighed up to 400 pounds.<sup>163</sup> The officials were not paying attention and released one of the carts in the woman’s direction without ensuring that it was secured.<sup>164</sup> The cart tipped over, crushing the woman under it.<sup>165</sup> As a result, “she suffered skull and facial fractures, brain injuries, internal bleeding, and further injuries to her face, scalp, and left side . . . .”<sup>166</sup> The Sixth Circuit found that the woman had presented sufficient evidence such that a reasonable jury could find that prison officials violated her Eighth Amendment rights by exhibiting deliberate indifference to her safety.<sup>167</sup>

While the country is trending towards applying the Eighth Amendment to labor conditions, resistance to this approach should be expected. Some may argue that the Eighth Amendment should not protect incarcerated people from harsh labor conditions because these conditions are part of their penalty for breaking the law. Proponents of this approach may argue that incarcerated people made a decision that resulted in their incarceration; as a result, they do not deserve the same protections afforded to people are not incarcerated. In fact, some may go so far as to say that these harsh conditions are not just incidental but integral to effective punishment. One such proponent was Alabama prison commissioner, Ron Jones, who reinstated the use of chain gangs in 1995.<sup>168</sup> He revived the practice of handcuffing prisoners to each

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157. *Id.* at 1074.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1078.

162. *Rhodes v. Michigan*, 10 F.4th 665, 669 (6th Cir. 2021).

163. *Id.*

164. *Id.* at 670.

165. *Id.*

166. *Id.* at 669.

167. *Id.* at 679.

168. Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES (Mar. 26, 1995), <https://www.nytimes.com/1995/03/26/us/chain-gangs-to-return-to-roads-of-alabama.html>.

other and forcing them to perform manual labor on the side of the highway because he thought it would increase the efficacy of incarceration.<sup>169</sup> “People say it’s not humane . . . . But I don’t get much flak in Alabama,” he told the *New York Times*.<sup>170</sup> The pervasive nature of severe prison labor conditions across the country suggest that Mr. Jones is likely not alone in his approach.

Proponents of these harsh labor practices are able to cherry-pick Supreme Court authority to support their position. The Court held in *Rhodes v. Chapman* that “the Constitution does not mandate comfortable prisons . . . .”<sup>171</sup> It further reasoned that, “To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”<sup>172</sup> However, the Court also stated that, “[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.”<sup>173</sup> Labor conditions under which prisoner laborers may be dismembered or killed constitute grossly disproportionate punishments. Therefore, courts should have no problem applying the deliberate indifference standard to prison labor conditions.

### III. PROPOSED SOLUTIONS

#### *A. The Supreme Court Should Adopt the Circuit Courts’ Application of the Eighth Amendment to Prison Labor Conditions*

A majority of circuit courts have held that the Eighth Amendment’s prohibition on cruel and unusual punishments applies to prison labor conditions. To extend this protection to all incarcerated Americans and ensure a uniform standard of application, the Supreme Court should do the same. The Court itself has acknowledged that its interpretation of the Eighth Amendment progresses in step with society’s “evolving standards of decency.”<sup>174</sup> It is time for the Court to acknowledge that this standard of decency has evolved to the point that it is no longer acceptable to allow prisons to get away with brutally maiming and killing incarcerated people without facing any consequences.

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169. *Id.*

170. *Id.*

171. 452 U.S. 337, 349 (1981).

172. *Id.* at 347.

173. *Id.*

174. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

The Court has interpreted the Eighth Amendment to prohibit the “unnecessary and wanton infliction of pain” that is “grossly out of proportion to the severity of the crime.”<sup>175</sup> Prison labor conditions in the United States have certainly, at times, degraded to the point where they inflict unnecessary and wanton pain on incarcerated people. Remember, again, the story of Ms. Fuelling from above.<sup>176</sup> She was the incarcerated woman whose skull was split open by an errant saw blade after her supervisor instructed her to remove a piece of wood from the saw. Her pain was surely unnecessary—it served no penological purpose and actively prohibited her from continuing her work duties. The supervisor who instructed her to dislodge the wood also acted wantonly by providing this instruction without first turning off the saw. Furthermore, the infliction of this pain was “grossly out of proportion to the severity” of the crimes Ms. Fuelling committed.<sup>177</sup> She was “serving prison time for escape and being an [sic] habitual traffic offender.”<sup>178</sup> Surely society’s standard of decency has evolved such that the average American would consider a saw blade to the skull to be a grossly disproportionate punishment for traffic violations. If the Supreme Court chose to apply the Eighth Amendment’s prohibition on cruel and unusual punishments to prison labor conditions, it could protect Ms. Fuelling, and other incarcerated people like her, and provide them with the path to justice they so deserve.

*B. OSHA Should Issue a New Directive Classifying Incarcerated Laborers as Employees and States Should Follow Suit*

An updated directive from OSHA could fill many of the gaps in protections for incarcerated laborers. The Occupational Safety and Health Act, which establishes OSHA, endeavors “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”<sup>179</sup> In order to meet this goal, the Act creates requirements for workplace trainings,<sup>180</sup> inspections and investigations,<sup>181</sup> the issuance of citations,<sup>182</sup> and the creation of enforcement procedures.<sup>183</sup> Notably, the

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175. *Id.*

176. *See supra* Parts I.B, I.C.3.

177. *Gregg*, 428 U.S. at 173 (quoting *Trop*, 356 U.S. at 101).

178. Kirk Mitchell, *Inmate Sues Pueblo Sawmill, Colorado Prison Officials After Serious Injury*, DENVER POST (Aug. 14, 2017), <https://www.denverpost.com/2017/08/14/pueblo-sawmill-injury-colorado-prison-lawsuit/>.

179. 29 U.S.C. § 651(b).

180. § 670.

181. § 657.

182. § 658.

183. § 659.

protections established by the Act only apply to employer-employee relationships.<sup>184</sup> Nonetheless, the Supreme Court has held that courts should construe the provisions of the Act broadly to best effectuate the intent of Congress.<sup>185</sup> Despite this urging from the Supreme Court, OSHA issued a directive in 1995, declaring that incarcerated workers are not “employees.”<sup>186</sup> While it provided that some incarcerated workers, under certain circumstances, may still be entitled to OSHA’s protection,<sup>187</sup> this protection only applies to those incarcerated in federal prisons.<sup>188</sup> As a result, states are left to create their own workplace-safety standards for incarcerated workers.<sup>189</sup> Given this opportunity, they have chosen to give incarcerated workers severely watered-down safety protections or no protections at all.<sup>190</sup> Thus, even though OSHA could fully protect incarcerated workers, it currently does not.

OSHA should issue a new directive classifying incarcerated workers as employees and urging states to follow suit, thus entitling them to the full protections the agency offers. This would provide incarcerated workers with the same workplace-safety protections as any non-incarcerated worker, filling the gaps left by judicial remedies. While the extension of Eighth Amendment protections would address instances of severely harsh, inhumane working conditions, the extension of OSHA protections would address the more run-of-the-mill labor safety considerations. If OSHA routinely inspected prison workplaces, ensured adequate training for incarcerated workers, and required prisons to remedy violations, the need for judicial remedies would likely disappear in many cases.

Furthermore, a requirement for workplace injury and death reporting is particularly important in the context of prison labor. Currently, neither OSHA nor the Bureau of Prisons is tracking injuries or deaths related to prison labor.<sup>191</sup> As a result, they do not know the full scope of the problems that unsafe prison labor conditions pose. Once this data is collected, OSHA may consider further solutions as it better understands the situation.

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184. Hauptman, *supra* note 21, at 78.

185. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980).

186. DIR. FAP 01-00-002, *supra* note 73, § F.

187. § G(3).

188. Interpretation Letter No. 1975.5, *supra* note 76.

189. *See id.*

190. Hauptman, *supra* note 21, at 85–86.

191. AM. C.L. UNION & U. OF CHI. L. SCH. GLOB. HUM. RTS. CLINIC, *supra* note 18, at 62.

*C. This Issue Should Be Brought to the Public's Attention*

Bringing a problem to the public's attention is a vital tool for social change. An example of this can be found at the turn of the 20th century, when Upton Sinclair put the horrors of the meat-packing industry into public view with his book, *The Jungle*.<sup>192</sup> When people found out the dark truth about what was in their food, a massive social movement came about.<sup>193</sup> In response, Congress passed comprehensive food-safety regulations.<sup>194</sup>

Ironically, Sinclair actually wrote *The Jungle* intending to bring attention to the inhumane labor conditions that meat-packing employees were facing, but the public instead focused on its effects on the food that they were eating.<sup>195</sup> While food-safety regulations are now in place, the labor conditions in meat-packing plants remain extremely dangerous.<sup>196</sup> However, the victims of these practices are no longer the Slavic immigrants of Mr. Sinclair's time, but incarcerated laborers, like Mr. Ellington who got sucked into the poultry-processing machine.<sup>197</sup>

Perhaps a story like Mr. Ellington's, broadcast widely, is what it would take to incite public action on prison labor conditions. Compelling personal stories have the power to cut through the static of media oversaturation in today's age and spur reform. In 2014, the *Serial* podcast brought mass attention to the deeply flawed prosecution of Adnan Syed.<sup>198</sup> Mr. Syed, at age 17, had been convicted of killing his girlfriend and was serving a life sentence.<sup>199</sup> *Serial* not only revolutionized podcasting and the medium of true crime, but made hundreds of millions of people aware of the profound flaws in the United States criminal justice system.<sup>200</sup> Furthermore, it brought

192. See generally UPTON SINCLAIR, *THE JUNGLE* (CreateSpace Independent Publishing Platform, 2015) (1906) (documenting dangerous and unsanitary conditions in Chicago's meatpacking industry and catalyzing landmark food safety legislation).

193. Roger I. Roots, *A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2419 (2001).

194. *Id.*

195. *Id.* at 2417.

196. *Id.* at 2419–21; Debbie Berkowitz & Patrick Dixon, *An Average of 27 Workers a Day Suffer Amputation or Hospitalization, According to New OSHA Data from 29 States*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 30, 2023), <https://www.epi.org/blog/an-average-of-27-workers-a-day-suffer-amputation-or-hospitalization-according-to-new-osha-data-from-29-states-meat-and-poultry-companies-remain-among-the-most-dangerous/>.

197. See discussion *supra* INTRODUCTION.

198. Serial Productions, 'Serial': Season 1, N.Y. TIMES, <https://www.nytimes.com/2022/09/20/podcasts/serial-adnan-syed.html>, (Oct. 5, 2022).

199. *Id.*

200. Aja Romano, *Serial Transformed True Crime—and the Way We Think About Criminal Justice*, VOX (June 3, 2024), <https://www.vox.com/culture/351238/serial-true-crime-podcast-criminal-justice-adnan-syed>.

enough attention to Mr. Syed's story that a judge overturned his conviction and freed him.<sup>201</sup> If hundreds of millions of people became aware of Mr. Ellington's story and other stories like it, surely they would demand that similar justice be given to the victims of inhumane prison labor conditions.

#### CONCLUSION

Every day, United States prisons subject incarcerated workers to blood-curdling, inhumane labor conditions. As it stands, these incarcerated workers have almost no recourse for this abuse. A combination of constitutional, administrative, and legislative remedies could go far to provide these workers with adequate safety protections. It would serve the United States to remember that a society is judged by how it treats its most powerless members. We are long overdue to provide basic human decency to ours.

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201. *Id.*

**CRUEL AND UNUSUAL PRIVATIZATION: HOW  
VERMONT’S PRIVATE PRISON CONTRACT RESTRICTS  
MEDICAL CARE**

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## INTRODUCTION

“[Individual] found unresponsive in his cell . . . .”<sup>1</sup> “Staff immediately began life-saving measures . . . .”<sup>2</sup> “[D]eath does not appear suspicious at this time.”<sup>3</sup> Three phrases often found in a press release or news article after a person dies in a private prison facility.

On February 25, 2024, Alfred Brochu was found unresponsive in his cell at 12:14 p.m. in the Tallahatchie County Correctional Facility (TCCF).<sup>4</sup> The next day, after being transferred to a medical center while in critical condition, Alfred died.<sup>5</sup> A 71-year-old from Newport, Vermont, Alfred served a life-without-parole sentence for aggravated murder.<sup>6</sup> Alfred had been in TCCF since 2011 due to Vermont Department of Corrections’ (DOC) contract with CoreCivic, a for-profit private prison company that owns facilities across the United States.<sup>7</sup> His death did not appear suspicious.<sup>8</sup> Two weeks after Alfred’s death, on March 10, 2024, prison staff found

1. See, e.g., Press Release, Dep’t of Corr., Vermont DOC Reports Death of Incarcerated Individual in Mississippi (Feb. 26, 2024) [hereinafter Vermont DOC Reports Death of Incarcerated Individual in Mississippi] (emphasis added), <https://doc.vermont.gov/press-release/vermont-doc-reports-death-incarcerated-individual-mississippi>; accord Press Release, Dep’t of Corr., Vermont DOC Reports Death of Incarcerated Individual in Springfield (Jan. 23, 2025) [hereinafter Vermont DOC Reports Death of Incarcerated Individual in Springfield (Jan. 2025)], <https://doc.vermont.gov/press-release/vermont-doc-reports-death-incarcerated-individual-springfield-9>; Press Release, Dep’t of Corr., Vermont DOC Reports Death of Incarcerated Individual in St. Albans (Sept. 11, 2023) [hereinafter Vermont DOC Reports Death of Incarcerated Individual in St. Albans], <https://doc.vermont.gov/press-release/vermont-doc-reports-death-incarcerated-individual-st-albans>.

2. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1 (emphasis added); Vermont DOC Reports Death of Incarcerated Individual in St. Albans, *supra* note 1; accord Vermont DOC Reports Death of Incarcerated Individual in Springfield (Jan. 2025), *supra* note 1; Press Release, Dep’t of Corr., Vermont DOC Reports Death of Incarcerated Individual in Springfield (Sept. 29, 2025) [hereinafter Vermont DOC Reports Death of Incarcerated Individual in Springfield (Sept. 2025)], <https://doc.vermont.gov/press-release/vermont-doc-reports-death-incarcerated-individual-springfield-10>.

3. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1 (emphasis added); Vermont DOC Reports Death of Incarcerated Individual in Springfield (Jan. 2025), *supra* note 1; Vermont DOC Reports Death of Incarcerated Individual in Springfield (Sept. 2025), *supra* note 2; accord Vermont DOC Reports Death of Incarcerated Individual in St. Albans, *supra* note 1.

4. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1; Ethan Weinstein, *Vermonter Incarcerated at Mississippi Private Prison Dies*, VTDIGGER (Feb. 26, 2024), <https://vtdigger.org/2024/02/26/vermonter-incarcerated-at-mississippi-private-prison-dies/>.

5. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1; Weinstein, *supra* note 4.

6. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1; Weinstein, *supra* note 4.

7. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1; Weinstein, *supra* note 4.

8. Vermont DOC Reports Death of Incarcerated Individual in Mississippi, *supra* note 1; Weinstein, *supra* note 4.

Sean Ousterhout unresponsive in his cell in TCCF.<sup>9</sup> Sean, a 43-year-old Barre, Vermont, native, died around half an hour later.<sup>10</sup> Sean served 5 years of his 14- to 30-year sentence.<sup>11</sup> His death did not appear suspicious.<sup>12</sup> On December 13, 2020, prison staff found Roberto Vargas unresponsive in his cell in TCCF.<sup>13</sup> Roberto, from Newport, Vermont, died the next day.<sup>14</sup> A Vermont court suspended all but 15 years of Roberto's 20-years-to-life sentence in 2017.<sup>15</sup> His death did not appear suspicious.<sup>16</sup> On September 2, 2019, Christopher Chase was found unresponsive in his cell in TCCF.<sup>17</sup> Chase was a 39-year-old from Vermont's Northeast Kingdom.<sup>18</sup> He died by suicide, hanging himself using a sheet and an electric cord.<sup>19</sup>

The Eighth Amendment explicitly states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>20</sup> When the state proves beyond a reasonable doubt that an individual committed a crime, the judge may incarcerate an individual based on the offense's sentencing guidelines.<sup>21</sup> Those sentencing guidelines, however, do not include losing medical access and treatment for illnesses or injuries. In practice, however, systemic administrative barriers often prevent incarcerated individuals from exercising these constitutional rights. Notably, a Vermont Superior Court agreed with Alfred that TCCF failed to provide grievance forms to incarcerated individuals or provided them upon request only after long delays.<sup>22</sup> The court stated that these delays “ma[de] it difficult

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9. VTD Editor, *Vermont Man Incarcerated in Mississippi Prison Dies*, VTDIGGER, (Mar. 10, 2024), <https://vtdigger.org/2024/03/10/vermont-man-incarcerated-in-mississippi-prison-dies/>.

10. *Id.*

11. *Id.*

12. *Id.*

13. Paul Heintz, *Vermont Inmate Dies at Mississippi Prison*, SEVEN DAYS (Dec. 14, 2020), <https://www.sevendaysvt.com/news/vermont-inmate-dies-at-mississippi-prison-31886921/>.

14. *Id.*

15. *Id.*

16. *Id.*

17. Alan J. Keays, *DOC: Vermont Inmate Dies of Apparent Suicide in Out-of-State Prison*, VTDIGGER (Sept. 3, 2019), <https://vtdigger.org/2019/09/03/doc-vermont-inmate-dies-of-apparent-suicide-in-out-of-state-prison/>.

18. *Id.*

19. *Id.*

20. U.S. CONST. amend. VIII.

21. *See Gall v. United States*, 552 U.S. 38, 50 (2007) (“[The judge] must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.”).

22. *Brochu v. Touchette*, No. 12-1-20 Wncv, 2021 WL 5112079, at \*3 (Vt. Sup. Ct. Feb. 2, 2021) (finding that Mr. Brochu had a statutory right to the reasonable availability of grievance forms at CoreCivic's facility).

or impossible to pursue” relief at the facility.<sup>23</sup> Without a functional grievance process, incarcerated individuals have no mechanism to report or remedy the very constitutional violations the Eighth Amendment prohibits. The Eighth Amendment’s Cruel and Unusual Punishments Clause must extend to protect people who are incarcerated from decreased medical care access in private for-profit facilities.

Oftentimes, engaging the public on an issue like prisoners’ healthcare rights proves to be a difficult task—unless the issue directly impacts them. Everyone in Vermont and across the country implicitly plays a role in continuing the private prison-industrial complex. Specifically, Vermont taxpayers pay \$7 million each year in taxes that fund the state’s CoreCivic contract.<sup>24</sup> The private prison-industrial complex generates nearly \$7.4 billion in revenue annually, making up 10% of the correctional market.<sup>25</sup> Private prisons, like CoreCivic or GEO Group, charge states \$30–\$200 per individual per day depending on the facility.<sup>26</sup> In 2023, Vermont DOC renewed its contract with CoreCivic for two years, setting a maximum cost of \$21,463,095 for 300 beds.<sup>27</sup> What would happen if taxpayer dollars went to improving peoples’ medical care rather than into a private prison’s pocket? Alfred’s death lost CoreCivic \$30–\$200 per day.<sup>28</sup>

Focusing on the numbers makes it easier to forget the constitutional violations real people face every day in these facilities. This Note uses Vermont as just one example of a state facing unconstitutional contractual problems with private prison companies, but these issues are not unique to Vermont.<sup>29</sup> This Note uses Vermont DOC’s contract with CoreCivic to demonstrate one state’s approach to outsourcing care for people who are

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23. *Id.*

24. James Lyall, *Prisons Are the Problem*, ACLU VT. (Jan. 23, 2020), <https://www.acluvt.org/news/prisons-are-problem>.

25. Thierry Godard, *The Economics of the American Prison System*, SMARTASSET, <https://smartasset.com/mortgage/the-economics-of-the-american-prison-system> (last updated May 30, 2023).

26. *CoreCivic Inc.*, INVESTIGATE (Sept. 15, 2024), <https://investigate.afsc.org/company/corecivic>; Liam Elder-Connors, *Vermont Renews Out-of-State Prison Contract with Private Company*, VT. PUB. (Sept. 27, 2023) [hereinafter Elder-Connors, *Vermont Renews*], <https://www.vermontpublic.org/local-news/2023-09-27/vermont-renews-out-of-state-prison-contract-with-corecivic-mississippi>.

27. *Id.*; VT. DEP’T OF CORR., AGENCY OF HUM. SERVS., STATE OF VERMONT CONTRACT # 46523, at 1, 4 (2022) (available at <https://doc.vermont.gov/document/doccocivic-contract>).

28. Elder-Connors, *Vermont Renews*, *supra* note 26. CoreCivic’s contracts charge states \$30–\$200 per incarcerated individuals a day depending on where incarcerated individuals are located. *Id.*

29. See KRISTEN M. BUDD, SENT’G PROJECT, PRIVATE PRISONS IN THE UNITED STATES 1 (Feb. 21, 2024) (“A total of 27 states and the federal government use private corporations like GEO Group, Core Civic, LaSalle Corrections, and Management and Training Corporation to run some of their corrections facilities.”).

incarcerated. Through a constitutional analysis of the Eighth Amendment, this Note argues that ending this contract will promote the rights and access to medical care for those incarcerated.<sup>30</sup>

Part I details private prisons' rise across the United States and how Vermont factors in. It then outlines United States Supreme Court precedent regarding private prisons and recognized standards for incarcerated individuals' medical claims. Part I concludes with the Vermont General Assembly's attempts at protective legislative action. Part II analyzes how private prisons violate Vermont incarcerated individuals' constitutional liberties protected by the United States Constitution's Eighth Amendment in a healthcare context.<sup>31</sup> Specifically, private prisons preclude access to quality medical care and inflict cruel and unusual punishment by limiting that right to access for those inside. Part III proposes actions for Vermont DOC and what relief incarcerated individuals can assert in the meantime. If Vermont DOC neglects to act, then the Vermont legislature must bring proposals back to the table. Ending the contract takes a step in the right direction by allowing Vermont to directly oversee its incarcerated individuals' healthcare access. Changes like these take time and money; therefore, Part III showcases ways incarcerated individuals can seek relief through the Vermont Constitution while the contract is still in effect. Overall, Vermonters must act, as this unconstitutional problem can no longer be ignored.

#### I. PRIVATE PRISONS, MASS INCARCERATION, AND VERMONT'S SOLUTIONS

Understanding private prisons' origin is crucial to understanding their unconstitutionality.

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30. This Note does not purport to solve all the issues that the nation and Vermont face by continuing privatization. Rather, this Note serves as a commentary on how prison privatization implicates neglected constitutional rights.

31. Private prisons violate the Thirteenth Amendment by enslaving prisoners for profits, but because the crime exception remains in the Amendment, incarcerated individuals are barred from relief under it. U.S. CONST. amend. XIII, § 1; *see* Sammy Brown, *A Badge of Slavery: How Private Prisons Are Unconstitutional Under the Thirteenth Amendment* 15 (Dec. 21, 2017) (unpublished manuscript) (available at <https://ssrn.com/abstract=3253206>); ACLU & GLOB. HUM. RTS. CLINIC, UNIV. OF CHI. L. SCH., *CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS* 5 (2022).

*A. The Catastrophic Reincarnation of Private Prisons*

Private prisons are not a new phenomenon in the United States.<sup>32</sup> Rather, the facilities date back to before the Civil War.<sup>33</sup> In 1844, Louisiana privatized a penitentiary by leasing it to a company, McHatton, Pratt, & Ward, which ran the facility as a factory.<sup>34</sup> Incarcerated individuals there made clothing for people who were enslaved.<sup>35</sup> Other southern states followed the trend, using incarcerated individuals as free laborers.<sup>36</sup> The Civil War's end led to abolishing slavery, but the Thirteenth Amendment permitted slavery as punishment for crimes.<sup>37</sup> Privatization continued to grow because states could not afford to run penitentiaries, so companies took the lead.<sup>38</sup> Incarcerated individuals suffered egregious treatment in these facilities.<sup>39</sup> In 1871, companies in Tennessee forced incarcerated individuals to work in the mines and even collected incarcerated individuals' urine to sell to tanneries.<sup>40</sup> After exhaustion or disease took incarcerated individuals' lives, Tennessee companies sold incarcerated individuals' bodies to medical schools for students to practice on.<sup>41</sup>

In the 1920s, private prisons took a different form. Private prisons in this period operated juvenile justice facilities, halfway houses, work-release programs, and immigration detention centers.<sup>42</sup> These facilities also provided services such as healthcare, food service, educational and vocational programs, and staff training.<sup>43</sup> During this time, private prisons focused on

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32. Eleven other countries use a variation of private prisons like in the United States. Specifically, England, Scotland, Wales, Germany, France, South Africa, New Zealand, Australia, Japan, Brazil, and Chile all operate prisons at some degree of privatization, with some utilizing a private-public partnership model, which maintains some state agency in overseeing its incarcerated population. CODY MASON, SENT'G PROJECT, INTERNATIONAL GROWTH TRENDS IN PRISON PRIVATIZATION, 2-3 (2013).

33. Shane Bauer, *The True History of America's Private Prison Industry*, TIME (Sept. 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

34. *Id.* An incarcerated individual in his memoir wrote that "as soon as the prison was privatized, his jailers 'laid aside all objects of reformation and re-instated the most cruel tyranny, to eke out the dollar and cents of human misery.'" *Id.*

35. *Id.*

36. *Id.*

37. U.S. CONST. amend. XIII, § 1.

38. Bauer, *supra* note 33.

39. *Id.*

40. *Id.*

41. *Id.*

42. David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 816 (1987).

43. *Id.*; Shymeka L. Hunter, *More than Just a Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?*, 17 ALASKA L. REV. 319, 321 (2000) (examining the constitutionality of incarcerating individuals in private prisons outside of Alaska in

“convict leasing.”<sup>44</sup> Convict leasing took the form of contracting incarcerated individuals as workers to private entrepreneurs.<sup>45</sup> Eventually, the labor movement challenged the practice of leasing individuals.<sup>46</sup> Congress temporarily sealed private prisons’ fate by passing the Hawes-Cooper Act, banning prison-made goods from interstate commerce.<sup>47</sup> Consequently, the need for facilities decreased, and facilities did not survive.<sup>48</sup>

Increased incarceration rates helped private prisons reenter the market. In the 1980s, when mass incarceration reared its ugly head, the market assigned greater value to for-profit prisons.<sup>49</sup> This value increased because states did not have the capacity to house incarcerated individuals on their own.<sup>50</sup> In 1985, over 740,000 individuals were incarcerated in the United States—with the number steadily increasing.<sup>51</sup> In 1990, 1.1 million individuals were incarcerated.<sup>52</sup> By 1995, the number rose to nearly 1.6 million individuals.<sup>53</sup> And in 2003, the nation incarcerated over 2.1 million individuals.<sup>54</sup> The United States makes up only 4% of the world’s population but accounts for 22% of the world’s prison population.<sup>55</sup>

Tough-on-crime propaganda and the War on Drugs resulted in exponential prison rate growth across the country.<sup>56</sup> State research in the

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relation to an Alaska Supreme Court holding); see Richard Culp, *Prison Privatization Turns Twenty-Five: The Evolution of a Mature Private Prison Industry in the United States* 11 (July 15, 2009) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1462792](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1462792)).

44. Culp, *supra* note 43, at 3.

45. *Id.*

46. *Id.* at 4.

47. *Id.*; DERECK ORR ET AL., *COLL. OF WM. & MARY, PRIVATE SECTOR PRISON INDUSTRIES: A REPORT TO THE STATES* 7 (n.d.).

48. Culp, *supra* note 43, at 4.

49. See Peter J. Duitsman, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2217 (1998); DAVID SHAPIRO, ACLU, *BANKING ON BONDAGE PRIVATE PRISONS AND MASS INCARCERATION* 9 (2011). The terms “private prisons” and “for-profit prisons” are interchangeable. *Id.*

50. See e.g., BUDD, *supra* note 29, at 1 (“The resulting burden on the public sector led to the modern emergence of for-profit prisons in many states and the federal system.”); Lauren Kozmor, *Profit, Power, and Prison*, BROWN POL. REV. (Nov. 1, 2025), <https://brownpoliticalreview.org/profit-power-and-prison/> (“This surge in incarceration overwhelmed the capacity of public facilities, leading to the rise of for-profit prisons in many states and the federal system.”).

51. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002*, at 478 (Kathleen Maguire & Ann L. Pastore eds., 2004).

52. *Id.*

53. *Id.*

54. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUST., *BULLETIN NO. NCJ 205335, PRISONERS IN 2003*, at 2 (2004).

55. German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX, <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts> (last updated Oct. 11, 2016).

56. Lisa D. Moore & Amy Elkavich, *Who’s Using and Who’s Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782, 782 (2008).

1980s showed an 8–15% savings through private prison use, but the Government Accountability Office noted “the difficulty in making valid comparisons between public and private sector costs of running a prison and criticized the methodological validity of the body of existing privatization cost comparison research.”<sup>57</sup> With heightened incarceration rates, private prison corporations chomped at the bit to provide a service states were unable to fulfill.<sup>58</sup> These groups wasted no time in building facilities across the country with enough beds to match the growing incarceration rates.<sup>59</sup>

### *B. The Major Players: CoreCivic and Wellpath*

CoreCivic exists as one of the major private prison companies in the United States.<sup>60</sup> Right on time with the War on Drugs, in 1983, CoreCivic began as Correctional Corporation of America (CCA) in Nashville, Tennessee.<sup>61</sup> At its founding, CCA had no experience in corrections.<sup>62</sup> Founder Terrell Don Hutto, however, did have experience running a cotton plantation in the 1960s, where predominately Black people convicted of crimes picked cotton for no pay.<sup>63</sup> To bridge its lack of knowledge, CCA hired management from the public sector.<sup>64</sup> Currently, CoreCivic operates 82 private prison facilities across the United States.<sup>65</sup> In 2023, CoreCivic reported a total revenue of \$1.9 billion with Damon Hiniger, its president and

57. Culp, *supra* note 43, at 6.

58. Exec. Order No. 12,803, 3 C.F.R. 296, 296–97 (1993), reprinted in 31 U.S.C. § 501 app. at 39 (2006).

59. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 457 (2005).

60. *About Us*, CORECIVIC, <https://www.corecivic.com/facilities> (last visited May 17, 2026) (“We are the nation’s largest owner of partnership correctional, detention and residential reentry facilities, and one of the largest prison operators in the United States.”); *see also* PAUL ASHTON & AMANDA PETERUTI, JUST. POL’Y INST. GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 6 (2011). This Note focuses on CoreCivic, as Vermont currently contracts with that facility.

61. *See generally* Alan Mobley & Gilbert Geis, *The Corrections Corporation of America AKA the Prison Realty Trust, Inc.*, in *PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE* 207, 209 (David Shichor & Michael J. Gilbert eds., 2001) (detailing the history of CCA’s founding).

62. *Id.*

63. Bauer, *supra* note 33. Thomas Beasley and Doctor Robert Crants also aided in CCA’s founding, with Beasley comparing private prisons to “selling cars, or real estate, or hamburgers.” *See* Mobley & Geis, *supra* note 61, at 209.

64. *See* Mobley & Geis, *supra* note 61, at 218 (stating that a “large percentage” of the Federal Bureau of Prisons’ executive staff departed to the private-prison sector). The same investors who aided in funding the Hospital Corporation of America and Kentucky Fried Chicken also partly financed the CCA. Aric Press, *Good, the Bad, and the Ugly: Private Prisons in the 1980’s*, in *PRIVATE PRISONS AND THE PUBLIC INTEREST* 19, 19 (1990).

65. *Find a Facility*, CORECIVIC, <https://www.corecivic.com/facilities> (last visited May 17, 2026).

chief executive officer, stating, “CoreCivic is experiencing strong business momentum” heading into 2024.<sup>66</sup>

Yet, CoreCivic’s strong business momentum does not correlate to quality facility conditions. Most recently, the United States Department of Justice announced a civil rights investigation into conditions at Trousdale Turner Correctional Center (TTCC), owned and operated by CoreCivic.<sup>67</sup> In a press release, former Assistant Attorney General Kristen Clarke of the Justice Department’s Civil Rights Division said that “[p]eople are incarcerated at [TTCC] as punishment for their crimes, but in our legal system, punishment does not and cannot include violence and sexual abuse.”<sup>68</sup> In 2024, CoreCivic spent over \$4.4 million in lawsuit settlements involving at least 22 incarcerated individuals deaths.<sup>69</sup> As of May 2026, CoreCivic faces an ongoing class action lawsuit, joined by individuals in CoreCivic’s California facilities.<sup>70</sup> The suit alleges that CoreCivic coerced or forced detainees to clean areas of the facility outside of their personal living area under threat of punishment and without adequate pay.<sup>71</sup>

CoreCivic denies incarcerated individuals access to adequate healthcare services. In 2016, TTCC agreed to “pause the ramp-up” of incarcerated individuals at the facility following “serious issues.”<sup>72</sup> Prison staff provided

66. News Release, CoreCivic, CoreCivic Reports Fourth Quarter and Full Year 2023 Financial Results (Feb. 7, 2024) [hereinafter *CoreCivic Reports Fourth Quarter and Full Year 2023 Financial Results*], <https://ir.corecivic.com/news-releases/news-release-details/corecivic-reports-fourth-quarter-and-full-year-2023-financial>. In 2023, CEO Hiniger’s salary amounted to \$1,060,751, and he obtained an additional \$1,788,378 bonus. *Damon T. Hininger*, SALARY.COM, <https://www.salary.com/tools/executive-compensation-calculator/damon-t-hininger-salary-bonus-stock-options-for-corecivic-inc?year=2023> (last visited May 17, 2026). Hiniger’s total amount earned in 2023 was \$5,792,037, including his \$2,799,997 stock award and \$142,911 in other compensation. *Id.*

67. Press Release, U.S. Dep’t of Just., Justice Department Announces Civil Rights Investigation into Conditions at Tennessee’s Trousdale Turner Correctional Center (Aug. 20, 2024), <https://www.justice.gov/opa/pr/justice-department-announces-civil-rights-investigation-conditions-tennessees-trousdale>. The investigation began August 20, 2024, after staffing shortages, physical and sexual assaults, murders, and a 188% turnover rate among prison guards in 2023. *Id.*

68. *Id.*

69. Jonathan Mattise et al., *Private Prison Giant Has Spent over \$4.4m to Settle Mistreatment Complaints in 1 State—Including at Least 22 Inmate Deaths*, FORTUNE (Oct 14, 2024), <https://fortune.com/2024/10/14/private-prison-corecivic-settle-mistreatment-complaints-tennessee-inmate-deaths/>.

70. *Owino v. CoreCivic*, No. 17-cv-1112 JLS, 2024 WL 2031647, at \*1 (S.D. Cal. May 3, 2024); Plaintiffs and Counter-Defendants’ Notice of Withdrawal of Motion for Leave to Clarify or Amend, *Owino v. CoreCivic*, No. 3:17-CV-01112 JLS, 2024 WL 2031647 (S.D. Cal. Apr. 16, 2026).

71. *Owino*, 2024 WL 2031647, at \*1.

72. Dave Boucher, *New Tennessee CCA Prison Stops Taking Incarcerated Individuals amid ‘Serious Issues’*, TENNESSEAN (May 24, 2016), <https://www.tennessean.com/story/news/politics/2016/05/24/new-tennessee-private-prison-stops-taking-inmates/84867834/>.

“inferior care,” specifically, denying one incarcerated individuals access to his inhaler and other necessary medicines.<sup>73</sup> In 2017, Douglas Dodson and Jasper Vick filed a class action suit against TTCC for depriving incarcerated individuals’ access to basic diabetic care at the facility.<sup>74</sup> The plaintiffs alleged that CoreCivic subjected incarcerated individuals to cruel and unusual punishment, violating the Eighth Amendment by enacting policies and practices manifesting “deliberate indifference” to individuals’ serious medical needs.<sup>75</sup> The facility deprived insulin-dependent incarcerated individuals access to blood sugar monitoring during mealtimes.<sup>76</sup> Because the court previously certified the plaintiffs’ case as a class action, the court did not deem the case moot; however, the court, in prior cases, found non-class action plaintiffs’ issues moot after the incarcerated individuals were transferred to another facility.<sup>77</sup> The parties eventually settled and the court entered a judgment order on July 25, 2019.<sup>78</sup> The order outlined a protocol CoreCivic must follow for insulin-dependent incarcerated individuals and detailed language CoreCivic must add to its written policies and training materials.<sup>79</sup> This judgment did not stop CoreCivic from continuing to deny adequate diabetic care. On February 5, 2020, Jason Cunningham, an incarcerated individuals at TTCC, wrote to the court that the order was “not being enforced.”<sup>80</sup> Cunningham further stated, “Someone really needs to look into this prison.”<sup>81</sup>

CoreCivic facilities lack necessary healthcare and mental health intervention services. In 2020, John and Soynia Smith brought a wrongful death suit against CoreCivic.<sup>82</sup> They asserted that the facility failed to provide

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73. *Id.*

74. Class Action Complaint, *Dodson v. CoreCivic*, No. 3:17-cv-00048, 2018 WL 4800836, at \*1 (M.D. Tenn. Oct. 3, 2018).

75. *Id.*

76. *Id.* This is not the first time CoreCivic denied individuals access to diabetic treatment. Cynthia Yue, *The Private Prison Industrial Complex*, EQUAL JUST. UNDER L. (Jan. 18, 2019), <https://equaljusticeunderlaw.org/thejusticereport/privateprisonindustrialcomplex>. “Two other class-action lawsuits claim that the same facility failed to properly screen or treat those affected by a previous scabies outbreak; other lawsuits against CoreCivic filed in the past dealt wrongful deaths and failed guard intervention.” *Id.*

77. *Dodson*, 2018 WL 4800836, at \*3 n.3. The court did, however, dismiss the plaintiffs’ Americans with Disabilities Act claim because CoreCivic is not a “public entity” as defined by the statute. *Id.* at \*6–7.

78. Judgment, *Dodson*, 2018 WL 4800836 (No. 3:17-cv-00048).

79. *Id.* at 1–2.

80. Letter from Jason Cunningham to Judge Richardson at 1, *Dodson*, 2018 WL 4800836 (No. 3:17-cv-00048).

81. *Id.* at 2.

82. *Smith v. CoreCivic, Inc.*, 3:20-cv-00563, 2022 WL 17640183, at \*2 (M.D. Tenn. Dec. 12, 2022).

adequate mental illness treatment on behalf of their son, who died by suicide four days after another incarcerated individual sexually assaulted him.<sup>83</sup> Following the tragic and preventable death of Kelsey Vial, a 23-year-old Brazilian asylum seeker, the American Civil Liberties Union of New Mexico sued CoreCivic for wrongful death.<sup>84</sup> Vial died by suicide under the company's watch.<sup>85</sup> CoreCivic employees ignored "critical red flags"<sup>86</sup> and sent Vial to an unoccupied cell with a bedsheet, leaving him unsupervised for 30 minutes during a "count."<sup>87</sup>

Additionally, research indicates higher assault levels within CoreCivic's facilities. In private facilities, violent attacks by incarcerated individuals toward correctional officers were 163% higher than in public facilities.<sup>88</sup> Further, United States Department of Justice researchers found that incarcerated individuals-on-incarcerated individuals assaults in private facilities are 28% higher than in public facilities.<sup>89</sup> Private prisons in Kentucky were forcibly shut down following sexual abuse allegations and large prison riots.<sup>90</sup> Yet these facilities have since reopened despite the actions that led to constitutional violations.<sup>91</sup>

With elevated assault rates come an elevated constitutional mandate for adequate healthcare access. Wellpath, a Tennessee-based corrections healthcare provider, attempts to fill that need through contracts with various

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83. *Id.*

84. Complaint at 16–17, *Estate of Kelsey Vial v. CoreCivic & Dr. Christopher Clancy*, D-101-cv-2022-01722 (N.M. Dist. Ct. 2023).

85. *Id.* at 17.

86. Press Release, ACLU, *ACLU Sues Private Prison Company After Preventable Death of Asylum Seeker at Torrance Detention Facility* (Sept. 27, 2023), <https://www.aclu.org/press-releases/aclu-sues-private-prison-company-after-preventable-death-of-asylum-seeker-at-torrance-detention-facility>.

87. Complaint, *supra* note 84. As of January 2026, the trial will not proceed, as the parties are "in the process of finalizing the settlement agreement." Press Release, ACLU N.M., *Trial in Wrongful Death Case of Kelsey Vial Will Not Proceed* (Jan. 4, 2026), <https://www.aclu-nm.org/press-releases/the-wrongful-death-trial-on-behalf-of-the-estate-of-kelsey-vial-scheduled-to-begin-monday-january-5-2026-in-first-judicial-district-court-will-not-proceed/>.

88. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., *REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS*, at 19 (2016). The Department of Justice's Office of the Inspector General conducts reviews of the federal private prison contracts to analyze how the Bureau of Prisons monitors the facilities. *Id.* at i. Research in 2016 showed contract prisons "incurred more safety and security incidents per capita than comparable BOP institutions." *Id.*

89. *Id.* at 18.

90. Morgan Watkins, *Kentucky Will Reopen Private Prison Despite Past Inmate Sex Abuse*, *COURIER J.* (Nov. 16, 2017), <https://www.courier-journal.com/story/news/2017/11/16/kentucky-reopen-private-prison-despite-past-inmate-sex-abuse/867367001/> (stating that a Tennessee state audit released in 2017 found "major staffing and managerial problems at a CoreCivic-run prison" in Tennessee).

91. *Id.*

states and CoreCivic facilities.<sup>92</sup> The company services roughly 200,000 individuals daily.<sup>93</sup> Wellpath has undergone restructuring over the years. In 2018, a multi-billion-dollar private equity firm, HIG Capital, acquired Wellpath, then known as Correct Care Solutions.<sup>94</sup> HIG Capital merged then-Correct Care Solutions with Correctional Medical Group Companies to form Wellpath.<sup>95</sup> But in 2019, Gerald Boyle, Wellpath's founder, was indicted for federal bribery charges, following exposure of a 12-year stint providing cash and gifts to former Norfolk, Virginia, Sheriff Robert McCabe.<sup>96</sup> Those gifts inspired McCabe to favor Wellpath for medical service contracts and insider bidding information.<sup>97</sup> Despite this history, Wellpath contracts with more than 500 facilities across 34 states, bringing in \$1.5 billion in annual revenue.<sup>98</sup>

Wellpath's acquisition has not shielded it from legal trouble. In 2021, Thomas Leighton sued Wellpath for wrongful death after his son, Andrew, died in prison.<sup>99</sup> Andrew sought medical attention five times from Wellpath between July 31, 2018 and October 1, 2018, and asked a nurse to be admitted for monitoring after having difficulty breathing and feeling a golf-ball-sized lump blocking his airway.<sup>100</sup> The nurse denied Andrew's request, and Andrew died on October 1, 2018.<sup>101</sup> His story is unfortunately not unique. A CNN investigation discovered that Wellpath faced more than 1,400 lawsuits from 2014 to 2018, involving over 70 deaths.<sup>102</sup>

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92. Liam Elder-Connors, *Vt. Prisons Will Have a New Medical Contractor July 1. The Company Is Accused of Providing Inadequate Care*, VT. PUB. (Apr. 5, 2023) [hereinafter Elder-Connors, *Vt. Prisons*], <https://www.vermontpublic.org/local-news/2023-04-05/vt-prisons-will-have-a-new-medical-contractor-july-1-the-company-is-accused-of-providing-inadequate-care>.

93. *About*, WELLPATH, <https://wellpathcare.com/about/> (last visited May 17, 2026).

94. Elder-Connors, *Vt. Prisons*, *supra* note 92.

95. Marsha McLeod, *The Private Option*, ATLANTIC (Sept. 12, 2019), <https://www.theatlantic.com/politics/archive/2019/09/private-equitys-grip-on-jail-health-care/597871/>.

96. Indictment ¶ 7, *United States v. McCabe*, No. 19-cr-00171, 2019 WL 10836031 (E.D. Va. Oct. 24, 2019). HIG Capital also owns TKC Holdings, a prison and detention food provider, and previously owned Securus, a prison phone company. PESP Admin, *Founder of HIG Capital-owned Wellpath Indicted on Federal Bribery Charges*, PRIV. EQUITY STAKEHOLDER PROJ. (Dec. 5, 2019), <https://pestakeholder.org/news/founder-of-hig-capital-owned-wellpath-indicted-on-federal-bribery-charges-2/>.

97. Indictment ¶¶ 9–10, *supra* note 96.

98. Blake Ellis & Melanie Hicken, *A CNN Investigation Exposes Preventable Deaths and Dangerous Care That Government Agencies Have Failed to Stop*, CNN (June 25, 2019), <https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/index.html>.

99. *Maine Father Says Negligence Led His Imprisoned Son's Death*, AP NEWS (Feb. 5, 2021), <https://apnews.com/article/lawsuits-maine-prisons-27cd03e5d6c1b1ab6276d37402117689>.

100. *Id.*

101. *Id.*

102. Ellis & Hicken, *supra* note 98.

This legal trouble likely contributed to Wellpath's \$644 million in debt.<sup>103</sup> On November 11, 2024, Wellpath Holdings, Inc. and its affiliated companies filed petitions in the United States Bankruptcy Court for the Southern District of Texas seeking Chapter 11 bankruptcy.<sup>104</sup> Due to the bankruptcy proceedings, the court granted stays in all lawsuits involving Wellpath.<sup>105</sup> These stays blocked individuals and families from continuing to seek relief against Wellpath for their claims ranging from negligence to wrongful deaths.<sup>106</sup> But now, the company has emerged from Chapter 11 to lead a "new era in correctional healthcare."<sup>107</sup>

### C. Vermont Enters the Private Fold

In the late 1990s, Vermont DOC began contracting with out-of-state prisons.<sup>108</sup> Since then, Vermont's overall prison population has declined.<sup>109</sup> Vermont is a smaller state than most;<sup>110</sup> no private facilities exist within the state, leading Vermont to house incarcerated individuals at facilities far beyond state borders.<sup>111</sup> Currently, Vermont has six correctional facilities within the state.<sup>112</sup> In 2014, a Vermont Superior Court held in *Carpenter v. Pallito* that Vermont DOC's policy of sending male incarcerated individuals out of state was unconstitutional, reasoning that it violated the Equal Protection Clause and Common Benefits Clause in the Vermont

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103. Dietrich Knauth, *Wellpath Spins Off Behavioral Health Unit in Bankruptcy Sale*, REUTERS, <https://www.reuters.com/legal/government/wellpath-spins-off-behavioral-health-unit-bankruptcy-sale-2025-01-08/> (Jan. 8, 2025).

104. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Wellpath SF Holdco, LLC, No. 24-90566 (Bankr. S.D. Tex. Nov. 11, 2024); see *Wellpath Takes Action to Strengthen Financial Foundation and Position Business for Future, Ensuring Uninterrupted Service Delivery*, WELLPATH (Nov. 12, 2024), <https://wellpathcare.com/2024/11/12/wellpath-takes-action-to-strengthen-financial-foundation-and-position-business-for-future-ensuring-uninterrupted-service-delivery/>.

105. Jaelyn Diaz, *A Health Care Provider that Faced Dozens of Prisoner Lawsuits Is Filing for Bankruptcy*, NPR (Dec. 27, 2024), <https://www.npr.org/2024/12/27/nx-s1-5223873/wellpath-prison-bankruptcy-lawsuits>.

106. *Id.*

107. *Wellpath Emerges from Chapter 11 to Lead a New Era in Correctional Healthcare*, WELLPATH (May 12, 2025), <https://wellpathcare.com/2025/05/12/wellpath-emerges-from-chapter-11-to-lead-a-new-era-in-correctional-healthcare/>.

108. Elder-Connors, *Vermont Renews*, *supra* note 26.

109. *Id.*

110. Matt Rosenberg, *What Are the Smallest States in the U.S.?*, THOUGHTCO. (May 5, 2025), <https://www.thoughtco.com/smallest-states-in-the-united-states-4071971>.

111. *Correctional Facilities*, DEP'T OF CORR., <https://doc.vermont.gov/correctional-facilities> (last visited May 17, 2026).

112. *Id.* South Burlington, Rutland, St. Johnsbury, Newport, Swanton, and Springfield contain facilities. *Id.*

Constitution.<sup>113</sup> Michael Carpenter was housed at CCA's (now CoreCivic) Lee Adjustment Center in Kentucky, denying him contact with his minor children.<sup>114</sup> The Superior Court determined that removing fathers' access to their children does not advance any governmental interest.<sup>115</sup> This holding had no impact on DOC's contracts with prison companies. Until 2015, CoreCivic held Vermont incarcerated individuals in Kentucky and Arizona facilities pursuant to DOC's contracts.<sup>116</sup> Then in 2015, Vermont DOC entered a two-year \$30 million contract with GEO Group, which transferred incarcerated individuals from Arizona and Kentucky to GEO Group's North Lake Correctional Facility in Michigan.<sup>117</sup>

Vermont's need for prison facilities decreased in the years to follow. In 2016, beds at Caledonia Community Work Camp, a state facility housing non-violent and low-level offenders, were left empty as the facility's population drastically decreased in size.<sup>118</sup> In January 2018, CoreCivic lobbied the Vermont legislature to build and lease a new 950-bed facility to the state.<sup>119</sup> Later in 2018, Vermont DOC announced a new contract with CoreCivic, which sent 228 incarcerated individuals from a state-run Pennsylvania prison in Camp Hill to CoreCivic's private prison in Mississippi.<sup>120</sup> Since then, however, Vermont DOC terminated the three-year contract with the Camp Hill State Correctional Institution following concern over incarcerated individuals' treatment.<sup>121</sup> Four Vermonters died at the state-run facility—Roger Brown, Herb Rodgers, Tim Adams, and Michael Senna.<sup>122</sup> Vermont DOC had the option between CoreCivic's contract and a contract with the Central Falls Detention Facility Corporation

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113. *Carpenter v. Pallito*, No. 531-9-13 Wncv, 2014 Vt. Super. LEXIS 52, at \*28, \*31, \*33 (Vt. Super. Ct. Aug. 13, 2014).

114. *Id.*

115. *Id.* at \*19.

116. See Taylor Dobbs, *State Hopes to Close Out-of-State Prison Program*, VT. PUB. (June 11, 2015), <https://www.vermontpublic.org/vpr-news/2015-06-11/state-hopes-to-close-out-of-state-prison-program>; Henry Epp, *Vermont Will Send Out-of-State Inmates to Private Mississippi Prison*, VT. PUB. (Sept. 19, 2018), <https://www.vermontpublic.org/vpr-news/2018-09-19/vermont-will-send-out-of-state-inmates-to-private-mississippi-prison>.

117. Dobbs, *supra* note 116.

118. April McCullum, *Why Vermont Could Close St. Johnsbury Prison Work Camp*, BURLINGTON FREE PRESS (Mar. 13, 2016), <https://www.burlingtonfreepress.com/story/news/politics/2016/03/13/why-vermont-could-close-st-johnsbury-prison-work-camp/81453576/>.

119. Katy Savage, *Vermont Prisoners to Be Moved to Mississippi Prison Run by CoreCivic*, VTDIGGER (Sept. 9, 2018), <https://vtdigger.org/2018/09/09/vermont-prisoners-moved-mississippi-prison-run-corecivic/>.

120. Epp, *supra* note 116.

121. Savage, *supra* note 119.

122. *Id.*

in Rhode Island.<sup>123</sup> Ultimately, Vermont DOC chose CoreCivic despite its farther distance from Vermont.<sup>124</sup>

Healthcare issues taint Vermont's history with CoreCivic. In 2020, COVID-19 infiltrated private prisons at concerning rates, as the disease plagued the country.<sup>125</sup> Specifically, Vermont's incarcerated individuals at CoreCivic's Tallahatchie County Correctional Facility (TCCF) faced an enormous outbreak, infecting 146 Vermont incarcerated individuals in Mississippi.<sup>126</sup> The Vermont Prisoners' Rights Office filed a lawsuit on behalf of Brian Butler, who detailed how TCCF failed to follow any social distancing policies and provided no disinfectant materials.<sup>127</sup> TCCF prison staff maintained "business as usual" despite testing positive for COVID-19 themselves.<sup>128</sup> A court dismissed the lawsuit after TCCF complied with Butler's requests.<sup>129</sup> Subsequently, in 2023, Vermont DOC renewed its contract with CoreCivic for two years, setting a maximum cost of \$21,463,095 for 300 beds; meanwhile, Vermont DOC only housed 120 prisoners in the facility.<sup>130</sup>

Yet, where did this power to contract away incarcerated individuals come from? Enter *Daye v. Vermont*.<sup>131</sup> In 2000, the Vermont Supreme Court held in *Daye* that Vermont's DOC Commissioner had implicit authority to enter into out-of-state contracts, notwithstanding an Interstate Corrections Compact (ICC) provision authorizing contracts only with member states.<sup>132</sup> The ICC codifies the agreement between member states to provide correctional facilities that "serv[e] the best interests of such offenders and of society and effect[] economies in capital expenditures and operational

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123. *Id.*

124. *Id.*

125. Miltonette Olivia Craig et al., *Incarcerated in a Pandemic: How COVID-19 Exacerbated the "Pains of Imprisonment"*, 49 CRIM. JUST. REV. 244, 244 (2023).

126. Kevin McCallum, *A Covid Outbreak Prompts Scrutiny of Vermont's Private Prison Contract*, SEVEN DAYS (Aug. 12, 2020), <https://www.sevendaysvt.com/news/a-covid-outbreak-prompts-scrutiny-of-vermonts-private-prison-contract-30984338/>.

127. *Id.*

128. *Id.*

129. *Id.*

130. Elder-Connors, *Vermont Renews*, *supra* note 26.

131. 171 Vt. 475, 769 A.2d 630 (2000).

132. *Id.* at 479, 769 A.2d at 634. John Gorczyk was the DOC Commissioner at the time of litigation, but this applies to any Vermont DOC Commissioner. *Id.* at 476, 769 A.2d at 631. Additionally, the Vermont DOC Commissioner's power to engage in the interstate commerce of people is codified in VT. STAT. ANN. tit. 28, § 102(6) (2026). The Commissioner must "maintain security, safety, and order at the correctional facilities and act to subdue any disorder, riot, or insurrection that may occur at any facility." *Id.*

costs.”<sup>133</sup> The ICC permits administrative and judicial officers to form nationwide contractual agreements for housing and treating offenders with prison sentences among participating states, ultimately allowing states to transfer incarcerated individuals interstate.<sup>134</sup> Further, the Vermont Supreme Court held in *Daye* that a contract delegating Virginia authorities the right to designate prison assignment of incarcerated individuals transferred from Vermont did not violate the ICC.<sup>135</sup>

As of May 2026, Vermont DOC incarcerates 1,656 total individuals, with 147 males located out of the state.<sup>136</sup> Males are the only gender currently housed at out-of-state facilities.<sup>137</sup> Ninety percent of DOC’s entire population receives medication, 70% receive psychotropic medications, and 55–60% receive medication for Opioid Use Disorder.<sup>138</sup> In fiscal year 2023, DOC saw 3,756 patient intakes, a 45% increase from the previous year.<sup>139</sup> Per month, an average of 1,117 individuals received medication.<sup>140</sup> Chronic illness affects 1,000 individuals who are incarcerated, representing 90% of DOC’s population.<sup>141</sup>

Vermont DOC currently contracts out its prison health services to Wellpath.<sup>142</sup> The \$113,524,463.73 agreement began on July 1, 2023, and extends until June 30, 2026.<sup>143</sup> The contract acknowledges that DOC is responsible for all incarcerated individuals healthcare and that DOC’s Health Division ensures that Wellpath complies with Eighth Amendment rights, state law, and National Commission for Correctional Health Care (NCCHC) standards.<sup>144</sup> Per the contract, Wellpath provides DOC with monthly and

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133. NAT’L CTR FOR INTERSTATE COMPACTS, INTERSTATE CORRECTIONS COMPACTS, art. I (2010). “The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.” *Id.*

134. *Id.* art. IV(c). Forty jurisdictions currently follow the compact, and Vermont joined in 1969. *Interstate Corrections Compact Scope*, NAT’L CTR FOR INTERSTATE COMPACTS, <https://compacts.csg.org/compact/interstate-corrections-compact/> (last visited May 17, 2026).

135. *Daye*, 171 Vt. at 478, 769 A.2d at 633.

136. *Daily Counts Dashboard*, DEPT. OF CORR., <https://doc.vermont.gov/daily-counts-dashboard> (last visited May 17, 2026).

137. *Id.*

138. DEP’T OF CORR., SFY25 BUDGET PROPOSAL 9 (2024).

139. *Id.* at 10.

140. *Id.*

141. *Id.* at 9.

142. VT. DEP’T OF CORR., AGENCY OF HUM. SERVS., STATE OF VERMONT CONTRACT # 46573, at 1 (2022) [hereinafter VERMONT CONTRACT # 46573] (available at <https://doc.vermont.gov/document/docwellpath-full-contract>).

143. *Id.*

144. *Id.* at 8.

quarterly reports in advance of required meetings.<sup>145</sup> Further, Wellpath must comply with all NCCHC standards relating to accessing care, medical autonomy, and responsible health authority.<sup>146</sup> DOC formerly contracted with Correct Care Solutions (Wellpath's former name) from 2010 to 2015.<sup>147</sup>

#### *D. The United States Supreme Court Weighs In*

The Supreme Court provided incarcerated individuals with a constitutional right to healthcare through *Estelle v. Gamble* in 1976.<sup>148</sup> J.W. Gamble, an incarcerated individual at a Texas facility, brought a pro se complaint against the prison following severe back pain after a cotton bale fell on him during prison work.<sup>149</sup> Staff repeatedly refused his requests to see a doctor, and even lost his pain medication prescription.<sup>150</sup> The Court held in *Estelle* that failing to provide “adequate medical care” violates the Eighth Amendment’s Cruel and Unusual Punishments Clause.<sup>151</sup> Since then, the Supreme Court set a rather narrow two-part test to determine whether prison staff violated incarcerated individuals’ Eighth Amendment rights.<sup>152</sup> First, courts look to whether the constitutional deprivation is “sufficiently serious.”<sup>153</sup> For a deprivation to be deemed “sufficiently serious,” the prison staff’s act or omission must either lead to a denial of “the minimal civilized measure of life’s necessities” or pose a substantial risk of serious harm.<sup>154</sup> The meaning of “sufficiently serious” is a matter for the courts to decide; however, any negligence toward an individual’s safety and health seems to be on its face “sufficiently serious.”

Second, courts look to whether prison officials had a “sufficiently culpable state of mind” and acted with “deliberate indifference” to an incarcerated individual’s health or safety.<sup>155</sup> Courts define “deliberate indifference” as occurring when a prison staffer “knows of and disregards an

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145. *Id.* at 25.

146. *Id.* at 24–25.

147. Press Release, Dep’t of Corr., Vermont DOC Announces Health Services Contract with Wellpath, LLC (Apr. 4, 2023), <https://doc.vermont.gov/press-release/vermont-doc-announces-health-services-contract-wellpath-llc>.

148. 429 U.S. 97, 99 (1976).

149. *Id.* at 100.

150. *Id.* at 101.

151. *Id.* at 105.

152. *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

153. *Id.* at 298.

154. *Id.* (depicting the “minimal civilized measure of life’s necessities” standard); *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (defining substantial risk of serious harm).

155. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Wilson*, 501 U.S. at 297.

excessive risk to incarcerated individuals health or safety.”<sup>156</sup> The Supreme Court set the “deliberate indifference” standard in *Estelle v. Gamble*.<sup>157</sup> The Supreme Court held that incarcerated individuals must show prison staff acted with an indifference that would offend “evolving standards of decency.”<sup>158</sup> The Court further held that mere negligence from prison staff would not cut it—making deliberate indifference a higher bar.<sup>159</sup>

The Supreme Court has created easier defenses over time for prison staff violating incarcerated individuals’ healthcare rights. This, however, wasn’t always the case. In 1971, the Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that individuals may sue federal officers for damages for alleged violations of their constitutional rights.<sup>160</sup> Meanwhile, state agents are susceptible to federal civil rights lawsuits under 42 U.S.C. § 1983.<sup>161</sup> In 1988, the Supreme Court held that a physician contracted to provide medical services to incarcerated individuals at a state-prison hospital must act under color of state law when treating an incarcerated individuals.<sup>162</sup> The Court, in *West v. Atkins*, defined state action as “[s]tate employment is generally sufficient to render the defendant a state actor.”<sup>163</sup> Subsequently, in 1996, the Supreme Court set a crucial standard for incarcerated individuals at private facilities looking for relief from constitutional violations. In *Richardson v. McKnight*, the Court held that prison guards employed at private facilities were not entitled to qualified immunity when incarcerated individuals filed 42 U.S.C. § 1983 violations.<sup>164</sup>

That standard, however, quickly vanished in subsequent cases. In 2001, the Supreme Court in *Correctional Services Corp. v. Malesko* declined to extend *Bivens*’ applicability.<sup>165</sup> In doing so, the Court safeguarded private

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156. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (“[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).

157. 429 U.S. 97, 100 (1976).

158. *Id.* at 106.

159. *Id.* at 105.

160. 403 U.S. 388, 390, 397 (1971).

161. 42 U.S.C. § 1983. In relevant part, the statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*Id.*

162. *West v. Atkins*, 487 U.S. 42, 49 (1988).

163. *Id.*

164. 521 U.S. 399, 412 (1997); 42 U.S.C. § 1983.

165. 534 U.S. 61, 63 (2001).

entities acting under color of federal authority.<sup>166</sup> Subsequently, in 2012, the Court held in *Minnecci v. Pollard* that prisoners could not assert a *Bivens* claim for damages against private prison employees.<sup>167</sup> *Minnecci* also held that state tort law provides private prison employees “roughly similar” incentives not to commit crimes, limiting what relief incarcerated individuals can assert against employees.<sup>168</sup>

### *E. Vermont Legislature’s Solutions Stalled*

Vermont politicians proposed a solution—or at least tried to—several times. In the 2023–2024 legislative session, representatives proposed H.326, titled, “An Act Relating to Prohibition on the Transfer of Vermont Incarcerated Individuals to an Out-of-State Correctional Facility.”<sup>169</sup> The act made four distinct findings. First, housing incarcerated individuals out of state does not serve as a temporary solution, creating long-term costly practices for Vermont.<sup>170</sup> Second, out-of-state incarceration leads to reduced familial visitation, increasing recidivism rates.<sup>171</sup> Third, out-of-state prisoners face additional burdens, with access to legal counsel restricted to expensive telecommunications.<sup>172</sup> And fourth, Vermont is unable to provide the same standard and level of care to prisoners held out of state.<sup>173</sup> The bill has since stalled. The last recorded action occurred on February 22, 2023, when the House heard the bill for the first time.<sup>174</sup> The House subsequently referred the bill to the Committee on Corrections and Institutions.<sup>175</sup>

And then, in the 2025–2026 session, representatives proposed a similar act: H.191.<sup>176</sup> The Act, titled, “An Act Relating to Prohibiting the Use of Private and For-Profit Correctional Facilities,” again acknowledged that Vermont is unable to provide the same level of oversight and care for

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166. *Id.* at 74–75 (declining to create an implied damages remedy in an Eighth Amendment suit against a private prison).

167. 565 U.S. 118, 131 (2012) (declining again to create an implied damages remedy in an Eighth Amendment suit against private prison guards).

168. *Id.* at 130.

169. H.326, 2023–2024 Gen. Assemb., Reg. Sess. (Vt. 2023). Rep. Barbara Rachelson sponsored the Act along with Rep. Troy Headrick, Rep. Emma Mulvaney-Stanak, Rep. Katherine Sims, Rep. Taylor Small, and Rep. Mary-Katherine Stone. H.326, VT. GEN. ASSEMBLY [hereinafter *H.326 Bill Status*], <https://legislature.vermont.gov/bill/status/2024/H.326> (last visited May 17, 2026).

170. Vt. H.326 § 1(1).

171. § 1(2).

172. § 1(3).

173. § 1(4).

174. *H.326 Bill Status*, *supra* note 169.

175. *Id.*

176. H.191, 2025–2026 Gen. Assemb., Reg. Sess. (Vt. 2025).

incarcerated individuals held at out-of-state prisons.<sup>177</sup> Yet, H.191 would allow the state to send individuals out of state, provided that the facility is public or nonprofit.<sup>178</sup> H.191 detailed the General Assembly’s intent to prohibit private prison use by 2034 “so that corporations are not enriched for depriving the liberty of persons sentenced to imprisonment.”<sup>179</sup> To date, H.191, however, has not gained traction. The House Committee on Corrections and Institutions did consider corrections reform,<sup>180</sup> but H.191 has not made progress since April 3, 2025, as of May 2026.<sup>181</sup> And after the Essex Town Planning Commission rejected a new women’s facility zoning request,<sup>182</sup> Vermont’s reliance on private facilities may increase.<sup>183</sup>

## II. PRIVATIZED PRISONS VIOLATE INCARCERATED INDIVIDUALS’ EIGHTH AMENDMENT RIGHT TO HEALTHCARE

While CoreCivic’s contract remains in effect, the Vermont Department of Corrections (DOC) violates out-of-state incarcerated individuals’ constitutional rights under the United States Constitution. Specifically, private prison staff violate incarcerated individuals’ Eighth Amendment rights against cruel and unusual punishment through medical neglect, caused by poor conditions.<sup>184</sup> A duty to protect individuals from cruel and unusual punishment stems from constitutional principles rooted in both American and

177. *Id.*

178. § 3(a) (proposed to be codified at VT. STAT. ANN. tit. 28, § 709 (2026)).

179. § 1(b).

180. Vt. Comm. on Corr. and Insts., *HCI - 2025-04-03 - 1:45PM*, YOUTUBE (Apr. 3, 2025), [https://www.youtube.com/watch?v=3\\_DiL9p2bNY](https://www.youtube.com/watch?v=3_DiL9p2bNY).

181. See Vt. Comm. on Corr. and Inst., *Meeting Record*, VT. GEN. ASSEMB., <https://legislature.vermont.gov/committee/meeting-detail/2026/17/1474> (last visited May 17, 2026) (stating that legislators heard a “[w]eigh-in by the Department of Corrections and Vermont State Employees Association” on H.191).

182. Press Release, Nat’l Council for Incarcerated and Formerly Incarcerated Women and Girls, FreeHer Vermont and the National Council Celebrate Major Victory: No New Women’s Prison in Essex (Oct. 12, 2025), <https://www.nationalcouncil.us/blog/freeher-vermont-and-the-national-council-celebrate-major-victory-no-new-womens-prison-in-essex>.

183. This is not to suggest that the solution is to build more facilities in Vermont. Reasonable minds can—and have—disagreed on the proper next steps, but stopping all conversations does not bode well for incarcerated individuals in the interim.

184. In 1892, Justice Field dissented in *O’Neil v. Vermont* arguing that the Eighth Amendment condemned “all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.” 144 U.S. 323, 339–40 (1892). Private prisons arguably violate the Eighth Amendment under this principle because private prisons create higher recidivism rates—making a sentence length greatly disproportionate to what the sentence could have been at a publicly-run prison. Rachel Leah Arco, *When Conditions of Confinement Lead to Violence: Eighth Amendment Implications of Inter-Prisoner Violence*, 20 HOUS. J. HEALTH L. & POL’Y 411, 422 (2021).

English legal history, dating back to 1689.<sup>185</sup> In private prisons, staff violations of incarcerated individuals' Eighth Amendment rights manifest as unreasonable assault risks,<sup>186</sup> overall poor conditions,<sup>187</sup> and heightened danger for incarcerated individuals.<sup>188</sup> Assaults and dangerous surroundings tend to cause incarcerated individuals to seek medical attention, but private prisons' limited healthcare support leaves incarcerated individuals in dangerous predicaments.

#### *A. Private Prisons' High Assault Risks Violate the Eighth Amendment*

Private prisons provide an unreasonable risk of assaults primarily due to two staffing issues: lack of knowledgeable staff and understaffing.<sup>189</sup> These two issues combined make assault more probable because inadequate oversight goes hand in hand with inadequate precautions.<sup>190</sup> Assault can be defined as any action that causes a person fear from physical attack from another person.<sup>191</sup> Yet, assaults take multiple forms, like threats, verbal abuse, or harassment.<sup>192</sup> The meaning of assault, however, differs depending on whether someone is incarcerated. Unlike non-incarcerated individuals, incarcerated individuals must prove prison staff *physically* attacked them.<sup>193</sup>

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185. Prohibiting “cruel and unusual punishment” has been a long-standing principle since the prohibition was first acknowledged in the 1689 English Bill of Rights—often seen as the precursor to the United States Bill of Rights. *See* Bill of Rights 1689, 1 Will. & M., sess. 2, cl. 2 (Eng.); *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (holding death penalty use in a discriminatory manner violates the Eighth Amendment). American colonists adopted the ban in subsequent years, and the ban ultimately became a part of the United States Bill of Rights in 1791. Anthony F. Granucci, ‘*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

186. “Contract prisons also had higher rates of assaults, both by incarcerated individuals on other incarcerated individuals and by incarcerated individuals on staff.” OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS ii (2016) [hereinafter REVIEW OF FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS].

187. *Id.* at iii.

188. *Id.* at ii.

189. *Watkins*, *supra* note 90.

190. REVIEW OF FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS, *supra* note 186, at 33 n. 62.

191. Assault is the “threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear . . . of an immediate battery . . . [or a]n attempt to commit battery [with] the specific intent to cause physical injury.” *Assault*, BLACK’S LAW DICTIONARY (12th ed. 2024).

192. *Id.*

193. *See* *Irving v. Dormire*, 519 F.3d 441, 448–49 (8th Cir. 2008) (finding that a prison employee’s multiple death threats, which were partially made in response to the prisoner starting a lawsuit against officers, were serious enough to implicate the Eighth Amendment); *Cole v. Fisher*, 379 Fed. App’x. 40, 43 (2d Cir. 2010) (vacating a district court judgment dismissing a pro se plaintiff’s excessive force claim) (citing *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986)).

Verbal threats from prison staff currently do not cross the threshold into an Eighth Amendment violation.<sup>194</sup>

The power dynamics between incarcerated individuals and superior officers create obstacles for reporting and receiving remedies for violent acts<sup>195</sup>—especially in a place where those superior officers do not have adequate training.<sup>196</sup> And these dynamics further cause incarcerated individuals' voices to go unheard, even when they ask for medical assistance.<sup>197</sup> In a way, prison staff assault incarcerated individuals by neglecting their medical needs—a different form of physical harm. Thus, the meaning of assault should not be limited to physical attacks within a prison.

The Eighth Amendment requires prison staff to conduct themselves humanely. First, the Eighth Amendment properly prohibits prison staff from using excessive force toward incarcerated individuals.<sup>198</sup> Courts, however, must acknowledge the difference in training between private employees and public employees.<sup>199</sup> The difference in training creates disparities between how staff treat incarcerated individuals.<sup>200</sup> Second, the Eighth Amendment further imposes prison employees with a duty to provide humane confinement conditions, including incarcerated individuals' ability to receive food, clothing, shelter, and medical care.<sup>201</sup> But that duty is seemingly

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194. *Cole*, 379 Fed. App'x. at 43 (noting that “verbal harassment, standing alone, does not amount to a constitutional deprivation”); see *Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992) (stating that any use of force “repugnant to the conscience of mankind” violates the Eighth Amendment). Prison guards are only liable for actions if those acts are completely unjustified, such as using force “maliciously and sadistically.” *Id.* at 9.

195. *Cole*, 379 Fed. App'x. at 43; John Wooldredge & Benjamin Steiner, *The Exercise of Power in Prison Organizations and Implications for Legitimacy*, 106 J. CRIM. L. & CRIMINOLOGY 125, 132–34 (2016) (describing types of power correctional officers exert over incarcerated individuals).

196. Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons—A Comparison of Select Characteristics*, 68 FED. PROB. 27, 29 (2004). Public facilities require an average of 58 more hours of pre-service training for new officers than private facilities offer. *Id.* Private facilities have nearly three times higher employee turnover rates compared to public facilities. *Id.*

197. Kelli Canada et al., *Multi-Level Barriers to Prison Mental Health and Physical Health Care for Individuals With Mental Illnesses*, FRONTIERS PSYCH., June 2022, at 1, 4 (“The broad consensus was that most medical staff and officers were just doing their jobs, but that there were a select few who also thought their jobs included making everyone miserable.”); see, e.g., Wooldredge, *supra* note 195, at 135 (noting that power is “exclusively in the hands of prison officials”).

198. See *Hudson*, 503 U.S. at 12 (holding that staff's use of excessive force against incarcerated individuals may constitute cruel and unusual punishment even if the incarcerated individuals does not suffer serious injury).

199. Blakely, *supra* note 196, at 29.

200. Judith Greene, *Comparing Private and Public Prison Services and Programs in Minnesota: Findings from Prisoner Interviews*, 11 CURRENT ISSUES CRIM. J. 202, 223 (2018) (noting that prisoners criticized staff training at the private facility but not at the public facility).

201. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

unimportant to for-profit prisons.<sup>202</sup> The vested interest in maintaining profits makes improving conditions a low priority when the facilities will remain full regardless.

*B. Courts Must Recognize that Private Prison Conditions Violate the Eighth Amendment*

A sequence of Supreme Court opinions seemingly operates preferentially toward incarcerated individuals, but in reality, is not so. The Court has held that the Constitution “does not mandate comfortable prisons.”<sup>203</sup> The Court further held that prisons may not exist if the conditions at the facility are inhumane.<sup>204</sup>

The Supreme Court then properly extended these principles to medical care. In *Brown v. Plata*, the Court recognized that grossly inadequate medical and mental healthcare is “incompatible with the concept of human dignity and has no place in civilized society.”<sup>205</sup> While this statement seems positive for incarcerated individuals, a company with nearly 1,400 lawsuits for medical neglect and conditions remains operational in civilized society.<sup>206</sup> The Court further held that courts may not permit prisons to violate incarcerated individuals’ constitutional rights “simply because a remedy would involve intrusion into the realm of prison administration.”<sup>207</sup> And the Court adequately recognizes its role in determining whether a facility violates the Eighth Amendment. The Court stated that “federal courts will discharge their duty to protect constitutional rights” when confinement conditions meet the cruel and unusual punishment bar.<sup>208</sup> Subsequently, in *Bell v. Wolfish*, the Court appropriately distinguished when it evaluates cruel and unusual punishment claims.<sup>209</sup>

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202. CoreCivic Reports Fourth Quarter and Full Year 2023 Financial Results, *supra* note 66. CoreCivic reported \$1.9 billion in revenue for 2023. *Id.*

203. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

204. *Farmer*, 511 U.S. at 832. Arguably, all facilities can be regarded as inhumane when prisons today utilize the same methods as plantations in the times of slavery. Prison farms were used following the Thirteenth Amendment’s carve-out that abolished slavery except as punishment for a crime, and the prison industry celebrates these practices today with prison labor at private and public facilities. RUTH DELANEY ET AL., VERA INST. OF JUST., REIMAGINING PRISON 39 (2018).

205. 563 U.S. 493, 502, 511 (2011) (ordering the release of nearly 46,000 incarcerated individuals from California prison because of overcrowding and neglected medical treatment causing “[n]eedless suffering and death”).

206. *Diaz*, *supra* note 105.

207. *Brown*, 563 U.S. at 511.

208. *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974).

209. 441 U.S. 520, 535 n.16 (1979) (evaluating claims under Due Process Clause rather than Eighth Amendment because pretrial detainee is not punished in the same way as sentenced incarcerated individuals).

Overstating deference to prison administration is where the Court erodes its own holdings. Deference to a state prison, however, is not the same as deference to a private for-profit prison. Per the Court, prison administration’s practices are evaluated in light of the administration’s “central objective.”<sup>210</sup> This principle cannot translate to a private facility. Increasing capacity and profits appear to be a private prison’s central objective—not safeguarding the individuals inside it.

Even so, this principle needlessly provides prison administrators with another cop-out if the courts continue to view private and public prisons in the same vein. Overarching statements of prisons’ interests in “safeguarding institutional security”<sup>211</sup> do not outweigh incarcerated individuals’ rights to medical access and against cruel and unusual punishment, especially in the private prison context where strong indicators point to prison administrators’ incompetence.<sup>212</sup> While aspects of these opinions point toward a rule that private prisons fall within the definition of “inhumane” under the Eighth Amendment, deference to prison administrators erodes it. Instead of providing deference, the Court should define “inhumane” to include what private prisons really do: deny healthcare access and delay access to grievance forms.

### *C. Incarcerated Individuals’ Recovery Avenues Remain Out of Reach*

Recovery from these constitutional violations is no easy feat for incarcerated individuals. With assault levels increasing and subpar conditions in these facilities, incarcerated individuals likely need greater access to medical and psychiatric care.<sup>213</sup> Yet, per the Supreme Court’s test, an incarcerated individuals must show that the prison showed a “deliberate indifference to serious medical needs” to prevail on a deprived healthcare claim.<sup>214</sup> This deliberate indifference standard “sets a very high bar.”<sup>215</sup> A

210. *Id.* at 547.

211. *Id.*

212. Memorandum from Sally Q. Yates, Deputy Attorney General on Reducing Use of Private Prisons I (Aug. 18, 2016) (available at <https://www.justice.gov/opa/file/886311/dl>).

213. *See, e.g.*, Brian Nam-Sonenstein, *Cut-Rate Care: The Systemic Problems Shaping ‘Healthcare’ Behind Bars*, PRISON POL’Y INITIATIVE (Feb. 2025), <https://www.prisonpolicy.org/reports/healthcare.html> (finding that “private providers had between 18% and 58% higher mortality rates . . . in jails compared to those with public providers”).

214. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (“An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”).

215. *Dockery v. Hall*, 443 F. Supp. 3d 726, 738 (S.D. Miss. 2019) (holding that a class of incarcerated individuals did not meet deliberate indifference bar even though they were denied medical care). The plaintiffs were in the East Mississippi Correctional Facility, owned and operated by Management and Training Corporation. *Id.* at 732–33. Several doctors toured the facility and determined

“very high bar” out of an incarcerated individual’s reach. If the courts, however, recognized the totality of the circumstances within private prisons equated to deliberate indifference, then that bar may not be as insurmountable.

Circuit courts have also made relief an unattainable goal. Incarcerated individuals in the Fifth Circuit must establish that the prison staff refused to treat them, ignored their complaints, intentionally provided incorrect treatment, or engaged in any conduct that would “clearly evince a wanton disregard for any serious medical needs.”<sup>216</sup> Proving a neglective intent is an insurmountable bar since the Supreme Court extended immunity to private prisons.<sup>217</sup> Incarcerated individuals have to prove that a prison official had the intent to neglect their needs, even though the Court’s qualified immunity doctrine already excuses that official’s behavior. But like in *Estelle v. Gamble*, an incarcerated individual’s disagreement with the care provided does not meet the deliberate indifference standard.<sup>218</sup> Further, some circuits have concluded that a “delay” in medical treatment does not meet the threshold for a constitutional violation without the delay being deliberately indifferent and causing substantial harm.<sup>219</sup> Yet again, the odds are stacked against incarcerated individuals in private prison facilities. And in civilized society, access to healthcare is a fundamental human right.<sup>220</sup>

Exhausting other options also feels out of reach. The Prison Litigation Reform Act (PLRA) imposes substantial limits on courts’ ability to provide injunctive relief.<sup>221</sup> While this protects against corrupt holdings, the PLRA limits courts’ ability to require a prison to make substantial modifications to its operations.<sup>222</sup> Further, the PLRA dictates that no legal action may be

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that the conditions violated the Eighth Amendment because incarcerated individuals faced excessive solitary confinement, were beaten and ignored by staff, and were at risk of incarcerated individuals-to-incarcerated individual violence. *Id.* at 733; *see, e.g.*, Brad Taylor, *Professional Judgment or Deliberate Indifference? Suicide Under the Eighth Amendment*, 2020 U. ILL. L. REV. ONLINE 60, 65 (2020).

216. *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006).

217. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

218. 429 U.S. at 106–07.

219. *See, e.g.*, *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006); *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) (evaluating whether a delay was “tolerable” and stating that delays can be reasonable); *King v. Lawson*, No. 21-14492, 2024 WL 3355179, at \*3 (11th Cir. 2024) (noting that if staff delays treatment, an incarcerated individuals “must place verifying medical evidence in the record to establish the detrimental effect of [the] delay in medical treatment” (alteration in original) (quoting *Hill v. Dekalb Reg’l Youth Det. Ctr.*, 40 F.3d 1176, 1188 (11th Cir. 1994))).

220. Zahara Nampewo et al., *Respecting, Protecting, and Fulfilling the Human Right to Health*, INT’L. J. EQUITY HEALTH, Dec. 2022, at 1, 2.

221. 18 U.S.C. § 3626(a)(1)(A).

222. *Id.* Courts must find that “such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation . . . .” *Id.*

brought “with respect to prison conditions” under 42 U.S.C. § 1983, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility “until such administrative remedies as are available are exhausted.”<sup>223</sup> Put simply, incarcerated individuals may not take legal action unless they have first exhausted the grievance process at their prison.<sup>224</sup> They must make a complaint against their superiors to other superiors; yet, CoreCivic has a record of delaying the grievance process.<sup>225</sup>

The grievance process may cause an incarcerated individuals to face more harm than good, but if they don’t exhaust that process, they will be barred from judicial relief.<sup>226</sup> Incarcerated individuals at private prisons submit 24% more grievances for conditions of confinement, institutional operations, safety and security, sexual abuse or assault, Special Housing Units, and complaints against staff compared to those at public prisons.<sup>227</sup> At Tallahatchie County Correctional Facility (TCCF), where Vermont incarcerated individuals are located, incarcerated individuals may only file a grievance every 14 calendar days, except for grievances health care staff deem emergent.<sup>228</sup> The handbook defines emergent grievances as one that arises “when the regular grievance time limits of waiting 14 calendar days between filing another grievance would increase risk of injury or might cause other serious and irreparable harm.”<sup>229</sup> Further, incarcerated individuals must file grievances within 30 calendar days of the event, and then have 30 days to appeal to headquarters following a decision from TCCF.<sup>230</sup> These procedures, are misleading, however, because only a small number of grievances are filed in the first place.<sup>231</sup>

Recovery for these cruel and unusual punishment violations by private prison officials should come from the Constitution. Simply put, the

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223. 42 U.S.C. § 1997e(a).

224. Tony Vick, *When the Prison Grievance Process Is Worth the Risk*, FILTER (Aug. 5, 2024), <https://filtermag.org/self-advocating-prison-grievance/>.

225. OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-25-47, RESULTS OF AN UNANNOUNCED INSPECTION OF ICE’S ELOY FEDERAL CONTRACT FACILITY IN ELOY, ARIZONA 6 (2025) (finding that a CoreCivic facility did not comply with all grievance standards).

226. Vick, *supra* note 224.

227. REVIEW OF FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS, *supra* note 186, at 22.

228. CORECIVIC, INMATE/DETAINEE ORIENTATION TO TALLAHATCHIE COUNTY CORRECTIONAL FACILITY HANDBOOK 14 (n.d.) [hereinafter INMATE/DETAINEE ORIENTATION HANDBOOK].

229. *Id.*

230. *Id.*

231. Tony Vick wrote about his experiences as a grievance clerk, where he stated that his job was “basically to send back the grievances people had submitted, rather than filing them.” Vick, *supra* note 224. One out of every 20 grievances he received would be filed, and a unit manager threatened someone else with a transfer to a violent unit unless they retracted a grievance. *Id.*

Constitution protects all people in the United States—even if some of those individuals are in private prisons.<sup>232</sup> If an incarcerated individual in a private prison faces a constitutional violation, their ability to seek damages should not be restricted to one subsection of law. Yet, in *Minneeci*, despite being a federal prisoner in a privately operated federal prison, the Court forced Mr. Pollard to seek a state tort law remedy.<sup>233</sup> The Court held that state tort law remedies provide “roughly similar incentives for potential defendants to comply with the Eighth Amendment”<sup>234</sup>—the “potential defendants” being private prisons and their employees—even though some private prisons operate through federal government contracts, not state contracts. This inconsistency restricts incarcerated individuals’ opportunities to seek damages.<sup>235</sup> Recovery should not be restricted solely to what state tort law provides.

The Supreme Court has previously recognized the proper distinction between state tort law and Eighth Amendment constitutional protections within the private prison context.<sup>236</sup> Despite Justice Breyer’s assertion, constitutional protections and state tort remedies do not provide “roughly similar incentives.”<sup>237</sup> Likewise, the Supreme Court must affirm that granting federal remedies to incarcerated people against private prisons and their employees would deter facilities from perpetuating harm.<sup>238</sup> Further, the Supreme Court acknowledged that state tort law can prove “less generous” than a *Bivens* claim.<sup>239</sup> Just because one specific Supreme Court composition deemed state tort law remedies sufficient does not mean this principle should stand.<sup>240</sup> Courts must look to the texts of the state tort law statutes compared

232. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison incarcerated individuals from the protections of the Constitution.”).

233. *Minneeci v. Pollard*, 565 U.S. 118, 131 (2012).

234. *Id.* at 130.

235. *Id.* at 129 (recognizing “that state tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages, . . . or by forbidding recovery for emotional suffering unconnected with physical harm, . . . or by imposing procedural obstacles, say, initially requiring the use of expert administrative panels in medical malpractice cases” (citations omitted)).

236. *Carlson v. Green*, 446 U.S. 14, 18–19 (1980) (holding that a *Bivens* remedy is available even where plaintiff’s allegations could support a suit against the United States under the Federal Tort Claims Act). In *Carlson*, Joseph Jones, Jr. died in a federal prison in Indiana because of personal injuries that went ignored by prison staff who failed to give him proper medical attention. *Id.* at 16 n.1. His mother sued pleading Eighth Amendment, Equal Protection, and Due Process violations, and sought compensatory and punitive damages. *Id.* at 16.

237. *Minneeci*, 565 U.S. at 130.

238. *Id.* at 133 (Ginsberg, J., dissenting).

239. *Id.* at 129 (majority opinion).

240. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 262 (2022) (stating that adherence to stare decisis “is not ‘an inexorable command’” (quoting *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015))).

to *Bivens* and 42 U.S.C. § 1983 principles to provide fully adequate relief and compensate incarcerated individuals appropriately for private prisons and their employees' violations.

#### *D. A Flawed Hypothetical*

Take, for example, Tony. Tony grew up in an unstable home in Vermont. His parents were in and out of prison throughout his childhood, he grudgingly made it through high school, and he managed his Type 1 diabetes the best he could. Tony graduated high school, started work at a local auto shop, and he barely afforded rent. One day at the auto shop, a man dropped off a brand new 2026 Rolls-Royce Ghost, with a value starting around \$370,750,<sup>241</sup> for inspection. Tony, now a 21-year-old, thought it would be fun to take the car for a joyride after inspecting it. Tony, however, got sidetracked on his way and did not bring the car back to the auto shop for almost 36 hours. Naturally, the car's owner reported it stolen, and subsequent investigation pointed to Tony. The State's Attorney's Office charged Tony with grand larceny, and because the stolen car's value exceeded \$900, Tony committed a felony.<sup>242</sup> Tony took a plea deal, and the court sentenced him to up to ten years in prison and a \$5,000 fine.<sup>243</sup> Vermont DOC sent Tony to TCCF in Mississippi to carry out his sentence.

At TCCF, however, private prison staff ignored Tony's pleas for insulin for his diabetes. Tony was unable to monitor his blood sugar multiple times while in TCCF, but per TCCF's handbook, Tony can only file a nonemergent grievance against prison staff every 14 days.<sup>244</sup> Tony's grievances seemingly continue to get misplaced, so on paper, it appears that nothing has ever been filed at all. Tony fears what will happen to him if his blood sugar levels get too low, and when staff do listen to him, Tony faces long delays before being seen by a healthcare provider. He knew he stole a car, but he never thought his sentence meant being denied access to his medication. Tony is far from home, his family has little access to funds, and his mental health is declining due to his circumstances. He wants to bring legal action against TCCF, so he looks to the law library when he feels up to it.

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241. Drew Dorian, 2025 *Rolls-Royce Ghost, CAR AND DRIVER*, <https://www.caranddriver.com/rolls-royce/ghost> (last visited May 17, 2026).

242. VT. STAT. ANN. tit. 13, § 2501 (2026). Vermont's grand larceny statute provides that a person who steals property valued at \$900.00 or more commits a felony punishable by imprisonment of not more than ten years. *Id.*

243. *Id.*

244. INMATE/DETAINEE ORIENTATION HANDBOOK, *supra* note 228, at 14.

Under the Supreme Court's test, Tony must prove two components of the prison staff's behavior. First, Tony must prove that what they did is "sufficiently serious."<sup>245</sup> For Tony's denial of insulin to be deemed "sufficiently serious," Tony must prove that prison staff's act, or in this case, omission, lead to Tony being denied "the minimal civilized measure of life's necessities" or posed a substantial risk of serious harm to Tony.<sup>246</sup> Tony believes that being denied access to insulin poses a substantial risk of harm to him, as the denial is potentially fatal, so he continues researching.

Second, Tony must prove that prison officials had a "sufficiently culpable state of mind" and acted with "deliberate indifference" to his health.<sup>247</sup> Per the Supreme Court's test, Tony must show prison staff acted with an indifference that would offend "evolving standards of decency."<sup>248</sup> Tony is not sure what that even means. Tony's research taught him that mere negligence would not cut it, so he attempts to determine the guard's mental state to prove deliberate indifference.<sup>249</sup> Yet, Tony cannot practically determine the guard's state of mind when that guard is in a position of authority over him. And because a lack of insulin weakened Tony, he cannot properly advocate for himself. For all Tony knows, some guards may very well just show up to work with a "deliberate indifference" mindset because, at the end of the day, they get paid regardless of what happens to an incarcerated individuals.<sup>250</sup> Furthermore, the courts provide private prisons with a sturdy shield, having held that incarcerated individuals cannot sue private entities under *Bivens*.<sup>251</sup> While individual private prison guards do not enjoy qualified immunity,<sup>252</sup> the courts shield the entities themselves from liability.<sup>253</sup>

But then, Tony remembers that his grievance against the guard was never properly filed. His research showed him what the PLRA requires of him. Tony cannot bring legal action "with respect to prison conditions" under 42 U.S.C. § 1983 "until such administrative remedies as are available are exhausted."<sup>254</sup> Because of the improper filing, he now must wait until prison

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245. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

246. *Id.*

247. *Id.*

248. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

249. *Id.* at 105–06.

250. *Correctional Services*, CORECIVIC, <https://jobs.corecivic.com/us/en/correctional-services> (last visited May 17, 2025) ("We offer competitive pay and flexible benefit options allowing you to build a career while achieving your financial goals.").

251. *Corr. Servs. Corp v. Malesko*, 534 U.S. 61, 74 (2001).

252. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

253. *Malesko*, 534 U.S. at 74.

254. 42 U.S.C. § 1997e(a).

staff deny him access *again* to his insulin within another 14-day period before the grievance cycle can restart. Tony, however, is afraid that if he continues to speak out against prison staff, prison staff will abuse him in other ways. Tony feels defeated. Even though this is a hypothetical, this very well may be the reality many incarcerated individuals face when sent to private facilities.

### III. NEXT STEPS: CEASING THE CONTRACT, REGAINING DIGNITY

Ending Vermont's Department of Corrections (DOC) contract with CoreCivic is a step in the right direction for regaining the dignity of those incarcerated. This, however, likely cannot happen immediately. Therefore, in the meantime, Vermont incarcerated individuals can assert claims under the Vermont Constitution to seek relief for denial of healthcare.

#### *A. The Realities of Ceasing the Contract*

In an ideal world, Vermont DOC would cease its contract with CoreCivic. Of course, that is easier said than done, but, at the very least, needs to be said. Vermont DOC's most recent strategic plan failed to reference contracting with for-profit prisons even once.<sup>255</sup> Its "Roadmap to 2030" claims the DOC is "[m]ission-focused" and "values-driven."<sup>256</sup> The CoreCivic contract must be acknowledged within the "Roadmap to 2030" plan if DOC continues sending incarcerated individuals to CoreCivic's facility. Ignoring a problem does not mean it does not exist. And former Corrections Commissioner Nicholas Deml acknowledged that this plan is the "first time in over 30 years" the DOC has looked to update its goals.<sup>257</sup> But now with an interim commissioner navigating the Department after Deml's departure in August 2025,<sup>258</sup> people incarcerated in Mississippi may not rank highly amongst the Department's structural changes.

With H.191 wasting away in the House Committee on Corrections and Institutions, a changeover in DOC leadership, and a lack of legislative priority on the issue, the battle against for-profit prisons seems sharply uphill. Pessimism, however, cannot prevent action. Bringing new legislation in

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255. See VT. DEP'T OF CORR., AGENCY OF HUM. SERVS., ROADMAP TO 2030: MISSION-FOCUSED, VALUES-DRIVEN (2024).

256. *Id.*

257. *Id.*

258. Press Release, Dep't of Corr., Governor Phil Scott Announces Departure of Corrections Commissioner Nick Deml, Appoints Jon Murad as Interim Corrections Commissioner (July 28, 2025), <https://doc.vermont.gov/press-release/governor-phil-scott-announces-departure-corrections-commissioner-nick-deml-appoints>.

future sessions, like a variation of H.191, back to the table is a step in the right direction.<sup>259</sup> This problem likely cannot be mitigated without legislative funding or action.

If Vermont DOC does renew the contract, however, Vermont DOC should propose a “pay for performance” contract, where companies only receive payment if they adequately fulfill their contractual obligations.<sup>260</sup> These types of contracts have resulted in decreased recidivism rates.<sup>261</sup> And Vermont’s contract with Wellpath already uses this model.<sup>262</sup> Vermont DOC could create a hotline for incarcerated individuals to quickly report abuse from prison staff or healthcare request denials.<sup>263</sup> Creating the hotline could even be a condition of the “pay for performance” contract. This way, ignored grievances, like Alfred’s, could be caught before it is too late.

### B. Regaining Dignity in the Meantime

Understandably, changes cannot happen overnight. Therefore, in the meantime, incarcerated individuals may choose to seek relief for inadequate healthcare through the Common Benefits Clause in Vermont’s Constitution if Eighth Amendment relief proves to be insurmountable. Chapter 1, Article 7, titled “Government for the people; they may change it,” outlines

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259. Representative Barbara Rachelson has reintroduced H.326, in its current form or a similar one, in 2016, 2018, 2021, and again in 2023. *See Testimony on H.326 Before the Joint Just. Oversight Comm.*, 2023–2024 Sess. 1 (2023) (statement of Rep. Barbara Rachelson).

260. Peter H. Kyle, *Contracting for Performance: Restructuring the Private Prison Market*, 54 WM. & MARY L. REV. 2087, 2089 (2023) (“In order to reformulate the market and in turn the incentives created, contracting agencies should use performance-based measurements—such as comparative recidivism and employment rates—that would begin to redefine the market as that for rehabilitated prisoners and reformulate the operational philosophy of prison corporations.”); *see* Leonard Gilroy, *Pay for Success Contracting Reducing Recidivism in Pennsylvania*, REASON FOUND (Aug. 31, 2015), <https://reason.org/commentary/pennsylvania-contract-recidivism/> (reporting that incentive-based, pay-for-success contracts lowered recidivism rates).

261. John F. Pfaff, *The Incentives of Private Prisons*, 52 ARIZ. ST. L.J. 991, 1007–08 (2020) (arguing for “incentivize[ing] better programming” and for reporting success in foreign countries to reduce recidivism); *cf.* Anita Mukherjee, *Impacts of Private Prison Contracting on Inmate Time Served and Recidivism*, 13 AM. ECON. J.: ECON. POL’Y 408, 425, 434 (2021) (finding that assigning incarcerated individuals to private prisons increases overall time served and private prisons’ cost savings claims do not save states as much as they allege).

262. VERMONT CONTRACT # 46573, *supra* note 142, at 49 (“To encourage the provision of high-quality services that lead to improvements in healthcare outcomes and processes, the Contractor will have the opportunity to earn an additional percentage of the total yearly price proposal . . .”).

263. *But see* Memorandum from the State of Vt. Dep’t of Corr. Cent. Off. to All Inmates Housed Out-of-State 4 (Sept. 27, 2018) (available at <https://doc.vermont.gov/sites/correct/files/documents/friends-family/faq-9-out-of-state.pdf>) (declining to create such a hotline in favor of incarcerated individuals reporting to caseworkers).

this clause.<sup>264</sup> In relevant part, Article 7 provides that “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .”<sup>265</sup>

Vermont courts analyze Common Benefits Clause challenges under three prongs.<sup>266</sup> First, a court must define the part of the community disadvantaged by the legal requirement.<sup>267</sup> Second, a court must identify the governmental purpose in excluding a part of the community from the benefit.<sup>268</sup> Third, a court must “ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose.”<sup>269</sup> The third prong requires courts to weigh additional factors. First, courts analyze “the significance of the benefits and protections of the challenged law.”<sup>270</sup> The second factor assesses “whether the omission of members of the community from the benefits and protections of the challenged law promotes the government’s stated goals.”<sup>271</sup> And the third factor asks “whether the [part of the community receiving the benefit] is significantly underinclusive or overinclusive.”<sup>272</sup> The courts are not bound by the tiered levels of scrutiny usually applied in federal Equal Protection cases.<sup>273</sup>

Arguably here, assessing the three prongs weighs in favor of incarcerated individuals. First, the incarcerated individuals at private prisons constitute the disadvantaged group. These incarcerated individuals are disadvantaged because Vermont DOC does not have the same level of oversight over them as it would if they were housed in Vermont’s own facilities.<sup>274</sup> Second, the government is denying incarcerated individuals housed at private, out-of-state private facilities equal access to healthcare compared to in-state facilities. While the State may argue that their purpose

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264. VT. CONST. ch. I, art. 7.

265. *Id.*

266. *Baker v. State*, 170 Vt. 194, 212–14, 744 A.2d 864, 878–79 (1999).

267. *Id.* at 212–13, 744 A.2d at 878.

268. *Id.* at 213.

269. *Id.* at 214, 744 A.2d at 878–79.

270. *Id.* at 214, 744 A.2d at 879.

271. *Id.*

272. *Id.*

273. *Id.* at 212, 744 A.2d at 878.

274. *Cf. Peyton Holahan, The Perils of Privatization: Exploring the Side Effects of Privatized Correctional Health Care in Favor of a Public Delivery Model*, 29 WASH. & LEE J. CIV. RTS. & SOC. JUST. 329, 363 (2023) (noting privatized healthcare systems within public prisons lack sufficient oversight).

for excluding individuals lies in cost efficiency reasons, this cannot outweigh an individual's healthcare rights. While incarcerated individuals lose certain liberty interests in prison, like freedom of movement, they do not lose all their rights.<sup>275</sup> Incarcerated individuals gain access to free food, shelter, and healthcare—which must not be overlooked.<sup>276</sup> Just because Vermont DOC may find continuing the contract to be an efficient use of departmental resources, that finding does not allow for incarcerated individuals' liberty interests to healthcare to be collateral damage. And third, denying an incarcerated individual's medical care is not related to a governmental purpose. Weighing the factors, access to medical care is a significant benefit that incarcerated individuals at CoreCivic facilities purportedly do not have.<sup>277</sup> Yet, Vermont DOC continues to send incarcerated individuals to Mississippi.

The Vermont Supreme Court has held that the Common Benefits Clause “also applies to other types of benefits, including those not guaranteed in the Vermont Constitution.”<sup>278</sup> The Court explained that even if the state is not required to provide a benefit, when it chooses to do so, that benefit “must comply” with the Clause.<sup>279</sup> Vermont DOC provides incarcerated individuals with the benefit of healthcare. Corporations, like CoreCivic, have no hierarchal role to play in overseeing people's healthcare access, and clearly, people are adversely affected because of CoreCivic's lack of knowledge. The DOC may argue that all medical treatment is the same regardless of in- or out-of-state facilities, but that would require the department to take a look

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275. Adam J. Kolber, *The End of Liberty*, 15 CRIM L. PHILOS. 407, 414–15 (2021) (describing the problems with measuring liberty and societal impressions of losing rights to bear arms and vote).

276. *Id.* at 414.

277. *Contrast What CoreCivic Does and Doesn't Do*, CORECIVIC (Aug. 5, 2019), <https://www.corecivic.com/news/what-corecivic-does-and-doesnt-do> (“While medical care is available, we don't provide the health care in the majority of our immigration facilities. In most cases, comprehensive medical, mental health and dental care is provided by the ICE Health Services Corps.”), with Press Release, Rep. Don Beyer, Beyer Presses CoreCivic for Immediate Improvements to Meet Required Medical and Safety Standards at the Farmville Detention Center (Dec. 2, 2025), <https://beyer.house.gov/news/documentsingle.aspx?DocumentID=8703> (“At the time of the visit, it was clear that the medical staff were overwhelmed, could not relay to us the amount of medical staff that were employed by the facility, and that requests for medical attention were not met in a timely fashion, with some detainees waiting days for simple requests like medication for a headache (at which point such request would likely be moot”), and *Newly Opened California City ICE Detention Facility: Dangerous for Disabled People*, DISABILITY RTS. CA. (Nov. 3, 2025), <https://www.disabilityrightsca.org/reports/california-city-ice-processing-center-a-dangerous-expansion-of-immigration-detention-in> (“Another individual reported going seven days without diabetes medications, during which time he felt physically unstable.”).

278. *Vitale v. Bellows Falls Union High Sch.*, 2023 VT 15, ¶ 19, 217 Vt. 611, 627, 293 A.3d 309, 320.

279. *Id.*

inside the services they provide to incarcerated individuals in-state. Through Vermont DOC's contract with CoreCivic, Vermont DOC has tasked CoreCivic with an immense oversight role. A role CoreCivic cannot fulfill—ultimately, violating Vermont's Constitution.

#### CONCLUSION

In the words of Dr. Martin Luther King, Jr., “When machines and computers, profit motives and property rights, are considered more important than people, the giant triplets of racism, extreme materialism, and militarism are incapable of being conquered.”<sup>280</sup> The private prison industrial complex continually perpetuates Dr. King's notion. While profits remain more important than people and their healthcare needs, a trifecta of societal issues persists. Capitalism has no place in rehabilitating an individual who needs help the most. People cannot be viewed in the same vein as a forgotten monthly subscription that automatically charges a credit card, nor can they be reduced to line items on a profit ledger.

Discussing prisoners' rights requires individuals to take a long look inside themselves and grapple with difficult moral concerns. Incarceration means a crime has occurred, and society places a high value on retribution.<sup>281</sup> True punishment, however, cannot commence when companies' profits exponentially rise by keeping people in cages. Punishment does not, and cannot, constitute a denial in necessary healthcare. A state cannot adequately invest in individuals' rehabilitative needs when they are already investing in a daily rate. A solution is not simple, but continuing to ignore the problem altogether only allows companies' profits to increase at the cost of incarcerated individuals' medical needs.

Ultimately, Vermont's contract with CoreCivic is a short-term solution to a long-term problem. Moving forward, Vermont leaders can rise to the occasion through collaborative problem solving, either in the legislature or at the departmental level, or at the very least, start the conversation. Outsourcing a fundamental responsibility of the government to a private entity is a red flag that can no longer be ignored. It's time to be responsive.

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280. Lee Smithey, *Martin Luther King, Jr. Day and Fixing the Jericho Road*, SWARTHMORE COLL. DEP'T OF PEACE & CONFLICT STUD. BLOG (Jan. 15, 2018), <https://pcs.domains.swarthmore.edu/pcs/martin-luther-king-jr-day-and-fixing-the-gericho-road/>.

281. Molly J. Crockett et. al, *The Value of Vengeance and the Demand for Deterrence*, 143 J. EXPERIMENTAL PSYCH. 2279, 2284 (2014) (“Our findings provide unambiguous behavioral evidence that people are willing to invest personal resources in pure retribution without the possibility of deterrence.”).

–*Phoebe Cykosky*\*

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**“RUBBER STAMPS FOR LANDLORDS”: HOW VERMONT’S  
RENT ESCROW STATUTE VIOLATES TENANTS’  
CONSTITUTIONAL RIGHTS IN EVICTION CASES**

**Kyle S. Clauss**\*

ABSTRACT

*[W]e reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial. . . . Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.<sup>1</sup>*

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1. *Pernell v. Southall Realty*, 416 U.S. 363, 384–85 (1974).

## INTRODUCTION

In any action for possession in Vermont, a landlord may request an order requiring the tenant to pay their rent to the clerk's office at the courthouse for the remainder of the eviction proceedings.<sup>2</sup> The order may also require that the tenant pay into court any rent that has accrued since the action commenced.<sup>3</sup> If a tenant fails to make a payment prescribed in the so-called "rent escrow order," whether a day late or a dollar short, the landlord may immediately request judgment<sup>4</sup> and a writ restoring them to possession seven days after service upon the tenant.<sup>5</sup> By providing landlords with an express lane for retaking possession upon the tenant's nonpayment, Vermont's rent escrow statute violates the tenant's statutory and constitutional right to a jury trial on their defenses, as well as their right to due process and access to the courts.

Tenants in Vermont have a statutory right to a jury trial in all eviction cases,<sup>6</sup> as well as a constitutional right to a jury trial in civil matters, which "ought to be held sacred"<sup>7</sup> and "preserved to the parties inviolate."<sup>8</sup> Tenants also have a constitutional right to seek justice "freely, and without being obliged to purchase it."<sup>9</sup> This Article concerns cases in which a tenant (1) answers their landlord's complaint and asserts affirmative defenses to the landlord's claim for possession, such as retaliation;<sup>10</sup> (2) requests a jury trial on any issue related to their defenses;<sup>11</sup> and (3) subsequently defaults on a rent escrow order.<sup>12</sup> The sheriff will remove the tenant from their home before the latter may submit their defenses to a jury, let alone start discovery or amend their answer to include counterclaims related to the landlord's misconduct.<sup>13</sup> From its inception, the rent escrow statute conditioned the

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2. VT. STAT. ANN. tit. 12, § 4853a(a)–(b) (2026).

3. § 4853a(d).

4. Where a landlord has pleaded discrete claims for possession and damages, the court will issue partial judgment for possession and schedule a final hearing on the landlord's remaining claim for damages. *See* VT. R. CIV. P. 54(b) ("When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.").

5. tit. 12, § 4853a(h).

6. § 4852.

7. VT. CONST. ch. I, art. 12.

8. VT. R. CIV. P. 38(a).

9. VT. CONST. ch. I, art. 4.

10. VT. STAT. ANN. tit. 9, § 4465 (2026).

11. VT. R. CIV. P. 38(b).

12. VT. STAT. ANN. tit. 12, § 4853a(d) (2026).

13. *See* § 4853a(h) ("If the tenant fails to pay rent into court in the amount and on the dates ordered by the court, the landlord shall be entitled to judgment for immediate possession of the premises.

tenant's ability to assert their rights in court upon timely payment of rent. Even where a landlord bases their ejectment action on grounds other than nonpayment, a missed rent payment may nevertheless be the reason why a writ issues for their dispossession.<sup>14</sup>

Landlords and their counsel might argue that our judicial system affords the low-income tenant the same opportunity as any other litigant to mount a robust defense against any remaining damages claims. Such a view ignores the barriers to the low-income tenant's continued participation in the judicial process after losing possession of their home. As Justice Douglas dissented in *Lindsey v. Normet*,

[W]here the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.<sup>15</sup>

Immense difficulty awaits a pro se litigant unable to charge their cell phone or access the internet to receive or submit court filings. Documents relevant to the case might be stashed away in a hastily packed storage unit or lost altogether in the turbulence. With transience comes transportation issues that can place the courthouse door beyond the tenant's reach.

Vermont's housing landscape has only grown harsher for renters in the four decades since the rent escrow statute's enactment. Between 1990 and 2020, for example, Vermont's rental vacancy rate halved.<sup>16</sup> Both the number of homeless children and the estimated overall number of homeless people more than tripled just between 2020 and 2024.<sup>17</sup> In 2023, Vermont's housing stock comprised roughly as many renter-occupied homes as vacant and

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The court shall forthwith issue a writ of possession directing the sheriff of the county in which the property or a portion thereof is located to serve the writ upon the defendant and, not earlier than seven days after the writ is served . . . to put the plaintiff into possession.”)

14. § 4853(a) (“In *any* action against a tenant for possession . . . .”) (emphasis added).

15. *Lindsey v. Normet*, 405 U.S. 56, 89–90 (1972) (Douglas, J., dissenting).

16. Vt. Hous. Fin. Agency, *Rental Vacancy Rate*, HOUSINGDATA.ORG, <https://housingdata.org/profile/rental-housing-costs/vacancy-rate> (last visited May 17, 2026).

17. Vt. Hous. Fin. Agency, *Homelessness*, HOUSINGDATA.ORG, <https://housingdata.org/profile/housing-needs/homelessness> (last visited May 17, 2026).

seasonal homes combined.<sup>18</sup> The number of homes listed as short-term rentals for platforms like Airbnb and Vrbo in Chittenden County, Vermont's most populous county, more than doubled between April 2020 and April 2024.<sup>19</sup> The hourly wage that a household must earn while working 40 hours a week to afford fair market rent without paying more than 30 % of their income toward housing costs increased nearly \$5.00 to \$23.20 between 2022 and 2024—about \$10.00 more than the state minimum wage.<sup>20</sup> The trial court that issues a writ of possession pursuant to a rent escrow order jettisons the defaulting tenant into an uncertain future on a brutal economic terrain.<sup>21</sup> The tenant may delay their exit or successfully defend themselves in court and remain in their home—but only if they conform with a rent escrow order once entered.<sup>22</sup>

Part I of this Article will trace the origins of eviction proceedings in Vermont and situate the rent escrow statute, as well as the Residential Rental Agreements Act (RRAA), within that history.

The rent escrow statute's legislative history reveals that lawmakers responded to landlords' complaints about the length of ejection proceedings by creating a provisional remedy to recover rent pending judgment.<sup>23</sup> Already doubtful if the landlord has terminated their tenancy for nonpayment, the tenant's ability to pay thus became a threshold requirement for continued proceedings on the issue of possession. Part II will survey the sundry legal and equitable theories undergirding the rent escrow statute and demonstrate how it operates in practice precisely as intended to discourage the tenant who cannot pay their rent from participating in the judicial process.

Part III will examine the constitutional issues raised upon the tenant's dispossession without the jury trial they had requested. Two Supreme Court

18. Vt. Hous. Fin. Agency, *Housing Stock*, HOUSINGDATA.ORG, <https://housingdata.org/profile/housing-stock/housing-units> (last visited May 17, 2026).

19. Vt. Hous. Fin. Agency, *Short Term Rentals*, HOUSINGDATA.ORG, <https://housingdata.org/profile/housing-stock/short-term-rentals> (last visited May 17, 2026).

20. Vt. Hous. Fin. Agency, *Housing Wage*, HOUSINGDATA.ORG, <https://housingdata.org/profile/income-employment/housing-wage> (last visited May 17, 2026).

21. See Derek Brouwer, *Out of House & Home: Chittenden County Landlords Are Evicting at a Record Pace. But It's the Sheriff Who Comes Knocking*, SEVEN DAYS (Dec. 6, 2023), <https://www.sevendaysvt.com/news/out-of-house-and-home-chittenden-county-landlords-are-evicting-at-a-record-pace-but-its-the-sheriff-who-comes-knocking-39672913/> (describing eviction of tenant who missed her first rent escrow payment).

22. VT. STAT. ANN. tit. 12, § 4856 (2026) (“When the plaintiff's complaint is dismissed or he or she does not prove his or her right to the possession, the defendant shall have judgment for his or her costs, and execution therefor.”).

23. *Discussing the Landlord/Tenant Issue: Hearing on H.339 Before the H. Judiciary Comm.*, 1985 Leg., Spec. Sess., 65–67 (Vt. 1985) (statement of Rep. Davenport) [hereinafter *Hearing on H.339*].

cases decided at the apex of the “tenants’ rights revolution” of the 1970s,<sup>24</sup> *Lindsey v. Normet*<sup>25</sup> and *Pernell v. Southall Realty*,<sup>26</sup> suggest the form that a successful challenge to Vermont’s rent escrow law could take. Though the *Lindsey* decision is notorious for its holding that there is no constitutional right to quality housing, the Court nevertheless conceded that a law conditioning the speed of the eviction process upon the tenant’s payment of rent could be “applied so as to deprive a tenant of a proper hearing in specific situations.”<sup>27</sup> Whenever the court issues a writ of possession in spite of a tenant’s demand for a jury trial, Vermont’s rent escrow statute presents such a situation.

Vermont courts have recognized that “removing persons from their rightful homes and subjecting them to homelessness is an irreparable harm.”<sup>28</sup> Given all that hangs in the balance, the tenant must be afforded the opportunity to submit their defenses to a jury before losing possession of their home. As written and in application, the rent escrow statute subordinates the tenant’s constitutional rights to the landlord’s right to timely payment.

## I. RENT ESCROW’S ORIGINS: ACTIONS FOR POSSESSION AND THE AVAILABILITY OF DAMAGES PENDING JUDGMENT

### A. Common Law and Justice Ejectment

Though Ethan Allen took Fort Ticonderoga without firing a shot, he found fighting ejectment actions before a skeptical court far more challenging.<sup>29</sup> The common-law right of action for ejectment catalyzed Vermont’s early political formation. Four centuries before the Green Mountain Boys formed to forcibly resist New York landlords’ claims to

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24. See generally David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 392–93 (2011) (collecting the “wide-ranging changes in tenants’ rights” that characterized the period, including the imposition of rent control, just cause eviction protections, and prohibitions on racial discrimination).

25. 405 U.S. 56 (1972).

26. 416 U.S. 363 (1974).

27. *Lindsey*, 405 U.S. at 65.

28. *Duprey v. Samuelson*, No. 23-CV-02299, 2023 Vt. Super. LEXIS 76, at \*15 (Washington Cty. Jun. 1, 2023); *Groundworks Collaborative Inc. v. Vt. Agency of Hum. Servs.*, No. 24-CV-00999, 2024 Vt. Super. LEXIS 45, at \*6 (Chittenden Cty. Mar. 22, 2024) (recognizing that “losing one’s housing—whether temporary or permanent—meets the standard for irreparable harm”).

29. See Clarence W. Rife, *Ethan Allen, an Interpretation*, 2 NEW ENG. Q. 561, 564 (1929) (“Assuming a place of leadership, he helped the settlers prepare their defense for the coming suits of ejectment which the New York land jobbers had instituted in the Supreme Court at Albany. These cases resulted adversely, but the incensed settlers decided to defend their possessions by force and made Ethan Allen ‘colonel commandant’ of a band of volunteers called the Green Mountain Boys.”).

possession, the right of action of ejectment emerged in England in the 14th century<sup>30</sup> as a byzantine string of legal fictions used to test title and circumvent the even more cumbersome real actions,<sup>31</sup> which “rarely proceeded for compensation in damages or for personal property.”<sup>32</sup> In the United States, we may understand the ensuing development of the legal forms of landlord-tenant law in the United States as a succession of innovations designed to make recovery of possession more convenient for the landlord. Ancient, clunky real actions gave way to ejectment actions, which begot forcible entry and detainer actions and a summary eviction process.<sup>33</sup> Ever-present was the threat of the landlord’s resort to disruptive self-help should the state not provide more peaceable means to assert their entitlement to possession.<sup>34</sup>

In the early 19th century, the Vermont Legislature codified the common-law right of action of ejectment as “justice ejectment” and outlined the legal means by which a landlord may retake possession of the premises without self-help:

It provides a summary remedy for a landlord whose tenant holds over without right after the determination of the lease. It lies where common law ejectment would lie. It is given for wrongful holding over of demised premises, and thus has all the characteristics of ejectment. The action sounds in tort. All the provisions of the statutes creating and allowing justice ejectment . . . proceed upon the supposition that the lease is at an end. It is only when the lessee holds without right after the determination of the lease that a plaintiff can resort to the remedy.<sup>35</sup>

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30. MARTIN L. NEWELL, *A TREATISE ON THE ACTION OF EJECTMENT* § 2, at 2 (1892).

31. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 23 (2d ed. 1985) (“This mummery (which everybody, the court included, knew to be false) served the purpose of bringing the issue of title before the court; but at the same time, because it was a *lease* case, the ancient land actions (which did not apply to leases) were avoided.”).

32. NEWELL, *supra* note 30, § 11, at 15; *Pernell v. Southall Realty*, 416 U.S. 363, 373–74 (1974) (“Ejectment originated as a very narrow remedy . . . . But by a variety of intricate fictions, ejectment eventually developed into the primary means of trying either the title to or the right to possession of real property. . . . [Q]uestions of fact arising in an ejectment action were resolved by a jury.”).

33. Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 397–98 (2022).

34. *Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972) (“An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges. Hence, the Oregon statute was enacted in 1866 to alter the common law and obviate resort to self-help and violence.”).

35. *Sabourin v. Woish*, 116 Vt. 385, 387, 78 A.2d. 333, 334 (1950) (citations omitted).

Revocation of the landlord's consent to the tenant's continued possession of the demised premises is thus a crucial prerequisite to commencing an ejectment action.<sup>36</sup> Though the lease governing the tenant's use of the premises creates rights and obligations under contract law, such as the warranty of habitability,<sup>37</sup> the action to oust a tenant following termination of the lease and regain possession sounds in tort.<sup>38</sup> Foreshadowing the Law and Economics movement by a century, the Vermont Supreme Court opined in 1875 that “[s]uch cheap and speedy remedy operates to the advantage of poor tenants, by rendering landlords willing to rent to them when they would not if the process of regaining possession necessarily required time and considerable expense.”<sup>39</sup> Rest assured, the summary remedy effecting the tenant's speedy dispossession is for the tenant's own good.<sup>40</sup>

Landlords had often paired actions for ejectment to recover possession with actions for trespass for mesne profits,<sup>41</sup> but as early as 1837 the Vermont Supreme Court noted that the two actions had *merged*.<sup>42</sup> In addition to possession of the land, the landlord could seek “what its use is worth” plus consequential damages resulting from acts of the tenant while in wrongful occupation.<sup>43</sup> The Vermont Supreme Court has long affirmed the landlord's

36. See *Andrus v. Dunbar*, 2005 VT 48, ¶ 15, 178 Vt. 554, 557, 878 A.2d 245, 249 (“Because the tenancy had not been terminated on the date that the landlord brought the ejectment action, the trial court should have entered judgment for tenant.”).

37. See *Hilder v. St. Peter*, 144 Vt. 150, 159–60, 478 A.2d 202, 208 (1984).

38. See *Cap. Garage Co. v. Powell*, 98 Vt. 303, 306, 127 A. 375, 377 (1925) (“At common law, a successful plaintiff in ejectment recovered the demanded premises, but with nominal damages, only. He could then bring an action of trespass for mesne profits, in which he recovered damages as the law gave him.”).

39. Compare *Pitkin v. Burch*, 48 Vt. 521, 523 (1875), with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 359 (2d ed. 1977) (“The right to a hearing before eviction is an especially good example of a provision that makes it cheaper for the landlord to deal with a more responsible (normally higher income) tenant against whom a cheap and speedy remedy of eviction is less likely to be needed.”).

40. See *South Park: The Mexican Staring Frog of Southern Sri Lanka* (Comedy Central television broadcast Jun. 10, 1998) (“[W]e have to kill animals, or else they’ll die.”).

41. See *Action for Mesne Profits*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A lawsuit seeking damages suffered by a landowner who has succeeded in a common-law action of ejectment whereby the plaintiff may recover for both the use of the land during the wrongful occupation and the costs of ejectment.”).

42. See *Brinsmaid v. Mayo*, 9 Vt. 31, 34 (1837) (“Whether after the ouster, the recovery of nominal damages will conclude the plaintiff’s right to recover further damages, it may be sufficient to say, that such has always been the practice of Courts in this State, since the statute giving the plaintiff the right to recover damages, as for *mesne* profits, in ejectment.”); *Lippett v. Kelley*, 46 Vt. 516, 524 (1874) (noting the legislature’s intent “to make the remedy of the plaintiff in ejectment, co-extensive with the remedy given by the action of trespass for mesne profits in England”).

43. *Toussaint v. Stone*, 116 Vt. 425, 430, 77 A.2d 824, 828 (1951) (citing *Powers v. Trs. of Caledonia Cty. Grammar Sch.*, 93 Vt. 220, 239–40, 106 A. 836, 844–845 (1919)) (ruling that at-will tenant had “without question . . . a reasonable time” to “gather up his property, dismantle and remove his

right to these damages.<sup>44</sup> But landlords were not satisfied with a judgment for mesne profits that only arrived after the judicial process reached conclusion, adequate in scope as it may be to embrace the landlord's damages resulting from the tenant's wrongful occupation of the premises.<sup>45</sup> The rent escrow statute would empower the landlord to retake possession based on the mere existence of mesne profits, turning the traditional order of ejectment and trespass for mesne profits actions on its head.<sup>46</sup>

### *B. The Residential Rental Agreements Act*

In *Hilder v. St. Peter*, the Vermont Supreme Court read an implied warranty of habitability into every residential rental agreement "that the landlord will deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean and fit for human habitation."<sup>47</sup> Partly in response to the landmark ruling, the Legislature enacted the Residential Rental Agreements Act (RRAA) in 1986, "in which it expressed its desire to protect the state's tenant population from unscrupulous and recalcitrant landlords, while striking a fair balance between the rights of landlords and tenants."<sup>48</sup> It resolved to "codify the common law relationship for residential rental agreements" with additional "tenant-protection and landlord-protection provisions."<sup>49</sup> The Vermont Supreme Court would later read the RRAA harmoniously with other consumer protection laws, such as the Vermont Consumer Protection Act.<sup>50</sup>

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cabin and depart" where action had not been brought until two years after tenancy was terminated); *Lippett*, 46 Vt. at 522.

44. *Walker v. Hitchcock*, 19 Vt. 634, 638 (1847).

45. *Hearing on H.339*, *supra* note 23, at 77–78 (statement of Rep. Donald Chioffi) ("The reason there are so many self-help evictions is that the present process isn't working. And, when it does work and you get a piece of paper and you can paper your wall with them. But, you don't get any money and you still have your obligations to pay. You've still got the tenant, you've still got the bills, you've got a nice writ and they can't pay, and it should have been established at the outset that they couldn't pay. Because that is what is happening at the end of the process. They can't pay. So, you've got a judgment for \$1,600.00 with costs, so what. So what?").

46. RANSOM H. TYLER, *A TREATISE ON THE REMEDY BY EJECTMENT AND THE LAW OF ADVERSE ENJOYMENT IN THE UNITED STATES* 840 (1870) (noting that "an action for the *mesne profits* is *consequential* to the recovery in ejectment").

47. 144 Vt. 150, 159–60, 478 A.2d 202, 208 (1984); *Birkenhead v. Coombs*, 143 Vt. 167, 172, 465 A.2d 244, 246 (1983) (citing support for diminished value approach in contract cases).

48. *Willard v. Parsons Hill P'ship*, 2005 VT 69, ¶ 16, 178 Vt. 300, 306–7, 882 A.2d 1213, 1218.

49. *Vt. Tenants, Inc. v. Vt. Hous. Fin. Agency*, 170 Vt. 77, 86, 742 A.2d 745, 751 (1999).

50. *Bisson v. Ward*, 160 Vt. 343, 350, 628 A.2d 1256, 1261 (1993) ("There is no indication that by enacting the Residential Rental Agreements Act, the Legislature intended to deny tenants the additional protections provided by the Consumer Fraud Act. Because the Residential Rental Agreements Act does not govern all aspects of the landlord-tenant relationship, it does not preclude other claims between tenants and landlords." (citations omitted)).

Minutes of the House Judiciary Committee's August 21, 1985, hearing on landlord-tenant issues provide revealing insight into the presuppositions upon which the proposed rent escrow mechanism rested. Representative Amy Davenport, a future chief administrative judge, recognized that the rent escrow mechanism was a "fairly strong provision" because "you basically are taking a lot away from the tenant at that point when you say that you must pay into court and if you don't pay into court a writ of possession issues immediately."<sup>51</sup> She felt it important that "if you have a fast track eviction process that is fair that it be very clear in the law in statute."<sup>52</sup> Representative Ruth Stokes, a Republican from Chittenden County, recounted that landlords' chief complaint was tenant nonpayment of rent during the eviction process.<sup>53</sup> Court-ordered payment of rent into court would deter the "false raising of issues" by tenants:

I think you would have less of a maneuvering of the system if the obligation to pay during the process was there. You would have less of a gerrymandering of the system, if you would, if that money was having to be paid to someone. I think there would be less false raising of issues.<sup>54</sup>

She endorsed speeding up nonpayment ejection cases upon the tenant's default on a rent escrow order.<sup>55</sup>

For Representative Donald Chioffi, a Republican from Rutland County, the "deadbeats" who bounce from place to place without honoring their obligation to pay ultimately foist the burden of higher rents on "good tenants," and ought to enjoy only conditional access to the courts to assert counterclaims related to their tenancy:

It should be established right away if the tenant does not have the money to pay. Then why go through process and get a writ of possession and a judgment order when there isn't any money? You can't get blood from a stone. So let's establish that right off and say, "Okay, go find some place else to live so that we can get somebody who can pay something."<sup>56</sup>

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51. *Hearing on H.339, supra* note 23, at 67 (statement of Rep. Davenport).

52. *Id.* at 69.

53. *Id.* at 70 (statement of Rep. Ruth Stokes, Member, H. Judiciary Comm.).

54. *Id.*

55. *Id.* at 71.

56. *Id.* at 78 (statement of Rep. Chioffi).

“[T]he landlord automatically gets the writ” and may evict the tenant “[e]ven if they have filed” affirmative defenses or counterclaims relating to the landlord’s obligation to provide habitable premises: “Let them file[,] . . . you have to have that [rent] regardless of whether the place is habitable or not. I mean you don’t automatically come up with less money available to you just because the place is uninhabitable [sic].”<sup>57</sup>

The House Judiciary Committee repeatedly considered the rent escrow process to be a paid prerequisite to “fighting it out” with their landlord in court:

REP. NUOVO: So, if you want to fight it out you’ve got to pay the rent the first of February.

REP. PINGERT: To the court.

REP. NUOVO: To the court so that the court can then make the adjustment. That’s what your procedure is saying.

REP. CHIOFFI: That’s right. Then they will determine whether it’s adjusted. The court may determine that in fact it needs to be adjusted and then through the appeal process it may go through this 85 days. Well, that brings us to another month’s rent. Then the adjusted month’s rent would be paid into court. On final resolution the money is going to be there.<sup>58</sup>

The landlord’s assurance that “the money is going to be there” upon final judgment thus justifies the imposition of a paid requirement upon the tenant’s right to “fight it out” in a jury trial. Perhaps the landlord’s convenience superseded the tenant’s right to mount a defense because legislators remained skeptical of the sincerity of the latter’s counterclaims:

REP. BATTEN: So now you’ve got it up to 55 days (interrupted)

REP. DAVENPORT: If there was a counterclaim. I mean it’s going to be hard to counterclaim if you don’t have any warranty of habitability issues to raise.

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57. *Id.* at 66, 76–77.

58. *Id.* at 77.

REP. CHIOFFI: Well, if you don't why haven't you paid the rent?

REP. NUOVO: Well, you get hassles by the landlord or whatever.<sup>59</sup>

The rent escrow statute that emerged had its intended effect of weeding out those tenants unable to pay their rent, regardless of the merits of their counterclaims and defenses to possession.

## II. THE RENT ESCROW PROCESS IN THEORY AND PRACTICE

### A. *In Theory*

A rent escrow order is a provisional remedy.<sup>60</sup> Like a prejudgment writ of attachment, a rent escrow order ensures the plaintiff's ability to recover.<sup>61</sup> Just as the court may dissolve an injunction in response to changing circumstances<sup>62</sup> or where an action is dismissed for lack of jurisdiction,<sup>63</sup> a rent escrow order may be vacated on motion upon dismissal of the landlord's ejectment claim.<sup>64</sup> Like an *ex parte* temporary restraining order, a rent escrow order requires the landlord to support their motion with an affidavit. Like a preliminary injunction, the court affords the tenant a hearing before ordering their timely payment of rent.<sup>65</sup> Unlike a preliminary injunction, a rent escrow

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59. *Id.* at 67.

60. See 11A FED. PRAC. & PROC. CIV. § 2931 (3d ed. 2017) (Provisional remedies "provide for seizure of a person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action.").

61. See VT. R. CIV. P. 65.1(c) (conditioning issuance of preliminary injunction upon applicant's posting bond); VT. R. CIV. P. 4.1 (stating that in most civil actions, prejudgment writ will issue "upon hearing and a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance, bond, or other security shown by the defendant to be available to satisfy the judgment.").

62. See *Boiselle v. Boisselle*, 162 Vt. 240, 243, 648 A.2d 388, 389–390 (1994) (citing *United States v. Swift & Co.*, 286 U.S. 106 (1932)).

63. *Auclair v. Vt. Elec. Power Co. Inc.*, 133 Vt. 22, 29, 329 A.2d 641, 645 (1974).

64. *Northgate Hous. Ltd. v. Kirkland*, No. 2002-152, 2002 WL 34422174, at \*3 (Vt. Nov. 2002).

65. Compare VT. STAT. ANN. tit. 12, § 4853a(a) (2026) ("The motion shall be accompanied by affidavit setting forth particular facts in support of the motion."), and § 4853a(d) ("If the court finds the tenant is obligated to pay rent and has failed to do so."), with VT. R. CIV. P. 65(a) ("A temporary restraining order may be granted . . . only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true.").

order does not require the landlord to establish the threat of irreparable harm—only the tenant's breach of their contractual obligation to pay rent and the amount of the landlord's money damages,<sup>66</sup> which would ordinarily preclude the availability of a preliminary injunction.<sup>67</sup>

The rent escrow order's availability in "any action against a tenant for possession,"<sup>68</sup> including those in which the landlord does not allege nonpayment of rent as the grounds for termination of the tenancy, further distinguishes it from a preliminary injunction, whose "very purpose . . . is to give temporary relief based on a preliminary estimate of the strength of the plaintiff's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case."<sup>69</sup> In an ejectment action based on the tenant's alleged interference with others' peaceful enjoyment of the premises,<sup>70</sup> for example, the landlord may obtain a rent escrow order by establishing only the tenant's obligation to pay rent and failure to do so.<sup>71</sup> The court thus provides the landlord with temporary relief for a claim they did not allege—i.e., nonpayment of rent—and a shortcut to the same final relief, possession, where the tenant appears likely to promptly default on the order. The rent escrow statute does not expressly require the landlord to demonstrate that the issuance of an order would advance the public interest.

The circumstances in which the tenant's obligation to pay rent would be suspended, warranting denial of the landlord's rent escrow motion, thus gain crucial importance. This obligation is subject to one express reservation: where the tenant has properly withheld rent after providing their landlord actual notice of an issue materially affecting health and safety as well as a "reasonable time" to perform repairs.<sup>72</sup> Landlords frequently violate their statutory and contractual obligation "to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean, and fit for human habitation and that comply with the requirements of applicable building, housing, and health regulations,"<sup>73</sup> yet their noncompliance rarely disposes of the action.

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66. tit. 12, § 4853a(d). After obtaining a rent escrow order but prior to final judgment, a landlord may obtain a disbursement of the tenant's rent paid into court by demonstrating they are "in actual danger of loss of the premises or other personal hardship resulting from the loss of rental income." § 4853a(f).

67. See *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 40, 205 Vt. 586, 605, 178 A.3d 313, 325 (citing FED. PRAC. & PROC. CIV., *supra* note 60, § 2948.1).

68. tit. 12, § 4853a(a).

69. FED. PRAC. & PROC. CIV., *supra* note 60, § 2948.3.

70. VT. STAT. ANN. tit. 9, § 4467(b)(1) (2026); § 4456(b).

71. tit. 12, § 4853a(d).

72. See tit. 9, § 4458(a)(1).

73. § 4457(a).

The Legislature never expressly subordinated this obligation to that imposed upon the tenant to pay rent “without demand or notice at the time and place agreed upon by the parties.”<sup>74</sup> In *Hilder*, the Vermont Supreme Court opined that recognition of these obligations as mutual covenants accorded with longstanding case law for the availability of contract remedies for breaches of lease agreements and “does not represent an abrupt change in Vermont law.”<sup>75</sup> The Residential Rental Agreements Act (RRAA) affords the tenant an infrequently invoked equitable remedy in the form of an injunction commanding the landlord to uphold their obligation to maintain habitable, code-compliant premises, just as a rent escrow order requires the tenant to uphold their obligation to pay rent.<sup>76</sup> While there is no equivalent to the landlord’s immediate entitlement to a writ of possession under the rent escrow statute, the tenant may seek an order to show cause why their landlord has not complied with the court’s order to provide habitable premises,<sup>77</sup> or move to dismiss the action altogether.<sup>78</sup>

The tenant’s obligation to pay rent and the landlord’s obligation to maintain habitable premises do not stand on equal footing and historically never have.<sup>79</sup> Whereas a landlord may move for a rent escrow order at the commencement of the ejectment action, the tenant may obtain their injunction only after meeting a series of statutorily prescribed yet judicially malleable prerequisites, while at risk of the landlord engaging in self-help in the meantime.<sup>80</sup> A judge’s discretion as to what a “reasonable time” would be for the landlord to continue depriving the tenant of the basic necessities of life, such as water and heat, before the tenant may seek injunctive relief, or whether the tenant’s issues “materially affect health and safety,” may affect the tenant’s success in obtaining an injunction.<sup>81</sup>

If they succeed, however, and the landlord defaults on the court’s order by failing to repair the serious habitability issues, the tenant can move to

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74. § 4455(a).

75. *Hilder v. St. Peter*, 144 Vt. 150, 159, 478 A.2d 202, 208 (1984).

76. tit. 9, § 4458(a)(2).

77. VT. STAT. ANN. tit. 12, § 122 (2009).

78. Should the landlord fail to make repairs and default on a preliminary injunction issued under Section 4458(a)(2), the tenant could move for judgment “[f]or failure of the plaintiff . . . to comply with . . . any order of court.” VT. R. CIV. P. 41(b)(2).

79. See Mason, *supra* note 33, at 397 (“The status conferred upon landowners and the prioritization of their possessory interests have dominated the landowner-lessee relationship ever since.”).

80. tit. 9, § 4458(a)(2).

81. See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEVELAND STATE L. REV. 137, 155 (2013) (“Judges without exposure to the lives of low-income people simply don’t appreciate the realities faced by poor individuals.”).

initiate contempt proceedings<sup>82</sup> and request relief, ranging from the provision of water fit for human consumption<sup>83</sup> to monetary damages.<sup>84</sup> Where a landlord has already demonstrated a recalcitrance necessitating contempt proceedings, however, their compliance with additional orders remains doubtful. In theory, the tenant may seek to imprison their landlord indefinitely until they comply with the court's order, but the court would impose such a startling sanction only in extraordinary cases, if ever.<sup>85</sup> In contrast to the tenant's lackluster prospects for enforcement of a habitability injunction, the landlord is all but certain to receive their due when the tenant defaults on a rent escrow order—a writ restoring them to possession of the premises in a fraction of the time.

It bears repeating that a landlord may obtain a rent escrow order even where their complaint does not allege nonpayment of rent.<sup>86</sup> In such cases, the tenant's compliance with their contractual and statutory obligation to pay rent is not a controversy properly before the court, as the landlord did not provide actual notice of the termination of their tenancy for this reason, nor did they allege nonpayment in the complaint.<sup>87</sup> If the tenant defaults on the rent escrow order, the court will award the landlord, on motion, the same relief sought by the claims the landlord might have actually pleaded, such as no-cause or for-cause eviction, or sale of the property.<sup>88</sup> The landlord has not demonstrated their entitlement to possession—at a minimum, in the last example, a valid notice of termination and an averment that the landlord “has contracted to sell the building.”<sup>89</sup> The court will nevertheless restore the

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82. tit. 12, § 122 (“When a party violates an order made against him or her in a cause brought to or pending before a Superior judge or a Superior Court after service of the order upon that party, contempt proceedings may be instituted against him or her before the court or any Superior judge.”); *see* *Town of Hinesburg v. Dunkling*, 167 Vt. 514, 526, 711 A.2d 1163, 1170 (1998) (“[C]ivil contempt penalties are assessed to coerce the defendant to do some act ordered by the court for the benefit or advantage of the opposite party.”) (citing *Spabile v. Hunt*, 134 Vt. 332, 335, 360 A.2d 51, 52 (1976)).

83. *See* tit. 9, § 4457(c).

84. *See* *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 197 (1949) (“Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.”); *but see* *Obolensky v. Trombley*, 2015 VT 34, ¶ 43, 198 Vt. 401, 419, 115 A.3d 1016, 1029–30 (affirming the trial court's decision in declining to hold in contempt a party whose violation of a stipulated order resulted in “only nominal damages”).

85. *See* tit. 12, § 123; *Sheehan v. Ryea*, 171 Vt. 511, 512, 757 A.2d 467, 468 (2000) (“Imprisonment of indefinite duration may be the means to compel a party to do some act ordered by the court, and the party must be released on compliance with the order.”).

86. tit. 12, § 4853a(a).

87. VT. R. CIV. P. 54(c) (“Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.”).

88. *See* tit. 9, § 4467(b)–(e).

89. *See* § 4467(d) (requiring 30 days' actual notice where landlord “has contracted to sell the building”).

landlord to possession once the landlord establishes that the tenant fell behind on rent either prior to or during the action.

*B. In Practice*

In Vermont's most populous counties, the superior courts schedule rent escrow hearings in 15- or 30-minute blocks. Tenants who appear may apply for and receive limited representation in their hearing from Legal Services Vermont,<sup>90</sup> Vermont Legal Aid, or a pro bono volunteer if they meet financial eligibility criteria.<sup>91</sup> When tenants do not appear, the landlord may proceed and receive their desired order in the tenant's absence.

An attorney will sift through the filings in the tenant's case with a keen eye for grounds for dismissal of the entire action, or at least denial of the landlord's request for a rent escrow order. The tenant has several options, which may be winnowed by court scheduling. Recall that the court may order not only rent as it accrues during pendency of the ejectment action but also rent that has accrued since commencement.<sup>92</sup> The rent escrow statute does not specify when this portion of back rent must be paid, though many courts typically require payment in about seven days.<sup>93</sup> Where a tenant is plainly unable to pay rent, finding several months' worth of rent in one week's time to keep their case alive is highly unlikely, especially when the first of the month follows closely behind. In such cases, everyone in the courtroom knows that the tenant will default on the first payment and a writ will issue. The parties may stipulate to a rent escrow order and negotiate a schedule that allows the tenant to demonstrate, through timely, court-ordered payment, their ability to pay the landlord, who may not immediately request a final hearing.

Some tenants have not failed to pay rent but instead exercised, or attempted to exercise, their statutory right to withhold rent in response to severe habitability issues in their home that their landlord failed to address within a reasonable time after receiving notice.<sup>94</sup> Few tenants are aware that withholding rent requires providing their landlord with written notice either hand-delivered or mailed via first-class or certified mail.<sup>95</sup> In-person conversations, phone calls, text messages, and emails all fall short of "actual

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90. The author worked as a staff attorney for Legal Services Vermont from 2023 until 2025.

91. Legal Services Vermont is funded by the Legal Services Corporation, which establishes maximum income levels for individuals eligible for legal assistance. *See* 45 C.F.R. § 1611 (2026).

92. VT. STAT. ANN. tit. 12, § 4853a(d) (2026).

93. *Id.*

94. *See* tit. 9, § 4458(a).

95. *See* § 4451(1).

notice.”<sup>96</sup> As a result, even where the tenant has obvious habitability issues in their home, they may be prevented from using them at the rent escrow hearing, either to reduce the amount ordered into court or to assert they had been relieved of their obligation to pay rent given the severity of the defects.

Sometimes, the court will entertain an oral motion made at the start of the rent escrow hearing suggesting that the court lacks subject matter jurisdiction and ought to dismiss the action.<sup>97</sup> At other times, the court will request the submission of written briefing and a full motion cycle before deciding on its jurisdiction;<sup>98</sup> in the meantime, it may impose a rent escrow order. Courts are hesitant to stay a rent escrow order pending disposition of a motion to dismiss and may issue a writ despite the tenant’s objections to jurisdiction.

Facing packed dockets,<sup>99</sup> Vermont courts have a limited appetite to make evidentiary findings at a rent escrow hearing; where one or both parties are unrepresented, such fact-finding can be doubly time-intensive.<sup>100</sup> The rent escrow statute permits, but does not require, the tenant to file a memorandum in opposition supported by affidavit “pursuant to Rule 7(b)(6).”<sup>101</sup> In turn, Rule 7(b)(6) requires the opposing party to include a written request to present evidence within their memorandum in opposition.<sup>102</sup> A court adopting a literal reading of Section 4853a(c) may streamline a morning’s worth of potentially contentious rent escrow hearings by precluding tenants who failed to file opposition and request to present evidence from doing so, even if it places the court’s subject matter jurisdiction in doubt.<sup>103</sup> Setting aside how even the most attentive pro se litigant in an ejectment action might be unaware of this requirement, this literal reading would betray the rent escrow order’s intended purpose as a provisional remedy to ensure the landlord’s collection. As a practical matter, a rent escrow motion and affidavit filed at the commencement of an action

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96. *Id.*; see *In re Soon Kwon*, 2011 Vt. 598, 603, 19 A.3d 139, 145 (2011) (“Landlord’s argument is based on a definition of actual notice as receipt of written notice, regardless of how that notice is delivered. The Legislature adopted a more narrow definition of what can constitute actual notice.”).

97. VT. R. CIV. P. 12(h)(3).

98. See VT. R. CIV. P. 7(b)(1)–(4).

99. The Vermont Judiciary reported a 6% increase in the civil backlog from fiscal years 2024 to 2025, despite an 8% increase in civil case dispositions during the same period. VT. JUDICIARY, STATISTICAL SUMMARY FY 2025 I (2025).

100. See *Super*, *supra* note 24, at 413 (noting that “the tenants’ rights revolution imposed stresses that the courts hearing eviction cases were ill-equipped to handle,” in part because “hearing these cases demanded far greater resources than had been required to grant possession routinely to landlords under a legal regime in which tenants had few defenses”).

101. VT. STAT. ANN. tit. 12, § 4853a(c).

102. VT. R. CIV. P. 7(b)(6).

103. See VT. R. CIV. P. 12(h)(3).

cannot attest to the rent that subsequently accrues before the court schedules the hearing, nor can the tenant's opposition and affidavit attest to a subsequently occurring habitability issue warranting a reduction in the amount of rent ordered into court. As Representative Davenport said: "[Y]ou have got to have a hearing."<sup>104</sup>

Once entered, a rent escrow order is difficult, though not impossible, to modify.<sup>105</sup> The rent escrow statute does not establish the criteria that the tenant must set forth in their affidavit to warrant reduction of the amount ordered paid into court, nor does it expressly authorize the court to modify the order's payment schedule.<sup>106</sup> Where a tenant has stipulated to a rent escrow order, a court might be less inclined to grant a modification, especially if the tenant had the benefit of counsel. Nevertheless, the court has the inherent authority to revise its own orders.<sup>107</sup>

Where a tenant has defaulted on a rent escrow order, they may oppose the landlord's motion for a writ before it issues "forthwith" and mount a longshot equitable defense.<sup>108</sup> Alternatively, they may file a motion to set aside the judgment for possession.<sup>109</sup> In *Northgate Housing Limited v. Wilson*, the Vermont Supreme Court took an interlocutory appeal from the trial court's issuance of a writ of possession based on the tenant's default on the rent escrow order.<sup>110</sup> Analogizing to contempt proceedings appeals, which recognize the defense of inability without fault to comply, the Court concluded that:

[T]o construe § 4853a(h) to apply automatically and mechanically, despite evidence of what amounts to impossibility of timely performance as to one payment would be draconian. Though the legislative intention to provide for an immediate and straightforward means for a landlord to obtain possession where the ultimate step of a

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104. *Hearing on H.339, supra* note 23, at 66 (statement of Rep. Davenport).

105. *See Dolgin v. Masure*, No. 123-5-12-Cacv (Vt. Superior Ct., Caledonia Cty. Aug. 27, 2012) (granting motion to modify on equitable grounds where defendant gave birth then went on maternity leave from her job at Dunkin' Donuts) (unpublished).

106. tit. 12, § 4853a(g) ("The motion for reduction shall be accompanied by affidavit setting forth particular facts in its support.").

107. *See Hill v. Springfield Hosp.*, 2023 VT 23, ¶ 12, 218 Vt. 64, 71, 297 A.3d 504, 509 ("The trial court certainly has discretion to revise interlocutory orders prior to judgment.") (citing *Dudley v. Snyder*, 140 Vt. 129, 131, 436 A.2d 763, 764 (1981)).

108. tit. 12, § 4853a(h).

109. The court may relieve a party from a final judgment for, inter alia, "mistake, inadvertence, surprise, or excusable neglect," due process defects rendering the judgment void, or "any other reason justifying relief from the operation of the judgment." VT. R. CIV. P. 60(b)(1), (4), (6).

110. No. 94-546, slip op. 59, 59 (Vt., Mar. 24, 1995) (unpublished).

payment-into-court order has been obtained, that end is not served nor justice done when the writ issues without any inquiry as to third-party fault. There was evidence in this case that the circumstances of noncompliance were temporary and beyond the tenant's control. This evidence was not considered by the court. Its resultant order was clearly erroneous.<sup>111</sup>

Though not a formal requirement, courts may be more likely to grant a motion to set aside a rent default when filed contemporaneously with the delinquent payment, demonstrating that the tenant's noncompliance was temporary and beyond their control.<sup>112</sup>

### III. CONSTITUTIONAL IMPLICATIONS OF THE RENT ESCROW STATUTE

#### *A. Right to Jury Trial Under Article 12 of the Vermont Constitution*

Article 12 of the Vermont Constitution provides “[t]hat when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.”<sup>113</sup> The Vermont Supreme Court interpreted this provision as a right to jury trial “to the extent that it existed at common law at the time of the adoption of the constitution in 1793,” requiring an inquiry not into whether Vermont courts actually recognized the action at issue in the late 18th century, but rather into “the nature of the action and whether it is the type of controversy that would have been tried by a jury under common law at that time.”<sup>114</sup> The constitutional right to a jury trial also attaches to claims “traditionally tried in a court of law,”<sup>115</sup> such as those for recovery of possession of real property.<sup>116</sup> A law is “unconstitutional with respect to juries if it ‘destroys or

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111. *Id.* at 61.

112. *Cf.* *Russell v. Armitage*, 166 Vt. 392, 399, 697 A.2d 630, 635 (1997) (requiring obligor accused of violating child-support order to show “an inability to comply”) (citing *Spabile v. Hunt*, 134 Vt. 332, 335, 360 A.2d 51, 52 (1976)); *State v. Bostwick*, 2014 VT 97, ¶ 8, 197 Vt. 345, 348, 103 A.3d 476, 478 (requiring defendant accused of probation violation to show that “failure to comply was not willful but rather resulted from factors beyond his control and through no fault of his own.”) (quoting *State v. Austin*, 165 Vt. 389, 398, 685 A.2d 1076, 1082 (1996)).

113. VT. CONST. ch. I, art. 12.

114. *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 155, 624 A.2d 1122, 1125 (1992) (citations omitted); *see Plimpton v. Town of Somerset*, 33 Vt. 283, 291–92 (1860).

115. *LeBlanc v. Snelgrove*, 2015 VT 112, ¶¶ 37–38, 200 Vt. 570, 586–587, 133 A.3d 361, 372–373.

116. *Id.* at 38 (citing *Ross v. Bernhard*, 396 U.S. 531, 533 (1970)); *Pernell v. Southall Realty*, 416 U.S. 363, 371 (1974) (“The various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded.”).

materially impairs the right of trial by jury according to the course of the common law.”<sup>117</sup>

The tenant’s right to a jury trial under both Article 12 and the ejectment statute<sup>118</sup> “shall be preserved to the parties inviolate” under Rule 38(a) of the Vermont Rules of Civil Procedure.<sup>119</sup> Nevertheless, the right is not self-executing; the tenant must file and serve a demand for a jury trial on any issues.<sup>120</sup> Imposing such a requirement does not ultimately deprive a tenant of their right in a legal sense,<sup>121</sup> but in a practical sense, this often proves an insuperable hurdle.<sup>122</sup> In *Jones v. Spear*, the Vermont Supreme Court upheld a county court rule conditioning the right to a jury trial upon the furnishing of an affidavit that a money claim was disputable, reasoning that in both England and states with comparable constitutional provisions, court rules often bar parties from making certain defenses without an affidavit, and “in neither country has it ever been supposed[] that the right of trial by jury was thereby impaired or trespassed upon.”<sup>123</sup>

For our purposes, assume the tenant files an answer to the landlord’s claim for ejectment.<sup>124</sup> They may raise standard affirmative defenses,<sup>125</sup> such as accord and satisfaction or waiver where the landlord has executed a new rental agreement after terminating the tenant’s previous tenancy; estoppel where the landlord may have permitted conduct later alleged as a lease violation; fraud or illegality where the landlord has engaged in fraudulent or

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117. *In re* Vt. Sup. Ct. Admin. Dir. No. 17, 154 Vt. 392, 399, 579 A.2d 1036, 1040 (1990) (quoting *Plimpton*, 33 Vt. at 290).

118. VT. STAT. ANN. tit. 12, § 4852 (1971) (“Either party shall have the right to a trial by jury.”).

119. VT. R. CIV. P. 38(a).

120. VT. R. CIV. P. 38(b), (d) (requiring party seeking jury trial to “serv[e] upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 14 days after the service of the last pleading directed to such issue” and file same with the court); VT. R. CIV. P. 38(d) (failure to serve and file demand constitutes waiver of right to jury trial).

121. *See* *Bloomer v. Gibson*, 2006 VT 104, ¶ 12, 180 Vt. 397, 402, 912 A.2d 424, 427 (holding that Rule 38 “provides the procedure for administration of the jury trial right,” and that “rules consistent with the Constitution can require that ‘reasonable notice be given of the intention of a party to avail himself of his right, in a civil case, to put his case before a jury.’”) (quoting *Muzzy v. Curtis*, 127 Vt. 516, 517, 253 A.2d 149, 150 (1969)); *In re* Admin. Dir. No. 17, 154 Vt. at 401, 579 A.2d at 1041 (ruling that “actions that may delay or condition the jury trial right do not by themselves infringe on that right”).

122. The tenant would likely make their jury demand in an answer to the landlord’s complaint for ejectment, should they file one. *See* Nicole F. Summers & Justin Steil, *Evicted by Default*, 57 CONN. L. REV. 1233, 1249 (2025) (“[A] requirement to file an answer is more onerous for tenants. Many tenants do not understand that an answer is required, do not know how to file an answer, and are unaware of the information an answer ought to include.”).

123. 21 Vt. 426, 430 (1849).

124. VT. R. CIV. P. 8(b).

125. VT. R. CIV. P. 8(c).

illegal activity related to the tenancy;<sup>126</sup> or laches where a landlord relies upon a lease violation from a previous lease term. The tenant may also raise the failure to join a necessary party, or object to the action not having been brought in the name of the real party in interest.<sup>127</sup> Though a breach of the warranty of habitability may not itself be a defense to ejectment for cause or no cause, a tenant who complains to their landlord about any violation of the RRAA has a defense in any retaliatory action for possession.<sup>128</sup>

Suppose the landlord brought a no-cause action<sup>129</sup> in retaliation for the tenant's complaint to the state Division of Fire Safety about unsafe conditions in their home.<sup>130</sup> The tenant may fall behind on rent during pendency of the action for any number of reasons. Nevertheless, the landlord may immediately request a writ of possession upon the tenant's default on a payment required under the rent escrow order.<sup>131</sup> Before the tenant may submit their affirmative defenses to a jury and thereby exercise their constitutional and statutory right, the landlord may execute the writ and render moot the issue of possession altogether.<sup>132</sup>

The trial court's occasional reluctance to engage in robust fact-finding at a rent escrow hearing underscores the need to safeguard the tenant's right to submit to a jury of their peers their defenses to the landlord's claim to possession. If the court is unwilling to consider a tenant's habitability defense at a rent escrow hearing, not even for the limited purpose of reducing the tenant's monthly obligation,<sup>133</sup> the tenant's only other opportunity would be their final hearing before a jury. Should the tenant miss a payment under the

126. *See, e.g.,* L'Esperance v. Benware, 2003 VT 43, ¶ 14, 175 Vt. 292, 298, 830 A.2d 675, 681 (“A landlord can commit a deceptive act prohibited by § 2453 of Title 9 when a landlord rents property to a tenant that is in violation of law.” (citing Bisson v. Ward, 160 Vt. 343, 351, 628 A.2d 1256, 1261 (1993))); Sawyer v. Robson, 2006 VT 136, ¶ 13, 181 Vt. 216, 224, 915 A.2d 1298, 1304 (holding that the plain meaning of “other violator” under VT. STAT. ANN. tit. 9, § 2461(b) includes landlords who engaged in unfair or deceptive commercial practices).

127. VT. R. CIV. P. 17(a). A landlord may commence an ejectment action in the name of one of their limited liability companies that does not own the subject property, and so long as the entity that actually owns it comes into the action within a reasonable time, they do not risk dismissal of their case. *S. Burlington Mech. & Elec. Contractors, Inc. v. Graybar Elec. Co., Inc.*, 138 Vt. 580, 581, 421 A.2d 1275, 1276 (1980).

128. tit. 9, § 4465(b).

129. *See* § 4467(c)–(e).

130. *See* § 4465(a)(1).

131. *See* VT. STAT. ANN. tit. 12, § 4853a(h) (2026).

132. *See* Handy v. Fiske, 2023 VT 46, ¶ 6, 218 Vt. 634, 635, 308 A.3d 544, 547 (ruling the issue moot upon the landlord retaking possession).

133. *See* tit. 12, § 4853a(d) (noting that the court shall order “full or *partial* payment” of rent into court. (emphasis added)). The reduced rent reflects the tenant's entitlement, where the landlord has breached the warranty of habitability and failed to make necessary repairs within a reasonable time, to “withhold the payment of rent for the period of the noncompliance.” tit. 9, § 4458(a)(1).

rent escrow order in the meantime, the court will issue partial judgment for possession and a writ before the tenant may put the issue to the jury.<sup>134</sup>

The rent escrow statute—specifically, Title 12, Sections 4853a(d) and (h)—threatens tenants’ uninhibited exercise of their constitutional and statutory right to a jury trial. This is especially evident in cases where nonpayment of rent is not part of the landlord’s claim for ejectment or pleaded as a separate cause of action, such as breach of contract. The tenant may have affirmative defenses to the landlord’s claim for ejectment, such as a retaliation defense to a no-cause claim. They will lose possession of their home after judgment issues on a claim the landlord never pleaded before they may exercise their right to a jury trial.

*B. Right to Access the Courts Under Article 4 of the Vermont Constitution*

Broadly speaking, Article 4 of the Vermont Constitution “ensure[s] access to the judicial process”<sup>135</sup> but has “never been held . . . to give rise to a substantive constitutional right”<sup>136</sup>:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably [sic] to the laws.<sup>137</sup>

This so-called “open courts provision” traces back to Chapter 29 of the 1225 Magna Carta.<sup>138</sup> “[F]reely, and without being obliged to purchase” does not

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134. A writ will issue “forthwith.” tit. 12, § 4853a(h). But there is no constitutional right to “instant access to a jury.” *In re Vt. Sup. Ct. Admin. Dir. No. 17*, 154 Vt. 392, 402, 579 A.2d 1036, 1041 (1990). When the Supreme Court decided *In re Admin Dir. No. 17* in 1990, Vermont juries decided about 50 civil trials in a typical six-month period. *Vermont Court Upholds Delay in Civil Trials*, N.Y. TIMES, Jun. 5, 1990, at A24. Vermont juries decided 17 civil trials in fiscal year 2025. VT. JUDICIARY, *supra* note 99, at 10.

135. *Shields v. Gerhart*, 163 Vt. 219, 223, 658 A.2d 924, 928 (1995).

136. *Levinsky v. Diamond*, 151 Vt. 178, 197, 559 A.2d 1073, 1086 (1989), *overruled on other grounds by Muzzy v. State By & Through Rutland Cty. State’s Att’y*, 155 Vt. 279, 583 A.2d 82, 83 (1990).

137. VT. CONST., ch. I, art. 4.

138. Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 BRANDEIS L.J. 613, 614–15 (2000); see Paul Blakeslee, ‘Certain Remedy Afforded for Every Wrong’: *State Constitutional Right-to-Remedy Provisions as a Vehicle for Climate Litigation*, 104 B.U. L. REV. 1829, 1836 (2024).

mean free of charge;<sup>139</sup> the Vermont Supreme Court has held that Article 4 does not prohibit courts from charging filing and transcript fees.<sup>140</sup> Nor do statutory awards of attorney's fees impermissibly force a defendant to purchase justice.<sup>141</sup>

For comparison, Oregon's open courts provision—which guarantees that “justice shall be administered, openly and without purchase”<sup>142</sup>—bars the procurement of legal redress by such means as paying money for a particular outcome,” such as “bribery and other forms of improper influence” or “the judicial imposition of fees and costs in amounts so onerous as to unreasonably limit access to the courts.”<sup>143</sup> In *Perce v. Hallett*, the Rhode Island Supreme Court ruled that the state's open courts provision prohibited “gratuities or exactions given or demanded for the direct purpose of influencing the course of legal proceedings and is to prevent the selling of justice by the sovereign.”<sup>144</sup> It was “designed to abolish, not fixed fees, prescribed for the purposes of revenue, but the fines which were anciently paid to expedite or delay law proceedings and procure favor.”<sup>145</sup>

In Vermont, once the court enters a rent escrow order, the tenant must make the prescribed payments to delay a writ from issuing against them before they can submit their affirmative defenses to a jury.<sup>146</sup> The tenant makes regular payments to the court for the landlord's ultimate benefit pending a motion for disbursement.<sup>147</sup> By failing to make a rent escrow payment, the tenant would effectively waive their right to a jury trial under Article 12, as discussed above. A hastily filed opposition to the landlord's motion requesting a writ would be their last opportunity to dispute the landlord's entitlement to possession—a poor substitute for a jury trial.

139. VT. CONST., ch. I, art. 4; *accord* *Jacobsen v. Garzo*, 149 Vt. 205, 208, 542 A.2d 265, 267 (1988) (“Free and uninhibited access to the courts is an important right of all citizens. Indeed, in Vermont this right is recognized by our fundamental law.”).

140. *State v. de Macedo Soares*, 2011 VT 56, ¶ 12, 190 Vt. 549, 551–52, 26 A.3d 37, 41 (“While there is a fundamental right to access the courts, there is no constitutional guarantee that a litigant will be able to do so without expense. Defendant's citation to the Magna Charta [sic] and other historic legal texts does not aid his cause.”).

141. *See Fleury v. Kessel/Duff Const. Co.*, 149 Vt. 360, 364, 543 A.2d 703, 705 (1988) (“Indeed, we have come to recognize as a society that a denial of the right to recover attorney's fees, or alternatively, publicly subsidized counsel, will prevent many individuals including workers' compensation claimants from having access to justice. We find no denial of defendant's state constitutional rights.”).

142. OR. CONST., art. I, § 10.

143. *Allen v. Employment Dept.*, 57 P.3d 903, 905–06 (Or. Ct. App., 2002).

144. *See Square D. Co. v. O'Neal*, 72 N.E.2d 654, 657 (Ind. 1947) (quoting *Perce v. Hallett*, 13 R.I. 363, 365 (1881)).

145. *Perce*, 13 R.I. at 364 (emphasis added); *see State v. Basinow*, 371 A.2d 458, 659–60 (N.H. 1977).

146. *See* VT. STAT. ANN. tit. 12, § 4853a(h) (2026).

147. § 4853a(f); VT. STAT. ANN. tit. 9, § 4451(7) (2026).

Conversely, by making the payments specified in the order, the tenant enjoys time to conduct discovery and develop evidentiary support for their affirmative defenses. Though a tenant pays rent into court and not for the judge's benefit, Vermont's rent escrow statute nevertheless inhibits tenants' access to justice by conditioning the speed of proceedings upon payment.

*C. Rights to Due Process and Equal Protection Under the Fourteenth Amendment of the United States Constitution*

Two decisions of the United States Supreme Court, hardly known for its interventions into landlord-tenant law, illuminate a path that may lead to a successful challenge of the rent escrow statute. The Court's decision in *Lindsey v. Normet* provides perhaps the strongest support for the law and comparable rent escrow mechanisms against attack on Fourteenth Amendment grounds.<sup>148</sup> Oregon's Forcible Entry and Wrongful Detainer (FED) statute required a trial within six days after service of the complaint unless the tenant paid security for accruing rent in the form of a "continuance bond"<sup>149</sup> and restricted the triable issues in a FED action to the tenant's nonpayment, excluding defenses based on the landlord's breach of their duty to maintain the premises.<sup>150</sup> The appellants argued they had been deprived due process because their rental payments had not been suspended while they litigated their habitability claims against their landlord.<sup>151</sup>

The Court found Oregon's rent escrow mechanism "hardly irrational or oppressive."<sup>152</sup> The state was free to "treat[] the undertakings of the tenant and those of the landlord as independent rather than dependent covenants" and insist "that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor."<sup>153</sup> After all,

The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by

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148. 405 U.S. 56, 64 (1972).

149. *Id.* at 70 n.17 (citing OR. REV. STAT. §§ 105.135, 105.140 (2026)).

150. *Id.* at 64.

151. *Id.* at 66–67 n.12.

152. *Id.* at 65.

153. *Id.* at 67–68.

refusing to pay rent and by preventing sale or rental to someone else.<sup>154</sup>

Ignoring how a landlord's failure to maintain habitable premises might place strain on the relationship, the Court noted that it was tenant's nonpayment that had "proved a virulent source of friction and dispute."<sup>155</sup> The Court found in the Constitution no "guarantee of access to dwellings of a particular quality, [n]or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."<sup>156</sup> The Constitution may not "provide judicial remedies for every social and economic ill," but make no mistake: the document "expressly protects against confiscation of private property or the income therefrom."<sup>157</sup> Though the Court conceded that "it is possible" for the Oregon FED statute's continuance bond mechanism "to be applied so as to deprive a tenant of a proper hearing in specific situations," it did not expound further.<sup>158</sup>

Two years after *Lindsey*, Justice Thurgood Marshall penned for a majority of the Court in *Pernell v. Southall Realty* an exhaustive history of the ejectment action, with attention to the longstanding availability of a jury trial.<sup>159</sup> Because the right to recover possession of real property governed by the District of Columbia's ejectment statute was a right recognized by courts at common law, the Seventh Amendment preserved the right to a jury trial to both parties in ejectment actions.<sup>160</sup> Marshall anticipated the concerns of the RRAA's framers about frivolous tenant litigation, noting that "where the failure to pay rent is established and no substantial defenses exist, it is unlikely that a defendant would request a jury trial," and "the trial court's power to grant summary judgment where no genuine issues of material fact are in dispute provides a substantial bulwark against any possibility that a defendant will demand a jury trial simply as a means of delaying an eviction."<sup>161</sup> A tenant may not be evicted from their home without "a fair opportunity to present their case[]." <sup>162</sup>

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154. *Id.* at 72.

155. *Id.* at 73.

156. *Id.* at 74.

157. *Id.*

158. *Id.* at 65.

159. 416 U.S. 363, 371–81 (1974).

160. *Id.* at 376; *Curtis v. Loether*, 415 U.S. 189, 195 (1974).

161. *Pernell*, 416 U.S. at 384; *see* VT. R. CIV. P. 56(a).

162. *Pernell*, 416 U.S. at 385.

Read together, *Lindsey* and *Pernell* suggest the form that a successful challenge to Vermont's rent escrow statute might take. The Court recognized that Oregon's continuance bond mechanism could "be applied so as to deprive a tenant of a proper hearing in specific situations."<sup>163</sup> Noncompliance with the requirement resulted in the action being tried sooner, but as the Court later noted in *Pernell*, the FED statute still provided for a jury trial.<sup>164</sup> The stakes are higher for a Vermont tenant subject to a rent escrow order. Rather than trying their case before a jury sooner than originally anticipated, the tenant loses altogether the right to a jury trial on the issue of possession. Unlike in Oregon, a tenant in the District of Columbia could assert habitability issues as a defense to the landlord's nonpayment claim to possession,<sup>165</sup> underscoring the need for a fair opportunity to present their case. Under Vermont's rent escrow statute, the landlord may obtain a writ upon the tenant's nonpayment despite the tenant's jury demand on their affirmative defenses to possession.<sup>166</sup> "[S]uch procedural protections as the particular situation demands" ought to include those guaranteed by both Article 12 of the Vermont Constitution and the ejectment statute.<sup>167</sup>

#### CONCLUSION

Forty years after its enactment, the rent escrow statute routinely achieves its desired effect. Low-income tenants who cannot pay rent become subject to a rent escrow order, and the court will issue a writ restoring the landlord to possession before the self-represented litigant can perfect their pronouncement of *voir dire*, let alone submit their defenses and counterclaims to a jury. Any convenience achieved for the landlord comes at the expense of the tenant's free exercise of their constitutional rights to access the courts and defend their claim to possession of their home before a jury. So long as the rent escrow statute remains good law, Vermont's courts stand at risk of becoming, as Justice Marshall warned in *Pernell*, "rubber stamps for landlords."<sup>168</sup>

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163. *Lindsey*, 405 U.S. at 65.

164. *Pernell*, 416 U.S. at 384.

165. *Id.* at 364.

166. See VT. STAT. ANN. tit. 12, § 4853a(h) (2026).

167. See *id.*; *Bandler v. Cohen Rosenthal & Kramer, LLP*, 2015 VT 115, ¶ 13, 200 Vt. 333, 338–39, 131 A.3d 733, 737 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

168. *Pernell*, 416 U.S. at 385.

**OFF-RAMP TO INJUSTICE: NORTH CAROLINA  
UNJUSTLY DETERS RECOVERY AGAINST STATE  
ACTORS FOR CIVIL RIGHTS DEPRIVATIONS AND TORT  
CLAIMS**

**Andrew Larson\***

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## INTRODUCTION

The United States Constitution affords protections designed to insulate individuals in every state from civil rights deprivations. However, the enforcement of these civil rights varies significantly by jurisdiction, producing disparate outcomes depending on the forum state in which litigation is brought. In all states, plaintiffs seeking redress for civil rights violations must navigate the available avenues in their jurisdiction for recovery—legal highways and litigious roads that often prove insufficient, poorly navigable pathways toward justice. Littering these avenues is a collection of insufficient and outdated state torts laws, qualified and sovereign immunity roadblocks, and narrow lanes of legislative willpower to pass laws directly addressing civil rights claims.

In every jurisdiction, claimants alleging government wrongdoing may sue state actors under Section 1983.<sup>1</sup> However, this federal avenue for redress presents plaintiffs with the formidable challenge of navigating qualified immunity.<sup>2</sup> States have implemented local practices for redress of constitutional deprivations and tort-based injuries as alternatives to suing under federal law. These state alternatives include: (1) allowing claimants to pursue state law tort claims; (2) the creation of an implied right of action which provides for state constitutional tort claim suits; or (3) permitting constitutional tort claims to proceed as a matter of law under a state's own civil rights statute.<sup>3</sup>

Plaintiffs suing state actors in North Carolina, whether for civil rights violations, constitutional torts, or personal injuries, face inadequate avenues for redress. Indeed, North Carolina—devoid of a civil rights statute—provides victims of constitutional deprivations only two of the three state alternative avenues for justice identified above. Currently, North Carolina only allows plaintiffs to pursue civil rights claims under an implied right of action (limited to a narrow set of causes of action under the state constitution)<sup>4</sup> or to litigate tort claims governed by the state's controlling tort law.<sup>5</sup> Notably, the North Carolina Supreme Court deems that tort law is adequate to remedy an alleged harm resulting from government wrongdoing; accordingly it has refused to allow such claims to be brought as constitutional

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1. 42 U.S.C. § 1983.

2. *See infra* Part III.A.

3. Alexander Reinhart et al., *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 759–60 (2021).

4. *See generally* Edwards v. City of Concord, 827 F. Supp. 2d 517 (M.D.N.C. 2011).

5. N.C. GEN. STAT. § 143-291(a) (2025).

torts.<sup>6</sup> Because an “adequate remedy” exists, claims against state actors must be brought as mere tort actions, precluding a constitutional tort cause of action.<sup>7</sup> Both of these pathways—a claim brought under an implied right of action under the North Carolina Constitution and a tort claim brought against a state actor—leave claimants with poor enforcement tools for redress of civil rights violations.<sup>8</sup>

Victims of civil rights deprivations in North Carolina face disparate challenges when seeking redress due to preclusive controlling state tort law. For example, when a North Carolina state actor is sued for negligence, the claimant must have immaculately clean hands—that is, they must bear no fault in the conduct giving rise to the claim.<sup>9</sup> Under North Carolina’s application of contributory negligence, a plaintiff who is proven only 1% at fault is barred from recovery.<sup>10</sup> Moreover, North Carolina courts apply the doctrine of contributory negligence in tort actions against private residents *and* state actors.<sup>11</sup>

Contributory negligence—a widely disfavored doctrine<sup>12</sup>—can prevent victims of civil rights violations from recovering in North Carolina. Indeed, identical claims brought in 46 other states would yield damages proportional to the plaintiff’s comparative negligence in the matter, not a complete bar.<sup>13</sup>

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6. *Id.* at 521–22 (holding that plaintiff’s intentional tort claims were an adequate remedy and therefore no constitutional claim was available). Constitutional torts are private lawsuits alleging injury due to the violation of a constitutional right. Noah Smith-Drelich, *The Constitutional Tort System*, 96 IND. L.J. 571, 571 (2021).

7. *Edwards*, 827 F. Supp. 2d at 520; Smith-Drelich, *supra* note 6, at 571.

8. *See infra* Part II.

9. *Contributory Negligence*, BLACK’S LAW DICTIONARY (12th ed. 2024) [hereinafter *Contributory Negligence*, BLACK’S LAW DICTIONARY]; *Draughon v. Evening Star Holiness Church of Dunn*, 843 S.E.2d 72, 76 (N.C. 2020) (“A plaintiff cannot recover for injuries resulting from a defendant’s negligence if the plaintiff’s own negligence contributed to his injury.”).

10. *See Contributory Negligence*, BLACK’S LAW DICTIONARY, *supra* note 9; *Draughon*, 843 S.E.2d at 76.

11. N.C. GEN. STAT. § 143-291(a) (2025).

12. *See generally* Hailey M. Bunce, *System Shock: Fontenot Shows Why North Carolina’s Contributory Negligence Rule Must Go*, 93 N.C. L. REV. 623 (2015); Stephen Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 25 (1996).

13. Under the comparative negligence doctrine, plaintiffs’ shared negligence in a matter is used as a metric for awarding damages proportional to their percentage of fault. *Comparative-Negligence Doctrine*, BLACK’S LAW DICTIONARY (12th ed. 2024); Sydney Goldstein, *Comparative and Contributory Negligence Laws by State*, LAWINFO, <https://www.lawinfo.com/resources/personal-injury/comparative-and-contributory-negligence-laws-by-state.html> (last updated Mar. 12, 2025); Bunce, *supra* note 12, at 623.

Striking discord with comparative negligence, negligence claims against state actors in North Carolina are subject to the harsh doctrine of contributory negligence codified in the North Carolina Tort Claims Act (NCTCA).<sup>14</sup>

When the North Carolina Supreme Court has determined an “adequate remedy” exists, plaintiffs suing state actors are limited to only one of two off-ramps for redress.<sup>15</sup> Claimants are either steered toward recovering damages for government wrongdoing via the NCTCA (and the codified doctrine of contributory negligence therein<sup>16</sup>) or Section 1983—faced with the hurdles presented by qualified immunity. Neither the NCTCA nor Section 1983 offers victims of government wrongdoing an adequate pathway toward justice. Rather, the preclusive effects of contributory negligence and qualified immunity shield state actors in North Carolina from liability due to insufficient state laws governing civil rights and tort claims against government actors. To provide claimants in North Carolina with adequate means of redress in actions against government actors, legislative action is necessary to provide statutory remedies to the insufficient status quo.

This Article proceeds in five parts. Part I provides background detailing North Carolina’s historical adherence to contributory negligence, from the doctrine’s common law adoption to the codification in the NCTCA. Next, Part II details the effect of Section 1983 on suits for civil rights violations against North Carolina state actors, highlighting the insufficiency of the NCTCA in providing equitable relief to plaintiffs because of the application of contributory negligence and the challenges of seeking redress under Section 1983 stemming from qualified immunity. Parts III–IV advance two discrete proposals. First, North Carolina should adopt a state statutory analogue to Section 1983, offering a direct and comprehensive avenue for claims against state actors for civil rights violations. Second, North Carolina should amend the NCTCA to apply comparative negligence rather than contributory negligence. Finally, Part V addresses potential impacts from the proposed legislation.

## I. CONTRIBUTORY NEGLIGENCE AND THE NORTH CAROLINA TORT CLAIMS ACT

Contributory negligence and comparative negligence are two discrete doctrines controlling whether a plaintiff can recover in a negligence suit if they themselves are negligent. Every American jurisdiction follows one of

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14. N.C. GEN. STAT. § 143-291 (2025).

15. *Edwards v. City of Concord*, 827 F. Supp. 2d 517, 520 (M.D.N.C. 2011).

16. § 143-291(a).

these two doctrines to allocate responsibility and recovery in negligence claims.<sup>17</sup> Under the doctrine of comparative negligence, a plaintiff's recovery is reduced proportionally to their degree of fault.<sup>18</sup> In contrast, contributory negligence—a harsher doctrine—bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault.<sup>19</sup> For a plaintiff's recovery to be barred due to their own contributory negligence, the defendant has the burden to demonstrate the plaintiff's partial culpability.<sup>20</sup>

Contributory negligence, first appearing in the 1809 English case *Butterfield v. Forrester*, is rooted in the concept of fault blameworthiness, with Lord Ellenborough stating that “[o]ne person being in fault will not dispense with another’s using ordinary care for himself.”<sup>21</sup> This new legal doctrine of contributory negligence rapidly gained traction across England and the United States. Indeed, by the mid-19th century, American courts adopted the doctrine with few exceptions.<sup>22</sup> However, the tide would soon shift. With the dawn of the 20th century, many jurisdictions abandoned contributory negligence in favor of the more equitable doctrine of comparative negligence.<sup>23</sup>

Various comparative negligence jurisdictions apply the doctrine differently. A minority of jurisdictions apply a pure comparative negligence standard which proportionately awards damages for each party’s ascertained fault, irrespective of a liability threshold for the plaintiff.<sup>24</sup> By contrast, the majority of jurisdictions apply a modified comparative negligence standard (sometimes referred to as the *50-percent rule*).<sup>25</sup> Modified comparative negligence instructs that a plaintiff’s recovery is proportional to their contributory negligence provided that their fault percentage falls below a legislatively-determined threshold.<sup>26</sup> Typically, recovery is barred if a

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17. *Comparative and Contributory Negligence in Personal Injury Lawsuits*, JUSTIA, <https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence/> (last updated July 2025).

18. *Comparative-Negligence Doctrine*, *supra* note 13.

19. *Contributory Negligence*, BLACK’S LAW DICTIONARY, *supra* note 9.

20. N.C. GEN. STAT. § 143-299.1 (2025).

21. (1809) 103 Eng. Rep. 926, 927, 11 East 60, 61.

22. Gregory D. Smith, *Contributory Negligence as a Matter of Law: The Last Vestiges*, 23 TORT & INS. L.J. 674, 674 (1988).

23. *Id.* at 675. In 1908, the United States Congress passed the Federal Employer’s Liability Act, which codified a pure comparative negligence standard. 45 U.S.C. § 51.

24. Pure comparative negligence is followed by a minority of jurisdictions that apply comparative negligence to torts claims. *Pure-Comparative-Negligence-Doctrine*, BLACK’S LAW DICTIONARY (12th ed. 2024). The pure comparative negligence doctrine allocates damages directly proportional to the parties’ fault, irrespective of a threshold. *Id.*

25. *50-Percent Rule*, BLACK’S LAW DICTIONARY (12th ed. 2024).

26. *Id.*

plaintiff's negligence surpasses a set threshold of 50% or 51%.<sup>27</sup> Currently, the majority of jurisdictions apply some form of modified comparative negligence in tort actions.<sup>28</sup>

Following a surge of cases and statutes in the 1970s, courts and legislatures around the country replaced contributory negligence with the comparative negligence approach.<sup>29</sup> Nationally, the hold contributory negligence had as the controlling comparative fault doctrine quickly loosened. Following Florida and California's adoption of comparative negligence in the 1970s,<sup>30</sup> ten additional states instituted the more equitable comparative negligence doctrine.<sup>31</sup> By 1995, 46 states had jettisoned contributory negligence, leaving only a handful of jurisdictions clutching onto the all-or-nothing bar on recovery created under *Butterfield*.<sup>32</sup>

The wave of comparative negligence ratification never reached the courthouses nor the legislature of North Carolina. Rather, North Carolina remains one of only four states (joined by Alabama, Maryland, and Virginia) and the District of Columbia that still apply the doctrine of contributory negligence.<sup>33</sup> Beginning with the North Carolina Supreme Court's adoption of contributory negligence in *Morrison v. Cornelius*, the state's adherence to the doctrine was solely based on common law precedent.<sup>34</sup> An entire century elapsed before contributory negligence was statutorily recognized. In 1979, the North Carolina General Assembly codified contributory negligence in the Products Liability Act.<sup>35</sup> However, this codification of contributory negligence was in direct contrast to legislative trends around the country.<sup>36</sup>

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27. *Id.*

28. *Contributory and Comparative Negligence by State*, BLOOMBERG LAW (Jan. 3, 2023), <https://pro.bloomberglaw.com/insights/litigation/contributory-and-comparative-negligence-by-state/#states-a-f>.

29. Gardner, *supra* note 12, at 1, 37.

30. John S. Hickman, *Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 742–43 (1995).

31. See *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); *Placek v. Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); *Scott v. Rizzo*, 1981-NMSC-021, 96 N.M. 682, 634 P.2d 1234; *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981); *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783 (S.C. 1991); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

32. Gardner, *supra* note 12, at 1, 3.

33. *Comparative & Contributory Negligence Law: 50-State Survey*, JUSTIA, <https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence-laws-50-state-survey/> (last visited May 17, 2026).

34. 63 N.C. 346, 348 (1869).

35. N.C. GEN. STAT. § 99B-4(3) (2025).

36. Hickman, *supra* note 30, at 742–43.

Indeed, by the 1980s, most other state legislatures had codified comparative negligence, recognizing the doctrine as a more equitable approach to remedying harms.<sup>37</sup>

In 1987, the North Carolina General Assembly reaffirmed its commitment to contributory negligence with a subsequent codification of the doctrine in the North Carolina Tort Claims Act (NCTCA), barring recovery by contributorily negligent plaintiffs seeking damages from the state.<sup>38</sup> The NCTCA allows claimants to sue the “State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State” for alleged unintentional torts.<sup>39</sup> Providing a vehicle for private citizens to sue state actors for negligent conduct, the NCTCA waives sovereign immunity for such claims in actions against state departments and agencies.<sup>40</sup> However, the NCTCA applies only to claims advanced for unintentional misconduct and applies North Carolina tort law—including contributory negligence.<sup>41</sup> As a result, the NCTCA bars plaintiffs who are even 1% contributorily negligent from recovering damages.

Negligence lawsuits brought against state actors under the NCTCA are heard exclusively by the North Carolina Industrial Commission.<sup>42</sup> If the Industrial Commission finds that a state actor, operating “within the scope of [their] office, employment, service, agency or authority . . . was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant[,]” the tribunal may award damages up to \$150,000.<sup>43</sup> In accord with North Carolina’s general tort principles, the NCTCA places the burden of proving contributory negligence on the defendant.<sup>44</sup>

The NCTCA has analogues in many other states, allowing civil rights violations that involve tort claims to be litigated under the forum state’s tort

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37. *Id.*

38. § 143-291(a).

39. *Id.*

40. *Meyer v. Walls*, 489 S.E.2d 880, 884 (N.C. 1997).

41. TREY ALLEN, UNIV. N.C. SCH. GOV’T., IMMUNITY OF THE STATE AND LOCAL GOVERNMENTS FROM LAWSUITS IN NORTH CAROLINA 2 (2013).

42. § 143-291(a); *see Guthrie v. N.C. Ports Auth.*, 299 S.E.2d 618, 628 (N.C. 1983) (holding that the Industrial Commission has exclusive jurisdiction over negligence claims against government defendants). The Industrial Commission is an agency created by the North Carolina General Assembly tasked with administering the North Carolina Worker’s Compensation Act and the North Carolina Torts Claims Act, among several other state programs. *About the N.C. Industrial Commission*, N.C. INDUS. COMM’N, <https://www.ic.nc.gov/about.html> (last visited May 17, 2026).

43. § 143-291(a)-(a1).

44. § 143-299.1; *see Barney v. N.C. State Hwy. Comm’n*, 192 S.E.2d 273, 277 (N.C. 1972) (holding that mere speculation and unsubstantiated possibilities are insufficient to establish a finding of contributory negligence).

laws.<sup>45</sup> The purpose of acts like the NCTCA is to provide an avenue for tort claims in state courts against government actors when a claim may be difficult to advance under federal law or absent a state civil rights statute.<sup>46</sup> Alternatively, plaintiffs can sue for a limited set of civil rights violations through an implied right of action brought under the North Carolina Constitution.<sup>47</sup>

While the North Carolina Supreme Court has recognized a right to damages under the state constitution, claims brought this way are limited to violations of free speech, due process, and rights to education.<sup>48</sup> Notably, among the 16 states that have recognized an implied right of action for constitutional violations, North Carolina stands as the only state that hasn't limited the reach of these suits by application of immunity defenses.<sup>49</sup> Importantly, for a claim against the state to properly advance under the North Carolina Constitution, there must be no "adequate" state remedy.<sup>50</sup> This limits the scope of the implied right of action for constitutional deprivations, effectively excluding many tort claims, particularly negligence claims.<sup>51</sup>

Thus, plaintiffs in North Carolina may only pursue negligence claims against state actors for civil rights violations through one of two avenues: (1) the NCTCA or (2) Section 1983.<sup>52</sup> However, claims brought under the NCTCA or Section 1983 face significant challenges particular to either legal channel. Negligence claims spawning from civil rights violations litigated under the NCTCA must survive assertions of contributory negligence defenses.<sup>53</sup> Alternatively, causes of actions brought under Section 1983 are often precluded by qualified immunity.<sup>54</sup>

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45. Kendall Morton et al., *50 Shades of Government Immunity: Complications with Bringing Civil Rights Claims Under State Laws*, INST. FOR JUST. (Jan. 25, 2022), <https://ij.org/report/50-shades-of-government-immunity/>.

46. *Id.*

47. *See Corum v. Univ. of N.C.*, 413 S.E.2d 276, 290 (N.C. 1992) (holding that actions brought under the state constitution are limited to claims alleging deprivations of due process, free speech, or rights to education).

48. *See id.*; *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 678 S.E.2d 351, 354 (N.C. 2009) (recognizing a cause of action for a violation of the right to education); *Sale v. State Highway & Pub. Works Comm'n*, 89 S.E.2d 290, 295–98 (N.C. 1955) (recognizing a cause of action under the state due process clause).

49. Reinhart et al., *supra* note 3, at 759 & n.91.

50. *See Corum*, 413 S.E.2d at 290.

51. *Id.*

52. *North Carolina*, INST. FOR JUST. [hereinafter *North Carolina*, INST. FOR JUST.], <https://ij.org/report/50-shades-of-government-immunity/state-profile/north-carolina/> (last visited May 17, 2026).

53. N.C. GEN. STAT. § 143-299.1 (2025).

54. Morton et al., *supra* note 45.

## II. A HOBSON'S CHOICE: SECTION 1983 OR THE NORTH CAROLINA TORT CLAIMS ACT

This Part demonstrates that the remedies North Carolina law affords plaintiffs for civil rights deprivations, constitutional torts, and negligence arising from state-actor misconduct are riddled with significant legal barriers. Plaintiffs attempting to recover damages from state actors in North Carolina are faced with a Hobson's choice: an illusory decision between courses of action that offer no real choice at all.<sup>55</sup> This choice manifests in a plaintiff's decision in how to sue North Carolina state actors. Whether filing a claim for government wrongdoing under Section 1983 or bringing suit under the North Carolina Tort Claims Act (NCTCA), claimants face distinct statutory and doctrinal hurdles that constrain even valid claims.

In every state, Section 1983 empowers plaintiffs wishing to sue a government actor for alleged civil rights violations to seek redress.<sup>56</sup> However, Section 1983 suits are subject to a slew of immunity hurdles and judicial precedent.<sup>57</sup> Enacted in 1871 as part of the Civil Rights Act, Section 1983 provides a mechanism for enforcing the Fourteenth Amendment by authorizing civil actions against government actors.<sup>58</sup> Deprivations of "any rights" enumerated in the Constitution by "person[s] who, under color of state law or custom" constitute actionable lawsuits in federal and state courts.<sup>59</sup> Importantly, 42 U.S.C. § 1988 informs the scope of Section 1983, which directs courts to apply federal law where suitable and permits the use of state law when necessary to effectuate Section 1983's purpose.<sup>60</sup>

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55. *Hobson's Choice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Hobson%27s%20choice> (last visited May 17, 2026).

56. 42 U.S.C. § 1983.

57. *Id.* "[The] creation of qualified immunity, rigorous municipal liability standards, pleading requirements, limitations on injunctive relief, and caveats for plaintiffs' attorneys' entitlement to fees have combined to make it exceedingly difficult for plaintiffs to use Section 1983 in its intended manner." Reinhart et al., *supra* note 3, at 757.

58. Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977). Largely lying dormant for decades, Section 1983 was revived in the seminal case, *Monroe v. Pape*, whereby the Court looked to the legislative history of the federal statute to hold that an avenue for claims against state actors for violations of constitutional rights is actionable under it. 365 U.S. 167, 170 (1962).

59. 42 U.S.C. § 1983; *see* *Testa v. Katt*, 330 U.S. 386, 394 (1947); *Martinez v. California*, 444 U.S. 277, 284 (1980) (evidencing that Section 1983 may be the basis for a cause of action brought in state courts).

60. 42 U.S.C. § 1988 states:

[Section 1983] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the

Section 1983 claims were given teeth by the 1962 *Monroe v. Pape* Supreme Court decision.<sup>61</sup> The *Monroe* Court extrapolated four purposes of Section 1983: “(1) to override unconstitutional state laws, (2) to provide remedies where state laws are deficient, (3) to provide remedies which are technically, but not practically available under state law, and (4) to provide remedies substantially equivalent to those practically available in state court.”<sup>62</sup> Armed with the precedent established in *Monroe*, plaintiffs may bring suit in state or federal court against local government actors for constitutional violations.<sup>63</sup> Consequently, an explosion of lawsuits were filed in the wake of the *Monroe* decision.<sup>64</sup>

However, subsequent Supreme Court decisions introduced the doctrine of qualified immunity, substantially limiting the viability of Section 1983 claims and shielding government officials from liability.<sup>65</sup> Section 1983 claims have proven to be difficult legal battles due in large part to the defense of qualified immunity.<sup>66</sup> As a result, many claimants alleging civil rights violations have maneuvered away from difficult Section 1983 litigation toward filing lawsuits under state tort claims acts, like the NCTCA.

Responding to the difficulties of litigating Section 1983 claims and the limited remedies available under state tort law, a handful of states have enacted civil rights statutes analogous to Section 1983.<sup>67</sup> With these laws, state legislatures have created causes of action that empower plaintiffs to bring lawsuits for violations of state constitutions as a matter of state law.<sup>68</sup> By directly addressing civil rights violations, these statutes circumvent the difficulties of relying on a state tort claims act rather than Section 1983.<sup>69</sup> To

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court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

§ 1988(a).

61. 365 U.S. at 191.

62. See *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494, 496 (1970); *Monroe*, 365 U.S. at 167.

63. ALLEN, *supra* note 41, at 1–2.

64. JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 10 (2023).

65. *Id.* at 73–79. Suing state officials under Section 1983 also presents additional immunity defenses that warrant pause on account of plaintiffs seeking recovery from state actors for alleged tort damages. Namely, judicial and legislative immunity block recovery in claims advanced for liability emanating from legislative or judicial acts.

66. SCHWARTZ, *supra* note 64, at 71–80.

67. ARK. CODE ANN. § 16-123-101 (2025); CAL. CIV. CODE § 52.1 (West 2025); COLO. REV. STAT. § 13-21-131 (2025); ME. REV. STAT. ANN. tit. 5, § 4682 (West 2025); MASS. GEN. LAWS ch. 12, § 11I (2025); NEB. REV. STAT. § 20-148; N.J. REV. STAT. § 10:6-2; N.M. STAT. ANN. § 41-4A-3.

68. Reinhart et al., *supra* note 3, at 760.

69. Morton et al., *supra* note 45; Reinhart et al., *supra* note 3, at 761.

date, the majority of states have not passed Section 1983 analogues—indeed, only eight states have enacted their own legal mechanism to directly enforce civil rights.<sup>70</sup>

### III. AN ARGUMENT FOR A NORTH CAROLINA CIVIL RIGHTS STATUTORY ANALOGUE TO SECTION 1983

North Carolina is among 42 states without a Section 1983 analogue, having yet to enact a state civil rights statute.<sup>71</sup> Such a law would allow claimants to pursue constitutional violations directly, rather than forcing them into underlying tort theories, subject to the North Carolina Tort Claims Act's (NCTCA) contributory negligence rule. Additionally, a state civil rights statute can avoid the bulwarks of qualified immunity defenses that plague claims brought under Section 1983.

This Part serves three functions: (1) to illustrate the way that lawsuits are advanced but also hindered under Section 1983; (2) to highlight critical statutory provisions that would strengthen a North Carolina Section 1983 analogue; and (3) to propose statutory language for a North Carolina civil rights statute. The proposed language draws from common law and statutory precedent to protect the law from the deflating effects of qualified and sovereign immunity.

#### *A. Section 1983: Scope and Redressability Limitations*

Government actor wrongdoing can trigger a host of lawsuits, including civil rights claims of discriminatory animus (amounting to constitutional tort claims), negligence tort claims, or intentional tort claims. However, lawsuits brought against government actors as Section 1983 claims are limited to civil rights violations and torts linked directly to constitutional rights deprivations.<sup>72</sup> As the United States Supreme Court held in *Paul v. Davis*, Section 1983 is not a vehicle for redress for all claims against state actors.<sup>73</sup> Rather, only claims that implicate constitutional violations, tort or otherwise, are properly brought under Section 1983.<sup>74</sup> Such a liberal use of the federal statute to sue state actors for *any* tort, the Court continued, “would make of

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70. Reinhart et al., *supra* note 3, at 760, 763.

71. *North Carolina*, INST. FOR JUST., *supra* note 52.

72. See *Parratt v. Taylor*, 451 U.S. 527, 544 (1981), *overruled on other grounds by Daniels v. Williams*, 475 U.S. 327 (1986) (stating that respondent's claim that state actors' loss of his mailed package, while incarcerated, constituted a violation of the Fourteenth Amendment was not a cognizable action under Section 1983 thereby differentiating the claim as a mere tort suit).

73. 424 U.S. 693, 701 (1976).

74. *Id.*

the Fourteenth Amendment a font of tort law,<sup>75</sup> ignoring the legislative purpose of Section 1983 as an avenue for civil rights litigation.<sup>76</sup> Thus, Section 1983 claims must be narrowly tailored toward remedying civil rights deprivations, with few exceptions.<sup>77</sup>

To be properly seated as a Section 1983 claim, a plaintiff must demonstrate two elements: (1) proof that the defendant deprived the plaintiff of a constitutional right and (2) the deprivation was done “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.”<sup>78</sup> However, even when a claim is properly seated, Section 1983 plaintiffs face significant hurdles to recovering damages. While the *Monroe* decision empowered plaintiffs to sue governmental officials for civil rights violations, the defense of qualified immunity tempers governmental accountability.<sup>79</sup> Moreover, qualified immunity imposes a heightened evidentiary burden on many government-wrongdoing claims.<sup>80</sup>

Frustrating plaintiffs’ Section 1983 claims for over 50 years, qualified immunity grants public officials immunity from civil lawsuits when “performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights.”<sup>81</sup> Created by the United States Supreme Court in *Pierson v. Ray*, qualified immunity was originally deployed to shield a respondent judge and police officers from liability for claims alleging false arrest and imprisonment brought under Section 1983.<sup>82</sup> The Court, finding that the public officials acted in good faith based on their subjective belief that the arrests were proper, granted them qualified immunity, thereby shielding the judge and police officers from liability.<sup>83</sup> The *Pierson* Court’s creation of qualified immunity dramatically narrowed

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75. *Id.*

76. *Id.*

77. See RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 14:126, at 1635 (3d. ed. 2025) (discussing the *Parratt* Court’s determination to differentiate common-law torts claims from suits alleging genuine constitutional deprivations); *Parratt*, 451 U.S. at 535 (providing a two-pronged analysis to determine if a claim is properly brought under Section 1983 or is merely a tort for which adequate state remedies exist).

78. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

79. See generally SCHWARTZ, *supra* note 64, at 73–91 (expounding on the Court-created doctrine of qualified immunity).

80. In Section 1983 suits, plaintiffs bear the burden of demonstrating that the facts of the claim mirror facts from a previously decided case where a defendant’s actions have been found to violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 814–18 (1982).

81. *Qualified Immunity*, BLACK’S LAW DICTIONARY (12th ed. 2024).

82. 386 U.S. 547 (1967) (establishing qualified immunity as a defense based on good faith and probable cause of arresting police officers, despite finding that the law that triggered the arrests was found to be unconstitutional).

83. *Id.*

the scope of successful claims brought under Section 1983 by creating a defense for state actors previously unavailable.

The weight of the Court's decision was noted in Justice Douglas's emphatic dissent to the *Pierson* Court's holding.<sup>84</sup> Citing the congressional intent behind the passing of Section 1983, Justice Douglas railed against the creation of immunities granted to officials as contrary to the function of the statute.<sup>85</sup> Nevertheless, qualified immunity has developed into a formidable defense for public officials, precluding many Section 1983 claims when there is "no prior court decision with nearly identical facts."<sup>86</sup> Thus, the power to hold government actors accountable, wielded by plaintiffs in the *Monroe* decision, eroded after the Court's creation of qualified immunity.

The breadth of qualified immunity's ability to shield state actors from liability, absent a previous court decision with identical facts, is shocking. For example, in an Eleventh Circuit case, a Georgia police officer, while ordering a man and his six children to the ground, fired two shots at the family's dog, striking a ten-year-old child in the knee with an errant bullet.<sup>87</sup> The family sued the officer for excessive force under Section 1983 and lost; the qualified immunity defense shielded the officer.<sup>88</sup> Because no other court had decided a case on those specific facts—whereby a child was shot by a police officer who was attempting to kill the family dog—the court held that the officer's actions, under the doctrine of qualified immunity, had not violated "any clearly established rights."<sup>89</sup> Troublingly, this broad protective defense of qualified immunity is not restricted to the federal courts. Indeed, the federal doctrine of qualified immunity traces its origins to a good-faith immunity defense under Mississippi law and continues to operate as a defense in most states, including jurisdictions with civil rights statutes.<sup>90</sup>

States that have enacted civil rights statutes have done so to provide an avenue for claimants to bring constitutional tort claims as a matter of state law.<sup>91</sup> These state alternatives to Section 1983 largely mirror the federal statute's language and scope, allowing for recovery and injunctions for

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84. *Id.* at 558–67.

85. *Id.* at 567 (Douglas, J., dissenting) ("Congress, I think, concluded that the evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweighed the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights.")

86. SCHWARTZ, *supra* note 64, at 74; *see Harlow v. Fitzgerald*, 457 U.S. 800, 814–18 (1982) (holding that police officer's entitlement to qualified immunity does not depend on whether they acted in good faith but rather on whether they did not violate clearly established law).

87. *Corbett v. Vickers*, 929 F.3d 1304, 1308 (11th Cir. 2019).

88. *Id.* at 1323.

89. *Id.* at 1307.

90. *Pierson*, 386 U.S. at 555.

91. Reinhart et al., *supra* note 3, at 760.

constitutional torts committed by public officials.<sup>92</sup> However, this avenue of redress is often muted by a state's decision to incorporate qualified immunity as a defense. Consequently, plaintiffs face hurdles analogous to the federal protection afforded to state actors in states that recognize qualified immunity defenses under their civil rights statutes.

As in federal civil rights actions, when a state's civil rights statute recognizes qualified immunity, plaintiffs must show that their claim arises under clearly established law.<sup>93</sup> For example, Arkansas directs that its civil rights statute be construed consistently with federal and state decisions interpreting Section 1983. Accordingly, the Arkansas Supreme Court, citing United States Supreme Court precedent,<sup>94</sup> has held that the Arkansas civil rights statute would allow defendants to access the qualified immunity defense where appropriate.<sup>95</sup> Thus, in Arkansas courts, as in federal courts, unless the facts of the claim mirror facts from a previously decided case where a defendant's actions have been found to violate clearly established law, qualified immunity precludes plaintiff recovery.

However, unlike claims brought under Section 1983, adherence to qualified immunity in constitutional tort claims brought under *state* civil rights acts is discretionary. Indeed, several jurisdictions have declined to adopt qualified immunity as a defense to claims advanced under their state's civil rights statute.<sup>96</sup> Currently, California, Colorado, and New Mexico are among the states with Section 1983 analogues that preclude the defense of qualified immunity.<sup>97</sup> California's civil rights statute directly addresses issues of immunity for state actors facing liability for a constitutional tort.<sup>98</sup> While echoing the federal model, the statute departs from a strict analogue by eliminating California's immunity defenses found elsewhere in state law. Namely, qualified immunity is not available for "any cause of action brought against any peace officer or custodial officer . . . or directly against a public entity that employs a peace officer or custodial officer" brought under the state's civil rights statute.<sup>99</sup> Like California's disposal of the defense, Colorado's and New Mexico's civil rights statutes also expressly preclude qualified immunity as a defense.<sup>100</sup>

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92. See sources cited *supra* note 67.

93. Reinhart et al., *supra* note 3, at 752.

94. *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985).

95. *Robinson v. Langdon*, 970 S.W.2d 292, 296 (Ark. 1998).

96. Reinhart et al., *supra* note 3, at 760.

97. *Id.*

98. CAL. CIV. CODE § 52.1(n) (West 2025).

99. *Id.*

100. COLO. REV. STAT. § 13-21-131(2)(b) (2025); N.M. STAT. ANN. § 42-4A-4 (2025).

*B. Statutory Provisions for Creation of an Effective North Carolina Section 1983 Analogue Must Preclude Qualified and Sovereign Immunity*

To provide an effective means of holding government actors accountable for constitutional violations, a proposed North Carolina Section 1983 analogue must eliminate the defense of qualified immunity. Otherwise, the state's process for recovering against public officials "under color of any statute" offers no meaningful distinction from the Supreme Court's restrictions on Section 1983 claims.<sup>101</sup> Additionally, North Carolina must also waive sovereign immunity for claims brought under the state's civil rights statute, as in the North Carolina Tort claim Act (NCTCA).<sup>102</sup> Notably, "sovereign immunity shields . . . governments themselves from constitutional-tort damages under any and all conditions."<sup>103</sup> Legislative waiver of the state's immunity for constitutional deprivations is essential to provide plaintiffs with effective equitable and injunctive relief. On this point, the *Corum* court quipped:

It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.<sup>104</sup>

Through statutory preclusion of qualified and sovereign immunity, a North Carolina civil rights statute would empower plaintiffs to pursue litigation based on the merits of their claims. Too often, the novelty of a claim may dissuade plaintiffs from seeking damages for government wrongdoing. Indeed, the need to demonstrate clearly established law frequently bars many otherwise meritorious claims.<sup>105</sup> Similarly, if the state reserves sovereign immunity as a defense to constitutional deprivations, no claims are actionable against state actors, rendering a civil rights statute toothless.

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101. *See* Pierson v. Ray, 386 U.S. 547, 556 (1967) (creating the defense of qualified immunity for Section 1983 lawsuits).

102. N.C. GEN. STAT. § 143-291 (2025).

103. Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701, 1704 (2022).

104. *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 291 (N.C. 1992).

105. SCHWARTZ, *supra* note 64, at 75.

*C. Inclusion of Attorney's Fees Creates Equitable Redressability*

An advantage for plaintiffs suing under a state civil rights statute is that most such laws permit recovery of attorney's fees when the plaintiff prevails.<sup>106</sup> Inclusion of this provision could encourage attorneys to advance claims when the plaintiff is unable to pay legal fees. Oftentimes, civil rights litigation is not a lucrative branch of legal services. Fees are usually paid through contingency arrangements and collected only after a favorable judgment; in many cases, the damages awarded fall well below an attorney's typical income for comparable work.<sup>107</sup> Attorney's fees, once recoverable under Section 1983 actions via 42 U.S.C. § 1988, have become largely unrecoverable following the *Evans* Court's approval of fee-waiver settlements.<sup>108</sup> This mechanism allows defendants to avoid paying attorney's fees while still resolving the civil rights issue central to the litigation.

In 1976, Congress passed 42 U.S.C. § 1988 to allow, per a court's discretion, "the prevailing party . . . a reasonable attorney's fees as part of the costs."<sup>109</sup> However, as civil rights litigation grew, so did attorney's fees. In some cases, attorney's fees dwarfed the accompanying plaintiff's recovery.<sup>110</sup> The *Evans* decision muted attorneys' ability to be compensated for their work on Section 1983 claims. The Court, in dicta, recognized that fee-waiver settlements, sanctioned under *Evans*, may serve as a financial deterrent for lawyers who would otherwise pursue civil rights deprivation claims.<sup>111</sup> Thus, including a provision awarding attorney's fees would make claims brought under the state statute more desirable for plaintiffs and lawyers faced with the financial hurdles of civil rights litigation.

*D. This Article's Proposed North Carolina Civil Rights Statute*

Using existing state Section 1983 analogues as models, this Article proposes North Carolina legislation that mirrors the Federal Code by providing the language necessary to bring claims for constitutional violations, along with a mechanism for injunctive and equitable relief.

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106. Reinhart et al., *supra* note 3, at 760.

107. SCHWARTZ, *supra* note 64, at 21–22.

108. See *Evans v. Jeff D.*, 475 U.S. 717, 719–20 (1986) (holding that courts have the power to refuse to award attorney's fees in fee waiver settlements).

109. 42 U.S.C. § 1988(b).

110. See *Riverside v. Rivera*, 477 U.S. 561, 573–74 (1986) (holding that attorney's fees need not be proportionate to the damages awarded plaintiff, though the attorney's fees were seven times the amount of damages awarded).

111. See *Evans*, 475 U.S. at 741 n.34; SCHWARTZ, *supra* note 64, at 26.

Namely, the proposed legislation should first identify who may bring a claim against whom and for what:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . *that* subjects, or causes to be subjected, any . . . *person within North Carolina* to the deprivation of . . . *their exercise or enjoyment of rights secured by the Constitution . . . of the United States or North Carolina* shall be liable to the *injured party for injunctive or equitable relief or other proper redress . . .*<sup>112</sup>

The above language outlines the framework for civil rights litigation within North Carolina. Like Section 1983, the proposed North Carolina civil rights statute establishes a cause of action for constitutional violations and specifies the parties who may be sued. The draft legislation, consistent with 42 U.S.C. § 1988, should also include a provision for attorney's fees to be awarded to plaintiffs upon favorable judgments. This provision fosters an environment that is conducive to claimants' ability to pursue damages irrespective of their ability to afford legal representation. The proposed language is:

*Any aggrieved party who prevails in an action authorized by this section shall be entitled to an award of the costs of litigation and reasonable attorney's fees per the court's discretion.*

Coupled with an express provision for the awarding of attorney's fees, the proposed North Carolina civil rights statute should also statutorily preclude qualified immunity as a defense to prohibit courts from diluting the effectiveness of the law. Proscriptive language that bars qualified immunity would legislatively protect the North Carolina law from suffering judicial declawing in the same manner as Section 1983 has undergone via a series of Supreme Court holdings.<sup>113</sup> In North Carolina, this move to exclude qualified immunity as a defense stands on judicial precedent in cases brought under an implied right of action.<sup>114</sup>

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112. 42 U.S.C. § 1983.

113. See *supra* cases and text accompanying notes 80, 82, 86, 101.

114. *North Carolina*, INST. FOR JUST., *supra* note 52; *Evans v. Cowan*, 510 S.E.2d 170, 175 (N.C. Ct. App. 1999) (holding a citizen may bring a direct claim for violation of their constitutional rights under the North Carolina constitution only absent an adequate state remedy).

In *Corum v. University of North Carolina*, the North Carolina Supreme Court denied the defenses of qualified or sovereign immunity<sup>115</sup> to claims alleging violations of constitutional rights.<sup>116</sup> With decisive language, the *Corum* court proclaimed, “[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.”<sup>117</sup> However, the types of claims allowed under this implied right of action are limited, leaving many claims against state actors unactionable and unprotected from immunity defenses under the *Corum* decision.<sup>118</sup>

The creation of a statute-based cause of action from a North Carolina civil rights statute would circumvent these limitations placed on suits brought under an implied right of action. However, to secure this pathway as a viable avenue of redress for constitutional deprivations, the statute must preclude qualified and sovereign immunity. To do so would echo the veneration the North Carolina Supreme Court expressed for the sanctity of citizen rights under the United States and North Carolina Constitutions: “The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.”<sup>119</sup> Drawing from Colorado’s and California’s statutory proscriptions of immunity defenses to claims brought under their states’ civil rights statutes, the proposed North Carolina statutory provision tenders:

*Qualified immunity and sovereign immunity are not defenses to liability pursuant to this section.*<sup>120</sup>

A claim for constitutional deprivations brought under a North Carolina Section 1983 analogue would address civil rights violations. Such a claim would avoid the virtually impenetrable qualified immunity barrier in a Section 1983 claim and the harsh doctrine of contributory negligence found in the NCTCA.

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115. MICHAEL CROWELL, UNIV. N.C. SCH. GOV’T., BASICS OF LOCAL GOVERNMENT LIABILITY AND IMMUNITY IN NORTH CAROLINA 1 (2011) (“Sovereign immunity is the state’s immunity from a lawsuit of any kind unless the state consents to be sued.”).

116. 413 S.E.2d 276, 291 (N.C. 1992).

117. *Id.* at 292.

118. *Id.* at 291 (recognizing a cause of action for violation of plaintiff’s freedom of speech); *see Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 678 S.E.2d 351, 354 (N.C. 2009) (recognizing a cause of action for violation of the right to education); *Sale v. State Highway & Pub. Works Comm’n*, 89 S.E.2d 290, 295–98 (N.C. 1955); *supra* Part I.

119. *Corum*, 413 S.E.2d at 290.

120. *See* COLO. REV. STAT. § 13-21-131(2)(b) (2025); CAL. CIV. CODE § 52.1(n) (West 2025).

#### IV. AMENDING THE NORTH CAROLINA TORT CLAIMS ACT TO ADOPT COMPARATIVE NEGLIGENCE

This Part will address an alternative pathway toward achieving more equitable judgments for claimants bringing tort claims—constitutional or not—against state actors in North Carolina. Currently, when a state actor has harmed a plaintiff and there is an “adequate state remedy,” the North Carolina Constitution will preclude constitutional claims from advancing.<sup>121</sup> This Part will show that claimants’ current avenue for litigating tort claims against state actors is *inadequate* due to the application of the contributory negligence doctrine in North Carolina. Beginning with a case illustrating the harsh effects of contributory negligence under the North Carolina Tort Claims Act (NCTCA), this Part demonstrates how comparative negligence is a more equitable fault standard for plaintiffs to pursue claims against state actors. Finally, this Part proposes statutory amendments to modify the NCTCA to abandon contributory negligence in favor of comparative negligence.

##### *A. The Preclusive Harshness of Contributory Negligence Derails Justice*

In the summer of 2011, a woman went jogging in Centennial Park, located in the heart of North Carolina’s capital city, Raleigh.<sup>122</sup> After finishing her exercise, the woman phoned her husband to pick her up from the park.<sup>123</sup> Spotting her husband’s car, she deviated from the park’s pedestrian pathway, cut across a grassy median, and stepped into an uncovered, city-maintained storm drain—falling five feet into the drain and sustaining injuries.<sup>124</sup> Subsequently, the woman sued the North Carolina Department of Transportation (NCDOT) under the NCTCA and lost.<sup>125</sup>

The Industrial Commission (the tribunal that hears claims against state actors under the NCTCA)<sup>126</sup> found in favor of NCDOT due to the woman’s contributory negligence.<sup>127</sup> Despite NCDOT’s duty to maintain the storm drain cover to prevent such accidents, the Industrial Commission and the North Carolina Court of Appeals found that the woman’s choice to deviate from the paved pedestrian path, coupled with her attention aimed at her husband’s car, constituted contributory negligence.<sup>128</sup> Considering her

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121. *Edwards v. City of Concord*, 827 F. Supp. 2d 517, 520 (M.D.N.C. 2011).

122. *Khatib v. N.C. Dep’t of Transp.*, 819 S.E.2d 111, 112 (N.C. Ct. App. 2018).

123. *Id.*

124. *Id.*

125. *Id.*

126. N.C. GEN. STAT. § 143-291(a) (2025).

127. *Khatib*, 819 S.E.2d at 112–13.

128. *Id.* at 113.

account and NCDOT's evidence, the Court of Appeals denied recovery for the woman's injuries, finding (1) a lack of due care and (2) a proximate connection between her negligence and the injury.<sup>129</sup>

Absent from the Court of Appeals' decision is any discussion about NCDOT's duty of care owed to the community. The court prioritized whether contributory negligence barred the recovery, despite the uncovered storm drain, rather than assessing breaches of duty by both parties.<sup>130</sup> Indeed, contributory negligence precludes any liability for a defendant irrespective of their tortfeasor conduct.<sup>131</sup> Arguably, had the Industrial Commission been released from the NCTCA's statutory direction to apply contributory negligence,<sup>132</sup> this case may have been decided more equitably by weighing both the woman's breach and the conduct (or omissions) of NCDOT. Determining liability based on the relative fault of the plaintiff and defendant embodies a comparative negligence approach.<sup>133</sup>

Under the doctrine of comparative negligence, a calculus of fault allocates proportionate liability to all parties and assigns damages accordingly.<sup>134</sup> While North Carolina courts currently apply contributory negligence, plaintiffs petitioning the courts to apply comparative negligence is not without precedent.<sup>135</sup> These attempts have pivoted on the novel application of comparative negligence via *lex loci*.<sup>136</sup> Under the doctrine of *lex loci*, the use of another state's substantive law circumvents the forum state's laws in certain circumstances, usually when the incident giving rise to the claim occurs out of state.<sup>137</sup>

For example, in *Parsons v. Alleghany County Board of Education*, the North Carolina Court of Appeals, reviewing a decision by the Industrial Commission, applied the substantive law of Virginia in a negligence case brought against a school bus driver.<sup>138</sup> The incident giving rise to the suit in *Parsons* occurred in Virginia, while the action was filed in North Carolina.<sup>139</sup> Because the forum state's law deviated from the state where the incident took

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129. *Id.*

130. *Id.* at 112–115.

131. *Contributory Negligence*, BLACK'S LAW DICTIONARY, *supra* note 9.

132. N.C. GEN. STAT. § 143-291(a) (2025).

133. *See supra* Part I.

134. *Comparative-Negligence Doctrine*, *supra* note 13.

135. *See Midgett v. N.C. Dep't of Transp.*, 568 S.E.2d 643, 646 (N.C. Ct. App. 2002) (evidencing the plaintiff's attempt to circumvent contributory negligence through the application of federal maritime law).

136. *Lex Loci*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The law of the place; local law.").

137. *Kirby v. Fulbright*, 136 S.E.2d 652, 654 (N.C. 1964).

138. 165 S.E.2d 776, 778 (N.C. Ct. App. 1969) (applying Virginia substantive law to a claim brought under the NCTCA).

139. *Id.*

place, the *Parsons* court applied North Carolina procedural law, but adhered to the substantive law that controls in Virginia.<sup>140</sup> This case is an example of one contributory negligence jurisdiction applying the law of another.<sup>141</sup> Hypothetically, under *lex loci*, North Carolina courts could apply comparative negligence if that doctrine governed the substantive law where the incident occurred. Indeed, one such plaintiff attempted this legal tactic.<sup>142</sup>

In *Midgett v. N.C. Department of Transportation*, the plaintiff argued that, because the negligence claim arose from an incident at sea, federal law—allowing comparative negligence—should apply, rather than the NCTCA’s contributory negligence rule.<sup>143</sup> The plaintiff argued that the *Parsons* court’s application of *lex loci* created a legal avenue for the Industrial Commission to abandon contributory negligence and adopt the comparative negligence standard used under the Jones Act.<sup>144</sup> Ultimately, the plaintiff in *Midgett* failed to establish that federal law governed under *lex loci*.<sup>145</sup> The *Midgett* court was unconvinced that it was bound to apply *lex loci* in the same manner that the *Parsons* court adhered to Virginia substantive law.<sup>146</sup> Specifically, the *Midgett* court held that the *Parsons* decision cannot be interpreted to expand the jurisdiction of the Industrial Commission to hear tort claims based entirely on federal law.<sup>147</sup> Thus, the court declined to extend *lex loci* on jurisdictional grounds rather than substantive law.<sup>148</sup> However, North Carolina courts have further defined when they will consider tort law from other jurisdictions, even if it differs from state law.<sup>149</sup>

While the plaintiff in *Midgett* sought a novel application of comparative negligence under federal law via *lex loci*, the attempt to avoid contributory

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140. *Id.* This case is an example of one contributory negligence jurisdiction applying the law of another. *Id.* Interestingly, the *lex loci* application would have allowed the North Carolina court to apply comparative negligence, provided the doctrine was the law of the jurisdiction.

141. Virginia, like North Carolina, applies contributory negligence. *Comparative & Contributory Negligence Law: 50-State Survey*, *supra* note 33; *see supra* Part I.

142. *See Midgett v. N.C. Dep’t of Transp.*, 568 S.E.2d 643, 644–45 (N.C. Ct. App. 2002); 46 U.S.C. § 688. The plaintiff in *Midgett* argued that the court should apply comparative negligence because it is the standard of the Jones Act. *Midgett*, 568 S.E.2d at 644–47.

143. 568 S.E.2d at 646.

144. *Id.* at 646–47. The Jones Act is a federal maritime law governing injuries suffered by seamen during the course of employment at sea. 46 U.S.C. § 688.

145. *Id.* at 646.

146. *Id.* at 647.

147. *Midgett*, 568 S.E.2d at 646–47 (stating that the North Carolina General Assembly hasn’t waived sovereign immunity for claims alleging negligence under federal statutes brought under the NCTCA).

148. *Id.* at 647.

149. *Id.* at 646–47.

negligence was unsuccessful.<sup>150</sup> However, the *Midgett* court, while considering the plaintiff's argument that federal law should control, noted the disparate outcomes stemming from adherence to contributory negligence in dicta.<sup>151</sup> Regarding the court's decision to bar recovery for the plaintiff in *Midgett*, the court recognized that "an employer who would be liable to a partially negligent claimant under the Jones Act, would not be liable to the same claimant 'in accordance with the laws of North Carolina,' because of the state law doctrine of contributory negligence."<sup>152</sup> The *Midgett* court suggested that, even if the Industrial Commission had jurisdiction, the plaintiff's otherwise meritorious claim could not succeed under the controlling law of the NCTCA.<sup>153</sup> It was precisely this harsh, preclusive effect of contributory negligence, illustrated by the *Midgett* court, that prompted the vast majority of jurisdictions in the United States to adopt comparative negligence laws.<sup>154</sup>

Despite acknowledgments of the disparate outcomes afforded plaintiffs under controlling law, lower North Carolina courts are bound by precedent to adhere to contributory negligence.<sup>155</sup> Challenges to a lower court's application of contributory negligence fall short of moving the needle toward the state's adoption of comparative negligence. Indeed, as the North Carolina Court of Appeals stated in *Jones v. Rochelle*, it is "beyond th[e] Court's authority to abandon the doctrine of contributory negligence."<sup>156</sup> The North Carolina Court of Appeals further recognized that adopting comparative negligence would require either: (1) the North Carolina Supreme Court to embrace the doctrine, or (2) the legislature to enact a statute replacing contributory negligence with comparative negligence.<sup>157</sup>

If recent North Carolina Supreme Court decisions indicating reluctance to adopt comparative negligence are predictive of the Court's position, contributory negligence remains firmly entrenched in the state's

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150. *Id.* at 647.

151. *Id.* at 646.

152. *Id.*

153. *Id.* at 647.

154. Gardner, *supra* note 12, at 3.

155. See *Saunders v. Hull Prop. Grp.*, 847 S.E.2d 83, 83 (N.C. Ct. App. 2020) (recognizing the Court's adherence to precedent); *Copeland v. Amward Homes*, N.C. 837 S.E.2d 903, 907 (N.C. Ct. App. 2020) (acknowledging North Carolina's adherence to contributory negligence).

156. 479 S.E.2d 231, 235 (N.C. App. 1997).

157. *Copeland*, 837 S.E.2d at 907 (stating that "such considerations [of adopting comparative negligence in place of contributory negligence] must be presented to our Supreme Court or our Legislature").

jurisprudence.<sup>158</sup> With over 155 years of *stare decisis* bolstering the Court's adherence to precedent, the North Carolina Supreme Court has not demonstrated any willingness to abandon the doctrine of contributory negligence.<sup>159</sup> Therefore, the most promising way for North Carolina plaintiffs to obtain equitable judgments against state actors is to amend the NCTCA to adopt comparative negligence. Such an amendment would bind the Industrial Commission to judgments based on comparative fault analysis rather than barring recovery for plaintiffs deemed contributorily negligent.

*B. Amending the Language in the North Carolina Tort Claims Act to Apply Comparative Negligence*

The bar on claims against state actors under the North Carolina Constitution, where an adequate state remedy exists, implies that the NCTCA provides sufficient relief.<sup>160</sup> However, the inverse is true. As demonstrated in this Article, the application of contributory negligence creates inequitable judgments that preclude recovery for injured plaintiffs—cases that would be decided differently under a comparative fault analysis.<sup>161</sup> Consequently, the inclusion of contributory negligence in the NCTCA<sup>162</sup> offers inadequate redress for plaintiffs claiming government wrongdoing. Furthermore, without the availability of a state civil rights statute, claimants are funneled into a restrictive path for claims deemed to have an “adequate state remedy,”<sup>163</sup> reducing constitutional tort claims to mere tort actions brought under the NCTCA.

Contributory negligence appears both explicitly and implicitly throughout the NCTCA. The NCTCA expressly allows recovery for plaintiffs only when there “was no contributory negligence on the part of the claimant.”<sup>164</sup> Additionally, the NCTCA limits the liability of state actors to circumstances where “a private person[] would be liable to the claimant in accordance with the laws of North Carolina.”<sup>165</sup> Because contributory

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158. *See Cullen v. Logan Devs.*, 904 S.E.2d 730, 732 (N.C. 2024) (applying contributory negligence); *Draughon v. Evening Star Holiness Church of Dunn*, 843 S.E.2d 72, 74 (N.C. 2020) (applying contributory negligence).

159. The North Carolina Supreme Court first adopted the doctrine of contributory negligence in 1869 in *Morrison v. Cornelius*. 63 N.C. 346, 350 (1869).

160. *Edwards v. City of Concord*, 827 F. Supp. 2d 517, 520, 523 (M.D.N.C. 2011) (stating that “no direct constitutional claim is recognized” when an adequate remedy is available (like claims brought under the NCTCA)).

161. *See supra* Part IV.A.

162. N.C. GEN. STAT. § 143-299.1.

163. *Craig ex rel. v. New Hanover Cnty. Bd. of Educ.*, 678 S.E.2d 351, 354 (2009).

164. § 143-291(a).

165. *Id.*

negligence is codified elsewhere in North Carolina law, the NCTCA's implicit references to it serve to reinforce the doctrine.<sup>166</sup> Additionally, the NCTCA contains a standalone provision that details contributory negligence as a matter of defense.<sup>167</sup> Overall, contributory negligence pervades the NCTCA, curtailing state-actor liability with only one exception.

Notably, the NCTCA broadly applies contributory negligence as a defense to state liability except for claims arising from smallpox vaccinations of state employees.<sup>168</sup> The NCTCA provides that “contributory negligence is not a defense for claims” brought under NCTCA by an individual that contracts smallpox or experiences an adverse reaction to the smallpox vaccination while living with a smallpox-vaccinated state employee.<sup>169</sup> Moreover, this anomalous provision does not require that the plaintiff prove negligence on behalf of the state, effectively making claims brought under this Section per se violations.<sup>170</sup> The provision demonstrates that the NCTCA permits a standard other than contributory negligence.

Legislators in North Carolina have repeatedly attempted, and failed, to pass bills that would enshrine comparative negligence into law statewide.<sup>171</sup> An alternative—though less comprehensive—approach to promoting statewide adoption of comparative negligence is to amend the NCTCA, removing contributory negligence from the law. Based on the NCTCA's provision excluding contributory negligence in claims related to smallpox vaccinations,<sup>172</sup> the statute itself provides precedent for departing from general North Carolina tort law. Rather than attempting to remove contributory negligence statewide through a comprehensive omnibus bill, amending the NCTCA provides lawmakers a limited statutory foothold to begin modernizing North Carolina tort law.

Amending the NCTCA to apply comparative negligence accords with the liberties granted to the Industrial Commission in the Act itself. The NCTCA grants the Industrial Commission extensive latitude, empowering the tribunal “to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent” of the law.<sup>173</sup> As the North Carolina Supreme Court has commented, the “obvious

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166. See § 99B-4(3) (codifying contributory negligence into North Carolina's Product Liability Act).

167. § 143-299.1.

168. § 143-300.1A.

169. *Id.*

170. *Id.*

171. As of 2025, House Bill 811 aims to abolish contributory negligence statewide. H.B. 811, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023).

172. § 143-300.1A.

173. § 143-300.

intention of the General Assembly in enacting the Tort Claims Act [NCTCA] was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency.”<sup>174</sup> Yet, the remedies available to injured plaintiffs under the NCTCA are tempered by the harshness of contributory negligence—effectively shrinking, not enlarging, the rights of claimants.

Amending the language of the NCTCA to apply comparative negligence requires several modifications to other sections of the law. The first time contributory negligence is implied in the NCTCA is when the NCTCA defines the conditions governing which state actors are liable for negligence “in accordance with the laws of North Carolina.”<sup>175</sup> To avoid the Industrial Commission applying general North Carolina tort law—and thus contributory negligence—to NCTCA claims, amendments must explicitly sever the statute from statewide tort law while maintaining liability for state actors.

This initial implicit reference to contributory negligence in the NCTCA may be avoided by including a restrictive clause modifying the sentence. Currently, the instant section reads:

The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.<sup>176</sup>

This Article’s proposed restrictive clause would modify the phrase “would be liable to the claimant in accordance with the laws of North Carolina”<sup>177</sup> to include the additional language: *without the availability of the defense of contributory negligence*. Modifying the statutory language would allow North Carolina tort law to remain intact while removing the contributory negligence defense for NCTCA claims.

Contributory negligence first appears explicitly in the NCTCA in the following sentence:

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174. *Wirth v. Bracey*, 128 S.E.2d 810, 813 (N.C. 1963).

175. § 143-291(a).

176. *Id.*

177. *Id.*

If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim was asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid . . . .<sup>178</sup>

Amending this section requires removing the phrase: “and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim was asserted.”<sup>179</sup> Additionally, this sentence provides the first opportunity to codify modified comparative negligence as the controlling fault standard for claims brought under the NCTCA. This Article’s proposed amended language reads:

If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury . . . the Commission shall determine the amount of damages that the claimant is entitled to be paid<sup>180</sup> *based on the comparative negligence of the parties, so long as the claimant’s contributory fault does not exceed 50%.*

Contributory negligence next appears in the NCTCA as a defensive doctrine.<sup>181</sup> Amending the NCTCA to apply comparative negligence requires a complete rewriting of this section to reflect the inclusion of comparative negligence as controlling law. Here, the amended language will detail the application of modified comparative negligence when the state asserts that the plaintiff was negligent in the incident giving rise to the claim. By including language that details the metrics of a comparative fault analysis, the NCTCA will require the Industrial Commission to analyze the

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178. *Id.*

179. *Id.*

180. *Id.*

181. § 143-299.1.

proportional negligence of each party and award damages accordingly.<sup>182</sup>  
This Article's proposed language reads:

*§ 143-299.1. Comparative negligence as matter of defense;  
burden of proof.*

~~Contributory~~ [N]egligence on the part of the claimant or the person [o]n whose behalf the claim is asserted shall be deemed to be a matter of defense on the part of the State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of ~~contributory~~ negligence<sup>183</sup> that contributed to the claimant's injury. If negligence on the part of the claimant or the person on whose behalf the claim is asserted is found by the Commission to be contributory to injury of the claimant or the person on whose behalf the claim is asserted, the Commission shall assess the comparative negligence of both parties and award damages based on comparative fault analysis and determinations of each party's share in the negligent conduct giving rise to the claim.

The final NCTCA amendment to eliminate contributory negligence would involve revising the provision exempting claims related to smallpox vaccinations of state employees. The existing operative language states: "The provisions of G.S. 143-299.1 shall not apply to claims made under this section, and contributory negligence is not a defense for claims under this section."<sup>184</sup> Because provision G.S. 143-299.1 has been amended to reflect adherence to comparative negligence, the sentence may remain while excising the irrelevant clause precluding contributory negligence. The proposed amended language reads:

The provisions of G.S. 143-299.1 shall not apply to claims made under this section, ~~and contributory negligence is not a defense for claims under this section.~~<sup>185</sup>

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182. See *infra* Part V.B (detailing fault metrics between plaintiffs and defendants for this Note's proposed adoption of modified comparative negligence).

183. § 143-299.1.

184. § 143-300.1A.

185. *Id.*

Amending the NCTCA to adopt comparative negligence would allow North Carolina claimants injured by state actors to recover more equitably than under the current contributory negligence regime. Because the North Carolina Supreme Court has limited claims against state actors under the North Carolina Constitution when an “adequate state remedy”<sup>186</sup> is available, plaintiffs seeking redress for constitutional deprivations or torts committed by government officials are necessarily constrained by the harsh doctrine of contributory negligence. Adopting this language brings North Carolina in line with the nationwide standard of comparative negligence, allowing recovery for claims otherwise barred under the state constitution.

#### V. CONSIDERATIONS AND IMPACTS OF ADOPTING A NORTH CAROLINA CIVIL RIGHTS STATUTE AND AMENDING THE NORTH CAROLINA TORT CLAIMS ACT

This Article proposes two discrete legislative avenues to create more equitable outcomes for plaintiffs seeking redress for government actor wrongdoing.<sup>187</sup> Creating a North Carolina Section 1983 analogue and amending the North Carolina Tort Claims Act (NCTCA) both provide statutory solutions to the preclusive barriers that hinder claimants from pursuing constitutional and unintentional tort claims against state actors. However, the adoption of either of these proposals requires consideration of how these changes would impact policy in North Carolina. First, this Part will address the implications of the adoption of a North Carolina civil rights statute and associated policy concerns of precluding qualified immunity for claims brought for constitutional rights deprivations. Second, the impacts of amending the NCTCA to apply comparative negligence for tort claims against state actors will be considered.

##### *A. Implications and Potential Impacts of a North Carolina Civil Rights Statute*

Allowing claims stemming from constitutional deprivations to be brought under a North Carolina Section 1983 analogue that statutorily precludes qualified immunity, would empower claimants to seek redress under the state’s civil rights statute rather than the federal statute. While plaintiffs would benefit from a Section 1983 analogue, state agencies and law

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186. *Edwards v. City of Concord*, 827 F. Supp. 2d 517, 520 (M.D.N.C. 2011) (citing *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 678 S.E.2d 351, 356–57 (2009)).

187. *See supra* Parts III–IV.

enforcement would undoubtedly disfavor such a law. Indeed, many law enforcement agencies point to qualified immunity as a necessary protection from litigation regarding police conduct.<sup>188</sup>

Precluding qualified immunity as a defense under a North Carolina civil rights statute would face legislative resistance due to concerns over state actors' liability. These same suits, if brought under Section 1983, would likely favor state actors due to the expansive application of qualified immunity. Moreover, providing an avenue of redress that avoids qualified immunity would permit plaintiffs to avoid restrictive federal precedent.<sup>189</sup> Removing the need to prove prior violations of established law would make a North Carolina civil rights statute one of the few that would allow plaintiffs to hold state actors liable, unshielded by qualified immunity.<sup>190</sup> Nevertheless, adopting a Section 1983 analogue in North Carolina would do little to advance civil rights protections unless it also precluded qualified immunity. Indeed, inclusion of qualified immunity would merely create legislative redundancy for claims that could be litigated under either the federal or state civil rights statute.

This Article concedes that the creation of a North Carolina civil rights statute that precludes qualified immunity will render verdicts that increase the number of cases holding government actors liable. Moreover, government actors sued as defendants acting in their official capacity could yield damages payable by municipalities, thereby creating financial burdens on local governments and taxpayers.<sup>191</sup> However, consistent with United States Supreme Court precedent, North Carolina courts are unlikely to hold municipalities financially liable under *respondeat superior*, which would limit damages to harmful conduct by state actors acting pursuant to official government policies.<sup>192</sup>

Importantly, this narrowing of municipality financial liability would echo the Supreme Court's interpretation of Congress's intent behind the Civil Rights Act.<sup>193</sup> As the Court held in *Monell v. Department of Social Services*,

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188. See generally Bobby Reilly Sheahan, *Qualified Immunity Today*, LEB (Oct. 10, 2023), <https://leb.fbi.gov/articles/featured-articles/qualified-immunity-today> (explaining that many law enforcement agencies claim that the defense of qualified immunity is necessary to shield officers from lawsuits associated with the daily duties performed by police).

189. *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

190. Reinhart et al., *supra* note 3, at 760. Colorado, California, and New Mexico preclude qualified immunity as a defense for claims brought under their respective state civil rights statutes. *Id.*

191. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 679–683, 690–91 (1978) (holding that municipalities can be held liable for damages when a state actor inflicts injury while executing a government policy while simultaneously precluding liability for *respondeat superior* claims).

192. *Id.* at 691.

193. *Id.* at 690–91.

*respondeat superior* is not a basis for rendering municipalities liable under Section 1983 for constitutional torts of employees.<sup>194</sup> Rather, monetary damages for liability dispositions under Section 1983 are levied on municipalities only when a state actor is found to have acted under official government policy causing injury to a plaintiff.<sup>195</sup> Nevertheless, although limiting municipalities' liability under *respondeat superior* reduces the pool of defendants, precluding qualified immunity would likely expand the number of state agencies and officials financially liable for civil rights violations.

Despite the expected increase in state actor liability from a North Carolina civil rights statute, government accountability must not be subordinated to fiscal concerns. Underscoring this dilemma is a choice that champions justice over monetary considerations: whether state actors will be held accountable for civil rights violations irrespective of the purse penalized by liability. Moreover, creating a North Carolina civil rights statute that precludes qualified immunity does not constitute a binding assumption of risk on the part of taxpayers. Rather, the law would serve as an incentive for government agencies and municipalities to adopt constitutionally sound policies and practices. Indeed, "[T]he mere possibility of having to pay a large settlement may cause errant municipalities to align their policies and customs with constitutionally acceptable standards."<sup>196</sup> Thus, the adoption of a North Carolina civil rights statute will offer claimants redress for government wrongdoing while simultaneously incentivizing government agencies and municipalities to ensure adherence to constitutional rights guarantees via policy.

*B. The Potential Impacts of Amending the North Carolina Tort Claims Act to Apply Comparative Negligence*

This Article has proposed that the North Carolina General Assembly amend the North Carolina Tort Claims Act (NCTCA) to jettison the doctrine of contributory negligence in favor of comparative negligence. A noteworthy artifact of this proposal is the lingering statewide application of contributory negligence for all negligence claims brought against private actors. Indeed, if amended to apply comparative negligence, the NCTCA would stand as the sole litigation vehicle in North Carolina that refrains from applying contributory negligence to tort claims. While far from ideal, this disparity

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194. *Id.* at 693.

195. *Id.* at 694–95.

196. Terry Clayton Paulson, *42 U.S.C. 1983—Civil Rights—Municipalities Liable for Money Damages*, 2 U. ARK. LITTLE ROCK L. REV. 419, 425 (1979).

between claims against private and state actors represents an extension of the NCTCA's existing, limited departure from contributory negligence.<sup>197</sup> Grounded in an existing NCTCA exception, the proposed amendment to adopt comparative negligence for claims against state actors circumvents the broader and historically contentious issue of abandoning contributory negligence statewide.<sup>198</sup>

Claims adjudicated under a comparative fault doctrine would inevitably result in state actors being held liable more often than under a contributory negligence regime. To avoid meritless claims and limit liability for state actors, the NCTCA may function most equitably—and less distanced from the current paradigm—by applying a modified comparative negligence fault standard.<sup>199</sup> Modified comparative negligence is grounded in principles of fairness, aiming to provide just compensation to injured parties while limiting recovery in less meritorious cases where the plaintiff bears the majority of fault.<sup>200</sup> Thus, modified comparative negligence presents a reasonable compromise between the harsh preclusive effect of contributory negligence and the liberal dispensing of liability damages in pure comparative negligence jurisdictions.<sup>201</sup>

Amending the NCTCA to apply modified comparative negligence would align North Carolina's fault doctrine, as applied in claims against state actors, with most jurisdictions in the United States. By limiting damages to claims brought by plaintiffs who share equal or less than 50% liability, modified comparative negligence strikes a balance between justice for injured plaintiffs and a potential torrent of meritless claims that could spell financial ruin for municipalities and state actors. Adopting a modified comparative negligence standard in the NCTCA would reflect the doctrine favored by lawmakers nationwide while balancing liability, fiscal concerns, and equitable recovery for injured claimants.

#### CONCLUSION

Plaintiffs in North Carolina, seeking to hold state actors accountable for civil rights deprivations, constitutional torts, and negligence, are currently limited by inadequate avenues for proper redress. Forced onto an off-ramp of

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197. N.C. GEN. STAT. § 143-300.1A (2025). The NCTCA instructs that contributory negligence should not apply for claims against state actors for injuries related to smallpox vaccinations. *Id.*; *see supra* Part IV.B.

198. *See supra* Part I.

199. *See supra* Part I.

200. *50-Percent Rule*, *supra* note 25.

201. *See supra* Part I.

injustice, injured plaintiffs are faced with three limited and problematic paths toward recovery: (1) a claim filed under the North Carolina Tort Claims Act (NCTCA) that precludes recovery for plaintiffs found contributorily negligent; (2) a claim advanced under the North Carolina Constitution which severely limits the type of actionable suits; or (3) a federal claim brought under Section 1983 that presents plaintiffs with the formidable hurdle presented by qualified immunity. This Article proposes two targeted legislative reforms to address deficiencies in North Carolina law and provide plaintiffs with adequate remedies.<sup>202</sup>

Adoption of a state civil rights statute and amending the NCTCA are two discrete, but not mutually exclusive means of providing equitable and just avenues for redress. In isolation, either proposal will advance justice for plaintiffs who have suffered wrongdoing at the hands of government actors. Working in tandem, the two pieces of proposed legislation would mark a substantive march toward the vindication of constitutional rights and exercise of government accountability. Together, amending the NCTCA and creating a North Carolina civil rights statute would safeguard constitutional rights by ensuring equitable redress under North Carolina state law.

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202. *See supra* Parts III–IV.

**BEGINNING THE TRIAL WITHOUT BECOMING AN  
OUTLAW: THE FORMIDABLE LAW OF OPENING  
STATEMENTS**

**David Crump\***

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## INTRODUCTION

A powerful, well-organized opening statement can do wonders for one's case. And there is a great deal of scholarship about how to give a good opening statement.<sup>1</sup> One commentary advocates "winning the beginning" and explains, "I mean that it is possible to slant everything that goes on in [a] trial your way."<sup>2</sup> The author adds that "[m]any advocacy teachers, lawyers and judges have [said] . . . that 'between 30% and 75% of jurors decide a case at the end of the opening statement.'"<sup>3</sup>

This statement should be qualified, however; it means only that "opening statements provide the framework for the credibility of you, your client, your story . . . ."<sup>4</sup> But an opening statement can be crucial to a trial strategy because of its timing: early in the case, when jurors are most likely to form opinions.<sup>5</sup> It can describe the battlefield to the jurors on which the trial will be centered. And it can give the jurors the contentions on which the advocate wants them to focus.

The point of this Article, however, is that there also are legal principles that guide, limit, and prohibit tactics in an opening statement. And there is not much written about this formidable body of law. This Article is an effort to fill that gap in the scholarship.

Part I, below, describes what the opening statement is supposed to accomplish and what it may contain. What place does this part of the battle fill in the overall scheme of a trial? Part II covers the possibility that a judgment as a matter of law or directed verdict can follow after an opening statement if it shows that there is no claim under the law. This is a rare occurrence but a dramatic one.

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1. See generally George A. Googasian, *Opening Statements*, 92 MICH. BAR. J. 54 (2013) (describing tactics for opening statements); Ron Spears, *Opening Statements: Soup for the Jury's Soul*, 95 ILL. BAR. J. 102 (2007) (same); Andrea Garland, *Book Review: Winning in the Beginning by Winning the Beginning*, 26 UTAH BAR. J. 46 (2013) (reviewing DOMINIC J. GIANNA & LISA A. MARCY, *OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING* (2011)).

2. DOMINIC J. GIANNA, *OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING* § 4.2, at 36 (2024).

3. *Id.* (quoting HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966)). [Editor's Note: While this 30% to 75% statistic is widely repeated in trial advocacy lore, its frequent attribution to Kalven and Zeisel's *The American Jury* is a well-documented fabrication. Hans Zeisel explicitly debunked this myth, stating that "we never made such a discovery; we never even asked the question. Nowhere in *The American Jury's* 438 pages can one even find the words 'opening statement.'" Hans Zeisel, *A Jury Hoax: The Superpower of the Opening Statement*, 14 LITIGATION 17, 17 (1987). Zeisel surmised that the legal community confused this hoax with the study's actual finding: that a jury's final decision is almost always determined by the first ballot taken at the beginning of the deliberation process. See *id.* at 17–18.]

4. GIANNA, *supra* note 2, § 4.2, at 37.

5. *Id.* § 4.2, at 36–37 (by providing the framework at the beginning).

Part III deals with an opening statement that introduces evidence that is never admitted. The party in question may attempt to offer its proof to the jury but is unable to supply what that party has promised, leaving the jury exposed to the information from the opening statement, without its inclusion in the evidence. Then, Part IV considers the opening statement that injects inadmissible evidence into the trial. What should happen, for instance, if the plaintiff's statement suggests that the defendant is protected by liability insurance?

Part V offers a hypothetical opening statement, and explores whether it complies with the governing law. Finally, the Conclusion covers the ways in which each of these issues should be resolved.

#### I. BEGINNING THE TRIAL: THE PURPOSE AND LIMITS OF AN OPENING STATEMENT

##### *A. The Right to Make an Opening Statement and the Judge's Control*

*United States v. Ziele*<sup>6</sup> shows the limited purpose of an opening statement and the judge's control over it. After the government had rested its case against Ziele, the judge asked counsel whether he still wanted to make an opening statement, having reserved it at the beginning of trial.<sup>7</sup> "Defense counsel advised the court that he would call no witnesses and introduce no evidence. Instead, he explained to the court that he needed an opening statement to explain to the jury the presumption of innocence and other basic points of law."<sup>8</sup> The trial judge then denied his request and prevented him from making an opening statement.<sup>9</sup>

The court of appeals affirmed. It explained the purpose of an opening statement and the judge's control over it:

The purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole." The timing and making of opening statements is within the discretion of the

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6. 734 F.2d 1447, 1454 (11th Cir. 1984).

7. *Id.* at 1455.

8. *Id.*

9. *Id.* at 1453-55.

trial judge. He can exclude irrelevant facts and stop argument if it occurs.<sup>10</sup>

The court went on to add: “The Constitution requires that trials be fairly conducted and that ‘guaranteed rights of defendants be scrupulously respected.’ However, an opening statement by the defendant is not such a guaranteed right.”<sup>11</sup> This was so, said the court, because “[t]he making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge.”<sup>12</sup> Although failure to afford a defendant the opportunity to make an opening statement can constitute error, said the court, “this is not such a case.”<sup>13</sup>

The court concluded by addressing defense counsel’s desire to cover basic points of law. “[T]his is not the purpose of an opening statement. An opening statement gives counsel the opportunity to explain the case to the jury and to outline the proof. ‘[I]t is not an occasion for argument.’”<sup>14</sup>

### *B. Is There a Right to Make an Opening Statement?*

On the other hand, denial of a proper opening statement at the proper time can be error. For example, in *United States v. Breedlove*, counsel reserved his opening statement until after the government’s case.<sup>15</sup> The trial judge later disallowed this (common) procedure and apparently ambushed the unfortunate lawyer and his client.<sup>16</sup> In addition, the judge made several unnecessary and critical remarks in front of the jury, including:

You see, we don’t allow lawyers to come down here from some other state and tell us how to run this Court. I’ve been running this court for over sixteen years and I’m going to keep on running it for sixteen more years, and I’m not going to ask somebody up in your state, whatever that is, how to run this court.<sup>17</sup>

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10. *Id.* at 1455 (first quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976); then citing *United States v. Salovitz*, 701 F.2d 17, 21 (2nd Cir. 1983); then citing *United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir.1982); and then citing *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975)).

11. *Id.* (quoting *McGautha v. California*, 402 U.S. 183, 221 (1971)).

12. *Id.*

13. *Id.*

14. *Id.* (quoting *Dinitz*, 424 U.S. at 612).

15. 576 F.2d 57, 60 (5th Cir. 1978).

16. *Id.*

17. *Id.* at 60 n.4.

The court of appeals disapproved of these remarks: “We do not sanction the unnecessarily harsh manner in which the opening was denied.”<sup>18</sup> And the denial of an opening statement was error.<sup>19</sup> But in light of all the circumstances, said the court, it was harmless error.<sup>20</sup> The defense had only one witness,<sup>21</sup> and the defensive theory was simple. But “if the defense had been long or complicated, we might be faced with a different situation.”<sup>22</sup>

The right to make an opening statement is denied by some courts but recognized in others. In *United States v. Hershenow*, the court said, “We believe it was error not to permit the defendant to make an opening statement. ‘The function of the defendant’s opening statement is to enable him to inform the court and jury what he expects to prove . . . .’”<sup>23</sup> The court added: “The importance of this function is not diminished by the fact that the defendant expects to prove his defense theory through cross-examination of the government’s witnesses . . . .”<sup>24</sup> But the court held that the denial of an opening statement in this case was harmless error.<sup>25</sup>

In *United States v. Salovitz*, however, the court flatly disagreed with the assertion of a right to make an opening statement, saying:

Rule 12(e) of the Rules of Civil Procedure of the United States District Court for the District of Connecticut . . . provides that opening statements by counsel are not allowed except on application to the presiding judge. Appellant [claims] . . . that a criminal defendant has a constitutional right to have his attorney make an opening statement. We disagree.<sup>26</sup>

This approach seems clumsy and unfair. It requires submission of one’s case to a judge who may be unfamiliar with the proceedings. It is an unusual rule that is often a trap for the unwary. The courts should decide, once and for all, whether there is a right to give an opening statement.

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18. *Id.* at 60.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. 680 F. 2d 847, 858 (1st Cir. 1982) (quoting *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975)).

24. *Id.*

25. *Id.* at 858–59.

26. 701 F.2d 17, 18 (2d Cir. 1983).

*C. Argument in an Opening Statement Is Inappropriate*

In *Arizona v. Washington*, the Supreme Court described the “narrow purpose” of an opening statement: “It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument.”<sup>27</sup>

In that case, the defense lawyer injected into his opening statement evidence that had been excluded in a previous trial.<sup>28</sup> The trial court then granted a mistrial.<sup>29</sup> The Supreme Court held that this was proper procedure.<sup>30</sup> The beginning of trial is supposed to be limited to “what evidence will be presented.”<sup>31</sup>

The lower courts’ implementation of this “narrow purpose” has been uneven. For example, in *Lawrence v. Superintendent Dallas SCI*, the court appears to have taken the “narrow purpose” idea too far.<sup>32</sup> During his opening statement, an attorney for the Commonwealth referred to the defendant as a “cold-blooded murderer.”<sup>33</sup> The defendant complained of his attorney’s failure to object to this single remark as the basis for a federal habeas corpus petition alleging incompetence of counsel.<sup>34</sup>

Given the low standard for attorney competence,<sup>35</sup> the defendant’s petition seems quixotic. Nevertheless, the court of appeals took pains to disapprove an argumentative term such as “cold-blooded murderer” at the beginning of trial:

[W]e emphasize that the fact that we must affirm the District Court’s denial of Lawrence’s habeas petition in no way suggests that the prosecutor’s opening statement here was appropriate or proper. On the contrary, the prosecutor’s opening was the kind of argument that should be reserved for summation, where such argument is allowed so long as it is based on the trial record. Given the zeal of the Commonwealth’s opening statement here, it is apparently

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27. 434 U.S. 497, 513 n.32 (1978) (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976)).

28. *See id.* at 498.

29. *Id.* at 500–01.

30. *Id.* at 516–17.

31. *Id.* at 513 n.32 (quoting *Dinitz*, 424 U.S. at 612).

32. 849 F. App’x 386, 388 (3d Cir. 2021).

33. *Id.* at 387.

34. *Id.*

35. “In determining whether trial counsel’s performance was deficient, we must be ‘highly deferential’ and ‘indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

necessary for us to remind counsel of a fundamental principle of trial advocacy: “[t]he purpose of an opening [statement] is to give the broad outlines of the case to enable the jury to comprehend it. *It is not to poison the jury’s mind against the defendant . . .*”<sup>36</sup>

The court went on to offer the by-now-familiar refrain: “Neither the emotion of the courtroom nor adversarial zeal should blind attorneys to the fact that ‘[a]n opening statement has a narrow purpose and scope.’”<sup>37</sup> The purpose, then, “is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; is not an occasion for argument.”<sup>38</sup>

But the *Lawrence* court was probably too restrictive. *Wright v. Barr* is a case that shows more sympathy with characterizations of the evidence in plain language.<sup>39</sup> There, in a medical malpractice case, counsel stated that you “don’t play Russian roulette” with a patient’s health.<sup>40</sup> The court of appeals regarded this colloquialism as proper. It explained:

We review the trial court’s ruling in opening statement for abuse of discretion. Counsel’s statement was not improper. Mr. and Mrs. Wright alleged that Dr. Barr was negligent in treating Mrs. Wright . . . . One of the purposes of opening statement is to outline for the court and the jury the anticipated evidence so that they can better understand the case. Counsel is permitted great latitude in making an opening statement. . . . Counsel’s Russian roulette remark in opening statement was not improper because it placed before the jury and the defense the theory of their case.<sup>41</sup>

Thus, the courts have held that accusing one’s opponent of playing “Russian roulette” is proper but accusing one’s opponent of being a “cold-blooded murderer” is not.<sup>42</sup> Unfortunately, the answers appear inconsistent. It seems that the “cold-blooded murderer” remark should be as permissible as the “Russian roulette” statement. If an attorney has evidence showing a callous

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36. *Id.* at 387–88 (alterations in original) (quoting *Gov’t of Virgin Islands v. Turner*, 409 F.2d 102, 103 (3d Cir. 1968)).

37. *Id.* at 388 (quoting *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring)).

38. *Id.* (quoting *Dinitz*, 424 U.S. at 612).

39. 62 S.W.3d 509 (Mo. App. W.D. 2001) (per curiam).

40. *Id.* at 532 (emphasis omitted).

41. *Id.* at 532–33 (citations omitted).

42. *Id.*; *Lawrence v. Superintendent Dallas SCI*, 849 F. App’x 386, 387 (3d Cir. 2021).

and inexcusable homicide, he or she should be able to tell the jury what the evidence will prove.

*D. What Can Lawyers Write on Charts and Visual Aids?*

In *United States v. Taylor*, the court of appeals described the conditions in which visual aids such as charts may be used in opening statements.<sup>43</sup> The chart in question diagrammed the trading hierarchy in a drug smuggling ring.<sup>44</sup> The court described the applicable law as follows:

[A]llowing the use of charts as “‘pedagogical’ devices intended to present the government’s version of the case” is within the bounds of the trial court’s discretion . . . under Rule 611(a). Such demonstrative aids typically are permissible to assist the jury in evaluating the evidence, provided the jury is forewarned that the charts are not independent evidence. . . . [W]e have permitted such use in conspiracy cases to aid the jury “[in] put[ting] the myriad of complex and intricate pieces of testimonial and documentary evidence comprising the puzzle together . . . .”<sup>45</sup>

But the defendant objected to the chart in this case on the ground that it was inaccurate.<sup>46</sup> The court of appeals agreed:

A necessary precondition to the admission of summary charts is that they accurately reflect the underlying records or testimony . . . . In this case, the organizational chart did not accurately reflect the underlying testimony. For example, the government never alleged and there was no evidence to support the assertion that Taylor supplied cocaine base to Hilliard Goodley. The lines of the chart would show that she did. The chart also reflects that Taylor supplied crack cocaine directly to Patricia Miller and Clarence Blaylock, both of whom testified that they never received such.<sup>47</sup>

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43. 210 F.3d 311, 315 (5th Cir. 2000).

44. *Id.* at 314.

45. *Id.* at 315 (alterations in original) (footnotes omitted) (first quoting *United States v. Posada-Rios*, 158 F.3d 832, 869 (5th Cir. 1995); then citing *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985); and then quoting *United States v. Winn*, 948 F.2d 145, 157 (5th Cir. 1991)).

46. *Id.* at 314.

47. *Id.* at 315–16 (footnote omitted).

The court decided that the error was not harmless, meaning that the conviction had to be reversed.<sup>48</sup>

*United States v. Ciampa* also shows the trial judge's control over visual aids.<sup>49</sup> The judge there ruled that the defense lawyer could not use a chart that he intended to present to the jury in his opening statement.<sup>50</sup> The judge actually interrupted the opening statement.<sup>51</sup> The court of appeals found no error:

It is true that the judge . . . interrupted defense counsel's opening statement, but, we think, justifiably so. The first interruption occurred when counsel started to use a chart to illustrate where defendant was when he allegedly seized the cocaine and drug paraphernalia subsequently found in his apartment. . . . Clearly, it was a waste of time . . . . It was not the location of the automobile that was important, but whether the jury believed defendant's story as to when and how he obtained the incriminating material.<sup>52</sup>

There are, of course, many cases in which the courts have permitted the use of visual aids in opening statements and in which no error was found.<sup>53</sup>

## II. JUDGMENT AS A MATTER OF LAW AFTER AN OPENING STATEMENT

Imagine the following scenario: the plaintiff's lawyer gives an opening statement in a medical malpractice case against his client's doctor, who performed a complex operation on the client. He tells the court and jury that he intends to call only one witness, his client, who is a layperson and is not knowledgeable about the medical profession.

The judge warns the plaintiff's lawyer that under the law, in the absence of an expert to set the standard of care, a judgment as a matter of law will follow.<sup>54</sup> The lawyer stands by his opening statement. Does the judge have the power to enter a judgment as a matter of law?

The answer is yes, but it is a qualified yes.

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48. *Id.* at 316.

49. 793 F.2d 19, 25 (1st Cir. 1986).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See, e.g., United States v. De Peri*, 778 F.2d 963, 978–79 (3d Cir. 1985) (overruling defendant's objection to chart used in opening statement; no error).

54. *See Wright v. Barr*, 62 S.W.3d 509, 524–25 (Mo. App. W.D. 2001) (per curiam).

In *Morfeld v. Kehm*, the court of appeals recognized the power of a trial court to grant a judgment as a matter of law or directed verdict immediately after a party has given its opening statement.<sup>55</sup> But the court also counseled against such a ruling:

A directed verdict after opening statements is proper only if the plaintiff's opening statement embraces all operative facts expected to be proven at trial and then only when such facts under any legal theory are insufficient to sustain a claim for relief. Despite the power to direct a verdict at this point in a trial, the district court should exercise "great restraint," and if there is any doubt as to the propriety of a directed verdict, the court should not "jump the gun but should wait until both sides have presented their evidence before ruling on motions for directed verdict."<sup>56</sup>

With this, the court reversed the trial court's dismissal of the plaintiff's case.<sup>57</sup>

The *Morfeld* court also considered whether a judgment as a matter of law was the appropriate procedure to dispose of a case in the circumstances.<sup>58</sup> The defendant had included both the pleadings and the opening statement in his motion to dismiss.<sup>59</sup> The court suggested, then, that a judgment on the pleadings might instead be proper.<sup>60</sup>

And the court also suggested that a judgment as a matter of law would not be appropriate because the plaintiff had not offered any evidence, and the governing rule is written so as to be applied after evidence.<sup>61</sup> But then the court recognized its power to grant a directed verdict, which is not authorized by the Federal Rules of Civil Procedure but has the same effect as a judgment as a matter of law in those jurisdictions that use it.<sup>62</sup>

In any event, the courts' authority to dispose of a case after an opening statement appears to be solidly established, whether by judgment on the

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55. 803 F.2d 1452, 1454 (8th Cir. 1986).

56. *Id.* (first citing *Knapp v. Wabash R.R. Co.*, 375 F.2d 983 (8th Cir. 1967); and then quoting *United States v. Vahlco Corp.*, 720 F.2d 885, 889 (5th Cir. 1983) (citing C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2533 (1971)) (stating that it is "better practice to defer ruling on motion for directed verdict until both sides have rested").

57. *Id.* at 1456.

58. *Id.* at 1454.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; *See Carman v. Carroll*, 749 F.3d 192, 196 n.4 (3d Cir. 2014) (explaining the equivalence between judgment as a matter of law and a directed verdict per Rule 50(a)).

pleadings, directed verdict, dismissal, or judgment as a matter of law. The Supreme Court has said so, albeit in a case decided before the Federal Rules were adopted.<sup>63</sup> In *Best v. District of Columbia*, the Court said, “[t]here is no question as to the power of the trial court to direct a verdict for the defendant upon the opening statement of plaintiff’s counsel” if the statement shows that there is no right to recover.<sup>64</sup> The Court added, “The exercise of this power in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials.”<sup>65</sup>

In *Best*, however, the Court reversed the directed verdict because the plaintiff’s statement did not eliminate the possibility of recovery.<sup>66</sup> The theory of liability was essentially that the plaintiff’s son had died as a result of an attractive nuisance,<sup>67</sup> although the Court did not use that term.<sup>68</sup> The plaintiff’s opening statement cited facts implying negligence on the part of the defendant, and thus the statement did not eliminate the possibility of a verdict for the plaintiff.<sup>69</sup> Thus, *Best* typifies the line of cases endorsing the power to dispose of a claim after an opening statement but holding that the disposition in the particular case was error.

Then, too, there are cases in which denial of a motion for judgment after opening statement has set in motion lengthy trials and complex appeals that could have been avoided. *Kusens v. Pascal Company* is an example.<sup>70</sup> The plaintiff argued that his opening statement had properly described a public policy exception to his at-will employment that gave him a claim for wrongful discharge.<sup>71</sup> The defendant disagreed, saying that he had not shown his at-will status.<sup>72</sup>

The case proceeded through trial and verdict.<sup>73</sup> The jury awarded the plaintiff nearly \$1 million,<sup>74</sup> only to have the trial court then grant a post-

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63. *Best v. Dist. of Columbia*, 291 U.S. 411, 415 (1934).

64. *Id.*

65. *Id.*

66. *Id.* at 419–20.

67. *See Smith v. Crown-Zellerbach, Inc.*, 638 F.2d 883, 885 (5th Cir. 1981) (“[T]he fundamental concept of the attractive nuisance doctrine is that the offending condition . . . although apparently dangerous to adults of discretion, is nevertheless so enticing and alluring as to be calculated to excite the curiosity of children of tender years to the extent of inducing them to utilize the instrumentality in some childish endeavor, the inherent danger of which the child is incapable of comprehending.” (quoting *Patterson v. Recreation & Park Com.*, 226 So. 2d 211, 214 (La. Ct. App. 1969)).

68. *Best*, 291 U.S. at 419–20.

69. *Id.*

70. 448 F.3d 349 (6th Cir. 2006).

71. *See generally id.*

72. *Id.*

73. *Id.*

74. The verdict awarded \$950,000. *Id.*

verdict motion for judgment for defendant as a matter of law because the plaintiff had not proved the at-will element.<sup>75</sup> Appeal, then, produced a lengthy opinion and an affirmance.<sup>76</sup> The trial court probably could have disposed of several other cases had it granted the motion for judgment at the end of the opening statement. And that is an important goal, in these times when we have too few trials.

### III. OPENING STATEMENTS CONTAINING REFERENCES TO EVIDENCE THAT IS NEVER ADMITTED

Imagine that an attorney giving an opening statement asserts that “we will show you that the plaintiff bribed his key witness.” But the attorney never offers any evidence of a bribe. What should the court or opposing counsel do in response to a situation involving such an explosive, but unfulfilled, promise?

One possible consequence is simply that during final arguments, opposing counsel may lambaste the lawyer whose opening statement announced the evidence that was not admitted. Another possibility is that a lawyer faced with this situation can move for a mistrial. One can infer that judges are reluctant to grant this request for several reasons: the loss of testimony up to this point,<sup>77</sup> the appearance of partisanship on the part of the judge, the difficulty of making such a decision on the fly, the possibility of ambiguity in the law, and the possibility that the jury might decide the question the right way and moot the issue. And therefore, the standard for a mistrial is relatively high: the existence of “manifest necessity.”<sup>78</sup>

In *Frazier v. Cupp*, for example, the prosecutor’s opening statement referred to incriminating testimony that would be given by a coconspirator.<sup>79</sup> As it turned out, however, the coconspirator claimed his right under the Fifth Amendment to remain silent.<sup>80</sup> The defendant then moved for a mistrial.<sup>81</sup> The defendant argued that this series of events placed the substance of the codefendant’s statement before the jury in a way that “may well have been the equivalent in the jury’s mind of testimony.”<sup>82</sup> He concluded that “the statement ‘added substantial, perhaps even critical, weight to the

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75. *Id.* at 354–55.

76. *Id.* at 369.

77. In particular, a prosecutor who may face a double jeopardy claim in a retrial after the mistrial.

78. See *Arizona v. Washington*, 434 U.S. 497, 505 (1978) (setting this standard).

79. 394 U.S. 731, 733 (1969).

80. *Id.* at 734.

81. *Id.*

82. *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)).

Government's case in a form not subject to cross-examination . . . .’ In this way,”<sup>83</sup> the defendant claimed, “he was denied his constitutional right of confrontation, guaranteed by the Sixth [Amendment] . . . .”<sup>84</sup>

The trial judge declined to grant a mistrial and instead instructed the jury that they “must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence.”<sup>85</sup> The Supreme Court ultimately found that the trial judge’s limiting instructions were sufficient to protect the defendant’s constitutional rights.<sup>86</sup> The Court observed:

Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given.<sup>87</sup>

The Court added, however, that the question was “not an easy one.”<sup>88</sup>

On the other hand, there are cases when mistrials in this situation have been granted and approved on appeal. For example, in *United States v. Shaw*, the defense lawyer’s opening statement referred to a potential government witness who later refused to testify.<sup>89</sup> “The refusal occurred despite a grant of immunity from prosecution. After the mistrial, Shaw moved to dismiss the indictment, contending that retrial would violate the double jeopardy clause of the Fifth Amendment. The district court denied the dismissal motion . . . .”<sup>90</sup> The case proceeded to retrial and defendant was found guilty.<sup>91</sup>

The court of appeals affirmed.<sup>92</sup> It held that defense counsel’s statements had the potential to prejudice the jury against the government’s case.<sup>93</sup> Even if “some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions,”<sup>94</sup> said the court, “we must accord the

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83. *Id.* (quoting *Bruton v. United States*, 391 U.S. 123, 128 (1968)).

84. *Id.*

85. *Id.*

86. *Id.* at 736–37.

87. *Id.* at 736.

88. *Id.* at 734–35.

89. 829 F.2d 714, 716 (9th Cir. 1987).

90. *Id.*

91. *Id.*

92. *Id.* at 720.

93. *Id.*

94. *Id.* (quoting *Arizona v. Washington*, 434 U.S. 497, 511 (1978)).

highest degree of respect to the trial judge's evaluation of the likelihood of juror bias."<sup>95</sup>

The court held that the district judge's discretionary decision about juror bias justified a mistrial under the manifest necessity standard<sup>96</sup> and that retrial did not violate the double jeopardy clause:

First, the trial judge's decision that jury instructions could not cure the prejudice to the government's case is entitled to great deference, and we decline to substitute our judgment for his. Second, it is clear from the record that defense counsel's most prejudicial statements could not have been supported at trial without [the uncooperative witness's] testimony . . . .<sup>97</sup>

The court also reasoned that the prosecutor had shown appropriate diligence and had not abused the opening statement:

[T]here is no evidence of undue delay or negligence in the government's failure to obtain immunity for [the witness] before trial. The prosecutor acted to obtain immunity . . . as soon as he learned that she would refuse to testify. Finally, a careful reading of the prosecutor's opening statement shows that he obeyed the judge's warning to refrain from references to [the] expected testimony and did not in any way invite defense counsel's prejudicial remarks.<sup>98</sup>

It must be rare, if it has ever happened, that an appellate court has found reversible error only on the basis that the opening statement has mentioned evidence that was not later admitted. The cases tend to find that the treatment by the trial judge was within the court's discretion or otherwise was not reversible error. Thus, a query by this author to Westlaw that requested cases by the address "'opening statement' /p 'not admitted'" found 33 cases. None of them resulted in reversible error.<sup>99</sup>

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95. *Id.*

96. In other words, that a mistrial was a "manifest necessity." *Arizona*, 434 U.S. at 505; *see supra* text accompanying note 78.

97. *Shaw*, 829 F.2d at 720.

98. *Id.*

99. *See, e.g., State v. Joyner*, 197 So.3d 724, 737 (La. Ct. App. 2016) ("Under these circumstances [which included good faith on the part of the prosecutor], we conclude that the reference to the excluded evidence does not present reversible error.").

## IV. OPENING STATEMENTS CONTAINING INADMISSIBLE EVIDENCE

In the preceding Part of this Article, we considered opening statements that mentioned evidence that was not later admitted.<sup>100</sup> But what about an opening statement that injects evidence that is not only not admitted but that is actually inadmissible? And what if this action is flagrant?

*A. In the Defendant's Opening Statement*

The opening statement, of course, can invoke the open-door doctrine, which allows a litigant to address a misleading impression created by the opponent by using otherwise inadmissible evidence, if necessary.<sup>101</sup> Thus, in *Lang v. Kohl's Food Stores*,<sup>102</sup> the plaintiff's opening statement and the evidence in an equal pay case raised issues about an EEOC report that would not normally have been admissible in evidence.<sup>103</sup> The trial judge ultimately informed the jury that the EEOC report had favored the defendant rather than the plaintiff.<sup>104</sup> The court of appeals held that this action was a proper exercise of the trial judge's discretion:

[I]t was plaintiffs who injected this subject into the case and entitled Kohl's to supply an answer. Plaintiffs did not argue to the district judge that the scope of the answer was too prejudicial and never suggested any possible response that was less prejudicial. The district judge protected plaintiffs' substantial rights by excluding the EEOC's actual language and reminding the jury that the conclusion had been rescinded.<sup>105</sup>

The jury actually asked to see the EEOC result.<sup>106</sup> The trial judge declined:

In response to the jury's question, the judge reread the instruction and added that the only issue properly under consideration was "whether the jobs are equal" rather than why Kohl's and the union changed the pay scales in 1998.

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100. *See supra* Part III.

101. *See* United States v. Amaya, 828 F.3d 518, 527–28 (7th Cir. 2016) (explaining the open-door doctrine and applying it to uphold admittance of apparent hearsay to rebut evidence implying lack of response to pistol brandished in officer's face, used by defense to imply that it never happened).

102. 217 F.3d 919 (7th Cir. 2000).

103. *Id.* at 926.

104. *Id.*

105. *Id.* at 927.

106. *Id.*

The evidence and the instructions as a whole ensured that the jury focused on, and answered, the right questions. Plaintiffs had a fair trial.<sup>107</sup>

*B. Prosecutorial Actions in Connection with Opening Statements*

But the open-door doctrine does not always lead appellate courts to affirmance. In *United States v. Green*, for example, the defendant, in his opening statement, challenged the government to produce any evidence it had as to his knowledge that illegal firearms were present in his home.<sup>108</sup> The district court then enabled the government to introduce evidence that the defendant, at the government's request, while he was under arrest and asking for his lawyer, had opened a locked briefcase and safe in which firearms were found.<sup>109</sup>

The court of appeals held that these acts were testimonial and had been obtained in violation of the Fifth Amendment.<sup>110</sup> Furthermore, the defendant's challenge implicitly asked only for *admissible* evidence.<sup>111</sup> The open-door doctrine did not erase the effect of the violation in this case. The court said:

[T]he [prosecution's] contention is that, because defense counsel challenged whether the government had *any* evidence, the door was opened to evidence obtained in violation of Green's Fifth Amendment right to counsel. This argument lacks record support, and we reject it.

It is the admission of improper *evidence*, not just *arguments*, of which Green complains . . . Moreover, this is not a case where defense counsel opened the door by questioning the defendant on a subject relating to inadmissible evidence.<sup>112</sup>

The appellate court reacted to this more serious and more prejudicial set of actions by reversing the defendant's conviction and remanding for a new trial.<sup>113</sup>

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107. *Id.* at 927–28.

108. 272 F.3d 748, 754 (5th Cir. 2001).

109. *Id.* at 750.

110. *Id.* at 753–54.

111. *Id.* at 756.

112. *Id.* at 754.

113. *Id.* at 757.

*Watters v. State* is a case in which the court reversed and remanded because of inadmissible evidence in the prosecutor's opening statement.<sup>114</sup> The defendant was on trial for grand larceny and related offenses.<sup>115</sup> The problematic information appeared during a digital slideshow accompanying the opening statement; it included a slide of defendant's booking photograph with "GUILTY" written across the defendant's face.<sup>116</sup>

The slide, said the state supreme court, diminished the presumption of innocence and was not harmless beyond a reasonable doubt.<sup>117</sup> There was no instruction to disregard, and the court considered a general instruction on the presumption of innocence inadequate to remove the prejudice to the defendant<sup>118</sup>:

The prosecution could not *orally* declare the defendant guilty in opening statement. Doing so would amount to improper argument and the expression of personal opinion on the defendant's guilt, which is forbidden. Making this improper argument "*visually* through use of slides showing [Watters's] battered face and superimposing . . . capital letters" spelling out GUILTY "is even more prejudicial" than doing so orally.<sup>119</sup>

*Watters* is the unusual case in which a court found inadmissible material in an opening statement flagrant enough to reverse.

The more likely result is for the appellate court to hold that remarks by the trial judge were sufficient to cure any prejudice. In *United States v. Arnold*, the prosecutor's opening statement paraphrased a confession by the defendant's co-felon.<sup>120</sup> But in the course of trial, the judge ruled the confession inadmissible.<sup>121</sup> The court of appeals held that the judge's instructions to the jury were sufficient:

[T]he jury heard only a paraphrase of Jones's [the codefendant's] confession . . . in an opening statement . . . [A]s in *Frazier*, the jury was given

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114. 313 P.3d 243, 249 (Nev. 2013).

115. *Id.*

116. *Id.* at 246.

117. *Id.* at 247.

118. *Id.* at 249.

119. *Id.* at 248 (alterations in original) (citation omitted) (quoting *In re Glasmann*, 175 Wash. 2d 696, 708, 286 P.3d 673, 680 (2012)).

120. No. 22-10012, 2023 WL 4030777, at \*1 (9th Cir. June 15, 2023).

121. *Id.*

cautionary instructions that opening statements should not be considered as evidence. Here, the district court three times instructed the jury that opening statements are not evidence. Moreover, one of those instructions was given shortly after and in direct response to the government's opening statement. Finally, again like in *Frazier*, the confession "was not a vitally important part of the prosecution's case" because there was ample independent evidence of Arnold's guilt. In sum, a mistrial was not warranted here, as "the limiting instructions given were sufficient to protect [Arnold's] constitutional rights."<sup>122</sup>

The judge's instructions to the jury sound as though they were formulaic,<sup>123</sup> and a specific admonition that the jury should disregard remarks about the inadmissible confession might have helped more. But this decision is consistent with others.<sup>124</sup>

## V. STRUCTURING A PROPER OPENING STATEMENT

### A. *An Example, Shaped by the Governing Rules*

What would a proper opening statement sound like, given the governing law? The following is a mock litigation example, with no claim of universal effectiveness. The situation is taken from a negligent homicide case prosecuted by the author as an assistant district attorney,<sup>125</sup> but it is transformed into a hypothetical civil case in order to allow insertion of expressions that invoke the issues discussed above.<sup>126</sup>

Good morning, ladies and gentlemen of the jury. I am [Donald Jones], and I represent Meredith and Daniel Smith.

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122. *Id.* (alteration in original) (quoting *Frazier v. Cupp*, 394 U.S. 731, 735 (1969)); see *supra* Part III (analyzing *Frazier*).

123. That is, the judge probably only told the jury that opening statements were not evidence, without instructing the jury to disregard references to the alleged confession.

124. See, e.g., *supra* cases cited in Part IV.A (showing cases upholding opening statements).

125. The case was tried more than 50 years ago, did not precipitate any court opinion, and would be virtually impossible to find today.

126. This opening statement is taken from a book by the author. DAVID CRUMP, HOW TO TRY A JURY TRIAL 26–28 (2025) [hereinafter HOW TO TRY A JURY TRIAL].

I'd like to thank you for being here to do your civic duty by serving on a jury. It's a job that only free people can perform.<sup>127</sup>

Now, in this trial, I, on the plaintiffs' side, will represent Meredith and Daniel Smith. Stand up for a moment, Meredith and Daniel. Now, ladies and gentlemen of the jury, these two are the most important people in the courtroom for me.

They have endured a loss that is hard to feel unless someone is in their position, and I hope everyone present never is.<sup>128</sup> They have lost their beautiful daughter Sarah, just six years old, due to the negligence [pointing] of this man sitting here, John Anton, the defendant.

We will have witnesses to show you three themes about this case. Here they are:

Our first theme is that John Anton drove his motorcycle not just too fast, but way too fast, through a group of children going home from school at 3:15 p.m. in the afternoon in a school zone. He was negligent; in fact, he was grossly negligent. The judge will tell you about negligence, but in essence, here it is: negligence is just 'carelessness.' And John Anton showed a lot of carelessness that awful day.<sup>129</sup>

Second, we will show you that the defendant's effort to claim that Sarah, little Sarah, was contributorily negligent is bogus. They blame her for her own death. Given the evidence, that is a just plain awful argument.

Third, we will show you that it would take more than ten million dollars to compensate for this terrifying loss. You can't bring Sarah back. Our court system can only award money to 'compensate' the survivors. And if someone

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127. "Is this comment within the allowed purpose of an opening statement . . . ?" *Id.* at 26 n.26. For analysis, see *infra* Part V.B.

128. See *infra* Part V.B (considering emotional statements).

129. "Is this 'translation' of the law appropriate . . . ?" HOW TO TRY A JURY TRIAL, *supra* note 126, at 26 n.27. For analysis, see *infra* Part V.B.

suffers this kind of loss, what amount in dollars is enough to compensate them?

And we will have some very strong witnesses to prove these facts.

Our first witness will be Deputy Sheriff Milton Hauseshorn. He was the officer who came onto the scene first. He interviewed witnesses, including children. He took measurements. He estimates the speed of John Anton's motorcycle at 55 to 65 miles per hour, when the speed limit was 20 miles per hour. John Anton knocked the body of this poor child a hundred and five feet. There were blood spots at three different places, sort of like a stone skipping over the water. Officer Hauseshorn's conclusion is clear. He is certain that John Anton was negligent, and that John Anton caused this child's death.

Our next witnesses will be two of the children who saw the whole thing. They will tell you that little Sarah was not contributorily negligent. She did not cause her own death. She just did what all the other children did in crossing the street right after school let out. The judge will tell you that negligence of a child is different. Instead of adult carelessness, it's based on what a six-year-old child would do.<sup>130</sup>

Next, Meredith Smith will tell you what she saw. She is Sarah's mother, and she was in her back yard. She saw the motorcycle and her estimate is that it was going over 50 miles per hour. So, you have two independent witnesses giving you similar estimates: that the motorcycle was going more than twice the speed limit. Meredith, whom you see right here, ran out and cradled her own child's bloody body, lying in the street. Sarah died in her arms.

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Then, we will call Professor James [Davidson]. He is a labor economist. He will tell you about the tremendous cost of hiring a child actor to perform all the little tasks of a child

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130. "Again, is this treatment of the law appropriate?" HOW TO TRY A JURY TRIAL, *supra* note 126, at 27 n.28. For analysis, *see infra* Part V.B.

like Sarah, six years old. It's not replacing Sarah, of course. This is a common method of proving what the death of a child can be compensated by, even if it doesn't show the exact thing.

Finally, Daniel and Meredith will tell you about dozens of little events they had with their daughter. Daniel remembers, for example, the excitement he and little Sarah felt when they were decorating the Christmas tree last year—last year, and for the last time. And Meredith will tell you about other events too.

And both of them will tell you their plans and visions of the future with Sarah—her days in school, the next grade, and on to her graduation from college and walking her down the aisle. All of it is lost due to John Anton's negligence. And you will be able to see why I say it would take more than ten million dollars to compensate for such a loss.

Thank you again, ladies and gentlemen. I know you will do the right thing.<sup>131</sup>

#### *B. How Closely Does This Example Follow the Rules?*

There are several items to point out in this example. Notice that it begins by thanking the jurors. This is a standard beginning, although it is controversial. Some lawyers may think it will sound insincere to jurors. This author disagrees, and there is psychological research that supports this disagreement.<sup>132</sup>

But the more relevant point here is that this introduction, thanking jurors, is not strictly within rules that would limit the opening statement to issues and witnesses alone. Officially, the “narrow purpose . . . is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it

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131. HOW TO TRY A JURY TRIAL, *supra* note 126, at 26–28 (alteration in original).

132. See DAVID CRUMP, HOW TO REASON 352–53 (2014). The famous experiments of Napolitan and Goethals proved dramatically that people attribute attitudes to the emotional conditions of the individuals involved, rather than to the situations in which the individuals are acting. *Id.* This phenomenon is so powerful that it is referred to as the fundamental attribution error. *Id.* The idea implies that a juror hearing thanks from a lawyer is likely to attribute such thanks to the lawyer's sincere feelings and not to the situation. *Id.*

is not an occasion for argument.”<sup>133</sup> But surely, the courts do not intend the opening statement to avoid identifying oneself and making a neutral introduction to the jury.

Likewise, there is rhetoric throughout this example that expresses conclusions in emotional terms. The loss is “terrifying,” for example.<sup>134</sup> The witnesses are “strong.”<sup>135</sup> The statement is partisan throughout. This is an adversarial system, and the approach in *Wright*, above, allowing “latitude” for an opening statement,<sup>136</sup> is more sensible than that in *Lawrence*, which strictly disallows this kind of commentary.<sup>137</sup> It is difficult to convey the meaning of the opening statement—the degree of defendant’s negligence or the magnitude of the loss—without this kind of latitude.

Furthermore, the statement introduces and briefly explains the governing law: the meaning of negligence as carelessness, for example.<sup>138</sup> Is the law a permitted subject in an opening statement? This rhetoric should fit into the purpose of “relat[ing] parts of the evidence and testimony to the whole.”<sup>139</sup> Getting across the concept that the evidence fits the law will be helpful to the jury. Or is it a violation of the law governing opening statements? The answer depends on the amount of latitude<sup>140</sup> the courts are willing to give.

## CONCLUSION

### *A. The Right to Make an Opening Statement and the Court’s Control of It*

The courts are not clear about the right to make an opening statement. They should be, and they should recognize and protect the right. The *Breedlove* case analyzed above in Part I of this Article implies the right.<sup>141</sup> The trial court’s control over the opening statement seems to be firmly

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133. *United States v. Dinitz*, 424 U.S. 600, 612 (1976); *see supra* Part I.C (discussing this purpose).

134. *HOW TO TRY A JURY TRIAL*, *supra* note 126, at 27.

135. *Id.*

136. *Wright v. Barr*, 62 S.W.3d 509, 532 (Mo. App. W.D. 2001) (per curiam); *see supra* Part I.C (discussing this case).

137. *Lawrence v. Superintendent Dallas SCI*, 849 F. App’x 386, 388 (3d Cir. 2021); *see supra* Part I.C (discussing this case).

138. *HOW TO TRY A JURY TRIAL*, *supra* note 126, at 26–27.

139. *United States v. Dinitz*, 424 U.S. 600, 612 (1976); *see supra* Part I.C (discussing purpose of opening statement).

140. *See Wright*, 62 S.W.3d at 532.

141. *United States v. Breedlove*, 576 F.2d 57, 60 (5th Cir. 1978); *see supra* Part I.B (discussing cases on point).

established, but control by a judge should not be a *de facto* power, as in *Breedlove*, to eliminate a party's opening statement.

*Breedlove* shows a situation in which the court sandbagged defense counsel by failing to notify counsel that his only opportunity to present an opening statement was at the beginning of the case.<sup>142</sup> The application of this idiosyncratic "rule" meant that counsel was disallowed from giving his opening before presentation of the defense case, as is commonly allowed.<sup>143</sup> It is a disappointing precedent.

### *B. The Proper Content in an Opening Statement*

The rule that the opening statement is limited to introducing the theory of the case and the witnesses seems to be firmly established.<sup>144</sup> But the rule that it should not contain any argument is the subject of obvious disagreement. The labeling of the defendant as a "cold-blooded murderer" in the *Lawrence* case conflicts with the approval of an argument that a defendant doctor played "Russian roulette" in the *Wright* case.<sup>145</sup>

The approach of the *Lawrence* court is unrealistic in our adversarial system, and it stifles speech in the opening statement that might well be helpful to the jury. A listener might think, "Well, he's going to try to prove that this case involves a murder committed in cold blood. I'll have to watch for that." This is appropriate communication with a jury. The approach of the *Wright* court is closer to the mark in saying that "[c]ounsel is permitted great latitude in making an opening statement," by using language such as "Russian roulette," so long as counsel remains in the process of introducing the case and the witnesses.<sup>146</sup>

### *C. The Court's Power to Grant a Motion for Judgment as a Matter of Law After the Opening Statement*

The appellate courts have performed appropriately in supervising trial courts' granting of motions for judgment as a matter of law after the opening statement. In cases demonstrating an inability of counsel to prevail in the particular claim or defense, the trial court should grant a judgment as a matter

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142. *Breedlove*, 576 F.2d at 60 n.4.

143. *United States v. Ziele* 734 F.2d 1447 (11th Cir. 1984); *see supra* Part I.A (discussing cases on point).

144. *Arizona v. Washington*, 434 U.S. 497, 513 n.32 (1978); *see supra* Part I.C (discussing these cases).

145. *Lawrence v. Superintendent Dallas SCI*, 849 F. App'x 386, 387 (3d Cir. 2021); *Wright*, 62 S.W.3d at 532–33; *see supra* Part I.C (discussing these cases).

146. *Wright*, 62 S.W.3d at 532; *see supra* Part I.C (discussing these cases).

of law. The Supreme Court, in the *Best* case, has said that there is “no question” that the courts have the power to do so.<sup>147</sup>

The problem, however, is not with this principle; rather, it lies in the tendency of trial judges on occasion to be impatient. Thus, the *Best* case itself resulted in reversal because the opening statement showed a possibility of recovery.<sup>148</sup> The principle to remember is that an opening statement that does not dispose of all elements of a claim or defense may not show that there is no claim or defense. The opening statement is an introduction to the case, or a kind of “table of contents”; it is not proof of the case.

#### *D. The Opening Statement That Includes Evidence That Never Is Admitted*

In most cases in which an opening statement includes evidence that never is admitted, the courts find that the error is harmless or is cured by the judge’s instructions.<sup>149</sup> As the Supreme Court said in *Frazier v. Cupp*, “Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance.”<sup>150</sup>

In other words, this situation is likely to occur often. It would be wasteful to retry every such case. A common situation of this kind occurs if a witness is expected to testify but decides, as a surprise, to refuse to testify.

The fact that the non-admitted evidence is mentioned early in the case probably makes it easier later for the court to remove prejudice to the opposing party. Everyone is familiar with the situation in which a subject that has been mentioned is subject to an admonition that amounts to “never mind.”

#### *E. References to Inadmissible Evidence*

The opening statement that injects inadmissible evidence into a trial presents a more serious problem than an opening statement that merely contains evidence that would be admissible but that is never admitted. Inadmissible evidence presumably is marked for exclusion precisely because rulemakers have decided that it should not be placed before the jury.

The cases above show outcomes as serious as reversal in this situation.<sup>151</sup> Trial lawyers have colorful ways of explaining the reason: A bell cannot be

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147. *Best v. Dist. of Columbia*, 291 U.S. 411, 415 (1934); see *supra* Part II (discussing the *Best* case).

148. *Best*, 291 U.S. at 419–20.

149. *Frazier v. Cupp*, 394 U.S. 731 (1969); see *supra* Part III (discussing these cases).

150. *Frazier*, 394 U.S. at 736; see *supra* Part III (discussing *Frazier*).

151. See *supra* Part IV (discussing cases on point).

unrung, after the thrust of the Sabre it is impossible to forget the wound, and one cannot throw a skunk into the jury box and instruct the jury not to smell it. Thus, the inadmissible evidence cases view the error as more serious. This result is appropriate.

**CLEVER TITLE: EVEN MORE-CLEVERER SUBTITLE  
ABOUT SOMETHING TO DO WITH HUMOR AND LAW**

**Andrew B. Delaney\***

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## INTRODUCTION

I used to think I was smart. Then I went to grad school and found out there are a lot of people who think they're smart. A shocking number of these people go to law school.<sup>1</sup> So actually, I'm more like a lemming—so much for that “special-little-guy” theory Mom had. I'm trying to get beyond that whole “me-so-smart” mentality, though, and at the same time ensure that I will never survive a Senate confirmation hearing for a Supreme Court seat.<sup>2</sup>

So why write another article about humor and law?<sup>3</sup> What's important about humor in the legal context?<sup>4</sup> Well, when something is funny, people generally have an easier time remembering it.<sup>5</sup> And there's a lot of law to remember. Put another “more-law-professor-like” way, incorporating humor into legal education increases the efficacy of the educational process. Additionally, it goes a long way to improving outlook and mental health.<sup>6</sup> Comic relief is necessary.

I'm going to have to come up with a bunch of studies and whatnot about humor now. Shit.<sup>7</sup>

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1. I can't speak to every person with an overinflated ego (I'm sure some go to med school or become radio personalities), but I'm sure that *most* of them ended up going to law school. Law schools seem to be to overachievers what stagnant pools of water are to mosquitoes. Except for the kids on the articles committee on law reviews—I'm not entirely sure why, but it seems that the kids on article committees are genuinely smart (and good looking, too). It's very curious.

2. Also, because I probably was totally in the running for a SCOTUS seat before I wrote this Article, and my other Articles . . . and did drugs in college . . . and got a DUI . . . and went to a third-tier law school . . . and wrote all those “funny” summaries of Vermont Supreme Court opinions for *SCOV Law*. See generally *SCOV LAW*, <https://scovlegal.blogspot.com/> (last visited May 17, 2026).

3. Um . . . because I felt like it? But I like the contemplative appearance of all the rhetorical questioning—can't you just imagine me stroking my chin and looking thoughtful right now?

4. Lots of things. I'm pretty sure that without a sense of humor, lawyers will go completely crazy and hurt themselves or others. That or they'll go into tax law. Neither one of these outcomes is pretty.

5. See Sarah J. Yablon, *Laughing Your Way to Academic Success*, 53 CONN. L. REV. 1, 7 (2020) (discussing how watching television is better than reading newspapers and also discussing testing spit, idk).

6. See *id.* at 8 (explaining how law students are furry little balls of anxiety and stress and how humor can help relieve anxiety).

7. Researching stuff is a pain in the ass. I did so much research in law school that I have horrible flashbacks whenever I have to write a motion or brief. Maybe I won't really research anything, and I'll just cheerfully abuse footnotes so that it *looks* like I spent a lot of time researching stuff. Or if this pile of garbage ever gets published, the kids who have to edit the thing for publication will spend days tracking down stuff to back up my bullshit. I love legal scholarship.

## I. THE PRINCIPLES OF PROFESSIONAL PEDANTRY

Many, though not most, lawyers have a hyperactive and twisted sense of humor.<sup>8</sup> It's kind of an unofficial job requirement in certain firms. God help you if you're a strait-laced individual who happens to land at one of those firms.<sup>9</sup>

Lawyers are people too.<sup>10</sup> We laugh, cry, and bleed just like everyone else. But some of us have a proverbial stick implanted in our proverbial posterior orifice and think that we shan't mix the humor with the profession 'cause that would be *un*professional.<sup>11</sup>

The point of this Article is to illustrate the need for humor in legal scholarship, learning, and life.<sup>12</sup> It's easier to learn when learning is fun. I believe it takes a little extra effort to make something boring fun. And believe it or not, law *isn't* boring. It's intriguing in its own way, and sometimes, especially when I need to get an article published to keep up my "legal scholar" reputation, it can be fun.<sup>13</sup>

There are also huge physical and mental health benefits associated with laughter.<sup>14</sup> Stress can be a killer. Humor is an antidote.

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8. See *infra* Part II (describing various humor-in-law attempts). Or spend a few hours with almost any trial lawyer. You'll see.

9. I work at a firm where strait-laced folks live in constant fear. Our employment manual says: "People who lack a sense of humor should seek other employment. Seriously, what were you thinking?" I am not making this up. I wrote the thing. MARTIN & ASSOCIATES, P.C., EMPLOYMENT MANUAL § 2.2 (2012). One Friday, many moons ago, I was doing my best to avoid "real" work and noticed we lacked an official employee handbook, so I put in place several very important policies like the safety policy of "[d]on't do stupid shit"; the security policy of "[l]ock the door when you leave, dipshit"; the ethics policy of "[i]f can get us disbarred, don't do it"; and the vacation policy of "[y]ou can take it. You won't get paid for it." *Id.* §§ 3.11–12, 4.11, 7.12.

10. You may not believe this, but it's true.

11. You might think that wasn't funny. You may be one of those lawyers that takes themselves too seriously. See Telephone conversation with Stefan Ricci, one of the author's law partners at Martin Delaney & Ricci Law Group (Feb. 2, 2025) (asking rhetorically: "Why do lawyers take themselves so fucking seriously?").

12. By now, I'm sure "serious" academics are pulling out their hair muttering, "Point?!? The point?!? There's no point to this nonsense! Rubbish!" Sorry.

13. This idea is not new, but I don't care. In 2003, when law school for me was just a maybe-someday concept, a few law professors got together and put together a compendium of legal humor called *Amicus Humoriae: An Anthology of Legal Humor*. We will be stealing from their work liberally throughout this Article. This practice in the legal writing world is *not* called, as one might expect, "plagiarism" but instead "citing sources," and sometimes, "recursive citation." ROBERT M. JARVIS ET AL., *AMICUS HUMORIAE: AN ANTHOLOGY OF LEGAL HUMOR* 171–211 (2003).

14. Dexter Louie et al., *The Laughter Prescription: A Tool for Lifestyle Medicine*, 10 AM. J. LIFESTYLE MED. 262, 263 (2016).

Now, lawyers love to talk.<sup>15</sup> I bet you're thinking, "No way!"<sup>16</sup> But it's true. In fact, because lawyers love to talk,<sup>17</sup> this Article is going to be many pages longer than it really needs to be.<sup>18</sup>

There is a class in law school during which the professor will do his or her level best to destroy your sense of humor, and it's a required first-year course.<sup>19</sup> And it gets worse during the 2L and 3L years. Despite all this, some people escape intact and even go on to fulfilling careers as stand-up comedians or cartoonists.<sup>20</sup>

### A. *Is It Too Late for Me?*

It may be. After all, you're reading an article about humor and law, published in a law review.<sup>21</sup> This is what we in the business call a "red flag."<sup>22</sup> But let's assume for now that there's still some hope for you and that

15. In fact, one of the few known ways to get a lawyer to shut up is to ask for some free legal advice.

16. In a *really* sarcastic inner voice, which might continue with, "Thank you, Captain Obvious!"

17. And I are one.

18. Honestly, we could probably stop this charade and call it quits right now. It's not going to really get any better—*different* perhaps, but not better. For what it's worth, the original draft had "ten-to-fifteen pages" instead of "many," which is to say I'm not a full-fledged sadist.

19. This class is called "civil procedure." It's extremely painful. Sometimes when daydreaming in class, one might expect to hear, "[i]t rubs the lotion on its skin." Ironically, it's also one of the few classes that will prove useful when practicing law, but nobody knows that until it's far too late. "It rubs the lotion on its skin or else it gets the hose again" is a line from the 1991 movie *The Silence of the Lambs* spoken by the character Buffalo Bill. THE SILENCE OF THE LAMBS (Orion Pictures 1991).

20. For example, Demetri Martin went to Yale, got a full ride to NYU Law, and finally dropped out at the beginning of his 3L year to pursue a career in stand-up comedy. See ANDREW B. DELANEY, *Delaney's Collection of Eclectic Trivia, in HIS HEAD* (2026). Okay, the Editors told me I can't cite that. Fine. Here's your source. See, e.g., *Wisecracker: Yale Graduate Demetri Martin Leaves 'em Laughing at Bridges Auditorium*, CLAREMONT MCKENNA COLL. (Mar. 1, 2012), <https://www.cmc.edu/news/wisecracker-yale-graduate-demetri-martin-leaves-em-laughing-at-bridges-auditorium>. Stephan Pastis got a law degree from UCLA and practiced the worst kind of law to practice—insurance defense, ask anyone—for nearly a decade before seeing the light and creating the very amusing comic strip *Pearls Before Swine*, featuring Rat, a character he dreamed up during a boring class in law school. See Tom Heintjes, *Swine Connoisseur: The Stephan Pastis Interview*, HOGAN'S ALLEY <https://www.hoganmag.com/blog/swine-connoisseur-the-stephan-pastis-interview> (last visited May 17, 2026); Stephan Pastis, *About the Author*, SIMON & SCHUSTER, <https://www.simonandschuster.com/authors/Stephan-Pastis/260427239> (last visited May 17, 2026).

21. Nobody—and I mean *nobody*—except people involved in law to the point of despair reads law review articles.

22. Everything in a law review article gets footnoted for some reason. Don't ask me why. I don't make the rules. Anyway, a "red flag" means, among other things (or *inter alia* if you want to prove you went to law school or took Latin for a semester), "a danger signal." *Red Flag*, DICTIONARY.COM, <https://www.dictionary.com/browse/red-flag> (last visited May 17, 2026). Personally, I like this definition: "Also called powder flag. *Nautical*. a red burgee, designating in the International Code of Signals the

your jokes don't consist of witty observations about the rule against perpetuities.<sup>23</sup>

## II. HUMOR AND EFFICACY IN LEARNING

Efficacy is a word that someone like me might use at a dinner party to sound smart.<sup>24</sup> All it really means is that something “works.”<sup>25</sup> Humor works. “Humor has been associated with a host of positive physiological and psychological effects.”<sup>26</sup> In fact, humor has been shown to better the learning environment and increase comprehension and retention.<sup>27</sup> “Unfortunately, some educators believe their role or their topic is too serious to engage humor or view humor as merely a disruption.”<sup>28</sup> Some of these educators teach 3L courses at law schools across the United States.<sup>29</sup>

As my dear friend Jack explains, “comedians get to tell the truth.”<sup>30</sup> That little boy in the fable who had the wherewithal to note that the emperor was nekkid?<sup>31</sup> He probably grew up to be a stand-up comedian.

letter ‘B,’ flown by itself to show that a vessel is carrying, loading, or discharging explosives or highly inflammable material.” *Id.*

23. *But cf.* Marianne M. Jennings, *Does Secured Transaction Mean I Have a Lien? Thoughts on Chattel Mortgages (What?) and Other Complexities of Article IX*, 17 NOVA L. REV. 689 (1993) (somehow making Article IX of the Uniform Commercial Code hilarious). *See infra* note 41 and accompanying text (discussing one of the first “funny” law review articles and its use of a footnoted rule-against-perpetuities joke).

24. *See supra* note 1. Many of us, coincidentally, went to law school where we learned that to effectuate an augmentation in the perceived cognitive acumen of one’s verbal articulations, it is imperative to engage in the utilization of grandiloquent lexemes and convoluted syntactical structures, thereby obfuscating the fundamental semantic content while simultaneously engendering an aura of pseudo-intellectual gravitas. This linguistic stratagem necessitates the incorporation of abstruse terminology, often derived from esoteric academic disciplines, interwoven with unnecessarily prolix phraseology and tautological redundancies. The resultant discourse, while ostensibly erudite, serves primarily to occlude lucidity and impede genuine communicative efficacy, paradoxically undermining the very intellectual pretensions it seeks to promulgate. *See what I did there?*

25. *See, e.g., Efficacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/efficacy> (last visited May 17, 2026) (defining *efficacy* as “the power to produce a[n] . . . effect”).

26. R. L. Garner, *Humor in Pedagogy: How Ha-Ha can Lead to Aha!*, 54 COLL. TEACHING 177, 177–80 (2006).

27. *See id.* at 179–80.

28. *Id.* at 179.

29. As the adage goes, “the first year, they scare you to death; the second year, they work you to death; and the third year, they bore you to death.” Have fun finding a source for that one. [Editor’s note: We enjoyed all ten seconds of it!] Dena Lefkowitz, *Exposing and Easing Fear of Young Lawyers in the Profession*, ACHIEVEMENTBYDESIGN (June 5, 2020), <https://achievementbydesign.com/exposing-and-easing-fear-of-young-lawyers-in-the-profession/>.

30. Telephone conversation with Jack De La Piedra, Elder Justice (Aug. 15, 2025).

31. HANS CHRISTIAN ANDERSON, *The Emperor’s New Clothes*, in STORIES FROM HANS ANDERSEN WITH ILLUSTRATIONS BY EDMUND DULAC 204, 218 (1923).

Let me be clear,<sup>32</sup> to apply humor to teaching a complex subject requires not only a thorough understanding of the material in the first place, but also creativity, insight, and great teaching skills.<sup>33</sup> Thus, done correctly, using humor in education increases the perception amongst students that the instructor is making an “extra effort to get the message across.”<sup>34</sup> That perception is generally true.

As with nearly anything, there’s a good way and a bad way to incorporate humor in education.<sup>35</sup> Alas, cheap shots—one of my favorite social crimes—are the bad way.<sup>36</sup> For humor to be effective in the teaching setting, the smart people write, “it must be specific, targeted, and appropriate to the subject matter.”<sup>37</sup> Fine. So be it.

Specific to legal education, there are instances where humor has been incorporated or attempted.<sup>38</sup> But not enough.<sup>39</sup> In 1975, a student at the University of Pennsylvania published an Aside titled *The Common Law Origins of the Infield Fly Rule*.<sup>40</sup> Footnote 2 contains a joke that references—using the Latin phrase *inter alia*—the rule against perpetuities.<sup>41</sup> A couple articles cover the topic of law school exams.<sup>42</sup> The *Bluebook*—one of the

32. Read this sentence in former President Obama’s voice, please. I also promise that this will be the only time in this Article that I will, in fact, be clear.

33. See, e.g., Angelo Spörk et al., *When Students Write Comedy Scripts: Humor as an Experiential Learning Method in Environmental Education*, 29 ENV’T EDUC. RSCH., 552, 555 (2023) (explaining the basics of humor and noting that humor requires surprise, insight, a target, and needs to be understood).

34. Garner, *supra* note 26, at 179–80.

35. *Id.* at 178 (explaining that “the effective use of humor is not akin to mere joke telling”).

36. Examples of cheap shots include, but are not limited to: (1) “That’s what she said” interjections at any remotely suggestive comment; (2) responding “Hi [emotion], I’m [your name]” to any person’s stated feeling; (3) stating the painfully obvious as though it’s a profound insight; (4) reminding friends of their most embarrassing moments from years ago at the worst times; (5) “yo mama” jokes; and (6) puns so painful they should require medical-consent forms.

37. Garner, *supra* note 26, at 178.

38. See generally Thomas E. Baker, *A Compendium of Clever and Amusing Law Review Writings: An Idiosyncratic Bibliography of Miscellany with in Kind Annotations Intended as a Humorous Diversion for the Gentle Reader*, 33 DRAKE L. REV. 105, 106 (2002) (“The world of the American law review resembles Middle Earth for all its strange inhabitants, secret rituals, and foreboding folklore.”).

39. *Id.* (“Law review articles—and the people who write them and the people who read them—are serious to a fault.”).

40. Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975).

41. *Id.* (“Depending upon the circumstances, other rules which may or may not apply to a particular situation include, *inter alia*, FED. R. CIV. P., Rule Against Perpetuities, and Rule of *Matthew 7:12 & Luke 6:31* (Golden).”); see *supra* note 22. Clearly, the author had some issues.

42. See Harold See, *Criteria for the Evaluation of Law School Examination Papers*, 38 J. LEGAL EDUC. 361, 361 (1988) (giving points for “[u]se of colorful ink,” “[i]llegible handwriting,” “[h]alf truths about the law,” and “[a]nalysis of an issue that may be relevant in another course”); C. Steven Bradford, *Viewpoint: The Gettysburg Address as Written by Law Students Taking an Exam*, 86 NW. U. L. REV. 1094,

most worthy targets of ire and lampooning—has been discussed.<sup>43</sup> Footnotes get their due. For example, one article that includes a great parenthetical—”I’ve had that shit up to here.”—focuses on footnote 3 of *Carolene Products*.<sup>44</sup> One article consists of the line: “Law Review articles have too many footnotes.”<sup>45</sup> The footnote that follows this line is three pages of tiny type, appositely.<sup>46</sup>

One article aspires to become the most-cited article ever and explains: “A great tradition of the American bar is under increasing attack. The tradition I refer to is name-calling.”<sup>47</sup> In an arguably more earnest attempt at fame, *The World’s Greatest Law Review Article* explains that unbelievable

1094 (1993) (“A Cameroonian proverb states that ‘[h]e who asks questions cannot avoid the answers,’ and, unfortunately, that proverb applies to law professors.” (footnote omitted)).

43. See, e.g., Richard A. Posner, *The Bluebook Blues*, 120 YALE L.J. 850, 851–52 (2011). Referring to his previous wishfully titled Article, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986), he noted:

I made a number of specific criticisms of *The Bluebook* in that piece, and I will not repeat them. I don’t believe that any of them have been heeded, but I am not certain, because, needless to say, I have not read the nineteenth edition. I have dipped into it, much as one might dip one’s toes in a pail of freezing water. I am put in mind of Mr. Kurtz’s dying words in *Heart of Darkness*—”The horror! The horror!”—and am tempted to end there.

*Id.*; Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1750 (1997) (noting the need to footnote *everything* in legal scholarship and explaining, “This Article, for example, solves one of the biggest problems in legal scholarship: the need to find authority for statements that are obviously true or completely unsupported” and providing a rather elegant and humorous solution to the problem).

44. Aside, *Don’t Cry Over Filled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553, 1553 (1988) [hereinafter *Don’t Cry Over Filled Milk*] (discussing footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), that introduced the concept of tiered levels of scrutiny to the wacky and wild world of constitutional law). Footnote 3 discusses how many states prohibited “filled milk” in 1938, which is basically reconstituted milk with non-cow fats. *Carolene Products Co.*, 304 U.S. at 150 n.3. The authors of the Aside explain: “Part I of this Aside describes footnote three’s contribution to the development of citation overkill in American law and the impending triumph of form over vulgar functionalism. Part II does not exist.” *Don’t Cry Over Filled Milk, supra*, at 1555. University of Pennsylvania at it again, huh?

45. Lori McPherson, *Law Review Articles Have Too Many Footnotes*, 68 J. LEGAL EDUC. 457, 457 (2019).

46. *Id.* at 457–59.

47. Gerald F. Uelmen, *Id.*, 1992 BYU L. REV. 335, 335 (1992) (“From the earliest inception of our profession, lawyers have been masters in the art of invective. We are frequently retained because our inarticulate clients need our voices to hurl epithets at their enemies. The greatest lawyers of the age were noted for their skill, dexterity and wit in insulting their opponents, as well as the judges who ruled against them.”). As to the author’s scheme to become the most-cited law review article ever, see the article’s first asterisk note:

This article may simply be cited “*Id.*,” followed by a page number which need not relate to any of the page numbers in this article. No reference to the author or this law journal is necessary. We will get all the glory we need in the *Guinness Book of World Records*, where this article will be enshrined as the most frequently cited law review article ever written.

*Id.*

amounts of *really* great material were omitted in progressing from footnote 11 to 28,343.<sup>48</sup> And *The Shortest Article in Law Review History* proclaims, simply, “This is it.”<sup>49</sup> Even my favorite “normie” author, Dave Barry, has written a law review article.<sup>50</sup>

Some articles discuss law school faculty meetings,<sup>51</sup> dean searches,<sup>52</sup> and facetious scholarship opportunities.<sup>53</sup> There is a “pocket part” to the *Devil’s Dictionary* written by a law student in 1980.<sup>54</sup> There’s also a primer on suing the devil.<sup>55</sup>

In 1991, two practicing lawyers published a compendium of judicial humor.<sup>56</sup> One of my favorite law professor authors—who’s currently

48. Andrew J. McClurg, *The World’s Greatest Law Review Article*, 81 A.B.A. J. 84, 85 (1995).

49. It nonetheless has two footnotes following this one line, because of course it does. Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. LEGAL EDUC. 156, 156 (2000).

50. Dave Barry, *Traffic Infraction, He Wrote*, 17 NOVA L. REV. 665, 665 (1993) (“Probably the greatest thing about this country, aside from the fact that virtually any random boner-head can become president, is the American system of justice.”). Technically, it’s a piece he wrote about traffic court that Nova re-published, but it still counts.

51. See Ron Lansing, *Faculty Meetings: “A Quorum Plus Cramshaw”*, 17 NOVA L. REV. 817 (1993); Anthony D’Amato, *Minutes of the Faculty Meeting*, 1992 BYU L. REV. 359, 359 (1992) (“A motion was made to approve the minutes of the previous meeting of the Faculty. A point of order was raised to the effect that the minutes of the preceding meeting could not be found. An amendment was then offered to the main motion to approve the minutes of the preceding meeting irrespective of what they contained. There was a general heated discussion as to whether this was constitutional. At 6:24 p.m., a document was found. While it was not the minutes of the preceding meeting, it was in fact the hours of the preceding meeting. A substitute motion was then offered to approve the hours of the preceding meeting. The motion carried.”).

52. Paul A LeBel & James E. Moliterno, *The Joe Isuzu Dean Search: A Guide to the Interpretation of Announcement Letters*, 39 J. LEGAL EDUC. 265, 267 (1989) (explaining, among other things, that “[t]he Search Committee will make every effort to maintain the confidentiality of applications” *really* means “[w]e realize that one of the few things that would be more embarrassing than getting this job is applying for it and not getting it, so your secret is safe with us.”).

53. Erik M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 KAN. L. REV. 433, 435 (2006) (explaining the author’s excitement discovering the *Buffalo Law Review*, his subsequent disappointment at lack of articles specific to Buffalo Law, and lamenting: “Why is there so little buffalo scholarship today?”).

54. Robert J. Morris, *The New (Legal) Devil’s Dictionary*, 6 J. CONTEMP. L. 231 (1979).

55. Charles Yablon, Essay, *Suing the Devil: A Guide for Practitioners*, 86 VA. L. REV. 103, 103 (2000) (“It is somewhat surprising, therefore, that one notorious perpetrator of injury, misery, and wrongful conduct has remained curiously immune from the current onslaught of civil litigation. I am speaking, of course, about the Devil incarnate, Satan, Prince of Darkness.”).

56. JOHN B. MCCLAY & WENDY L. MATTHEWS, *CORPUS JURIS HUMOROUS: A COMPILATION OF HUMOROUS, EXTRAORDINARY, OUTRAGEOUS, UNUSUAL, COLORFUL, INFAMOUS, CLEVER, AND WITTY REPORTED JUDICIAL OPINIONS AND RELATED MATERIALS DATING FROM 1256 A.D. TO THE PRESENT* (1991).

“playing with con law haiku” because he can’t help himself<sup>57</sup>—wrote a book review that on its own is pretty entertaining.<sup>58</sup>

And there’s humor in day-to-day practice.<sup>59</sup> There’s usually a way to work amusing Yogi Berra quotes into pleadings and motions.<sup>60</sup> One of the best examples of humor in day-to-day practice<sup>61</sup> I’m aware of is when the “world’s leading news publication” submitted an amicus brief to SCOTUS in support of a parody Facebook page in October 2022.<sup>62</sup>

And of course, who could forget the sex-offender shuffle,<sup>63</sup> “Dear 16-year-old Me,”<sup>64</sup> or the “so you want to go to law school” bit?<sup>65</sup>

All this is to say that there is a body of work in law that incorporates humor. But like I said before, we need more.

### III. THE CRISIS AND COMEDY

Here’s the serious part of this Article. This is the part I don’t enjoy writing because it’s not light and breezy or juvenile. There’s a mental health crisis in the legal profession, and it’s been going on since our forebearers were drinking three-martini lunches to deal with stress. Mental health issues in the practice of law are an occupational hazard.

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57. I have a few law professor authors that I’ve stolen stuff from, but I’ve stolen a *lot* of stuff from Thomas E. Baker. I ran across his work in 2009, while serving a voluntary sentence on a law review myself.

58. See Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH L. REV. 869 (1993).

59. See, e.g., Debra Cassens Weiss, *Call Me Captain Justice: Lawyer Requests Euphemisms After Prosecutor Seeks Ban on ‘Government’ Word*, ABAJOURNAL (Nov. 4, 2013), [https://www.abajournal.com/news/article/call\\_me\\_captain\\_justice\\_lawyer\\_requests\\_euphemisms](https://www.abajournal.com/news/article/call_me_captain_justice_lawyer_requests_euphemisms).

60. How do I know? Because I do it often. My favorite Yogi quote to use in legal writing is: “It’s like *déjà vu* all over again.” *Yogi-isms*, YOGI BERRA MUSEUM & LEARNING CTR., <https://yogiberramuseum.org/about-yogi/yogisms/> (last visited May 17, 2026).

61. Day-to-day might be a bit of a stretch since most of us aren’t writing SCOTUS briefs, but you get my drift.

62. See Andrew Cohen, *Peeling Layers: The Onion’s Head Writer Dishes on Satire and the World’s Funniest Amicus Brief*, UC BERKELEY L. (Nov. 18, 2022), <https://www.law.berkeley.edu/article/peeling-layers-onion-head-writer-mike-gillis-dishes-on-satire-and-worlds-funniest-amicus-brief/>. The brief itself? It’s actually on the Supreme Court’s website. *No. 22-293*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-293.html> (last visited May 17, 2026).

63. Scott Gairdner, *Sex Offender Shuffle*, YOUTUBE (Nov 30, 2009), <https://www.youtube.com/watch?v=VfCYZ3pks48>.

64. HueToobz, *Dear Me, Don’t Go to Law School (Alternate)*, YOUTUBE (Feb. 29, 2012), <https://www.youtube.com/watch?v=y05HnXomG88>. Sadly, this video was released *after* I completed my law studies.

65. David Kazzie, Author, *So You Want to go to Law School?*, YOUTUBE (Oct. 14, 2010), <https://www.youtube.com/watch?v=nMvARy0IBLE>. See *supra* text accompanying note 64 (release date).

Statistically, “lawyers are the most frequently depressed occupational group in the United States and are 3.6 times more likely to suffer from depression than nonlawyers.”<sup>66</sup> We deal with horrific shit day in and day out. A sense of humor is a necessity because if we don’t laugh once in a while, all the stress associated with practicing law builds up and leads to both mental and physical health consequences.<sup>67</sup> To add to the general sense of fuckery, it’s not something we often talk about.<sup>68</sup> As of 2023, some states made an effort to mandate continuing education on attorney wellness and substance abuse, but it is a distinct minority.<sup>69</sup> We tend to isolate, perhaps because we hold so many secrets. We experience “Secondary Traumatic Stress,” which is probably better described as second-hand post-traumatic stress.<sup>70</sup> If you told me 20 years ago that I’d be writing an “academic” article about “poor lawyers” and their collective mental health, I would have laughed and told you to get the fuck out.

But legal education is set up in a way that makes it dreadfully serious from the get-go. And don’t get me wrong. There’s a lot of shit that you shouldn’t joke about.<sup>71</sup> But we spend a lot of time learning how to take

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66. See Michael Steven Webb, *Dissenting from Death: Preventing Lawyer Suicide*, ABA (Nov. 24, 2021), [https://www.americanbar.org/groups/senior\\_lawyers/resources/voice-of-experience/2010-2022/dissenting-death-preventing-lawyer-suicide/](https://www.americanbar.org/groups/senior_lawyers/resources/voice-of-experience/2010-2022/dissenting-death-preventing-lawyer-suicide/) (citing Nee Foundation study).

67. See, e.g., Abiola Keller et al., *Does the Perception that Stress Affects Health Matter? The Association with Health and Mortality*, 31 J. HEALTH PSYCHOL. 677, 677 (2012) (“High amounts of stress and the perception that stress impacts health are each associated with poor health and mental health. Individuals who perceived that stress affects their health and reported a large amount of stress had an increased risk of premature death.”); see also Caroline Kaercher Kramer & Cristiane Bauermann Leitao, *Laughter as Medicine: A Systematic Review and Meta-Analysis of Interventional Studies Evaluating the Impact of Spontaneous Laughter on Cortisol Levels*, PLOS ONE, May 23, 2023, at 1, 2 (“Current evidence demonstrates that spontaneous laughter is associated with greater reduction in cortisol levels as compared with usual activities, suggesting laughter as a potential adjunctive medical therapy to improve well-being.”). How’s that for some science?

68. Though some of us—like *moi*—have therapists who unequivocally *earn* their fees.

69. Illinois and Vermont, for example, require at least one hour of wellness Continuing Legal Education (CLE) per reporting period. Iowa requires an hour of wellness CLE *or* diversity, equity, and inclusion CLE. Nevada, North Carolina, Oregon, and South Carolina have CLE requirements that touch on substance abuse and wellness. See INST. FOR WELL-BEING IN L., SURVEY OF WELL-BEING CLE STATUS BY JURISDICTION (2023) (charting state-specific requirements) (available at <https://lawyerwellbeing.net/state-task-forces/> by scrolling to the bottom and selecting “Survey of Well-Being CLE Status by Jurisdiction” under “Other State-Specific Resources”).

70. See, e.g., Andrew P. Levin et al., *Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working With Trauma-Exposed Clients*, 199 J. NERVOUS & MENTAL DISEASE 946, 953 (2011) (noting that a study of the Wisconsin public defender’s offices “indicated a significant level of distress among the attorneys compared with administrative support staff”).

71. Originally, I wrote “can’t,” but my friends and I will joke about necrophilia, so “shouldn’t” is the right word here.

*ourselves* too seriously. There is a drive for perfection that is dangerous.<sup>72</sup> It's one thing to take the rule of law and the principles and ideals—the moral integrity of the profession and our duties to our clients—seriously. There's nothing wrong with being respectful of the rules. We don't have to be irreverent about everything.

But when we take *ourselves* too seriously, it leads to things far worse than being the kind of person that nobody wants at a dinner party. It leads to feelings of guilt strong enough to lead to suicidal ideation.<sup>73</sup> And being too serious too much of the time can make it difficult to connect with other human beings. Humor can be connective.<sup>74</sup>

There is a distinction to be made here, of course.<sup>75</sup> Researchers have identified differences between humor styles and well-being.<sup>76</sup> While “positive humor” is generally associated with positive perceptions of social status and well-being, humor that is “self-defeating” can correlate with feelings of not mattering to others.<sup>77</sup> But that's not an absolute. Self-deprecating humor—which would potentially fall into the “self-defeating” bucket mentioned above—can be an indicator that one is happier and better socially adjusted than most people.<sup>78</sup>

Much as I would love it to be, humor is not the panacea for all of the ills of the legal profession. There is nuance. Humor is not appropriate in every situation. Sometimes—as my wife will remind me—we have to be serious. The courtroom is not the place to try out one's jokes for open-mic night

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72. See Brian Clarke, *How I Almost Became Another Lawyer Who Killed Himself*, N.C. BAR J. 28, 29 (2014) (“I was trying to be all things to all people at all times. Superstar lawyer. Superstar citizen. Superstar husband. Superstar father. Of course, this was impossible. The feeling that began to dominate my life was guilt . . . Guilt that I was letting my bosses down because I was not being the perfect lawyer to which they had become accustomed. Guilt. Guilt. Guilt.”).

73. See *id.*

74. See Laura E. Kurtz & Sara B. Algoe, *Putting Laughter in Context: Shared Laughter as Behavioral Indicator of Relationship Well-Being*, 22 PERS. RELATIONSHIPS 573, 583 (2015) (making a very qualified conclusion that shared laughter is correlated with better romantic relationships in the authors' study). Also, duh.

75. I think this is a law of the law, perhaps of life in general.

76. See Kristi Baerg MacDonald et al., *No Laughing Matter: How Humor Styles Relate to Feelings of Loneliness and Not Mattering*, 10 BEHAV. SCI. 165, 165 (2020) (noting that “[h]umor styles are unique, but often over-looked, variables that also have considerable associations with measures of mental health”).

77. *Id.* at 166.

78. See Jorge Torres-Marín et al., *Is the Use of Humor Associated with Anger Management? The Assessment of Individual Differences in Humor Styles in Spain*, 120 PERSONALITY & INDIVID. DIFF. 193, 199 (2018); Univ. of Granada, *Self-defeating Humor Promotes Psychological Well-being, Study Reveals*, SCI. DAILY (Feb. 8, 2018), <https://www.sciencedaily.com/releases/2018/02/180208104225.htm> (“In particular, we have observed that a greater tendency to employ self-defeating humor is indicative of high scores in psychological well-being dimensions such as happiness and . . . sociability.”).

(though funny things do happen in court and acknowledging that is not a crime). A little more laughter in the law, however, is a good start.

#### IV. THE HEURISTICS OF HUMOR

Here's something funny. I don't (well, *didn't*) really know what *heuristics* meant when I wrote the heading above. Sure, I've heard and read the word many times. I've probably even used it a time or two in my writing, possibly even correctly. But my understanding of the word was more or less, "I dunno. Something to do with learning . . . and I know it sounds fancy." So, when I wrote the topic heading above, I was going for alliteration and dumbassed into the right word. I write like Bob Ross paints—happy accidents.

*Heuristic*, in its adjective form, means "involving or serving as an aid to learning, discovery, or problem-solving by experimental and especially trial-and-error methods."<sup>79</sup> As a noun, *heuristics* means heuristic studies or procedures.<sup>80</sup> That seems to fit.

Humor can be effective in public-facing disputes. One area where this is self-evident is in some of the cease-and-desist letters and responses to cease-and-desist letters that have gone viral.<sup>81</sup> There's no reason to avoid humor when it can advance a client's case. Under the right circumstances, it can double as a marketing tool.

Other areas where humor can help are in negotiations, initial drafting of motions and pleadings, and the day-to-day communications required for the practice of law. In negotiations, if you can make the other person laugh, they're more likely to be reasonable. It's hard to take a hard line while you're amused. When I initially draft a particularly difficult motion or response, an off-the-cuff, irreverent, and snarky response can dispel a lot of the initial anger and frustration and allow me to focus on the real issues in the case. And injecting a little humor in day-to-day communication can really provide some relief from the drudgery.

Humor can also be effective in keeping attention. Unfortunately, I forget who said it, but someone asked me once, "What's the one group that people

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79. *Heuristic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/heuristic> (last visited May 17, 2026).

80. *Id.*

81. See, e.g., Staci Zaretsky, *The Greatest Response to a Cease and Desist Letter, Probably Written While Drunk*, ABOVE THE L., <https://abovethelaw.com/2013/12/the-greatest-response-to-a-cease-and-desist-letter-probably-written-while-drunk/> (Jan. 6, 2014) (referencing three snarky cease-and-desist responses written in 2013, one of which was written by yours truly); see also *Threats with a Smile: The Cease-and-Desist Letter in a Time of Social Media*, NOVAGRAAF (Sept. 29, 2020) (describing humorous cease-and-desist letters written on behalf of the Doobie Brothers and Netflix).

happily pay to watch talk—no music, no visual aids, no PowerPoint, no juggling—for an hour or more?”<sup>82</sup> The answer, of course, is stand-up comedians. While I’d never suggest that one should turn an opening statement into a joke fest, the presentation skills required for effective comedy—timing, use of space, storytelling, delivery, and connection—can all translate well into trial practice.

So, I propose that law schools make an effort to include humor in the curriculum. Given that humor can have a positive effect on both comprehension and retention,<sup>83</sup> it makes sense to look for ways to incorporate it. Let’s see a seminar on the use of humor in legal correspondence.<sup>84</sup> Let’s take a look at stand-up comedy as performance art and apply it to trial practice. Let’s have a required 1L course that gives the students a chance to laugh once a week and let off a little steam—that course can be the vehicle to show how it all ties together and highlights the absurdities that can otherwise be maddening that first year.<sup>85</sup> This course is not without logistical issues, but it should be doable.<sup>86</sup> Learning to *not* take oneself so seriously is imperative for one’s future well-being. The scarcity of humor in the legal-education process is having a detrimental effect on law students and graduates.

Ask yourself what attributes your best professors or teachers had? For me, one of those attributes invariably has been a bit of a mischievous sense of humor. There are a lot of other things that come into play, but the sense of humor—and using it—is the great unifier. A little bit of fun can go a long way to a positive outcome.

Taking it a step further, let’s have some CLEs that provide some relief from the pressure cooker that is practicing law. I have ideas.<sup>87</sup> We could all use some instruction in taking ourselves a little less seriously. How about a CLE titled “How to Laugh at Yourself Without Sacrificing Your Overinflated Ego”? See what I did there? But you could have more “serious”

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82. If you’re the person that asked me this, email me and I’ll figure out some way to get you your footnote.

83. See a whole bunch of the footnotes above.

84. This could be a standalone course or a unit in my made-up 1L *Humor and the Law* course.

85. I am not volunteering to teach this course, but I’d be happy to help write the curriculum.

86. Professor Steve Bradford notes, for example, “The only problem is that a law professor would be teaching and would undoubtedly turn it into some theoretical abstraction about the attributes necessary for humor.” E-mail from Steve Bradford, Henry M. Grether Jr., Professor of Law Emeritus, Univ. of Neb.-Lincoln, Coll. of L., to author (Nov. 18, 2025) (on file with author). On a related note, Professor Bradford’s latest book, *CABIN CATASTROPHE*, should be on the shortlist for textbooks. STEVE BRADFORD, *CABIN CATASTROPHE: SURVIVING MY APPALACHIAN MOUNTAIN RETIREMENT HOME* (2025).

87. Because *of course* I do.

CLEs that cover the audience rapport and storytelling techniques of certain stand-up comedians as applied to trial practice. One other idea is “Something Funny Happened on the Way to the Courthouse,” consisting entirely of funny war stories from the practice of law. The beauty of this CLE, as I see it, is that it gives CLE credit for what most lawyers talk about on the breaks at traditional CLEs anyway.<sup>88</sup>

The opportunity to incorporate more laughter into law is there for the taking. Let’s take it.

#### CONCLUSION

In sum, humor in law isn’t merely a nice-to-have thing. It’s a potential survival strategy—like bringing a flask to a 12-hour deposition, but with *far* fewer professional consequences. The legal profession’s collective mental well-being is at stake, and a well-timed joke may be our last, best hope. Without it, we’re left with only the rule against perpetuities and, frankly, nobody deserves that.<sup>89</sup>

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88. This one is really less-than-half serious, though workshopping some of these stories would be of value to those that must endure them (and I include myself in the offender group).

89. Well, almost nobody. Anyone on an articles committee that rejects this self-described masterpiece probably deserves to study the rule against perpetuities in perpetuity.